



Panasonic Europe Ltd.  
European Legal & International Affairs  
ConneXion Business Park  
Brusselsesteenweg 502  
1731 Zellik  
Belgium

**PUBLIC CONSULTATION ON THE REVIEW OF THE COMPETITION RULES  
APPLICABLE TO HORIZONTAL CO-OPERATION AGREEMENTS**

**RESPONSE TO DG COMPETITION**

**ON BEHALF OF**

**PANASONIC EUROPE Ltd**

**Brusselsesteenweg 502**

**1731 Zellik**

**Belgium**

**ID number: 9750301418-25**

Telephone +32 (0)2 231 1380 Fax +32 (0)2 230 5607  
[www.panasonic-europe.com](http://www.panasonic-europe.com)

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Registered Office: Willoughby Road, Bracknell, Berkshire, RG 12 8 FP, UK. Registered No. 3329345 England.  
VAT GB417 3218 71

## 1. Introduction

Panasonic Europe Ltd (“Panasonic”) is part of the Panasonic Corporation Group, one of the largest electronic product manufacturers in the world, with headquarters in Osaka, Japan. Panasonic provides a wide range of products, from audiovisual and information/communication equipment to home appliances and components.

Panasonic welcomes the opportunity to submit the following comments in response to the public consultation on the review of the competition rules applicable to horizontal co-operation agreements, which was launched by the European Commission on 4 May 2010. Panasonic’s comments are based on the draft Commission Regulations and the draft Guidelines published on the Commission’s website.

### 1. The draft R&D Block Exemption

Panasonic notes that the Commission proposes two significant changes to the R&D Block Exemption which, in Panasonic’s opinion, risk reducing the incentive for companies to start joint R&D projects.

First, the Commission proposes to make the application of the R&D Block Exemption conditional upon the parties disclosing their existing and pending IPR, prior to starting the R&D, in so far that the IPR is relevant for the exploitation of the results by the other parties. (Article 3, paragraph 2).

Panasonic believes that the absolute ex-ante disclosure obligation will impose a significant burden on companies planning to enter R&D projects, and is therefore likely to hamper innovation (rather than promoting it). In the early stages of a R&D project, it is generally very difficult for the parties to identify exactly what IPR could be relevant at the stage of the exploitation of the results. Therefore, we recommend the Commission replaces the absolute disclosure obligation with a “good faith disclosure” and “reasonable efforts” obligation, which is the standard the Commission proposes introducing in the context of standardisation activities.

Second, while the current R&D Block exemption allows field of use restrictions provided the parties are not competing undertakings, the new draft R&D BE requires “equal access” for the parties (Article 3(3)). Panasonic believes it is important, to guarantee full exploitation of the results, that the parties to the R&D project will be able to continue using field of use restrictions. Such restrictions are exempted under the Technology Transfer BE, and we do not see any reason not to allow such field of use restrictions in the context of the exploitation of the results of joint R&D efforts.

Panasonic therefore recommends that the Commission sticks to the current wording of the R&D BE and allow field of use restrictions between non-competing undertakings. Alternatively, if the Commission insists on the new proposed wording, Panasonic recommends that the Commission clarifies what is meant by “equal access”.

## 2. The Horizontal Guidelines

### 2.1 Information Exchange

As regards the concept of “undertaking” (paragraph 11 of the draft Horizontal Guidelines), Panasonic recommends the Commission clearly states that the concept of “decisive influence” requires the actual exercise of decisive influence, and that the mere possibility to exercise such influence does not suffice.

Panasonic welcomes the Commission's clarification as to what constitutes "public information" (paragraph 82 of the draft Horizontal Guidelines). We note however that companies often incur costs relating to the preparation of the information, and we recommend the Commission takes this into account when determining the ease of access to the relevant data. For instance, where a trade association prepares general market forecasts, the participating companies contribute both by dedicating time and effort to prepare the necessary input and to the financing of the trade association as such. In such circumstances, it is reasonable that the companies that did not participate have to pay more than the participating companies. In light of this, Panasonic suggests to delete (i) the reference to "equally" easy in the second sentence of this paragraph and (ii) the fourth sentence starting with "*For information to be genuinely public...*". As long as the information is publicly available, or the cost for accessing the information in question does not "discourage to a sufficient degree other companies and buyers", the information should be considered as "genuinely public information".

Panasonic notes the Commission adopts a very broad definition of the type of information exchange that is considered anti-competitive by object (paragraph 68 of the draft Horizontal Guidelines). In light of this expansive definition, Panasonic recommends the Commission recognizes in the draft guidelines that the gravity of the information exchange infringement is lower than the gravity of classic cartel type infringements, such as price fixing or market allocation.

## 2.2 Standardisation agreements

Panasonic welcomes the Commission's efforts to provide additional guidance for standardisation activities allowing companies to carry out their own assessment of the compatibility of their standard setting activities with EU competition law. In particular, the "safe harbour" provisions in the draft are helpful to illustrate the Commission's thinking with respect to standardisation activities.

Having said that, in order to fully achieve the benefits and efficiencies resulting from standardisation, it is important to acknowledge that standardization takes place in many different forms and many different industries, and that these activities to a large extent depend on the voluntary activities and operations of Standard Setting Organisations (SSO)<sup>1</sup> and their members. Such SSO's have different types of rules depending on what is appropriate and efficient with regard to the industry concerned by the possible standard and the size and scope of the activities of the SSO in question.

In order to maintain these efficiencies and pro-competitive benefits of standardisation, intervention should be kept to a minimum to allow the SSOs the flexibility to set rules which "fit" their industry and format. In particular, the Commission should avoid creating a situation where the "safe harbour" rules become the de-facto standard for all SSOs and should take care not to exclude rules which are equally or more efficient and pro-competitive.

For instance, Panasonic agrees that good faith ex-ante disclosure combined with a FRAND commitment would normally result in the standard setting activity falling outside Article 101 (1) TFEU. However, the same can be said for other types of IPR policies, for instance an absolute FRAND commitment without ex-ante disclosure. In this connection, the Commission should keep in mind that full ex-ante disclosure in many cases is a significant burden for a company - even if it is based on "reasonable efforts".

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<sup>1</sup> Whether this is standard setting organisations adopting multiple standards or small one-standard organisations.

Finally, as the Commission is aware, following the adoption of a standard, hold-up problems may occur which are the result of the unilateral action by a holder of one or more essential patents. Panasonic therefore recommends the Commission inserts a clear statement in this Section of the Horizontal Guidelines that Article 102 TFEU continues to apply, for instance at the end of paragraph 276.

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