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Suggested Revision of Competition Rules on R&D Agreements and Production Agreements

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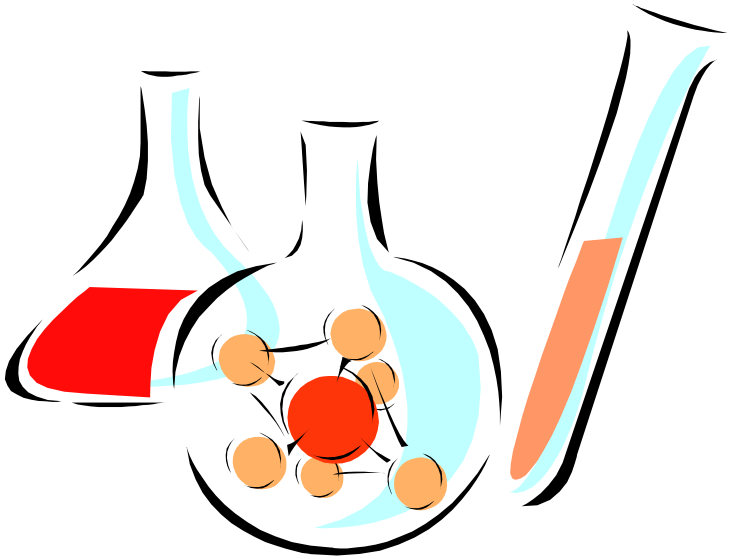
Revision of rules on R&D agreements and production agreements - Overview

- No major policy concerns
- Very few decisions and judgments
- BERs not always clear - in practice, often uncertainty whether BER would apply to a specific agreement
- Some outdated provisions and statements
- Commission proposal
  - No major policy change
  - Several adjustments and clarifications in the BERs
  - Some additional guidance in the draft Horizontal Guidelines, more and improved examples
  - Still only very limited discussion of BERs in the draft Horizontal Guidelines, unlike in Vertical GL and Technology Transfer GL

Research and Development Agreements



Types of agreements covered by draft R&D BER

- No change: Draft R&D BER can apply to agreements under which parties carry out R&D (and exploitation of the results) "jointly"
- No change: Definition of "jointly" (Art. 1 No. 11 (a)-(c) draft R&D BER):
  - Carried out by a joint team, organisation or undertaking
  - Jointly entrusted to a third party; or
  - Allocated between the parties by way of specialisation in R&D or exploitation
- Under current R&D BER, significant uncertainty as to interpretation of third alternative

New definition of "specialisation in R&D" – Art. 1 No. 12 draft R&D BER

- Each party must "carry out some of the R&D activities and focus on a distinct area of the R&D"
- Explicitly excluded: "Scenario where one party carries out all the R&D and the other party merely finances these activities or exploits the results"
- No minimum level of significance for carrying out "some" of the R&D
- Additional clarification would be useful regarding
  - One party contributes relevant know-how/IP rights (and otherwise only finances or exploits)
  - One party finances and exploits
  - Joint oversight/evaluation of R&D of other party = covered as specialisation in R&D, or possibly as joint team?
  - "Focus on distinct area": Should allow sufficient flexibility

New definition of "specialisation in exploitation" – Art. 1 No. 13 draft R&D BER

- Imposition of restrictions regarding exploitation sufficient
- But: Each party "must carry out some of the exploitation of the results in the internal market"
  - Notably: Each party must carry out "some distribution activities" for example in relation to certain territories, customers or fields of use allocated to it
  - One party producing and distributing under (exclusive) license from other parties not sufficient
- Policy justification?
  - Agreements between non-competitors from EU and US, foreseeing distribution in their home markets
  - Significant difference between scenarios of "no" distribution and "some" minimal distribution within the EU?
  - Difference as to entrustment of third party, which constitutes joint exploitation and also excludes competition in the EU?

New requirement to disclose existing and pending IP rights – Art. 3(2) draft R&D BER

- New condition for application of draft R&D BER: "The parties have to agree that, prior to starting the R&D, all the parties will disclose all their existing and pending IPRs in as far as they are relevant for the exploitation of the results by the other parties"
- Apparently, disclosure can be after conclusion of agreement
- Disclosure does not mean license
- Goal: Prevention of "patent ambush" situations known from standard setting
- Policy justification if parties necessarily are non-competitors or competitors with a combined share not exceeding 25%?

