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**COMMISSION STAFF WORKING DOCUMENT**

# ***IMPACT ASSESSMENT***

***Accompanying document to the***

**COMMUNICATION FROM THE COMMISSION**

**Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements**

Draft

**COMMISSION REGULATION**

**on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements**

Draft

**COMMISSION REGULATION**

**on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements**

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This report commits only the Commission's services involved in its preparation and does not prejudge the final form of any decision to be taken by the Commission

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# 1. BACKGROUND

## 1.1. Context

1. Innovation and competitiveness are fundamental to the Commission's Europe 2020 strategy.[1] Efficiency enhancing co-operation agreements between competitors, and in particular R&D and standardisation agreements, can further innovation and competitiveness in Europe.

2. Competition is one of the key tools for achieving a more competitive, connected, greener, knowledge based and inclusive society. Greater prosperity results from innovation and from using resources better, with knowledge as the key input. To make this transformation happen, Europe needs to use a number of tools, including competition to drive companies to innovate and co-operate in efficiency enhancing projects. Competition enforcement can only be effective if its policy instruments and in particular those impacting on horizontal co-operation agreements are kept up to date and brought in line with market developments.

3. In 1997 the Directorate General for Competition ("DG COMP") first identified a trend towards more horizontal cooperation between undertakings in order to respond to the challenges of globalisation, the rapid development of advanced technologies and fiercer competition.[2] In the period from January 1995 to December 1999, DG COMP assessed and cleared some 37 notified cases concerning joint R&D and Specialisation, even though these two areas were covered by Block Exemption Regulations ("BERs").

4. Statistics on the total number of cooperation agreements entered into between competitors are scarce. Nevertheless, the number of cooperation agreements that require assessment by legal advisers for compliance with the competition rules is likely to be substantial. Certain figures can be gathered from the Community Innovation Survey about cooperation patterns of *innovating* firms, ***Annex II***.[3] These figures show that approximately one third of innovating firms in the study are involved in cooperation with other bodies and almost half of them in horizontal cooperation. In other words, horizontal cooperation is a prevalent behaviour for innovating firms.

5. Guidance for the assessment of horizontal co-operation agreements under EU competition rules is currently given by three instruments, namely two BERs (Commission Regulation (EC) No. 2659/2000 on research and development (R&D)

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1 http://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf

2 XXVIIth Report on Competition Policy 1997 – SEC (98) 636 final, para 47.

3 The Community Innovation Survey (CIS) is a survey on innovation activity in enterprises covering EU Member States, EU Candidate Countries, Iceland and Norway. The share of firms cooperating with competitors is comparable to the share of firms cooperating with universities or higher education institutes. These figures, however, have obvious limitations since they simply count the innovating firms irrespective of the value of the innovation for customers. They also show a large discrepancy of behaviours, or answering patterns, between different countries and some important economies such as France, Germany and Italy do not report their figures, or only report very partially.

agreements and Commission Regulation (EC) No. 2658/2000 on specialisation agreements) and the accompanying guidelines on the applicability of Article 81 of the Treaty to horizontal cooperation agreements ("Horizontal Guidelines"). These three instruments are now subject to revision.

6. This Impact Assessment Report ("Report") accompanies the draft Commission Block Exemption Regulations applicable to R&D agreements ("draft R&D BER"), the draft Commission Block Exemption Regulation applicable to Specialisation agreements ("draft Specialisation BER") as well as the draft Horizontal Guidelines. These texts revise and update Commission Regulation (EC) No 2658/2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements ("Specialisation BER"), Regulation (EC) No 2659/2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements ("R&D BER"), and the Horizontal Guidelines.

7. DG COMP is the lead service for the review of the two draft BERs and the draft Horizontal Guidelines. The other departments involved are: DG Enterprise and Industry, DG Internal Market, DG Economic and Financial Affairs, DG Health and Consumer Affairs, DG Information Society and Media, DG Mobility and Transport, DG Energy, DG Education and Culture, DG Agriculture and Rural Development, DG Environment, DG Research, DG Employment, Social Affairs and Equal Opportunities, DG Maritime Affairs and Fisheries, DG Home Affairs, the Legal Service and the Secretariat-General.

8. Both the two draft BERs and the draft Horizontal Guidelines are in principle applicable to all sectors of the economy. However, the draft Horizontal Guidelines do not apply to the extent that sector specific rules apply, as is the case for certain agreements with regard to agriculture, transport or insurance. Moreover, a competition law assessment will be based on the specific facts of every case and the beneficial or negative effects of a certain type of cooperation will not be the same in every situation. These reasons taken together makes it extremely difficult to provide any reliable quantitative data on the positive or negative impacts of the policy options discussed below. Therefore, the present Report outlines the expected qualitative impact of the policy options identified but does not bring forward quantitative data. In this context it should be noted that, to a large extent, the Commission has a limited margin of discretion in the area of competition policy. The Commission is bound by the competition rules as laid down in the Treaty on the Functioning of the European Union ("TFEU") and in particular by the case-law of the European Courts and is thereby, in most cases, limited in the choice of policy options. In the light of this jurisprudence, the revision aims to update the already existing legal instruments, in the light of stakeholder input and legal and economic research. The leitmotiv of the different areas impact assessed, which focuses on some of the most important novelties or modifications in the instruments (covering a wide area of different type of agreements), is that a legal gap or a lack of guidance has been identified. The topics selected for the Impact Assessment are not as such interrelated and there are therefore no synergies between certain options in the different areas assessed.

## 1.2. Horizontal co-operation agreements and substantive competition rules

9. Horizontal co-operation agreements are efficiency enhancing agreements entered into between companies operating at the same level in the market. Hence, in most cases horizontal co-operation amounts to co-operation between actual or potential competitors in areas such as R&D, production, purchasing, commercialisation or standardisation. It also involves information exchange. Cartels, another form of horizontal co-operation, are not efficiency enhancing and are not covered by the instruments which are the subject of this review.

10. On the one hand, horizontal co-operation agreements may restrict competition within the meaning of Article 101(1) TFEU, thereby creating obstacles to market integration and harming consumers by leading to higher prices, less output, less product quality or variety, or less innovation. This is, for example, the case where the parties agree to fix prices, share markets, limit output, collude or foreclose competitors from the market.

11. On the other hand, horizontal co-operation agreements may also have positive effects as they can give rise to substantial efficiencies, in particular if the companies involved combine complementary activities, skills or assets. Such co-operations allow companies to respond to increasing competitive pressures in a changing market place driven by globalisation. For example, a standardisation agreement on an interoperability standard may limit competition between technologies but might also enable the creation of a new market and reduce the lead-time for an innovative product to reach the consumer. Alternatively, an R&D agreement may lead to less companies researching in e.g. a particular type of medicine, but lead to efficiencies where the combination of their efforts leads to a quicker and better solution for the identified problem. Consequently, agreements which have an anti-competitive effect may nonetheless be held to fall within the exception defined in Article 101(3) TFEU, providing that a sufficient share of the benefits arising from the agreement are passed on to consumers.

12. Horizontal co-operation agreements therefore require first an assessment aimed at establishing whether they are caught by Article 101(1) TFEU in light of their anti-competitive object or effects and if so, secondly, whether they comply with all the conditions set out in Article 101(3) TFEU, so as to benefit from the legal exception provided for therein. Agreements falling under Article 101(1) TFEU which do not comply with Article 101(3) TFEU are null and void pursuant to Article 101(2) TFEU.

13. Since the so called "modernisation" of the public enforcement of EU competition law in May 2004, as implemented by the procedural Council Regulation 1/2003[4], the Commission is no longer the sole entity which has the competence to apply Article 101(3) TFEU. This was previously the case under the old notification system, where companies had to apply for an "exemption" in order to be able to go ahead with a horizontal co-operation agreement on the basis of the exception set out in Article 101(3) TFEU. In other words the exception was not applicable unless formally

[4] Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1, 4.1.2003, p. 1 ("Regulation 1/2003).

granted by the Commission following notification by one of the parties to the agreement.[5] Companies are now responsible for carrying out the assessment of their agreements under Article 101 TFEU in its entirety (so called "self-assessment") and the Member States' national competition authorities ("NCAs") and national courts are empowered to apply Article 101 TFEU directly. All this has reinforced the need for guidance by the Commission on the application of Article 101 TFEU to horizontal co-operation agreements.

14. Commission guidance in this area is currently given in the R&D and Specialisation BERs as well as the accompanying Horizontal Guidelines. The Horizontal Guidelines provide an analytical framework for the assessment of the most common types of horizontal co-operation agreements such as research and development agreements, production agreements – in particular those that fall outside the BERs – purchasing agreements, commercialisation agreements and standardisation agreements. The two BERs exempt R&D as well as specialisation and joint production agreements from the EU's general ban on restrictive business practices contained in Article 101(1) TFEU, provided they meet all conditions set out in the Regulations. The basic approach of the Horizontal Guidelines and the two BERs is to allow competitor collaboration where it contributes to economic welfare without creating a risk for competition.

15. The R&D BER exempts joint R&D agreements which may also include the joint exploitation of the results (e.g., by way of joint production and/or joint selling of the products to which the results of the joint R&D relate) if (i) the parties fulfil certain positive conditions (e.g. all the parties must have access to the results of the joint R&D, the joint exploitation must only relate to results of the joint R&D which are protected by intellectual property rights or constitute know-how and which are indispensable for the manufacture of the contract products), (ii) the parties do not have a combined market share in excess of 25% in case they are competitors (there is no market share threshold for non-competitors), and (iii) the agreement does not include so-called "hardcore" restrictions of competitions such as price-fixing or output limitations etc.

16. The Specialisation BER exempts unilateral and reciprocal specialisation agreements as well as joint production agreements provided that (i) the parties do not have a combined market share in excess of 20% with regard to the products subject to the agreement, and (ii) the agreement does not include so-called "hardcore" restrictions of competitions such as price-fixing or output limitations etc. Under the Specialisation BER, unilateral specialisation agreements are agreements by virtue of which one party agrees to cease production of certain products or to refrain from producing those products and to purchase them from a competing undertaking while the competing undertaking agrees to produce and supply those products. For example, company A agrees with company B to stop producing input X and only buy this from B, which is its competitor (on the downstream market). Reciprocal specialisation agreements are agreements by virtue of which two or more parties on a reciprocal basis agree to cease or refrain from producing certain but different

5 It was the burden of the notification system that forced the Commission to put in place a system of block exemption regulations, whereby agreements complying with the conditions of the block exemption regulation automatically fell within the exception of Article 101(3) TFEU.

products and to purchase these products from the other parties, who agree to supply them. In other words, company A agrees to stop producing input X and only buy it from B and B agrees to stop producing input Y and only buy it from A. Joint production agreements are agreements by virtue of which two or more parties agree to produce jointly, for example, a petrochemical company active predominantly in Europe and a national oil company from the Gulf region decide to build a new production plant for a petrochemical in the Gulf region for which the petrochemical company will provide know-how and the national oil company will provide access to the necessary raw materials for the production.

17. For R&D, specialisation or joint production agreements concluded by companies whose market shares exceed the above mentioned thresholds or which otherwise do not fulfil the conditions of the BERs, there is no automatic exemption, but equally there is also no presumption that the agreement is illegal: it is necessary to assess the agreement's negative and positive effects on the market. The Commission's Draft Horizontal Guidelines assist in making this assessment.

## 1.3. The current review of the Regulations and Guidelines

18. Due to the expiry of the R&D and the Specialisation BERs at the end of 2010, the Commission initiated a review of these two instruments as well as the accompanying Horizontal Guidelines in 2008. The review consisted in an ex post evaluation by assessing, together with the stakeholders (in particular the national competition authorities, business, consumer associations and the legal community) the functioning of the current rules and identifying areas for improvement in the light of recent market developments as well as in economic and legal thinking.

### *1.3.1. Consultation and expertise sought*

19. Since the launch of the Horizontals Review in September 2008, a number of steps were taken to get input on both the perception of the present systems and on potential aspects that could be improved.

20. The main steps include:

– Ex post evaluation by way of (a) written consultations of the Member States' National Competition Authorities ('NCAs'); and (b) written consultation of stakeholders at the end of 2008/beginning of 2009;

– Three meetings with Member States in the context of the European Competition Network ; and

– A public consultation on the draft texts was launched on 4 May 2010.

### *1.3.2. Ex post evaluation - Input from stakeholders on initial questionnaire and statistics*

21. In December 2008, a stakeholders' questionnaire on the current Horizontals regime was launched with a deadline to respond by 30 January 2009. More than 20 responses were received mainly from business associations, law firms and individual companies. Stakeholders considered that the present system is largely satisfactory, but requires updating and fine-tuning in several areas. In particular, guidance on the assessment of information exchanges was requested by many stakeholders. An

overview of the most noteworthy feedback from stakeholders in early 2009 is attached at ***Annex I***.

*1.3.3. Ex post evaluation - Input from Member States*

22. When consulted on the functioning of the current R&D and Specialisation BERs as well as the Horizontal Guidelines in the autumn of 2008, Member States' replies were largely consistent with the feedback received from stakeholders. Many NCAs requested further guidance on information exchange.

23. Member States have given a broad support to the Commission's proposed changes in the draft BERs and the draft Horizontal Guidelines. In December 2009, DG COMP sent drafts of the revised R&D and Specialisation BERs and the Horizontal Guidelines to NCAs and ministries dealing with competition matters with a view to discussing them in an extended ECN Meeting, which was held on 1 and 2 February 2010. The overall feedback received from Member States was very positive. At the ECN Meeting, delegates from all Member States that made interventions overwhelmingly welcomed the revised drafts. Comments from delegates were generally confined to technical issues and did not call into question any of the fundamental concepts underlying the draft texts. In an Advisory Committee meeting held on 14 April 2010, Member States approved the drafts subsequently adopted by the Commission for public consultation.

