

Block Exemption Communiqué on Research and Development Agreements

Communiqué No: 2003/2

Agreements whose subject are research and development (R&D) studies, and the joint use of R&D results by the participation of more than one undertaking often increase the speed of dissemination of technical information between parties, prevent the concurrence of R&D studies to the same end, and lead to new developments through the mutual exchange of complementary technical information. The contribution of such agreements to technological and economic development arises particularly when there exist the launching of new products in a market and the implementation of advanced production techniques. Owing to the spread and efficiency of R&D, it is expected that consumers would benefit from the market entry of new or developed products or services and/or price falls which occur as a result of new or developed production techniques. The ability to acquire the expected benefit in terms of parties and consumers may sometimes be possible via certain limitations of competition. However, not limiting competition more than what is compulsory is an important condition for being able to obtain the targeted goals and sustain economic efficiency. Therefore, it is required to determine limitations in the said agreements, which may mean the infringement of competition rules.

The types of agreements to fall under block exemption are specified in article 2 of the Communiqué. Those agreements which do not encompass industrial practice, and which concern jointly conducting research studies or jointly developing research results are usually not caught by article 4 of the Act No. 4054. However, in some cases, for instance in the event that parties agree not to make R&D in the same area, the said agreements are included in the relevant articles of this Communiqué, since they may be caught by article 4 of the Act.

On the other hand, agreements which encompass the joint use of R&D results often involve competition-limiting provisions and are caught by article 4 of the Act as they provide parties with the opportunity of jointly determining how to produce developed products, or how to apply developed production processes, and how to use intellectual rights or know-how. Due to the fact that cooperation between parties is extended to the stage of industrial practice, block exemption ensured for such agreements which also involve the joint use of results is limited to five years, commencing from the date of initial launching, in a market within the borders of the Turkish Republic, of the products which are the subject of the agreement, or the products produced by employing production techniques which are the subject of the agreement.

In order to be able to make a clear distinction between agreements which do not cover industrial practice and which solely provide for cooperation in the area of R&D, and agreements which also cover the use of R&D results, the concepts of "research and development" and "use of results" have been identified. Productions and practices made so as to be able to determine the development of an R&D program may not be evaluated as the use of results unless products emerging as a result of such practices are launched in a market. Since the concepts of "industrial research" and "pre-competitive industrial development activity" in "The Agreement on Subsidies and Countervailing Measures" which is the annex of "The Agreement Establishing the World Trade Organization" do not involve the use of results within the meaning of this Communiqué, they are dealt with under the definition of R&D.

The joint use of results may be evaluated as a natural consequence of an R&D activity. In order to be able to obtain the goals and benefits expected from such agreements, and in order for undertakings to be able to benefit from the exemption regime, this joint use should be related to the products and production processes which are the subject of R&D. Those developments achieved within the framework of agreements that have another fundamental goal such as

licence of intellectual rights, joint production or specialization and that only contain subsidiary provisions concerning R&D, rather than within the framework of an R&D program may not be accepted as the joint use of R&D results. Agreements involving the joint sale of the products or production techniques which are the subject of the agreement are also excluded from the block exemption ensured by this Communiqué.

When the likelihood is taken into account that cooperation between parties may become not caught by an agreement aimed at R&D, there emerges the obligation to clearly define the goals of the said agreement, and the area where research and development studies would be performed. In case the scope, goals and study areas of an agreement are ambiguous, the said agreement shall become not caught by block exemption.

Even though parties have not decided for the joint use of results of R&D studies, they should be able to reach the results of such study. In case the agreement does not involve the joint use of results, it is required that parties be able to use independently already existing technical information and results of research and development. These prerequisites intend the dissemination of technical information between parties, the prevention of the concurrence of R&D studies, thus diminishing the costs of research and development, and the facilitation of technical progress through the mutual exchange of complementary technical information. That parties do not equally contribute to R&D studies, or they shall not make use of the results of such study to the same degree may not constitute an obstacle to all parties' obtaining the results which arise as a result of R&D.

Should joint distribution between parties has not been decided, and the task of producing the products which are the subject of the agreement has been granted to either of the parties or to an undertaking to be determined by parties, undertaking to perform the production is required to meet the orders of parties for the said products. Thus, it may be possible for consumers to purchase the

products which are the subject of the agreement from more than one provider, and competition may continue between parties in lower markets.

