**This document is meant purely as a documentation tool and the institutions do not assume any liability for its contents**

►**B**

# COMMISSION REGULATION (EC) No 2659/2000

## of 29 November 2000

## on the application of Article 81(3) of the Treaty to categories of research and development agreements

**(Text with EEA relevance)**

(OJ L 304, 5.12.2000, p. 7)

Amended by:

| | | Official Journal | | |
|---|---|---|---|---|
| | | No | page | date |
| ►**A1** | Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded | L 236 | 33 | 23.9.2003 |

▼B

# COMMISSION REGULATION (EC) No 2659/2000

## of 29 November 2000

## on the application of Article 81(3) of the Treaty to categories of research and development agreements

**(Text with EEA relevance)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2821/71 of 20 December 1971 on 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 Austria, Finland and Sweden, and in particular Article 1(1)(b) 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 81(3) (formerly Article 85(3)) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices falling within the scope of Article 81(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 intellectual property rights.

(2) Article 163(2) of the Treaty calls upon the Community to encourage undertakings, including small and medium-sized undertakings, in their research and technological development activities of high quality, and to support their efforts to cooperate with one another. Pursuant to Council Decision 1999/65/EC of 22 December 1998 concerning the rules for the participation of undertakings, research centres and universities and for the dissemination of research results for the implementation of the fifth framework programme of the European Community (1998-2002) ([3]) and Commission Regulation (EC) No 996/1999 ([4]) on the implementation of Decision 1999/65/EC, indirect research and technological development (RTD) actions supported under the fifth framework programme of the Community are required to be carried out cooperatively.

(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 81(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 81(1) and should therefore be included within the scope of this Regulation.

(4) Pursuant to Regulation (EEC) No 2821/71, the Commission has, in particular, adopted 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 ([5]), as last

([1]) OJ L 285, 29.12.1971, p. 46.
([2]) OJ C 118, 27.4.2000, p. 3.
([3]) OJ L 26, 1.2.1999, p. 46.
([4]) OJ L 122, 12.5.1999, p. 9.
([5]) OJ L 53, 22.2.1985, p. 5.

▼B

amended by Regulation (EC) No 2236/97 [1]. Regulation (EEC) No 418/85 expires on 31 December 2000.

(5) A new regulation should meet the two requirements of ensuring effective protection of competition and providing adequate legal security for undertakings. The pursuit of these objectives should take account of the need to simplify administrative supervision and the legislative framework to as great an extent possible. Below a certain level of market power it can, for the application of Article 81(3), in general be presumed that the positive effects of research and development agreements will outweigh any negative effects on competition.

(6) Regulation (EEC) No 2821/71 requires the exempting regulation of the Commission to define the categories of agreements, decisions and concerted practices to which it applies, to specify the restrictions or clauses which may, or may not, appear in the agreements, decisions and concerted practices, and to specify the clauses which must be contained in the agreements, decisions and concerted practices or the other conditions which must be satisfied.

(7) It is appropriate to move away from the approach of listing exempted clauses and to place greater emphasis on defining the categories of agreements which are exempted up to a certain level of market power and on specifying the restrictions or clauses which are not to be contained in such agreements. This is consistent with an economics based approach which assesses the impact of agreements on the relevant market.

(8) For the application of Article 81(3) by regulation, it is not necessary to define those agreements which are capable of falling within Article 81(1). In the individual assessment of agreements under Article 81(1), account has to be taken of several factors, and in particular the market structure on the relevant market.

(9) The benefit of the block exemption should be limited to those agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 81(3).

(10) Cooperation in research and development and in the exploitation of the results generally promotes technical and economic progress by increasing the dissemination of know-how between the parties and avoiding duplication of research and development work, by stimulating new advances through the exchange of complementary know-how, and by rationalising the manufacture of the products or application of the processes arising out of the research and development.

(11) The joint exploitation of results can be considered as the natural consequence of joint research and development. It can take different forms such as manufacture, the exploitation of intellectual property rights that substantially contribute to technical or economic progress, or the marketing of new products.

