COMPETITION ASSESSMENT OF COOPERATION IN RESEARCH AND DEVELOPMENT UNDER EUROPEAN UNION AND TURKISH LAWS

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I. INTRODUCTION

This article aims at analyzing the R&D agreements under EU and Turkish competition laws and comparing the Turkish Block Exemption Communiqué No. 2003/2 Concerning the R&D Agreements[1] (the "Communiqué") with the EU Regulation No. 2659/2000 of 29 November 2000 on the Application of Article 81/3 of the Treaty to Categories of R&D Agreements[2] (the "Regulation").

I.1. Certain Basic Concepts

R&D: Article 2(4) of the Regulation defines R&D as *"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."* By virtue of Article 3 of the Communiqué, which provides the relevant definitions, however, *"the acquisition of know-how relating to products or processes"* is not considered within the scope of the definition of R&D under Turkish law.

Cooperation in R&D: Cooperation in R&D broadly refers to the agreements made between two or more companies deciding to put together their R&D teams and equipment in order to carry out a particular research together, or to create a common R&D unit.[3] However, the meaning of R&D agreements combined with EU Competition law refers to a wider definition. Under *the Guidelines to Assess the Applicability of Article 81 of the EC Treaty to Horizontal Agreements*[4] (the "Guidelines"), R&D agreements may vary in form and scope: they range from outsourcing certain R&D activities to the joint improvement of existing technologies or to a cooperation concerning the research, development and marketing of completely new products, or they may take the form of a cooperation agreement or of a jointly controlled company.[5] As stated in its preamble, the Communiqué also adopts that wider definition.

Collaborative and non-collaborative R&D: The majority of R&D agreements are essentially customer-supplier relationship, and thus in a non-collaborative nature: the supplier, e.g. university department, provides a service, and on the other hand, the customer, e.g. client or sponsor, bears the risk that the result yielded by the work will have no commercial value.[6] A certain number of R&D agreements, on the other hand, have a

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1 Published in Official Gazette No. 25212 dated 27 August 2003.

2 Published in EU Official Journal L 304, 05/12/2000 P. 0007-0012.

3 Tercinet, A., *Droit Européen de la Concurrence: Opportunités et Menaces*, Paris, 2000, p. 290.

4 Adopted by the Commission and published in the Official Journal on 6 January 2001, OJ [2001] C 3/2, [2001] 4 CMLR 386.

5 The Guidelines at §39.

6 Byrne, N., *Research and Development Contracts*, [1995] 8 I.C.C.L.R. at pp. 272-276.

collaborative character; so allowing contracting parties to share the risks and benefits of the work, i.e. collaborative R&D agreements. In so doing, the parties to the collaborative R&D agreement aim to obtain results that are not likely to be forthcoming, at least not within the time-scale envisaged by the joint-venture, if the R&D were left to the separate, uncoordinated efforts of the parties.[7]

I.2. BENEFITS AND RISKS OF COOPERATION IN R&D

I.2.a. Benefits of Cooperation in R&D

Cooperation in R&D and in the exploitation of the results is generally beneficial to both undertakings, in particular, to small and medium-sized enterprises (the "SMEs") and to the consumers. Particularly collaborative R&D agreements promote technical and economic progress by increasing the dissemination of know-how between the parties and avoiding duplication of R&D work.[8]

Collaborative R&Ds are especially beneficial to SMEs aiming to become a leader in fast-developing market segments. To achieve that goal and to remain competitive, SMEs need constantly to innovate. Through R&D cooperation there is a likelihood that overall R&D by SMEs will increase and that they will be able to compete more vigorously with stronger market players. However, that consideration can also be criticized by simply mentioning a statistical research done by the OECD: The vast majority of small firms in OECD countries do not perform any organized R&D cooperation, and, for example, eight largest R&D programs account for more than 30% of all industrial R&D in all OECD countries.[9]

Consequently, although R&D cooperation is considered to be particularly beneficial to SMEs, it is rather preferred by large size companies. Recent statistics carried out on the relation between size of the company and expenditure on R&D cooperation also demonstrate that those data did not change from the time when OECD carried out that statistical work.[10]

In addition to the undertakings, consumers can generally be expected to benefit from collaborative R&D agreements as well, thanks to the increased volume and effectiveness of R&D through the introduction of new or improved products or services or the reduction of prices brought about by new or improved processes.[11]

I.2.b. Anti-Competitive Effects of Cooperation in R&D

Cooperation in R&D enables the creation of wholly new markets or industries; however, on a negative balance, it may lead over time to the demise of existing industries.[12] R&D agreements between powerful and potentially very innovative competitors may reduce

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7 *ibid.* at p. 276.

