



EUROPEAN COMMISSION  
IMPACT ASSESSMENT BOARD

Brussels,  
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## Opinion

### Title

**DG COMP - Impact Assessment on: Draft Commission Notice - Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements and Draft Specialisation and R&D Block Exemption Regulations**

**(draft version of 10 September 2010)**

### **(A) Context**

Agreements restricting competition within the meaning of Treaty Art. 101(1) are null and void unless they generate and transfer to consumers a sufficient amount of benefits as set out by Art. 101(3). The undertakings concerned have to self-assess whether these conditions are fulfilled. They may, however, benefit from "block exemption regulations" (BER) exempting whole categories of agreements.

In the case of co-operation agreements entered into by companies operating at the same level in the market ("horizontal agreements"), two BERs (Commission Regulation (EC) No. 2659/2000 on research and development agreements – "R&D BER" - and Commission Regulation (EC) No. 2658/2000 on specialisation agreements – "specialisation BER") are set to expire on 31 December 2010. The Commission is considering which changes may be required to the BERs and/or the accompanying guidelines on the applicability of Article 81 (now 101) of the Treaty to horizontal cooperation agreements ("Horizontal Guidelines").

### **(B) Overall assessment**

**The report provides the necessary analysis for continued action in this area but should be improved in various respects. It should use more factual evidence and existing case law to clarify whether problems have been identified on the basis of the potential risks caused by legal gaps / absence of guidance or on the basis of actual evidence of restrictions of competition. It should provide more detail on the content of the options and clarify the baseline which is used for comparing them. Finally, the report should improve the analysis of impacts by providing more quantitative evidence of compliance costs when possible and being more precise about expected changes relative to the baseline.**

## **(C) Main recommendations for improvements**

### **(1) Clarify the nature of the problems and strengthen the accompanying evidence.**

The report should present the problems more clearly against the background of the functioning of the existing instruments for the application of EU competition rules to horizontal agreements and the existing case law. It should, in particular, clarify the basis on which problems have been identified: the risks caused by the legal gaps and/or lacking guidance highlighted by the public consultations or the actual evidence of restrictions of competition that the current system could not deter. It should also clarify whether the problems identified are of particular relevance to certain sectors. To improve the analysis of the problems, the report should use case law more extensively and other evidence such as actual cases of patent ambushes or unjustified protection granted by the existing "specialisation BER" to companies with significant market shares in the downstream markets. Finally, the report should explain in the problem definition section that the public consultation demonstrated that the issue of potential "patent ambushes" in the case of R&D agreements does not call for EU action as it can be dealt with by the concerned parties through private contractual arrangements. The report, therefore, does not need to develop the issue further in later sections.

**(2) Improve the presentation of the options.** The report should provide a fuller description of each of the options, including by shifting forward text which is currently presented in the section on the analysis of impacts. It should also clearly define baseline options for the two problems addressed in the standardisation chapters. Since the option of introducing a BER for information exchanges is not considered legally feasible, it should be discarded already when putting forward options rather than when analysing them (§ 110). In so doing, the report should however explain why proposing a change in the Council Enabling Regulation is not considered opportune. The reasons why no sub-options are presented with regard to the content of the proposed chapter on information exchanges should also be spelled out. The report should clearly indicate whether this chapter is a mere codification of existing case law or if it goes beyond that. In addition, the proposed 20% level for the downstream market threshold should be justified (also in relation to the higher level envisaged under the vertical restraint guidelines). Finally, the report should clarify what "reasonable efforts" would imply when presenting disclosure options in terms of intellectual property rights for the standardization chapter.

**(3) Improve the analysis of impacts.** The assessments in the tables in sections 6 to 8 should be revised to reflect clearly the main text and/or changes relative to the baseline scenario. For instance, in the case of disclosures in the standardisation chapter, impacts do not seem to be assessed against a baseline and the differences in the impacts on competition and on consumers are not explained. Similarly, the report should better explain why impacts on innovation are considered neutral under pro-competitive policy options while in other cases strongly negative despite a lack of empirical experience (§ 99 and following table). The analysis of compliance costs should be strengthened by referring to existing estimates for the costs of calculating downstream market shares and patent searches. The report should clarify whether small and medium enterprises have been involved in the consultation process and to what extent they are affected by the issues raised.

*Some more technical comments have been transmitted directly to the author DG and are expected to be incorporated in the final version of the impact assessment report.*

**(D) Procedure and presentation**

The report is written in clear language and can be read as a stand alone document. However, it exceeds the suggested 30-page limit and should be reduced, for instance by dropping a discussion of options and impacts on the R&D BER, merging section 1.4 "Main changes proposed" into sections 4.2 and 5 to 8, combining the analysis of impacts on competition and on consumers, and by avoiding repetition (see, for instance, the text on public administration, EU budget, social and environmental impacts). All acronyms should be explained when first presented.

**(E) IAB scrutiny process**

Reference number	<b>2010/COMP/022</b>
External expertise used	No
Date of Board Meeting	6 October 2010