

Open Innovation and EU Competition Law

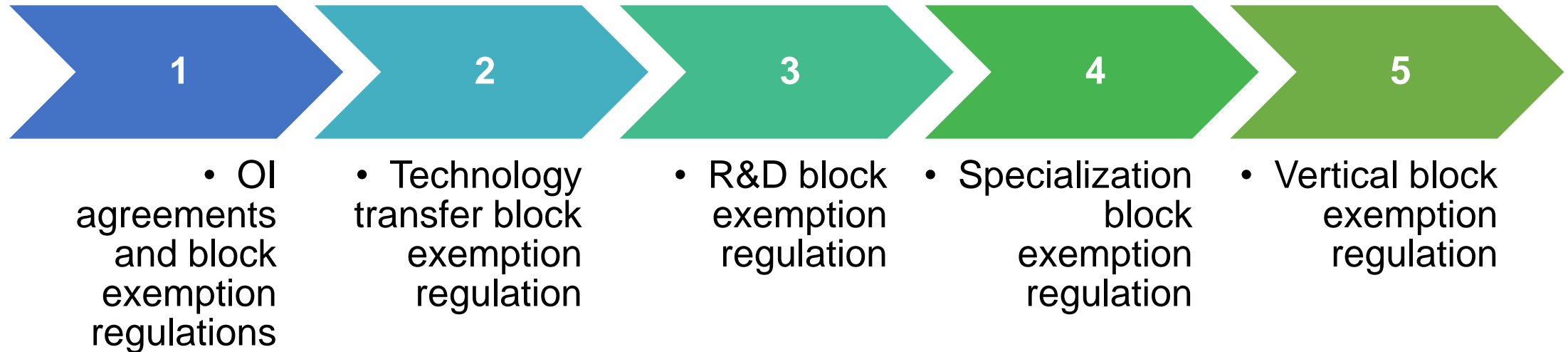
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Structure



Open innovation and block exemption regulations



OI agreements and block exemptions



| Agreements | Block exemption |
|----------------------------------|--|
| Licensing agreements | Regulation 316/2014 on the application of Article 101(3) of the TFEU to categories of technology transfer agreements |
| Assignment agreements | |
| R&D contract research agreements | Regulation 1217/2010 on the application of Article 101(3) of the TFEU to categories of research and development agreements |
| R&D collaboration agreements | |
| R&D consortium agreements | |



Other agreements and block exemptions



| Agreements | Block exemption |
|-----------------------------|---|
| Joint production agreements | Regulation 1218/2010 on the application of Article 101(3) of the TFEU to certain categories of specialization agreements |
| Subcontracting agreements | |
| Distribution agreements | Regulation 330/2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices |
| Franchising agreements | |
| Supply agreements | |



Article 101 (1) TFEU

1. The following shall be *prohibited* as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which *have as their object or effect the prevention, restriction or distortion of competition within the internal market*, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.



Article 101 (2-3) TFEU

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;


(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.




Technology transfer block exemption regulation



Relevant legal documents

- 
- Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, *OJ L 93, 28.3.2014, p. 17–23*

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- Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, *OJ C 89, 28.3.2014, p. 3–50*



The TTBER covers **agreements for the transfer of technology.**

'Technology transfer agreement' means:

(i) a technology rights licensing agreement entered into between two undertakings for the purpose of the production of contract products by the licensee and/or its sub-contractor(s),

(ii) an **assignment** of technology rights between two undertakings for the purpose of the production of contract products where part of the risk associated with the exploitation of the technology remains with the assignor.

'Technology rights' means

know-how and the following rights, or a combination thereof, including applications for or applications for registration of those rights: (i) patents, (ii) utility models, (iii) design rights, (iv) topologies of semiconductor products, (v) supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained, (vi) plant breeder's certificates and (vii) software copyright.



Scope (2) - Article 1 of the TTBER; Recital 6 of the TTBER; Section 3.2.3 and 3.2.4 of the TTBER Guidelines



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| 'Product' means | goods or a service, including both <i>intermediary</i> goods and services and <i>final</i> goods and services. |
| 'Contract product' means | a product produced, <i>directly or indirectly</i> , on the basis of the licensed technology rights. |
| Two undertakings | <p>Technology transfer agreements between more than two undertakings are not covered by the TTBER (e.g. technology pools).</p> <p>Agreements conducted by two undertakings fall within the scope of the TTBER even if the agreement stipulates conditions for more than one level of trade.</p> |



Scope (3) - Recital 7 and Article 9 of the TTBER; Section 3.2.6.1 of the TTBER Guidelines



Applies

To agreements where the licensor permits the licensee and/or one or more of its sub-contractors to exploit the licensed technology rights, possibly after further R&D by the licensee and/or its sub-contractors, for purpose of goods or services.

