



Policy statement

Suggested issues for European Commission Guidelines to the Transfer of Technology Block Exemption

*Prepared by Commissions on Competition and on Intellectual
Property*

Introduction

In order to provide legal certainty to undertakings operating in the European Union (“EU”) and entering into technology transfer agreements, it is essential that the revised Technology Transfer Block Exemption (“TTBE”) and any accompanying guidelines (the “Guidelines”) be as transparent and unambiguous as possible. This is all the more essential in light of the EU’s modernization proposal, which would devolve to Member State authorities a greater role in interpreting EU competition law, thus raising the risk of multiple, conflicting interpretations of identical legislation throughout the EU.

This paper has been drafted to highlight certain issues that may merit further elaboration by the European Commission (“Commission”) in the Guidelines. It focuses in particular on market-definition, multi-party licensing and on situations where one or more of the parties involved in a technology transfer agreement would exceed the market share thresholds of the revised TTBE. It also highlights the need to clarify how such agreements would be treated under the Guidelines.

The Importance of Clear Guidelines to accompany the Revised TTBE

The Commission acknowledged in the *Sicasov* decision¹ that even when the existing technology transfer block exemption² is not strictly applicable because an agreement falls outside of its provisions, “it can nevertheless provide criteria that may be used” in the context of an individual decision.³

¹ 1999/6/EC: Commission Decision of 14 December 1998 relating to a proceeding under Article 81 of the EC Treaty (IV/35.280 – *Sicasov*), hereinafter “*Sicasov*”.

² i.e. Regulation 240/96.

³ *Sicasov*, at para 73.

The Commission's recently revised rules on the assessment of horizontal and vertical agreements take this approach further by providing guidelines on how agreements that fall outside the scope of the block exemption should be assessed. They not only provide guidance on how to apply the principles of the block exemption by analogy but also incorporate existing case-law and introduce a more economics-based approach. This has resulted in guidelines which provide parties to an agreement with a framework against which their agreement will be assessed.

We would wish the Commission to draw inspiration from that exercise in order to ensure that the Guidelines :

- clarify that a technology transfer agreement is not *per se* anticompetitive or illegal merely because the parties exceed a market share threshold that would be set forth in the TTBE;
- provide guidance on how to assess agreements that fall outside the scope of the block exemption, by introducing a more economics-based approach and allowing efficiencies and economic benefits to be taken into account in assessing often complex agreements.

Some Suggested Topics For Incorporation Into The TTBE Guidelines

The Guidelines should recognize that the licensing of intellectual property rights ("IPR") expands the use of inventions, increases competition in such use, and disperses technology, thereby encouraging improvements.

- The Guidelines should clarify, by citing clear examples, the different potentially relevant competitive aspects and effects of licensing agreements within and outside the scope of the TTBE as regards: innovation markets; technology markets; product markets; and in particular, explain how the competitive conditions in each of such interlinked markets will be taken into account in assessing whether a dominant position might exist in one or more of them.
- The aim of a revised TTBE should be to proceed to a fair and balanced examination of all constituent factors to a technology transfer agreement. The Guidelines should specify that market strength is only one of the factors taken into account and ensure that other elements, such as efficiencies and benefits to the consumer, are given appropriate weight in the assessment. It is recommended that examples be provided of technology transfer scenarios where such efficiencies could be accepted; and where anti-trust concerns outweigh such efficiencies; guidance can be drawn from the guidelines on horizontal agreements⁴;
- The Guidelines should clearly state that an *a priori* ban on agreements entered into by undertakings with market shares above the specified thresholds is not contemplated and should specify the circumstances under which potentially restrictive clauses included in such agreements may have pro-competitive effects.

⁴ Guidelines on the applicability of Article 81(1) of the EC Treaty to Horizontal Cooperation Agreements, OJ 2001/C 3/2 at para 37.

- The Guidelines should highlight the relative importance of inter-brand v. intra-brand competition in the context of technology transfer agreements. In this context it is to be noted that certain restrictions on intra-brand competition may provide impetus for more vigorous inter-brand competition.
- Note should be taken of the fact that higher profits can often be made by exploiting IPR oneself. Entering into a technology transfer agreement often indicates that the rights-holder is unable to exploit the rights itself, rendering such agreements more likely to be pro-competitive. These considerations are certainly useful in the context of assessing site licences.
- The Guidelines should recognize that restrictions relating to, *e.g.*, field of use, output or customers will often be pro-competitive, as they can ensure the capital-intensive dissemination of new technology without foreclosing competition.
- The Guidelines should recognize that if the licensor and the licensee are non-competitors and operate on totally unrelated markets (with no “spillover” risk), most typical restrictions in technology transfer agreements are unlikely to have anti-competitive effects, regardless of the contracting parties’ market shares in their respective markets.

Conclusion

The above issues require clarification in the Guidelines, if industry is to operate under an environment of legal certainty under the revised TTBE. The emphasis is on recognizing the economic and legal limits of bright line market share thresholds as a tool for determining market power and the pro- or anti-competitive nature of any particular technology transfer agreement.

It is imperative that a revised TTBE strike a proper balance between encouraging technology transfer and investment while protecting the rights of IPR holders on the one hand, and intelligent policing against anti-competitive behavior on the other.

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