

# The Revised EU Block Exemption Regulation for Research and Development Agreements



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# Overview

- Article 1 (definitions): significantly amended and expanded
  - more definitions
  - more types of agreements covered (paid-for R&D)
- Article 2 (exemption): significantly shortened
  - ancillary restraints no longer mentioned
- Article 3 (conditions): broadly unchanged
  - access condition clarified
  - disclosure obligation regarding pre-existing IP rights proposed in the Commission's May 2010 draft has not been adopted
- Article 4 (market shares): slight changes
- Article 5 (hardcore list): significantly changed and clarified
- Article 6 (excluded restrictions): two contract provisions previously treated as hardcore restrictions are now treated as excluded restrictions
- Article 7 (application of market share threshold): some changes
  - Article 6 under predecessor R&D BER
  - Article 7 of predecessor R&D BER (withdrawal) removed, see Recitals 19-21 and VO 1/2003
- Article 8 (transitional period): January 2011 – December 2012
- Article 9 (period of validity): 31 December 2022

## Types of Agreements Covered

- Joint R&D

- joint team, organization or undertaking
- jointly entrusted to a third party
- allocated between parties by way of specialization in R&D
  - clarified that “joint R&D” can be arranged flexibly (“divide the work between [the parties] in any way that they consider most appropriate”)
  - May 2010 draft: each party “focuses on a distinct area”





“Paid-for R&D” introduced as a new category of R&D cooperation included in the BER

- excluded from the May 2010 draft

- Joint exploitation: same forms of cooperation as joint R&D

- clarified that exploitation by way of specialization includes the allocation of exploitation rights to only one of the parties
- May 2010 draft: each party must exploit

## Access Condition

- Access has to be “full” access
-  Only applies to “final results” of the R&D, but “as soon as they become available”
- Clarified that no access is required for purposes of exploitation during joint exploitation phase
  - NB: Non-compete allowed during joint exploitation (Article 5(b)(iv) R&D BER)
- Clarified that access has to be granted for purposes of further R&D during the joint exploitation phase (see also Article 5(a) R&D BER)
-  Access can be remunerated, but financial “compensation must not be so high as to effectively impede such access”
  - May 2010 draft: “equal access”
- Clarified that in case of R&D agreements without joint exploitation, access must be given to pre-existing know-how that is indispensable for the exploitation of the R&D results
  - NB: Restrictions of exploitation rights lead to joint exploitation
- NB: R&D outsourcing and exclusive access rights discussed in paragraphs 131 and 140 of the Horizontal Guidelines

# Market Share Threshold

- 25% combined if parties are competitors (actual or potential)

- market share is irrelevant if parties are non-competitors



■ In case of paid-for R&D: cumulative share of the financing party and all third parties with which the financing party has entered into research and development agreements with regard to the same contract products or contract technologies



■ Market share on technology markets also relevant





- double calculation required under paragraph 125 of the Horizontal Guidelines



■ Definition of “potential competitor”:

- un undertaking that, absent the agreement
  - on realistic grounds
  - in response to a small but permanent increase in relative prices
  - would be likely to undertake within not more than 3 years
  - the necessary additional investments [...] to supply
  - a product [...] capable of being improved, substituted or replaced by the contract product
  - on the relevant geographic market
  - NB: See footnote 5 of Horizontal Guidelines

## Hardcore list changed and clarified

- More complex structure due to the inclusion of paid-for R&D in the scope of the BER and the possibility to allocate exploitation rights to only one party
-  Customer & territorial passive sales restrictions = hardcore
  - no explicit exceptions
- Customer & territorial active sales restrictions = hardcore, unless regarding customers and territories exclusively allocated to the other party
-  (Active) sales restrictions are possible beyond 7 years from product launch
-  Provisions on active/passive sales apply to technology licensing
  - Field-of-use restrictions are not hardcore (Recital 15)
-  Moved from the hardcore list to the new list of excluded restrictions:
  - IP no-challenge clauses
  - prohibitions on third party licensing if exploitation does not take place

# Thank You!

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