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**HOW WILL THE NEW EUROPEAN HORIZONTAL BLOCK
EXEMPTION REGULATIONS AFFECT COOPERATION
AGREEMENTS LIKE R&D AND STANDARDIZATION**

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TODAY'S SPEAKER

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- Fellow in competition law at the Faculty of Law of the University of Turin.
- Lecturer of industrial property law in the second cycle degree in Plant Biotechnology of the Faculty of Agricultural, Forest and Food Science of the University of Turin.
- Responsible for the coordination of the scientific activity and former Vice-president of LES Italy
- Editorial Board Coordinator of the legal journal “*Journal of Law, Market and Innovation (JLMI)*” edited by the University of Turin (<https://www.ojs.unito.it/index.php/JLMI>).
- Master of of Laws (LL.M.) in the field of EC Competition Law from the London School of Economics (2006).
- Legal advisor of Competition & Markets Authority (CMA) in 2015.
- Member of the “*Permanent Observatory on Private Enforcement of EU Competition*” (ARC-<http://www.osservatorioantitrust.eu>).
- Author of articles on competition and IP matters in both national and international legal journals.

OUTLINE

- I. Introduction: the block exemption regime
- II. the new draft EU competition law framework for R&D agreements
 - a) Step 1 – does the agreement fall outside art. 101.1TFUE?
 - b) Step 2 – R&D not falling within art. 101.1 and ones covered by the BER
 - c) Step 3 – conditions to be met
 - d) Step 4 – Thresholds – market shares – duration
 - e) Step 5 – no hardcore restrictions
 - f) Step 6 – no excluded restrictions



THE EXEMPTION UNDER 101.3 TFUE: FROM A SYSTEM OF NOTIFICATION FOR INDIVIDUAL EXEMPTION TO A BLOCK EXEMPTION BASED ON SELF-ASSESSMENT

- An agreement that falls within art. 101.1TFUE is not necessarily unlawful.
- Art. 101.3 provides a “*legal exemption*” to the prohibition in art. 101.1 if 4 (four) conditions are met. The first two **positive** and last two **negative**.
- The agreements:
 1. must contribute to improving the productions or distribution of goods or to promoting technical or economic progress
 2. allowing consumers a fair share of the resulting benefits
 3. must not impose restrictions which are not indispensable to the attainment of these objectives
 4. no elimination of competition in substantial part of market
- Art. 101.3 foreshadowed the advent of block exemptions by providing that the prohibition o art. 101.1 could be declared inapplicable both in relation to agreements and the “*categories of agreements*”
- The treaty itself envisaged the generic authorisation of agreements as well as pursuant to individual assessment



THE EXEMPTION UNDER 101.3 TFUE: FROM A SYSTEM OF NOTIFICATION FOR INDIVIDUAL EXEMPTION TO A BLOCK EXEMPTION BASED ON SELF-ASSESSMENT

1962 – 2003 / notifications + first «generation» of BER

- Parties whose Agreement were caught by art. 101.1 were obliged to file them with the EU Commission
- The process took time and effort to have specific exemption
- **The Commission issues different types of block exemption regulations (first generation of BE)**
 - Subject agreements exempt from notification and automatically entitled to an Article 101(3) exemption if they contained certain **mandatory or allowed clauses (whitelist)** and contained **no prohibited clauses (blacklist)** (es; Reg. 1983/84 exclusive purchasing agreements; Reg. 1983/83 exclusive distribution Agreement; Reg. 4087/88 – franchising)
 - **Straitjacket-effect of the BE** – too formalistic and overly detailed

Reg. 1/2003 – moving towards an effects/economic-based approach + “second” generation of BER

- Notification and clearance procedure abolished and replaced by a system of self-assessment.
- The Commission withdrew some block exemptions and reviewed others, retaining some in order to give guidance and greater certainty.
- Agreements within the terms of a BE are valid without specific authorization
- **The BER provides for “safe harbor” for certain types of agreements**
- **Under new BER what is the main issue?** Not whether certain clauses are present or absent, but whether the agreement and certain clauses are likely to promote competition and whether benefit for consumers are higher than potential anticompetitive effects.