*1.3.4. Public consultation*

24. The draft R&D and Specialisation BERs as well as the draft Horizontal Guidelines were published for public consultation on 4 May 2010, after having been approved by the College on the same day. The public consultation was open until 25 June 2010.[6] The Commission received just over 120 replies from stakeholders. These are summarised in ***Annex IV***.

### 1.4. Main proposed changes in the draft Horizontal Guidelines and the draft R&D and draft Specialisation BERs as put to public consultation on 4 May 2010

*25.* The most significant changes to the draft Horizontal Guidelines pertain to a substantial revision of the chapter on standardisation agreements and the inclusion of a chapter on the assessment of information exchange under EU competition law. With regard to the other chapters, the changes in the draft Horizontal Guidelines bring about incremental improvements.

*26.* The revision of the **standardisation chapter** attempts to update the guidance on standardisation agreements, drawing on recent research and case experience. It aims at ensuring that standards are set in such a way that the specific benefits of standard-setting are realised and passed on to European consumers and businesses while at the same time providing guidance to standard setting organisations. To this end, the draft standardisation chapter outlines in more detail the conditions under which standardisation normally falls outside the prohibition of Article 101 TFEU. Those

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[6] For the main proposed changes in the draft Horizontal Guidelines and the draft R&D and draft Specialisation BERs as put to public consultation on 4 May 2010, please see section 1.4., for the results of the public consultation, please see section 1.5. and Annex III.

standard setting organisations that do not want to carry out a self assessment under Article 101 TFEU but which nevertheless want to have reassurance that there will be no competition concerns, can be sure that by fulfilling those conditions they will fall within a so called "safe harbour" from the potential application of the prohibition of Article 101(1) TFEU. Falling outside the "safe-harbour", however, entails no presumption that there is a restriction of competition. The sole implication of falling outside the safe-harbour is that individual assessment of the standardisation setting is required in accordance with the guidance given in the chapter. The three recognised European standards bodies (CEN, CENELEC, and ETSI) prima facie can avail of the "safe harbour" in the draft Horizontal Guidelines.

*27.* Moreover, the revised standardisation chapter provides comfort for standard-setting organisations that wish to introduce a system of unilateral ex ante disclosures of most restrictive licensing terms (including maximum royalty rates) and thereby clarifies the Commission's position on how to assess this issue under EU competition law (i.e. fills a legal gap). This is a system where each holder of intellectual property rights ("IPR") makes a unilateral disclosure of the maximum price it would charge for its IPR, were its technology to be chosen for the standard. By way of such unilateral disclosures the standard setting organisation would be able to choose technology not only on the basis of technological aspects (quality) but also on price (commercial aspects). In addition, it should lead to lower prices on IPR by creating competition on price between technologies (before the industry is locked-in to the standard).

*28.* The standardisation chapter has also introduced guidance on standard terms (also referred to as standard policy conditions). The Commission has already committed to give such guidance (in the Horizontal Guidelines) in the Communication from the Commission on the application of Article 101(3) of the TFEU to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ 2010 of 30.3.2010 C 82/20). The chapter sets out the factors relevant for assessing whether there is a risk that standard terms leads to a restriction of competition.

*29.* In response to strong stakeholder demand and corresponding requests from NCAs, a chapter on **information exchange** has been introduced in the draft Horizontal Guidelines. The chapter sets out general principles on the competition assessment of information exchanges building on already existing case-law. It guides the assessment of specific agreements on information exchange and complements the assessment of other horizontal co-operation agreements where the parties also share information (e.g., in the context of a joint production agreement). The chapter provides guidance as to which information exchanges the Commission is likely to consider as having as their object a restriction of competition. Moreover, it contains a set of principles and criteria which can be used to assess whether an information exchange that does not have an anti-competitive object is likely to have anti-competitive effects on the market within the meaning of Article 101(1) TFEU. Finally, the information exchange chapter gives guidance on efficiencies of information exchanges under Article 101(3) TFEU. Information exchange often generates various types of efficiency gains, for instance by solving different problems of information asymmetries, reducing search costs of consumers, improving internal efficiency of firms etc. For example exchange of consumer data allowing companies to keep track of past behaviour of customers in terms of accidents or credit defaults, may enable the companies to detect the customers carrying the lowest risk which should benefit from lower prices.

30. In line with the ex post evaluation, there are no fundamental changes in the draft **R&D BER**. The few amendments provide more clarity and legal certainty as to its application. In addition, the "hardcore" provisions have been streamlined and aligned on other BERs such as the Technology Transfer BER.[7]

31. As is the case for the R&D BER, there are also no fundamental changes in the draft **Specialisation BER**. The main change is 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 exemption is also conditional upon a 20% market share threshold downstream. In such a case, merely looking at the parties' market position at the level of the intermediary product would ignore the potential risk of closing off or increasing the price of inputs for competitors at the level of the downstream products. Consequently, such a specialisation or joint production agreement should not benefit from a BER but should be subject to an individual assessment. The introduction of the second market share threshold is thus intended to fill the legal gap identified. Moreover, the draft Specialisation BER clarifies that its benefit applies to specialisation agreements, even where one of the parties to the agreement only partly ceases production. This enables a company that has two production plants for a certain product to close down one of its plants, outsource the output of the closed plant, and still avail of the Specialisation BER.

32. The main changes in the draft Horizontal Guidelines and the draft R&D and Specialisation BERs are set out in more detail in ***Annex III***.

### 1.5. Results of the public consultation

33. In response to the public consultation between 4 May and 25 June 2010, over 120 submissions were received.

34. 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 BERs and accompanying guidelines, which is considered as having worked well in practice.

35. 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 "safe harbours" provided for in the BERs and in the guidelines. Therefore, companies welcomed the Commission's "evolution, not revolution" approach.

36. 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

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7 Commission Regulation (EC) No 772/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L123, 27.4.2004, p. 11.

were also submitted on the draft Horizontal Guidelines, notably on the introduction and the sections on R&D, production, purchasing and commercialisation agreements.

*37.* The main comments received from stakeholders are summarised in more detail in ***Annex IV.***

### 1.6. Procedure – Impact Assessment

38. An inter-service steering group was set up for this Impact Assessment Report and met on 23 February 2010 and 1 September 2010. A draft of this Impact Assessment Report was submitted to the Impact Assessment Board on 10 September 2010, which met on 6 October 2010. In its opinion dated 8 October 2010, the Board gave a positive opinion. It found that the Report submitted provided the necessary analysis for continued action in this area but also identified certain areas which could be improved. In particular, it should be specified in the Report whether the problems assessed have been identified on the basis of potential risks caused by legal gaps/absence of guidance or on the basis of actual evidence of restrictions of competition. The Board further found that the baseline used for comparing the options needed to be clarified. Finally, when possible, the Report should provide more quantitative evidence of compliance costs. The Board also made more detailed comments. This revised draft has taken into account the Board's comments, in particular by specifying the basis on which a certain problem was identified and clarifying the baseline scenario for all issues assessed. As regards compliance costs, no quantification has been added since the costs assessed would, in exact terms, vary from one case to another (for the sake of the Impact Assessment it is enough to compare them in order of magnitude). For example the cost of defining the relevant market when assessing the second market share threshold in the Specialisation BER would depend on whether there is a clear precedent in EU competition law defining that market or not. The more detailed suggestions of the Board have been taken on board to the greatest extent possible.

## 2. ISSUES TO BE ADDRESSED: – THE "WHY"

### 2.1. Standardisation

#### *2.1.1 Ex post evaluation*

39. Standardisation agreements can give rise to significant efficiency gains. For example, EU wide standards may facilitate market integration and allow companies to market their goods and services in all Member States, leading to increased consumer choice and decreasing prices. Moreover, standards which establish technological interoperability often encourage competition on the merits between technologies from different companies and help to prevent lock-in to one particular provider. Standards may reduce transaction costs. They also play an important role for innovation, i.a., by encouraging the faster uptake of new technologies and by allowing companies to build on top of an agreed solution.

40. From a competition law perspective, the specific context of standards setting also entails certain risks. For example, discussions in the context of standard setting can provide an opportunity to reduce or eliminate competition in the markets concerned,

thereby facilitating a collusive outcome on the market. Standard setting agreements can, in certain circumstances, also lead to foreclosure of competitors and/or products. These more traditional theories of harm are already covered by the current chapter of the Horizontal Guidelines on standards. However, during the last 10 years another potential problem related to the significantly increased number of patents both at a European and an international level has surfaced. The number of European patents granted rose from 27,522 in 2000 to 62,777 in 2006.[8] Since the peak in 2006 there has been a slight downward trend, with 51,969 patents granted in 2009.

41. Due to this increasing number of patents applied for and granted, an increasing number of standards involve IPR (and sometimes a significant amount of IPR). There are no precise figures on all existing standards currently in use or their rate of development. However, in the area of ICT (i.e. information and communication technologies), according to the World Trade Organisation, approximately 70,000 standards were developed in the ICT industry between the eighties and 2004[9]. In a recent study for DG ENTR, the consultants *Economisti Associati* estimate that each year some 3,000 new ICT specifications appear (standards are made of a number of specifications).[10] There are also uncertainties as to the total number of organisations that develop ICT standards. One private entity estimates that there are 674 organisations world-wide, mainly consortia, which develop, promote and/or support ICT standards.[11] In its survey of September 2009, CEN list 224 standards-related fora and consortia.[12]

42. Moreover, interoperability standards have become critical in more and more sectors (for example interoperability standards allowing mobile telephones or computers to communicate with each other). As a result IPR has an important role in standardisation and technology solutions needed for interoperability often need to respect proprietary rights.[13] European standardisation policy allows proprietary technologies, protected by IPR, to be incorporated in standards.

### *2.1.2 Problem definition*

43. Both case experience, academic research and literature as well as input to the public consultation shows that the increasing involvement of IPR can give rise to an increased risk of anti-competitive outcome in various ways (even if it should be emphasised that in most cases standard-setting involving IPR in practice will be unproblematic from a competition law point of view). One specific risk relevant for the revised chapter is the risk for misuse of patents by a company holding intellectual property rights essential for the implementation of the standard. For example, a company participating in a standard-setting exercise might hide the fact that it has a patent likely to be essential for a future standard while the industry is discussing which technological solution to adopt, and later use to block the standard by either refusing to licence this patent or charging excessive fees. This practice is often

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8 http://www.epo.org/about-us/office/statistics/patent-granted.html
9 See WTO, World Trade Report, 2005.
10 Future ICT Standardization Policy; Impact Assessment of Policy Options ENTR /2008/041. Report by Economisti Associati 27 February 2010.
11 www.consortiuminfo.org/links
12 www.cen.eu/cen/Sectors/Sectors/ISSS/Consortia/Pages/default.aspx
13 See Industrial Property Rights Communication – COM(2008) 465, 16.7.2008.

referred to as "patent ambush".[14] In practice, the problem of IP holders bluntly refusing to license their IPR seems to be rare.

44. An IPR disclosure could not only diminish the risks for patent ambushes[15] but, just as importantly, also address the problem of asymmetric information in the context of standard setting (i.e. the fact that the participants in the standard setting process do not have the same knowledge of IPR potentially relevant for the standard) and therefore allow for a better informed decision on the choice of technology. IPR disclosures could for example allow the industry to choose a technology with less IPR if that technology is likely to be cheaper or even choose a technology without IPR. There is a clear need for guidance on the EU competition law aspects of IPR disclosures.

45. There have in recent years been disputes when implementers of a standard claim that IP holders apply prohibitive terms. In order to solve this issue many standard setting organisations require that for IPR to be included in the standard a commitment to license is given. This is often done in the form of a commitment to license on fair, reasonable and non-discriminatory conditions ("FRAND"), a so called FRAND commitment.

46. However, FRAND as a concept is not easily applied in the context of a competition law dispute and there has not been any clear and common understanding as to the type of benchmarks that could be used, in this context, for assessing whether specific terms are non-FRAND. In the debate there has, in particular, been a discussion on two alternative ways of solving this problem. Firstly, certain standard setting organisations as well as economic and legal literature have suggested that one solution may be a system where all IPR holders unilaterally disclose (ex ante) the maximum rate that they would charge for their IPR if it were to be included in the standard. Such a system could, the proponents suggest, enable the standard setting organisation and the industry to take an informed choice not only on quality but also on price when they choose which technology to include into the standard. Declaration ex ante of the most restrictive licensing terms may be a means of improving the effectiveness of FRAND licensing. Until now there has been a significant level of uncertainty in Europe as to whether standard setting organisations would risk infringing EU competition law if they allowed for or made mandatory such a system.[16] The fear has been that introducing a price element in the discussions within the standard setting organisation could lead to collusion (either by providing the companies with an opportunity to collude on prices down-stream or by giving an incentive for bid-rigging between owners of competing technologies). There is a

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14 As regards EU competition law see case COMP/C-3/38.636 – Rambus. In the US the issue of patent ambush has been analysed in the following cases: In re Dell Computer Corp., 121 FTC 616 (May 20, 1996), in the matter of Union Oil Company of California, FTC Docket No. 9305 (2005) and in the matter of Rambus Inc., FTC Docket No. 9302 (2002). In the US Rambus case the DG Circuit Court of Appeals reversed the FTC's finding of liability.

15 Leveque and Meniere ("Licensing commitments in standard setting organizations", CERNA wp, 2007) show that reducing or eliminating the risk of hold-up by all potential licensors may benefit licensors as well as consumers by encouraging the entry of manufacturing specialists.

