

**Republika e Kosovës**

**Republika Kosova - Republic of Kosovo**

**Autoriteti Kosovar i Konkurrencës**

Autoritet Kosova za Konkurenciju - Kosovo Competition Authority

Pursuant to article 28 paragraph 1.10, of the Law on Protection of Competition no. 03/L-229, (Official Gazette nr. 88, dt. 25.11.2010) and article 5 and 7A, paragraph 2 of the Law no. 04/l-226 on Amending and Supplementing the Law no. 03/l-229 on Protection of Competition, the Kosovo Competition Authority on 14.11.2017 issues this:

**REGULATION No. 01/2019 FOR SOME CATEGORIES OF RESEARCH AND DEVELOPMENT AGREEMENTS**

**Article 1**

**Purpose**

1. The purpose of this Regulation is to determine the research and development agreements that are exempted, to assess the impact of these agreements on the relevant market, and to determine the cases when these agreements are not subject to exemption.

**Article 2**

**Definitions**

1. For the purposes of this Regulation, the following definitions apply:
2. " Research and development agreement" means an agreement concluded between two or more parties which assume conditions that must be met;
3. joint research and development of contracted products and technologies as well as joint use of the results of this research and development,
4. joint use of the results of research and development of contracted products or technologies to which they have jointly reached in accordance with the previous agreement between the same parties,
5. joint research and development of contracted products or technologies excluding the joint use of results,
6. payment for the research and development of contracted products or technologies and the joint use of the results of this research and development,

joint use of paid research and development results of products or technologies contracted in accordance with the prior agreement between the same parties, or

* 1. paid research and development of the results of contracted products or technologies excluding the joint use of the results;
1. "agreement" means an agreement, a decision by an enterprise association or a coordinated practice;
2. "research and development" means the acquisition of knowledge and experience about products, technologies or processes for conducting theoretical analysis, systematic study or experimentation, including experimental production, technical testing of products or processes, creating facilities necessary and the acquisition of intellectual property rights for these results;
3. ""product" means goods or services, including semi-finished goods or services and finished products or services;
4. "contracted technology" means the technology or process resulting from joint research and development;
5. "contracted product" means a product either resulting from joint research and development or is manufactured or purchased using contracted technologies;
6. ""use of results" means the production or distribution of contracted products or the application of contracted technologies, namely the granting or licensing of intellectual property rights or the use of the know-how required for such production or application;
7. "intellectual property right" means the right to intellectual property, including the right to industrial property, copyright and similar rights;
8. ""know-how" (knowledge and experience) means a package of patented practical information which has resulted from experience and testing and which is secret, essential and identified;
9. “secret" in the context of know-how means that that know-how is not generally known or easily accessible;
10. “important" in the context of know-how means that know-how is important and useful for the production of contracted products or for the application of contracted technologies;
11. "identified" in the context of know-how means that know-how is described in a very comprehensive manner in order to enable verification of whether it meets the criteria of secrecy and importance;
12. "common" in the context of the activities carried out under the research and development agreement means the activities in which the work involved is:
	1. Executed by the joint team, organization or joint enterprise,
13. Jointly entrusted to e third party, or
14. distributed between the parties through specialization in the context of research and development or use;

(**n**)" "specialization in the context of research and development" means that each party is involved in research and development activities determined by the research and development agreement and that the parties share the research and development work between them in the manner they consider as more appropriate; this does not include paid research and development;

1. "specialization in the context of use" means that the parties assign individual tasks between them such as production or distribution, or impose on each other definitions related to the use of results, such as definitions in terms of use of territories, customers or areas; this includes situations in which only one party produces and distributes the contracted products based on the exclusive license it has under the agreement with the other parties;
2. "paid research and development" means the research and development carried out by one party and financed by the other party to the agreement;
3. ""financing party" means a party which finances paid research and development as long as it does not carry out any research and development activity itself;
4. "competitive entrepreneur" means a true or potential competitor;
5. "current competitor" means an entrepreneur who supplies a product, technology or process which may be upgraded or replaced by a product or technology contracted in the relevant geographic market;
6. "potential competitor ”means the enterprise which in the absence of one research and development agreements are likely, on a realistic basis and not merely as a theoretical possibility, to make the necessary additional investment in the event of any small but steady increase in relative prices within a period of not more than three (3) years, or finance the other necessary replacement costs to supply a product, technology or process that is about to be upgraded or replaced with the contract product or contract technology in the relevant geographic market;
	1. "relevant product market" means the relevant product market which can be improved or replaced with contracted products;
	2. "relevant technology market" means the relevant technology market or process which can be improved or replaced with contracted technologies.
7. For the purposes of this Regulation, the terms "enterprise" and "party" include their respective affiliated enterprises, therefore "affiliated enterprises" means:
8. enterprises in which one of the parties to the research and development agreement is directly or indirectly:
	* 1. authorized to exercise more than half of the voting rights,
		2. authorized to appoint more than half of the members of the Supervisory Board, the Board of Directors or the bodies which legally represent that enterprise, or
		3. is authorized to run the enterprise business;
	1. enterprises which are directly or indirectly authorized to supervise the rights or authorizations of the party specified in the research and development agreements and numbered under point (a);
	2. enterprises in which the enterprise referred to in paragraph (b) has direct or indirect rights or authorizations referred to in paragraph (a);
	3. the undertakings in which the party to the research and development agreement together with one or more undertakings referred to in points (a), (b) or (c), or among whom two or more undertakings, jointly have rights or authorizations referred to in point (a);
	4. enterprises in which the rights or authorizations listed in point (a) are jointly held by:

**(i)** the parties to the research and development agreement or their respective related undertakings, which are mentioned from point (a) to (d), or

**(ii)** one or more parties to the research and development agreement, or one or more of their undertakings linked and mentioned from point (a) to (d) and one or more third parties..

**Article 3**

**Exemption**

1. Article 5 of Law no. 03 / L-229 on Competition Protection shall not apply in respect of agreements entered into between two or more undertakings subject to research and development, and as long as these agreements do not contain restrictions on competition.

**Article 4**

**Exemption conditions**

**1**. The exception provided for in Article 3 shall apply in accordance with the conditions laid down in paragraph 2 to paragraph 5 of this Article.

**2**. The research and development agreement shall stipulate that all parties have full access to the final results of joint research and development or paid research and development, including all rights arising from intellectual property and know-how for the purpose of further research, development and exploitation, and that as soon as the final results become available. If the parties in accordance with this Regulation restrict their rights of use, in particular if they specialize in terms of use, access to the results for the purpose of use may be in accordance with this restriction. Furthermore, research institutes, academic bodies or enterprises that provide research and development as a commercial service without being regularly active in the use of results, they may agree to limit the use of these results in order to further research. . The research and development agreement may provide that one party give the other party a compensation for giving access to results for the purpose of further research or use, but the compensation should not be as high as to essentially impede such access.

**3**. Without prejudice to paragraph 2, where the research and development agreement only provides for joint research and development or paid research and development, the research and development agreement shall specify that each party be given access to any pre-existing know-how’ of the other party if this know-how is necessary for the purpose of using the results. The search and development agreement may provide for the parties to compensate each other for accessing their pre-existing know-how, but the compensation should not be as high as to effectively impede such access.

**4**. Any joint use may relate only to results which are protected by intellectual property rights or constitute know-how and which are necessary for the production of contracted products or the application of contracted technologies.

**5**. The parties responsible for the production of products contracted through specialization in the context of exploitation shall be required to fulfill the orders for the supply of products contracted by other parties, except when the research and development agreement also provides for the joint distribution in meaning of point (m) (i) or (ii) of Article 2, paragraph 1 or when the parties have agreed that only the party which produces the contracted products may distribute them.

**Article 5**

**Market participation threshold and duration of the exemption**

**1**. Where the parties are not competitive undertakings, the exemption provided for in Article 3 shall apply to the duration of the research and development. Once the results have been jointly exploited, the exemption will continue to apply for 7 years from the time the contract products or technologies were first put on the market within the domestic market.

**2**. Where two or more parties are competing undertakings, the exemption provided for in Article 3 shall apply to the period referred to in paragraph 1 of this Article only if, at the time of concluding the research and development agreement:

**(a)** in the case of a research and development agreement referred to in Article 2 (1), points (a) (i), (ii) or (iii) the combined market share of the parties to the research and development agreement shall not exceed 25 % of the relevant product and technology market; or

**(b)** in the case of the research and development agreement referred to in Article 2 (1), points (a) (iv), (v) or (vi) the combined market share of the financing party and of all parties with which the financing party has entered into research and development agreements regarding the same contract products or contract technologies, does not exceed 25% of the respective product and technology market..

1. After the end of the period referred to in paragraph 2, the exemption shall continue until the combined market share of the parties does not exceed 25% of the respective market of the product and technology.