(12) 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.

(13) In order to attain the benefits and objectives of joint research and development the benefit of this Regulation should also apply to provisions contained in research and development agreements which do not constitute the primary object of such agreements, but are directly related to and necessary for their implementation.

(14) In order to justify the exemption, the joint exploitation should relate to products or processes for which the use of the results

[1] OJ L 306, 11.11.1997, p. 12.

▼B

of the research and development is decisive, and each of the parties is given the opportunity of exploiting any results that interest it. However, where academic bodies, research institutes or undertakings which supply research and development as a commercial service without normally being active in the exploitation of results participate in research and development, they may agree to use the results of research and development solely for the purpose of further research. Similarly, non-competitors may agree to limit their right to exploitation to one or more technical fields of application to facilitate cooperation between parties with complementary skills.

(15) The exemption granted under this Regulation should be limited to research and development agreements which do not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question. It is necessary to exclude from the block exemption agreements between competitors whose combined share of the market for products or services 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.

(16) In order to guarantee the maintenance of effective competition during joint exploitation of the results, provision should be made for the block exemption to cease to apply if the parties' combined share of the market for the products arising out of the joint research and development becomes too great. The exemption should continue to apply, irrespective of the parties' market shares, for a certain period after the commencement of joint exploitation, so as to await stabilisation of their market shares, particularly after the introduction of an entirely new product, and to guarantee a minimum period of return on the investments involved.

(17) This Regulation should not exempt agreements containing restrictions which are not indispensable to attain the positive effects mentioned above. In principle certain severe anti-competitive restraints such as limitations on the freedom of parties to carry out research and development in a field unconnected to the agreement, the fixing of prices charged to third parties, limitations on output or sales, allocation of markets or customers, and limitations on effecting passive sales for the contract products in territories reserved for other parties should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market share of the undertakings concerned.

(18) The market share limitation, the non-exemption of certain agreements, and the conditions provided for in this Regulation normally ensure that the agreements to which the block exemption applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the products or services in question.

(19) In particular cases in which the agreements falling under this Regulation nevertheless have effects incompatible with Article 81(3) of the Treaty, the Commission may withdraw the benefit of the block exemption.

(20) Agreements between undertakings which are not competing manufacturers of products capable of being improved or replaced by the results of the research and development will only eliminate effective competition in research and development in exceptional circumstances. It is therefore appropriate to enable such agreements to benefit from the block exemption irrespective of market share and to address such exceptional cases by way of withdrawal of its benefit.

(21) As research and development agreements are often of a long-term nature, especially where the cooperation extends to the exploitation of the results, the period of validity of this Regulation should be fixed at 10 years.

▼B

(22) This Regulation is without prejudice to the application of Article 82 of the Treaty.

(23) In accordance with the principle of the primacy of Community law, no measure taken pursuant to national laws on competition should prejudice the uniform application throughout the common market of the Community competition rules or the full effect of any measures adopted in implementation of those rules, including this Regulation,

HAS ADOPTED THIS REGULATION:

*Article 1*

**Exemption**

1. Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 81(1) shall not apply to agreements entered into between two or more undertakings (hereinafter referred to as 'the parties') which relate to the conditions under which those undertakings pursue:

(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 parties; or

(c) joint research and development of products or processes excluding joint exploitation of the results.

This exemption shall apply to the extent that such agreements (hereinafter referred to as 'research and development agreements') contain restrictions of competition falling within the scope of Article 81(1).

2. The exemption provided for in paragraph 1 shall also apply to provisions contained in research and development agreements which do not constitute the primary object of such agreements, but are directly related to and necessary for their implementation, such as an obligation not to carry out, independently or together with third parties, research and development in the field to which the agreement relates or in a closely connected field during the execution of the agreement.

The first subparagraph does, however, not apply to provisions which have the same object as the restrictions of competition enumerated in Article 5(1).

