EXEMPTION (TECHNOLOGY LICENSING): COMMISSION PROPOSALS

Subject: Exemption

Industry: Most industries (involved in technology transfer licensing)

Source: Commission Statement IP/03/1341, dated 3 October 2003

(Note. The Commission's plan to replace the Technology Transfer regulation is now available for comment: see the website reference in this report.)

The Commission is seeking comments on changes to the competition rules applicable to the licensing of patents, know how and software copyright. Technology transfer licensing agreements currently benefit from block exemption if certain conditions are met. The Commission proposes a number of changes to the block exemption regulation designed to reduce the regulatory burden for companies, while ensuring an effective control of agreements between companies holding significant market power. The proposals complement the modernisation of the European Community's competition rules coming into force in May 2004.

Licensing is important for economic development and consumer welfare as it helps disseminate innovations and allows companies to integrate and use complementary technologies and capabilities. However, licensing agreements can also be used for anti-competitive purposes, for instance when two competitors use a license agreement to divide markets between them, or when an important licensor excludes competing technologies from the market by requiring its licensees to use only the licensed technology. Competition is one of the main driving forces of innovation and dissemination and it is therefore important to find the right balance between protecting competition and protecting intellectual property rights.

Licensing agreements which distort competition fall under the Community's competition rules, in particular Article 81 of the EC Treaty. Specific rules on these agreements are contained in the 1996 block exemption Regulation. That regulation exempts agreements fulfilling certain requirements, saving them from individual scrutiny by the Commission, the courts and national competition authorities. It is, however, somewhat rigid in effect.

The proposed new rules will replace the current Regulation. They contain a more economic approach and leave companies more freedom to devise their licensing agreements according to their commercial needs. The new rules will have a hardcore list, clear and short in presentation, of restrictions which will normally be prohibited. The new rules will provide exemptions for parties below certain market share thresholds: 20% for licensing agreements between competitors and 30% for agreements between non-competitors. For those cases not covered by exemption a set of guidelines will explain the application of Article 81 to individual cases.

The Commission invites all interested parties to send their comments on the proposed new rules by 26 November 2003. The draft texts are published in the Official Journal (C 235 of 1 October). They are also available on the internet at the following address:

http://europa.eu.int/comm/competition/general_info/consultation.html

Article 81 (1) of the EC Treaty prohibits agreements which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. Under Article 81(3) an anti-competitive agreement may be exempted from the prohibition of Article 81(1) if the positive effects brought about by the agreement outweigh its negative effects. The Commission can exempt categories of agreements of the same nature and has done so in 1996 for certain licensing agreements by the current technology transfer block exemption Regulation EC/240/96 (hereafter the TTBE) which covers the licensing of patent and know how rights. In December 2001, the Commission adopted a mid-term review Report as required by the TTBE. This was taken as an opportunity to start a thorough review of its policy towards intellectual property licensing agreements.

Most of 2002 was spent consulting stakeholders on the review report. Since then the Commission has been working out the details of a new draft block exemption regulation and a set of guidelines. The draft texts for a new block exemption regulation and guidelines were adopted by the Commission for consultation purposes just before the summer break. They were discussed with Member States and are now published for consultation of industry and consumer organisations and other interested third parties. This public consultation will be concluded before the end of November. The objective is to have the revised rules in place before the application of the new antitrust Modernisation regime in May 2004.

The new rules will be firmly aligned on the new generation of block exemption regulations and guidelines for distribution agreements and horizontal co-operation agreements. This was also requested by many of those who commented on the Evaluation Report of December 2001 and will have the following advantages. The block exemption regulation will have only a "black" list. By doing away with the "white" and "grey" lists of the current regulation, rigidity is avoided and the scope of the regulation extended and made more flexible: whatever is not explicitly excluded from the block exemption will now be exempted. The scope of the new rules is also extended by covering all types of technology transfer agreements for the production of goods or services. The new regulation is to cover not only patent and know-how licensing but also software copyright licensing, as requested by many of those who commented on the Evaluation Report. Where the Commission does not have the powers to adopt a block exemption regulation, as for patent pools and for copyright licensing in general, the guidelines will give clear guidance as to future enforcement policy. The new rules will also make a clear distinction between licensing between competitors and licensing between non-competitors. In conclusion, these new rules will mean an important improvement compared to the current TTBE in terms of clarity, scope, and in protecting competition and innovation. ■

The "Steel Beams" Cases

In Case C-176/99P, *Arbed v Commission*, the Court of Justice annulled in its entirety a judgment of the Court of First Instance, which had upheld a Commission Decision finding an infringement and imposing a fine. But the Court dismissed six of the eight appeals brought by steel undertakings and their trade association, Eurofer, which had been found guilty of engaging in a cartel. It partially annulled the Commission Decision relating to Siderúrgica Aristrain.

Steel beams are essential components in steel structures. By a decision adopted in 1994, the Commission found that 17 European steel undertakings and their trade association Eurofer had participated in a series of agreements, decisions and concerted practices designed to fix prices, share markets and exchange confidential information on the Community market for steel beams. The Commission then imposed on 14 of those undertakings fines of over €104m.

The principal ground of ARBED's appeal was that the Commission had failed to differentiate the parent company from its subsidiary in the procedure following the Statement of Objections. The Commission took the decision against ARBED SA as the parent company, without first informing it of its intention or its reasoning and without giving it an opportunity to make known its point of view.

The Court of Justice pointed out that, in all proceedings in which financial sanctions (fines or penalties) may be imposed, observance of the rights of the defence is a fundamental principle of Community law. That principle requires, in particular, the inclusion, in the Statement of Objections addressed by the Commission to an undertaking on which it intends to impose a penalty for infringement of competition rules, of the essential factors taken into consideration against that undertaking so that it may submit its arguments effectively. The Statement of Objections must specify unequivocally the legal person on whom a fine may be imposed and must be addressed to that person.

Similar considerations applied to the Siderúrgica Aristrain case, as regards the calculation of the fine. The Court observed that the anti-competitive conduct of an undertaking could be attributed to another undertaking where the former had not determined independently its own market conduct but carried out, in all material respects, the instructions given to it by the other undertaking, having regard in particular to the economic and legal links between them. The Court noted, however, that the Commission decision states no reasons in that regard and even contains a contradiction. The Court of First Instance therefore erred in law in upholding the position adopted by the Commission. The Court found that the Commission decision had to be annulled in respect of the surplus of the fine, that is to say, the amount which was calculated on the basis of the second company's turnover but payment of which was claimed from the first.

Source: Court Press Release CJE/03/82, dated 2 October 2003