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Memorandum

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To	European Commission, DG Competition, Brussels
From	Commeo LLP, Frankfurt, Germany
Date	5 February 2020
Re	**Remarks on the review of Regulation 1217/2010 ("R&D BER")**

Commeo LLP is a boutique law firm based in Frankfurt, Germany specialized on giving advice on all aspects of German and EU competition law. Commeo has particular expertise in assisting companies in their assessment of potential restrictions in vertical and horizontal agreements. We therefore welcome the opportunity to comment on the possible reform of the horizontal block exemption regulations. With the exception of some general remarks in section 1 below, our observations and comments in this paper are limited on the possible reform of Regulation 1217/2010 ("R&D BER"). As a consequence, all legal references to Articles made in this paper relate to the Articles of the R&D BER, unless specifically marked otherwise.

1. Practical importance of Block Exemption Regulations

(1) The concept of a Block Exemption Regulation ("BER") for certain types of agreements has significant value to companies and should not be abandoned: it provides (i) increased legal certainty compared to a situation of a direct application of Art. 101 TFEU and (ii) ensures the homogeneous application of the exemption requirements of Art. 101 (3) TFEU throughout the EU.

(2) While the direct application of Art. 101 (3) TFEU is based on a self-assessment subject to review by the national competition authorities and courts and, ultimately, the European Court of Justice, the European Commission – within the realm of the empowering legislation – has sole and exclusive authority to issue block exemptions, (Art. 103 TFEU, Regulation 19/65/EEC) and thereby determine which type of agreements should be automatically exempt from Art. 101 (1) TFEU. The Commission ensures in regular reviews and consultations that the framework remains in tune with market requirements. Given the supra-national effects of many R&D agreements and their key role in fostering innovation, the loss of a BER for such type of agreements

risks the loss of an essential common denominator for unified assessment and enforcement standards in all Member States.

(3) R&D as well as specialization agreements as defined in the respective BERs are the only horizontal cooperation agreements that can benefit from an automatic exemption from Art. 101 (1) TFEU, provided that the exemption requirements stated in the relevant BER are met. In practice this entails a significant advantage for companies entering into such agreements as it enhances legal certainty. A company does not have to demonstrate on an individual basis that each of the exemption criteria of Art. 101 (3) TFEU is met for the respective agreement. It only needs to show that the application requirements of the relevant BER are satisfied. The requirements of such BERs are directly applicable in EU Member States and prevent that differing enforcement activities of national competition authorities water down essential common principles and create uncertainty. This applies in particular for restrictive agreements that are rarely dealt with by national enforcers, let alone are subject to fining decisions or other publicly available precedents. R&D agreements are almost exclusively drafted, applied and reviewed following a self-assessment and – if conflicts arise – disputed in arbitration. Still, the enforceability of such contracts *inter partes* is of utmost relevance for the respective companies. Uncertainties as to the validity of crucial contract provisions also beyond a formal dispute, such as in particular limitations on the access to results, might well lead to giving up the idea of entering into such pro-competitive agreements in the first place.

2. Conceptual issue: Positive exemption criteria in Art. 3 paired with wide notion of R&D agreements covered by the R&D BER

(4) The R&D BER covers six types of R&D agreements:

(i) and (ii)	joint R&D with and without joint exploitation of the results;
(iii)	joint exploitation of results gained by the same parties in prior joint R&D;
(iv) and (v)	paid-for R&D with or without joint exploitation of the results;
(vi)	joint exploitation of results gained by the same parties in a prior paid-for R&D agreement.

(5) Joint exploitation of the results is not a requirement for an R&D agreement to fall within the scope of the R&D BER. However, the practical relevance of the R&D BER for pure R&D agreements is very limited. This is due to the wide notion of "joint exploitation" (Art. 1 (1) (g) and Art. 1 (1) (o)) that covers any form of internal or external use or commercialization of the results, be it in the form of production, distribution, licensing, assignments of IPRs or communication of know-how (Art. 1 (1) (g)). The definition also includes "specialization during exploitation" (Art. 1 (1)

(m) (iii) in connection with Art. 1 (1) (o)). As a consequence, "joint exploitation" is already given when one or more parties is/are no longer free to use and/or commercialize the results, even if there is no element of active collaboration or genuinely joint market activities. Or in other words: All R&D agreements which limit access to or use of the results for one or more parties are agreements involving "joint exploitation" as defined by the R&D BER.

(6) In light of the wide notion of "R&D agreement" paired with the even wider notion of "joint exploitation", there is only a very limited room to argue that collaborative R&D activities fall outside the scope of the R&D BER. This is not a problem as such – see for example the wide notion of the Vertical BER ("VBER") – but becomes a very relevant practical issue in light of Art. 3 R&D BER: Different from other BERs, the R&D BER provides for positive exemption requirements. An R&D agreement not fulfilling these requirements cannot benefit from the block exemption, even though the Commission stresses that it might still be non-restrictive (and thus fall outside of Art. 101 (1) TFEU) or qualify for an individual exemption under Art. 101 (3) TFEU.

