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TECHNOLOGY TRANSFER AGREEMENTS

Draft Commission Regulation on the application of Article 81 (3) to categories of technology transfer agreements.

Draft Guidelines on the application of Article 81 to technology transfer agreements

UNICE COMMENTS

1. Innovation is an essential and dynamic component of an open and competitive market economy. The dissemination of technology protected by intellectual property rights is of critical importance for the European economy. EC competition law should therefore encourage pro-competitive licensing. By doing so, it should adopt a realistic view on the dynamic efficiencies associated with the licensing of intellectual property, in particular the integration of complementary intellectual property and the avoidance of costly infringement litigation, especially in view of the "modernisation" and the decentralised application of EC competition law. It is of utmost importance that the Guidelines provide a clear and simple framework for assessment, allowing filtering out of *prima facie* non infringing situations. In this respect the Guidelines should be more clear about – and provide more examples of – situations where contractual provisions included in intellectual property licenses are, on superficial inspection, restrictive but which may be objectively necessary and inherent to a license agreement and do not therefore infringe Article 81(1).

2. Any impediments on the transfer of technology are likely to result in a sub-optimal level of consumer welfare, an inefficient allocation of resources and stifled innovation. Given the nature of technology licensing, these consequences matter especially in the international context.

3. UNICE believes that the Commission's future policy in the field of technology licensing should be solidly based on the following principles:

    1. The mere possession of an intellectual property right does not presume the existence of market power. Instead, the existence of such power must be determined by evaluating the availability of close substitutes. By doing so, the Commission should take account of both current and likely potential participants in the relevant product- or technology markets.

    2. While seeking to encourage pro-competitive licensing, the Commission should recognise that field of use-, territorial- and other intrabrand limitations on intellectual property licensing may serve pro-competitive ends in allowing the licensor to exploit its intellectual property efficiently. The cornerstone of the Commission's approach should be the question of how the arrangement affects interbrand competition. As a consequence, the Commission's focus should be on whether the licensing

agreement may have the object of a horizontal cartel, the suppression of competition in competing technologies or related markets, or the raising of barriers to entry.

3. The assessment under Article 81 should concentrate on the *ex ante* situation (*i.e.* before the agreement is concluded) and should recognise that concerns are unlikely to arise when a licensing arrangement is entered into between entities that would not have been actual or likely potential competitors in a relevant market in the absence of the license. This is the case, even when an alternative licensing arrangement would have created more competition. Only if the licensing arrangement is likely to have such anticompetitive effects, the Commission should analyse whether the terms of the agreement are reasonably necessary to achieve pro-competitive benefits that outweigh those anticompetitive effects.

4. Any future block exemption should provide certainty for the larger part of licensing arrangements; it should preferably include rules which are simple, clear and relatively easy to apply, both for the companies involved, as well as for courts. By the same token, the accompanying Guidelines should be sufficiently clear and in particular explain how in specific examples the agreement at issue affects the relevant markets. With the entering into force of Regulation 1/2003, the need for legal certainty has become even more important than in the past.

UNICE's POSITION

While UNICE appreciates the Commission's attempt to replace the current block exemption Regulation 240/96 by a new, less formalistic, regulation which takes account of economic insights, it regretfully submits that it has come to the firm conclusion that the current proposal unduly limits pro-competitive licensing arrangements; does not meet the European business community's need for clear and easy-to-apply rules; and, that, as a consequence, it is unable to support the Commission's proposal.

UNICE's position is based on a number of fundamental and practical considerations.

<u>FUNDAMENTAL CONCERNS</u>

1. The market share thresholds of Article 2 fail to recognise the nature of dynamic competition and are an incorrect parameter for the measurement of market power in the market(s) affected by intellectual property licenses. While the use of a market share ceiling may be justified with respect to "simple" horizontal and vertical restraints regarding markets for goods and services, the application of these thresholds as a "hard and fast" rule in markets where dynamic competition is key, is likely to result in an unreliable assessment of market power as the test *ipso facto* focuses on actual market positions rather than the competitiveness of the markets concerned over a longer period of time. This applies in particular where market shares are calculated on the basis of existing product markets. A closely related concern is that the application of a market share test is likely to "punish" companies which have successfully developed and introduced new technologies by taking away the benefit of the exemption in the event their market shares exceed 20 or 30% of the relevant technology and product markets. While the Commission acknowledges that the non- applicability of the exemption does

not imply that the agreement at issue infringes Article 81, the sanction of the non-availability of immunity under Article 81(3) is disproportionate, potentially discourages licensing of technology and innovation in general and, more fundamentally, conflicts with the assumption that intellectual property rights do not, as such, confer market power. Account should be taken of the fact that under Regulation 1/2003 Article 81 will mostly be applied *ex post*, generally when conflicts have emerged many years after the conclusion of the license agreement at issue. The Guidelines do not make sufficiently clear that an assessment of the technology transfer agreement and the circumstances surrounding it at the time of conflict only is insufficient, and that the facts at the time of concluding the license should be decisive as to any anticompetitive effects of the license.