16 In the US the Department of Justice has issued two business letters with the message that a system of unilateral ex ante declarations of most restrictive licensing terms is not infringing competition law. See IEEE-SA (2007) , available at http://www.justice.gov/atr/public/busreview/222978.pdf and VITA (2006), available at http://www.justice.gov/atr/public/busreview/219380.htm.

clear need for clarifying (legal gap) the EU position on how this system of ex ante disclosures relates to EU competition law.

47. The problem identified is relevant for all industries in which there is IPR (the relevance increasing with the overall number of IPR and the frequency and importance of standardisation).

### 2.2. Information exchange

*2.2.1 Ex post evaluation*

48. Information exchange between companies is a business reality. It can be pro-competitive as it may, for example, lead to an intensification of competition or significant efficiency gains. However, there are also situations where information exchange has an anti-competitive object or gives rise to restrictive effects on competition.

49. In light of this and against the background of the decentralised application of Article 101 TFEU and the need for self-assessment by companies whether their agreements are in compliance with this provision as introduced by Regulation 1/2003, there is a clear need for comprehensive Commission guidance on information exchange. This need is reflected in the unanimous demands by both stakeholders and national competition authorities for such guidance.

*2.2.2 Problem definition*

50. The economics of information exchange are very complex and there is limited case-law by the European Courts on this topic.[17] In particular, the scarce case-law does not give any useful guidance on when information exchange can be efficiency enhancing. Moreover, it does not give guidance on important issues in the modern economy such as whether price-comparison websites would be pro-competitive or whether they could lead to a competition risk. In addition, the Commission has so far only given sector specific guidance on information exchange, with regard to the maritime transport sector.[18] There is a need to develop a policy instrument that encompasses the different economic variables necessary to evaluate the effects of information exchange in a particular market setting, while giving workable guidance to economic players. Not giving such guidance would risk preventing a large number of pro-competitive information exchanges, thereby jeopardising the efficient development of the European economy. In addition, there is also the risk that companies engage in anti-competitive information exchanges, thereby harming European consumers.

51. Giving guidance on information exchange will be important for most industries and it is difficult to single out any particular industries for which this guidance would be of more relevance.

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[17] See Case C-7/95 P, *John Deere,* [1998] ECR I-3111; Case C-238/05, *Asnef-Equifax,* [2006] ECR I-11125; Case C-8/08, *T-Mobile Netherlands,* [2009] ECR I-not yet reported.

[18] Guidelines on the application of Articles 81 of the EC Treaty to maritime transport services, OJ C245, 26.9.2008, p. 2.

### 2.3. R&D Block Exemption Regulation

*2.3.1 Ex-post evaluation*

52. Joint R&D can give rise to substantial efficiencies, in particular when companies contribute complementary activities, skills or assets by leading to more innovation and product choice and a wider dissemination of knowledge. However, when competitors enter into joint R&D agreements, risks for competition cannot be excluded either. The consultation of stakeholders and national competition authorities in 2008/2009 did not identify any major problems with the operation of the R&D BER.

*2.3.2 Problem definition*

53. Nevertheless, drawing on our experience in the area of standardisation, we had initially identified one particular scenario where we believed there could be a competition problem. This could theoretically happen where two competitors combine their R&D activities and one of them has pre-existing essential intellectual property rights necessary for the exploitation of the results by the other party. If this other party is not aware of these intellectual property rights at the outset, it may realise at a later stage that it has invested significantly into a joint R&D project – giving up its individual efforts –, the results of which it cannot exploit ("patent ambush"). This would not only be problematic for the party concerned but could also be detrimental for competition by depriving European consumers of more, better and cheaper products. However, it has become apparent during the public consultation that the initial concerns about patent ambushes in the context of joint R&D agreements, though theoretically correct, appear to have been overstated in the published draft R&D BER and do not appear to reflect commercial reality. While the Commission and other competition authorities have dealt with patent ambushes in the area of standardisation, there do not appear to have been any such cases in the context of R&D agreements. While a number of stakeholders explicitly pointed this out, no stakeholder mentioned any concrete example where a patent ambush problem existed outside standardisation. The input given in the public consultation therefore shows that the potential for "patent ambush" in the context of R&D agreements does not call for EU action since a) it is not perceived as a problem in practices, and b) it can be properly dealt with by the concerned parties through private contractual arrangements. This issue will therefore not be further dealt with in this Impact Assessment.

### 2.4. Specialisation Block Exemption Regulation

*2.4.1 Ex-post evaluation*

54. Specialisation and joint production agreements can give rise to substantial efficiencies, in particular, cost-efficiencies, which may benefit European consumers. However, they may also lead to competition concerns such as output reductions or input foreclosure. It has become apparent that the current Specialisation BER does not, to a large enough extent, exclude the possibility that a specialisation or a joint production agreement which benefits from the BER could nevertheless give rise to competition concerns to the detriment of European businesses or consumers.

### 2.4.2 *Problem definition*

55. One particular scenario where this can and does occur in practice is where the products which are the subject matter of a specialisation or joint production agreement entered into between vertically integrated companies are intermediary products which one or more of the parties fully or partly use captively for the production of certain downstream products which are also sold by these parties. In such a case, merely looking at the parties' market position upstream (i.e., at the level of the intermediary product – which is the approach taken by the current Specialisation BER) and not also at the parties' market position regarding the downstream products would ignore the potential risk of, for example, output reductions or input foreclosure[19] in case one or more of the parties produce large quantities for captive use, while at the same time having only a minor presence on the upstream merchant market for the intermediary product, and where competing suppliers of the intermediary product are capacity constrained.[20] The fact that the current Specialisation BER still covers this type of situation is a legal gap.

56. This issue is in particular relevant for those production sectors where companies are vertically integrated.

# 3. OBJECTIVES – THE "WHAT"

## 3.1. General objectives of the review

57. One of the overreaching goals of the revision is to contribute to the Commission's Europe 2020 strategy. In particular R&D and standardisation agreements may further innovation and competitiveness. The Commission's policy towards horizontal co-operation agreements, as embodied in the two BERs and the Horizontal Guidelines, aims to leave companies maximum flexibility when concluding horizontal co-operation agreements in order to increase the competitiveness of the European economy while at the same time ensuring effective competition for the benefit of

[19] As regards input foreclosure in the areas of mergers, see the Commission's Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C265, 18.10.2008, p. 6, paras. 31 et seqq.

[20] This can be illustrated by the following example, which reflects a situation that can happen in practice: independent vertically integrated producers A and B both produce the input chemical X, mainly for their own use in the production of the final product Y, which they sell to third parties. A and B produce significant quantities of X but their market shares on the merchant market for X do not give them market power (e.g., A has a market share of 18% and B a market share of 1%) as A and B use most of X for their own use in the production of Y rather than sell X to third parties who are sometimes competitors with regard to Y. The 18% market share held by A merely results from its need to sell its excess production on the merchant market. On the market for Y, however, A and B each have a market share of 35%. In such a case, a block exemption solely based on A and B's share on the merchant market for X underestimates A's and B's combined market power for Y. Should A and B, for example, enter into a unilateral specialisation agreement whereby A would cease its own production of X and purchase its requirements of X from A (who can expand its production accordingly), this could mean that A would only purchase X from B for his own production of Y (but no longer for sale on the merchant market). Consequently, a large volume in the merchant market for X (i.e., 18%) would be lost. This could lead to a price increase for X where other producers of X are capacity constrained and those that produce X for internal consumption would not be likely to enter the merchant market for X in response to the price increase.

European businesses and consumers. The Horizontals Regime aims at providing guidance to the companies as to what business actions they can undertake without a risk of infringing competition law.[21] A linked objective is to allow for an increased level of legal certainty thereby reducing the compliance costs of the companies that will have to do a self-assessment. Finally, the BERs and the accompanying Horizontal Guidelines also aim at simplifying administrative supervision by providing a framework also for the Commission, NCAs and national courts as to the assessment of horizontal co-operation agreements.

### 3.2. Specific objectives of the revised standardisation chapter

58. The specific objective of the revised standardisation chapter is to give guidance on the (competition law related) problems created by the increased use of IPR in standards by laying down the Commission's policy in this area.

### 3.3. Specific objectives of the new information exchange chapter

59. The objective of giving comprehensive Commission guidance on the assessment of information exchange under EU competition rules is not only to ensure that companies will refrain from anti-competitive information exchanges which would harm European consumers but also that they will not shy away from efficiency enhancing pro-competitive information exchanges which are beneficial for the European economy.

### 3.4. Specific objectives of the revised Specialisation BER

60. The objective of the revised draft Specialisation BER – as for any BER – is to ensure that it covers most but also only scenarios where it can be assumed with reasonable certainty that the anticipated efficiencies generated by the covered agreements outweigh any negative effects.

## 4. POLICY OPTIONS – THE "HOW"

### 4.1. Identification of the "baseline" scenario

61. As described above, stakeholders are satisfied with the overall regime – i.e. a system of two BERs for R&D and specialisation agreements accompanied by the Horizontal Guidelines covering a much wider scope of arrangements. No NCA and no stakeholder proposed not to renew the existing regime (the "no EU action" option).

62. Although the main historical reason for introducing a block exemption regulation (i.e. to avoid a large number of repetitive notifications) has disappeared, there is consensus among the stakeholders that: (i) A block exemption regulation provides legal certainty for companies entering into R&D and Specialisation agreements and is justified where the risk of harm to consumers is low; (ii) a block exemption

[21] Regulation (EEC) No 2821/71 on application of Article 85(3) of the Treaty to categories of agreements, decisions, and concerted practices, OJ L 285, 29.12.1971, p. 46, the enabling regulation for both the R&D and Specialisation BER, provides that "it is desirable that the Commission…declare by way of regulation…..in order to make it easier for undertakings to co-operate in ways which are economically desirable and without adverse effect from the point of view of competition policy".

regulation frees competition authorities' resources to deal with the most harmful agreements, i.e. those concluded by companies that have significant market power; (iii) a block exemption regulation combined with guidelines provides guidance to businesses that need to assess by themselves the compatibility of their agreements with the EU competition rules[22]; (iv) moreover, a block exemption regulation combined with detailed guidelines provides a common framework for the NCAs and for the courts, which contributes to a European-wide level playing field.[23]

63. In view of the positive feedback obtained during the ex post evaluation on the functioning of the system with BERs (accompanied by Guidelines), it can safely be concluded that not renewing the BERs and withdrawing the Guidelines is not a sound, or desired, policy option. For that reason, this high-level option has been discarded. Therefore the baseline scenario is to have the BERs, complemented by the Horizontal Guidelines, in unchanged format, i.e. the current regime.[24] All options below will be assessed against this baseline scenario of keeping the instruments in unchanged format.

## 4.2. Identification of the Policy Options to be assessed

64. The following policy options have been identified in relation to the two most significant changes in the Guidelines (i.e. the new chapter on information exchange as well as the revised chapter on standardisation agreements) and in relation to the two BERs. The details and implications of each option will be further described in chapters 5-7 below.

### *4.2.1 Policy Options concerning the standardisation chapter*

Ex ante disclosure of intellectual property rights

65. The following options will be assessed: Option 1 making IPR disclosures[25] a necessary condition for compliance with EU competition law[26]; Option 2 requiring a disclosure of intellectual property rights in order to benefit from the safe-harbour;

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22 A block exemption regulation is a rigid instrument and there will be many efficiency enhancing agreements that fall outside of its scope. Hence, the importance of guidelines.

23 A block exemption regulation is binding not only on the Commission, but also on the NCAs and the national and Union courts, and even though guidelines are in principle binding only on the Commission, other authorities generally refer to them. Through its combination of regulations and guidelines the Commission gives guidance on the application of Art 101 TFEU in the field of horizontal agreements. Also, under Regulation 1/2003 the Commission is responsible for ensuring that the EU competition rules are applied consistently by the NCAs.

24 Instead of having two separate BERs for R&D and specialisation agreements, one could have theoretically consolidated the two BERs into one BER. This would, however, not have led to any simplification or reduction of administrative burden. On the contrary, the result would likely be a more complicated text fraught with difficulties such as the proper delineation of the scope of application of the BER and its respective parts.

25 It should be noted that the type of IPR disclosure assessed is a binding IPR disclosure which requires the members in the standard-setting organisation to declare any IPR which they believe might be essential for the standard under development. It is a disclosure obligation based on "good faith" and "reasonable efforts" and does therefore not require an expensive patent search. The definition of "reasonable efforts" and "good faith" may need to be adapted to the particular industry.

26 In other words, the Horizontal Guidelines would describe a policy of the Commission to the effect that the Commission would consider standard setting agreements without an ex ante disclosure rule as restrictive of 101(1) and very unlikely to produce sufficient efficiencies under 101(3) TFEU.

Option 3 not requiring a disclosure of IPR in order to benefit from a safe-harbour but instead provide an effects based guidance (in the standards chapter of the Horizontal Guidelines) explaining how this factor is taken into account when assessing a particular case and Option 4 retaining the baseline scenario i.e. not providing any guidance on this issue.

Ex ante disclosure of most restrictive licensing terms

66. The following options will be assessed: Option 1 making the ex ante disclosures of most restrictive licensing terms[27] a necessary condition for compliance with EU competition law[28], Option 2 making the ex ante disclosures of most restrictive licensing terms part of the safe harbour, Option 3 giving comfort that, in principle, such systems are not infringing competition law and Option 4retaining the baseline scenario i.e. not providing any guidance on this issue.

