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THE EUROPEAN STEEL ASSOCIATION

EUROFER comments to the draft of the Research and Development Block Exemption Regulation

26 April 2022

EUROFER would like to comment on the draft of the R&D Block Exemption Regulation (BER) and note that the introduction of the significantly stricter requirements for the competition in innovation is very critical from our point of view – the reasons are listed below.

Therefore, we suggest that the the relevant provision of Article 6 (3) of the draft of the R&D BER and the related provisions (also in the draft of the Horizontal Guidelines) are deleted without being replaced.

On the draft of the R&D BER:

Stricter conditions for competition in innovation – Article 6 (3) of the draft of the R&D BER (as well as recital 17, Article 1 (1) lit 18, Article 1 (1) lit 19 and Article 7 (2) of the draft of the R&D BER):

We consider the provision of Article 6 (3) of the draft of the R&D BER regarding competition in innovation, which states that "*where two or more of the parties to the R&D agreement are undertakings competing in innovation, the exemption* […] *shall apply for the duration of the research and development if, at the time the R&D agreement is entered into, there are three or more competing R&D efforts in addition to and comparable to those of the parties to the R&D agreement*", to be particularly problematic.

Recital 17 of the draft of the R&D BER demonstrates that even more clearly as it says that "**it is necessary** to exclude research and development agreements from the block exemption where there would remain **less than three competing R&D efforts in addition to and comparable with** those of the parties to the R&D agreement."

This provision raises a number of problems:

1. On the one hand, there is the danger that **many cooperations** (especially in areas where there are less than 4 or 5 competitors) **won't be carried out anymore**. However, also in an area where there are only a few competitors, new technologies (especially against the background of environmental protection, climate friendliness…) may not be affordable for a single company or require investments that it cannot bear alone. Nevertheless, even in case there are only a few competitors in a market, it will eventually be more favourable for the consumer if competitors (e.g. 2 out of 3 competitors) enter into a cooperation and develop a new technology from which the consumers benefit as if the competitors refrain from the research and development of the new technology at all due to lack of sole technical or economic feasibility. The proposed provision ultimately requires that there are at least 5 competitors in the relevant market – this won't be the case in some areas. Thus, meaningful

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and pro-competitive research and development cooperations in these markets would be completely excluded from benefitting of the new R&D BER. (There would only be the possibility of an individual exemption under Article 101 (3) TFEU. However, this provision is associated with great uncertainties and a huge risk and therefore not desirable).

2. On the other hand, it can be assumed that many companies refrain from pro-competitive cooperations for fear of violating this new article. Hence, the European market would lose its innovative incentives and there is the great risk that the European market will be out-competed by other less restrictive markets.

3. Moreover, the proposal is an insurmountable obstacle for the companies, as it requires the companies to find out which of its competitors is engaged in R&D efforts in addition to (therefore independent) and comparable with those of the parties to the R&D agreement OR is able and likely to independently engage in such efforts.

a. Here questions arise as to whether this can be found out whilst not violating the restrictions imposed by applicable competition law.

b. As regards the eventuality OR "*able and likely to independently engage*": to answer this question, a competitor would actually need internal, secret knowledge about the strategy and the future orientation of its competitor and then the competitors would also be burdened with providing a probability assessment.

Above all, there are also secrecy interests and obligation (e.g. from non-disclosure agreements) which contradict to or prohibit such disclosure so that from a practical point of view it will be difficult to find out whether and which competitors are working on similar developments (or in the language of the draft of the R&D BER: the same or likely substitutable new products and/or technologies).

Please note that there are also major secrecy interests against the background of patent protection (infringement of novelty status and therefore preventing from patenting one's innovation)!

- Article 7 (2) of the draft of the R&D BER states that for the purposes of applying the threshold provided for in Article 6 (3) – which can only be the threshold of at least 3 comparable competing R&D efforts – reliable information must be used for its assessment and states the following:
- Size, stage and timing of the R&D efforts,
- Third parties' (access to) financial and human resources, their intellectual property, know-how or other specialized assets, their previous R&D efforts and
- Third parties' capability and likelihood to exploit directly or indirectly possible results of their R&D efforts on the internal market.

This is **almost exclusively strategically important secret information that constitutes the competitive advantage and is therefore not publicly known!** An exchange of such information would also violate applicable competition law.

4. Even if it were possible for a company to obtain the necessary information without infringing the applicable competition law in order to carry out the respective R&D cooperation without infringing the suggested provision, the exemption under Article 2 would only apply for the duration of the research and development and not, as has been customary for a longer period (e.g. in case of agreements between competitors depending on the market shares). However, the cooperating companies should be given the opportunity to jointly exploit their research results as before if certain market share thresholds are observed.

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5. Finally, the question arises as to what is meant by comparable competing R&D efforts. The use of this term, which has not been explained further so far, also increases legal uncertainty. The phrasing "*…likely substitutable new products and/or technologies*" also does not contribute to legal certainty. In practice, it will be difficult to evaluate whether any research of a competitor is likely substitutable or in the sense of Article 1 (1) lit 18 b) if one pursues substantially the same aim or objective.

For the above-mentioned reasons, it is therefore suggested that the provision of Article 6 (3) of the draft of the R&D BER and the associated provisions (also in the draft of the Horizontal Guidelines) are deleted without being replaced.

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