THE TYPICAL FORMAT OF SECOND GENERATION OF BLOCK EXEMPTIONS REGULATIONS

- Recitals which explain the policy of the Commission in adopting the regulation in question.
- Confer block regulation upon certain categories of agreements.
- New BERs are setting out «**hard-core restrictions**» that must not be included if an agreement want to enjoy the safe harbour – the all agreement is void – «**blacklist**».
- New BERs are setting out «**Excluded restrictions**» obligations which does not benefit from BE, an individual assessment of the restriction is required, and the BE continue to apply to the remaining parts of the Agreement.
- Market thresholds «*safe harbour*» (es where the parties of the R&D are competing undertakings – BER applies provided that parties at the time entered into agreement their share of the market for the contract products or contract technologies did not exceed 25%).
- Each BER is followed by specific guidelines.
- Conditions for withdraw the exemption.
- Date of validity + process of review.

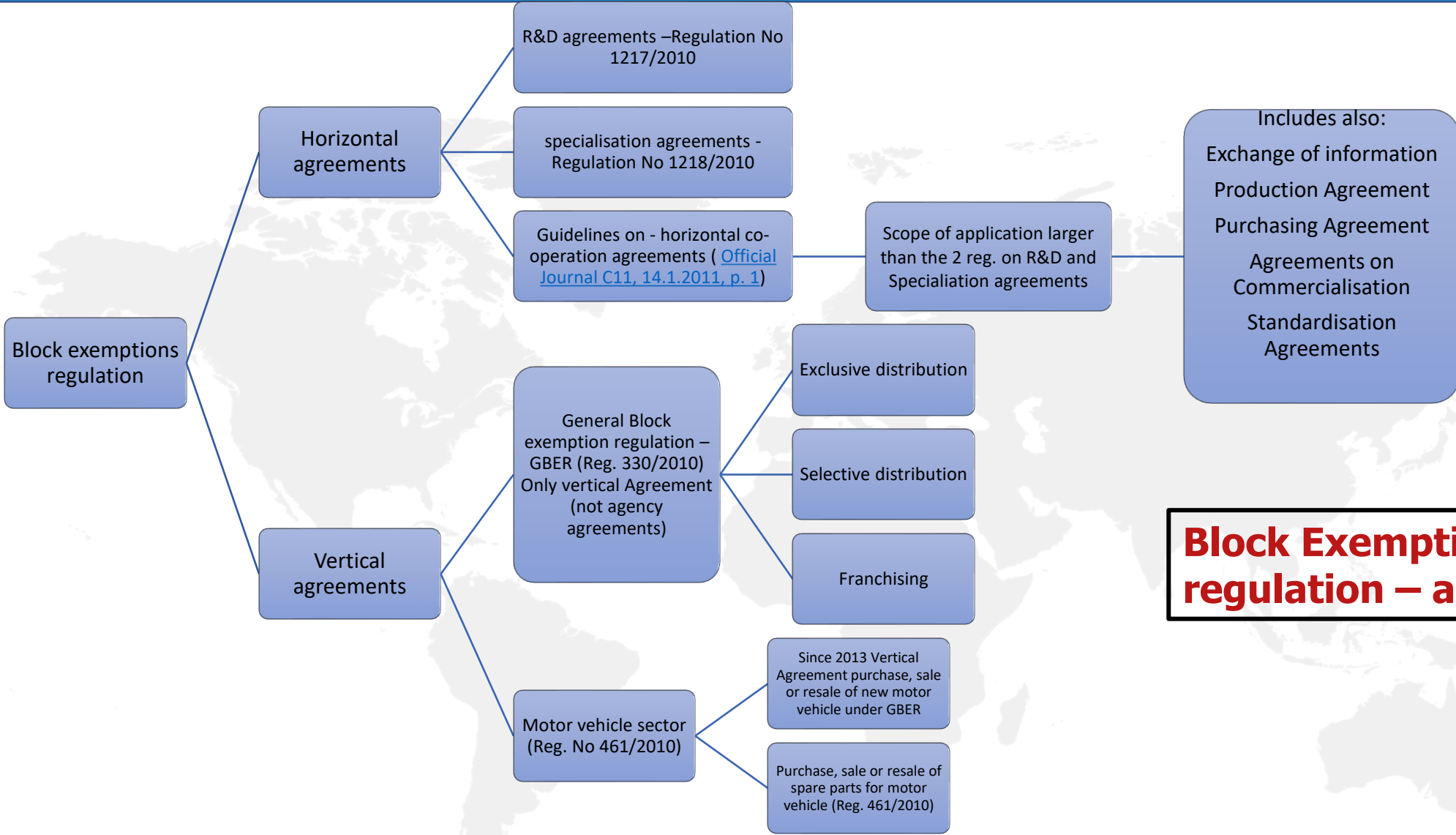
Specific for the R&D BER = conditions for exemption (green list)



