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The International Comparative Legal Guide to:

Patents 2015

5th Edition

A practical cross-border insight into patents law

Published by Global Legal Group, in association with CDR, with contributions from:

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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd.
August 2014

ISBN 978-1-910083-13-0
ISSN 2044-3129

Strategic Partners

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Country Question and Answer Chapters:

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Chapter 1

The New EC Technology Transfer Agreements Block Exemption Regulation

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1 Introduction

The European Commission published in March 2014 the new version of its Technology Transfer Agreements block exemption, Regulation 316/2014[i]. This replaced the previous version of the block exemption, Regulation 772/2004[ii], as from 1 May 2014, following the expiry of the old Regulation on 30 April 2014. At the same time, the Commission adopted replacement Guidelines on the application of Article 101 TFEU to technology transfer agreements[iii], likewise updating and replacing the previous Guidelines[iv] which accompanied Regulation 772/2004. The new Regulation will continue for a period of 12 years, expiring on 30 April 2026. This is a relatively long period (the previous block exemption had a 10-year duration). This chapter will summarise the most important features of the new Regulation, with a particular focus on the changes made from the previous Regulation.

The conclusion cannot be avoided that the Commission has taken a cautious approach from a competition perspective in the revision of the block exemption. As a result, the changes benefit, on the whole, licensees more than licensors. Some of the changes remove legal certainty, arguably to an unacceptable degree, by reserving certain types of provisions to individual assessment under Article 101(3) TFEU that would previously be eligible for automatic exemption under the previous Regulation.

2 Overview

As in the case of the previous block exemption, Regulation 772/2004, the block exemption applies to licences of patents, know-how, software copyright and certain neighbouring intellectual property rights[v] or a combination of them, and also assignments of these rights where part of the risk of exploitation remains with the assignor, such as where the sums payable are dependent on the assignee's revenue from the relevant products. As previously, there are separate black-listed provisions for agreements between competitors and between non-competitors. Undertakings may be actual or potential competitors in the relevant product market or actual competitors in the relevant technology market. A distinction continues to be made, in the case of agreements between competitors, between reciprocal and non-reciprocal agreements. The market share thresholds for the application of the block exemption are unchanged; 20% combined market share of the parties for agreements between competitors and 30% for each party on the relevant market(s) in the case of agreements between non-competitors. The Commission's new Guidelines[vi] make clear that where the parties become competitors at a later point in time, the 20% market share threshold will apply from the point in time when they become competitors, but in that case the black-list relevant for agreements between non-competitors will continue to apply to the agreement unless the agreement is subsequently amended in any material respect (as provided for in Article 4(3) of the Regulation).

In addition, certain types of restrictions, whilst not black-listed, are excluded from the scope of the block exemption, as specified in Article 5.

3 The New Regulation: Scope

The new Regulation contains improved use of definitions, in particular of "technology rights". These are now separately defined as comprising patents, software copyright, design rights and know-how, and certain neighbouring types of intellectual property[vii], or any combination of these. As a result the definition of "technology transfer agreement" is simplified so as now to mean any technology rights licensing agreement entered into between two undertakings permitting the production of contract products, or an assignment of technology rights between two undertakings for the purpose of such production where part of the risk of exploitation remains with the assignor.

The criterion that the licensee (or assignee) should use the technology for the purpose of producing goods or services, featured prominently in the previous Regulation. The principle has been strengthened in the new Regulation with reference to software copyright agreements, by means of a statement in recital 7 that the Regulation should not apply to agreements for the mere reproduction and distribution of software copyright protected products. This is stated to be on the basis that such agreements are more akin to distribution agreements rather than concerning the licensing of a technology to produce. As a result, agreements for the production of hard copies of software from a master copy will no longer be within the scope of the block exemption Regulation. The Commission states in recital 7 that such agreements are in effect to be considered distribution agreements for competition law purposes, whilst the new Guidelines state (in paragraph 62) that such agreements should be covered "by analogy" by Regulation 330/2010 on Vertical Agreements[viii]. However, an agreement for the reproduction and distribution of software does not properly fall within the scope of the Vertical Agreements Regulation, because a licence for the reproduction of software copyright is normally an intellectual property licence and not a vertical provision of a service. By contrast, the supply of existing hard copies of the software to a reseller who does not receive any licence of the software, including situations where the only licence is a shrink-wrap licence by the software owner to the end-user, will typically be vertical agreements. The exclusion of licensed reproduction of hard copies of software for distribution clearly involves a loss of legal certainty for software licensors. In any event, a licence of software copyright for sub-licensing without reproduction, or for online distribution only, will probably not fulfil the Regulation's criterion of production by the licensee and so would not normally be covered by the block exemption.

