

**COMMISSION EVALUATION REPORT ON THE TRANSFER OF TECHNOLOGY BLOCK  
EXEMPTION REGULATION NO. 240/96 TECHNOLOGY TRANSFER AGREEMENTS UNDER  
ARTICLE 81**

**UNICE COMMENTS**

1. GENERAL COMMENTS

It is necessary that the main antitrust jurisdictions of the world try to converge their policies as much as possible in all matters having significant multi-jurisdictional effects. This especially applies to antitrust policies in the field of intellectual property. The intellectual property system is a key driver of innovation and therefore of economic development and welfare.

Exploitation within the scope of intellectual property rights, as defined by law, should be granted, as far as possible, "safe harbour" treatment under the antitrust laws. Intellectual property right protection is aimed to provide legal certainty for the holder for the duration of the right. Antitrust agencies and courts applying antitrust laws should not question the social contract under which intellectual property rights are granted. This social contract is for the legislator to amend, if necessary, and not for the antitrust agencies or courts in specific cases. This principle seems to be endorsed by the Commission in no. 58 of its Report: "If it is assumed that IPR-laws are striking the right balance between over- and underprotection of innovator's efforts, such a policy (i.e. putting more limits on the possibilities of competition policy to intervene against license agreements between non-competitors) helps to stimulate innovation".

There is an urgent need for the European Commission to undertake an in-depth review of the Transfer of Technology Block Exemption Regulation (TTBE), since it is overly formalistic, too complex and too narrow in scope. It is also out of line with the Commission's new policy approach regarding vertical and horizontal restrictions, and negatively affecting an optimal use of the innovation engine.

In view of the negative effects of divergent approaches, as in the US, EU competition law should, in general, respect the right of an IPR-holder to fully exploit the intellectual property right by imposing in a licensing agreement the restrictions necessary to obtain the full benefit of the right (cf. no. 46 Report). UNICE is of the opinion that the reference in no. 55 Report, to the need to protect intrabrand competition, is not relevant for assessing IPR licenses, since, normally, (room for) competition between licensed products of different licensees is far larger than between products from one source sold through different distributors.

UNICE agrees that point of departure indeed must be that high market share or market power does not have to be perceived negatively as it will often be the result of innovative activity, which needs to be protected (no. 179 Report). In this respect a clear distinction should be made between innovation markets, technology markets and the markets where the licensed products compete.

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 and product markets; and in particular, explain how the dynamic competitive conditions on each of such interlinked markets

will be taken into account in assessing whether market power might exist in one or more of them.

A distinction indeed should be made between horizontal and vertical licensing relations and UNICE agrees with the description of this distinction in no. 125 Report. However, in our opinion, this distinction should only be relevant for horizontal license situations imposing obligations on each of the parties reciprocally restricting their own use of their own IPR within the EU.

In UNICE's view, introduction of a new wide umbrella block exemption regulation, with a limited 'hardcore' list (effecting absolute territorial protection at downstream product markets, and restrictions on licensees as to own use of own IPR in horizontal licenses), in combination with a set of clear guidelines, would have a positive effect on dynamic efficiency within Europe.

As commented in UNICE's response to the TTBE Questionnaire, this goal would be impossible to reach if the new block exemption regulation would introduce a dominance ceiling for restraints within the scope of an IPR. It seems to follow from no. 179 Report that even if dominance would be (or has been) acquired as a consequence of an IPR, exploitation thereof within the scope of such IPR should be generally acceptable, both under article 81 and 82. Introducing a dominance ceiling for exploitation within the scope of an IPR would expose successful innovators to the risk of court litigation and to investigations of national competition agencies applying national competition laws reviewing the boundaries for acceptable exploitation of IPR. The new TTBE and the accompanying guidelines should avert the resulting chilling effect on innovation within Europe. The possibility for the Commission and national competition authorities to withdraw the application of the TTBE in cases where the conduct of a licensor or licensee has effects incompatible with article 82 should be a sufficient remedy.

