

## **FFII e.V. Comments on Draft R&D Block Exemption Regulation**

1. The **drafting technique** makes it rather complicated to understand the legal implications of the provisions from the draft regulation. Article 3 (Conditions for exemption) demonstrates the potential for technical improvements of the draft.
2. The Recital 9 claim "...that substantially contribute to technical or economic progress" has no scientific backing. There is **insufficient empirical evidence** for such a contribution.
3. A research-only constraint clause may be unconstitutional under German Basic Law Section 5 Item 3:  
"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."
4. On ex-ante disclosure we submit that **substantive patent laws** are not yet harmonised within the European Acquis which appears to be a useful prerequisite for such measures.
5. The Article 1(4) definition of R&D is far too broad as even **legal services are included within the scope of R&D**:  
«Research and development» means the acquisition of know-how relating to products, technologies 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.
6. Article 2 (1) requires more precise wording:  
shall not apply to agreements entered into between two or more parties which relate to the conditions under which those parties pursue:
7. It is **unacceptable** to extent Article 2 (2) to all licensing matters regardless of specific circumstances:

The exemption provided for in paragraph 1 shall also apply to research and development agreements containing provisions which relate to the assignment or licensing of intellectual property rights to one or more of the parties, provided that those provisions do not constitute the primary object of such agreements, but are directly related to and necessary for their implementation.

The conditions set are too weak. The phrase "do not constitute the primary object of such agreements, but are directly related to and necessary for their implementation." lacks a specific phrasing. It is apparent that the conditions could be always met and **defunct Article 101 for IPR licensing** related antitrust applications. Article 2 (2) translates into a **patent cartel exemption**. It is not fully defined what does or does not constitute a "research and development agreement". A teleological criteria for the interpretation or a priority scope ("the primary object of such agreements") is arbitrary, difficult to apply and easy to circumvent.

8. **Special requirements may be necessary** in an e-government context where patent arrangements may not overrule free access for citizens to government services, and would otherwise impose a private toll on these subjects. As regards of copyright the block exemption regulation should explicitly extent to software licensed under the European Union Public License or similar open arrangements of copyright licensing, and also consider the needs of open standards industry consortia.

9. Article 6 covers cases which are contra public order, it ought to be investigated whether such contractual terms are null and void under generic private law and thus constitute irrelevant scenarios of Article 101 enforcement. Null and void shall be **any** contractual agreement between parties not to challenge the validity of exclusive rights granted by state authority. Challenging validity is in the public interest, and a legitimate procedural right under law for all participants that cannot be constrained by agreement.



*The Foundation for a Free Information Infrastructure (FFII) e. V. is a charitable association registered in Munich, Germany, which is dedicated to the spread of data processing literacy and consumer protection. It funds the development of public information works based on copyright, free competition and open standards. The FFII attained broad international recognition for its phrontistery role in the European debate on a software patent directive (2002-2005) and software-related patent reform.*

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