

**OVERVIEW OF THE FEEDBACK RECEIVED FROM STAKEHOLDERS IN THE PUBLIC CONSULTATION  
ON THE DRAFT TEXTS PUBLISHED IN 2010**

**1. INTRODUCTION**

- (1) The public consultation on the revised rules for the assessment of horizontal cooperation agreements under EU competition law took place between 4 May and 25 June 2010. In this context, over 120 submissions were received.
- (2) Just like the national competition authorities, which were consulted through the European Competition Network and the Advisory Committee for Restrictive Agreements and Dominant Positions, stakeholders expressed striking support for maintaining a system of block exemption regulations and accompanying guidelines, which is considered as having worked well in practice.
- (3) Companies are used to self-assessing the compliance of their agreements with Article 101 of the Treaty and in general support the effects based approach to enforcement that the Commission has been promoting. The current system has given them flexibility to organise their cooperation, notably through the so called "safe harbours" provided for in the Block Exemption Regulations ('BERs') and in the guidelines. Therefore, companies welcomed the Commission's "evolution, not revolution" approach.
- (4) In the light of the focus and content of the contributions received, the main areas of interest in the public consultation were, in the draft Horizontal Guidelines, the revised chapter on standardisation agreements and the new chapter on information exchange. As regards the BERs, the draft R&D BER was the focus of much more attention than the draft Specialisation BER. Beyond these topics, a few comments were also submitted on the draft Horizontal Guidelines, notably on the introduction and the sections on R&D, production, purchasing and commercialisation agreements.

**2. COMMENTS REGARDING DRAFT HORIZONTAL GUIDELINES**

- (5) As the main focus of the revised draft of the Horizontal Guidelines is standardisation and information exchange, comments from stakeholders regarding these issues will be addressed first in the following concise summary. Thereafter, stakeholder comments are presented in the order in which the topics appear in the draft Horizontal Guidelines.

**2.1. Comments on Chapter 7 – Standardisation Agreements**

*2.1.1. Introduction*

- (6) About two thirds of stakeholders commented on standardisation. The majority of stakeholders welcome the additional guidance for standardisation set out in the draft

chapter on Standardisation agreements. However, they also make a number of comments which reflect a need for further clarification. Most of these comments relate to the safe harbour set out in paragraphs 277 to 286 of the draft Guidelines.

- (7) The safe harbour is composed of three main pillars, namely
- (i) a balanced intellectual property rights ("IPR") policy requiring (a) good faith disclosure of those IPRs that might be essential for the implementation of a standard, and (b) a requirement for all holders of essential IPR in technology which may be adopted as part of a standard to provide an irrevocable commitment to license their IPR on fair, reasonable, and non-discriminatory terms ("FRAND")
  - (ii) the procedure for adopting the standard is unrestricted with participation open to all relevant actors (Open and transparent Standard setting) , and
  - (iii) transparency to ensure that stakeholders are able to inform themselves of upcoming, on-going and finalised work.
- (8) Stakeholder's comments focussed on the first pillar and to a lesser extent on the second pillar. There were almost no comments on the third pillar which appears to be universally accepted. Set out below is a summary of stakeholder comments on the first two pillars. However, prior to summarising comments on the first two pillars it is useful to address some general issues of importance relating to the safe harbour.

#### *2.1.2. General Issues of Importance Relating to the Safe Harbour*

- (9) While generally favourable to the individual criteria set out in the safe harbour, a number of stakeholders are of the view that there is no "one size fits all" approach to IPR policies and that some standard setting organisations ("SSOs") will not be able to avail themselves of the safe harbour. Some of these stakeholders are also of the view that the safe harbour is too prescriptive.
- (10) In addition, there is a perceived lack of guidance in the Guidelines concerning agreements that fall outside the safe harbour. Where the situation does not fall within the safe harbour, an individual assessment is necessary. A number of stakeholders have asked for confirmation that no presumption of illegality exists in this situation. They have also sought additional guidance where the cumulative criteria for the safe harbour are not met.
- (11) Some stakeholders seek clarification that the Commission is not prohibiting royalty-free standards.

