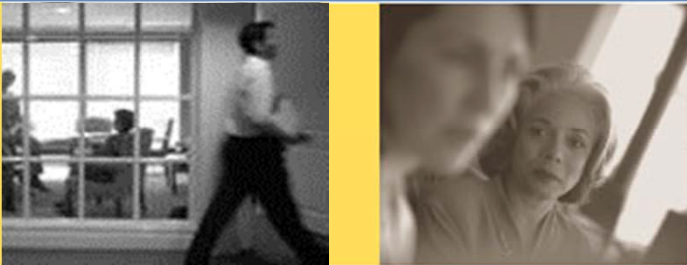


The impact of EU competition law on intellectual property licences

LES Benelux – Licensing course 2008

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Outline

- General context
- Enforcement priorities
- Overview of the system set by the Technology Transfer Block Exemption (“TTBER”)

General context

- Modernisation of EC Competition rules
- Last block exemption regulation to be adopted in May 2004
- Tentative effort to reconcile IP protection (long term objective) and competition (short term policy) as both share common purpose to promote innovation and enhance consumer welfare
- Growing convergence with U.S. policy

Specificity of intellectual property rights

- IP rights are protected by and enforced in accordance with national laws (e.g., design rights and patent laws)
- IP laws confer a power to exclude (but not necessarily giving rise to a monopoly) with respect to the specific product, process or work
- Such exclusion is legitimate if legally acquired
- Exercise of that right, including transfer of the right to exploit the IP through a license, may be subject to antitrust scrutiny

Enforcement priorities

- Single firm conduct, e.g., refusal to license, excessive royalties, patent “ambush”: Article 82 of the EC Treaty
- Multi-party licensing (pools): Guidelines
- Bi-lateral licensing: regime of the TTBER & Guidelines

Single firm conduct

- Recent enforcement (some still pending):
 - ❑ Microsoft (2007): refusal to deal
 - ❑ GSK (2008): refusal to supply/restrict parallel import
 - ❑ Rio Tinto Alcan: tying
 - ❑ Rambus: patent “ambush”
 - ❑ Qualcomm: excessive royalties

Bi-lateral licensing: TTBER

- Key questions:
 - ❑ What is the **scope** of the licensing?
 - ❑ Are the parties in **rivalry** in relation to the product or technology in question?
 - ❑ What is/are the stated or underlying **purpose(s)** of the licensing arrangement? in other words, its *object(s)*
 - ❑ Is the licensing likely to **restrict competition**? what is/are its *effect(s)*?

Scope

- For the TTBER to apply, the agreement must relate to:
 - ❑ A technology (e.g., patent, know-how, software copyright, utility models, design rights)
 - ❑ Transfer (license + assignment where part of the risk remains with the assignor)
 - ❑ Between two parties (multi-party is not covered by the TTBER but see the Guidelines)
 - ❑ For the production of goods or services

Rivalry

- Different concerns arise:
 - Where the parties' activities compete on the technology and/or product markets
 - Where the parties are in a vertical relationship

Are the parties competitors?

- To be determined at the time of the license
- Parties are competitors if:
 - ❑ Both are active on the **technology** or the **product** markets (without one or both parties infringing the IP rights of the other party)

Are the parties competitors?

- The parties are not competitors where:
 - ❑ Absent the license, they would not have been actual or potential competitors
 - ❑ The licensee is not licensing out his own competing technology (but would do so as a result of SNIPP) and the licensor is not an actual or potential competitor on the product market
 - ❑ e.g., research institute out-license technology to a market participant
 - ❑ Both parties are in “blocking” positions
 - ❑ Drastic innovation

Black listed restrictions of competition

- Licensing agreements may not contain restrictions whose **purpose** or **object** is to restrict competition
- TTBER provides two sets of black listed restrictions:
 - Between **competitors**, the legality of the restrictions will depend on the reciprocal character of the licensing arrangement
 - Between **non-competitors**, the list is a replicate of the vertical restraints BER

Black-listed clauses

- Between competitors:
 - ❑ Fix prices
 - ❑ Restrict licensee's ability to exploit its own technology; or
 - ❑ Restrict ability of any of the parties to carry out R&D (save for purpose of protecting know-how against disclosure to third parties)

The parties have more latitude where the agreement is not reciprocal:

1. Output limitations on the licensee may be imposed
2. Exclusive licenses (as to certain territories or worldwide) may be granted
3. Field of use on both parties may be imposed
4. Allocation of customers and/or territories between the parties is permitted
5. Active sales restrictions vis-à-vis other licensees are permitted
6. Second source of supply limitation permitted

By contrast, in a cross-license:

1. No output limitations (except, only on one of the licensee)
2. No exclusivity (i.e., the licensor must be there), except licensor may grant a sole license
3. No field of use on the licensor (but ok on licensee)
4. No allocation of customers and/or territories
5. No second source of supply limitation

Authorised in both reciprocal/non-reciprocal licensing agreements to:

- Grant sole license (i.e., licensor will not grant another license within a designated territory)
- Impose Captive use restrictions on licensee

Between non-competitors

- No minimum price (but ok to fix maximum price or recommend sale price for products)
- No active/passive sales restriction in a selective distribution system

Permissible clauses

- In exclusive distribution, no passive sales restriction, except:
 - Restrict passive sales by intermediaries into exclusive territory of another licensee during the first two years of the introduction of the product if new geographic market (note § 119 (10) of Vertical Guidelines)
 - Restrict passive sales on territory/customer group reserved to the licensor
- It is OK to:
 - Reserve a second source of supply for a customer
 - Impose captive use restrictions

Does the licensing restrict competition?

Market share thresholds

Legal basis	Competitors	Non-competitors
De minimis notice	Together below 10%	Each below 15%
Safe-harbour of TTBER	Together below 20%	Each below 30%
Guidelines and effect-based analysis required	Together above 20% and up	Either or both 30% or above

Does the licensing restrict competition?

- Beyond the safe harbour, no presumption of illegality but effect-based analysis is called for
- Three major sources of concern should be explored
 - ❑ Loss in inter-technology competition
(i.e., increased risk of tacit or explicit collusion)
 - ❑ Foreclosure effects
(Raising rivals' costs, limitation in access to essential inputs, or raising barriers to entry)
 - ❑ Loss in intra-brand competition
(Territorial restrictions may reduce competition between licensees)

Practical Details

- Duration of exemption
 - As long as the IPR remains valid or know-how remains secret
 - Regulation expires end of April 2014
- Link to TTBER and guidelines:
<http://ec.europa.eu/comm/competition/antitrust/legislation/transfer.html>

Questions?

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