Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements (Text with EEA relevance)

COMMISSION REGULATION (EU) No 316/2014

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation No 19/65/EEC of the Council of 2 March 1965 on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices[(1)], and in particular Article 1 thereof,

Having published a draft of this Regulation,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation No 19/65/EEC empowers the Commission to apply Article 101(3) of the Treaty by regulation to certain categories of technology transfer agreements and corresponding concerted practices to which only two undertakings are party which fall within Article 101(1) of the Treaty.

(2) Pursuant to Regulation No 19/65/EEC, the Commission has, in particular, adopted Commission Regulation (EC) No 772/2004[(2)]. Regulation (EC) No 772/2004 defines categories of technology transfer agreements which the Commission regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty. In view of the overall positive experience with the application of that Regulation, which expires on 30 April 2014, and taking into account further experience acquired since its adoption, it is appropriate to adopt a new block exemption regulation.

(3) This Regulation should meet the two requirements of ensuring effective protection of competition and providing adequate legal security for undertakings. The pursuit of those objectives should take account of the need to simplify administrative supervision and the legislative framework to as great an extent as possible.

(4) Technology transfer agreements concern the licensing of technology rights. Such agreements will usually improve economic efficiency and be pro-competitive as they can reduce duplication of research and development, strengthen the incentive for the initial research and development, spur incremental innovation, facilitate diffusion and generate product market competition.

Changes to legislation: *There are outstanding changes not yet made to Commission Regulation (EU) No 316/2014. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(5) The likelihood that such efficiency-enhancing and pro-competitive effects will outweigh any anti-competitive effects due to restrictions contained in technology transfer agreements depends on the degree of market power of the undertakings concerned and, therefore, on the extent to which those undertakings face competition from undertakings owning substitute technologies or undertakings producing substitute products.

(6) This Regulation should cover only technology transfer agreements between a licensor and a licensee. It should cover such agreements even if the agreement contains conditions relating to more than one level of trade, for instance requiring the licensee to set up a particular distribution system and specifying the obligations the licensee must or may impose on resellers of the products produced under the licence. However, such conditions and obligations should comply with the competition rules applicable to supply and distribution agreements set out in Commission Regulation (EU) No 330/2010[(3)]. Supply and distribution agreements concluded between a licensee and buyers of its contract products should not be exempted by this Regulation.

(7) This Regulation should only apply to agreements where the licensor permits the licensee and/or one or more of its sub-contractors to exploit the licensed technology rights, possibly after further research and development by the licensee and/or its sub-contractors, for the purpose of producing goods or services. It should not apply to licensing in the context of research and development agreements which are covered by Commission Regulation (EU) No 1217/2010[(4)] or to licensing in the context of specialisation agreements which are covered by Commission Regulation (EU) No 1218/2010[(5)]. It should also not apply to agreements, the purpose of which is the mere reproduction and distribution of software copyright protected products as such agreements do not concern the licensing of a technology to produce but are more akin to distribution agreements. Nor should it apply to agreements to set up technology pools, that is to say, agreements for the pooling of technologies with the purpose of licensing them to third parties, or to agreements whereby the pooled technology is licensed out to those third parties.

(8) For the application of Article 101(3) of the Treaty by regulation, it is not necessary to define those technology transfer agreements that are capable of falling within Article 101(1) of the Treaty. In the individual assessment of agreements pursuant to Article 101(1), account has to be taken of several factors, and in particular the structure and the dynamics of the relevant technology and product markets.

(9) The benefit of the block exemption established by this Regulation should be limited to those agreements which can be assumed with sufficient certainty to satisfy the conditions of Article 101(3) of the Treaty. In order to attain the benefits and objectives of technology transfer, this Regulation should not only cover the transfer of technology as such but also other provisions contained in technology transfer agreements if, and to the extent that, those provisions are directly related to the production or sale of the contract products.

(10) For technology transfer agreements between competitors it can be presumed that, where the combined share of the relevant markets accounted for by the parties does

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not exceed 20 % and the agreements do not contain certain severely anti-competitive restrictions, they generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.

(11) For technology transfer agreements between non-competitors it can be presumed that, where the individual share of the relevant markets accounted for by each of the parties does not exceed 30 % and the agreements do not contain certain severely anti-competitive restrictions, they generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.

(12) If the applicable market-share threshold is exceeded on one or more product or technology markets, the block exemption should not apply to the agreement for the relevant markets concerned.

(13) There can be no presumption that, above those market-share thresholds, technology transfer agreements fall within the scope of Article 101(1) of the Treaty. For instance, exclusive licensing agreements between non-competing undertakings often fall outside the scope of Article 101(1). There can also be no presumption that, above those market-share thresholds, technology transfer agreements falling within the scope of Article 101(1) will not satisfy the conditions for exemption. However, it can also not be presumed that they will usually give rise to objective advantages of such a character and size as to compensate for the disadvantages which they create for competition.