#### *2.1.3. Comments on ex ante disclosure of intellectual property rights*

- (12) The majority of stakeholders support the proposed requirement that there should be a good faith disclosure by companies participating in standard-setting of essential IPR. There is a general understanding of the aim to avoid misuse of the standard-setting process through hold-ups and charging of abusive royalty rates by IPR holders. At the same time stakeholders point out that in seeking to address the potential problem of patent

ambush, the draft Guidelines should not create unreasonable difficulties for companies involved in standard-setting.

- (13) A particular emphasis is put on the claim that no single set of policy clauses is appropriate for every SSO. In other words, a “*one size fits all*” approach to IPR policies would be inappropriate. Some stakeholders voice concern that, the current wording of the safe harbour, when read in conjunction with Example no 2 (this example assesses a case where a standard-setting organisation does not have clear rules on IPR disclosure) risks compelling IPR holders to comply with the safe harbour and disclose all their potentially essential IPR before a standard is agreed. These stakeholders advocate the adoption of less prescriptive language for the IPR disclosure and amendment or deletion of example 2.
- (14) While some potentially essential IPR may be readily identifiable, it can be difficult to identify “all” truly essential IPR until after the standard is set and implemented. Stakeholders point to the risk that licensors would find themselves obliged to perform full *patent searches*—for both issued and merely applied for IPRs—to avoid potential competition law exposure. The policies of some standards organizations expressly state that no searches will be necessary. Holders of large portfolios have difficulty determining whether patents will “read on” a draft standard as it changes and such searches incur considerable costs.
- (15) A number of stakeholders argue that the disclosure obligation should not cover unpublished patent applications. Patent applications should, they argue, generally remain confidential for a period of time during their filing. The same goes for trade secrets which should also not fall under the disclosure obligation.
- (16) It is argued that an exhaustive disclosure requirement could have detrimental effects on standardisation itself as it may lead to extensive and unnecessary disclosures. Whether a patent or patent application is really *essential* to a potential standard is often hard to determine. Some stakeholders thus call for clarification of the concept of “essential IPR” as well as of the expressions “good faith disclosure” and “reasonable efforts”; a few also request precision as to whether “personal knowledge” is of relevance in this context.
- (17) Some submissions point out that a number of standard-setting bodies have policies based on the so-called “participation model”, i.e. where all participants agree in advance that they will license IPR that is technically essential to practice the final standard that is adopted FRAND terms with compensation or FRAND terms without compensation. In other words, it is considered disclosure can be replaced by a commitment to license on royalty free terms or FRAND terms.

#### 2.1.4. Comments on FRAND licensing

- (18) The majority of stakeholders recognise the need for a FRAND commitment
- (19) Many stakeholders believe that FRAND should be discussed more extensively given the difficulties and ambiguities surrounding the term in general. Some stakeholders express concerns about the reference to “excessive” or “abusive” royalties or license fees, the

boundaries of which are not well-defined. Some of these stakeholders also argue against or query addressing the issue of exploitative abuses under Article 102 in the Guidelines.

- (20) More generally, some claim that FRAND is not always effective – sometimes SSOs have very limited ability to police anticompetitive conduct by opportunist participants. Problems in standard-setting may not be caused by SSOs but by their participants.
- (21) The draft Guidelines provide a non-exhaustive list of methods for assessing whether royalty fees are excessive. Stakeholders generally endorse the presented methods but some request more extensive guidance on the concept of FRAND or make proposals for the inclusion of additional factors for the determination of what licensing terms are compliant with FRAND.
- (22) Another aspect that attracted many comments pertains to the duration of FRAND obligations, in particular, the continuation of a FRAND commitment after an assignment of IPR (*transfer of FRAND commitment*). These stakeholders believe that it is desirable that, when ownership of an essential IPR is transferred, any applicable licensing commitment should automatically be transferred to the new owner.
- (23) Several stakeholders argue for the inclusion of an explicit statement in the Guidelines that *injunction relief* should not be available to a patentee that is subject to a commitment to license patents on FRAND terms for implementation of a standard.

#### 2.1.5. *Comments on Open and transparent Standard setting*

- (24) The focus on open and transparent procedures is broadly welcomed. Most stakeholders who have expressed their position on this point agree that participation should be open, though some of these though that the concept should be further clarified. A few stakeholders do not support the concept of openness and transparency.

