



The new EU Competition rules on Technology Transfer Agreements

Blaž Višnar*

European Commission,
DG Competition, Unit E-4
10th EU-China Competition Week
Beijing, 18 March 2015

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Overview

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 - Licensing of IPR and Antitrust
 - Process
 - Basic features of TTBER and Guidelines
- Changes
 - Regulation
 - Scope
 - Hardcore Restrictions
 - Excluded Restrictions
 - Guidelines
 - Settlements
 - Technology Pools

Licensing of IPR and Antitrust

- Innovation is an essential long term driver of consumer welfare:
 - Licensing promotes innovation by disseminating technology, creating design freedom and creating incentives for innovation
- But competition is also an essential driver of innovation – a virtuous circle.
- Not licensing as such but restrictive clauses in licensing agreements that can stifle competition.
- Philosophy of the TTBER and Guidelines: Licensing is generally pro-competitive and should be encouraged, but no immunity from competition law.



Process – from old to new

- Autumn 2011 to March 2014
- 6 December 2011 - first public consultation on the old technology transfer regime
- 20 February 2013 - public consultation on draft new TTBER and the draft new Guidelines
- The new TTBER was adopted on 21 March 2014.
- Entered into force 1 May 2014.
- Transitional period of one year for companies' to adapt existing agreements.
- TTBER runs until 2026 (12 years as compared to 10 years for the old).
- Evolution but no revolution – overall structure kept.

Background - basic features of the TTBER

- Applicable to the licensing of patents, know-how, design rights, software copyrights etc. (Article 1).
- A wide block exemption with
 - a limited hardcore list (Article 4 TTBER)
 - a limited list of excluded restrictions (Article 5 TTBER)
 - market share thresholds (Article 3 TTBER)
 - 20% for agreements between competitors
 - 30% for agreements between non-competitors
- No presumption of illegality above the market share thresholds.
- Guidelines on the application of the TTBER as well as guidance on the assessment of licensing agreements outside of the scope of the TTBER.

Main changes in the new TTBER

Scope of the TTBER

- TTBER made **subsidiary** to Horizontal BERs (R&D and Specialisation).
- Simplified test for ancillary provisions concerning **purchase of input and/or licensing of trademarks**: from "not being the primary object of the licence" to "if, and to the extent, that those provisions are directly related to the production or sale of the contract products"

Hardcore Restrictions

- Hardcore list for licensing between competitors (art. 4(1)):
 - Price fixing, output limitations (except in certain contract manufacturing arrangements), allocation of markets and customers, restriction on licensee's ability to exploit its own technology
 - simplification of language for market allocation but no change in substance
- Hardcore list for licensing between non-competitors (art 4(2)):
 - the **automatic exemption for restrictions of passive sales** into the exclusive territory/customer group of another licensee for the first two years has been **removed**

Exclusive grant back obligations

= obligations on the licensee to grant an exclusive licence or to assign rights to the licensor or to a third party designated by the licensor in respect of its own improvements of the licensed technology

- All **exclusive grant-back** obligations are now **excluded restrictions** (before only exclusive grant-backs for severable improvements)
- Concern: such obligations can be expected to reduce the incentive of the licensee to innovate and exclusivity often not necessary for obtaining potential efficiencies

Termination clauses

- **Non-challenge clauses** remain **excluded restrictions**: generally good to remove invalid IPR from the market
- Experience: termination clauses may have same effect, in particular if switching difficult due to sunk costs or necessary input
- Change: termination clauses also treated as excluded restrictions (but only in non-exclusive agreements)

The Guidelines

Settlements

- Short new section on **reverse payment settlements**
 - Delay or otherwise limited entry
 - Actual or potential competitors and a significant value transfer
 - ↳ Risk of market allocation/market sharing (hardcore Article 4(1)(c) and 4(1)(d)).
- Non-challenge clauses in settlement agreements

Technology Pools

- Guidelines provide a comprehensive **soft safe harbour** for the creation and licensing of the pool if certain conditions are fulfilled:
 - a) Open to all
 - b) Only essential technologies
 - c) Only info exchange necessary for the pool
 - d) IPR holder can still license out outside pool
 - e) Licensing out on FRAND terms
 - f) No restriction on challenging validity/essentiality
 - g) No restriction on developing competing products/technology

Thank you!