(14) This Regulation should not exempt technology transfer agreements containing restrictions which are not indispensable to the improvement of production or distribution. In particular, technology transfer agreements containing certain severely anti-competitive restrictions, such as the fixing of prices charged to third parties, should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market shares of the undertakings concerned. In the case of such hardcore restrictions the whole agreement should be excluded from the benefit of the block exemption.

(15) In order to protect incentives to innovate and the appropriate application of intellectual property rights, certain restrictions should be excluded from the benefit of the block exemption. In particular certain grant back obligations and non-challenge clauses should be excluded. Where such a restriction is included in a licence agreement only the restriction in question should be excluded from the benefit of the block exemption.

(16) The market-share thresholds and the non-exemption of technology transfer agreements containing the severely anti-competitive restrictions and the excluded restrictions provided for in this Regulation will normally ensure that the agreements to which the block exemption applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the products in question.

(17) The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Council Regulation (EC) No 1/2003[(6)], where it finds in a particular case that an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty. This may occur

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in particular where the incentives to innovate are reduced or where access to markets is hindered.

(18) The competition authority of a Member State may withdraw the benefit of this Regulation pursuant to Article 29(2) of Regulation (EC) No 1/2003 in respect of the territory of that Member State, or a part thereof where, in a particular case, an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty in the territory of that Member State, or in a part thereof, and where such territory has all the characteristics of a distinct geographic market.

(19) In order to strengthen supervision of parallel networks of technology transfer agreements which have similar restrictive effects and which cover more than 50 % of a given market, the Commission may by regulation declare this Regulation inapplicable to technology transfer agreements containing specific restrictions relating to the market concerned, thereby restoring the full application of Article 101 of the Treaty to such agreements,

HAS ADOPTED THIS REGULATION:

Article 1

Definitions

1 For the purposes of this Regulation, the following definitions shall apply:

a ‘agreement’ means an agreement, a decision of an association of undertakings or a concerted practice;

b ‘technology rights’ means know-how and the following rights, or a combination thereof, including applications for or applications for registration of those rights:

(i) patents,

(ii) utility models,

(iii) design rights,

(iv) topographies of semiconductor products,

(v) supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained,

(vi) plant breeder’s certificates and

(vii) software copyrights;

c ‘technology transfer agreement’ means:

(i) a technology rights licensing agreement entered into between two undertakings for the purpose of the production of contract products by the licensee and/or its sub-contractor(s),

(ii) an assignment of technology rights between two undertakings for the purpose of the production of contract products where part of the risk associated with the exploitation of the technology remains with the assignor;

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d ‘reciprocal agreement’ means a technology transfer agreement where two undertakings grant each other, in the same or separate contracts, a technology rights licence, and where those licences concern competing technologies or can be used for the production of competing products;

e ‘non-reciprocal agreement’ means a technology transfer agreement where one undertaking grants another undertaking a technology rights licence, or where two undertakings grant each other such a licence but where those licences do not concern competing technologies and cannot be used for the production of competing products;

f ‘product’ means goods or a service, including both intermediary goods and services and final goods and services;

g ‘contract product’ means a product produced, directly or indirectly, on the basis of the licensed technology rights;

h ‘intellectual property rights’ includes industrial property rights, in particular patents and trademarks, copyright and neighbouring rights;

i ‘know-how’ means a package of practical information, resulting from experience and testing, which is:

(i) secret, that is to say, not generally known or easily accessible,

(ii) substantial, that is to say, significant and useful for the production of the contract products, and

(iii) identified, that is to say, described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;

j ‘relevant product market’ means the market for the contract products and their substitutes, that is to say all those products which are regarded as interchangeable or substitutable by the buyer, by reason of the products’ characteristics, their prices and their intended use;

k ‘relevant technology market’ means the market for the licensed technology rights and their substitutes, that is to say all those technology rights which are regarded as interchangeable or substitutable by the licensee, by reason of the technology rights’ characteristics, the royalties payable in respect of those rights and their intended use;

l ‘relevant geographic market’ means the area in which the undertakings concerned are involved in the supply of and demand for products or the licensing of technology rights, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas;

m ‘relevant market’ means the combination of the relevant product or technology market with the relevant geographic market;

n ‘competing undertakings’ means undertakings which compete on the relevant market, that is to say:

(i) competing undertakings on the relevant market where the technology rights are licensed, that is to say, undertakings which license out competing technology rights (actual competitors on the relevant market),

(ii) competing undertakings on the relevant market where the contract products are sold, that is to say, undertakings which, in the absence of the technology transfer agreement, would both be active on the relevant market(s) on which the contract products are sold (actual competitors on the relevant market) or which, in the absence of the technology transfer agreement, would, on realistic grounds and not just as a mere theroretical possibility, in response to a small