

Since 1 July 2023, a new regulation concerning the block exemption for research and development (R&D) agreements is in force (Commission Regulation 2023/1066 of 1 June 2023 on the application of Article 101, §3 of the Treaty on the Functioning of the European Union [TFEU] to certain categories of research and development agreements, OJEU, 2 June 2023, No. L 143). It replaces Regulation 1217/2010.

For the record, a block exemption regulation sets out the conditions under which a type of agreement between undertakings is exempted from the prohibition on restrictive agreements (Article 101, §§1 and 3 of the Treaty on the Functioning of the European Union). If an agreement does not meet these conditions, it is not necessarily prohibited and may still qualify for an individual exemption.

New guidelines (OJEU, 21 July 2023, No. C 259) provide guidance on the interpretation and application of Regulation 2023/1066.

Existing agreements that do not comply with this new regulation, will have to be amended by 1 July 2025 if the parties want to continue to benefit from a block exemption.

THE BLOCK EXEMPTION AND ITS CONDITIONS

The new regulation exempts, under various conditions, certain R&D agreements from the prohibition on restrictive agreements (article 101, §1 TFEU). If these legal conditions are met, these agreements are presumed to meet the four conditions set out in article 101, §3 TFEU for exemption from the prohibition.

As in the previous regulation,

- the exemption requires the inclusion of certain clauses in the agreement (access to the final results, access to pre-existing know-how, joint exploitation: articles 2 to 5);
- the duration of the exemption depends on the market shares of the products and technologies, on the evolution of these market shares and on the competitive situation between the parties (articles 6 and 7);
- the exemption does not apply if the agreement contains or is accompanied by certain restrictions, known as hardcore restrictions, in particular restrictions on R&D activities and, in relation to the exploitation of results, restrictions on production or sales, restrictions on prices, passive sales and active sales (article 8);
- the exemption does not apply to certain so-called “excluded” restrictions, in particular in relation to the right to challenge intellectual property rights (article 9) (the agreement may for the remainder remain

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exempt, but an individual examination is required to determine whether the restriction meets the general conditions for exemption under article 101, §3 TFEU);

- the benefit of the exemption may be withdrawn by the Commission or a national competition authority in certain exceptional cases where, despite compliance with the block exemption, the agreement does not fulfill the conditions laid down in article 101, §3 TFEU (articles 10 and 11).

DURATION OF THE EXEMPTION (ARTICLE 6): A LITTLE MORE CLARITY AND FLEXIBILITY

R&D period: if the parties are competitors, the exemption applies for the entire duration of the R&D, provided that, at the time the agreement is entered into, the combined market share of the parties does not exceed 25% on the relevant product and technology markets. In the case of remunerated R&D (where the financing party does not perform the R&D activities), all R&D agreements entered into by the financing party with third parties and relating to the same contract products or technologies are to be taken into account.

If the parties are not competing undertakings, the exemption applies for the entire duration of the research and development. The absence of competition is now understood quite broadly, in particular in the case of R&D not related to existing or specific products or services (Guidelines, paragraph 98).

Period of joint exploitation: for research and development agreements where the results are jointly exploited (cf. art. 1.1, sub and art. 5), the exemption continues to apply for seven years from the time the contract products or contract technologies are first put on the market within the internal market, provided that the market share conditions for the R&D period are satisfied at the time the agreement is entered into (or at the time of the initial R&D agreement if joint exploitation is the subject of a subsequent agreement).

After the end of the seven-year period, the exemption continues to apply as long as the combined market share of the parties to the agreement does not exceed 25% on the relevant markets to which the contract products or contract technologies belong. However, if the combined market share does not exceed that threshold at the end of the 7-year period, but subsequently rises above that threshold, the exemption shall continue to apply for a period of 2 years following the year in which the threshold was first exceeded (article 6, §§3-5).

TWO OTHER CLARIFICATIONS

Excluded restrictions: their effects are made clearer: the exemption continues to apply to the remaining part of the R&D agreement, provided that these excluded restrictions can be severed from that remaining part and provided that the other conditions in the Regulation are met (art. 9, §3).



Individual withdrawal: the reminder (art. 10) of the power of the Commission and national competition authorities to withdraw the benefit of the exemption in individual cases is accompanied by examples of cases where there is reason to suspect that the conditions for exemption (referred to in article 101, §3 TFEU) have not been met.

ENTRY INTO FORCE AND PERIOD OF VALIDITY OF REGULATION; TRANSITIONAL PERIOD

Regulation 2023/1066 entered into force on 1 July 2023 and is applicable until 30 June 2035. Article 12 provides for a transitional period of two years (from 1 July 2023 to 30 June 2025) during which agreements already in force on 30 June 2023 which do not satisfy the conditions of the new Regulation but which satisfy the conditions of Regulation 1217/2010 will continue to benefit from the exemption. Parties therefore have two years to comply with the new rules if they want to continue to benefit from the block exemption.

For any questions or assistance, please reach out to our

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