Recital 7 and also paragraphs 65 and 66 of the new Guidelines make clear that the Regulation also applies to licence agreements where the licensee must carry out development work before obtaining a product or a process that is ready for commercial exploitation. However, the object of the agreement must be the production of an identified contract product, for the Regulation to apply. Neither the Regulation nor the Guidelines cover agreements where technology rights are licensed to enable the licensee to carry out further research and development more widely in the field of the licensed technology, for example where the object is the provision of research and development services to improve the technology as opposed to the production of goods and services based on the licensed technology.

The block exemption also applies to technology licence agreements which also relate to the licensing or assignment of other intellectual property rights or know-how to the licensee, if and to the extent that those provisions are directly related to the production or sale of the contract products[ix]. This could in principle apply to, for example, licences of trademarks or certain types of non-software copyright. This principle was previously embedded in the definition of "technology transfer agreement" in the previous Regulation, and is a logical improvement in the scheme and layout of the Regulation. The same operative provision also contains a further improvement, to the effect that the block exemption would also apply to technology transfer agreements relating to the purchase of products by the licensee, again provided that and to the extent that such provisions are directly related to the production or sale of the contract products.

4 Agreements Between Competitors: Changes to Black-listed Provisions

The new Regulation revises the types of provisions that are specifically permitted in agreements between competitors. This results from amendments to the list of hardcore restrictions in Article 4(1), the black-list of restrictions in agreements between competitors and in particular the stated exceptions to such black-listed restrictions. However, these revisions need to be read in the light of the relevant parts of the new Guidelines.

As previously, the new Regulation black-lists pricing restrictions, reciprocal limitations of output and restrictions on the licensee's ability to exploit its own technology and restrictions on either party to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties (Article 4(1)(a)(b) and (d) of both the previous and new Regulations). The new Regulation also continues to black-list restrictions concerning "the allocation of markets or customers" in Article 4(1)(c). However, the stated exceptions to such black-listed market or customer allocation provisions are revised and are now limited to the following in the new Regulation:

(i) an obligation on either party in a non-reciprocal agreement not to use the licensed technology rights for production within the exclusive territory reserved for the other party and/or not to sell (actively or passively) into the exclusive territory or exclusive customer group reserved for the other party;

(ii) a restriction in a non-reciprocal agreement of active sales by the licensee into the exclusive territory or exclusive customer group allocated by the licensor to another licensee where that other licensee was not a competitor of the licensor at the time;

(iii) an obligation on the licensee to produce the contract products only for its own use (provided the licensee may sell the contract products as spare parts for its own products); and

(iv) an obligation on the licensee in a non-reciprocal agreement to produce the contract products only for a particular customer (where the licence was granted to create an alternative source for supply to that customer).

As a result, the block exemption no longer expressly covers obligations on the licensor not to license the technology to another licensee in the same territory in agreements between competitors (Article 4(1)(c)(iii) of the previous Regulation). However, the new Guidelines now make it clear that it is not a hardcore restriction for the licensor in a non-reciprocal agreement to grant the licensee an exclusive licence for production in a particular territory and thus agree not itself to produce the contract products in (or provide the contract products from) that territory[x]. The Guidelines further state that, irrespective of whether the agreement is reciprocal or not, by implication the grant of a sole licence does not constitute a hardcore restriction either, on the basis that such an agreement does not affect the ability of the parties to fully exploit their own technology rights in their respective territories[xi]. However, for licensing between competitors, reciprocal exclusive licensing is a black-listed hardcore restriction (under Article 4(1)(c))[xii].

The new Regulation also no longer expressly permits field of use restrictions. Under the previous Regulation, field of use limitations on a licensee were expressly permitted, as were field of use limitations on a licensor or licensee in a non-reciprocal agreement where the relevant field of use had been reserved for the other party (Article 4(1)(c)(i) and (ii) of the previous Regulation).

