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## CONTRIBUTION

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From:	the German delegation
To:	Working Party on Intellectual Property (Patents)
N° Cion doc.:	8901/23 + ADD 1-5
Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on compulsory licensing for crisis management and amending Regulation (EC) 816/2006 - Position Paper from the German delegation

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Delegations will find attached a paper from the German delegation in relation to the above-mentioned proposal.

January 2024

**Position Paper of the German Federal Government on the European Commission  
Proposal for a Regulation on compulsory licensing for crisis management and amending  
Regulation (EC) 816/2006 (COM(2023) 224 final)**

The German Federal Government sees **no need for regulatory action** for the introduction of an EU-wide compulsory licence. Such a licence is neither appropriate nor necessary to ensure effective crisis management within the EU. Compulsory licences are provided for in the legislation of all Member States in line with the TRIPS Agreement. However, the European Commission's statements on transnational aspects do not allow for a fact-based discussion. This applies in particular to the proposed additions to Regulation (EC) No. 816/2006, which is yet to be evaluated.

Confidence in patent protection itself would be disturbed by the proposal. In this respect, compulsory licenses are in no way suitable for eliminating acute production and distribution bottlenecks.

Notwithstanding this fundamental position, the Federal Government wishes to comment on selected substantive aspects as follows:

**a. Limitation of the scope of application**

Compulsory licences constitute a limitation of the fundamental right to property and must therefore always be kept to an absolute minimum. This must also be made clear with regard to the temporal and territorial scope of application.

The Federal Government rejects EU-wide compulsory licences for published patent applications. There is no evidence-based justification for such a broad scope of application.

From the Federal Government's perspective, a compulsory licence should always be granted on a case-by-case basis; the reference to a list of EU crisis instruments under which an EU-wide compulsory licence can be granted is therefore not convincing. In any event, it should be clarified for reasons of legal certainty that the list of EU crisis instruments under which an EU-wide compulsory licence may be granted is exhaustive. The provisions on ad-hoc advisory bodies in the Regulation proposal are therefore unnecessary.

**b. Compatibility with TRIPS**

It must be ensured that the proposed Regulation does not go beyond the provisions of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The Federal Government has a number of concerns in this regard, including unlimited EU-wide compulsory licences for semi-conductor technology (Article 31(c) TRIPS), the upper limit for

remuneration (Article 31(h) TRIPS), and the requirement for decisions to be subject to judicial review (Article 31(i) TRIPS).

**c. Redesign of the granting procedure**

The granting of an EU-wide compulsory licence can only ever be considered as a last resort and under clearly defined conditions.

Against this background, it must be clarified – in line with the TRIPS Agreement – that serious efforts must first be made to reach a voluntary licensing agreement. In addition, the role of the rights-holder must be strengthened (mandatory prior identification; participation of an advisory body at the earliest possible stage, etc.). The requirements for the granting of an EU-wide compulsory licence must also be clearly and exhaustively regulated (criteria such as: specific market failure triggering a product shortage, special public interest etc.).

The advisory bodies can only fulfil their intended function if the members have extensive expertise in patent law and a transparent procedure is provided for; both of these aspects must be clarified in the text of the Regulation itself.

**d. No disclosure of business and trade secrets**

The Federal Government rejects the non-specific power of the European Commission to adopt “*complementary measures*” (Article 8(1)(h) and Article 14(2) of the proposal) as well as the obligation of the rights-holder and licensee to cooperate “*in good faith*” (Article 13 of the proposal). In any event, this must not lead to a situation where rights-holders can be obliged to disclose trade secrets. The provisions should therefore be clarified or deleted.

**e. No upper-limit for remuneration**

The Federal Government rejects the rigid upper limit for the remuneration to be paid by the licensee to the rights-holder, as this violates the TRIPS Agreement (see b. above). The determining criteria provided for in the Regulation proposal must be linked, in particular, to market conditions and to licence fees at typical market rates. An upper limit for remuneration also undermines the conclusion of voluntary licensing agreements.

**f. Necessity of a comprehensive redress mechanism**

It must be made clear that decisions on the basis of the proposed Regulation are subject to judicial review. Clarification is also needed regarding the assertion in court of the rights and obligations arising from the compulsory licence.