#### 2.1.6. *Comments on assessment of unilateral ex ante disclosures of maximum royalty rates*

- (25) A number of stakeholders welcome the fact that the draft Guidelines clearly recognise the potential benefits of unilateral ex ante disclosure of license terms, while not including this as a condition for falling within the scope of the safe harbour. These submissions recognise the pro-competitive benefits of ex ante disclosure.
- (26) At the same time, a number of submissions point out that this mechanism may not work in complex settings (primarily because ex-ante knowledge might be low – for the mechanism to work, alternative technologies must be known and there must be a stable ownership of known patents and patent applications).
- (27) There is a concern that the caveat “as long as the rules do not allow for the joint negotiation or discussion of licensing terms in particular royalty rates” set out in paragraph 267 of the Guidelines, could be interpreted as meaning that any joint consideration of licensing terms would automatically be viewed unfavourably. Therefore, stakeholders ask for a clarification on this point.

- (28) A number of Stakeholders request the Commission to state, in the Guidelines, that early discussions on pool formation, even before a standard is set, are likely to be beneficial.

2.1.7. *Other comments*

- (29) With regard to paragraph 288 of the draft Guidelines, a number of stakeholders submit that the inclusion of substitute technologies in a standard is not necessarily anticompetitive. They emphasize in particular that *patent pool* concerns do not apply to standard-setting agreements. It appears that a number of SSOs permit the inclusion of substitute technologies in standards. Unlike in the case of pools, there is normally no restriction that would prevent a patent holder from contributing the same technology to different standards. Thus, it is argued that the inclusion of substitute technologies should not be presumed to result in anticompetitive effects.
- (30) Some point out that *de facto* standards should also be taken into consideration. Technology developed by individual market participants that has emerged as a *de facto* standard must be distinguished from standards that have been adopted through an agreement or concertation. A clarification is sought to the effect that Article 101, and consequently the draft Guidelines, do not apply to this type of *de facto* standards.
- (31) Stakeholders read the position towards standardisation agreements that entrust certain bodies with the exclusive right to test compliance with the standard, or impose restrictions on marking of conformity, as suggesting that such agreements are *per se* illegal. They argue that the appointment of a compliance testing body should be subject to analysis under Article 101(3) and even claim that there might be pro-competitive reasons to agree on exclusive agreements.
- (32) The standardisation chapter now also contains guidance and examples on *standard terms*, the comments on this part come primarily from stakeholders operating in the insurance business. They do not support replacing the relevant part of the previous Insurance BER (standard policy conditions SPCs and security devices) with the draft Guidelines. They argue that the fact that non-binding model terms are to be regulated together with agreements on technical standards does not facilitate the establishment of such terms. In their view, if standard terms are still to be dealt with in the Guidelines, at least a separate section should be dedicated to this. Some stakeholders submit that the expressions “model terms” or “model clauses” are more appropriate.
- (33) Some of the stakeholders who commented on standard terms also invited the Commission to consider including two or more additional insurance related examples in the new text. Their clear preference is that the examples are ones where consumer organisations are not involved in the process. Stakeholders consider that the conditions already contained in the guidelines regarding transparency and effective access provide suitable and sufficient safeguards for consumers without requiring further consumer involvement in the establishment of the terms.

