

Authority issues draft block exemption communiqué on R&D agreements

December 17 2015 | Contributed by [ELIG, Attorneys-at-Law](#)

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Introduction

The Competition Authority recently issued a draft block exemption communiqué on research and development (R&D) agreements. It updates the existing Block Exemption Communiqué 2003/2 on Research and Development Agreements and sets out revised rules for the block exemption regime that is applicable to R&D agreements in Turkey. Public consultation on the draft communiqué ended on December 7 2015.

The draft communiqué reflects the authority's practice of closely following developments in EU competition law and attempting to retain harmony between EU and Turkish competition law instruments. Accordingly, the draft communiqué largely resembles the EU Regulation 1217/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of R&D agreements.

Draft communiqué

The draft communiqué includes a broader section of definitions than the existing communiqué and provides further clarification regarding terminology for the concerned undertakings. For instance, definitions of 'potential competitor' and 'competing undertaking', have been introduced in the draft communiqué. Similarly, the draft communiqué introduces new concepts such as:

- specialisation in the context of exploitation;
- specialisation in research and development;
- paid-for research and development; and
- financing party.

It thus follows the EU regulation in making a finer distinction between different types of R&D arrangements.

Regarding the restrictions that fall outside the scope of the exemption, the draft communiqué adopts the EU regulation's approach and divides them into:

- hardcore restrictions, which result in the agreement as a whole being unable to benefit from the block exemption; and
- excluded restrictions.

Excluded restrictions

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The existing communiqué does not include a separate excluded restrictions section. Unlike hardcore restrictions, if an R&D agreement includes excluded restrictions, the block exemption may still be applied to the rest of the agreement. In parallel with the EU regulation, excluded restrictions under the draft communiqué include:

- restricting the right to challenge the validity of related IP rights after completion of research and development; and
- restricting the right to grant licences to third parties to manufacture the contract products or to apply the contract technologies where the agreement does not provide for the joint exploitation of R&D results or such exploitation does not take place.

Under Articles 6(b) and 6(g) of the existing communiqué, the above restrictions are considered to be hardcore restrictions.

Hardcore restrictions

The authority has also revised the scope of hardcore restrictions in the draft communiqué in line with the EU regulation. Under Article 8(1)(d) of the draft communiqué, the allocation of customer groups or territories (which is regarded as a hardcore restriction without qualification under Article 6(f) of the existing communiqué) no longer constitutes a hardcore restriction where the R&D agreement includes specialisation in the context of exploitation. In line with Article 5(d) of the EU regulation, the draft communiqué provides that where the agreement includes exclusive licensing, passive sales to certain customers and territories may also be prohibited.

The mutual determination of output and sales levels or restrictions on the ability of the parties to determine their level of output or sales independently are still regarded as hardcore restrictions under Article 8(1)(b) of the draft communiqué. However, in line with the exceptions set out under Article 5(b) of the EU regulation, the following exceptions have been added:

- the establishment of production targets where the joint exploitation of the results includes the joint production of the contract products;
- the establishment of sales targets, where:
 - the R&D operations are carried out by a jointly constituted team, organisation or undertaking or by another jointly appointed third-party undertaking; and
 - the joint exploitation of the results includes the joint distribution of the contract products or joint licensing of the contract technologies;
- practices constituting specialisation in the context of exploitation; and
- the restriction of the freedom of the parties to manufacture, sell, assign or license products or technologies which are in the same relevant product or technology market as the contract products or technologies during the period of joint exploitation of R&D results.

Market share thresholds

Compared to the EU Regulation, the draft communiqué still includes a higher general market share threshold for the block exemption. It permits R&D agreements including the joint exploitation of results between competing undertakings to qualify for the block exemption where the parties' combined market share does not exceed 40% of the relevant market. In the case of paid-for research and development where the same party is the financing party in multiple R&D agreements regarding the same contract products or contract technologies, the 40% market share threshold applies to the combined market share of the financing party and all other relevant parties. R&D agreements including exclusive distribution of contract products remain the exception to the above market share thresholds; the threshold for such agreements remains at 20%.

Comment

The draft communiqué sets out explicit provisions that define the block exemption conditions applicable to R&D agreements in Turkey. The authority's decision to use the EU Regulation on R&D agreements as a point of reference advances its aim of creating harmony between EU and Turkish competition law instruments.

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