

# Revised EU Rules on Co-operation Between Competitors

**A missed opportunity for reform?**

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# A historical perspective

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- **From 1962, the European Commission interpreted Article 85(1) broadly as catching restrictions good and bad. Justification was done within 85(3). Only the Commission could issue blessings under 85(3).**
- **Commission doctrine:**
  - Notify if you have any doubt and we will consider it
  - OR fit within block exemption regulations
- **Actual practice:**
  - Very few decisions
  - Almost no specific exemptions
  - Reluctance to notify by some
  - Enthusiasm to notify by others
- **Tendency to regard block exemptions as legally compulsory**
- **System failure widely recognised from 1990's but reluctant to reform**

# A historical perspective

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- **New regime from Regulation 1/2003**
- **What has changed?**
  - Articles 101(1) and 101(3) TFEU are applied together
  - Commission's intellectual monopoly abolished
  - Parallel trade (the driver of Regulation 67/67 and its successors) greatly reduced as enforcement priority
- **“Sophisticated” users of competition law analysis did not regard block exemptions as dispositive (things not exempted might be legal; and apparently available exemptions might be denied).**
- **They are however useful guidance. As they have become more detailed and prescriptive they have become in some ways less reliable but they reveal more policy of the enforcer.**

# A historical perspective

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- **“Modernisation” of EU competition rules:**
  - New procedural rules allowing for direct applicability of Article 101(3) TFEU
  - More “economic” approach in substantial rules: a comprehensive review of the framework for the application of Article 101 TFEU
  - Guidelines allowing for individual assessment of agreements under Article 101 TFEU
- **Shift in the enforcement focus**
  - Enforcement priorities modernised: the Commission finally caught up with other countries
  - Relevant economic criteria acknowledged and emphasised
  - Reluctance to surrender ground won in past cases
  - The surviving Block Exemption Regulations: Vertical Agreements, Motor Vehicle, Research & Development, Specialisation, and Technology Transfer

# Horizontal Restraints Rules in General

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- **The BERs and the Guidelines should not be read as prescribing how agreements should be structured**
  - An agreement not covered by a BER is not automatically illegal, it only needs to be individually assessed under Article 101 TFEU
  - If the case is controversial, the Commission may intervene even if the deal appears to be covered by a BER
- **Both BERs are narrowly drawn:**
  - It might have been more practical to abolish them (leaving the parties free to shape their R&D and specialisation agreements in light of common sense and basic principles)
  - R&D BER is of limited practical importance: most R&D agreements are pro-competitive and might not be caught by Article 101(1)TFEU
- **BUT the BERs and the Guidelines serve as a useful indication of the Commission's current thinking and enforcement priorities**

# 2010: Revision of substantive rules on the application of Article 101 TFEU

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- **Revision of substantive rules ten years after the “modernised” regulations and guidelines were adopted**
  - Few cases from 2000 to 2010 in which the Guidelines and the “modernised” BERs focus on cartels and on Article 102 TFEU
- **April 2010: Revised Vertical Restraints Guidelines and Verticals Block Exemption Regulation**
- **December 2010: Revised Horizontal Restraints Guidelines, R&D Block Exemption Regulation**
  - 2008: questionnaire to the Member States and stakeholders consultation
  - May-June 2010: public consultation
  - 14 December 2010: new rules adopted and published

# Revised Block Exemption Regulations & Guidelines

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- **Revised horizontal restraints regime:**

- **Horizontal Guidelines**

- Revised Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements

- **Research & Development Block Exemption Regulation (R&D BER)**

- Regulation No 1217/2010 on the applicability of Article 101(3) TFEU to certain categories of research and development agreements

- **Specialisation Block Exemption Regulation (Specialisation BER)**

- Regulation No 1218/2010 on the applicability of Article 101(3) TFEU to certain categories of specialisation agreements

- **Entry into force:**

- New BERs came into force on 1 January 2011 and will be valid until 31 December 2022

- Transitional phase: agreements exempted under the old BERs continue to benefit from exemption until 31 December 2012

# BERs: What is new?

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- **No major changes in the R&D and Specialisation BERs**
  - The Commission felt that the current regime has worked well
  - Attempts to clarify and simplify the BERs: new definitions (e.g. “potential competitor”), more examples in the Guidelines
- **EU Commission has traditionally considered R&D and Specialisation Agreements as broadly desirable with a few BUTs**



# R&D BER

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- **Extended scope:**
  - “Paid for research” agreements (the relaxation of the restriction)
  - Joint exploitation agreements with exclusive licensing
- **Black list (Article 5) has been relaxed and shortened:**
  - No more 7 year limit on active sales restrictions regarding territories and customers that are exclusively allocated to one of the parties (e.g. one party can use the new medicine for human use and the other party can use it for veterinary use permanently)
- **Disclosure of IPRs relevant for the exploitation has been abandoned:**
  - An obligation to disclose “existing and pending IPRs in as far as they are relevant for the exploitation of the results by the other parties” was included in the drafts published in May 2010, but is no longer there

# Horizontal Guidelines

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- **Guidelines are often drafted to make no concession but to close no door!**
  - The Guidelines are not binding on the EU Courts but are authoritative as a prediction of what cautious enforcers would say
- **“Self-assessment” tool for horizontal agreements in six general categories**
  - Information exchanges
  - R&D
  - Production
  - Purchasing
  - Commercialisation
  - Standard setting agreements
- **Important new topics covered in the Horizontal Restraints Guidelines:**
  - Information exchanges
  - Standard setting

