

SUBSIDIARY LEGISLATION 379.06

**RESEARCH AND DEVELOPMENT AGREEMENTS
(BLOCK EXEMPTION) REGULATIONS**

1st July, 2002

LEGAL NOTICE 177 of 2002.

1. (1) The title of these regulations is the Research and Development Agreements (Block Exemption) Regulations. Citation and commencement.

(2) These regulations shall come into force on the 1st July, 2002 and shall have effect until the 30th June, 2012.

2. These regulations specify the block exemption subject to such conditions and limitations and as applicable to categories of research and development agreements in terms of article 5(1) of the Act. Scope.

3. In these regulations, unless the context otherwise requires - Interpretation.
"Act" means the Competition Act, which regulates competition and provides for fair trading in Malta; Cap. 379.

"agreement" means an agreement, a decision of an association of undertakings or a concerted practice;

"Commission" means the Commission for Fair Trading as provided for under the Act;

"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);

"connected undertakings" means -

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

- 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 management or bodies legally representing the undertaking, or
- 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 paragraph (a);

(c) undertakings in which an undertaking referred to in paragraph (b) has, directly or indirectly, the rights or

- powers listed in paragraph (a);
- (d) undertakings in which a party to the research and development agreement together with one or more of the undertakings referred to in paragraphs (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in paragraph (a);
 - (e) undertakings in which the rights or the powers listed in paragraph (a) are jointly held by:
 - parties to the research and development agreement or their respective connected undertakings referred to in paragraphs (a) to (d), or
 - one or more of the parties to the research and development agreement or one or more of their connected undertakings referred to in paragraphs (a) to (d) and one or more third parties;

"contract process" means a technology or process arising out of the joint research and development;

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

"Director" means the Director of the Office for Fair Competition as provided for under the Act;

"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;

"intellectual property rights" includes industrial property rights, copyright and neighbouring rights;

"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 or recorded in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;

"participating undertakings" means undertakings party to the research and development agreement and their respective connected undertakings;

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

"relevant market for the contract products" means the relevant

product and geographic market(s) to which the contract products belong;

"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;

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.

4. (1) Subject to the provisions of these regulations, there shall be exempted from the provisions of article 5(1) of the Act agreements entered into between two or more undertakings (hereinafter referred to as "the parties") which relate to the conditions under which those undertakings pursue - Block exemption.

- (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 earned 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.

(2) The block exemption contained in subregulation (1) 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 5(1) of the Act.

(3) The block exemption shall also apply to ancillary 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, including 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.

(4) The block exemption shall not apply to provisions which have the same object as the restrictions of competition provided for under regulation 7(1).

5. The block exemption shall apply subject to the following conditions: Applicability of block exemption.

- (a) all the parties must have access to the results of the

joint research and development for the purposes of further research or exploitation; provided that 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;

- (b) without prejudice to paragraph (a), 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; provided that this 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;
- (c) 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;
- (d) 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.

Market share and duration.

6. (1) Where the participating undertakings are not competing undertakings, the block exemption shall apply for the duration of the research and development, and where the results are jointly exploited, the block exemption shall continue to apply for seven years from the time the contract products are first put on the market within Malta or part thereof.

(2) Where two or more of the participating undertakings are competing undertakings, the block exemption shall apply for the period referred to in subregulation (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 twenty five *per centum* 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 subregulation (1), the block exemption shall continue to apply as long as the combined market share of the participating undertakings does not exceed twenty five *per centum* of the relevant market for the contract products.

(4) For the purposes of applying the market share threshold under this regulation, 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 paragraph (e) of the definition of "connected undertakings" in regulation 3 shall be apportioned equally to each undertaking having the rights or the powers listed in paragraph (a) of the same definition.

(5) If the market share referred to in subregulation (3) is initially not more than twenty-five *per centum* but subsequently rises above this level without exceeding thirty *per centum*, the block exemption shall continue to apply for a period of two consecutive calendar years following the year in which the twenty-five *per centum* threshold was first exceeded.

(6) If the market share referred to in subregulation (3) is initially not more than twenty-five *per centum* but subsequently rises above thirty *per centum*, the block exemption shall continue to apply for one calendar year following the year in which the level of thirty *per centum* was first exceeded.

(7) The benefit of subregulations (5) and (6) may not be combined so as to exceed a period of two calendar years.

7. The block exemption 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 -

Non-applicability
of block
exemption.

- (a) the restriction of the freedom of the participating undertakings to carry out research and development independently or in co-operation 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) the prohibition to challenge, after completion of the research and development, the validity of intellectual property rights which the parties hold in Malta 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 Malta and which protect the results of the research and development, without prejudice to the possibility 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;
- (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 Malta or part thereof that are reserved for other parties after the end of seven years from the time the contract products are first put on the 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 Malta or part thereof; or
- (j) the requirement to make it difficult for users or resellers to obtain the contract products from other resellers within Malta or part thereof, 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, products which have been lawfully put on the market by another party or with its consent:

Provided that the block exemption shall nonetheless 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.

Withdrawal by
Commission.

8. The Commission is hereby being granted the power to withdraw the benefit of this block exemption when it finds in a particular case, on a request by the Director, that any agreement which is exempted by these regulations nevertheless has effects which are incompatible with the conditions provided for in article 7(1) of the Act, 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.
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