## 2.2. Chapter 2 - Information exchange

- (34) The majority of stakeholders commented on information exchange. All submissions welcome the guidance provided in the new chapter on information exchange. The majority of those that commented on information exchange find the analytical framework clear and helpful. Most submissions agree on the basic differentiation between object restrictions (covering sharing individualised future intentions of prices and quantities) and restrictions by effect, and find the guidance in the chapter sufficiently detailed and balanced. However, a number of stakeholders have made suggestions for further improvement of the text;
- (35) Several stakeholders point out that the Commission adopts a very broad definition of restriction by object ("object box"), which instead should be narrower and more clear cut. Several stakeholders would prefer the wording of the object box to be limited to sharing of individualised future intentions on prices and quantities, rather than including the ambiguous description of other types of data (e.g. current pricing and quantities) that reveal future intentions or have the aim of restricting competition. Some stakeholders also suggested that the object box should be limited to sharing of "non genuinely public" information. A few stakeholders, referring to recent case law such as *T-Mobile* and *GSK*, also pointed out that it would be useful if the Commission gave some guidance on the assessment of the "economic and legal" context in which information exchanges restrict competition by object.
- (36) Moreover, several submissions encourage the Commission to provide additional information regarding the extent to which exchange of information might be used as evidence of an agreement subject to Article 101. Several stakeholders point to the need to precise the circumstances under which indirect exchanges would be viewed as problematic, and in which ones they wouldn't. In this context, the role of trade associations in collecting and aggregating the data could also be better explained. Moreover, it would be useful if the Commission could provide examples from enforcement practice on information exchange leading to foreclosure. Many stakeholders also stated the need to have some safe harbours in the chapter, mainly related to market coverage, concentration and the type of data (e.g. genuinely public, aggregate and historic data). In addition, several stakeholders suggested further clarification of the definitions of "genuinely public", "historic" and "aggregate" data. Some submissions also pointed to the absence of provision to declare illegal an exercise of rights derived from minority shareholding in a competitor company for the purpose of gaining access to sensitive information about the competitor company and using it for anticompetitive purposes. Finally, some stakeholders encouraged the Commission to provide more borderline examples.

## 2.3. Other chapters of the draft Horizontal Guidelines

- (37) A number of stakeholders commented on the **introduction** of the draft Horizontal Guidelines, in particular on the legal interpretation given therein on the application of Article 101 to agreements between parent companies and their joint ventures ('JVs').

- (38) The draft Guidelines provide that Article 101 does not apply to agreements between the parent companies and a JV set up by them if the parent companies jointly exercise decisive influence and effective control over the JV, as under such circumstances each parent and the JV form part of the same "undertaking". Some stakeholders agree with this approach. Others stakeholders do not approve the proposed approach because they fear it would broaden the Commission's ability to hold parent companies liable for competition law infringements committed by the JV.
- (39) Less than one third of stakeholders submitted comments on the sections of the draft Guidelines on **R&D, production, purchasing and commercialisation agreements**. Stakeholders generally agree with the Commission's approach towards those agreements and their comments are mainly meant to further improve the proposed text.
- (40) With regard to the **R&D** chapter, very few comments were received (most comments relating to R&D focussed on the draft R&D BER, which is addressed below). These comments revolved around market definition and market shares in technology markets and competition in innovation as well as a number of technical issues.
- (41) A number of those stakeholders commenting on the **purchasing** chapter believe that the "safe harbour" 15% market share threshold is too low because, in practice, joint purchasing is the only way for small companies to compete with bigger vertically integrated companies (e.g., in retailing). These stakeholders propose to increase the level of the market share threshold to at least 20%, if not 25-30%. In addition, a few stakeholders are of the view that the relevant threshold should only be that on the downstream markets where market power is exercised and anticompetitive effects are felt by consumers. Some stakeholders also proposed to increase the relevant market share threshold for **commercialisation** agreements from 15% to at least 20%.
- (42) A number of stakeholders criticise that the draft Guidelines overstate the risk of anticompetitive effects (horizontal collusion) resulting from a potential commonality of costs created by production, purchasing and commercialisation agreements. Some stakeholders criticised the "vagueness" of the concept of commonality of costs and the perception from the draft text that commonality of costs as such is problematic. To remedy their concerns, the stakeholders suggest providing some benchmarks for levels of commonality of costs which would be problematic and explaining better the relevance of other factors in the competitive assessment such as the market power of the parties, market concentration, entry barriers and buying power of customers.
- (43) With regard to the requirement set out in Article 101(3) that efficiencies must be passed on to consumers to a sufficient extent, some stakeholders considered that the description of this condition in the different sections of the draft text could be improved by providing a more detailed guidance on other efficiencies than just cost savings, such as innovation, product enhancement and a more balanced formulation of the conditions to be met for the pass-on to be effective than just a reference to the absence of market power (i.e. by referring to countervailing buyer power, potential competition, genuine interest of the parties to improve quality of products).

