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COMMISSION REGULATION (EEC) No 418/85

of 19 December 1984

on the application of Article 85 (3) of the Treaty to categories of research and development agreements

(OJ L 53, 22.2.1985, p. 5)

Amended by:

		Official Journal		
		No	page	date
►**M1**	Commission Regulation (EEC) No 151/93 of 23 December 1992	L 21	8	29.1.1993

Amended by:

►**A1**	Act of Accession of Spain and Portugal	L 302	23	15.11.1985
►**A2**	Act of Accession of Austria, Sweden and Finland	C 241	21	29.8.1994
	(adapted by Council Decision 95/1/EC, Euratom, ECSC)	L 1	1	1.1.1995

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COMMISSION REGULATION (EEC) No 418/85

of 19 December 1984

on the application of Article 85 (3) of the Treaty to categories of research and development agreements

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 85 (3) of the Treaty to categories of agreements, decisions and concerted practices [1], as last amended by the Act of Accession of Greece, and in particular Article 1 thereof,

Having published a draft of this Regulation [2],

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation (EEC) No 2821/71 empowers the Commission to apply Article 85 (3) of the Treaty by Regulation to certain categories of agreements, decisions and concerted practices falling within the scope of Article 85 (1) which have as their object the research and development of products or processes up to the stage of industrial application, and exploitation of the results, including provisions regarding industrial property rights and confidential technical knowledge.

(2) As stated in the Commission's 1968 notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises [3], agreements on the joint execution of research work or the joint development of the results of the research, up to but not including the stage of industrial application, generally do not fall within the scope of Article 85 (1) of the Treaty. In certain circumstances, however, such as where the parties agree not to carry out other research and development in the same field, thereby forgoing the opportunity of gaining competitive advantages over the other parties, such agreements may fall within Article 85 (1) and should therefore not be excluded from this Regulation.

(3) Agreements providing for both joint research and development and joint exploitation of the results may fall within Article 85 (1) because the parties jointly determine how the products developed are manufactured or the processes developed are applied or how related intellectual property rights or know-how are exploited.

(4) Cooperation in research and development and in the exploitation of the results generally promotes technical and economic progress by increasing the dissemination of technical knowledge between the parties and avoiding duplication of research and development work, by stimulating new advances through the exchange of complementary technical knowledge, and by rationalizing the manufacture of the products or application of the processes arising out of the research and development. These aims can be achieved only where the research and development programme and its objectives are clearly defined and each of the parties is given the opportunity of exploiting any of the results of the programme that interest it; where universities or research institutes participate and are not interested in the industrial

[1] OJ No L 285, 29. 12. 1971, p. 46.
[2] OJ No C 16, 21. 1. 1984, p. 3.
[3] OJ No C 75, 29. 7. 1968, p. 3, corrected by OJ No C 84, 28. 8. 1968, p. 14.

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exploitation of the results, however, it may be agreed that they may use the said results solely for the purpose of further research.

(5) Consumers can generally be expected to benefit from the increased volume and effectiveness of research and development through the introduction of new or improved products or services or the reduction of prices brought about by new or improved processes.

(6) This Regulation must specify the restrictions of competition which may be included in the exempted agreements. The purpose of the permitted restrictions is to concentrate the research activities of the parties in order to improve their chances of success, and to facilitate the introduction of new products and services onto the market. These restrictions are generally necessary to secure the desired benefits for the parties and consumers.

(7) The joint exploitation of results can be considered as the natural consequence of joint research and development. It can take different forms ranging from manufacture to the exploitation of intellectual property rights or know-how that substantially contributes to technical or economic progress. In order to attain the benefits and objectives described above and to justify the restrictions of competition which are exempted, the joint exploitation must relate to products or processes for which the use of the results of the research and development is decisive. Joint exploitation is not therefore justified where it relates to improvements which were not made within the framework of a joint research and development programme but under an agreement having some other principal objective, such as the licensing of intellectual property rights, joint manufacture or specialization, and merely containing ancillary provisions on joint research and development.