To bear in mind:

- Not exempted under “De Minimis notice” ([Official Journal C 291 30.8.2014 p. 1](#)) agreements including “hardcore restrictions” set out in BERs since they are restrictions by object – see ECJ Case C-226/11 *Expedia*, in particular paragraphs 35, 36 and 37
- Provided that agreements do not contain restrictions of competition by object and in particular hardcore restrictions, there is **no presumption** that agreements that fall outside the scope of BER fall within the scope of Article 101(1) of the Treaty or fail to satisfy the conditions of Article 101(3) of the Treaty. **Necessary an individual assessment**
- With reference to the “Hardcore restrictions” Commission will follow 2 presumptions:
 - (a) where a hardcore restriction is included in an agreement, that agreement is likely to fall within the scope of Article 101(1) of the Treaty.
 - (b) an agreement that includes a hardcore restriction is unlikely to fulfil the conditions of Article 101(3) of the Treaty.
- In case of “*hardcore restriction*” included in the agreement an **undertaking may demonstrate pro-competitive effects under Article 101(3) of the Treaty in an individual case**
- **If it is not forbidden, it is permitted** – consequence of stating hard-core restrictions which must not be in the agreement





Block Exemptions regulation – a MAP





EU R&D BLOCK EXEMPTION REGULATION



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THE EU LEGAL FRAMEWORK ON R&D AGREEMENTS

- **Legal framework**
 - Art. 101.1 e 101.3 TFUE
 - **until june 2023** Regulation UE n. 1217/2010 dated 14.12.2010 (Reg. R&D);
 - **Until june 2023** *Guidelines on the applicability of Article 101 TFUE to horizontal co-operation agreements*
- **Position of the Commission**
 - Positive approach – in general R&D agreements enhance competition bringing new and better product, services or technology
 - Negative approach only when the R&D agreement is **a tool to engage in a disguised cartel** (**Siemens/Fanuc** - dec. 18.12.1985, IV/30.739)
- **On 1 March 2022** the Commission published for stakeholder consultation the draft revised block exemption regulations on research and development agreements ('R&D BER')



MOST IMPORTANT CHANGES PROPOSED FOR THE DRAFT REVISED R&D BER

- 1) the draft revised R&D BER proposes to
 - a) **no longer exempt such agreements where less than three competing R&D efforts would remain in addition to and comparable with those of the parties to the R&D agreement. The evaluation showed that the text of the R&D BER is not sufficiently adapted to agreements for the development of new products, technologies and processes and for R&D efforts directed primarily towards a specific aim or objective (so-called ‘R&D poles’).**
 - b) new definitions and clarify the wording of existing ones;
 - c) reorganizing the conditions upon which the exemption is granted to R&D;
 - d) calculate market shares on the basis of the preceding calendar year or the average of the three preceding years depending on the market;
 - e) slightly modify the definition of ‘potential competitors’ to take out the reference to a small but permanent increase in prices.
- 3) **New chapter on horizontal guidelines to help companies to better understanding the way the BER works**



SELF ASSESMENT – STEP 1 – DOES THE AGREEMENT FALL OUTSIDE ART. 101.1 TFUE?

