Review of the R&D Block Exemption Regulation

Summary of the stakeholder workshop of 13 September 2022 on Research and Development agreements (competition in innovation)

This document summarises the feedback provided by stakeholders during the workshop. It does not represent the position of the European Commission or its services.

On 13 September 2022, the European Commission ('Commission') organised a workshop in the context of the review of Commission Regulation (EU) No 1217/2010 (Research & Development Block Exemption Regulation – 'R&D BER') and the R&D chapter of the Commission Guidelines on horizontal cooperation agreements ('Horizontal Guidelines'). The workshop was announced on DG Competition's website, and stakeholders with knowledge or experience of applying the R&D BER and Horizontal Guidelines were invited to participate. In addition, invitations were sent to stakeholders that had provided feedback to the Commission's public consultation on the draft revised R&D BER and Horizontal Guidelines conducted between 1 March 2022 and 26 April 2022.

The feedback to the public consultation in relation to R&D agreements mainly concerned the new test proposed by the Commission for block-exempting R&D agreements between undertakings that compete in innovation (Article 6(3) of the draft revised R&D BER). According to this proposed test, such agreements would only be block-exempted in cases where there remain at least three other independent comparable R&D efforts (the '3+ test').

In the light of this feedback, the workshop focused on the draft revised rules for so-called 'pre-market' R&D agreements, namely R&D agreements between undertakings competing in innovation, in scenarios where it is not possible to calculate market shares. 33 participants attended the workshop. They represented 11 law firms, 7 companies and 7 associations.

The workshop participants were presented with six questions to guide the discussion: (1) on the basis of a practical example of a hypothetical pre-market R&D agreement, participants were asked under what conditions R&D agreements that restrict competition within the meaning of Article 101(1) TFEU should be block-exempted (emphasising that the Commission must have sufficient certainty that a category of agreements generally meets the conditions of Article 101(3) TFEU in order to block-exempt); (2) exploring the potential to narrow the scope of the 3+ test for pre-market R&D agreements (set out in Article 6(3) of the draft revised R&D BER), consisting in changing the definition of "undertakings competing in innovation" (which refers to the parties to the R&D agreement); (3) exploring ways of making the 3+ test easier to apply, consisting in changing the definition of "competing R&D efforts" (which refers to third parties); (4) exploring the assessment of the comparability of competing R&D efforts, set out in Article 7 (2) of the draft revised R&D BER; (5) exploring what information is available to companies to enable them to conduct the comparability assessment, and (6) exploring possible alternatives to the Commission's proposed 3+ test.

Participants were divided into four groups, each containing representatives of law firms, companies and associations. Each group discussed four of the above questions in two separate sessions, led by a moderator.

According to several participants (mainly companies and law firms), pre-market R&D agreements are generally unlikely to raise antitrust concerns. On the one hand, these agreements

are unlikely to create an appreciable restriction of competition, since there is too much uncertainty about the outcome of R&D projects, and the actual outcome of R&D projects can be quite different from the parties' initial objective. And on the other hand, the efficiencies resulting from such collaborations generally outweigh any possible restriction.

Participants from all categories said that the Commission's proposed 3+ test for block-exempting pre-market R&D agreements is not workable, as companies do not have sufficient knowledge about their rivals' R&D activities, in particular in industries where R&D activities are not structured. Participants therefore considered that the 3+ test would create legal uncertainty and increase the complexity of understanding, explaining and implementing the R&D BER. Regarding the possibility of narrowing the scope of the 3+ test (for example, applying it only in cases where the parties to the R&D agreement were already actively engaged in comparable R&D projects at the time they entered into their agreement), most participants from all categories considered that this would still not address the problems of complexity and uncertainty that the new test would create.

With regard to the assessment of the comparability of competing R&D efforts of third parties, companies and law firms indicated that collecting the information necessary to conduct such an assessment presents significant challenges, as this information is generally highly confidential. This information might be easy to collect in some sectors, e.g. in pharma where patent applications provide indications about competing R&D efforts, but not in all sectors.

In conclusion, participants from all categories suggested that a more appropriate solution to address any antitrust concerns raised by pre-market R&D agreements would be for the Commission to withdraw the benefit of the block exemption, as foreseen by Articles 10 and 11 of the draft revised R&D BER.

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