EUROPEAN COMMISSION

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COMMISSION STAFF WORKING DOCUMENT

SUMMARY OF THE 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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1. BACKGROUND

1. Guidance for the assessment of horizontal co-operation agreements under EU competition rules is currently given by three instruments, namely two 'block exemption' Regulations (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)) and the accompanying guidelines on the applicability of Article 81 of the Treaty to horizontal cooperation agreements ("Horizontal Guidelines").

2. As the two current Regulations will expire on 31 December 2010, the Commission started to review the rules applicable to horizontal co-operation agreements in December 2008 by way of an ex-post evaluation comprising a wide-ranging consultation of European stakeholders and Member States' competition authorities. It showed that the current regime was regarded as working well but that some areas would merit a revision.

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

3. The expiry of the current R&D and Specialisation BERs at the end of 2010 makes it necessary to examine whether there are any legal, market or other developments that should be taken into account when designing the rules to be applied from that date. This also provides an opportunity to update the accompanying Horizontal Guidelines, which together with the two BERs form what is referred to as the "Horizontals Regime", in light of new case-law and case experience, advancements in industrial economics, changes in the market, and experience in competition policy with a view to ensuring that companies enjoy maximum flexibility when entering into horizontal co-operation agreements while at the same time safeguarding competition.

4. While the current "Horizontals Regime" is perceived to have been working well, some issues have surfaced which should be addressed by revised rules. These issues pertain to **standardisation agreements** and the process leading to their conclusion, **information exchange**, as well as the **Specialisation BER**.

3. OBJECTIVES – THE "WHAT"

General objectives of the review

5. 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 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 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.

Specific objectives

6. 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.

7. The objective of giving 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.

8. The specific objectives of the revised draft **Specialisation BER** is to ensure that they cover 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"

9. In view of the overall positive experience and the broad support from stakeholders and NCAs to keep a system of BERs accompanied by guidelines, the **baseline scenario** is to have the BERs, complemented by the Horizontal Guidelines, in unchanged format, i.e. the current regime.

Options concerning the standardisation chapter

10. Ex ante disclosure of intellectual property rights:

- Making IPR disclosures a necessary condition for compliance with EU competition law[1] (Option 1);
- Requiring a disclosure of intellectual property rights in order to benefit from the safe-harbour (Option 2);
- 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 (Option 3);
- Retaining the baseline scenario, i.e. giving no guidance (Option 4)

11. Ex ante disclosure of most restrictive licensing terms:

- Making the ex ante disclosures of most restrictive licensing terms[2] a necessary condition for compliance with EU competition law[3] (Option 1);

[1] 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.

– Making the ex ante disclosures of most restrictive licensing terms part of the safe harbour (Option 2);

– Giving comfort that, in principle, such systems are not infringing competition law (Option 3);

– Retaining the baseline scenario, i.e. giving no guidance (Option 4).

Options concerning information exchange

12. The following options will be assessed:

– Having no chapter on information exchange in the guidelines (Option 1);

– Having a new chapter providing guidance on information exchange (Option 2).

Options concerning the Specialisation BER

13. The following options will be assessed:

– Introduction of a second market share threshold as set out in the draft Specialisation BER ("second market share threshold for captive producers") (Option 1);

– 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"). (Option 2).

5. IMPACT ASSESSMENT OF THE POLICY OPTIONS RELATED TO THE STANDARDISATION CHAPTER

5.1. Economic impacts

5.1.1. Impact on competition

Ex ante disclosure of IPR

14. Option 1 (mandatory disclosure) would, at first sight, seem to produce very favourable effects on competition by giving the participants in the standard setting process an early understanding of the IPR that risk reading on the standard and the possibility to work around such IPR if the IPR holder were not willing to license. In addition, it makes it easier for the standard setting to clearly map different technologies which could be of interest to put into the standard (i.e. increases

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[2] "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.

[3] 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.

competition between technologies). Option 1 would also diminish the risk for "patent ambushes". However, there are also other models of standard-setting organisations without any disclosure of IPR which might, in certain situations, have positive effects on competition. On balance, option 1, which would force all companies to adapt the same model, could therefore risk having a negative effect on competition between standard-setting organisations/standards.

15. 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 only means that the standard-setting organisation and its members would have to "self-assess" whether the standard-setting agreement is in compliance with competition law.

16. Finally, Option 3 (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 a standard-setting procedure with 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 (Option 2).

Ex ante disclosure of most restrictive licensing terms

17. At first sight, Option 1 (mandatory) or 2 (part of safe harbour) seem beneficial for competition by providing for more clear-cut competition between technologies at the 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 being adopted. However, there is a lack of empirical evidence as to how this system would work in practice. It is clear following the public consultation that not all actors agree that ex ante disclosures of most restrictive licensing terms is an efficient way of ensuring competitive pricing. On the contrary, some stakeholders claim that disclosures of most restrictive licensing terms could complicate the process, not lead to lower prices nor allow for a better competition betwen technologies.

18. Thus, 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. However, Option 3 also has the implicit cost of foregoing fostering competition between technologies on pricing (before the standard is adopted).