8 Recital 10 of the Regulation.

9 Freeman, C., *Size of Firms, R and D, and Innovation*, in International Conference on Monopolies, Mergers, and Restrictive Practices, Cambridge, 1969, pp. 145-154.

10 See e.g. Statistics on *"Company and other non-Federal funds for industrial R&D performance in the U.S. 1997 to 2000"* by National Science Foundation, available at *'http://www.nsf.gov/sbe/srs/srs02403/tables/e2.xls'*.

11 Recital 12 of the Regulation and Paragraph 1 of the Preamble of the Communiqué.

12 Byrne, N., *Research and Development Contracts*, [1995] 8 I.C.C.L.R. at pp. 272-276.

the competition in innovation, and may facilitate coordination of prices and production.[13] Therefore, the EU Commission has, in a considerable number of cases[14], made it a condition of an exemption that the partners have the right to use the results of the R&D separately, thus preserving competition between the parties to the R&D.[15] Similarly, Article 5(e) of the Communiqué provides that any R&D agreements have to recognize the right of the parties to use the results of the R&D separately.

The EU Commission makes a threefold distinction with respect to the anti-competitive effects of R&D cooperation: first, it may restrict innovation, secondly it may cause the coordination of the parties' behavior in existing markets and thirdly, foreclosure problems may occur at the level of the exploitation of possible results.[16] However, these types of negative market effects are only likely to emerge when the parties to the cooperation have significant power on the existing markets and/or competition with respect to innovation is significantly reduced.[17] The Communiqué does not specifically deals with the possible adverse market effects of the R&D agreements.

II. REGULATORY FRAMEWORK GOVERNING R&D AGREEMENTS

II.1. Regulatory Framework Under EU Law

II.1.a. Treaty Basis of R&D Policy of the EU

Title XVIII[18] of the EU Treaty particularly deals with research and technological development, and Article 163(1) clearly points out the objective of the EU as *"strengthening the scientific and technological bases of Community industry and encouraging it to become more competitive at international level."* Moreover, Article 163(2) provides that, in order to achieve that objective, *"the Community shall, throughout the Community, encourage undertakings, including small and medium-sized undertakings, […] in their research and technological development activities of high quality; it shall support their efforts to cooperate with one another."*

Article 81(1) of the EC Treaty prohibits all agreements, decisions and concerted practices between undertakings which may effect trade between EC Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The application of this provision to R&D cases shows particularities as R&D agreements themselves are treated in a different manner from other horizontal agreements, particularly because of their importance for the promotion of innovation. The EU Commission considers that, in order to assess the applicability of Article 81(1), it is not sufficient to envisage the competition between parties, but it is also necessary to consider whether an R&D agreement is likely to affect competition to such an extent that negative effects can be expected.[19] In considering whether an R&D is likely to cause such a

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13 Fifteenth Report of the Commission on Competition Policy, point 282. See also Regulation, Recital 4; and also Guidelines, §42.

14 e.g. in *Henkel/Colgate*, D. Comm. Dec. 23, 1971, 1972 OJ L 31/29; and also in *Beecham/Parke Davis*, D. Comm. Jan. 17, 1979, 1979 OJ L 70/11.

