



28 April 2022

## **BUSINESSEUROPE COMMENTS TO THE CALL FOR EVIDENCE FOR AN IMPACT ASSESSMENT ON COMPULSORY LICENCING IN THE EU**

BUSINESSEUROPE is the leading advocate for growth and competitiveness at European level, standing up for companies across the continent and actively campaigning on the issues that most influence their performance. We speak for all-sized enterprises in 35 European countries whose national business federations are our direct members.

BUSINESSEUROPE has taken notice of the call for evidence for an impact assessment (Call for Evidence) on compulsory licencing in the European Union (EU) prepared by the European Commission (DG GROW) in view of collecting input from stakeholders on grounds and procedures for issuing compulsory licencing in crisis situations in the EU.

BUSINESSEUROPE is happy to contribute to this debate and pleased to share the following comments.

### **Comments on Call for Evidence on Compulsory licencing**

BUSINESSEUROPE has always welcomed initiatives intended to harmonise intellectual property legislation in the Members States when there is evidence that these can increase legal certainty, efficiency, and benefits to businesses. It is key that EU harmonisation initiatives really bring added value.

Our members consider that these conditions are not met with respect to compulsory licencing of patents in the EU and there are no convincing reasons supporting harmonisation in this field.

- ***No need for an EU legislative initiative on compulsory licencing***

BUSINESSEUROPE believes that the current international and EU frameworks as well as Member States legislations are sufficient to regulate compulsory licencing of patents.

Article 5 of the Paris Convention provides that compulsory licenses shall only be imposed in exceptional circumstances to prevent abuse which might result from the exercise of the exclusive rights conferred by the patent. The relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement)<sup>1</sup> refer to the Paris Convention and clearly state the limited and exceptional cases in which governments could decide about

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<sup>1</sup> See Articles 2, 31 and 31b of the TRIPs Agreement.



compulsory licenses. The EU is bound by both the Paris Convention and the TRIPs Agreement.

The combined reading of Article 17 of the Charter of Fundamental Rights of the European Union with the Article 5 of the Treaty on European Union (TEU) on the principles of proportionality and subsidiarity provides that any limitations to intellectual property should only be made when there is a clear need for doing so in the public interest. BUSINESSEUROPE members believe that the public interest referred to in Article 17 of the EU Charter of Fundamental Rights and Article 5 TEU is sufficiently taken care of by the Paris Convention and TRIPs Agreement when it comes to determine whether the compulsory licenses are needed.

The competence to impose compulsory licenses mostly falls within the responsibility of the Member States. The fact that there is some discretion to regulate compulsory licencing left to Member States and that their national legislations differ, does not mean in itself that there is a need for harmonisation. Our members consider that currently there are no problematic divergences between Member States' legislations on this matter and there is also no evidence that imposing compulsory licenses at national level does cause any problems.

As the EU Commission highlights,<sup>2</sup> the COVID-19 pandemic has shown the importance of having a strong and balanced IP system to provide the necessary incentives to develop new treatments and vaccines as well as a suitable framework for sharing technologies, know-how and data. The successful cooperation (also shown by the current overproduction of vaccines) observed in the context of the COVID-19 pandemic is a clear indication that no major legislative changes are necessary as regards compulsory licencing.

BUSINESSEUROPE appreciates and agrees with the need to be better prepared to respond to future crisis, to meet challenges in their different forms (e.g., health, environmental and notably climate change). However, when it comes to patents, the perception of fragmentation among Member States' legislations is misleading as the road to implementation of patents requires more than licensing. Instead of adding an additional layer of legal constraints for compulsory licences (which would have to be TRIPs compliant), other instruments might be a better way forward for solving problem of too long court pendency that may exist in certain countries.

Therefore, and considering the principles of subsidiarity and proportionality governing the EU, BUSINESSEUROPE is of the view that there is no need of any additional action by the European Union regarding compulsory licencing of patents.

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<sup>2</sup> See Call of Evidence "Compulsory licensing in the EU", page 1.



- ***EU legislative initiative on compulsory licencing would run against the interest of the EU economy's objectives***

The European Union envisages being a knowledge-based economy, where its competitive advantage should be based – among other things - on innovation and advanced technology. Innovation and advanced technology are valuable when their creators and inventors are rewarded for their investments in R&D, and this is mainly achieved through patents.

Compulsory licences clearly weaken the protection granted by patents and, accordingly, compulsory licences should only be used in knowledge-based economies as a last resort and in very limited circumstances. Those circumstances have to be considered as exceptions and as such restricted to very exceptional situations taking place in particular places.

Any attempt to harmonise those exceptional circumstances would probably lead to an extension of the situations where compulsory licencing would be applicable, and this would risk going against the objectives to create a strong knowledge-based economy in the EU.

In conclusion, BUSINESSEUROPE members believe that it would not be in line with the EU economy's objectives to pursue any change in the existing compulsory licences regime in Europe. Therefore, also for this reason, our proposal is to choose the option of no policy change.

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