5.1.2. Impact on compliance costs borne by companies

Ex ante disclosure of IPR

19. As regards compliance costs a distinction has to be made between companies participating in the standard setting process ("participation companies") and mere users of the technology/standard which will not incur any compliance costs. As regards particpation companies, Options 1 (and to some extent Option 2) would lead

to an increased compliance cost (to the extent that the standard setting organisation did not already have an IPR disclosure obligation). The cost for identifying the link between the company's IPR and the standard under development could in abstract be significant. However, the IPR disclosure in the chapter is based on good faith disclosure and reasonable efforts (and does not include costly patent searches).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 they would have to renegotiate their IPR policy) and who wish to avail of the safe harbour.

20. 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 might not be as effective in obtaining the identified goal. However, it could also lead to lower compliance costs (marginally).

Ex ante disclosures of most restrictive licensing terms

21. Neither of the options would seem to give rise to any significant compliance costs for companies. Option 1 or 2 could slightly increase compliance costs by forcing the IPR holder to identify its most restrictive licensing terms at a stage where the commercial value of its IPR in relation to other potential technologies for inclusion in the standard might not yet be completely clear. However, considering that most restrictive licensing terms is only "maximum terms" this cost would not seem to be of importance. To the extent, there is a compliance cost, Option 3 would potentially lead to lower costs since a lower number of standard setting organisations might adopt the system. Any compliance costs would only occur for participation companies. Options 1 and 2 would lead to some "one-off" compliance costs for the standard setting organisations (since the IPR policy would have to be renegotiated).

Impact on consumers

22. 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.

5.1.3. Impact on innovation and research

Ex ante disclosures of IPR

23. As to our present understanding, it would seem that all three options are neutral to innovation and research with some potential beneficial effects for Options 1 and 2

Ex ante declarations of most restrictive licensing terms

24. To the extent that ex ante declarations would have a risk of driving prices to a too low level (which is limited due to the absence of a blanket approval of joint negotiations with a particular IPR holder) 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.

5.2. Impact on public administration and the Union budget and other impacts (social and environmental)

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

6. IMPACT ASSESSMENT OF POLICY OPTIONS RELATING TO INFORMATION EXCHANGE

6.1. Economic impacts

26. Providing guidance on information exchange in a new chapter of the Horizontal Guidelines (Option 2) will positively impact effective competition. Since there are no clear-cut absolute safe harbours for information exchanges, providing guidance through means of a Block Exemption Regulation is not a feasible alternative and has therefore not been impact assessed.

27. Generally, by providing guidance on which information can be safely exchanged and which ones can not, Option 2 will increase legal certainty to firms and reduce their compliance costs.

6.2. Impact on consumers

28. 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. Since a stricter approach towards information exchanges on future intentions is likely to save consumer welfare that would be lost in a process similar to that of a cartel, introducing a chapter on information exchange in the Horizontal Guidelines (Option 2) is likely to benefit consumers.

6.3. Impact on public administration, the Union budget and other impacts

29. None of the options has a direct impact on the Union budget. The impact of Options 1 and 2 in terms of employment and social issues as well as the environment are not direct and measurable.

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

7.1. Economic impacts

7.1.1. Impact on competition

30. The aim of Options 1 and 2 is to ensure that specialisation or joint production agreements with regard to intermediary products which the parties fully or partly use as an input for their production of downstream products which they then sell on the merchant market do not impede competition.

31. Option 1 addresses this issue directly by introducing a second market share threshold relating to the parties' position on the downstream market. Option 2 addresses the

issue at stake only indirectly as it grants the benefit of the Specialisation BER without taking into account the parties' market position on the downstream market. Under Option 2, the benefit of the Specialisation BER would have to be withdrawn by the Commission or a national competition authority should an agreement that falls under the BER nevertheless gives rise to competition problems. Option 2 would not avoid an at least partial deterioration of competition but would attempt to restore competitive conditions once a competition problem has arisen.

32. 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.

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

33. Options 1 and 2 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 relevant agreement. Option 1 extends this requirement to one or several downstream markets. At first sight it would appear that Option 1 necessarily gives rise to more compliance costs as more markets need to be analysed. However, for at least those companies investing in large scale joint production projects the compliance costs of Options 1 and 2 will normally not differ. For smaller scale projects, Option 1 will slightly increase compliance costs. However, this would only arise where they are vertically integrated and the products subject to the agreement are intermediary products used downstream (i.e. only in a limited category of cases)

34. Overall, Option 2 will give rise to less compliance costs borne by companies.

7.2. Impact on consumers

35. As competition policy is about preserving consumer welfare, the impacts on consumers have already been measured under point 7.1 above.

7.3. Impact on the Union budget and other impacts (social and environmental impacts)

36. None of the options has a direct impact on the Union budget. The impact of Options 1 and 2 in terms of employment and social issues as well as the environment are not direct and measurable.

8. CONCLUSION: THE PREFERRED OPTION

37. Concerning the **standardisation chapter**, as regards *IPR disclosures* Option 2 would seem to be, on balance, the preferable option. Option 2 leads to the most positive effects on competition and consumers.. As regards *ex ante declarations of most restrictive licensing terms*, the result of the impact assessment indicates that Option 3 should be the preferred option.

38. Regarding **information exchange**, by providing guidance on information exchange in a new chapter of the Horizontal Guidelines, 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.

39. Regarding the **Specialisation BER**, 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.

9. MONITORING AND EVALUATION

40. The Commission will continue to monitor the operation of the Regulations and Guidelines based on market information from stakeholders and Member States. The proposed Regulations will expire twelve years after their entry into force, but the Commission may amend them earlier if the monitoring and evaluation of their operation, based on market information from stakeholders and NCAs, show that the provisions no longer respond to market conditions in the EU.

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