



Commission Evaluation Report on the Transfer of Technology Block Exemption Regulation No. 240/96 (14/03/2001)

Orgalime position (5 July 2002)

Introduction

ORGALIME speaks for 31 trade federations representing over 100,000 companies in the mechanical, electrical, electronic and metalworking industries in 21 European countries. These industries, the vast majority of which are small and medium size enterprises employ some 7.6 million people and account for 1200 billion euros in the GNP.

General Comments

Orgalime in general welcomes the Commission initiative to modernize the current Block Exemption Regulation on Transfer of Technology with a view to simplifying it and making it clearer. We particularly welcome the intention of the Commission to choose a more flexible approach including only a limited number of black clauses.

Extension of Scope

Orgalime is convinced that there is a need for more legal certainty with respect to other IPRs (trademarks, copyright, etc...) which are only covered by the Block Exemption Regulation on Transfer of Technology if they are ancillary to the licensed patent or know-how. The issue of how to license software, which is today included in almost every machine, is the best example for legal uncertainty with which our member companies are confronted in practice.

However, we do not believe that the revision of the Block Exemption Regulation on Transfer of Technology is the right instrument to regulate competition aspects of other IPR licences. For the time being, the Commission should concentrate on the necessary revision of the provisions on patent and know-how licences, which are by far the most important instruments used for the transfer of technology. Due to the differences between patents on the one hand and copyright and trademarks on the other hand, the extension of the scope of Block Exemption Regulation on Transfer of Technology to copyright and trademark licences would render the proposed regulation unnecessarily complicated and prolong the entire process. SMEs, in particular, need regulation which is not only easy to understand but also easy to apply in practice.

Use of Market Share Thresholds

Orgalime considers as very problematic the use of market share thresholds in the Block Exemption Regulation on Transfer of Technology for the purpose of determining whether or not a specific licence has anti-competitive effects.

Companies, particularly SMEs, will not be able to define relevant product and geographic markets with a sufficient degree of certainty. According to the case law of the Commission and the European Court of Justice the main criteria for the delineation of the relevant product market is substitutability of the product in question. This criteria is particularly difficult to handle in relation to innovative products and products based on new technologies. The experience with Commission decisions shows that the Commission's perception of how the relevant product and geographic market should be defined, in a specific case, can significantly differ from that of companies.

Moreover, it must be clear that a high market share held by the licensor is only a weak indication for anti-competitive effects of a licence agreement. In the engineering industry, companies regularly create new, but rather small, niche markets through successful specialization and the development of new technologies with, as a consequence, high market shares in these niche markets. From a competition point of view, these developments cannot be considered as problematic because they are the result of successful and highly competitive R&D activities which must be protected themselves through competition law.

Distinction between Competitors and Non-Competitors

Orgalime believes that the distinction between competitors and non-competitors can be an important criterion in order to determine whether or not a licence agreement has anti-competitive effects. One should not disregard the fact that the transfer of technology between competitors can significantly increase competition. A company which acquires a licence from a competitor in order to develop and market a competing product will strengthen rather than weaken competition. For such cases, stricter conditions for licences among competitors are not justified. The same applies to patent pools: if competitors have each on their own developed and patented part of a specific relevant technology, a deadlock situation may arise rendering the use of the combined technology impossible. In order to prevent such a situation, cross licensing should not be prohibited by competition law.

Conclusion

While Orgalime welcomes the Commission's interest to adopt a more flexible approach, which could include only a limited number of black clauses, we caution the Commission in adopting regulation which will lead to legal uncertainty for companies or hamper industry's capacity to innovate and exploit the results of R&D.