(8) The exemption granted under the Regulation must be limited to agreements which do not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. In order to guarantee that several independent poles of research can exist in the common market in any economic sector, it is necessary to exclude from the block exemption agreements between competitors whose combined share of the market for products capable of being improved or replaced by the results of the research and development exceeds a certain level at the time the agreement is entered into.

(9) In order to guarantee the maintenance of effective competition during joint exploitation of the results, it is necessary to provide that the block exemption will cease to apply if the parties' combined shares of the market for the products arising out of the joint research and development become too great. However, it should be provided that the exemption will continue to apply, irrespective of the parties' market shares, for a certain period after the commencement of joint exploitation, so as to await stabilization of their market shares, particularly after the introduction of an entirely new product, and to guarantee a minimum period of return on the generally substantial investments involved.

(10) Agreements between undertakings which do not fulfil the market share conditions laid down in the Regulation may, in appropriate cases, be granted an exemption by individual decision, which will in particular take account of world competition and the particular circumstances prevailing in the manufacture of high technology products.

(11) It is desirable to list in the Regulation a number of obligations that are commonly found in research and development agreements but that are normally not restrictive of competition and to provide that, in the event that, because of the particular economic or legal circumstances, they should fall within Article 85 (1), they also would be covered by the exemption. This list is not exhaustive.

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(12) The Regulation must specify what provisions may not be included in agreements if these are to benefit from the block exemption by virtue of the fact that such provisions are restrictions falling within Article 85 (1) for which there can be no general presumption that they will lead to the positive effects required by Article 85 (3).

(13) Agreements which are not automatically covered by the exemption because they include provisions that are not expressly exempted by the Regulation and are not expressly excluded from exemption are none the less capable of benefiting from the general presumption of compatibility with Article 85 (3) on which the block exemption is based. It will be possible for the Commission rapidly to establish whether this is the case for a particular agreement. Such an agreement should therefore be deemed to be covered by the exemption provided for in this Regulation where it is notified to the Commission and the Commission does not oppose the application of the exemption within a specified period of time.

(14) Agreements covered by this Regulation may also take advantage of provisions contained in other block exemption Regulations of the Commission, and in particular Regulation (EEC) No 417/85 ([1]) on specialization agreements, Regulation (EEC) No 1983/83 ([2]) on exclusive distribution agreements, Regulation (EEC) No 1984/83 ([3]), on exclusive purchasing agreements and Regulation (EEC) No 2349/84 ([4]) on patent licensing agreements, if they fulfil the conditions set out in these Regulations. The provisions of the aforementioned Regulations are, however, not applicable in so far as this Regulation contains specific rules.

(15) If individual agreements exempted by this Regulation nevertheless have effects which are incompatible with Article 85 (3), the Commission may withdraw the benefit of the block exemption.

(16) The Regulation should apply with retroactive effect to agreements in existence when the Regulation comes into force where such agreements already fulfil its conditions or are modified to do so. The benefit of these provisions may not be claimed in actions pending at the date of entry into force of this Regulation, nor may it be relied on as grounds for claims for damages against third parties.

(17) Since research and development cooperation agreements are often of a long-term nature, especially where the cooperation extends to the exploitation of the results, it is appropriate to fix the period of validity of the Regulation at 13 years. If the circumstances on the basis of which the Regulation was adopted should change significantly within this period, the Commission will make the necessary amendments.

(18) Agreements which are automatically exempted pursuant to this Regulation need not be notified. Undertakings may nevertheless in a particular case request a decision pursuant to Council Regulation No 17 ([5]), as last amended by the Act of Accession of Greece,

HAS ADOPTED THIS REGULATION:

Article 1

1. Pursuant to Article 85 (3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 85 (1) of the

([1]) OJ No L 53, 22. 2. 1985, p. 1.
([2]) OJ No L 173, 30. 6. 1983, p. 1.
([3]) OJ No L 173, 30. 6. 1983, p. 5.
([4]) OJ No L 219, 16. 8. 1984, p. 15.
([5]) OJ No 13, 21. 2. 1962, p. 204/62.