*Article 2*

**Definitions**

For the purposes of this Regulation:

1. 'agreement' means an agreement, a decision of an association of undertakings or a concerted practice;

2. 'participating undertakings' means undertakings party to the research and development agreement and their respective connected undertakings;

3. 'connected undertakings' means:

   (a) undertakings in which a party to the research and development agreement, directly or indirectly:

      (i) has the power to exercise more than half the voting rights,

      (ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or

      (iii) has the right to manage the undertaking's affairs;

   (b) undertakings which directly or indirectly have, over a party to the research and development agreement, the rights or powers listed in (a);

▼B

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

(d) undertakings in which a party to the research and development agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);

(e) undertakings in which the rights or the powers listed in (a) are jointly held by:

(i) parties to the research and development agreement or their respective connected undertakings referred to in (a) to (d), or

(ii) one or more of the parties to the research and development agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties;

4. 'research and development' means the acquisition of know-how relating to products or processes 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;

5. 'product' means a good and/or a service, including both intermediary goods and/or services and final goods and/or services;

6. 'contract process' means a technology or process arising out of the joint research and development;

7. 'contract product' means a product arising out of the joint research and development or manufactured or provided applying the contract processes;

8. 'exploitation of the results' means the production or distribution 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;

9. 'intellectual property rights' includes industrial property rights, copyright and neighbouring rights;

10. 'know-how' means a package of non-patented practical information, resulting from experience and testing, which is secret, substantial and identified: in this context, 'secret' means that the know-how is not generally known or easily accessible; 'substantial' means that the know-how includes information which is indispensable for the manufacture of the contract products or the application of the contract processes; 'identified' means that the know-how is described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;

11. research and development, or exploitation of the results, are carried out 'jointly' where the work involved is:

(a) carried out by a joint team, organisation or undertaking,

(b) jointly entrusted to a third party, or

(c) allocated between the parties by way of specialisation in research, development, production or distribution;

12. 'competing undertaking' means an undertaking that is supplying a product capable of being improved or replaced by the contract product (an actual competitor) or an undertaking that would, on realistic grounds, undertake the necessary additional investments or other necessary switching costs so that it could supply such a product in response to a small and permanent increase in relative prices (a potential competitor);

13. 'relevant market for the contract products' means the relevant product and geographic market(s) to which the contract products belong.

▼B

*Article 3*

**Conditions for exemption**

1. The exemption provided for in Article 1 shall apply subject to the conditions set out in paragraphs 2 to 5.

2. All the parties must have access to the results of the joint research and development for the purposes of further research or exploitation. However, research institutes, academic bodies, or undertakings which supply research and development as a commercial service without normally being active in the exploitation of results may agree to confine their use of the results for the purposes of further research.

3. Without prejudice to paragraph 2, where the research and development agreement provides only for joint research and development, each party must be free independently to exploit the results of the joint research and development and any pre-existing know-how necessary for the purposes of such exploitation. Such right to exploitation may be limited to one or more technical fields of application, where the parties are not competing undertakings at the time the research and development agreement is entered into.

4. Any joint exploitation must relate to results which are protected by intellectual property rights or constitute know-how, which substantially contribute to technical or economic progress and the results must be decisive for the manufacture of the contract products or the application of the contract processes.

5. Undertakings charged with manufacture by way of specialisation in production must be required to fulfil orders for supplies from all the parties, except where the research and development agreement also provides for joint distribution.

*Article 4*

**Market share threshold and duration of exemption**

1. Where the participating undertakings are not competing undertakings, the exemption provided for in Article 1 shall apply for the duration of the research and development. Where the results are jointly exploited, the exemption shall continue to apply for seven years from the time the contract products are first put on the market within the common market.

2. Where two or more of the participating undertakings are competing undertakings, the exemption provided for in Article 1 shall apply for the period referred to in paragraph 1 only if, at the time the research and development agreement is entered into, the combined market share of the participating undertakings does not exceed 25 % of the relevant market for the products capable of being improved or replaced by the contract products.

3. After the end of the period referred to in paragraph 1, the exemption shall continue to apply as long as the combined market share of the participating undertakings does not exceed 25 % of the relevant market for the contract products.