However, the new Guidelines appear to indicate that the Commission now regards field of use restrictions, as opposed to customer restrictions, as not being hardcore restrictions[xiii]. On this basis, a true field of use restriction would not constitute an allocation of customers within the meaning of Article 4(1)(c) so that no exception from the black-list in respect of such field of use restrictions is needed. The Commission also clearly states in the new Guidelines[xiv] that field of use restrictions are not considered to be output restrictions (within the meaning of Article 4(1)(b)) because a field of use restriction does not limit the output the licensee may produce within the licensed field of use.

5 Agreements Between Non-competitors: Changes to Black-listed Provisions

In relation to agreements between non-competitors, the black-list of hardcore restrictions and stated exceptions to any such restrictions, are the same as in the previous Regulation, with one important exception. The previous permitted restriction for a two-year period on passive sales by the licensee, into an exclusive territory or exclusive customer group allocated by the licensor to another licensee (Article 4(2)(b)(ii) of the previous Regulation), has been deleted in the new Regulation. This removes an important exceptional permission for a restriction on passive (as opposed to active) sales between territories or customer groups within the EU.

The new Regulation continues to black-list in all other respects, restrictions on the territory into which and the customers to whom the licensee may passively sell the contract products except for the following: a restriction on passive sales into an exclusive territory or exclusive customer group reserved for the licensor; an obligation to produce the contract products only for the licensee's own use provided it may sell the contract products as spare parts; an obligation to produce the contract products only for a particular customer (where the licence was granted to create an alternative source for supply to that customer); and a restriction on sales to end-users by a licensee operating at the wholesale level of trade[xv] and certain provisions specifically related to selective distribution systems[xvi]. Also, of course, the new Regulation continues the provisions of the previous Regulation, of blacklisting restrictions on either party's ability to determine its prices to third parties[xvii].

The provision now removed in the new Regulation, the permission for a two-year restriction on passive sales by a non-competitor licensee into a territory newly and exclusively allocated to another licensee, has featured in all previous versions of the Regulation. It was based on the pro-competitive consideration of encouraging the dissemination of technology, based on the need to safeguard the investments normally required of a technology licensee to exploit the licensed technology. Licensees may be reluctant to make such investments where they are exposed to competition in the short term from other licensees. The two years' permission was therefore a transitional period to give short term protection to the licensee without restricting competition in the medium to long-term.

However, the new Guidelines helpfully state[xviii] that where substantial investments by the licensee are necessary to start up and develop a new market, restrictions on passive sales by other licensees into such a territory or to such a customer group fall outside Article 101(1) for the period necessary for the licensee to recoup those investments. The Commission further states in the Guidelines that in most cases a period of up to two years from the date on which the contract product was first put on the market in the exclusive territory by the relevant licensee (or sold to its exclusive customer group) would be considered sufficient for the licensee to recoup the investments made, but that in an individual case a longer period of protection for the licensee might be necessary for such recoupment. On this basis, where there is a genuine need for the licensee to make such investments, parties can individually assess the position concerning their licence agreement and where appropriate form a view that, subject to the specific facts, a two-year restriction on passive sales in this context may not constitute a competition restriction, so as not to need the application of Article 101(3) TFEU.

6 Changes to the Excluded Restrictions

Article 5 of the Regulation sets out details of two types of restrictions which individually cannot benefit from the block exemption; this is without prejudice to the possibility of applying the block exemption to the rest of the relevant agreement. Article 5 is therefore based on a presumption of severability of such restrictions in order for the rest of the agreement to be able to benefit from the block exemption.

Two important changes are now made as compared with the previous Regulation. First, the excluded restrictions now include any assignment or exclusive licensing obligation on the licensee (in favour of the licensor) in respect of the licensee's improvements to the licensed technology, whether or not the improvements are severable from the licensed technology. Second, an important change is made in relation to the exclusion of obligations on a party not to challenge the validity of the other party's intellectual property rights. Under previous versions of the Regulation, this has been expressly without prejudice to the possibility of a right of termination of the technology transfer agreement in the event that the licensee challenges the validity of any of the licensed intellectual property, but this possibility is, in the new Regulation, now limited to exclusive licences.

