New Block Exemption Rules for Technology-Transfer Agreements


The general structure and most of the provisions have been retained unchanged compared to the previous Regulation (EC) 772/2004 ("previous TTBER") although some language was streamlined. The TTBER as a whole, highly revised for licensing positions, fewer of them lighten the exemption, in particular:

- restrictions of passive sales to territories reserved for "new" licensees,
- point-back obligations for non-severable improvements and
- termination rights provided for a non-exclusive licensor’s challenge of the validity of the licensed IP.

Other amendments take a more generous approach, in particular regarding the licensor’s purchase obligations.

Main Changes in the Revised Regulation

The main changes pertain to (i) the applicability of the block exemption, (ii) the list of "hardcore restrictions" under Article 5 and (iii) the list of "excluded restrictions" under Article 6.

The revised TTBER clarifies that it will only apply if the block exemption Regulation on Multi- Agreements and the Block Exemption Regulation on Specialization Agreements are not applicable (see Art. 4 TTBER). It also changes the test for when purchase of raw materials or equipment is covered by the safe harbor stipulated in the TTBER (see Art. 25 TTBER).

By contrast, market share thresholds, i.e., 25 % for competing and 45 % for non-competing undertakings, have not been changed (Art. 17 TTBER). In practice, determining the market shares of the parties involved is difficult. If it is unclear, in a particular case, whether or not the thresholds of the TTBER are met, the agreement should be assessed for compliance with Art. 101(1) and (3) TFEU outside the scope of the TTBER.

The Guidelines have been updated to reflect the changes in the TTBER. In addition, the section on settlements (Art. 5(1)(b) TTBER) has been removed. The exclusion of "agreements concerning the substitution of competitors’ products" (see Art. 5(1)(c) TTBER) has been maintained.

Also – and this is quite important – clauses providing for the licensor to terminate the agreement if a non-exclusive licensee challenges the validity of the licensed IP, have been removed. Only – and this is quite important – clauses providing for the licensor to terminate the agreement if a non-exclusive licensee's challenge of the validity of the licensed IP, have been removed. Only

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