A finding of abuse of a dominant position, of course, would not be blocked by applicability of the safe harbour regulation (cf. European Court of Justice in *Compagnie Maritime Belge*, 2000)

## 2. SPECIFIC ISSUES RAISED IN THE REPORT

### 2.1 *The scope of the TTBE*

#### 2.1.1 Type of IPR

The scope of the TTBE should be widened to include all IPR as IPR laws must be assumed to strike the right balance between over- and under-protection of innovators' efforts, and, patents, know how, software and trademark licenses in practice often are closely inter-connected and equally important to the total arrangement. Where IPR licenses are ancillary to transactions covered by the Verticals Block Exemption, the latter should prevail. However, most importantly, patent and technical know how licenses should be covered by a new TTBE as soon as possible.

### 2.2 *Specific restrictions in vertical license relations*

2.2.1 Non-exclusive licenses should be included in the scope of the TTBE safe harbour, even if generally not infringing article 81 (1), especially in view of the decentralised application of the EU competition rules as envisaged by the Commission's modernisation effort.

#### 2.2.2 Exclusive licenses

Territorial and non-territorial licensee exclusivities (e.g. field of use, customer groups, product categories), as well as maximum quantity, site, equipment or similar restrictions should similarly benefit from the TTBE safe harbour, except for an obligation of a licensee for a period of more than 5 years not to engage in passive exports to a territory within the EU for which sales exclusivity has been granted to another licensee.

#### 2.2.3 Multiparty licenses: crosses: pools

Multiparty package licenses for the avoidance of any doubt should benefit from the safe harbour of the new block exemption regulation (no. 133 Report). Crosses and pools should also be covered.

These kind of agreements are of the essence to broad technological development and implementation of new innovations by cutting the patent thicket and allowing introduction of new standardised systems covered by numerous complementary patents of different holders.

The Commission should therefore request the Council for an extension of the scope of Council Enabling Regulation no. 19/65. The introduction of a new TTBE should however not wait until the Council has broadened the Mandate regulation. Prior to this the Guidelines should set out that bundle of individual agreements could qualify under the new TTBE .

2.2.4 Non-compete and other unilateral restrictions imposed on the licensee outside the scope of the IPR

In vertical IPR relations these restrictions should be treated similarly to vertical restrictions generally. One should, however, introduce a market share ceiling only relating to the market where the licensed products do compete.

2.3 *Specific restrictions in horizontal license relations*

As stated above, restrictions within the scope of an IPR in horizontal license relations should be within the safe harbour without a market share ceiling if there is no restriction of the licensee's own use of his own IPR within the EU. As similarly stated above, the Commission or a national competition authority could withdraw the applicability of the safe harbour if the license must be considered to be a cloaked hard core cartel, or apply Article 82 if the conduct involved has effects which are incompatible with this Article.

3. CONCLUSION

UNICE would favour a broad new TTBE, covering multiparty licensing of all IPR in both horizontal and vertical licenses. The new TTBE should contain a licensed product market share ceiling only for restrictions imposed on the licensee outside the scope of the licensed IPR. The new TTBE should only include a very short list of black clauses (absolute territorial protection on downstream product markets, reciprocal restrictions as to own use of own IPR in horizontal licenses). UNICE is of the opinion that the possibility of automatic inapplicability of safe harbour protection to exploitation within the scope of an IPR as soon as dominance is alleged as to the IPR-holder concerned, would stifle innovation to an unacceptable extent, especially on innovation or technology markets. The possibility of withdrawal by the Commission, or a national competition authority, or the possibility to apply Article 82, provide for sufficient safeguards and remedies where appropriate. Clear guidelines and examples should explain the importance of innovation for sustainable effective competition and the need for competition authorities and courts to limit interference with exploitation within the scope of IPR's to clear 'hard core' situations.

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