BUSINESSEUROPE

POSITION PAPER

17 February 2012

BUSINESSEUROPE & U.S. CHAMBER OF COMMERCE COMMENTS

REVIEW OF THE CURRENT REGIME FOR THE ASSESSMENT OF TECHNOLOGY TRANSFER AGREEMENTS

Commission Regulation (EC) 772/2004 on the application of Article 81(3) EC [now Article 101(3) TFEU] to categories of technology transfer agreements, and Guidelines on the applicability of Article 81 EC to technology transfer agreements (expiring 30 April 2014).

1. INTRODUCTION

BUSINESSEUROPE and the U.S. Chamber of Commerce are the two leading business federations in Europe and the United States, representing businesses of all sizes and across all sectors of the economy. We work collaboratively on a number of policy matters given the common interests of our members and degree of economic integration across the transatlantic market.

Our membership includes leading firms engaged in the invention, development, dissemination and implementation of intellectual property. We are pleased to continue to provide our views and comments to the Commission and other competition enforcement agencies on various important topics relating to the intersection of antitrust and intellectual property rights.

2. GENERAL COMMENTS

A fundamental policy that BUSINESSEUROPE and the Chamber share is that the development, implementation, and protection of intellectual property rights are indispensible to economic growth, efficiency, and the enhancement of consumer welfare.

Providing encouragement and appropriate antitrust latitude for licensing of intellectual property rights expands output and encourages the growth and development of innovation and the effective dissemination of new technology. Conversely, an unwarranted limitation on intellectual property rights, including on their licensing with market-based fees, stifles these pro-competitive benefits.

BUSINESSEUROPE and the Chamber strongly urge that any revision to the current Regulations and Guidelines maintain the guidance and flexibility that were embodied in the 2004 rules. Any change should reflect a commitment to promotion of intellectual property through a clarification of standards and a generally flexible and sound approach to legal principles. Accordingly, BUSINESSEUROPE and the Chamber respectfully submit the following comments recognizing the important role the 2004 Regulations and Guidelines play in providing transparency and predictability in enforcement.

3. SPECIFIC COMMENTS

A. Definition of Competitors

The distinct treatment in the Guidelines between competitors and non-competitors is an appropriate means to evaluate the competitive effects of various forms of licensing restrictions. The Regulation should, however, support the Guidelines to provide that the competitor relationship would not be found to exist if the licensed technology constitutes such a drastic innovation as to make the licensee's technology obsolete or noncompetitive.

Further, the Regulation appears to treat parties in a blocking position as competitors and thus subject to the "hard core" limitations if they compete in the downstream product market. This approach fails to take into consideration whether the parties would not have been competitors absent the license as a result of a blocking position. This overly inclusive definition of "competitor" is unwarranted and serves to inhibit pro-competitive licensing agreements.

In addition, the Guidelines' imposition of burden of proof on the parties to demonstrate a blocking position or a drastic innovation making the licensee's technology obsolete is excessively restrictive. It suggests that such proof must consist of independent expert opinion or court decisions relying on injunctions and such opinions. These restrictive limitations discourage licensing by generating uncertainty and the risk of costly litigation. Such limitations also may encourage IP licensors to select licensees who may be less competent to efficiently exploit the license and, thus, be less likely to be considered competitors.

BUSINESSEUROPE and the Chamber believe that the standard of proof be relaxed to give substantial weight to the good faith, reasonable view of the parties concerning blocking position and the existence of "drastic innovation". Finally, it is critically important that a competitive relationship should not be deemed to exist unless competition between the parties would exist in the absence of the technology transfer agreement. A competition authority should avoid challenging an agreement simply because it believes it is possible for the terms of the agreement to be more competitive if the relationship outside of the agreement would not have existed.

B. Market Share Safe Harbor

An excessive reliance on market shares for application of the safe harbor exemption renders it of limited scope. This is particularly true when the share of the downstream product is the factor considered. Reliance on market share is particularly inappropriate in innovation markets where dynamic developments are the norm and a snapshot of market share at a particular moment does not provide an accurate reflection of the competitive dynamics of the market.

The need for recognition of market dynamics is particularly acute in the case of technology markets where the development of new technology can result in firms with a short-term market position well in excess of the thresholds.

However, such a situation does not indicate that such firms are insulated from actual and potential competitors, even for very brief periods. Therefore, we suggest the Commission should consider scrapping the safe harbor exemptions, or at the very least raise them considerably from 30% to 40% and from 20% to 30%.

C. Settlement Agreements

As the Commission recognises, settlement of patent disputes can avoid costly litigation and provide a means of enhancing the implementation of intellectual property rights. However, the current Guidelines contain provisions that can unduly restrict settlement and discourage this mechanism for pro-competitive dispute resolution.

First, the Guidelines appear to take an unduly restrictive position regarding licensing of future developments. Yet the protection afforded by coverage of future developments provides assurance that the license can be exercised in the face of uncertainty concerning future developments that may bear on the relevant intellectual property.

Second, the Guidelines statement disfavoring running royalties where there may be an effect on market price is inappropriate. The determination of market price effect is uncertain and should be balanced against the efficient exploitation of the license. Moreover, there is no legitimate basis for a negative view of the per unit pricing of intellectual property rights compared with that accorded other product inputs. Such pricing is an accepted and efficient means of assuring that the reward to the input provider is commensurate with the valuation by consumers.

In addition, the Guidelines should make clear that there is no presumption of illegality flowing merely from a transfer of value; *e.g.,* payment from one party to the other in a settlement agreement. Such provisions can appropriately take into account the uncertainties inherent in patent litigation and can be particularly benign where the entry of a party's competitive technology can occur prior to the expiration of the other party's patent. A careful case-by-case examination of the value transfer is called for rather than a generalized presumption.

Finally, the Guidelines appropriately acknowledge that settlement agreements containing cross-licensing obligations are not in themselves anticompetitive in that they can foster the exploitation of patent rights by the parties. This observation applies with particular force to markets characterized by patent thickets. The study undertaken for the Commission urges a negative and restrictive approach to cross-licensing agreements. It is skeptical about the pro-competitive effects of such agreements and proposes that revised Guidelines treat them the same as the Guidelines treated research and development joint ventures. Although the study may be of interest as an academic piece of work, it stands out (even acknowledged by its authors) as mainly theoretical and therefore unsubstantiated as it lacks the empirical foundation required for policy to be based upon it. Its adoption even in a partial form by the Commission would undermine the desirable incidence of patent settlements which have the desired effect of stimulating innovation.

D. Field of Use Limitation

The Guidelines properly suggest that licensing practices, other than those containing hard core restrictions falling outside the scope of the exception, do not necessarily constitute illegal undertakings.

The implication is, however, that those that may be classified as "hard core" restrictions are illegal. The problem arises from a particularly overbroad definition of what is a "hard core" license provision. The implication that field of use exemptions can be justified only by technical characteristics is not warranted. A more appropriate approach, and one less likely to discourage optimal licensing, would be to exempt limitations identified not only by technical characteristics but also by recognizable distinctions in the market. The focus of analysis should in these circumstances, moreover, be on the effect of the limitation on inter-brand competition and the extent to which the limitation enhances that competition as to outweigh any concern with a possible restriction on intra-brand competition.

4. Conclusion

BUSINESSEUROPE and the Chamber appreciate the opportunity to submit these comments. We recognize and appreciate the steps taken by the Commission in the 2004 Regulations and Guidelines to provide greater latitude and clarity to promote pro-competitive licensing. The suggestions herein are our respectful attempt to enhance this effort.

* * *