Should not apply

To licensing in the context of **R&D agreements** which are covered by the EU Regulation 1217/2010.

To licensing in the context of **specialization agreements** which are covered by the EU Regulation 1218/2010.

To agreements, the purpose of which is the mere reproduction and distribution of software copyright protected products as such agreements do not concern the licensing of a technology to produce but are more akin to distribution agreements [**vertical agreements**].

To agreements to set up technology pools, that is to say, agreements for the pooling of technologies with the purpose of licensing them to third parties, or to agreements whereby the pooled technology is licensed out to those third parties.



Exemption - Article 2 of the TTBER



Scope

(1) Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, Article 101(1) of the Treaty shall not apply to technology transfer agreements.

(3) The exemption provided for in paragraph 1 shall also apply to provisions, in technology transfer agreements, which relate to the purchase of products by the licensee or which relate to the licensing or assignment of other intellectual property rights or know-how to the licensee, if, and to the extent that, those provisions are directly related to the production or sale of the contract products.

Duration

(2) The exemption provided for in paragraph 1 shall apply to the extent that technology transfer agreements contain restrictions of competition falling within the scope of Article 101(1) of the Treaty.

The exemption shall apply for as long as the licensed technology rights have not expired, lapsed or been declared invalid or, in the case of know-how, for as long as the know-how remains secret. However, where know-how becomes publicly known as a result of action by the licensee, the exemption shall apply for the duration of the agreement.



Market-share thresholds of the safe harbor - Article 3 of the TTBER; Section 3.3 of the TTBER Guidelines



Competing undertakings

Where the undertakings party to the agreement are competing undertakings, the exemption shall apply on condition that the **combined market share of the parties does not exceed 20 %** on the relevant market(s).

Non-competing undertakings

Where the undertakings party to the agreement are not competing undertakings, the exemption shall apply on condition that the market share of **each of the parties does not exceed 30 %** on the relevant market(s).



Relevant market - Article 1 of the TTBER; Section 3.3 of the TTBER Guidelines



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| 'Relevant market' means | the combination of the relevant product or technology market with the relevant geographic market. |
| 'Relevant product market' means | the market for the contract products and their substitutes, that is to say all those products which are regarded as interchangeable or substitutable by the buyer, by reason of the products' characteristics, their prices and their intended use. |
| 'Relevant technology market' means | the market for the licensed technology rights and their substitutes, that is to say all those technology rights which are regarded as interchangeable or substitutable by the licensee, by reason of the technology rights' characteristics, the royalties payable in respect of those rights and their intended use. |
| 'Relevant geographic market' means | the area in which the undertakings concerned are involved in the supply of and demand for products or the licensing of technology rights, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas. |



Hardcore restrictions: competing undertakings - Article 4 of the TTBER

(1) Where the undertakings party to the agreement are **competing undertakings**, the exemption shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object any of the following:

- the restriction of a party's ability to determine its prices when selling products to third parties;
- the limitation of output, except limitations on the output of contract products imposed on the licensee in a non-reciprocal agreement or imposed on only one of the licensees in a reciprocal agreement;
- the allocation of markets or customers [with exceptions];
- the restriction of the licensee's ability to exploit its own technology rights or the restriction of the ability of any of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.



'Reciprocal agreement'
means

a technology transfer agreement where two undertakings grant each other, in the same or separate contracts, a technology rights licence, and where those licences concern competing technologies or can be used for the production of competing products [**cross-license**].

'Non-reciprocal agreement'
means

a technology transfer agreement where one undertaking grants another undertaking a technology rights licence, or where two undertakings grant each other such a licence but where those licences do not concern competing technologies and cannot be used for the production of competing products.



