

**COMMISSION QUESTIONNAIRE ON LICENSING AGREEMENTS:
THE COMMUNITY COMPETITION RULES ON TECHNOLOGY LICENSING
UNICE COMMENTS**

1. INTRODUCTION

The Commission is to carry out an assessment of the application of Regulation 240/96 on, the application of Article 81 (3) to certain categories of technology transfer agreements and UNICE welcomes the Commission's initiative to consult widely on the issue. UNICE appreciates being given the opportunity to exchange views with the Commission as regards issues to be taken into consideration during the policy review.

As suggested by the Commission in the questionnaire, UNICE will only reply to the questions relevant to it. UNICE's views as regards section III of the questionnaire are outlined below.

2. THE QUESTIONNAIRE: III – THE COMMUNITY COMPETITION RULES ON TECHNOLOGY LICENSING (16-21)

PLEASE INDICATE, ON THE BASIS OF YOUR EXPERIENCE, WHAT DIFFICULTIES (IF ANY) OR ADVANTAGES YOU HAVE EXPERIENCED IN APPLYING REGULATION 240/96

Advantages

?? Absence of market share thresholds for application of Block Exemption Regulation (BER).

?? Single BER applicable to patent and know-how licensing.

Difficulties

?? Complexity and disproportionate consequences of infringements of BER bans on active and passive sales:

?? Complexity and straitjacket effect of three BER lists of restrictions (white, black and grey);

?? Non-applicability of BER to non-ancillary licenses of software and other non-patent IP rights (such as copyright, trademarks, design rights);

?? Possible non-applicability of BER to agreements authorizing sublicensing;

?? Possible non-applicability of BER to (sub)licenses agreed between two parties and comprising a package of complementary patents of more than one patentee;

?? Uncertainty as to effect of market share threshold in BER for joint R&D on joint licensing of IPRs resulting from joint R&D .

?? Possible non-applicability of BER on grantback obligations as to blocking patents of licensee.

17.

PLEASE INDICATE WHETHER IN YOUR VIEW REGULATION 240/96 HAS HAD A POSITIVE OR NEGATIVE IMPACT ON THE DEVELOPMENT OF AND DISSEMINATION OF TECHNOLOGY THROUGHOUT THE COMMUNITY. PLEASE PROVIDE REASONS FOR YOUR REPLY.	
<p><i>POSITIVE</i></p> <p>Most licensors manage to disseminate their technology within the framework of the BER in the absence of a market share ceiling.</p>	<p><i>NEGATIVE</i></p> <p>?? Still too much based on 81 (3) instead of 81 (1), and not sufficiently endorsing importance of long term dynamic competition flowing from innovation and licensing.</p> <p>?? As a result of the rules contained in the BER, some licensors prefer to self-exploit their technology.</p>

18.

PLEASE INDICATE WHETHER IN YOUR VIEW REGULATION 240/96 HAS HAD A POSITIVE OR NEGATIVE IMPACT ON THE PROTECTION OF EFFECTIVE COMPETITION IN THE COMMUNITY. PLEASE PROVIDE REASONS FOR YOUR REPLY.	
<p><i>POSITIVE</i></p> <p>The BER provides legal certainty.</p> <p>We are not aware of excessively restrictive block exempted licences.</p> <p>There have been virtually no instances of withdrawal of benefit of BER.</p>	<p><i>NEGATIVE</i></p> <p>The Block Exemption is too prescriptive and has a negative impact on competition:</p> <p>?? it does not encourage new forms of licensing and new approaches to licensing; and</p> <p>?? it discourages exploitation.</p>

19.

HOW DO YOU CONSIDER THE APPROACH OF REGULATION 240/96 ON THE FOLLOWING ISSUES			
	<i>Satisfactory</i>	<i>Unsatisfactory</i>	<i>No opinion</i>
<i>Licence exclusivity</i> Art's 1 & 3(7)		Too complex and legalistic	
<i>Territorial restraints on licensor</i> Art's 1, 3(3) & 3(7)	?		
<i>Territorial restraints on licensee</i> Art's 1, 3(3) & 3(7)		Duration limits are excessively complex as it depends upon the nature of the right in other jurisdictions	
<i>Customer restrictions</i> Art 3(4) & Recital 23	?		
<i>Field-of-use restrictions</i> Art 2.1(8)		Field-of-use restrictions should be allowed by reference to "product" rather than "product market" as the latter might be difficult to determine in respect of new and innovative products	

<i>Quantity limits</i> Art's 3(5), 1.1(8), 2.1(13) & Recital 24		Quantity limits should be allowed and in particular site licences should be made expressly lawful (contrary to <i>ARCO/Repsol</i>)	
<i>Non-compete obligations</i> Art 3(2)	?		
<i>Tying</i> Art 4.2(a)		Tying should be allowed without recourse to non-opposition procedure	
<i>Non-challenge obligations</i> Art 5.2(b)		No challenge clauses should be allowed without recourse to non-opposition procedure	
<i>Grant-backs</i> Art's 2.1(4) & 3(6)		Grant-backs should include blocking patents, not only improvements.	
<i>Cross-licenses</i> Art 5		Current rules need to be simplified for non-exclusive cross-licenses.	
<i>Technology pools</i> Art 5		Current rules need to be simplified for non-exclusive pools and package sublicensing.	
<i>Licences to joint ventures</i> Art 5		Current rules need to be simplified (the market share test is too formalistic and complicated)	

20.

THE APPROACH TO TECHNOLOGY LICENSING	DO YOU AGREE OR DISAGREE WITH THE FOLLOWING STATEMENTS ? PLEASE GIVE REASONS FOR YOUR REPLY.		
	<i>AGREE</i>	<i>DISAGREE</i>	<i>NO OPINION</i>
The Commission's policy approach to technology licensing should be brought in line with the approach in the new block exemptions for horizontal restraints and vertical restraints	However, in view of the special character of licensing, without a marketshare threshold.	The introduction of a marketshare threshold would be disastrous for innovation/licensing, because safe harbour would cease to be available if and when the licensed invention is a success in the market, especially if a market share test would be applied to a "technology license" market.	
The Commission's policy approach to technology licensing takes insufficient account of issues of market power and inter brand competition		The introduction of a market share test would be disastrous Issues of market power are already covered by Article 82 EC	
The Commission's		Such issues should not be	

<p>policy approach to technology licensing should take account of effects both in the market for technology and the market for the products produced on the basis of the technology</p>		<p>considered under Article 81 EC</p> <p>These issues are sufficiently addressed under Article 82 EC, and in particular the judgments in the <i>Tetrapak</i> case</p> <p>Overall conditions on the technology and products markets are improved by a flexible approach to marketing and licensing</p>	
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21.

<p>THE SCOPE OF REGULATION 240/96</p> <p>Extending the scope of the Block Exemption would not be useful if it remains in its current form.</p> <p>However, if the Block Exemption was amended into a substantially less prescriptive instrument, an umbrella Block Exemption covering all IP rights would be useful.</p> <p>IF YOU CONSIDER THAT THE SCOPE OF REGULATION 240/96 SHOULD BE EXTENDED, PLEASE INDICATE WHICH PROPERTY RIGHTS SHOULD BE INCLUDED AND GIVE REASONS.</p> <p>At present, as mentioned above, there is some uncertainty as to the precise application of the Block Exemption to other non-patent IP rights.</p> <p>As substantial up-front payments are often made in respect of other IP rights, in the interests of legal certainty, all IP rights should be covered by one umbrella Block Exemption as long as the umbrella Block Exemption adopts a more flexible approach.</p>
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