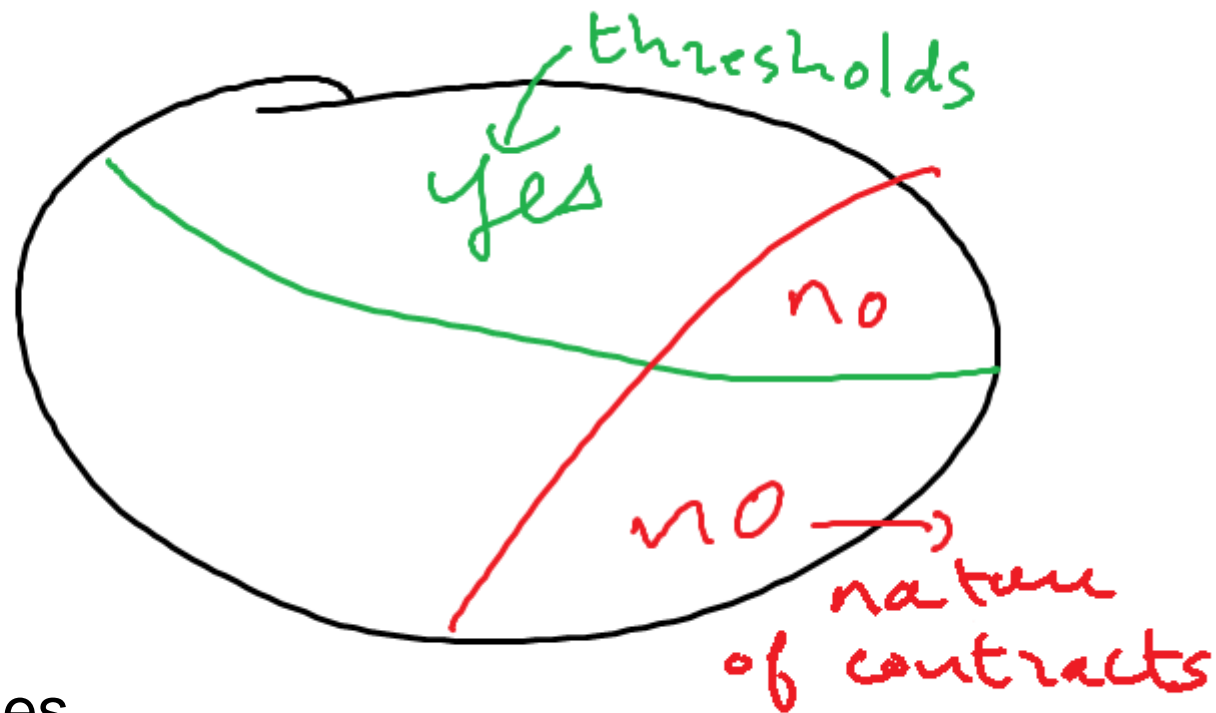

The new competition rules for technology transfer agreements: comments and discussion

Jacques Crémer



The structure of the TTBER



The TTBER does not only exempt.



Field-of-use restrictions: the economics literature



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Field-of-use restrictions in licensing agreements *

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The proposed regulations, very quickly summarized

- Agreements between non-competitors:
 - Less than 30% market share, both in product market and technological market.
- Agreements between competitors:
 - Less than 20% combined market share.



Why are the thresholds important?


- The guidelines state « The fact that market shares exceed the threshold does not give rise to any presumption either that the Agreement is caught by Article 101(1) or that the agreement does not fulfil the conditions of Article 101(3)".
 - But: the existence of the safe harbour changes the relative cost of different types of agreement.
 - In some cases, the lack of explanation of what the Commission fears when thresholds are exceeded increases legal uncertainty.
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An example.


(Adaptation of Example 1 of the guidelines).

- Firm A produces develops a technology that can be used in a market M in which it is not active.
 - In M, there are three firms: B with market share 60%, C and D each with market share 20%.
 - If I understand well the computations of market shares in the technology market, A can only licence to **one** of C and D.
 - Wouldn't it be more efficient to allow A to licence to all the firms? Or to C and D? Or to firm B?
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What I do not understand

- Why isn't broad non discriminatory licencing encouraged at least by the guidelines?
 - Guidelines §198 have a long discussion of the reasons why if threshold is exceeded in agreements b/w competitors there might be anticompetitive concerns (linked to economies of scope in production).
 - Guidelines §199 only states that field of use restrictions b/w non-competitors "generally" do not create problems. But then why the threshold?
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The example (cont...)

- If the restriction is imposed in order to encourage licencing only when it reequilibrates competition, is this consistent with the general philosophy of the granting of IPR?
 - Economic theory has stressed the fact that agreements can be means of enforcing collusion, for instance by decreasing incentives for innovation? Is this the fear here?
 - It would be useful if the guidelines explained restrictions on licensing between non competitors so that agreements outside of the safe harbour could be better evaluated at the time of the signing of the contract.
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Patent pools: the guidelines

- Guidelines at 244: patents pools OK "if all the following conditions are met;
 - a) participation ... is open to all interested parties;
 - b) sufficient safeguards are adopted to ensure that only essential technologies (which therefore ... are also complements) are pooled;
 - c)"
 - These two conditions look difficult to meet at the same time!
 - b) may not be useful.
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Substitutability and complementarity

- are not technical constructs but economic constructs and depend on prices:
 - It is possible to be complements at low prices and substitute at high prices.



Lerner - Tirole

- Imposing on patents pools the requirement that they allow independent licensing is an information-free perfect screen:
 - does not affect welfare-enhancing pool;
 - restores competition when welfare-decreasing pools.
- The requirement of independent licensing is already in the guidelines.



Rey – Tirole (forthcoming)

- What about tacit coordination (collusion)?
- Independent licensing does not prevent desirable cooperation but may allow for collusion that would not be sustainable otherwise.



Rey – Tirole (forthcoming)

- Suggests that collusion will not be increased by pool if the price of the pool is the sum of the prices of the independent licences.



Conclusions

- The guidelines should make clear that broad licensing is encouraged.
 - The guidelines need to include more discussion of the reasons for the regulations.
 - Patent pools regulations could probably be relaxed.
 - ... if I had more time I would have asked questions about the types of allowed field of use restrictions.
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