COMMISSION REGULATION (EC) No 772/2004

of 27 April 2004

on the application of Article 81(3) of the Treaty to categories of technology transfer agreements

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 19/65/EEC 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 [2],

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

Whereas:

(1) Regulation No 19/65/EEC empowers the Commission to apply Article 81(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 81(1).

(2) Pursuant to Regulation No 19/65/EEC, the Commission has, in particular, adopted Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85(3) of the Treaty to certain categories of technology transfer agreements [3].

(3) On 20 December 2001 the Commission published an evaluation report on the transfer of technology block exemption Regulation (EC) No 240/96 [4]. This generated a public debate on the application of Regulation (EC) No 240/96 and on the application in general of Article 81(1) and (3) of the Treaty to technology transfer agreements. The response to the evaluation report from Member States and third parties has been generally in favour of reform of Community competition policy on technology transfer agreements. It is therefore appropriate to repeal Regulation (EC) No 240/96.

(4) This Regulation should meet the two requirements of ensuring effective competition and providing adequate legal security for undertakings. The pursuit of these objectives should take account of the need to simplify the regulatory framework and its application. It is appropriate to move away from the approach of listing exempted clauses and to place greater emphasis on defining the categories of agreements which are exempted up to a certain level of market power and on specifying the restrictions or clauses which are not to be contained in such agreements. This is consistent with an economics-based approach which assesses the impact of agreements on the relevant market. It is also consistent with such an approach to make a distinction between agreements between competitors and agreements between non-competitors.

(5) Technology transfer agreements concern the licensing of technology. 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.

(6) 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.

(7) This Regulation should only deal with agreements where the licensor permits the licensee to exploit the licensed technology, possibly after further research and development by the licensee, for the production of goods or services. It should not deal with licensing agreements for the purpose of subcontracting research and development. It should also not deal with licensing agreements to set up technology pools, that is to say, agreements for the pooling of technologies with the purpose of licensing the created package of intellectual property rights to third parties.

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[1] OJ 36, 6.3.1965, p. 533/65. Regulation as last amended by Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).
[2] OJ C 235, 1.10.2003, p. 10.
[3] OJ L 31, 9.2.1996, p. 2. Regulation as amended by the 2003 Act of Accession.
[4] COM(2001) 786 final.

(8) For the application of Article 81(3) by regulation, it is not necessary to define those technology transfer agreements that are capable of falling within Article 81(1). In the individual assessment of agreements pursuant to Article 81(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 81(3). In order to attain the benefits and objectives of technology transfer, the benefit of this Regulation should also apply to provisions contained in technology transfer agreements that do not constitute the primary object of such agreements, but are directly related to the application of the licensed technology.

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

(12) There can be no presumption that above these market-share thresholds technology transfer agreements do fall within the scope of Article 81(1). For instance, an exclusive licensing agreement between non-competing undertakings does often not fall within the scope of Article 81(1). There can also be no presumption that, above these market-share thresholds, technology transfer agreements falling within the scope of Article 81(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.

(13) 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 restraints 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.

(14) In order to protect incentives to innovate and the appropriate application of intellectual property rights, certain restrictions should be excluded from the block exemption. In particular exclusive grant back obligations for severable improvements 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.

(15) The market-share thresholds, the non-exemption of technology transfer agreements containing severely anti-competitive restraints 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.

(16) In particular cases in which the agreements falling under this Regulation nevertheless have effects incompatible with Article 81(3), the Commission should be able to withdraw the benefit of the block exemption. This may occur in particular where the incentives to innovate are reduced or where access to markets is hindered.

(17) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [1] empowers the competent authorities of Member States to withdraw the benefit of the block exemption in respect of technology transfer agreements having effects incompatible with Article 81(3), where such effects are felt in their respective territory, or in a part thereof, and where such territory has the characteristics of a distinct geographic market. Member States must ensure that the exercise of this power of withdrawal does not prejudice the uniform application throughout the common market of the Community competition rules or the full effect of the measures adopted in implementation of those rules.

(18) 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 should be able to declare this Regulation inapplicable to technology transfer agreements containing specific restraints relating to the market concerned, thereby restoring the full application of Article 81 to such agreements.

[1] OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

(19) This Regulation should cover only technology transfer agreements between a licensor and a licensee. It should cover such agreements even if conditions are stipulated for more than one level of trade, by, 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. Supply and distribution agreements concluded between a licensee and its buyers should not be exempted by this Regulation.

(20) This Regulation is without prejudice to the application of Article 82 of the Treaty,

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 transfer agreement' means a patent licensing agreement, a know-how licensing agreement, a software copyright licensing agreement or a mixed patent, know-how or software copyright licensing agreement, including any such agreement containing provisions which relate to the sale and purchase of products or which relate to the licensing of other intellectual property rights or the assignment of intellectual property rights, provided that those provisions do not constitute the primary object of the agreement and are directly related to the production of the contract products; assignments of patents, know-how, software copyright or a combination thereof where part of the risk associated with the exploitation of the technology remains with the assignor, in particular where the sum payable in consideration of the assignment is dependent on the turnover obtained by the assignee in respect of products produced with the assigned technology, the quantity of such products produced or the number of operations carried out employing the technology, shall also be deemed to be technology transfer agreements;

(c) 'reciprocal agreement' means a technology transfer agreement where two undertakings grant each other, in the same or separate contracts, a patent licence, a know-how licence, a software copyright licence or a mixed patent, know-how or software copyright licence and where these licences concern competing technologies or can be used for the production of competing products;

(d) 'non-reciprocal agreement' means a technology transfer agreement where one undertaking grants another undertaking a patent licence, a know-how licence, a software copyright licence or a mixed patent, know-how or software copyright licence, or where two undertakings grant each other such a licence but where these licences do not concern competing technologies and cannot be used for the production of competing products;

(e) 'product' means a good or a service, including both intermediary goods and services and final goods and services;

(f) 'contract products' means products produced with the licensed technology;

(g) 'intellectual property rights' includes industrial property rights, know-how, copyright and neighbouring rights;

(h) 'patents' means patents, patent applications, utility models, applications for registration of utility models, designs, topographies of semiconductor products, supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained and plant breeder's certificates;

(i) 'know-how' means a package of non-patented 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) 'competing undertakings' means undertakings which compete on the relevant technology market and/or the relevant product market, that is to say:

(i) competing undertakings on the relevant technology market, being undertakings which license out competing technologies without infringing each others' intellectual property rights (actual competitors on the technology market); the relevant technology market includes technologies which are regarded by the licensees as interchangeable with or substitutable for the licensed technology, by reason of the technologies' characteristics, their royalties and their intended use,