Hardcore restrictions: not competing undertakings - Article 4 of the TTBER

(2) Where the undertakings party to the agreement are **not competing undertakings**, the exemption shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object any of the following:

- the restriction of a party's ability to determine its prices when selling products to third parties, without prejudice to the possibility of imposing a maximum sale price or recommending a sale price, provided that it does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- the restriction of the territory into which, or of the customers to whom, the licensee may passively sell the contract products [with exceptions];
- the restriction of active or passive sales to end-users by a licensee which is a member of a selective distribution system and which operates at the retail level, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.



Excluded restrictions - Article 5 of the TTBER

(1) The exemption shall not apply to any of the following obligations contained in technology transfer agreements:

- any direct or indirect obligation on the licensee to grant an exclusive licence or to assign rights, in whole or in part, to the licensor or to a third party designated by the licensor in respect of its own improvements to, or its own new applications of, the licensed technology [**exclusive grant back**];
- any direct or indirect obligation on a party not to challenge the validity of intellectual property rights.

(2) Where the undertakings party to the agreement are not competing undertakings, the exemption shall not apply to any direct or indirect obligation limiting the licensee's ability to exploit its own technology rights or limiting the ability of any of the parties to the agreement to carry out R&D, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.

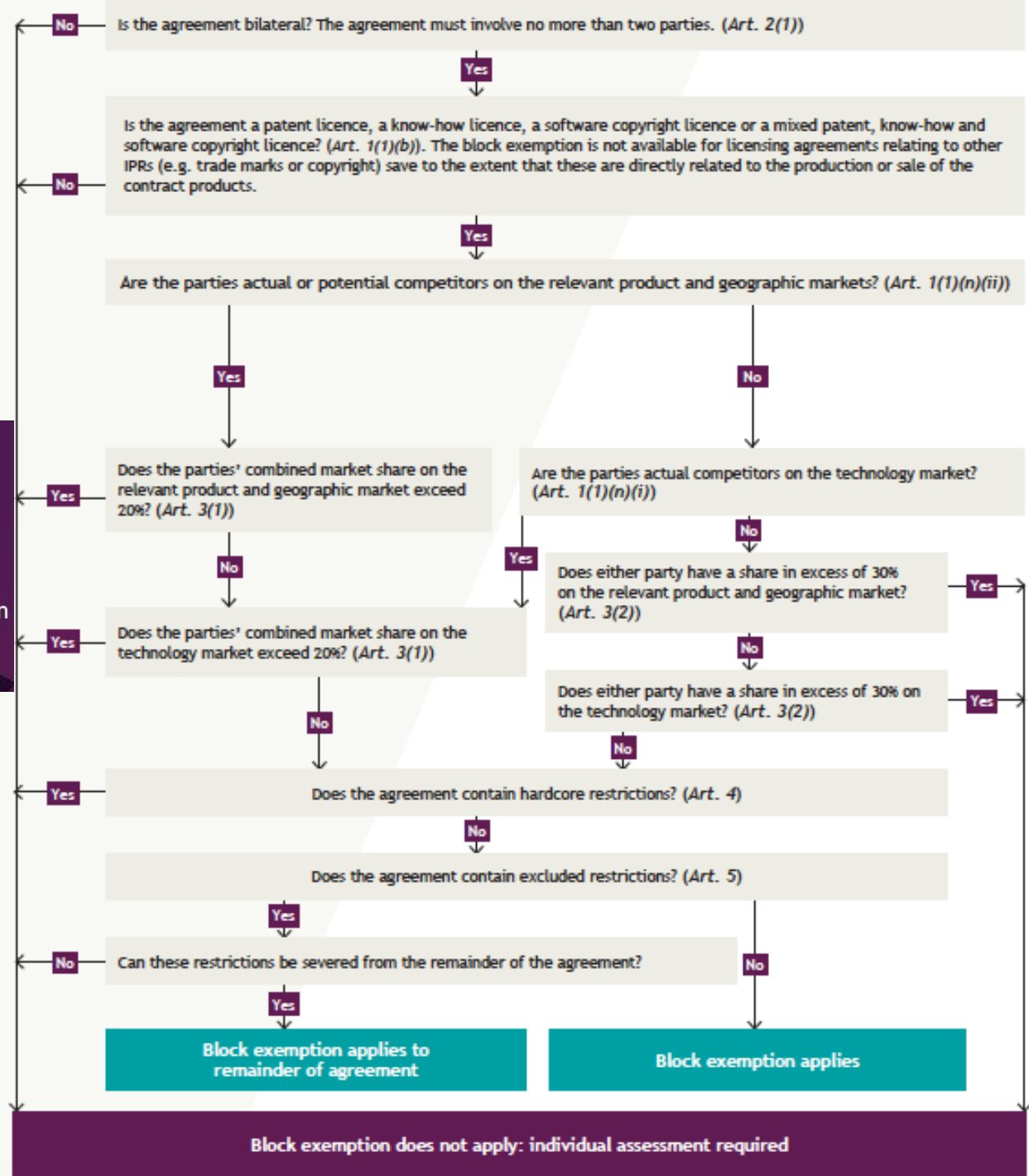


SLAUGHTER AND MAY

The EU competition rules on intellectual property licensing

A guide to the European Commission's Technology Transfer Block Exemption Regulation and competition issues relating to IP licensing and enforcement


June 2016



R&D block exemption regulation



Relevant legal documents

- 
- Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, *OJ L 335, 18.12.2010, p. 36–42*

- 
- Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, *OJ C 11, 14.1.2011, p. 1–72*



Scope - Article 1 of the R&D BER

The R&D BER covers **R&D agreements**. R&D agreements means an agreement entered into between two or more parties which relate to the conditions under which those parties pursue:

- joint R&D of contract products or contract technologies and joint exploitation of the results of that R&D;
- joint exploitation of the results of R&D of contract products or contract technologies jointly carried out pursuant to a prior agreement between the same parties;
- joint R&D of contract products or contract technologies excluding joint exploitation of the results;
- paid-for R&D of contract products or contract technologies and joint exploitation of the results of that R&D;
- joint exploitation of the results of paid-for R&D of contract products or contract technologies pursuant to a prior agreement between the same parties;
- paid-for R&D of contract products or contract technologies excluding joint exploitation of the results.



Article 1 of the R&D BER