### *4.2.2 Policy Options concerning information exchange*

67. The following options will be assessed: Option 1 having no chapter on information exchange in the guidelines, Option 2 having a new chapter providing guidance on information sharing in light of the case law on information exchange, Option 3 having a Block Exemption Regulation on information exchange. Since there are no clear-cut absolute safe harbours for information exchanges, providing guidance through means of a Block Exemption Regulation (Option 3) is not a feasible alternative. As an additional factor, it should be mentioned that unlike for R&D and specialisation agreements, the Council Enabling Regulation[29] does not provide a legal basis for the adoption by the Commission of a BER on information exchanges. Therefore, in the discussion of the subsequent impacts Option 3 will not be included. Moreover, it should be emphasised that the option to also impact assess more specific sub-options has been considered and discarded.[30]

### *4.2.3 Policy Options concerning the Specialisation BER*

68. The following options will be assessed: Option 1 introduction of a second market share threshold as set out in the draft Specialisation BER ("second market share threshold for captive producers"), and Option 2 no second market share threshold and addressing the competition issues that may arise when parties use the products manufactured under a specialisation or joint production agreement for captive use by way of withdrawing the Specialisation BER in individual cases ("retaining the baseline scenario").

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27 "Most restrictive licensing terms" also covers royalties and other pecuniary terms but also non-pecuniary terms such as limitation in field of use, grant-backs etc.

28 See above footnote 26..

29 Council Regulation (EEC) No 2821/71 of 20 December 1971 on application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices (OJ L 285, 29.12.1971, p. 46).

30 In particular, it was concluded that the policy options as regards the scope of the object box, i.e. what is considered as automatically having a negative effect on competition, are severely limited by the case-law of the European Court of Justice and therefore not suitable to impact assess. As regards the effects based parts of the chapter the numerous criteria used for the assessment are intertwined and therefore not suited to individual impact assessessment.

## 5. IMPACT ASSESSMENT OF THE POLICY OPTIONS RELATING TO THE STANDARDISATION CHAPTER

69. The different options for solving the problems due to the increased use of IPR in standards will be assessed against certain identified criteria focussing on economic impacts. The assessment will analyse impacts on competition (including consumers) and on compliance costs borne by companies As regards the standardisation chapter the Commission also analyses the impact on research and development. The general impact on public administration and the implications on the Union budget will also be briefly discussed.

### 5.1. Economic impacts

#### *5.1.1 Impact on competition*

Ex ante disclosure of IPR

70. IPR disclosure policies allow for the members of the standard-setting organisation, and the standard-setting organisation itself, to have an early understanding of the IPR that might read on the standard under development. This in turn also allows the standard-setting organisation to either ask for a licensing commitment from the IPR holders or to try to work around that particular solution. The IPR disclosure obligation is also intended to avoid that the standard is later blocked by an IPR holder not willing to license at reasonable terms or at all.[31] Another positive effect is that it is easier for the standard-setting organisation to map all the different types of technologies that already exist and that could be interesting to put into the standard.[32]

71. The Commission's investigation in the recent *Rambus* "patent ambush" case showed the potential restrictive effects on competition resulting from non-disclosure of relevant IPR.[33] In this case, which ended with a commitment from Rambus to lower its royalty rates, the alleged deceptive conduct consisted of the non-disclosure of the existence of patents and patent applications which were later claimed to be relevant to the adopted standard. The Commission took the preliminary view that as a result Rambus could claim royalties for the use of its patents from industry standard-compliant manufacturers at a level which, absent its allegedly intentional deceptive conduct, it would not have been able to charge.

72. Option 1 (necessary condition) would, at first sight, seem to produce very favourable effects on competition (see the list of positive effects set out in paragraph 70). However, there are also other models of standard-setting organisations which might,

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31 See for example Joseph Farrell, John Haynes, Carl Shapiro and Theresa Sullivan, "Standard setting , patents and hold-up" in 74 Antitrust Law Journal No. 3 2007, "Early disclosure, promptly followed by ex ante negotiation, is intellectually the cleanest and most targeted response to the problem of patent hold-up and we favour policies that minimize barriers to this approach".

32 See Farrell and Simcoe ("Choosing the rules for formal standardization, 2007, unpublished manuscript) which show that a policy which requires stronger disclosure and licensing requirements reduce delay in the adoption process and do not necessarily reduce patent holder's incentive to improve the quality of its technology in the first place. See also Benjamin Chiao, Josh Lerner and Jean Tirole ("The Rules of Standard-Setting Organizations: An Empirical Analysis." RAND Journal of Economics, 2007) .

33 Case COMP/C-3/38.636 – RAMBUS

in certain situations, have positive effects on competition. In particular, the public consultation has drawn the Commission's attention to a model where there is no obligation for the members to disclose their potentially essential IPR, but where instead the participants in the standard-setting organisation (or the technical committee actually working on the technical aspects of the standard) agree upfront that they will license any IPR that they might have and that might read on the final standard on FRAND or royalty-free terms.[34] This participation model might in certain situations produce efficiencies by resulting in a quick proliferation, acceptance, of a new standard and by quickly and cheaply bringing a new or better product to the consumer.[35] On balance, Option 1, which would in practice force all companies to adapt the same model, could therefore risk having a negative effect on competition between different models for structuring standard setting, between standard-setting organisations/standards and also have a stifling effect on a sometimes efficient model.

73. Option 2 (safe-harbour) would only give an incentive to standard-setting organisations to adopt the IPR disclosure model and would not prevent them from using a different model. Falling outside the safe-harbour does not in any way mean that the set-up is in violation of competition law, but only that the standard-setting organisation and its members would have to "self-assess" whether the standard-setting agreement is in compliance with competition law (based on the principles set out in effects based part of the chapter).

74. Finally, Option 3 (guidance for assessing the importance of an IPR disclosure on a case-by-case basis) would have the advantage of not giving the message that any solution is more preferred than the other – thus allowing for full competition between models. On the other hand, i.a. the Commission's practical experience so far shows that an IPR disclosure obligation is in principle positive for the competitive outcome and that it would therefore be beneficial for competition to give the policy message of putting the IPR disclosure obligation in the safe-harbour (as long as there is sufficient guidance in the chapter for those agreements falling outside the safe-harbour).

**Table 1**

| **Impact on competition (--- to +++)** | | | |
|---|---|---|---|
| Option 1<br><br>("Necessary condition") | Option 2<br><br>("Part of safe harbour") | Option 3<br><br>("Effects based/case by case") | Option 4<br><br>("Retaining the baseline scenario") |
| - | ++ | + | 0 |

34 This model is often referred to as the "participation" model and can be combined with either a commitment to license royalty free or to license on FRAND terms.

35 In case no potentially useful technology is excluded, for example because all relevant actors are vertically integrated, there might not even be any initial restriction under 101(1). See also footnote 34 above.

Ex ante disclosure of most restrictive licensing terms

75. The aim of ex ante disclosures of most restrictive licensing terms is to allow the standard setting organisations and the industry to make an informed choice on the technological solution to put in a certain standard, not only on technical but also on commercial grounds. The follow-on goal being to ensure competitive prices for the implementers of the standards and therefore also increasing the likelihood of competitive prices at consumer level. At first sight, it would seem that Option 1 (necessary condition) or 2 (part of safe harbour) would be beneficial for competition by providing for more clear-cut competition between technologies at a stage when the standard-setting organisation still has the freedom to adapt its choice of technology. The system of ex ante disclosures of most restrictive licensing terms should, at least in theory, lead to the best technology (both from a technical and commercial perspective) being adopted.[36] However, there is still a clear lack of empirical evidence as to how this system would work in practice. It is clear following the public consultation that not all actors or industries agree that ex ante disclosures of most restrictive licensing terms are an efficient way of ensuring competitive pricing.[37] In particular, concerns have been raised that in industries with very complex technologies and where the technology is developed as the standard setting work is progressing, a system of ex ante disclosures of most restrictive licensing terms could complicate the process (considering the potential for uncertainty as to which patents in the end will read on the standard), might not lead to lower prices, and not allow for an efficient process of competition between technologies.[38] Due to

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36 Swanson D.G., Baumol W. J. 2005, "Reasonable and non-discriminatory (RAND) royalties, Standards Selection and Control of Market Power", 73 Antitrust L. J. See also Eric J. Iversen, Rudi Bekker and Knut Blind, "DIME working papers on Intellectual Property Rights – Emerging coordination mechanisms for mutliparty IPR hodlers: linking research with standardization". About voluntary ex ante licensing schemes: "This experiment is promising and its risks are very limited (as it is a voluntary scheme)".

37 See "Modernising ICT standardisation in the EU – the Way Forward" – Overview of the results of the public consultation on the white paper", p. 11 "Although many felt that there might be scope for improving FRAND, the possibility of requiring a declaration of most restrictive licensing terms, including (maximum) royalty rates before adoption of a standard, was not generally accepted as a route to providing more predictability and transparency. While the users of technologies broadly-speaking supported the proposal, technology providers generally have no wish to see such an approach becoming mandatory, arguing that it would prolong standardisation discussions and could even lead to an increase level of royalties. Some technology providers and industry associations however could consider the inclusion of ex-ante declarations of royalty rates on a voluntary basis. Most of the standards developing organisations also opposed the proposal. They were of the opinion that "commercial" discussions should not take place in standardisation organisations. A few standards developing organisations though could accept a voluntary approach within their IPR policies and a very few already foresaw such a possibility."

38 See also "The Ex Ante Auction Model for the Control of Market Power in Standard Setting Organizations", Geradin, Damien Layne-Farrar, Anne, Padilla, Atilano Jorge: *"[F]RAND commitments - i.e., promises to license on reasonable and non-discriminatory terms - play a key role in standard setting processes. However, the usefulness of those commitments has recently been questioned. The problem allegedly lies in the absence of a generally agreed test to determine whether a particular license satisfies a [F]RAND commitment. Swanson and Baumol have suggested that "the concept of a 'reasonable' royalty for purposes of [F]RAND licensing must be defined and implemented by reference to ex ante competition." In their opinion, a royalty should be deemed 'reasonable' when it approximates the outcome of an ex ante auction process where IP owners submit [F]RAND commitments coupled*

these concerns raised and the lack of practical experience with this system it is therefore extremely difficult to assess the impact in particular of Options 1 and 2. From this perspective Option 3 (comfort that system not anti-competitive) would, based on current market practice, seem to be overall the most beneficial solution for competition since it provides the requested comfort for those standard setting organisations that wish to try out this type of ex ante disclosures while at the same time not imposing it as a straight jacket on standard setting organisations (without the necessary empirical data allowing the Commission to conclude whether the system is efficient in all sectors and all types of standard setting contexts) or unduly incentivising its use. However, Option 3 potentially also has the implicit cost of foregoing fostering competition between technologies also on pricing (before the standard is adopted).

**Table 2**

| **Impact on competition (--- to +++)** | | | |
|---|---|---|---|
| Option 1<br><br>("Necessary condition") | Option 2<br><br>("Part of safe harbour") | Option 3<br><br>("Comfort that not contrary to competition law") | Option 4<br><br>("Retaining the baseline scenario") |
| 0 (This option also has the potential to produce a negative result) | 0 (This option also has the potential to produce a negative result) | ++ | 0 |

### 5.1.2 *Impact on compliance costs borne by companies*

Ex ante disclosure of IPR

76. As regards compliance costs a clear distinction has to be made between companies who participate in the standard setting (and have IPR) and therefore bear the compliance costs ("participation companies") and mere users of the technology who have not particpated in the standard setting process and thus do not risk being

*with licensing terms and selection to the standard is based on both technological merit and licensing terms. In this paper we investigate whether the ex ante auction approach proposed by Swanson and Baumol is likely to deliver efficient outcomes, both from static and dynamic standpoints. We find that given the peculiar characteristics of some of the industries where standardization takes place, in particular the many different business models adopted by innovating companies in those industries, the ex ante auction approach proposed by Swanson and Baumol may not always deliver the right outcomes from a social welfare viewpoint."* See also Joseph Farrell, John Haynes, Carl Shapiro and Theresa Sullivan, "Standard setting, patents and hold-up" in 74 Antitrust Law Journal No. 3 2007, p. 635 about ex ante auctions: *"This approach can harness the power of ex ante technology competition and might prevent the technology users from acting as a buyers' cartel, at least if the SSO is not permitted to impose a reserve price in the auction… However, such an ex ante auction may not be practical. Back-and-forth bargaining between the SSO and patent holders may be necessary if, for example, the SSO is engaged in an ongoing process of evaluating technical alternatives, especially if the SSO or its members also are evaluating the scope and strength of the relevant pending or issued patents".*

imposed any compliance costs. It can be expected that the number of companies in the second category in many cases outweigh those in the first. The impact of IPR disclosure on the second category (in principle more competitively priced standards) will always be positive and there are no compliance costs. It should also be kept in mind that compliance costs will only arise for companies participating in standard-setting organisations where IPR is of relevance (for example the setting of a quality standard for paper might not include any IPR).

77. As regards the first category, i.e. par ticipation companies, Option 1 i.e. making IPR disclosures a necessary condition (and also to some extent Option 2 which incentiveses standard-setting organisations to introduce the obligation to disclose IPR in its IPR policy) would increase participation companies' compliance costs, in particular in industries with a large number of complex patents[39] to the extent that the standard setting organisation did not already have such a disclosure policy in place.[40] In order to comply with the disclosure obligation, the participation companies (including SMEs) would have to analyse to what extent either their existing patents or pending patent applications read on a particular technology which is discussed as a potential future standard, in other words examine the link between their IPR and the standard under development. Such costs could, in the abstract, be significant. However, the IPR disclosure obligation set out in the draft standards chapter, is based on a good faith disclosure and reasonable efforts and does not include a patent search (which could be costly). Due to this softer IPR disclosure obligation, the costs for companies to identify the IPR to disclose would be less significant.