- **The following R&D are unlikely to have an anticompetitive effects and would normally fall outside prohibition of art. 101.1 TFUE**
 - a) R&D agreements related to a cooperation “at an early stage, far removed from the exploitation of possible results
 - b) R&D agreements between non-competitors unless there is a possibility of a foreclosure effect and one of the parties has a significant market power with respect to the relevant technology – analysis in the context of the affected existing markets and in the context of innovation
 - c) The outsourcing of R&D to research institute and academics bodies which are not active in the exploitation of the results



STEP 1 – DOES THE AGREEMENT FALL OUTSIDE ART. 101.1 TFUE?

- d) “pure” R&D agreements that do not extent to joint exploitation of the results – fall within art. 101.1 TFUE only when they appreciably reduce competition in innovation

Clarification in the draft new R&D BER (§88)

*In general, however, R&D cooperation concerning new products or technologies or R&D poles is unlikely to give rise to restrictive effects on competition unless there is **only a limited number of competing R&D efforts** that remains in addition to those of the parties to the R&D cooperation.*

To be clarified probably 3 is the threshold (application by analogy of art. 6.3 of the draft regulation)

Definition of “competing R&D Efforts” art. 1 (19)

- ‘**competing R&D effort**’ means an R&D effort in which a third party engages, alone or in cooperation with other third parties, or in which a third party is able and likely to independently engage, and which concerns:
 - (a) the research and development of the same or likely **substitutable** new products and/or technologies as the ones to be covered by the R&D agreement; **or**
 - (b) R&D poles **pursuing substantially the same aim or objective** as the ones to be covered by the R&D agreement;

These third parties must be independent from the parties to the R&D agreement.



STEP 2 – R&D AGREEMENTS COVERED BY THE BER

New horizontal guidelines (§90)

- The R&D BER covers R&D agreements entered into between two or more parties which relate to the conditions under which those parties pursue:
 - a) **joint R&D** of contract products or contract technologies which includes or excludes joint exploitation of the results of that R&D; or
 - b) **paid-for R&D** of contract products or contract technologies which includes or excludes joint exploitation of the results of that R&D; or
 - c) **joint exploitation of the results of R&D** of contract products or contract technologies carried out pursuant to a prior agreement pursuing joint R&D (as defined in point (a) above) between the same parties; or
 - d) **joint exploitation of the results of R&D** of contract products or contract technologies carried out pursuant to a prior agreement pursuing paid-for R&D (as defined in point (b) above) between the same parties.



STEP 3 – CONDITIONS TO BE MET

New R&D BER split in 3 articles conditions previously set out in art. 3

- 1. full access to the final results** for the purpose of further research and development and for the purpose of exploitation (art. 3)
- 2. Access to pre-existing know-how (art. 4)**

R&D agreements that exclude joint exploitation of the results of joint or paid-for research and development may state that the parties **compensate each other for giving access to their pre-existing know-how. The compensation must not be so high as to effectively impede such access.**

3. Conditions linked to joint exploitation (art. 5)

- Joint exploitation should be limited to R&D results that are protected by IP rights or constitute know-how indispensable for the production of the contract products or the application of the contract technology
- If the parties agree that each of them can distribute the contract products the parties charged with the production of the contract product by way of specialization they must be required to fulfil orders from the other parties.



STEP 3 – CONDITIONS TO BE MET

New art 3: *full access to the final results* for the purpose of further research and development and for the purpose of exploitation.