15 Ritter, Braun & Rawlinson, *European Competition Law: A Practitioner's Guide*, 2nd ed., 2000, p. 674.

16 Guidelines, §61

17 *ibid.*

18 Articles 163 to 173 of the EC Treaty.

19 *La Politique Européenne de Concurrence: XXXe Rapport sur la politique de concurrence,* by the European Commission, 2000, p. 20.

negative effect on the market, in the wording of the Guidelines, *"the economic context must be considered, taking into account the nature of the agreement and the parties' market power."*[20] Under Article 81(3) of the EC Treaty, provided that certain conditions are fulfilled, the provisions set out in the Article 81(1) may be declared inapplicable, i.e. the agreement or arrangement may be granted an exemption.[21]

II.1.b. The Regulation[22]

The EU Commission, taking into consideration the importance of R&D agreements for the promotion of innovation in Europe, adopted the Regulation, which entered into force on 1 January 2001. The Regulation mainly confers block exemption upon certain R&D agreements, sets out conditions for application of the block exemption, deals with the market share threshold and duration of the exemption, and finally provides for the principals on the application of that market share threshold.

The Regulation, in the method followed as well as in the substance, is rather comparable to, and globally compatible with, the US Guidelines for Collaborations among competitors, which would allow undertakings concluding agreements producing their effect on both continents to observe the prescriptions of both sets of rules.[23]

II.1.c. The Guidelines[24]

The Guidelines mainly set out the perspective of the EU Commission as regards horizontal agreements and then work through the treatment of different types of horizontal agreements including R&D. Chapter 2 of the Guidelines[25], which particularly deals with R&D agreements, sets out the benefits, especially for small and medium-sized undertakings and the competition problems that the R&D agreements may lead; gives the definition of relevant market with respect to R&D agreements; and finally, clarifies a number of issues concerning the application of Article 81(1) and 81(3) of the EC Treaty.

The Guidelines are mainly of benefit to undertakings, among them, in particular, to small and medium-sized enterprises (the "SMEs"). Firstly, they offer a significant increase in legal certainty, since they are intended to help companies falling outside the block exemption to assess with greater certainty whether an agreement is eligible for an individual exemption. To facilitate this assessment, the Guidelines also offer a number of concrete examples.[26]

II.2. Regulatory Framework Under Turkish Law

II.2.a. Law No. 4054 on the Protection of Competition[27] *(the "Competition Law")*

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20 Guidelines, §20.

21 e.g. in *BP/Kellogg* (16 *BP/Kellogg* [1986] 2 CMLR 619), the Commission held that the agreement infringed Article 81(1) as the agreement contained restrictions as to products other than those which were subject of the joint R&D. However, an exemption under Article 81(3) was granted. See also: Singleton, E.S., *Competition Law*, 1992, p. 237.

22 See fn. 1 *supra.*

23 Jalabert-Doury, N., *op. cit.*

24 See fn. 5 *supra.*

25 Guidelines, Ch. 2, § 39 to 77.

26 *ibid.* at §75 to 77.

27 Published in Official Gazette No. 22140 dated 13 December 1994.

Article 5 of the Competition Law provides that "the Board may issue communiqués by which certain categories of agreements shall be exempted as a group" provided that such agreement (i) contributes to new developments and progress or technical or economic improvement in production or distribution of goods and in providing services; (ii) allows consumers to get a share from the resulting benefit; (iii) do not eliminate competition in a substantial part of the relevant market; and (iv) do not induce a restraint on competition that is more than essential for the attainment of the objectives set out in paragraphs (a) and (b).

II.2.b. The Communiqué

The Communiqué mainly provides block exemption for certain R&D agreements; sets out the period of exemption, conditions for application of the block exemption and the hard core restrictions; regulates the withdrawal of the exemption; and finally provides the principles of application of the exemption to the concerted practices.

III. BASIC PRINCIPLES OF THE COMMUNIQUÉ AND THE REGULATION

III.1 Exemptions Granted to R&D Agreements

As mentioned in the Guidelines[28] and the Communiqué[29], most R&D agreements bring economic benefits by means of cost savings and cross fertilization of ideas and experience. It therefore appears reasonable to provide exemptions to such agreements, since it can be presumed that the positive effects of R&D cooperation would outweigh any negative effects on competition.

Accordingly, the Regulation exempts those R&D agreements which fulfill the conditions stated in Article 3 of the Regulation and which do not include hard core restrictions stated in Article 5 thereof, provided that the combined market share of the parties in the affected existing markets does not exceed 25 percent. Where cooperation in R&D makes an undertaking dominant either on existing markets or as regards innovation, such an agreement, which produces anti-competitive effects in the meaning of Article 81, can -in principle- not be exempted.