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Treaty shall not apply to agreements entered into between undertakings for the purpose of:

(a) joint research and development of products or processes and joint exploitation of the results of that research and development;

(b) joint exploitation of the results of research and development of products or processes jointly carried out pursuant to a prior agreement between the same undertakings; or

(c) joint research and development of products or processes excluding joint exploitation of the results, in so far as such agreements fall within the scope of Article 85 (1).

2. For the purposes of this Regulation:

(a) *research and development of products or processes* means the acquisition of technical knowledge and the carrying out of theoretical analysis, systematic study or experimentation, including experimental production, technical testing of products or processes, the establishment of the necessary facilities and the obtaining of intellectual property rights for the results;

(b) *contract processes* means processes arising out of the research and development;

(c) *contract products* means products or services arising out of the research and development or manufactured or provided applying the contract processes;

(d) *exploitation of the results* means the manufacture of the contract products or the application of the contract processes or the assignment or licensing of intellectual property rights or the communication of know-how required for such manufacture or application;

(e) *technical knowledge* means technical knowledge which is either protected by an intellectual property right or is secret (know-how).

3. Research and development of the exploitation of the results are carried out *jointly* where:

(a) the work involved is:

— carried out by a joint team, organization or undertaking,

— jointly entrusted to a third party, or

— allocated between the parties by way of specialization in research, development or production;

(b) the parties collaborate in any way in the assignment or the licensing of intellectual property rights or the communication of know-how, within the meaning of paragraph 2 (d), to third parties.

Article 2

The exemption provided for in Article 1 shall apply on condition that:

(a) the joint research and development work is carried out within the framework of a programme defining the objectives of the work and the field in which it is to be carried out;

(b) all the parties have access to the results of the work;

(c) where the agreement provides only for joint research and development, each party is free to exploit the results of the joint research and development and any pre-existing technical knowledge necessary therefore independently;

(d) the joint exploitation relates only to results which are protected by intellectual property rights or constitute know-how which substantially contributes to technical or economic progress and that the results are decisive for the manufacture of the contract products or the application of the contract processes;

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(f) undertakings charged with manufacture by way of specialization in production are required to fulfil orders for supplies from all the parties.

Article 3

1. Where the parties are not competing manufacturers of products capable of being improved or replaced by the contract products, the exemption provided for in Article 1 shall apply for the duration of the research and development programme and, where the results are jointly exploited, for five years from the time the contract products are first put on the market within the common market.

2. Where two or more of the parties are competing manufacturers within the meaning of paragraph 1, the exemption provided for in Article 1 shall apply for the period specified in paragraph 1 only if, at the time the agreement is entered into, the parties' combined production of the products capable of being improved or replaced by the contract products does not exceed 20 % of the market for such products in the common market or a substantial part thereof.

3. After the end of the period referred to in paragraph 1, the exemption provided for in Article 1 shall continue to apply as long as the production of the contract products together with the parties' combined production of other products which are considered by users to be equivalent in view of their characteristics, price and intended use does not exceed 20 % of the total market for such products in the common market or a substantial part thereof. Where contract products are components used by the parties of the manufacture of other products, reference shall be made to the markets for such of those latter products for which the components represent a significant part.

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3a. Where one of the parties, a joint undertaking, a third undertaking or more than one joint undertaking or third undertaking are entrusted with the distribution of the products which are the subject of the agreement under Article 4 (1) (fa), (fb) or (fc), the exemption provided for in Article 1 shall apply only if the parties production of the products referred to in paragraphs 2 and 3 does not exceed 10 % of the market for all such products in the common market or a substantial part thereof.

4. The exemption provided for in Article 1 shall continue to apply where the market shares referred to in paragraphs 3 and 4 are exceeded during any period of two consecutive financial years by not more than one-tenth.

5. Where the limits laid down in paragraph 5 are also exceeded, the exemption provided for in Article 1 shall continue to apply for a period of six months following the end of the financial year during which they were exceeded.