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| 'R&D' means | the acquisition of know-how relating to products, technologies or processes and the carrying out of theoretical analysis, systematic study or experimentation, including experimental production, technical testing of products or processes, the establishment of the necessary facilities and the obtaining of IPRs for the results. |
| 'Contract technology' means | a technology or process arising out of the joint R&D. |
| 'Contract product' means | a product arising out of the joint R&D or manufactured or provided applying the contract technologies. |
| 'Exploitation of the results' means | the production or distribution of the contract products or the application of the contract technologies or the assignment or licensing of IPRs or the communication of know-how required for such manufacture or application. |



Article 1 of the R&D BER



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| 'Joint' means | activities where the work involved is: (i) carried out by a joint team, organisation or undertaking; (ii) jointly entrusted to a third party or (iii) allocated between the parties by way of specialisation in the context of R&D or exploitation. |
| 'Specialization in the context of R&D' means | that each of the parties is involved in the R&D activities covered by the R&D agreement and they divide the R&D work between them in any way that they consider most appropriate. |
| 'Specialization in the context of exploitation' means | that the parties allocate between them individual tasks such as production or distribution, or impose restrictions upon each other regarding the exploitation of the results such as restrictions in relation to certain territories, customers or fields of use; this includes a scenario where only one party produces and distributes the contract products on the basis of an exclusive licence granted by the other parties. |
| 'Paid-for R&D' means | R&D that is carried out by one party and financed by a financing party. |



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- (1) Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to research and development agreements.
 - (2) The exemption provided for in paragraph 1 shall apply to research and development agreements containing provisions which relate to the assignment or licensing of intellectual property rights to one or more of the parties or to an entity the parties establish to carry out the joint research and development, paid-for research and development or joint exploitation, provided that those provisions do not constitute the primary object of such agreements, but are directly related to and necessary for their implementation.



Conditions for exemption - Article 3 of the R&D BER



- 1 • The R&D agreement must stipulate that all the parties have full access to the final results of the joint R&D or paid-for research and development.
- 2 • The R&D agreement must stipulate that each party must be granted access to any pre-existing know-how of the other parties, if this know-how is indispensable for the purposes of its exploitation of the results.
- 3 • Any joint exploitation may only pertain to results which are protected IPRs or constitute know-how and which are indispensable for the manufacture of the contract products or the application of the contract technologies.
- 4 • Parties charged with the manufacture of the contract products by way of specialisation in the context of exploitation must be required to fulfil orders for supplies of the contract products from the other parties.