78. Option 1 (and to a lesser extent Option 2) would also lead to a "one-off" compliance cost for those standard setting organisations which do not yet have this type of disclosure obligation, since the standard setting organisation would need to negotiate with its member in order to draft and decide on a new IPR policy. For those standard setting organisations which are based on the so called participation model (see above) this might be a quite difficult process since it would mean an important change of the standard setting organisations set up.

79. Option 3 (effects based/case-by-case) ) would give a less strong incentive to all standard setting organisations to introduce rules on IPR disclosure and it might lead to a lower number of standard setting organisations adopting this policy. It could therefore also lead to lower compliance costs (marginally) than Option 2. As regards SMEs no particular concerns have been identified. In can however be assumed that in many cases SMEs would have smaller IP portfolios and that, in case the SME actually participate in the standard setting process, it would be relatively easy for the SME to identify whether its IPR could be relevant for the standard to be adopted.

**Table 3**

| **Impact on compliance costs of participation companies (--- to +++)** |
|---|

39 However, it has to be emphasised that the disclosure obligation assessed is not requiring patent searches, but is instead presumed to be based on a good faith duty to make reasonable efforts.

40 For example the European formalised standard setting organisations, i.e. CEN, CENELEC and ETSI already have such IPR disclosure policy. For a company only participating in these bodies the compliance costs would therefore not be increased.

| Option 1<br><br>("Necessary condition") | Option 2<br><br>("Part of safe harbour") | Option 3<br><br>("Effects based/case by case") | Option 4<br><br>("Retaining the baseline scenario") |
|---|---|---|---|
| - - | - | - | 0 |

Ex ante disclosures of most restrictive licensing terms

80. Neither of the options would seem to give rise to any significant compliance costs for companies. Option 1 (necessary condition) or 2 (part of safe harbour) would, in those cases where a standard setting organisation choose to adopt a policy not only allowing for but also requiring ex ante disclosurse of most restrictive licensing terms, slightly increase compliance costs by forcing the IPR holder to identify its most restrictive licensing terms at a stage where the commercial value if its IPR in relation to other potential technologies for inclusion in the standard might not yet be completely clear. However, considering that most restrictive terms is not exact terms but only "maximum terms" this cost would not seem to be of importance. In addition, the public consultation shows that concern that such a process would be complex (or rather difficult) is limited to the certain industries. To the extent there is a compliance cost, Option 3 (only giving comfort for the use of the system) would maybe lead to a lower number of standard setting organisations adopting this model and therefore to, overall, lower compliance costs for companies.

81. In addition, Options 1 and 2 would lead to some "one-off" compliance costs for a majority of standard setting organisations (since very few in the world today have introduced a system of ex ante disclosures of most restrictive licensing terms).

82. As with the ex ante disclosures of IPR discussed above, any compliance costs would only arise for those companies participating in the standard setting process (and holding IPR). For those companies only implementing the standard there will be no compliance costs. As regards SMEs no particular concerns have been identified.

**Table 4**

| **Impact on compliance costs for participation companies (--- to +++)** | | | |
|---|---|---|---|
| Option 1<br><br>("Necessary condition") | Option 2<br><br>("Part of safe harbour") | Option 3<br><br>("Comfort that not contrary to competition law") | Option 4<br><br>("Retaining the baseline scenario") |
| - - | - | 0 | 0 |

## 5.2. Impact on consumers

83. Competition policy and enforcement are about ensuring that the competitive process is not distorted because that process is considered to deliver the best outcomes for consumers in terms of price, qualitity, product variety, choice and innovation. Competition policy is therefore about preserving consumer welfare. Hence, the impacts on consumers have already been assessed above Section 5.1.1.

## 5.3. Impact on innovation and research

Ex ante disclosures of IPR

84. Is there a risk that ex ante disclosures of IPR, while having a positive effect on competition, could have a negative effect on the incentives for companies to innovate and carry out research? The procedure for identifying and disclosing the relevant IPR proposed in the standard chapter is not overly burdensome (as pointed out above, the option impact assessed is an IPR disclosure excluding patent searches, based on "good faith" and "reasonable efforts"). It would not seem that such a proportionate obligation to disclose IPRs would lead to negative effects on innovation and research. A very remote argument could be that the time needed for the procedure for IPR disclosures would increase time-to-market for standards and therefore provide a lessened incentive for innovation (since it would take longer time for the research company to be remunerated for its efforts). However, this risk would seem to be extremely remote. As regards positive effects, it is difficult to see any such direct (and measurable) positive effects on innovation flowing from an IPR disclosure obligation. However, the fact that the companies setting the standard openly discuss the IPR that they already hold, could potentially lead to a more widespread knowledge of already existing innovations[41], leading participating engineers and technical experts to follow-on innovation. As to our present understanding, it would therefore seem that all three options are mainly neutral to innovation and research (perhaps with some minor positive effects for Options 1 and 2).

**Table 5**

| **Impact on innovation and research (--- to +++)** | | | |
|---|---|---|---|
| Option 1<br><br>("Necessary condition") | Option 2<br><br>("Part of safe harbour") | Option 3<br><br>("Effects based/case by case") | Option 4<br><br>("Retaining the baseline scenario") |
| 0/+ | 0/+ | 0 | 0 |

Ex ante declarations of most restrictive licensing terms

41 Even if the IPR was already public, the other participants might not de facto have known about it.

85. Companies with a business model focussing on research and development and therefore with licensing of IPR as their only source of income, have raised the concern that an efficient system of ex ante declarations of most restrictive licensing terms would risk pushing prices down too low, i.e. to a level where there would be no or less incentives for companies to engage in further research and innovation. There is also theoretical work suggesting that in certain limited circumstances ex ante declarations of most restrictive licensing terms could have negative effects on innovation.[42] However, due to the lack of empirical experience in relation to this issue, there are no real facts supporting this suggestion. Moreover, as long as there is no unconditional approval of collective negotiations in relation to the IPR holder[43] the risk of giving a disincentive to innovation by too low prices would seem to be limited. To the extent that ex ante declarations would have a risk of driving prices to a too low level this risk would be somewhat higher for Options 1 and 2 since they provide stronger incentives for standard-setting organisations to introduce such a system.

**Table 6**

| **Impact on innovation and research (--- to +++)** | | | |
|---|---|---|---|
| Option 1<br><br>("Necessary condition") | Option 2<br><br>("Part of safe harbour") | Option 3<br><br>("Comfort that not contrary to competition law") | Option 4<br><br>("Retaining the baseline scenario") |
| - | - | 0 | 0 |

### 5.4. Impact on public administration and the Union budget

86. None of the options has a direct impact on the Union budget.

87. Improved guidance in the standardisation chapter however has the potential of reducing the number of alleged cases of anticompetitive conduct being brought to the Commission's attention, whether through formal complaints or other data submissions or information gathering.

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42 See for example Tor Winston, Economic Analysis Group Discussion Paper, 06-3, March 2006. The author considers that, more competitive licensing terms (by ex ante disclosures of licensing terms) may dampen incentives to innovate. The paper analyzes the balance between the welfare benefits of the added competition and the welfare costs of reduced innovation. The model of R&D investment and standard setting predicts that both total welfare and consumer welfare are higher when an SSO considered licensing terms ex ante as long as the cost of innovation is not "high." The model also predicts that the welfare benefits of ex ante consideration of licensing terms grow as the costs of innovation falls. However, when the cost of innovation is "high" the negative welfare effects are always small.

43 The model of unilateral ex ante declarations assessed, does not give such a blanket approval to joint negotiations in relation to an individual IP holder.

88. Given that horizontal agreements cases under Article 101 TFEU are also dealt with at the national level, furthered guidance on the standardisation agreements will reduce the legal uncertainty of firms and therefore the workload of national competition authorities.

### 5.5. Other impacts: social and environmental impacts

89. While, the impact of the specific policy options involved in the standardisation chapter in terms of employment and social issues as well as the environment are not measurable, none of the Options assessed above would seem to have any apparent adverse effects in this regard.

90. Undistorted competition between firms is positive for creating a competitive economy which will be more able to face the environmental challenges. However, as with the impact on employment, the specific impacts of each of the options assessed on the environment are not measurable.

### 5.6. Summary of impacts

**Table 7**

| Overall scores IPR disclosures | | | | |
|---|---|---|---|---|
| | Option 1<br><br>("Necessary condition") | Option 2<br><br>("Part of safe-harbour") | Option 3<br><br>("Effects based/case-by-case") | Option 4<br><br>("Retaining the baseline scenario") |
| Competition | - | ++ | + | 0 |
| Compliance costs | - - | - | - | 0 |
| Innovation and research | 0/+ | 0/+ | 0 | 0 |

**Table 8**

| Overall scores ex ante declarations of most restrictive licensing terms | | | | |
|---|---|---|---|---|
| | Option 1<br><br>("Necessary condition") | Option 2<br><br>("Part of safe-harbour") | Option 3<br><br>("Effects based/case-by-case") | Option 4<br><br>("Retaining the baseline scenario") |
| Competition | 0 / - | 0 / - | ++ | 0 |
| Compliance costs | - - | - | 0 | 0 |

| | | | | |
|---|---|---|---|---|
| Innovation and research | - | - | 0 | 0 |

91. The assessment of the impacts of the different options above shows that as regards IPR disclosures Option 2 (part of safe harbour) would seem to be, on balance, the preferable option. Option 2 leads to the most positive effects on competition and consumers. It does lead to compliance costs for participation companies (even if those are not significant considering that the option assessed does not require a patent search but is instead based on "good faith" and reasonable efforts") but does not lead to any compliance costs for those companies only implementing the standard or those companies that do participate in the standard-setting process but that do not own any IPR in the standard about to be adopted.

92. As regards ex ante declarations of most restrictive licensing terms, the result of the impact assessment indicates that Option 3 (providing comfort that a system of unilateral ex ante disclosures is not as such in violation of competition law) should be the preferred option. In particular this stems from the fact that ex ante declarations of most restrictive licensing terms might not be an efficient system in all sectors and that there is still (due to lack of experience with this system in practice) some uncertainty in relation to the various advantages and disadvantages that such a system could lead to.

# 6. IMPACT ASSESSMENT OF POLICY OPTIONS RELATING TO INFORMATION EXCHANGE

93. This section sets out the Commission's assessment of the positive and negative impacts that the identified policy options would be likely to have if implemented. The assessment will analyse impacts on competition (including consumers) and on compliance costs borne by companies. The general impact on public administration and the implications on the Union budget will also be briefly discussed.

## 6.1. Economic impacts

### *6.1.1 Impact on general objective of ensuring effective competition*

94. Providing guidance on information exchange in a new chapter of the Horizontal Guidelines (Option 2) will positively impact effective competition as it will strengthen enforcement in cases where information exchange carries the highest risks (exchanges of individualised future intentions on prices and quantities). At the same time, by giving detailed guidance on the types of data exchanges and market situations in which harm is unlikely to occur and benefits presumed high, the chapter will encourage and facilitate pro-competitive information exchanges.

95. The strength of Option 2 lies in the ability to give a detailed description of interrelated factors relevant for competitive assessment of information exchanges, such as type and presentation of data, market coverage and market characteristics. The aim of the guidance is to describe situations in which information exchanges are likely to have restrictive effects on competition, and situations which are most likely to be harmless. It is also possible to address the important issue of efficiencies.

### 6.1.2 *Impact on compliance costs borne by companies (in particular SMEs)*

96. Generally, by providing guidance on which information can be safely exchanged and which ones can not, the chapter will increase legal certainty to firms and reduce their compliance costs.

97. Since the chapter states that information exchange is unlikely to restrict competition in fragmented markets, and where the exchange covers a small part of the relevant market, it generally should provide comfort to information exchanges between SMEs. Therefore, it is likely that the new chapter on information exchange (Option 2) will provide legal certainty and reduce compliance costs of SMEs.

## 6.2. Impact on consumers

98. Since the main objective of competition policy and enforcement is to protect consumer welfare by ensuring that the competitive process is not distorted, the conclusions of the analysis of impacts on effective competition are relevant to assess possible impacts of different options on consumers and households.

## 6.3. Impact on public administration and the Union budget

99. None of the options has a direct impact on the Union budget.

100. Improved guidance in the information exchange chapter has the potential of reducing the number of alleged cases of anticompetitive conduct being brought to the Commission's attention, whether through formal complaints or other data submissions or information gathering.

101. Given that horizontal agreements cases under Article 101 TFEU are also dealt at the national level, guidance on the assessment of information exchange agreements will reduce the legal uncertainty of firms and therefore the workload of national competition authorities

## 6.4. Other impacts: social and environmental impacts

102. The impact of Options 1 and 2 in terms of employment and social issues as well as the environment are not direct and measurable.

103. To the extent that the Commission considers that undistorted competition between firms is positive for long term employment opportunities (see paragraphs **Error! Reference source not found.** and 89 above), the option which has positive impacts on effective competition would have a better impact on employment (Option 2).

## 6.5. Summary of impacts

**104.** Overall, by providing guidance the chapter on information exchange (Option 2) will encourage pro-competitive information exchanges and discourage the harmful ones. This will have positive economic impacts. It is likely to benefit both companies (by allowing them to save costs and increase their efficiency) and consumers though lower prices and better choice and quality of goods.