*Article 5*

**Agreements not covered by the exemption**

1. The exemption provided for in Article 1 shall not apply to research and development agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the restriction of the freedom of the participating undertakings to carry out research and development independently or in cooperation with third parties in a field unconnected with that to which the research and development relates or, after its completion, in the field to which it relates or in a connected field;

▼B

(b) the prohibition to challenge after completion of the research and development the validity of intellectual property rights which the parties hold in the common market and which are relevant to the research and development or, after the expiry of the research and development agreement, the validity of intellectual property rights which the parties hold in the common market and which protect the results of the research and development, without prejudice to the possibilty to provide for termination of the research and development agreement in the event of one of the parties challenging the validity of such intellectual property rights;

(c) the limitation of output or sales;

(d) the fixing of prices when selling the contract product to third parties;

(e) the restriction of the customers that the participating undertakings may serve, after the end of seven years from the time the contract products are first put on the market within the common market;

(f) the prohibition to make passive sales of the contract products in territories reserved for other parties;

(g) the prohibition to put the contract products on the market or to pursue an active sales policy for them in territories within the common market that are reserved for other parties after the end of seven years from the time the contract products are first put on the market within the common market;

(h) the requirement not to grant licences to third parties to manufacture the contract products or to apply the contract processes where the exploitation by at least one of the parties of the results of the joint research and development is not provided for or does not take place;

(i) the requirement to refuse to meet demand from users or resellers in their respective territories who would market the contract products in other territories within the common market; or

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

2. Paragraph 1 shall not apply to:

(a) the setting of production targets where the exploitation of the results includes the joint production of the contract products;

(b) the setting of sales targets and the fixing of prices charged to immediate customers where the exploitation of the results includes the joint distribution of the contract products.

*Article 6*

**Application of the market share threshold**

1. For the purposes of applying the market share threshold provided for in Article 4 the following rules shall apply:

(a) the market share shall be calculated on the basis of the market sales value; if market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the undertaking concerned;

(b) the market share shall be calculated on the basis of data relating to the preceding calendar year;

(c) the market share held by the undertakings referred to in point 3(e) of Article 2 shall be apportioned equally to each undertaking having the rights or the powers listed in point 3(a) of Article 2.

2. If the market share referred to in Article 4(3) is initially not more than 25 % but subsequently rises above this level without exceeding

▼B

30 %, the exemption provided for in Article 1 shall continue to apply for a period of two consecutive calendar years following the year in which the 25 % threshold was first exceeded.

3. If the market share referred to in Article 4(3) is initially not more than 25 % but subsequently rises above 30 %, the exemption provided for in Article 1 shall continue to apply for one calendar year following the year in which the level of 30 % was first exceeded.

4. The benefit of paragraphs 2 and 3 may not be combined so as to exceed a period of two calendar years.

*Article 7*

**Withdrawal**

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation (EEC) No 2821/71, where, either on its own initiative or at the request of a Member State or of a natural or legal person claiming a legitimate interest, it finds in a particular case that a research and development agreement to which the exemption provided for in Article 1 applies nevertheless has effects which are incompatible with the conditions laid down in Article 81(3) of the Treaty, and in particular where:

(a) the existence of the research and development 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 research and development 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;

(e) the existence of the research and development agreement would eliminate effective competition in research and development on a particular market.

*Article 8*

**Transitional period**

The prohibition laid down in Article 81(1) of the Treaty shall not apply during the period from 1 January 2001 to 30 June 2002 in respect of agreements already in force on 31 December 2000 which do not satisfy the conditions for exemption provided for in this Regulation but which satisfy the conditions for exemption provided for in Regulation (EEC) No 418/85.

▼A1

*Article 8a*

The prohibition in Article 81(1) of the Treaty shall not apply to agreements which were in existence at the date of accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia and which, by reason of accession, fall within the scope of Article 81(1) if, within six months from the date of accession, they are so amended that they comply with the conditions laid down in this Regulation.

▼B

*Article 9*

**Period of validity**

This Regulation shall enter into force on 1 January 2001.

▼B

It shall expire on 31 December 2010.

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