With this Communiqué, it is intended that besides an effective protection of competition, legal hesitations of undertakings which engage in R&D cooperation be relieved. It gains importance that in practices and regulations aimed at the realization of these goals, an administrative supervision as simple as possible and a legal framework as clear as possible be ensured. Therefore, in this Communiqué, instead of adopting the approach as to the presence of limitations of competition deemed reasonable (white list) as well, the approach of only including necessary prerequisites for enabling undertakings to benefit from a block exemption, and limitations of competition which shall render an agreement not caught by a block exemption (blacklist) has been adopted. In this manner, it would be partially possible to preclude that certain undertakings engaged in cooperation in particular issues consider the provisions as to limitations of competition under block exemption as the elements to be present in an agreement, thus precluding that sometimes parties include in agreements obligations limiting competition more than what is needed. Determining those limitations which may not be deemed reasonable in terms of competition law, and granting freedom to undertakings in other arrangements aimed at cooperation are also compatible with the recent approach that priority and weight should be given to the assessment of economic effects that agreements between undertakings would create on the relevant market. Within this framework, listed in article 6 are the cases which render agreements of the types mentioned in the Communiqué not caught by block exemption.

Taking into account the above-mentioned statements, the Competition Board has decided for the issue of this Communiqué.

Purpose

Article 1- The purpose of this Communiqué is to determine the conditions for exempting in block R&D agreements made between undertakings, from the application of the provisions of article 4 of the Act on the Protection of Competition dated 07/12/1994 and numbered 4054, based on articles 1 and 5, and article 27 sub-paragraph (f) of the Act.

Scope

Article 2- Within the framework of article 5 of the Act No. 4054 and the provisions in this Communiqué,

agreements having the nature of limiting competition, which are concluded between undertakings for purposes of

- a) joint research and development of new products or production techniques, and joint use of results, or
- b) only research and development of products or production techniques in a way not to include the stage of joint use of results, or
- c) joint use of results which have been obtained under an agreement previously made between the same parties, aimed at research and development of products or production techniques

fall under this Communiqué.

Those agreements which have another basic goal such as joint production, resale and transfer of intellectual rights, and which involve merely

subsidiary provisions concerning joint R&D fall outside the scope of exemption provided by this Communiqué.

Definitions

Article 3- In terms of the provisions of this Communiqué,

- (a) **The Act** expresses the Act on the Protection of Competition No. 4054,
- (b) **Research and Development (R&D)** expresses the process in relation to obtaining technical information, testing products or production processes, carrying out theoretical analyses and observations, realizing experiments including experimental productions, establishing necessary facilities for these issues, and obtaining intellectual rights related to results,
- (c) **The production techniques which are the subject of the agreement** express the production processes and/or technologies which are the subject of R&D or which emerge as a result of R&D,
- (d) **The products which are the subject of the agreement** express the goods and/or services which are the subject of R&D or which emerge as a result of R&D, or the goods and/or services provided or produced by the production techniques which are the subject of the agreement,
- (e) **Party** expresses the undertaking or undertakings which is/are party to the agreement,
- (f) **Technical information** expresses know-how, or information protected by intellectual rights,

- (g) **Intellectual rights** express industrial rights, rights of the owner of the work, and neighbouring rights,
- (h) **Use of results** expresses the production or production and distribution of the products which are the subject of the agreement, and/or the application of the production techniques which are the subject of the agreement, or the transfer of intellectual rights to third persons with a view to enabling that such a production or application be realized by the said third persons, and/or the passing of know-how to the same end again,
- (i) **Relevant market** expresses the market comprised of the relevant product market and geographical market.

In the following cases, it is deemed that R&D is carried out by parties together, or its results are utilized jointly:

- (a) Carrying out R&D studies by a team, an organization or undertaking set up together or via a third undertaking appointed together, or engaging in division of labor between parties through specialization in the areas of research, development, production or distribution,
- (b) Having made cooperation about the transfer of intellectual rights or the passing of know-how under the provision of sub-paragraph (f) of the first paragraph.

Exemption Periods Determined for R&D Agreements

Article 4- Exemption granted by this Communiqué solely to agreements involving R&D is valid during the agreement. In case the joint use of R&D results is also in question, exemption shall be valid for another five years, commencing

from the date the products which are the subject of the agreement are first launched in the market within the borders of the Turkish Republic.

Prerequisites Required for Benefitting from Block Exemption

Article 5- Exemption provided by this Communiqué is benefitted in the event that the following conditions are met:

- (a) If the agreement involves the joint use of results and at least two of the undertakings hold the position of competing undertakings in the relevant market, total market shares of all parties in the relevant market do not exceed 40 %,
- (b) On the other hand, if the distribution right of the products which are the subject of the agreement has been exclusively granted to one of the parties or to an undertaking controlled by parties or to a third undertaking appointed by parties together, total market shares of all parties in the relevant market do not exceed 20 %,
- (c) The scope and goal of R&D have been clearly defined in the agreement,
- (d) It is ensured that all undertakings party to the agreement acquire information about the results of the study,
- (e) In case the agreement is only directed at R&D, not preventing parties from being able to use technical information and R&D results independently of each other,
- (f) Joint use is limited to R&D results, and these results constitute the essential facility in the production of the products which are the subject of

the agreement or the application of the production techniques which are the subject of the agreement,

- (g) If the joint distribution of the products which are the subject of the agreement has not been decided in the agreement between parties, the undertaking or undertakings which assume(s) the production meet(s) the orders of parties in relation to the products which are the subject of the agreement.