Market-share thresholds of the safe harbor (1) - Article 4 of the R&D BER



- (1) Where the parties are **not competing undertakings**, the exemption shall apply for the duration of the R&D. Where the results are jointly exploited, the exemption shall continue to apply for 7 years from the time the contract products or contract technologies are first put on the market within the internal market.
- (2) Where two or more of the parties are **competing undertakings**, the exemption shall apply for the period referred to in paragraph 1 of this Article only if, at the time the R&D agreement is entered into:
 - in the case of R&D agreements referred to in point (a)(i), (ii) or (iii) of Article 1(1), the **combined** market share of the parties to a R&D agreement does not exceed 25 % on the relevant product and technology markets; or



Market-share thresholds of the safe harbor (2) - Article 4 of the R&D BER



- in the case of research and agreements referred to in point (a)(iv), (v) or (vi) of Article 1(1), the **combined** market share of the financing party and all the parties with which the financing party has entered into R&D agreements with regard to the same contract products or contract technologies, does not exceed 25 % on the relevant product and technology markets.

(3) After the end of the period referred to in paragraph 1, the exemption shall continue to apply as long as the combined market share of the parties does not exceed 25 % on the relevant product and technology markets.



Article 1 of the R&D BER



'Relevant product market'
means

the relevant market for the products capable of being improved, substituted or replaced by the contract products.

'Relevant technology market'
means

the relevant market for the technologies or processes capable of being improved, substituted or replaced by the contract technologies.



Hardcore restrictions (1) - Article 5 of the R&D BER



The exemption shall not apply to R&D agreements which have as their object any of the following:

- the restriction of the freedom of the parties to carry out R&D independently or in cooperation with third parties in a field unconnected with that to which the R&D agreement relates or, after the completion of the joint R&D or the paid-for R&D, in the field to which it relates or in a connected field;
- the limitation of output or sales [with exceptions];
- the fixing of prices when selling the contract product or licensing the contract technologies to third parties [with exceptions];
- the restriction of the territory in which, or of the customers to whom, the parties may passively sell the contract products or license the contract technologies, with the exception of the requirement to exclusively license the results to another party;



Hardcore restrictions (2) - Article 5 of the R&D BER



- the requirement not to make any, or to limit, active sales of the contract products or contract technologies in territories or to customers which have not been exclusively allocated to one of the parties by way of specialisation in the context of exploitation;
- the requirement to refuse to meet demand from customers in the parties' respective territories, or from customers otherwise allocated between the parties by way of specialisation in the context of exploitation, who would market the contract products in other territories within the internal market;
- the requirement to make it difficult for users or resellers to obtain the contract products from other resellers within the internal market.



Excluded restrictions - Article 6 of the R&D BER

The exemption shall not apply to the following obligations contained in R&D agreements:


- the obligation not to challenge after completion of the R&D the validity of IPRs;
- the obligation not to grant licences to third parties to manufacture the contract products or to apply the contract technologies unless the agreement provides for the exploitation of the results of the joint R&D or paid-for R&D by at least one of the parties and such exploitation takes place in the internal market vis-à-vis third parties.




Specialization block exemption regulation



Relevant legal documents

- 
- Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, *OJ L 335, 18.12.2010, p. 43–47*

- 
- Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, *OJ C 11, 14.1.2011, p. 1–72*

- 
- Guidelines on Vertical Restraints, *OJ C 130, 19.5.2010, p. 1–46*



Scope (1) - Article 1 of the SBER and Section 4 of the Guidelines on horizontal co-operation agreements



The SBER covers **specialization agreements**, including vertical agreements containing provisions on IPRs.

'Specialization agreement' means

a unilateral specialisation agreement, a reciprocal specialisation agreement or a joint production agreement.

'Joint development agreement' means

an agreement by virtue of which two or more parties agree to produce certain products jointly.



Scope (2) - Article 1 of the SBER and Section 4 of the Guidelines on horizontal co-operation agreements



'Unilateral specialization agreement' means

an agreement between two parties which are active on the same product market by virtue of which one party agrees to fully or partly cease production of certain products or to refrain from producing those products and to purchase them from the other party, who agrees to produce and supply those products.

'Reciprocal specialization agreement' means

an agreement between two or more parties which are active on the same product market, by virtue of which two or more parties on a reciprocal basis agree to fully or partly cease or refrain from producing certain but different products and to purchase these products from the other parties, who agree to produce and supply them.



