



# Position Paper

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Huawei Technologies Duesseldorf GmbH (Huawei) runs with its European affiliates in European Research & Development and Innovation Centres in several European countries including Germany, United Kingdom, Sweden, Italy, Spain, France, Belgium and the Netherlands research and development for leading telecom solutions and has already established end-to-end advantages in Telecom Network Infrastructure, Application & Software, Professional Services and Devices through continuous customer-central innovation. In order to find prominent telecom solutions for future networks, services and devices, Huawei co-operates with numerous service providers, network providers, equipment and device suppliers, research institutes and universities in several European countries.

Huawei welcomes the publication of the new draft of the Guidelines on the applicability of Article 101 of the Treaty regarding the Functioning of the European Union to categories of research and development agreements, here the Draft R&D Block Exemption Regulation (referred to as "New Guidelines" hereinafter) which in its present form may help avoiding infringements of Article 101(3) of the Treaty regarding the Functioning of the European Union based on R&D contracts (referred to as "New R&D BER" hereinafter).

## Summary

Huawei shares the opinion that measures should be taken to avoid patent ambush when granting an exemption under the New R&D BER..

However, we suggest that the measures to be taken could be chosen out of several options instead of restricting such measures for granting an exemption to only one compulsory measure.

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#### Comments on the New Guidelines

Please note that the proposals for the New Guidelines hereunder are focusing on Article 3(2) of the New Guideline and derive from Huawei's experiences in performing co-operations based on R&D agreements particularly in consortiums between each of network providers, network equipment suppliers, device suppliers, universities and research institutes.

#### *"Restrictions on passive sales and active sales" (Article 5 (c and d))*

Huawei welcomes the amended paragraphs regarding restrictions on passive sales and active sales. These paragraphs help to understand more clearly that the respective restrictions might be suspected of infringing Article 101 of the Treaty on the Functioning of the European Union.

#### *"Agree to disclose relevant IPRs" (Article 3(2))*

Huawei strongly supports that parties' IPR should not obstruct the exploitation of the result by the other parties. We also believe that one reason for an exemption under Article 101(1) of the treaty can be if prior to starting the research and development the parties agree that all the parties will disclose in an open and transparent manner all their existing and pending IPR in so far as they are relevant for the exploitation of the results by the other parties.

However, as we experienced in the past, in many R&D co-operations and particularly in most of the R&D co-operations between larger consortiums which are actually those co-operations having horizontal effects, only about half of the parties could not even name the relevant Background know how before starting the research and development. This is true for larger companies having first to discover available resources and know how in several sub-divisions, and also for small companies or Universities not having enough capacity to start pre-research before a project starts. Those parties, therefore certainly could not name the IPR relating to such know how. In each of those cases experienced in practice according to Article 3(2) of the New R&D BER no exemption can be achieved. By this, parties which do not start basic research on a common project in order to discover Background know how and thus IPR before the respective projects starts, are discriminated compared to others. Therefore, even smaller co-operation partners would be forced to pre-invest in a project.



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On the other hand, also other contractual measures for reliably avoiding that parties' IPR could obstruct the exploitation of the result by the other parties exist. For demonstration, parties could cross-license their relevant IPR in exchange, or grant royalty free license, or commit not to implead for the infringement of relevant IPR. With respect to exemptions to be covered by Article 3(2) of the New Guideline each of those measures would lead to the same effect as the early information about IPR.

Therefore, Huawei proposes that "Agreeing to disclose relevant IPR" should be only one of several measures but certainly not the only and compulsory measure according to Article 3(2) of the New Guideline.

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