



Draft European Commission Block Exemption Regulation on Research and Development Agreements

Article 101(1) of the Treaty on the Functioning of the European Union (TFEU)¹ identifies in general terms classes of agreements that are incompatible with the internal market, subject to the possibility of exemption under Article 101(3), e.g. where the agreement promotes technical or economic progress. If an agreement is “caught” by Article 101(1) but not exempted under Article 101(3), then it is unenforceable.

Before 1 May 2004 (*Trends and Events*, 2002/3, page 27), the European Commission had the exclusive authority to grant exemptions under Article 101(3). This meant that an agreement not notified to the Commission and caught by Article 101(1) was unenforceable in a national Court, even if the Commission would have exempted it on its merits; in effect, full justice was not obtainable from the national Courts. This risk, combined with the generality of the wording of Article 101(1), led companies to overwhelm the Commission with notifications of agreements requesting exemption. In an attempt to stem this tide of notifications, the Commission issued “block exemption” Regulations (BERs) for entire categories of agreements.

Since 1 May 2004, national Courts and national competition authorities have had the authority to grant exemptions under Article 101(3), including with retrospective effect. It is doubtful that BERs would have been invented had that always been the case, and it is arguable that the BERs are unnecessary now that full justice is obtainable from the national Courts at the time a party wishes to enforce an agreement.

However, instead of scrapping the BERs, the Commission have taken a middle course, continuing with periodic revision and reissue of BERs, but in general being less generous in the range of agreements covered. The two BERs most relevant to Federation Members before 1 May 2004 were Regulation 240/96 on technology transfer agreements and Regulation 2659/2000 on research and development agreements.

When Regulation 240/96 was replaced by Regulation 772/2004, the Commission introduced 20 % and 30 % combined market share tests (previously absent) even for the simplest licensing agreement (*Trends and Events*, 2003/2004, pages 23-26). These market share tests are difficult to apply, and unless both parties to an agreement are small, it may be better to justify an agreement under Article 101 than to rely on the block-exemption.

¹ Article 101 of the TFEU corresponds to Article 85, later renumbered as 81, of the Treaty of Rome, which the TFEU supersedes. In the historical discussion above, “101” is used for the sake of simplicity, despite any anachronism.

Regulation 2659/2000 expires on 31 December 2010, and accordingly the Commission issued in spring 2010 a draft replacement for it, inviting comment. This block exemption (like its predecessor, Regulation 418/85) was always difficult to rely on, for instance because the parties need to test whether they are “competing undertakings” and, if they are, to pass a 25 % combined market share test. Nevertheless, the Federation thought it worthwhile to comment on any changes in the new draft that restricted the scope of the block exemption. Even companies who do not expect to argue that an agreement falls within the exemption need to fear adverse inferences from block exemptions in a Court’s Article 101 analysis. More specifically, they need to fear that an inexperienced national Court might think that any provision which is a bar to block exemption must be a bar to an individual exemption.

The Federation in its comments focused on four changes in the draft. Two of these (in Articles 3.3 and 5(e)) may have been inadvertent in their effects. Two were clearly both intentional and substantive:-

- (i) An explicit statement in Regulation 2659/2000 relating to the permissibility of technical field of use restrictions between non-competitors was removed.
- (ii) A new condition for exemption (Article 3.2) was introduced reading as follows:

“The parties must agree that prior to starting the research and development all the parties will disclose all their existing and pending intellectual property rights in as far as they are relevant for the exploitation of the results by the other parties.”

On (i), the Federation stated its opinion that such a restriction did not infringe Article 101(1), noted that such a restriction was permitted even between competitors under Regulation 772/2004, and urged reinstatement of the removed sentence.

On (ii), it can be speculated that the Commission was concerned by the possibilities of “patent ambush” in R&D cooperation analogous to “patent ambush” in standards organisations. However, the Federation argued that any such analogy would be invalid, both (a) **legally** and (b) **practically**, as follows:-

(a) **Legally**, standards-setting raises issues under TFEU Article 102 (dealing with abuse of dominant positions), whereas an R&D cooperation does not. Companies making products or services affected by a standard have *no realistic option* but to comply with it, so that failure by others to disclose essential patents is very serious for them. In contrast, an R&D cooperation is *voluntarily* entered into by the parties, so that any party who is not satisfied by the terms available from the other party or parties on “existing and pending intellectual property rights” can simply “walk away” from the negotiation and seek new collaborators.

(b) **Practically**, prior disclosure of “existing and pending intellectual property rights” is generally unworkable in the context of R&D cooperation. R&D cooperation, unlike standards-setting, is an excursion into the unknown, concerned with generating significant new knowledge. Therefore, it is logically impossible to say with any certainty at the outset whether or not exploitation of the results will require licences under existing or pending patents owned by the parties. *A clause in an agreement as required by Article 3.2 would in practice be likely to be*

inadvertently breached. Accordingly, Article 3.2 is undesirable because it would lead to disputes and legal uncertainty.

The Federation concluded that the issue of “existing and pending intellectual property rights” should be left to the parties to work out their own solutions, and urged that Article 3.2 should be deleted.

A redraft from the Commission is awaited.

MJ, 28 September 2010