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Article 4

1. The exemption provided for in Article 1 shall also apply to the following restrictions of competition imposed on the parties:

(a) an obligation not to carry out independently research and development in the field to which the programme relates or in a closely connected field during the execution of the programme;

(b) an obligation not to enter into agreements with third parties on research and development in the field to which the programme relates or in a closely connected field during the execution of the programme;

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(c) an obligation to procure the contract products exclusively from parties, joint organizations or undertakings or third parties, jointly charged with their manufacture;

(d) an obligation not to manufacture the contract products or apply the contract processes in territories reserved for other parties;

(e) an obligation to restrict the manufacture of the contract products or application of the contract processes to one or more technical fields of application, except where two or more of the parties are competitors within the meaning of Article 3 at the time the agreement is entered into;

(f) an obligation not to pursue, for a period of five years from the time the contract products are first put on the market within the common market, an active policy of putting the products on the market in territories reserved for other parties, and in particular not to engage in advertising specifically aimed at such territories or to establish any branch or maintain any distribution depot there for the distribution of the products, provided that users and intermediaries can obtain the contract products from other suppliers and the parties do not render it difficult for intermediaries and users to thus obtain the products;

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(fa) an obligation to grant one of the parties the exclusive right to distribute the contract products, provided that that party does not distribute products manufactured by a third producer which compete with the contract products;

(fb) an obligation to grant the exclusive right to distribute the contract products to a joint undertaking or a third undertaking, provided that the joint undertaking or third undertaking does not manufacture or distribute products which compete with the contract products;

(fc) an obligation to grant the exclusive right to distribute the contract products in the whole or a defined area of the common market to joint undertakings or third undertakings which do not manufacture or distribute products which compete with the contract products, provided that users and intermediaries are also able to obtain the contract products from other suppliers and neither the parties nor the joint undertakings or third undertakings entrusted with the exclusive distribution of the contract products render it difficult for users and intermediaries to thus obtain the contract products;

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(g) an obligation on the parties to communicate to each other any experience they may gain in exploiting the results and to grant each other non-exclusive licences for inventions relating to improvements or new applications.

2. The exemption provided for in Article 1 shall also apply where in a particular agreement the parties undertake obligations of the types referred to in paragraph 1 but with a more limited scope than is permitted by that paragraph.

Article 5

1. Article 1 shall apply notwithstanding that any of the following obligations, in particular, are imposed on the parties during the currency of the agreement:

(a) an obligation to communicate patented or non-patented technical knowledge necessary for the carrying out of the research and development programme for the exploitation of its results;

(b) an obligation not to use any know-how received from another party for purposes other than carrying out the research and development programme and the exploitation of its results;

(c) an obligation to obtain and maintain in force intellectual property rights for the contract products or processes;

(d) an obligation to preserve the confidentiality of any know-how received or jointly developed under the research and development

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programme; this obligation may be imposed even after the expiry of the agreement;

(e) an obligation:

(i) to inform other parties of infringements of their intellectual property rights,

(ii) to take legal action against infringers, and

(iii) to assist in any such legal action or share with the other parties in the cost thereof;

(f) an obligation to pay royalties or render services to other parties to compensate for unequal contributions to the joint research and development or unequal exploitation of its results;

(g) an obligation to share royalties received from third parties with other parties;

(h) an obligation to supply other parties with minimum quantities of contract products and to observe minimum standards of quality.

2. In the event that, because of particular circumstances, the obligations referred to in paragraph 1 fall within the scope of Article 85 (1), they also shall be covered by the exemption. The exemption provided for in this paragraph shall also apply where in a particular agreement the parties undertake obligations of the types referred to in paragraph 1 but with a more limited scope than is permitted by that paragraph.