Being specific to sub-paragraphs (a) and (b) of the first paragraph, block exemption may not be benefitted in case total market shares of parties in the relevant market are above the thresholds in these sub-paragraphs as of the date of conclusion of the agreement. And agreements concluded between undertakings, which fall under block exemption as of the date of conclusion of the agreement but which exceed the said thresholds while the research program is in progress become not caught by this Communiqué from the end of the year following the year when these thresholds have been exceeded.

Should the products which are the subject of the agreement have the nature of raw material or intermediate good used in the production of another good or service by parties, and in case such products constitute the essential facility of the final good or service, the market concerning the said final good or service is taken as the basis in calculating total market share of parties.

Cases Rendering R&D Agreements Not Caught By Block Exemption

Article 6- Those agreements which involve one or more of the following cases or which give rise to such results, may not benefit from the block exemption ensured by this Communiqué. Following are the cases in question:

- a) Restriction of the freedom of one or more of the parties to conduct R&D activities independently on its/their own or with third persons, in areas which are not associated with the subject of the R&D agreement between them, or in an area related with the subject of the R&D agreement after the expiry of the agreement,
- b) Elimination of parties' rights to object, after the completion of the program or the expiry of the agreement, to the validity of intellectual rights which concern R&D or which serve for the protection of R&D results,
- c) Joint determination of the sale amount of the products which are the subject of the agreement, or limitation of the power of one or more of the parties to independently determine the sale amount of the said products,
- d) Joint determination of the amount to be produced by each party in agreements which do not involve the joint use of results, or limitation of the power of one or more of the parties to independently determine the production amount of the said products,
- e) Joint determination of the sale prices and/or sale conditions of the products which are the subject of the agreement, or limitation of the power of one or more of the parties to independently determine the sale prices and/or sale conditions in relation to the said products,
- f) Sharing of customers and regions between parties,
- g) Prohibition for one or more of the parties against granting licence to third persons related to the production of the products which are the subject of the agreement or the application of the production techniques which are the subject of the agreement, where the joint use of R&D results by parties is not envisaged, or where such use does not take place,

- h) Prevention, through various measures, the use of intellectual rights being in the lead, of distributors' obtaining and/or launching in the market, or users' obtaining the products which are the subject of the agreement and which have been legally launched in the market by parties or the consent of one of the parties.

Revocation of Exemption

Article 7- Should the Competition Board establishes that an agreement which is exempt from the application of the provisions of article 4 of the Act under this Communiqué has effects incompatible with the terms provided in article 5 of the Act, and especially

- a) the existence of the current agreement prevents the entry of third persons to the relevant market, due to the particular structure of a good or service or market, or
- b) parties do not utilize the results of joint R&D activities, without any objective and justifiable reason, or
- c) an efficient competition does not exist between undertakings in the market in the whole or a part of the territory, concerning the products deemed equivalent, in the eye of consumers and users, with the products which are the subject of the agreement, in terms of their characteristics, prices and intended uses,

it may revoke the exemption ensured by the Communiqué, concerning the said agreement. In this case, the Competition Board requires the written and/or oral opinions of parties prior to making its final decision.

Until the decision of revocation, the said agreement is deemed to be exempt from the application of the provisions of article 4 of the Act.

Notification

Article 8- R&D agreements falling under the block exemption ensured by this Communiqué are not subject to the obligation to notify specified in articles 10 and 12 of the Act, and provided by the Communiqué No. 1997/2, published in the Official Gazette dated 12/08/1997 and numbered 23078.

Application of the Communiqué to Concerted Practices and Decisions of Associations of Undertakings

Article 9- The provisions of this Communiqué shall also be applicable to concerted practices between undertakings, and decisions of associations of undertakings, insofar as it is appropriate.

Implementation of Article 6 of the Act

Article 10- Exemption granted pursuant to the provisions of this Communiqué shall not prevent the implementation of article 6 of the Act.

Entry Into Force

Article 11- This Communiqué shall enter into force on the date it is published. Agreements which have been concluded before the date of entry into force of this Communiqué and which comply with the conditions provided in the Communiqué shall also be deemed to fall under the Communiqué.

Execution

Article 12- The provisions of this Communiqué shall be executed by the President of the Competition Authority.