Similarly, the Communiqué exempts the R&D agreements which fulfill the conditions stipulated in Article 5 of the Communiqué and which do not include hard core restrictions stated in Article 6 thereof, provided that the combined market share of the parties in the affected existing markets does not exceed 40 percent.

III.2. Relevant Market with respect to R&D Agreements

The identification of products, technologies or R&D efforts which, are subject to cooperation in R&D, is of cardinal importance in the determination of relevant market with respect to such agreements.

Firstly, the innovation may result in a product or technology, which compete in an existing product or technology market. In that case, possible effects concern the market for existing products. Existing relevant market may also be divided into sub-categories of product and technology markets. When the cooperation concerns R&D for the improvement

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28 Guidelines, §68.

29 See Preamble of the Communiqué.

of existing products, these existing products including its close substitutes form the relevant product market.[30] Technology markets arise when intellectual property rights are commercialized independently from the products to which they relate.[31]

Secondly, innovation may result in a new product that creates its own new market. In this case, the cooperation concerns the development of new products or technology, which either replace existing ones or create a completely new demand.

In all cases, where it is required to define the market, the ECJ and the EU Commission intend to use an extremely narrow definition of product and geographical markets, particularly to facilitate findings of dominance.[32] However, such a narrow determination, in the words of Greaves, is particularly worrying for owners of intellectual property rights since the ownership of intellectual property becomes a particularly significant factor in assessing dominance in the defined relevant market.[33]

Under the Communiqué, the relevant market is defined as the relevant geographic and product markets, but it is not provided any means to determine the relevant geographic and product markets. However, the definition of the relevant market under Turkish law is provided in the Communiqué No. 1997/1 on the Control of Mergers and Acquisitions[34] (the "Communiqué No. 1997/1"), which defines the geographic market as any area within the country, where enterprises are involved in the supply and demand of products and services, the conditions of competition are sufficiently homogenous, and can easily be distinguished from neighboring areas due in particular to the conditions of competition which are appreciably different in those areas. In assessing the geographic market, such factors, in particular, the characteristics of the products or services concerned, existence of entry barriers, appreciable differences of the enterprises' market shares or substantial price differences between the neighboring areas and the relevant area with respect to consumer preferences are taken into account.

Pursuant to the Communiqué No. 1997/1, in determining the relevant product market, the market comprising all products or services, which are regarded as substitutable by consumers by reason of their characteristics, prices and intended use are taken into account, together with the products or services that are subject matter of the merger concerned.

III.3. Conditions for Exemption

Articles 3 and 4 of the Regulation and Article 5 of the Communiqué stipulate the following conditions that the R&D agreements have to fulfill in order to benefit from the exemption. Pursuant to the Regulation and the Communiqué, all of the following conditions must be met in order for an R&D agreement to benefit from the exemption:

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30 Guidelines, §44.

31 Vrins, O., *Intellectual Property Licensing and Competition Law: The Role of Market Power and "Double Jeopardy" in the EC Commission's New Deal,* [2001] E.I.P.R, pp. 576-585.

32 e.g. the *United Brands* case (Case C-27/76 [1978] 1 C.M.L.R. 429) constitutes a paradigm to illustrate the severity of the ECJ when defining product market. In that case, the Court upheld the Commission's decision in refusing to include bananas in a global market for fresh fruits. See Vrins, O., *op. cit.* at 579.

33 Greaves, R., *Article 86 of the EC Treaty and Intellectual Property Rights*, [1998] E.I.P.R. at 383.

34 Published in Official Gazette No. 23078 dated 12 August 1997.

i. all the parties have access to the results of the joint research and development for the purposes of further research or exploitation;

ii. the R&D 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;

iii. the joint exploitation relates to results which are protected by intellectual property rights or constitute know-how, which substantially contribute to technical or economic progress and the results are decisive for the manufacture of the contract products or the application of the contract processes;

iv. the undertakings charged with manufacture by way of specialization in production are required to fulfill orders for supplies from all the parties, except where the research and development agreement also provides for joint distribution.