## 7. IMPACT ASSESSMENT OF POLICY OPTIONS RELATING TO THE SPECIALISATION BER

105. This section sets out the Commission's assessment of the positive and negative impacts of Options 1 ("second market share threshold for captive producers") and 2 ("retaining the baseline scenario") relating to the Specialisation BER. The objective will be measured against the same criteria as for standardisation set out above (except for the effect on research and development).

### 7.1. Economic impacts

#### *7.1.1 Impact on competition*

106. The aim of Options 1 ("second market share threshold for captive producers") and 2 ("retaining the baseline scenario") is to ensure that specialisation or joint production agreements with regard to intermediary products which the parties fully or partly use captively, i.e. as an input for their production of downstream products which they then sell on the merchant market, do not impede competition, in particular by way of input foreclosure or output reductions

107. Option 1 addresses this issue directly by introducing a second market share threshold relating to the parties' position on the downstream market. Only if the parties have a combined market share of 20%[44] or less on both the merchant market for the intermediary products and the downstream market for the products for which the intermediary products are used by the parties as an input, the benefit of the Specialisation BER will be available. This avoids competition problems such as input foreclosure or output reductions from arising in the first place. At the same time, pro-competitive specialisation or joint production agreements which do not fall under the Specialisation BER as they do not meet the second market share threshold will not be deterred. Not falling under a BER does not in any way mean that the agreement is presumed to infringe competition rules – it only means that an individual assessment of the agreement under competition rules is necessary. The result of that individual assessment may well be that the agreement is in compliance with the competition rules. However, the individual assessment ensures that no agreements are "falsely blessed" by the Specialisation BER.

108. The public consultation of 4 May 2010 did not call into question the logic of and the need for the second market share threshold. Of the only 10 stakeholders who commented on the second market share threshold (out of a total of 121) only five have expressed their disagreement. However, the five stakeholders that disagreed

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[44] In the Specialisation BER, a (second) market share threshold set at 20% is considered appropriate for the following reasons: (i) there is a sliding scale of market share thresholds in the Commission's various BERs, and the different thresholds reflect the abstract level of danger a particular type of agreement may pose for competition. Where there is the least danger, the threshold is the highest. Consequently, there is a market share thresholds of 30% in the Verticals BER, 25% for R&D agreements between competitors, 20% for production and specialisation agreements (first market share threshold), and 15% (as a safe harbour in the Horizontal Guidelines) for commercialisation agreements. In light of this, there is no reason why the second market share threshold in the Specialisation BER should be set at a different level than the first market share threshold of the same BER.

were mainly concerned with the burden of having to calculate a second market share.[45]

109. Option 2 addresses the issue at stake only indirectly. The mechanism it follows is that it grants the benefit of the Specialisation BER without taking into account the parties' market position on the downstream market solely on the basis of the parties having a combined market share with regard to the (intermediary) products subject to the specialisation or joint production agreement. In case, competition problems arise on the downstream market, Option 2 could solve the issue (but only for the future) by relying on the Commission or, to a certain extent, the Member States' competition authorities (if the matter were brought to their attention) to withdraw the Specialisation BER. The results of this would also be an individual assessment of the agreement in question, albeit at a later stage and, due to the fact that the BER was withdrawn, with a predetermined negative outcome. This means that withdrawal of a BER can only happen at a stage where the agreement has already given rise to competition concerns – to which situation the withdrawal is the reaction. Option 2 would therefore not avoid an at least partial deterioration of competition but would attempt to restore competitive conditions once a competition problem has arisen.

110. In light of the above and due to the fact that specialisation or joint production agreements with regard to intermediary products are not uncommon in industry practice, and, consequently, the issue at stake is likely to arise, Option 1 is preferable based on its impacts on competition.

**Table 9**

| **Impact on competition (--- to +++)** | |
|---|---|
| Option 1<br><br>("Second market share threshold for captive producers") | Option 2<br><br>("Retaining the baseline scenario") |
| + + | 0 |

*7.1.2 Impact on compliance costs borne by companies (in particular SMEs)*

111. Option 1 ("second market share threshold for captive producers") and Option 2 ("retaining the baseline scenario") require those companies that wish to avail themselves of the Specialisation BER to analyse their market shares on the merchant market for the products which are produced under the specialisation or joint production agreement. Option 1 extends this requirement to one or several downstream markets. Undertaking an analysis of market shares is not costless as it consumes working time of the companies' staff and normally implies hiring outside legal counsel or economic advisors. These costs depend on the number of markets to be analysed, on the products concerned and on whether there are useful precedents by competition authorities which may facilitate defining the markets.

45 With regard to the impacts of the two options on compliance costs, please see paras. 111 et seqq. below.

112. At first sight it would appear that Option 1 necessarily gives rise to more compliance costs as more markets need to be analysed. However, such a view does not take fully into account that the Commission can withdraw the benefit of the BER should an agreement that formally falls under a BER nevertheless give rise to effects which are incompatible with Article 101 TFEU. Many companies that fall under a BER may not go on to assess whether the BER could be withdrawn (as falling under the BER renders the agreement legal and a subsequent withdrawal could only have an effect on the legality for the future). However, at least those companies that enter into large scale specialisation or, in particular, joint production agreements (which may trigger significant investments in a new production plant) will not simply confine their analysis to assessing whether the conditions of the Specialisation BER are met but can be expected to go further and verify that the comfort given by this BER can not be jeopardised by way of a withdrawal. Consequently, such companies are likely to analyse by way of an individual assessment whether their planned co-operation gives rise to effects incompatible with Article 101 TFEU. For vertically integrated companies whose specialisation or production agreement relates to intermediary products, which they partially use captively for the production of downstream products, this would necessarily include a competition analysis of the downstream markets. Consequently, for many of these companies the compliance costs of Options 1 and 2 would not differ. However, participants of smaller scale operations may simply rely on the safe harbour of the BER. It is these latter operators who could incur compliance costs in the event of the introduction of a second market share threshold – however, this would only arise where they are vertically integrated and the products subject to the specialisation or production agreement are intermediary products partly or fully used by the parties for captive use of downstream products. It should be noted, however, that these parties would normally have a good understanding of their market position in the downstream markets where they are themselves active, thereby containing the necessary compliance costs. Companies, whose specialisation or production agreements do not relate to intermediary products used captively, will not be subject to the second market share threshold; hence, they will not incur additional compliance costs under Option 1.

113. During the public consultation, one stakeholder has argued that Option 1 ("second market share threshold for captive producers") would decrease legal certainty for companies as the legality of specialisation or joint production agreements would be dependent on a further condition. However, it appears that the opposite is the case. Option 2 may falsely render certain companies and their advisors to believe that their specialisation or joint production agreement is fully in compliance with the competition rules as it meets the requirements of the Specialisation BER, thereby ignoring the possibility of withdrawal of the BER in case the agreement is nevertheless incompatible with Article 101 TFEU. Such a withdrawal would effectively require the parties to terminate their co-operation, thereby incurring significant costs, in particular where the parties have invested considerably in the construction and operation of a new production plant. Consequently, Option 1, which makes visible a relevant factor of the competition analysis of specialisation and joint production agreements which may otherwise inadvertently be ignored by some companies, gives rise to increased legal certainty with regard to the ultimate legality of specialisation and joint production agreements under the competition rules.

114. Overall, Option 2 will give rise to less compliance costs.

**Table 10**

| Impact on compliance costs borne by companies (in particular SMEs) (--- to +++) | |
|---|---|
| Option 1<br><br>("Second market share threshold for captive producers") | Option 2<br><br>("Retaining the baseline scenario") |
| - | 0 |

### 7.2. Impact on consumers

115. Competition policy and enforcement are about ensuring that the competitive process is not distorted because that process is considered to deliver the best outcomes for consumers in terms of price, qualitity, product variety, choice and innovation. Competition policy is therefore about preserving consumer welfare. Hence, the impacts on consumers have already been measured under point 9.1. above.

### 7.3. Impact on public administration and the Union budget

116. None of the options has a direct impact on the Union budget.

### 7.4. Other impacts: social and environmental impacts

117. The impact of Options 1 and 2 in terms of employment and social issues as well as the environment are not direct and measurable.

118. To the extent that the Commission considers that undistorted competition between companies is positive for long term employment opportunities, any option which has positive impacts on effective competition would also have a positive impact on employment.

### 7.5. Summary of impacts

**Table 11**

| Overall scores | | |
|---|---|---|
| | Option 1<br><br>("Second market share threshold for captive producers") | Option 2<br><br>("Retaining the baseline scenario") |
| Competition | + + | 0 |
| Compliance costs | - | 0 |

119. This summary table shows that in light of the assessed impacts, Option 1 ("second market share threshold for captive producers") is the preferred policy option, in particular as the – moderately – higher compliance costs triggered by it are outweighed by the positive effects on competition Option 1 gives rise to.

## 8. MONITORING AND EVALUATION

120. The Commission will continue to monitor the operation of the Regulations and Guidelines based on market information from stakeholders and Member States. This will provide the Commission with opportunities to receive feedback from representatives from industry, consumer associations, law firms and economic consultants.

121. The Commission is also engaged in a continuous dialogue with the national competition authorities on the application of Articles 101 and 102, primarily through the European Competition Network (ECN). The ECN has various working groups, including a working group on horizontal co-operation agreements. Given that the enforcement of Article 101 as regards horizontal co-operation agreements also takes place at the national level, this dialogue is a very important tool for the Commission not only to monitor, but also to evaluate the functioning of the proposed rules in practice.

122. The proposed Regulations will expire 12 years after their entry into force. However, the Commission will amend or repeal the Regulations before their expiry, should they no longer respond any longer to market conditions in the EU or lead to anticompetitive practices with no countervailing efficiencies.

## Annex 1

## Overview of the Feedback Received from Stakeholders in 2008/2009 on the Current Horizontals Regime

(1) In December 2008, a stakeholders' questionnaire on the current Horizontals regime was launched with a deadline to respond by 30 January 2009. More than 20 responses were received mainly from business associations, law firms and individual companies. While more detailed, replies to the questionnaire are consistent with the feedback from NCAs, namely that the current regime is generally satisfactory, but requires updating and fine-tuning in several areas. In the following, we will give you a concise summary of the most noteworthy feedback received from stakeholders and how we have treated this in the revised texts.

(2) **General comments.** Some submissions claimed that the multiplicity of applicable documents in the field of horizontal agreements (different BERs and guidelines) makes the handling of them very complex for companies and practitioners. Also, a clearer determination of hierarchy of the regimes applicable to "mixed agreements" would be welcome. More guidance should be given on the determination of the "centre of gravity" of an agreement. The stakeholders also suggested that the Horizontal Guidelines should be revised in light of the more recent General Guidelines.[46] In addition, they noted that the relative size of the safe harbour thresholds in different types of agreements should reflect the relative anti-competitive risks involved. Some argued that the thresholds of 20% in the Specialisation BER and 25% in the R&D BER were too low.

(3) Moreover, stakeholders claimed that the review should take account of the fact that the modernisation of the EU antitrust regime has taken place since they had been written and therefore the new Horizontal Guidelines would need to become more useful for self-assessment purposes. In addition, stakeholders saw a need for adding an initial section with general principles and an overall framework for analysis. Others complained that the current Horizontal Guidelines exclude from their scope more complex arrangements that involve a number of instruments of cooperation. The submissions called for more practical examples, also including ones that are unproblematic from an Article 101 TFEU perspective and taking account of new case law. Stakeholders also expressed the view that the indispensability condition in Article 101(3) TFEU should not be theoretical but instead take account of business realities.

(4) **Joint R&D agreements.** Many stakeholders submit that the review of the R&D BER and the R&D chapter in the Horizontal Guidelines should focus on simplifying and streamlining these texts. Some submissions called for further clarity regarding some of the terminology used in the R&D BER (e.g. "*joint* research and development", "distribution channels" etc.).

(5) **Joint production and specialisation agreements.** Some stakeholders questioned the usefulness of the practical examples provided in the joint production chapter of the current Horizontal Guidelines. It is argued that the examples appear overly

46 Guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, p. 97.

restrictive. The stakeholders pointed towards some cases where the proposed production agreement may have resulted in a high commonality of costs – and therefore would be viewed negatively under the current Horizontal Guidelines – while in reality the market remained competitive. It has also been argued that the terms "substantial" and "low degree" in the context of commonality of costs are too vague. Some submissions argued that the current chapter on joint production agreements gives too much the impression that a combined market share of slightly more than 20% in a concentrated market would by definition lead to a restriction of competition.

(6) Many stakeholders argued that the treatment of **joint purchasing** agreements should be governed by economic principles – specifically, whether the agreement in question would give rise to monopsony concerns – rather than being determined on the basis of the size of the firms involved. Many stakeholders suggested that the following points should be addressed and/or improved in the revised Horizontal Guidelines: (i) the concept of buying power, (ii) the issue of commonality of costs, and (iii) the competitive situation on the downstream market.

(7) In addition, several stakeholders also noted that the interplay of the Horizontal Guidelines and the EU's rules regarding vertical restraints might give rise to issues in relation to purchasing agreements that have both horizontal and vertical aspects. They recommended that the Commission should consider providing greater clarification with regard to this issue, as well as to the interplay between the Horizontal and Vertical Guidelines.

(8) **Joint commercialisation.** Some stakeholders expressed their concerns about retail alliances which, in addition to joint purchasing, offer other services to manufacturers such as coordination of promotions, product introduction and negotiations of rebate payments etc. This may put other retailers at a competitive disadvantage. Moreover, these stakeholders pointed out that paragraph 146 of the current Horizontal Guidelines identifies the exchange of sensitive commercial information (such as marketing strategy and pricing) as a competitive concern in relation to commercialisation agreements falling short of joint selling. They submitted that the Horizontal Guidelines should be revised in order to specifically address information exchanges between or among competitors in this context. Finally, the stakeholders noted that promotion agreements between competitors are considered as a form of commercialisation agreement by the Commission (paragraph 139 of the Horizontal Guidelines), but the Horizontal Guidelines do not clearly set out the Commission's approach towards these agreements.