Access condition – Art. 3(3) and (4) draft R&D BER

- As before, requirement that all parties must have access to results of joint R&D, but with clarification that access must be "equal"
- Further guidance desirable:
  - Time of access (after joint exploitation ends)
  - Parties are free to set remuneration for access
- Possibility to limit access rights to specific fields of use in pure R&D agreements between non-competitors?
  - Limitation of access rights should lead to joint exploitation
- Para. 134 draft Horizontal Guidelines: Exclusive access potentially justified under Art. 101(3) TFEU (no change)
  - But again: As long as all parties have some exploitation rights, this should lead to joint exploitation, during which access should not be relevant

Market share threshold – Art. 4 draft R&D BER

- If competitors, combined market share must not exceed 25% with regard to the relevant market for the
  - products
  - technologies or
  - processes

  capable of being improved or replaced by the contract products or contract processes.
- Para. 119 Guidelines: Double calculation required for technology markets (share of licensing income and share on end product market)

Hardcore restrictions and excluded restrictions – Art. 5 and 6 draft R&D BER

- Significant improvement
- Restriction of independent R&D in the field (or related field): Now allowed for duration of R&D agreement
- Active sales restrictions regarding territories and customers that are exclusively allocated to one of the parties through specialisation in exploitation allowed without time restriction (7 years limit abolished)
- All passive sales restrictions regarding territories and customers continue to be prohibited
  - No exceptions (compare TT-BER, Vertical Restraints BER, including two-year rule in Vertical Guidelines)
- Field of use restrictions allowed? (arg.: Art. 1 No. 13 draft R&D BER)
- No longer hardcore, but excluded restrictions:
  - No challenge clauses
  - Requirement not to grant licenses to third parties if exploitation within the EU is not foreseen or does not take place

Production Agreements

Types of agreements covered by BER (1)

- Harmonized conditions for unilateral and reciprocal specialisation agreements:
  - Parties must be active on the same product market(s) – activity as to geographic market not relevant
  - Agreement to "fully or partly" cease production of certain products or to refrain from producing those products (and to purchase them from other party/parties
  - Other contract party/parties must agree to produce and supply those products
- Main change: Complete cessation of existing production no longer required – partial cessation sufficient
  - Partial cessation: Capacity reduction required, or agreement to reduce production in existing capacity sufficient?
  - No minimum level defined

Types of agreements covered by BER (2)

- If no cessation of production: "Subcontracting agreement with a view to expanding production" (paras. 146, 147 draft Horizontal Guidelines) – Specialisation BER does not apply
  - Practical risk: Discussion between competitors about supply agreement coupled with discussion about plant closures
- Reciprocal specialisation: As before, the products that are the subject matter of the two legs of the agreement have to be "different products"
  - Still no definition of when products are "different"
  - As parties' activity on one product market appears to suffice, "different" products can belong to the same product market?
  - Clarification desirable

Types of agreements covered by BER (3)

- Joint production agreement, "by virtue of which two or more parties agree to produce certain products jointly"
  - Still no definition
  - Only jointly controlled joint ventures?
  - Compare new definition of "joint distribution" in Art. 1 No. 15 draft Specialisation BER and existing definition of "joint exploitation" in Art. 1 No. 11 draft R&D BER
  - Full or partial cessation of existing production (or agreement to refrain from starting production) necessary?
  - Clarification desirable

New second market share threshold in case of intermediate products

- Art. 3 and Art. 1 No. 7 draft Specialisation BER
- If agreement concerns an intermediate product that one or more of the parties fully or partly use captively for the production of downstream products, then the Specialisation BER only applies if
  - Combined market share in specialisation products does not exceed 20%; and
  - Combined market share in downstream products does not exceed 20%

Clarification regarding joint distribution

- Clarified that joint distribution is possible for all three types of agreements covered by the BER (Art. 2(3)(b) draft Specialisation BER)
- But: Art. 1 No. 15 draft Specialisation BER: Joint distribution only if:
  - Joint team, organisation or undertaking; or
  - Appointment of third party distributor (exclusive or non-exclusive), who cannot be a competitor
- Not: Joint distribution by allocation of tasks between parties (different from R&D BER)

No change in hardcore restrictions – Art. 4 draft Specialisation BER

- Price fixing
- Limitation of output or sales
- The allocation of markets or customers
- Clarification desirable regarding treatment of field of use restrictions
  - Not treated as customer restriction in para. 180 TT-Guidelines
  - Art. 1 No. 13 draft R&D BER also suggests that field of use restrictions do not constitute customer restrictions

Examples in draft Horizontal Guidelines

- Example 3 – not modified: Competitors A and B enter into a production agreement. B already has a production agreement with competitor D.
  - Guidelines: The new agreement A-B creates a link between A and D, which has a negative impact on the competition assessment
- Example 8 - new: Partial geographic swap between competitors within the EU "does not in itself give rise to competition concerns"

Thank You!

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