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- (1) Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to specialisation agreements.
 - (2) The exemption provided for in paragraph 1 shall apply to specialisation agreements containing provisions which relate to the assignment or licensing of intellectual property rights to one or more of the parties, provided that those provisions do not constitute the primary object of such agreements, but are directly related to and necessary for their implementation.



Exemption (2) - Article 2 of the SBER



(3) The exemption provided for in paragraph 1 shall apply to specialisation agreements whereby:

- the parties accept an exclusive purchase or exclusive supply obligation; or
- the parties do not independently sell the specialisation products but jointly distribute those products.



Market-share thresholds of the safe harbor - Article 3 of the SBER

- The exemption shall apply on condition that the **combined** market share of the parties does not exceed 20 % on any relevant market.



Hardcore restrictions - Article 4 of the SBER

The exemption shall not apply to specialisation agreements which have as their object any of the following:


- the fixing of prices when selling the products to third parties with the exception of the fixing of prices charged to immediate customers in the context of joint distribution;
- the limitation of output or sales with the exception of:
 - provisions on the agreed amount of products in the context of unilateral or reciprocal specialisation agreements or the setting of the capacity and production volume in the context of a joint production agreement; and
 - the setting of sales targets in the context of joint distribution;
- the allocation of markets or customers.



Vertical block exemption regulation



Relevant legal documents

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- Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, *OJ L 102, 23.4.2010, p. 1–7*

- 
- Guidelines on Vertical Restraints, *OJ C 130, 19.5.2010, p. 1–46*



Scope - Article 1 of the VBER and Section 2.4 of the Guidelines on Vertical Restraints



The VBER covers **vertical agreements**, including vertical agreements containing provisions on intellectual property rights.

'Vertical agreement'
means

an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.

'IPRs'
includes

industrial property rights, know how, copyright and neighbouring rights.

Generally concerns three main areas: trade marks, copyright and know-how.



Exemption (1) - Article 2 of the VBER



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- (1) Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to vertical agreements.
 - (2) The exemption provided for in paragraph 1 shall apply to vertical agreements entered into between an association of undertakings and its members, or between such an association and its suppliers, only if all its members are retailers of goods and if no individual member of the association, together with its connected undertakings, has *a total annual turnover exceeding EUR 50 million.*



Exemption (2) - Article 2 of the VBER



(3) The exemption provided for in paragraph 1 shall apply to vertical agreements containing provisions which relate to the assignment to the buyer or use by the buyer of **intellectual property rights**, provided that those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers.

The VBER applies to vertical agreements containing IPR provisions where **5 conditions** are fulfilled:



1

⑩ The IPR provisions must be part of a vertical agreement, that is, an agreement with conditions under which the parties may purchase, sell or resell certain goods or services;

2

⑩ The IPRs must be assigned to, or licensed for use by, the buyer;

3

⑩ The IPR provisions must not constitute the primary object of the agreement;

4

- The IPR provisions must be directly related to the use, sale or resale of goods or services by the buyer or its customers. In the case of franchising where marketing forms the object of the exploitation of the IPRs, the goods or services are distributed by the master franchisee or the franchisees;

5

- The IPR provisions, in relation to the contract goods or services, must not contain restrictions of competition having the same object as vertical restraints which are not exempted under the Block Exemption Regulation.

Exemption (3) - Article 2 of the VBER


(4) The exemption provided for in paragraph 1 shall not apply to vertical agreements entered into between competing undertakings. However, it shall apply where competing undertakings enter into a non-reciprocal vertical agreement and:

- the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level; or
- the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.

(5) This Regulation shall not apply to vertical agreements the subject matter of which falls within the scope of any other block exemption regulation, unless otherwise provided for in such a regulation.



Market-share thresholds of the safe harbor - Article 3 of the VBER

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- The market share held by *the supplier* does not exceed 30 % of the relevant market on which it sells the contract goods or services.

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- The market share held by *the buyer* does not exceed 30 % of the relevant market on which it purchases the contract goods or services.



Hardcore restrictions - Article 4 of the VBER

The exemption shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- the restriction of the buyer's ability to determine its sale price;
- the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services [with some exceptions];
- the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade;
- the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade;
- the restriction on sales of components.



Excluded restrictions - Article 5 of the VBER

The exemption shall not apply to the following obligations contained in vertical agreements:

- any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years;
- any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services;
- any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers.





Thank you for your attention!



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