III.4. Market share Threshold and Duration of Exemption

Pursuant to the Regulation, where two or more of the participating undertakings are competing undertakings, the exemption shall apply only if the combined market share of the participating undertakings does not exceed 25 % of the relevant market for the products capable of being improved or replaced by the contract products. By virtue of the Communiqué, however, where two or more of the participating undertakings are competing undertakings and the results of the R&D shall be jointly exploited, the exemption only applies if the combined market share of the participating undertakings does not exceed 40 % of the relevant market.

The Communiqué also stipulates that where the distribution right of the products subject to R&D agreement is exclusively granted to one of the parties or to a subsidiary of the parties, or to a third party, the combined market share of all parties must not exceed 20 % of the relevant market. The Regulation, however, does not make such a distinction between R&D agreements where the distribution right of the products subject to R&D agreement is exclusively granted to one person, and apply the 25% market share threshold to such R&D agreements as well.

Under the Regulation, where the participating undertakings are not competing undertakings, the exemption shall apply for the duration of the R&D, and where the results are jointly exploited, the exemption shall continue to apply for seven years from the time the contract products are first put on the market within the common market.

The Communiqué also provides that where the R&D agreements do not include joint exploitation of the results, the exemption shall apply for the duration of the R&D. But, the Communiqué does not stipulate the condition of not being competing undertakings to grant the exemption for the duration of the R&D. By virtue of the Communiqué, where the R&D agreement includes joint exploitation of the results, the exemption shall apply for five years from the time the contract products are first put on the market within Turkey.

III.5. Market Share Calculation in R&D Cases

The calculation of market shares is based on the distinction between different form of relevant market explained above, namely existing markets and competition in innovation. Both the Regulation and the Guidelines adopt that methodology and deal with various possibilities:

Firstly, if the R&D agreement only aims at improving or refining existing products, this market includes the products directly concerned by the R&D. Market shares can thus be calculated on the basis of the sales value of the existing products.

As a second possibility, if the R&D aims at replacing an existing product, the new product will, if successful, become a substitute to the existing products. To assess the competitive position of the parties, it is again possible to calculate market shares on the basis of the sales value of the existing products. For an automatic exemption, this market share may not exceed 25 percent.

Finally, if the R&D aims at developing a product which will create a completely new demand, market shares based on sales cannot be calculated, and it is only possible to analyze the effects of the agreement on competition in innovation. Therefore, the Regulation exempts these agreements irrespective of market share for a period of seven years after the product is first put on the market.

Contrary to the Regulation and the Guidelines, the Communiqué does not provide any methodology regarding the calculation of the market shares.

III.6. The So-Called Hard Core Restrictions

Article 5 of the Regulation and Article 6 of the Communiqué provide certain categories of R&D agreements which are not covered by the exemption. These categories are:

i. the restriction of the freedom of the participating undertakings to carry out research and development independently or in cooperation 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;

ii. the prohibition to challenge after completion of the research and development the validity of intellectual property rights which the parties hold in the common market and which are relevant to the research and development

iii. the limitation of output or sales;

iv. the fixing of prices when selling the contract product to third parties;

v. share of customers and territories; or

vi. 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.

III.7. Withdrawal of Exemption

Both the Regulation and the Communiqué provide that the exemption granted to R&D agreements may be withdrawn upon fulfillment of the following conditions:

i. 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;

ii. without any objectively valid reason, the parties do not exploit the results of the joint research and development;

iii. 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.

In addition to the above stated conditions for withdrawal of an exemption, the Regulation provides two more conditions in the existence of which the EU Commission may withdraw an exemption and which are not provided in the Communiqué. These conditions are:

i. 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; or

ii. the existence of the research and development agreement would eliminate effective competition in research and development on a particular market.

In other words, the Regulation provides more grounds for the Commission to withdraw an exemption that the Communiqué provides for the Competition Authority.