# Information exchanges

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- **Increased focus on information exchanges, not only in context of broader anti-competitive behaviour (e.g. cartels) but also as standalone infringements**
  - See UK Tractor Exchange and Greek Cement cases
  - Very recent NCA case: Dutch Hospital decision with commitments (benchmarking OK; but not direct transparency between competitors)
- **“Information exchange” includes the sharing of data:**
  - Directly between competitors
  - Through a common agency (e.g. trade association)
  - Through a third party
  - By means of publishing
- **Guidelines include rules for the assessment of information exchanges:**
  - Very conservative rules; useful guidelines on borderline cases

# Information exchanges (Cont'd)

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- **Case by case assessment**
  
- **Listed factors to be considered:**
  - **Market characteristics**
    - More guidance on collusive outcome and foreclosure
  - **Characteristics of the information exchanged**
    - Strategic information
    - Market coverage
    - Aggregated/Individualised data
    - Data relevancy
    - Frequency
    - Public availability

# Information exchanges are said to be pro-competitive

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- **Horizontal Guidelines (para 57):**
  - “Information exchange is a common feature of many competitive markets and may generate various types of efficiency gains.”
- **Express recognition that certain information exchanges can benefit from Article 101(3) TFEU:**
  - Benchmarking (para 95)
  - Finding high-demand markets and low cost companies (para 96) (e.g. reports on agricultural markets and perishable products)
  - Consumer data for insurance and credit products (para 97)

# But, there is a narrowing of the tolerance

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- **Strategic (instead of commercially sensitive) information is risky**
  - Broader scope: information on risks, investments, technologies and R&D programs, etc.
- **Aggregated data may not be safe**
  - Aggregated data does not necessarily mean no restriction of competition, only less likely
- **Old data may still be risky**
  - Historic data = if several times older than the average length of contracts in the industry
  - Little guidance on exchanging information less than 1 year old
- **Publicly available information may be risky**
  - No infringement when exchanging genuinely public information, i.e. equally accessible to all competitors and customers
  - No such presumption for information in the public domain, i.e. if the costs or efforts involved in collecting data deter other companies and customers from doing so

# Some information exchanges are Restrictions By Object “irredeemably bad”

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- **Consistent with the case law**

- 1969 Commission Decision of in *Dyestuffs*, upheld by the ECJ in Case 48/69 *ICI v Commission*:
  - “it is contrary to the rules on competition contained in the Treaty for a producer to cooperate with his competitors, in any way whatsoever, in order to determine a coordinated course of action relating to a change of prices and to ensure its success by prior elimination of all uncertainty as to each other’s conduct regarding the essential elements of that action, such as the amount, subject-matter, date, and place of such changes”
- Case C-8/08 *T-Mobile Netherlands*
  - “when one undertaking alone breaks cover and reveals to its competitors confidential information concerning its future commercial policy, that reduces for all participants uncertainty as to the future operation of the market and introduces the risk of a diminution in competition and of collusive behaviour between them” (AG Kokkott opinion):

- **The Guidelines restrictions by object are limited to intentions:**

- “Any information exchange with the objective of restricting competition on the market will be considered as a restriction of competition by object” (paragraph 72)
- Examples: exchanges relating to individualised data regarding *intended* future prices or quantities, private exchanges between competitors of their individualised *intentions* regarding future prices or quantities

# Standard setting agreements

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- **Raised a lot of interest/reaction during the consultation**
- **For the first time covered in the Guidelines**
- **A number of recent high-profile Article 102 TFEU cases (Rambus settlement and Qualcomm case)**
- **Complex because of the interaction between Article 101 TFEU, Article 102 TFEU and IPRs**
- **Must the company be dominant at the moment of the controversial conduct? Or is it an abuse to use once dominant the advantage unfairly acquired when not dominant?**



# Standard setting agreements – Rambus controversy

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- **Inventors of the asynchronous DRAM**
- **Discussion among manufacturers of DRAMs whether to incorporate this new technology in industry standard for the DRAM**
- **Was there a duty to disclose status of patent applications?**
- **“Patent ambush”**
- **When industry members negotiate standards, each is likely to seek advantages, not pursuing some higher goals**
- **Desirability of clarity as to what is obligatory to disclose**

# Standard setting agreements - Reassurance

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- **According to the Guidelines, Article 101 TFEU would not apply in three situations:**
  - Participation in SSO and procedure for adopting standards is open and transparent
  - Clear, balanced and binding IPR policy
    - Policy should require disclosure of IPRs “that might be essential for the implementation of the standard under development”
  - FRAND commitment for essential IPRs
    - FRAND not defined as such, but assessment to be based on whether the rates bear a reasonable relationship to the economic value of the patents (however, it remains extremely difficult to resolve pricing controversies)

# Standard setting agreements - Guidance

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- **No presumption of illegality**
- **“Effects-based” features:**
  - Freedom to develop alternative standards and products
  - Access to the standard
  - Market shares of the goods and services based on the standard
  - Discrimination against any participating or potential members
  - Sufficiently transparent disclosure of IPRs

# Helpful guidance or a new straitjacket?

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- **Information Exchange:**

- Very conservative guidance (sometimes going further than the case law, e.g. one year old data may still be risky ⇔ UK Tractor Exchange)
- No safe harbour for information exchanges
- Uncertainty remains on the assessment of information exchanges
- But T-Mobile case seems to endorse Commission approach

- **Standard setting agreements:**

- The Guidelines are an improvement on the position taken by the Commission in early stages of the Rambus case
- The Guidelines are still very prescriptive and not practical in every specific instance