### 3. COMMENTS REGARDING THE BERS

#### 3.1. R&D BER

- (44) The R&D BER has attracted considerable attention in the public consultation. Almost half of the stakeholders provided comments on the revised draft text. Many stakeholders expressly stated that they **generally welcome the published draft**, while at the same time providing detailed comments on specific issues. The following summary will first focus on the main issue raised by the draft BER – the proposed disclosure obligation. Subsequently, stakeholder comments will be summarised in the order of the articles of the draft regulation to which they relate.
- (45) **Disclosure obligation.** The draft R&D BER introduced a new condition for exemption, a so-called disclosure obligation which requires the parties to agree that prior to starting the research and development all the parties will disclose all their existing and pending intellectual property rights in as far as they are relevant for the exploitation of the results of the joint R&D by the other parties. This new requirement, whose aim was to avoid situations in which one party can obstruct the exploitation of the results of the joint R&D by the other party by relying on its pre-existing intellectual property rights ("patent ambush"), has been subject to critical comment by stakeholders. Many stakeholders (around 2/3 of those commenting on the draft R&D BER) request the deletion of the disclosure obligation altogether, while a few stakeholders would not object to retaining a less stringent disclosure obligation. Very few stakeholders have expressed outright support for the proposed disclosure obligation.
- (46) The main arguments brought forward by stakeholders in favour of the deletion of the disclosure obligation include (i) the impossibility to comply with the disclosure obligation as it will not be known prior to the start of the R&D work which intellectual property rights will have a bearing on the yet unknown results of the joint R&D, (ii) the disproportionate administrative burdens and costs triggered by ensuing due diligences and patent searches, (iii) that fact that no instances of "patent ambushes" have ever been recorded in the context of an R&D agreement, (iv) that below a market share of 25% even a patent ambush could not have any anti-competitive effects; (v) that even the Commission's FP7 programme does not contain such a wide-ranging disclosure obligation; (vi) that should the parties consider a disclosure pertinent they can agree on this in their agreement, (vii) that the proposed disclosure obligation acts as a disincentive and delay for R&D; (viii) that it is more onerous than, e.g., the corresponding IPR disclosure rules adopted by the standard-setting organisation ETSI; (ix) that unlike in the area of standardisation there is no need for an IPR disclosure rule in the context of R&D as a patent ambush would only affect the parties and not an entire industry (as would be the case in standardisation); and (x) the disclosure of pending patents would amount to disclosing confidential information.
- (47) Those stakeholders taking the position that the disclosure obligation should at least be limited proposed that (i) only reasonable efforts to make disclosures in a timely fashion should be required; (ii) there should be no requirement to make patent searches; (iii) it should be limited to what is technically essential or indispensable for the exploitation of

the R&D results; (iv) only good faith efforts to disclose any existing IPR should be required at a stage where the IPR holder can know with relative certainty which IPR are relevant; and (v) parties should only be required to disclose the existence of IPR and not the subject matter of such rights.

- (48) A few stakeholders proposed alternatives to the disclosure obligation which they consider more proportionate to the aim of avoiding patent ambushes in the context of R&D, notably the inclusion of an obligation for the parties to license to each other any IPR necessary for the R&D project and the exploitation of the results.
- (49) **General comments.** Besides the general broad support for the draft R&D BER (see above), there were very few general comments made by stakeholders. A small number of stakeholders suggested that there should be detailed explanations of the R&D BER in the Horizontal Guidelines.
- (50) Many stakeholders argued that the **scope of the BER** should be broadened. In particular, so-called "paid for research", whereby one partner finances the R&D activities carried out by the other partner should be included and regarded as joint R&D. It is argued that such a scenario does not give rise to more antitrust concerns than the ones covered by the draft BER. In addition, many stakeholders argued that as regards joint exploitation of the results stemming from the joint R&D, the BER should also cover a scenario where one party (very often a research firm or a start-up) only exploits the results by exclusively licensing their IPR to the other party (very often an industrial partner). Moreover, the requirement that in order to benefit from the BER for the purposes of joint exploitation both parties must have at least residual distribution activities in the EU should be deleted. Such a requirement would mean that many global R&D projects, which are usually structured in a way that one party exploits in Europe and the other parties exploit in other parts of the world, would fall outside the safe harbour. Moreover, it could easily be circumvented by simply allocating a small Member State (e.g., Malta) to one party.
- (51) A number of stakeholders called into question the definition of "**potential competitor**" which states that in order to qualify as a potential competitor a company would need to be likely to undertake necessary investments to enter a market within not more than three years. The stakeholders who commented on this issue mainly take issue with the three year period, which they consider to be too long and to create legal uncertainty. Whether or not a company is considered a potential competitor is decisive for the application of the market share threshold (see also below)
- (52) Many stakeholders commented that the benefit of the R&D BER should not be conditional on the parties having "**equal access**" to the results of the joint R&D. Equal access would not be appropriate in all circumstances, in particular where the parties have made differential contributions to the joint R&D. In any event, the parties should be able to make access to the results conditional on compensation. Moreover, the access requirements should not call into question the possibility afforded to the parties to agree on different degrees of exploitation, e.g., by reference to certain territories, customers or fields of use. In addition, stakeholders raised a number of technical points regarding the equal access requirements.