III.8. Application of the Exemption to Concerted Practices

Both the Regulation and the Communiqué covers the concerted practices. Article 2 of the Regulation defines the term "agreement" as "agreement, a decision of an association of undertakings or a concerted practice." Consequently, the concerted practices between two or undertakings or groups of undertakings as regards cooperation in R&D may also benefit from the block exemption provided under the Regulation. Similarly, Article 9 of the Communiqué states that its provisions *"shall be applied to the concerted practices of the undertakings and the decisions of the group of undertakings."*

IV. CONCLUSION

R&D is essential for undertakings to remain and compete in the market. It is widely accepted that strong economies are based on research and technology.[35] However, R&D may often require enormous investment, thus necessitating cost and risk sharing through cooperation in R&D. On the other hand, such cooperation may lead to competition problems.

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35 e.g. the increase of High-Technology sector in the US, see Kirkbride, J. & Xiong T., *Controling Research and Development Co-operation through EC Competition controls: Some Concerns*, 1998 The Company Lawyer 19, pp. 296-301.

Any initiative dealing with such a delicate issue, therefore, needs a balanced assessment taking into account both the benefits of such cooperation and its anti-competitive effects.

Ensuring that balance is even more important when combined with EU policies. From the 1960's (so-called big era of science) onwards, the EU Commission, trying to ensure that balance, has adopted a twofold objective, namely favoring cooperation in R&D to promote EU businesses, while also trying to ensure maintenance of fair competition in the common market. Those efforts by the EU Commission have sometimes given rise to contradictions between technology and competition policies: the so-called cross-policy problem.[36] It is argued by certain academics that in order to avoid that problem, the EU Commission must take a more positive and clear[37] position towards cooperation in R&D, whereby both the legal certainty that the undertakings need could be ensured, and the contradiction between technology and competition policies could be reduced to a minimum level.

Having appreciated the contributions of the Regulation, the Guidelines and the Communiqué in terms of technological development and consumer protection, all three of them have certain shortcomings.

Firstly, the Regulation has certain shortcomings. Although it makes a distinction between R&D agreements between non-competing manufacturers to which market share criterion applies, versus agreements between competing manufacturers, it is not clear why the Article 3(3)[38] limitation should exist as regards non-competing manufacturers: if non-competitors have jointly created a market share, why should the joint operation come to an end as a result of the increase of market shares (to the extent that this did not result in the elimination of effective competition by creating an unassailable competitive position in the market)?[39]

The Guidelines are also subject to serious criticism for not meeting the expectations[40]. Firstly, although they increase the legal certainty, they are criticised for leaving a number of issues intact. For instance, they establish that the "centre of gravity"[41] rule shall be applied to agreements that combine various levels of cooperation. According to this rule, the system to be applied to the agreement in question will be determined by the main activity. However, any solution is not indicated for the situation where it is not possible to establish the main activity. Secondly, the Guidelines are criticised for being long and complex. They cover a

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36 See e.g. Lawless, M., *Balancing Industrial and Competition Policies*, available at *"http://econserv2 .bess.tcd.ie/SER/1999/essay13"*.

37 The Commission's and the ECJ's strictness in defining relevant market constitutes an example of the EU's unclear position towards R&D: in the words of Vrins, narrow definitions of markets threaten to make the block exemption Regulation a false promise rather than true "peace treaties". See Vrins, *ibid.* at 584.

38 Article 3(3) provides that: *"Without prejudice to paragraph 2, 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. Such 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."*

39 *Position paper on the reform of competition rules relating to Horizontal Cooperation Agreements*, by the EU committee of the American Chamber of Commerce.

40 e.g., the EU committee of the American Chamber of Commerce and the International Chamber of Commerce

41 Guidelines, §39.

great number of theoretical and minor cases, while they should rather concentrate on the main ones.[42]

There are certain shortcomings of the Communiqué as well. For example, as stated above, the Communiqué does not provide any methodology regarding the calculation of the market shares. Moreover, any explanatory note similar to the Guidelines has not yet been issued under Turkish law, although certain issues regulated in the Communiqué need clarification. For example, the determination of the relevant geographic and product markets as regards the R&D agreements is clearly made in the Guidelines, but no such clarification exists under the Communiqué.

42 *Comments by the ICC on the reform relating to horizontal cooperation*, available at *'http://www.iccwbo.org/home/statements_rules/ statements/2000 /ec_proposals.aspetc'*.