Article 6

The exemption provided for in Article 1 shall not apply where the parties, by agreement, decision or concerted practice:

(a) are restricted in their freedom to carry out research and development independently or in cooperation with third parties in a field unconnected with that to which the programme relates or, after its completion, in the field to which the programme relates or in a connected field;

(b) are prohibited after completion of the research and development programme from challenging the validity of intellectual property rights which the parties hold in the common market and which are relevant to the programme or, after the expiry of the agreement, from challenging the validity of intellectual property rights which the parties hold in the common market and which protect the results of the research and development;

(c) are restricted as to the quantity of the contract products they may manufacture or sell or as to the number of operations employing the contract process they may carry out;

(d) are restricted in their determination of prices, components of prices or discounts when selling the contract products to third parties;

(e) are restricted as to the customers they may serve, without prejudice to Article 4 (1) (e);

(f) are prohibited from putting the contract products on the market or pursuing an active sales policy for them in territories within the common market that are reserved for other parties after the end of the period referred to in Article 4 (1) (f);

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(g) are required not to grant licences to third parties to manufacture the contract products or to apply the contract processes even though the exploitation by the parties themselves of the results of the joint research and development is not provided for or does not take place;

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(h) are required:

— to refuse without any objectively justified reason to meet demand from users or dealers established in their respective territories who would market the contract products in other territories within the common market, or

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— to make it difficult for users or dealers to obtain the contract products from other dealers within the common market, and in particular to exercise intellectual property rights or take measures so as to prevent users or dealers from obtaining, or from putting on the market within the common market, products which have been lawfully put on the market within the common market by another party or with its consent.

Article 7

1. The exemption provided for in this Regulation shall also apply to agreements of the kinds described in Article 1 which fulfil the conditions laid down in Articles 2 and 3 and which contain obligations restrictive of competition which are not covered by Articles 4 and 5 and do not fall within the scope of Article 6, on condition that the agreements in question are notified to the Commission in accordance with the provisions of Commission Regulation No 27 ([1]), and that the Commission does not oppose such exemption within a period of six months.

2. The period of six months shall run from the date on which the notification is received by the Commission. Where, however, the notification is made by registered post, the period shall run from the date shown on the postmark of the place of posting.

3. Paragraph 1 shall apply only if:

(a) express reference is made to this Article in the notification or in a communication accompanying it, and

(b) the information furnished with the notification is complete and in accordance with the facts.

4. The benefit of paragraph 1 may be claimed for agreements notified before the entry into force of this Regulation by submitting a communication to the Commission referring expressly to this Article and to the notification. Paragraphs 2 and 3 (b) shall apply *mutatis mutandis*.

5. The Commission may oppose the exemption. It shall oppose exemption if it receives a request to do so from a Member State within three months of the forwarding to the Member State of the notification referred to in paragraph 1 or of the communication referred to in paragraph 4. This request must be justified on the basis of considerations relating to the competition rules of the Treaty.

6. The Commission may withdraw the opposition to the exemption at any time. However, where the opposition was raised at the request of a Member State and this request is maintained, it may be withdrawn only after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions.

7. If the opposition is withdrawn because the undertakings concerned have shown that the conditions of Article 85 (3) are fulfilled, the exemption shall apply from the date of notification.

8. If the opposition is withdrawn because the undertakings concerned have amended the agreement so that the conditions of Article 85 (3) are fulfilled, the exemption shall apply from the date on which the amendments take effect.

9. If the Commission opposes exemption and the opposition is not withdrawn, the effects of the notification shall be governed by the provisions of Regulation No 17.

Article 8

1. Information acquired pursuant to Article 7 shall be used only for the purposes of this Regulation.

([1]) OJ No 35, 10. 5. 1962, p. 1118/62.

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2. The Commission and the authorities of the Member States, their officials and other servants shall not disclose information acquired by them pursuant to this Regulation of a kind that is covered by the obligation of professional secrecy.

3. Paragraphs 1 and 2 shall not prevent publication of general information or surveys which do not contain information relating to particular undertakings or associations of undertakings.

Article 9

1. The provisions of this Regulation shall also apply to rights and obligations which the parties create for undertakings connected with them. The market shares held and the actions and measures taken by connected undertakings shall be treated as those of the parties themselves.

2. Connected undertakings for the purposes of this Regulation are:

(a) undertakings in which a party to the agreement, directly or indirectly:
   — owns more than half the capital or business assets,
   — has the power to exercise more than half the voting rights,
   — has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertakings, or
   — has the right to manage the affairs;

(b) undertakings which directly have in or over a party to the agreement the rights or powers listed in (a);

(c) undertakings in or over which an undertaking referred to in (b) directly or indirectly has the rights or powers listed in (a).