**Article 6**

**Severe restrictions**

1. The exemption provided for in Article 3 shall not apply to research and development agreements, which, directly or indirectly, alone or in combination with other factors under the control of the parties, have as their object any of these:
	1. restricting the freedom of the parties to conduct research and development independently or in cooperation with third parties in the field unrelated to what the research and development agreement applies to, i.e. upon completion of the joint research and development or paid research and development, in the field to which it relates or in a related field;
	2. restricting production or sales except:
		1. setting production targets, where the joint use of results involves the joint production of contracted products;
		2. setting sales revenue targets, through which the use of results includes the joint distribution of contracted products or the joint licensing of contracted technologies within the meaning of Article 2 (1), point (m) ( i) or (ii);
	3. actions representing specialization in the context of exploitation; and

* 1. restriction of the parties' freedom to produce, sell, assign or license products, technologies or processes that are competitive with the contracted products or the contracted technologies during the period for which the parties have agreed to jointly use the results;
1. pricing for the sale of a contracted product or licensing of contracted technologies to third parties, except for the assignment of prices charged to direct customers or license fees charged to direct licensees, where joint exploitation of results involves the joint distribution of contracted products or joint licensing of contracted technologies within the meaning of Article 2 (1) point (m) (i) or (ii);
2. restriction on territory or clients to whom the parties may passively sell the contracted products or license the technology of the contract, except when the results are licensed exclusively to the other party to the agreement;
3. the condition that the active sale of contracted products or contracted technologies to territories or customers that have not been assigned to only one of the parties to the agreement through specialization in the context of use has not been carried out, or restricted;
4. the condition of refusal to meet the customer's request in the respective territories of the parties to the agreement, or otherwise placed for the parties through specialization in the context of exploitation, would place the products contracted in the market in other territories within the market of interior;
5. the condition of making it difficult for customers or sellers to obtain contract products from other vendors within the domestic market.

**Article 7**

**Exempted restrictions**

The exemptions set out in Article 3 shall not apply to the following obligations under research and development agreements:

1. the obligation not to challenge the validity of the intellectual property rights that the parties have in the internal market and which are important for research and development after the completion of the research and development or, the validity of intellectual property rights which the parties hold in the domestic market and which protect the results of research and development after the expiration of the research and development agreement, without prejudice to the possibility of providing for the conclusion of the research and development agreement in the event that one of the parties challenges such validity of intellectual property rights;
2. the obligation not to grant licenses to third parties for the production of contracted products or for the application of contracted technologies, unless the agreement stipulates that at least one party shall use the results of joint research and development or paid research and development, and such use in relation to third parties is made in the domestic market.

**Article 8**

**Applying market share threshold**

For the purposes of applying the market share threshold provided for in Article 5 of this Regulation, the following rules shall apply:

(**a**) market share shall be calculated on the basis of the market value of the sale; if sales market value data is not available, estimates based on other reliable market information, including market sales volumes may be used to determine the market share of the parties;

(**b**) market share will be calculated on the basis of data relating to the previous calendar year;

(**c**) market share held by the enterprises referred to in paragraph (e) of the second subparagraph of Article 2 (2) of this Regulation shall be equally distributed to each enterprise having the rights or authorizations referred to in paragraph 1. (a) of this subparagraph;

(**d**) if market share referred to in Article 5 (3) is initially not more than 25% but then increases above that level without exceeding 30%, the exemption provided for in Article 3 shall continue to apply during a period of time of 2 consecutive calendar years after the year in which the threshold of 25% was exceeded for the first time;

(**e**) if the market share referred to in Article 5 (3) is initially not more than 25% but then increases above 30%, the exemption provided for in Article 3 shall continue to apply for a period of 1 calendar year after the year in which the level of 30% was exceeded for the first time;

(**f**) the benefit of points (d) and (e) cannot be combined in order to exceed a period of 2 calendar years

**Article 9**

**Transitional Provisions**

In case of difficulties in applying the provisions of this Regulation or lack of provisions for making the final decision, the provisions of the Law on Protection of Competition, the Law on Amending and Supplementing the Law on Protection of Competition and the Law on General Administrative Procedure must be applied.

**Article 10**

**Amending and supplementing the Regulation**

The amendment and supplementation of this Regulation may be proposed by any member of the Commission of the Kosovo Competition Authority, and shall be made in the manner and procedure provided for its approval.

**Article 11**

**Entry into force**

This Regulation enters into force on the day of its signature by the Commission of Kosovo Competition Authority

**THE COMMISSION OF KOSOVO COMPETITION AUTHORITY**

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Valon Prestreshi

President

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