The full access include **any resulting intellectual property rights and know-how** + shall be granted as soon as the **results of the research and development become available**

- The R&D agreement may state that the parties compensate each other for giving access to the results for the purposes of further research and development or for the purpose of further exploitation, but **the compensation must not be so high as to effectively impede such access.**
- Research institutes, academic bodies and undertakings that supply research and development as a commercial service without normally being active in the exploitation of results, **may agree to confine their use of the results for the purposes of further research.**



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STEP 4 – THRESHOLDS – MARKET SHARES – DURATION

New R&D BER new rules for Thresholds, market shares and duration of exemption (art. 6)

First case – **not competing** undertaking =

1. *the exemption provided by the BER shall apply irrespective of market shares for the duration of the R&D.*

Second case – **competing** undertaking on product or technology =

2. the exemption provided by the BER apply for the duration of the R&D if, at the time the R&D agreement is entered into:

(a) the combined market share of the parties to an R&D agreement involving **joint research and development** excludes or includes joint exploitation of the results, **does not exceed 25 %** on the relevant product and technology markets; or

(b) in case of an R&D agreement involving paid-for research and development 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.



EU R&D BLOCK EXEMPTION REGULATION – STEP 3 – THRESHOLDS – MARKET SHARES

New R&D BER new rules for Thresholds, market shares and duration of exemption (art. 6)

4. For R&D agreements where the results are jointly exploited, the exemption provided by **BER shall continue to apply for seven years from the time the contract products or contract technologies are first put on the market** within the internal market, if the conditions provided for in paragraphs 1, 2 or 3 are satisfied at the time the agreement falling under Article 1 paragraph 1 (1)(a) or (b) is entered into.

5. **After the end of the seven year period referred to in paragraph 4**, the exemption provided for BER shall continue to apply as long as the combined market share of the parties to the R&D agreement **does not exceed 25 %** on the markets to which the contract products or contract technologies belong.

NEW If, **after the end of the seven year period, the market share rises above 25 %** on one of these markets, the exemption provided by BER shall continue to apply for a period of two consecutive calendar years following the year in which the 25 % threshold was first exceeded (gratia period).



STEP 5 – NO HARDCORE RESTRICTIONS

In art 8 are set out the hardcore restrictions that cannot be included in the R&D

- 1) Restriction of the freedom of parties to carry out R&D in field unconnected to the agreement
- 2) Limitation on output or sales with the following exception (restrictions allowed):
 - 1) Setting of production or sales targets in the event of joint exploitation or joint distribution
 - 2) Specialization in the context of exploitation
 - 3) Non competition clause during the period of joint exploitation
- 3) Fixing of prices when selling the contract products or licensing the contract technologies
- 4) **Restriction of the territories** to which or the customers to whom the parties may **passively** sell with the exception of the requirement to exclusively license the results to another party.
- 5) **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 specialization in the context of exploitation.
- 6) **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.
- 7) The requirement to make it difficult for users or resellers to obtain the contract products from other resellers within the internal market.

STEP 6 – NO EXCLUDED RESTRICTIONS

In art 9 are set out 2 **excluded restrictions**

- 1) **An obligation not to challenge the validity of the IP concerned**
 - (i) **after completion of the research and development**, the validity of intellectual property rights, which:
 - (1) the parties hold in the internal market, and
 - (2) are **relevant** to the research and development; or
 - (ii) **after the expiry of the R&D agreement**, the validity of intellectual property rights which:
 - (1) the parties hold in the internal market, and
 - (2) **protect** the results of the research and development.

The possibility to provide for termination of the R&D agreement in the event of one of the parties challenging the validity of the intellectual property rights referred to in (i) and (ii) **shall remain unaffected**

- 2) **An obligation not to grant licenses to third parties to manufacture the contract products or to apply the contract technologies**



Any questions???

Many thanks for your kind attention!

MERCI!

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