3. Undertakings in which the parties to the agreement or undertakings connected with them jointly have, directly or indirectly, the rights or powers set out in paragraph 2 (a) shall be considered to be connected with each of the parties to the agreement.

Article 10

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation (EEC) No 2821/71, where it finds in a particular case that an agreement exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions laid down in Article 85 (3) of the Treaty, and in particular where:

(a) the existence of the agreement substantially restricts the scope for third parties to carry out research and development in the relevant field because of the limited research capacity available elsewhere;

(b) because of the particular structure of supply, the existence of the agreement substantially restricts the access of third parties to the market for the contract products;

(c) without any objectively valid reason, the parties do not exploit the results of the joint research and development;

(d) the contract products are not subject in the whole or a substantial part of the common market to effective competition from identical products or products considered by users as equivalent in view of their characteristics, price and intended use.

Article 11

1. In the case of agreements notified to the Commission before 1 March 1985, the exemption provided for in Article 1 shall have retroactive effect from the time at which the conditions for application of this Regulation were fulfilled or, where the agreement does not fall within Article 4 (2) (3) (b) of Regulation No 17, not earlier than the date of notification.

2. In the case of agreements existing on 13 March 1962 and notified to the Commission before 1 February 1963, the exemption shall have

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retroactive effect from the time at which the conditions for application of this Regulation were fulfilled.

3. Where agreements which were in existence on 13 March 1962 and which were notified to the Commission before 1 February 1963, or which are covered by Article 4 (2) (3) (b) of Regulation No 17 and were notified to the Commission before 1 January 1967, are amended before 1 September 1985 so as to fulfil the conditions for application of this Regulation, such amendment being communicated to the Commission before 1 October 1985, the prohibition laid down in Article 85 (1) of the Treaty shall not apply in respect of the period prior to the amendment. The communication of amendments shall take effect from the date of their receipt by the Commission. Where the communication is sent by registered post, it shall take effect from the date shown on the postmark of the place of posting.

4. In the case of agreements to which Article 85 of the Treaty applies as a result of the accession of the United Kingdom, Ireland and Denmark, paragraphs 1 to 3 shall apply except that the relevant dates shall be 1 January 1973 instead of 13 March 1962 and 1 July 1973 instead of 1 February 1963 and 1 January 1967.

5. In the case of agreements to which Article 85 of the Treaty applies as a result of the accession of Greece, paragraphs 1 to 3 shall apply except that the relevant dates shall be 1 January 1981 instead of 13 March 1962 and 1 July 1981 instead of 1 February 1963 and 1 January 1967.

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6. As regards agreements to which Article 83 of the Treaty applies as a result of the accession of the Kingdom of Spain and of the Portuguese Republic, paragraphs 1 to 3 shall apply except that the relevant dates should be 1 January 1986 instead of 13 March 1962 and 1 July 1986 instead of 1 February 1963, 1 January 1967, 1 March 1985 and 1 Sebtember 1985. The amendment made to the agreements in accordance with the provisions of paragraph 3 need not be notified to the Commission.

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7. As regards agreements to which Article 85 of the Treaty applies as a result of the accession of Austria, Finland and Sweden, paragraphs 1 to 3 shall apply *mutadis mutandis* on the understanding that the relevant dates shall be the date of accession instead of 13 March 1962 and six months after the date of accession instead of 1 February 1963, 1 January 1967, 1 March 1985 and 1 September 1985. The amendment made to these agreements in accordance with the provisions of paragraph 3 need not be notified to the Commission. However, this paragraph shall not apply to agreements which at the date of accession already fall under Article 53 (1) of the EEA Agreement.

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Article 12

This Regulation shall apply *mutatis mutandis* to decisions of associations of undertakings.

Article 13

This Regulation shall enter into force on 1 March 1985.

It shall apply until 31 December 1997.

This Regulation shall be binding in its entirety and directly applicable in all Member States.