UNICE submits that the use of market share ceilings to measure market power in technology markets is inapt. The fact that market shares – and consequently market power – in technology markets are evaluated by reference to existing products only strengthens its concerns. A more realistic approach under the future regulation would be to allow authorities to withdraw the exemption in the event a sufficient number of R&D pools no longer exists.

Again, as long as the affected markets are competitive, market shares exceeding the proposed market share ceilings do not raise concerns. As a consequence, UNICE believes that the potential application of Article 82, as well as the mechanisms for withdrawal and disapplication of the exemption – perhaps in a form more specifically tailored to technology and innovation markets – sufficiently safeguard the interests that the future exemption should seek to protect. At a very minimum the Commission is encouraged to consider how the presence of a sufficient number of relevant R&D pools could be given more weight in the event a first analysis would reveal that market share ceilings are exceeded. This method is currently reserved for a limited number of situations only. UNICE would welcome this method being applied more generally. It also invites the Commission to review whether the "R&D pool test" could be included as a correction in the sense that a party relying on the non-applicability of the exemption would also have to demonstrate the absence of a sufficient number of those pools.

2. The proposal fails to acknowledge that intrabrand restrictions may bring about a number of efficiencies. This concern is particularly pertinent with respect to license arrangements with non-competitors. Here, the Commission seeks to simply apply its methodology developed in the framework of vertical restraints under Regulation 2790/1999 by listing a number of territorial restrictions as hard core restrictions. However, there are a number of reasons why this approach is not justified. First, this approach does not take account of the fact that license agreements enabling non-competitors to use a technology, *e.g.* to manufacture a novel product, are by definition pro-competitive. The Commission's reasoning in para 23 of the Guidelines concentrates however on the fact that licensees are selling their own product which implies that there may "thus" be greater scope for intrabrand competition. However, UNICE respectfully submits that the key observation is whether intrabrand restrictions foster interbrand competition. The increased emphasis on

intra brand restriction in Article 4(b) also conflicts with the Commission's own observation in the Evaluation Report that the future exemption should be less focussed on intrabrand restrictions than Regulation 240/96. Furthermore, the Commission does not seem to acknowledge that, as a rule, licensees need to invest more than mere distributors, hence need more protection against free riding.

3. By the same token, the proposals fail to appreciate that –provided they do not contain any restrictions on the competitive conduct of the licensor or licensee- non exclusive licensing agreements do generally not result in any anticompetitive effects, even if the parties are in a horizontal agreement.

4. The Guidelines take a hostile approach towards asymmetrical field of use restrictions in reciprocal cross licenses. It is however widely acknowledged that cross licenses may result in a variety of efficiencies, in particular the elimination of reciprocal blocking positions. In many cases cross licenses allow companies to pierce through patent thickets, thereby enabling them to become active on markets on which they would otherwise not be able to be active. The current draft regulation does however blacklist asymmetrical field of use restrictions in cross licenses under Article 4(1)c, even where such cross licenses do not lead *de facto* to any restriction in the use of their own technology by any of the parties.

5. The Commission suggests to replace the current Commission Notice on subcontracting agreements and to include a corresponding framework of analysis in the Guidelines. UNICE is in favour of this approach. However, the text as currently suggested is significantly harsher than the existing Notice in that it requires that "…the licensed technology or the supplied equipment is necessary for the purpose of producing the goods…". The current Notice only requires that the subcontractor receive designs, other proprietary information or tools necessary to enable him, under reasonable conditions, to manufacture products he could not produce without. Moreover, the draft Guidelines make the non-applicability of Article 81 dependent on a number of circumstances which so far were not taken into account, in particular the reduction of the subcontractor's incentive to innovate, possible foreclosure effects, and increased potential for collusion (para 39). These "effects", which are hardly verifiable for companies wishing to outsource the production of goods, may have a chilling effect on subcontracting arrangements and should be taken out the definitive text of the Guidelines.

ADDITIONAL SUGGESTIONS

1. UNICE suggests to broaden the scope of the future exemption to know-how licensing agreements which involve "substantial" know-how (know-how that includes information which must be useful, *i.e.* can reasonably be expected to be capable of enabling the licensee to manufacture the contract products) or insert wording which brings the scope of covered know–how licenses in line with Regulation 240/96, rather than the suggested, more restrictive wording that the information must be "indispensable" for the manufacture or supply of the contract products.

2. UNICE is pleased with the general line in the Guidelines that package licensing is pro-competitive, even if non-essential patents are included. UNICE, however, does not understand why the Guidelines do not recognise that royalties relate to access to a certain technology and not to the number of patents actually used by a licensee.