(7) One practical flaw of the R&D BER is, however, that there is no reliable guidance as to when agreements that are non-compliant with Art. 3 are indeed eligible for an individual exemption. The scarce hints in the Horizontal Guidelines (i) cannot be brought in line with exemption mechanism of the R&D BER and (ii) lack sufficient legal certainty as they are only binding for the Commission, but not for national competition authorities and courts.

(8) In para. 140 of the Horizontal Guidelines, the Commission states:

„*Agreements may also fall outside the R&D Block Exemption Regulation irrespective of the parties' market power. This applies for instance to agreements which unduly restrict access of a party to the results of the R&D co-operation [Art- 3(2)]. The R&D Block Exemption Regulation provides for a specific exception to this general rule in the case of academic bodies, research institutes or specialised companies which provide R&D as a service and which are not active in the industrial exploitation of the results of R&D [Art. 3(2)]. Nevertheless, agreements falling outside the R&D Block Exemption Regulation and containing exclusive access rights for the purposes of exploitation may, where they fall under Article 101(1), fulfil the criteria of Article 101(3), particularly where exclusive access rights are economically indispensable in view of the market, risks and scale of the investment required to exploit the results of the research and development*."

(9) This paragraph is unfortunately of little practical relevance: Unlimited exclusive access rights are not only failing to meet the requirements of Art. 3 (2), but likely result

in hardcore restrictions, namely Art. 5 (a) second alternative, for restriction of further R&D by failing to provide access to results after the end of the research phase, and Art. 5 (b), for failing to meet the criteria for specialization under Art. 5 (b) (iii) when not providing for any access after expiration of the specialization period. R&D agreements including hardcore restrictions are eligible for an individual exemption only in exceptional circumstances. The parties will typically fail to prove that such restrictions are indispensable[1] for the cooperation. The hurdle to demonstrate that a less restrictive provision would not have been equally appropriate in this type of agreement is very high.

(10) This is a particular dilemma as the R&D BER (i) includes paid-for research and (ii) does not make a distinction between R&D agreements between competitors or non-competitors. All R&D agreements falling under the wide definition of the R&D BER have to meet the requirements in Art. 3 in order to directly benefit from a block exemption.

(11) The wide scope of the R&D BER can thus not be praised without taking into account the consequences following from the complex exemption requirements in Art. 3. These requirements quite simply lead to the fact that unless competition law experts are asked to assist with the drafting of an R&D agreement, such agreement is almost inevitably incompatible with Regulation 1217/2010 for failing to meet the positive exemption criteria. There is just no intuitive way to "get it right". Practical experience rather shows: The provisions in Art. 3 are outright counter intuitive to paid-for research agreements and typically not required for R&D agreements between non-competitors without market power in order to prevent negative effects on competition.

(12) Art. 3 (2) solves this dilemma insufficiently, by providing for exceptions or limitations of the principle of unlimited access to the end results only in the following circumstances:

- rights of exploitation might be limited according to the rights of specialization as set out in the R&D BER;
- rights of companies that supply R&D as a commercial service without normally being active in the exploitation of results might be limited to using the results solely for purposes of further research;
- access to the R&D results, be it for purposes of further R&D or exploitation must not be granted free of charge, but can be royalty bearing.

(13) All of these exemptions/limitations trigger significant practical challenges:

[1] Horizontal Guidelines, para 142.

(i) Limitations on access rights according to the rights of specialization in the context of exploitation are only possible for the duration of the exemption according to Art. 4. This means that absent the protection of the R&D BER due to an expiration of the specialization period because of time and/or market shares, the general principle of unlimited access to R&D results has to be resumed, unless the parties can demonstrate that continued restrictions are either not covered by Art. 101 (1) TFEU or benefit from an individual exemption under Art. 101 (3) TFEU. As it is generally not foreseeable where market shares might end up after seven years from first bringing a product to market, in practice contracts have to foresee a provision positively outlining access provisions at the end of the specialization period in order for the restricting party not to risk non-compliance with Art. 3 (2) and potentially lose even the limited exclusivity that is covered by the R&D BER. Furthermore, the wording of Regulation 1217/2010 stipulates that if specialization in commercialization entails that only one party exploits the results it needs to do so "*on the basis of an exclusive license granted by the other party*" (Art. 1 (1) (o)). All this means: Exclusive access to the results, as it would for example follow from the allocation of ownership of resulting IP rights to just one party without any further contract provision on access by the other, does simply not qualify for "*specialization in the context of exploitation*" as defined by Regulation 1217/2010 and hence not for an exemption under Art. 5 (b) (iii).

