



Review of the technology transfer rules

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* The views expressed are those of the speakers and do not necessarily reflect those of DG Competition or the European Commission

Introduction

Background

- TTBER 772/2004 and Guidelines
- Effects-based approach
- Expiry of the TTBER in April 2014

The review so far

- Régibeau/Rockett Study
- First consultation
- Draft revised TTBER and Guidelines now in public consultation (until 17 May)

The 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

The underlying philosophy

- Emphasis of dynamic competition over static competition
- Innovation is an essential long term driver of competition and consumer welfare
 - Licensing promotes innovation by disseminating technology and creating incentives for innovation
 - Licensing creates design freedom
- Competition is an essential driver of innovation
- Conclusion: licensing is generally pro-competitive and should be encouraged, but no immunity from competition law



Proposed Changes in the TTBER

Scope of the TTBER

- Clarification of relationship with other block exemption regulations (BERs)
 - Subsidiary to the application of R&D BER and the Specialisation BER (recital 7 and new Art 9)
- Replaces "primary object test" by a test according to which provisions concerning e.g. purchase of input are covered provided they are "directly and exclusively related to the production of contract products" (recital 9 and Art1(1)(c))

Market Share Threshold

- Market share threshold of competitors (20%) shall now also apply to the situation where:
 - a) the licensee owns a technology which it only uses for in-house production and
 - b) is substitutable for the licensed technology (new Art 3(2))

Hardcore Restrictions

- Removal of Article 4.2(b)(ii) from the TTBER, i.e. the provision, in agreements b/w non-competitors, allowing restrictions on passive sales by a licensee into an exclusive territory or customer group of another licensee for the first two years

Excluded Restrictions

- All exclusive grant-backs are now excluded restrictions (before only exclusive grant-backs for severable improvements) (Art 5(1)(a))
- Termination clauses in the context of challenging IPRs are now excluded restrictions (Art 5(1)(b))



Proposed Changes in the Guidelines

Settlements

- Clarifies that settlements may fall under Article 101 where the licensee agrees, against a value transfer from the licensor, to more restrictive settlement terms than would otherwise have been accepted based solely on the strength of the licensor's technology
- Clarifies that non-challenge clauses are likely to be anti-competitive if the licensor knows or could reasonably be expected to know that the licensed technology does not meet the respective legal criteria to receive intellectual property protection

Patent Pools

- Clarifies that licensing agreements between the pool and third parties are falling outside the TTBER
- Licensing out from the pool will instead be covered by the chapter on patent pools in the Guidelines

Patent Pools

- Provides a comprehensive soft safe harbour for the creation and licensing of the pool
 - 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

Timetable

- May 17: end of consultation period
- How to submit comments:
http://ec.europa.eu/competition/consultations/2013_technology_transfer/index_en.html
- Summer 2013: evaluation of comments, revise draft texts
- Early 2014: Final adoption

Thank You