(9) A number of stakeholders provided comments on **standard-setting**. No practical examples of problems were given but some suggestions were made**.** Some stakeholders emphasised the fact that standard-setting may have anti-competitive consequences in terms of foreclosure. Some stakeholders raised concerns regarding the Commission's analytical approach with respect to third party access.

(10) Some stakeholders argued that the revised Horizontal Guidelines should recognise that standards could also cause harm in the technology market itself, i.e., through foreclosure of other optimal technologies from the market and inhibition of development for those excluded technologies (such consumer harm could occur if

there were genuine alternative technologies and if the industry commitment to the standard rendered other technologies unviable).

(11) There seems to be considerable uncertainty in practice as to the assessment of the obligation of IP rights holders or other proprietary technology incorporated in standards to grant licences on fair, reasonable and non-discriminatory terms (FRAND). Finally, stakeholders highlighted that the extent of permissible information exchange with a view to setting a standard would merit further investigation.

(12) Several stakeholders called for reflection on wider objectives as part of an Article 101 analysis, especially given the chapter on **environmental agreements** in the current Horizontal Guidelines. The stakeholders argued that agreements relating to the environment should be treated in the same manner as other horizontal agreements. The advancement of social welfare objectives should be the prerogative of legislators and not of competition authorities. They suggested that "environmental agreements" are not an appropriate analytical category for the application of competition law.

(13) Many stakeholders argued that **information exchange** should be addressed as a separate topic in the revised Horizontal Guidelines as the exchange of information between competitors is common practice in the market. The fact that information exchange is not currently dealt with in the Horizontal Guidelines, coupled with statements in the Horizontal Guidelines and other Commission documents concerning the risk that exchanges of information between competitors may entail, gives the wrong impression that information exchange agreements are in all cases anti-competitive. The lack of legal certainty in this matter could reinforce this even further. Many stakeholders claim, however, that information exchanges often lead to efficiency gains. Hence, addressing the issue of information exchange in the revised Horizontal Guidelines would allow companies and markets to benefit from the positive effects of such exchanges without constant fear of investigation. Since the Maritime Guidelines[47] are the Commission's only explicit guidance on this issue so far (apart from a few decisions), there is a certain tendency to apply those principles to a wider set of scenarios, and therefore general guidelines on information exchange should follow. Stakeholders suggest that the parameters for assessment could include: the characteristics of the information exchanged (e.g., whether the information is public, individual or aggregated, etc.), the characteristics of the market in which the exchange takes place (mainly the degree of concentration of the market and the existence of barriers to entry) and the way in which the information exchange is organised (e.g., non-discriminatory access to all companies interested in the exchange, exchanges through a third entity, confidentiality requirements) etc.

[47] Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, OJ C245, 26.9.2008, p. 2.

## Annex 2

## Community Innovation Survey – Cooperation Patterns of Innovating Firms

The Community Innovation Survey (CIS) is a survey on innovation activity in enterprises covering EU Member States, EU Candidate Countries, Iceland and Norway. The table below is based on the last survey, CIS 2006, which was carried out in 27 Member States, Candidate Countries and Norway; it was launched in 2007, is based on the reference period 2006, and with the observation period 2004 to 2006. This survey focuses on innovating firms and asks questions on cooperation. The table shows the proportion of innovating firms involved in cooperation.

| | Any type of cooperation | Horizontal cooperation | cooperation with clients | cooperation with suppliers | Cooperation with universities and higher education institutes |
|---|---|---|---|---|---|
| Belgique | 34,96% | 8,85% | 18,25% | 26,15% | 13,73% |
| Bulgarie | 21,21% | 8,62% | 13,08% | 15,66% | 5,42% |
| République tchèque | 38,25% | 13,09% | 25,24% | 29,70% | 11,20% |
| Danemark | 34,23% | 10,20% | 19,67% | 20,92% | 9,66% |
| Allemagne (incluant l'ex-RDA à partir de 1991) | 16,73% | | | | |
| Estonie | 39,47% | 16,05% | 24,61% | 22,76% | 9,34% |
| Irlande | 27,01% | 4,43% | 13,75% | 17,15% | 6,83% |
| Grèce | 34,78% | 11,33% | 15,18% | 25,42% | 12,56% |
| Espagne | 16,97% | 3,00% | 4,66% | 8,73% | 4,94% |
| France | | | | | |
| Italie | 13,45% | | | | |
| Chypre | 68,79% | 27,93% | 39,22% | 62,42% | 10,88% |
| Lettonie | 39,11% | 20,73% | 28,57% | 32,79% | 16,86% |
| Lituanie | 51,16% | 18,33% | 30,98% | 40,42% | 18,81% |
| Luxembourg (Grand-Duché) | 33,33% | 17,16% | 21,99% | 23,83% | 8,37% |
| Hongrie | 38,99% | 12,05% | 16,24% | 25,55% | 18,06% |
| Malte | 23,59% | 4,62% | 12,82% | 16,92% | 3,59% |
| Pays-Bas | 38,27% | 10,70% | 20,69% | 30,16% | 11,22% |
| Autriche | 38,89% | 14,01% | 23,28% | 22,80% | 16,13% |
| Pologne | 48,17% | 12,45% | 23,88% | 37,75% | 8,93% |
| Portugal | 18,10% | 5,57% | 9,64% | 11,73% | 8,29% |
| Roumanie | 16,48% | 6,80% | 10,83% | 13,65% | 5,76% |
| Slovénie | 50,18% | 24,51% | 38,00% | 42,71% | 22,70% |
| Slovaquie | 35,76% | 22,14% | 25,75% | 31,72% | 13,18% |
| Finlande | 57,74% | 35,59% | 52,64% | 50,53% | 35,99% |
| Suède | 40,00% | | 25,20% | 29,14% | 15,59% |
| Royaume-Uni | 29,47% | 9,62% | 20,54% | 19,76% | 8,86% |
| Croatie | 35,63% | 17,76% | 25,29% | 29,15% | 13,79% |
| Turquie | 18,03% | 6,77% | 10,70% | 13,03% | 6,38% |
| Norvège | 29,60% | 6,54% | 15,56% | 17,53% | 10,77% |
| Average | 34,08% | 13,42% | 21,71% | 26,60% | 12,14% |

## Annex 3

## Overview of the Main Changes in the

## Draft Horizontal Guidelines and the R&D and Specialisation BERs as published for public consultation on 4 May 2010

### 1. HORIZONTAL GUIDELINES

(1) In the following the main changes contained in the draft Horizontal Guidelines are set out. The order follows the structure of the draft Horizontal Guidelines.

### 1.1. Introduction

(2) The introduction of the Horizontal Guidelines has been rewritten to reflect the need for self-assessment under the modernisation regime and the more recent General Guidelines.[48] This chapter sets out a framework for analysis, which is then followed in each of the subsequent chapters.

(3) The Draft Horizontal Guidelines give a clearer explanation of how to apply them to agreements covering more than one type of co-operation (e.g., joint R&D, production and distribution). The "centre of gravity test", which previously defined which parts of the Horizontal Guidelines are applicable to such an integrated agreement has been replaced. The Draft Horizontal Guidelines clarify that, generally speaking, all the chapters pertaining to the different parts of an integrated agreement will be relevant for its analysis. Consequently, the competition concerns set out in the R&D, production and commercialisation chapters are meaningful for the analysis of a joint R&D, production and distribution agreement. However, where these chapters contain graduated messages, for example with regard to the safe harbours or whether certain conduct will normally be considered a restriction by object or by effect, what is set out in the chapter pertaining to that part of the agreement which can be considered the "most upstream indispensable building block" of the co-operation prevails. In the above example this will normally be the joint R&D as the joint production and distribution will only occur if the joint R&D leads to results. Consequently, the assessor of such an agreement should always start its analysis by referring to the R&D chapter before turning to the production and commercialisation chapters.

(4) Moreover, the Horizontal Guidelines now provide explicit guidance as to when a joint venture and its parent companies form part of one undertaking within the meaning of Article 101 TFEU according to the case-law of the European Courts. This is an area of great importance for businesses as Article 101 TFEU is not applicable to the relationship between a joint venture and its parents if they form part of the same undertaking. According to the well established case law of the European Courts, a parent company and a subsidiary over which it exercises decisive influence form a single economic entity and, hence, are part of the same undertaking. However, most of these cases deal with situations where a subsidiary is wholly owned or almost wholly owned by one parent company. We propose to clarify that the same logic can also

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48 Guidelines on the application of Article 81(3) of the Treaty, OJ C101, 27.4.2004, p. 97.

apply to the relationship between parent companies and their jointly controlled joint ventures (irrespective of whether the joint venture is a full function or a non-full function joint venture) if the creation of the joint venture did not infringe EU competition rules. In other words, a joint venture forms part of one undertaking with each of the parent companies that jointly exercise decisive influence and effective control over it, with the effect that Article 101 TFEU does not apply to agreements between the parents and such a joint venture.

(5) The draft Horizontal Guidelines introduce some guidance on the treatment of horizontal co-operation agreements encouraged or endorsed by government agencies with a view to attaining other policy objectives. It is clarified that absent state compulsion as defined by the relevant case-law of the European Courts, such agreements are subject to a "normal" analysis under Article 101 TFEU.

(6) Finally, for the sake of clarity, the definition of restriction of competition has been aligned on the provisions of the General Guidelines.

### 1.2. Information exchange

(7) In response to strong stakeholder demand and corresponding requests from NCAs, a new chapter setting out general principles for the competition assessment of information exchange has been introduced in the draft Horizontal Guidelines. Based on the case-law of the European Courts and economic principles, the draft chapter guides the assessment of agreements on information exchange and complements the assessment of other horizontal agreements where the parties also share information.

(8) Information exchange can be pro-competitive as it can, for example, lead to an intensification of competition or significant efficiency gains. However, there are situations where the exchange of market information may lead to restrictive effects on competition. The major anticompetitive concern addressed in the draft chapter is that information exchange can lead to a collusive outcome on the market, i.e., to coordination of the undertakings' behaviour leading to restrictive effects on competition such as higher prices. By increasing transparency in the market information exchange can enable companies to reach a common understanding on the terms of coordination or/and enable them to monitor deviations from a collusive outcome on the market.

(9) The draft chapter clarifies that information exchange between competitors of individualised information regarding intended future prices or quantities is considered to be a restriction of competition by object within the meaning of Article 101(1) TFEU. Exchanging future intentions is the most likely to lead to a collusive outcome because it allows competitors to arrive at a common higher price level without incurring the risk of losing market share or triggering a price war during the period of adjustment to new prices. This type of information exchange is also the most likely to be taking place for anticompetitive reasons.

(10) The subsequent part of the draft chapter provides guidance on assessing the effects of such exchanges of information that do not have an anti-competitive object. It describes the market characteristics which are the most susceptible to a collusive outcome and clarifies that in non-complex, stable and tight oligopolies the risks are the highest. However, information exchange can not only have restrictive effects on competition in

tightly oligopolistic markets (where they are, however, most likely) but also in less concentrated markets. The draft text also discusses the types of information exchanges that are the most likely to lead to a collusive outcome, i.e. the non-public exchanges of recent strategic (liable to enable undertakings to be aware of market strategies of their competitors) individualised data, which cover a large part of the relevant market.

(11) Finally, the draft chapter gives guidance on efficiencies of information exchange under Article 101(3) TFEU. These involve, for example, solving problems of asymmetric information, consumer lock-in, and more efficient meeting of demand. It is information about present and past behaviour that is more likely to generate efficiency gains than information about future intentions. To fulfil the condition of indispensability, the data's type, aggregation, age, confidentiality and frequency of the exchange should be of the type that carries the lowest risks indispensable for creating the claimed efficiency gains.

### 1.3. R&D Agreements

(12) While many elements of the current chapter on R&D agreements have been retained, the revised draft chapter has been updated to reflect the latest economic learning, to clarify the theories of harm, and give greater guidance on efficiencies under Article 101(3) TFEU. The section on timing of the competitive assessment has been revised to bring it into line with the wording of the General Guidelines. The draft R&D chapter also clarifies that as regards technology markets, the market share threshold of the R&D BER may not be exceeded by the parties irrespective of which possible calculation method they use (i.e., based on incorporation of the technology on the downstream market or on the share of the overall licensing fees generated).

### 1.4. Production Agreements

(13) Although the orientation is still the same, the draft chapter on production agreements has been re-written in clearer language and with clearer examples. The revised draft chapter explicitly adds a theory of harm based on a direct limitation of competition between the parties, i.e., the parties to a production agreement could achieve higher prices by, for example, directly limiting the output of their production joint venture. The current draft also includes sections on the concept of commonality of costs and information exchange and how this could lead to restrictive effects on competition. The issue of swaps is dealt with for the first time by way of an example.

### 1.5. Purchasing Agreements

(14) While many elements of the current chapter on purchasing agreements are retained, the revised draft chapter has been updated to reflect the latest economic learning, to better differentiate when the joint setting of purchase prices constitutes a restriction by object or by effect, to clarify the theories of harm, and to give greater guidance on efficiencies under Article 101(3). The revised chapter clarifies that the 15% safe-harbour for joint purchasing is subject to a double threshold, namely the parties must not exceed the 15% threshold on both the purchasing and selling markets. There are new sections on commonality of costs and information exchange and the examples have been updated.