(ii) The possibility to limit access to R&D results solely for purposes of further R&D (Art. 3 (2), third sentence) is of limited relevance. This is due to the fact that universities or research organizations are (against the assumption of the BER) in fact typically commercially active in the exploitation of IPRs gained by R&D by licensing them out to third parties (and might even be required to do so by national law as it is for example the case due to the German Hochschulgesetz). In other words: Many research bodies are simply not covered by the exemption, as they are active in licensing which is in fact one form of exploitation, as defined in Art. 1 (1) (g). An important exemption to Art. 3 therefore often fails to apply.

(iii) The clarification added in Art. 3 (2), last sentence, that access to R&D results for either R&D or exploitation does not have to be granted free of charge, provided that compensation is not so high as to effectively impede access triggers significant problems. The wording of Regulation 1217/2010 suggests, that an appropriate royalty level has to be determined on a case-by-case basis, i.e. by taking the financial possibilities of the actual contract partner into account. Smaller R&D partners might hence be able to claim access to R&D results below their actual market value. This might prevent companies from choosing them as R&D partners in the first place.

(14) In summary, in order to fix the current conceptual problems of the R&D BER, the following points might be worth contemplating:

- Exclusion of paid-for research agreements from the scope of the R&D BER. These type of agreements can be dealt with easily under the general framework of Art. 101 (1) and (3) as well as Art. 102 TFEU. Most of them are not restrictive of competition in the first place. However, the R&D BER somehow puts them in a straight-jacket not tailored to the commercial and competitive realities of such agreements.
- Abandoning the positive exemption criteria in Art. 3 in lieu of a split set of hardcore restrictions distinguishing R&D agreements between competitors from agreements between non-competitors (as can be found in the TTBER). Such a step would provide clear guidance to companies on where not only the Commission, but also the courts and national enforcers would have to respect a safe harbor unless the BER was withdrawn. Different from applying the VBER or the TTBER, the wide notion of the R&D BER in combination with the positive application requirement in fact creates a great deal of uncertainty for many agreements that are unlikely to be restrictive of competition in the first place.

3. Selected issues in individual provisions of the R&D BER:

3.1 Art. 5 (a)

(15) Paid-for research should be eliminated from this hard-core restriction. For the reasons set out above, the access rights in Art. 3 (2) do not fit paid-for research agreements (as well as many agreements between non-competitors). Sentence 1 of Art. 3 (2) requires companies to grant full access to results to the R&D for purposes of further R&D. This access needs to be granted as soon as the result becomes available, i.e. generally at a time where the R&D phase on an agreement is over and the commercialization phase just begins. Art. 5 (a) further secures this access by prohibiting all restrictions on R&D partners to enter into further research in the field alone or with third parties once the development phase is over (Art. 5 (b), 2nd alternative). It does not reflect the commercial realities between the parties in a paid-for research agreement to allow a fully compensated party further access to transferred IP rights beyond the scope of the research privilege as it is reflected in national IP law (i.e. para. 11 *PatentG* corresponding to Art. 27 b Agreement relating to Community Patents of 1989 – not yet in force). For the reasons set out above, the fact that such access does not have to be granted free of charge cannot compensate the chilling effect on competition caused by not selecting a research partner in the first place to eliminate the risk that results might be used by such research partner straight away

for competing research activities with competitors. In particular in areas where IP rights "only" result in know-how, the risk of losing the pro-competitive benefits of a paid-for research result via the provisions in Art. 3 (2) and Art. 5 (a) are immense.

3.2 Art. 5 (b) (ii) and Art. 5 (c) – Limitations of output or sales and price fixing

(16) The exceptions to the prohibition of limitations of output or sales and price fixing should comprise all forms of joint exploitation and should not leave out variation Art. 1 (1) (m) (iii) in scenarios in which exploitation collaboration entails the commercialization of complementary components sold by individual R&D partners. It is difficult to understand why complementary products resulting from an R&D collaboration could be limited in output or be price fixed if sold by a joint team or organisation, but not if they are sold individually by the parties that have produced them by way of specialization and now intend to commercialize them in the same way (i.e. one party selling element A and the other party selling element B of a joint product).

3.3 Art. 5 (d)-(g) – Resale/licensing restrictions

(17) The hardcore restrictions in Art. 5 (d-g) should be streamlined and brought in line with the general concept applied in the TTBER and VBER. Making resale restrictions a hardcore restriction as such and only allow limited exemptions (that may well deviate for agreements between competitors and agreements between non-competitors as it is foreseen in the TTBER) would harmonize the concept between all BERs and facilitate their application. It would furthermore make Art. 5 (f) and (g) redundant.

4. Summary

(18) Commeo strongly advocates for holding on to a BER for R&D agreements and not to replace the current framework by mere guidelines. However, we respectfully propose that the Commission contemplates to implement certain changes to a future BER to ensure that a revised framework corrects provisions that currently undermine the practical application of the R&D BER and hence its purpose to provide a safe harbour for pro-competitive R&D collaborations.

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for
Commeo LLP **Frankfurt, February 5, 2020**