- (53) Another condition of the draft R&D BER – just like the existing R&D BER – is that where the parties have not agreed to jointly exploit the results, each party must be granted **access to the background know-how** of the other parties if this know-how is indispensable for the exploitation of the results. Comments by stakeholders on this provision were mixed. While some stakeholders argue that the access requirement to background know-how should be deleted, others called for an expansion of this provision to also require access to background IPR. Some stakeholders covered the middle ground and asked to limit the access requirement to know-how previously contributed to the joint R&D.
- (54) For competitors, the R&D BER is only available where they have a combined market share not exceeding 25%. For non-competitors, the **market share threshold** only starts to apply seven years after the products emanating from the joint R&D have been first put on the market. Prior to that, no market share threshold applies to non-competitors. Very few stakeholders argued that the market share threshold should be slightly increased or abolished altogether.. In addition, a number of technical comments were made.
- (55) Stakeholders broadly support the revised **hardcore provisions**, in particular the abolition of the seven year limitation previously imposed on active sales restrictions in case the parties allocate territories or customers between them in the context of joint exploitation of the R&D results. Apart from that, the comments received mainly pertain to the interpretation of the "hardcore" provisions, for which clarifications are sought. Notably, a number of stakeholders asked for clarifications regarding the permissibility of field of use restrictions. With regard to the provision declaring passive sales restrictions as "hardcore", a number of stakeholders suggested that for new products passive sales restrictions should be possible for a two year period, as would be the case under the new Verticals regime. Stakeholders also support the removal of two former hardcore provisions to a newly created "grey list" of excluded restrictions.

### 3.2. Specialisation BER

- (56) Compared to the R&D BER, far fewer comments were made on the draft Specialisation BER (around one fifth of submissions). The following summary will first focus on the main issue raised by the draft BER – the proposed second market share threshold. Subsequently, stakeholder comments will be summarised in the order of the articles of the draft regulation to which they relate.
- (57) **Second market share threshold.** In general, specialisation and joint production agreements can benefit from the Specialisation BER where the parties' combined market share does not exceed 20% on the market(s) for the products which are the subject of the agreement. In addition, the draft Specialisation BER provides that where the products concerned by a specialisation or joint production agreement are intermediary products which one or more of the parties use captively for the production of certain downstream products which they also sell, the availability of the BER is also conditional upon the parties not having a combined market share in excess of 20% on the downstream market.

- (58) The public consultation did not call into question the logic of and the need for the second market share threshold. Of the few stakeholders who commented on the second market share threshold, one category expressed their agreement with the second market share threshold, another disagreed, while a third category noted that the rationale of the second market share threshold would need to be better explained by the Commission. Those stakeholders that disagreed were mainly concerned with the burden having to calculate a second market share.
- (59) With regard to the (first) **market share threshold**, not many comments were received. Almost no stakeholders argued that 20% is too low.
- (60) A number of stakeholders asked for **clarifications** regarding the interpretation of a number of terms used in the draft Specialisation BER, such as the exact meaning of "preparation of services", "joint distribution" or "joint production" or "reciprocal specialisation". In addition, a number of technical comments were made.
- (61) As regards the **scope of the BER**, a number of stakeholders expressly welcomed that the draft also covers the partial cessation of activities in the context of specialisation agreements. Questions were raised with regard to the extent of the required reduction or production required to fall under the BER. In addition, a number of stakeholders urged to cover subcontracting agreements with a view to expanding production.
- (62) Almost no stakeholders made comments on the **hardcore provisions**. These argued that field of use restrictions should be explicitly excluded from the hardcore list.