## 1.6. Commercialisation Agreements

(15) While many elements of the current chapter on commercialisation agreements have been retained, the revised draft chapter has been updated to reflect the latest economic learning, to clarify the theories of harm, and give greater guidance on efficiencies under Article 101(3). There are new sections on commonality of costs and information exchange and the examples have been updated.

## 1.7. Standardisation Agreements

(16) The current chapter on standardisation agreements has been substantially revised in order to reflect the Commission's recent case experience on standardisation and competition, in particular on how to avoid that the involvement of intellectual property rights in the standard-setting process risks leading to an anticompetitive outcome. The revision of the standardisation chapter aims at ensuring that standards are set in such a way that the specific benefits of standard-setting are realised and passed on to European consumers.

(17) To this end, the draft standardisation chapter provides certain conditions – a so called "safe harbour" – for how the standardisation process should be construed in order to ensure that it falls outside the prohibition of Article 101 TFEU. The general message is that as long as participation in the standard-setting process (as well as the procedure for adopting the standard) is unrestricted and transparent, the standard is not compulsory and access is given to a standard on fair, reasonable and non-discriminatory terms, it does not restrict competition within the meaning of Article 101 TFEU. In more specific terms this means that the following conditions should be fulfilled:

- First, as regards unrestricted participation and the procedure for adopting the standard, the rules of the standard-setting organisation (in particular its IPR policy) should guarantee that all interested actors can participate in the process leading to the selection of the standard. In particular, there should be no bias in favour or against royalty free standards. There should also be objective and non-discriminatory procedures for allocating voting rights.

- Second, as regards transparency, the standard-setting organisations procedure should allow stakeholders to inform themselves of upcoming, on-going and finalised work.

- Third, the standard-setting organisation's rules should aim at avoiding misuse of the standard-setting process through hold-ups and charging of abusive royalty rates by IPR holders. This should be done through a binding, clear and balanced IPR policy requiring a good faith disclosure of IPRs that might be essential to the standard as well as a requirement that a particular IPR will only be included in the standard if the company provides an irrevocable FRAND commitment (i.e. a commitment to license their IPR to all third parties on fair, reasonable and non-discriminatory terms). There should also be a requirement on all IPR holders who provide a FRAND commitment to take all necessary measures to ensure that any undertaking to which the IPR owner transfers its IPR is bound by that commitment.

(18) The revised draft chapter also provides comfort for those standard-setting organisations that wish to introduce a system of unilateral ex ante disclosures of maximum royalty rates. Indeed, such a system enables those deciding on the technology to be adopted as the standard, to not only take into account the technical but also the pricing aspects and therefore enhances competition between technologies before the standard is set. The revised guidelines therefore give the requested comfort to standard setting organisations that such systems of unilateral ex ante disclosures are pro-competitive and that DG Competition will therefore not come after such systems. However, this is not part of the safe harbour and it is not intended to require the standard-setting organisations to introduce this system.

(19) Finally, the revised draft chapter provides guidance on appropriate benchmarks for the assessment of whether royalty rates charged by the holder of an intellectual property right are "FRAND" (fair, reasonable and non-discriminatory). These benchmarks could be relied on in case of a dispute as to whether licensing fees or other terms are excessive. The non-exhaustive list of benchmarks includes a comparison of the licensing fees charged prior to and after the inclusion of the intellectual property right in the standard ("ex ante / ex post comparison"), a comparison of the licensing fees charged after its inclusion in the standard with a potential "ex ante disclosure" of most maximum royalty rates made by the holder of the intellectual property right, or an independent expert assessment of the objective quality and centrality of an intellectual property right for the standard.

(20) The recent review of the Insurance Block Exemption Regulation[49] revealed that the use of standard terms in contracts was not specific to the insurance industry. The specific exemption for co-operation on standard insurance policy conditions has therefore not been renewed. Indeed, agreements on standard terms are found in various industries such as banking or energy and there seems to be a demand for guidance on when such agreements risk infringing competition law. Therefore, the standardisation chapter now also contains guidance and examples on standard terms.

(21) The revised draft chapter explains that standard terms do generally not restrict competition if participation in the establishment of the standard terms is unrestricted and transparent and the standard terms are non-binding and effectively accessible to everybody wishing to use them, unless the standard terms have a likely negative effect on prices, rebates or other relevant parameters of competition.

(22) An individual assessment of standard terms under Article 101 TFEU – along the lines set out in the revised standardisation chapter and the introduction of the draft Horizontal Guidelines – will be necessary where the standard terms are either binding, define the scope of the product sold (as is the case, for example, in insurance contracts), or constitute a decisive part of the transaction without defining the scope of the product. Binding standard terms increase the likelihood of a restriction of competition with regard to product variety / consumer choice, in particular if they are binding on the entire market. Where standard terms define the scope of the product sold, this also increases the likelihood of a restriction of product variety / consumer

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49 Commission Regulation (EU) No 267/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ L83, 30.3.2010, p. 1.

choice. Standard terms that are a decisive part of the transaction without actually defining the scope of the product risk becoming a de facto standard – in practical terms they are very close to a binding standard – and need to be assessed accordingly.

### 1.8. Environmental Agreements

(23) Contrary to the current version of the Horizontal Guidelines, the revised draft no longer contains a separate chapter on environmental agreements. Standard-setting in the environment sector – which was what the current environmental chapter effectively deals with – is more appropriately dealt with in the standardisation chapter. The removal of the chapter does not imply any downgrading for the assessment of environmental agreements. On the contrary, instead of having a chapter addressing a narrow aspect of environmental standards, it is now made clear that environmental agreements are to be assessed under the relevant chapter of the draft Horizontal Guidelines, be it R&D, production, commercialisation or standardisation.

## 2. R&D BLOCK EXEMPTION REGULATION

(24) There are no fundamental changes to the R&D BER, the amendments should be regarded as incremental improvements to the existing text with a view to providing more clarity and legal certainty as to its interpretation.

(25) The main change pertains to the introduction of a "disclosure obligation": in order to ensure that a party's intellectual property rights do not unduly impair the exploitation of the results of an R&D agreement by other parties, an exemption is only available under the draft R&D BER if prior to starting the research and development all the parties agree that they will disclose in an open and transparent manner their existing and pending intellectual property rights relevant for the exploitation of the results by the other parties. This ensures that one of the parties cannot unduly impair the exploitation of the results by other parties, thereby depriving customers and consumers of the benefits of the joint R&D.

(26) Moreover, the revised draft R&D BER draws a clearer dividing line between agreements that foresee mere joint R&D and those that foresee a combination of joint R&D and joint exploitation by the parties. In addition, it is clarified that the joint exploitation of R&D results regarding products (i.e., by way of joint production and/or joint distribution) and regarding technologies (i.e., by way of joint licensing) are treated by the BER in the same way.

(27) Furthermore, the definition of "potential competition" has been clarified by introducing a three year time frame during which a party would need to be likely to enter a market in order to be considered to be a potential competitor. The current R&D BER is unclear as to the timeframe within which entry would need to occur for a company to be considered as a potential competitor. As the R&D BER applies to co-operation between competitors (including potential competitors) only if their combined market share does not exceed 25% (note that there is not market share thresholds for co-operations between non-competitors), it is important for parties to know when one of them will be considered a potential competitor or a non-competitor. Consequently, inserting a fixed time limit will therefore enhance legal certainty for parties wishing to avail of the R&D BER.

(28) Moreover, the "hardcore" provisions have been amended with regard to restrictions on active sales as follows: under the revised draft R&D BER, parties may impose on each other restrictions with regard to active sales to territories or customers which have been exclusively allocated to the other party - as long as the parties fulfil the conditions stipulated by the BER and their market shares are below the BER's market share threshold. That is to say that the possibility to impose active sales restrictions will no longer be limited to a fixed period in time as is the case under the current version of the BER. However, restrictions on active sales to territories not exclusively allocated to one party are considered hardcore. In addition, it has also been clarified in the draft R&D BER that passive sales restrictions with regard to customers (i.e., not only those with regard to territories) are also considered hardcore restrictions.

(29) Finally, two former "hardcore" provisions have been moved to a new "grey list" of excluded restrictions (the presence of a grey clause in an agreement means that the BER does not apply to the clause while the presence of a hardcore restriction results in loss of the benefit of the BER for the entire agreement): (i) the prohibition to challenge the validity of one of the parties' intellectual property rights which are relevant to the research and development; and (ii) the prohibition to grant licences to third parties to manufacture the products arising from the R&D where there is no exploitation by the parties.

## 3. SPECIALISATION BLOCK EXEMPTION REGULATION

(30) As is the case for the R&D BER, there are also no fundamental changes in the draft Specialisation BER. The main change is 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 exemption is also conditional upon a 20% market share threshold downstream. In such a case, merely looking at the parties' market position at the level of the intermediary product would ignore the potential risk of closing off inputs for competitors at the level of the downstream products. The parties could, for example, decide not to make sales to downstream competitors who may find it problematic to source the upstream intermediary product elsewhere. However, such a scenario would only be likely to arise if the parties have a significant market presence downstream. Therefore, in such a case the safe harbour of the Specialisation BER should only be available if the parties' combined market share does not exceed 20% both in the upstream merchant market for the intermediary product and the downstream market. Consequently, where one of these market share thresholds is exceeded, a specialisation or joint production agreement should not benefit from a BER but should be subject to an individual assessment.

(31) Under the existing Specialisation BER, a specialisation agreement occurs where one of the parties ceases production of a product and outsources from another. While the current version of the Specialisation BER can be construed to mean that a party has to fully cease production of a certain product in order to benefit from the BER, it is clarified that the revised Specialisation BER should also apply where one party only partly ceases production. This would enable a company which has two production plants for a certain product to close down one of its plants, outsource the output of the closed plant, and still avail of the Specialisation BER.

(32) The revised draft Specialisation BER also clarifies that the parties to a unilateral or a reciprocal specialisation agreement need to be active on the same relevant product market(s) without necessarily being actual or potential competitors. The efficiencies that can be expected from a specialisation agreement do not depend on the parties being already or potentially active in the same geographic market.

(33) Finally, as in the R&D BER, the definition of "potential competition" has been clarified by introducing a three year time frame during which a party would need to be likely to enter a market in order to be considered to be a potential competitor. Whether a party is considered a competitor (including potential competitors) or a non-competitor is meaningful for the application of the Specialisation BER to exclusive supply obligations and joint distribution activities agreed on by the parties. Consequently, inserting a fixed time limit will enhance legal certainty in that regard.

## Annex 4

## 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 "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 – and as these topics are subject to the Impact Assessment -, 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 vast 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 IPR policy requiring (a) good faith **disclosure** of those intellectual property rights (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 extend 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) As the setting of royalty free standards also fall outside of the safe harbour, 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 vast majority of stakeholders support the proposed requirement that there should be a good faith disclosure by companies participating in standard-setting of essential intellectual property rights (IPRs), e.g. patents and patent applications. 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 Standard Setting Organisation (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) 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 on fair, reasonable, and non-discriminatory (FRAND) terms with compensation or FRAND terms without compensation. In other words, 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) Some request the Commission to adopt a less strict approach regarding object based restrictions so as to enable companies to undertake ex ante disclosure without risking an infringement of Article 101(1). 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, 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 – which is also the subject of the Impact Assessment of the R&D BER. 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. Only two 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. One shareholder questioned the added value of a BER over guidelines in general. A small number of stakeholders suggested that there should be detailed explanations of the

R&D BER in the Horizontal Guidelines as is the case in the Verticals BER and the Technology Transfer BER.

(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, stakeholder 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. One stakeholder argued that for joint R&D impinging on competition in innovation there should be an additional safe harbour based on the number of available poles of research. 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. One stakeholder argued that passive sales restrictions with regard to customers should not be considered "hardcore" at all. Stakeholders also support the removal of two former hardcore provisions to a newly created "grey list" of excluded restrictions.

(56) Lastly, two stakeholders made comments about the **transitional period** of one year foreseen in the draft R&D BER. One stakeholder argued that agreements that fall under the current R&D BER but do not fulfil the conditions of the new R&D BER should be "grandfathered", i.e., the benefit of the current BER should not lapse irrespective of whether the conditions of the new BER are met. In any event, the transitional period should be extended to two years. Another stakeholder suggested a transitional period of five years.

### 3.2. Specialisation BER

(57) 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 – which is also the subject of the Impact Assessment of the Specialisation BER. Subsequently, stakeholder comments will be summarised in the order of the articles of the draft regulation to which they relate.

(58) **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.

(59) The public consultation did not call into question the logic of and the need for the second market share threshold. Of the only 10 stakeholders who commented on the second market share threshold, three express their agreement with the second market share threshold, five disagree, and two note that the rationale of the second market

share threshold would need to be better explained by the Commission. The five stakeholders that disagreed were mainly concerned with the burden having to calculate a second market share.

(60) With regard to the (first) **market share threshold**, not many comments were received. Two stakeholders argued that 20% is too low.

(61) 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.

(62) 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 by the BER.

(63) Only two stakeholders made comments on the **hardcore provisions**. They argued that field of use restrictions should be explicitly excluded from the hardcore list. One stakeholder stated that it was unclear how non-compete clauses were treated by the BER.

(64) Last, one stakeholder made comments about the **transitional period** of one year foreseen in the draft Specialisation BER. Agreements that fall under the existing BER but do not fulfil the conditions of the new BER should be "grandfathered", i.e., the benefit of the current BER should not lapse irrespective of whether the conditions of the new BER are met. Absent grandfathering, the transitional period should be extended to five years.