Each of these provisions will now be considered in turn.

Grant-backs of Licensee Improvements

The exclusion of any assignment or exclusive licensing obligation on the licensee in respect of the licensee's improvements, not just severable but also non-severable improvements, is a significant issue for licensors. The previous distinction between severable and non-severable improvements, which featured in all previous versions of the Regulation, was conceptually clear and practically workable. It was logical that severable and non-severable improvements be treated differently, from the perspective of intellectual property rights, on the basis that a licensee does not have the right to utilise improvements which cannot be severed from the licensor's technology because to do so would require the licensor's permission. Moreover, the Commission indicated in the previous version of its Guidelines[xix] that exclusive grant-backs and obligations to assign non-severable improvements are not restrictive of competition within the meaning of Article 101(1) TFEU, for the reason that non-severable improvements cannot be exploited without the licensor's permission.

The Commission's new Guidelines define an exclusive licence or assignment obligation on the licensee for the purposes of Article 5(1)(a) of the Regulation, as a grant back obligation which prevents the licensee from exploiting the improvement either for its own production or for licensing out to third parties[xx].

The new Guidelines make clear that an obligation on the licensee to grant a non-exclusive licence in relation to its improvements, to the licensor, is covered by the block exemption. This is the case even where the (non-exclusive) grant back obligation is non-reciprocal, i.e., where the licensor is not subject to a corresponding obligation to license its improvements to the licensee, and also where the licensor is entitled to "feed-on" the licensee's improvements to other licensees[xxi].

Limitation of Permission for a Right of Termination in the Event of a Challenge to the Validity of the Licensed Intellectual Property Rights

In the new Regulation, the restrictions excluded from the scope of the block exemption include a right for a party to terminate a non-exclusive technology licence agreement in the event of a challenge by the licensee to the validity of the licensed intellectual property rights. This is a change from the position under all previous versions of the Regulation; that the exclusion of a no challenge obligation has been without prejudice to the possibility of including a mere right of termination of the licence agreement in the event of such a challenge. This distinction has been widely accepted in patent licensing practice and the change under the new Regulation therefore represents a further reduction in legal certainty.

There is a logical distinction between a no challenge obligation and a right of termination in the event of a challenge by the licensee; insofar as the licensee takes the view that the licensed intellectual property is not valid, then based on this position, the licensee will not need an intellectual property licence and therefore should not be able to object to the licence being terminated. Excluding a right to terminate the licence agreement might in some cases provide an incentive for the licensee to challenge the validity of the intellectual property rights as a bargaining tactic towards the licensor. Since the licensor could not terminate the agreement, the licensee could even take advantage of the costs of invalidity proceedings in negotiations with the licensor on royalties.

The Commission states in the new Guidelines[xxii] that a right of termination can have the same effect as a no challenge clause, in particular where switching away from the licensor's technology would result in a significant loss to the licensee (for example where the licensee has already invested in specific machines or tools which cannot be used for producing with another technology) or where the licensor's technology is a necessary input for the licensee's production. On the latter point, the Commission's stated concern is that in the context of standard-essential patents, a licensee producing a standard-compliant product will need to use all patents comprised in the standard, and challenging the validity of any of these patents may result in significant loss to the licensee if the technology transfer agreement were then terminated. The Commission further states that where the licensor's technology is not standard-essential but has a very significant market position, the disincentive to challenge may also be high considering the difficulty to the licensee of finding a viable alternative technology to license-in. However, the Commission also states that outside the context of these scenarios, a termination clause will often not provide a significant disincentive to challenge the validity of intellectual property and would therefore not produce the same effect as a no challenge clause[xxiii]. On this basis, outside of the scenarios specifically referred to in paragraph 136 of the Guidelines, a right of termination in the event of such a challenge may in appropriate cases be considered acceptable on an individual assessment basis, even in a non-exclusive licence, under Article 101(3) TFEU.

In any event, it is open to question whether there is a justifiable distinction between exclusive and non-exclusive licences for purposes of allowing or disallowing a right of termination for the licensor in the event of a challenge by the licensee to the validity of the licensed intellectual property rights. The limitation on the right of termination, to exclusive licences only, under the new Regulation will therefore be seen by many as an unwelcome development, although outside of standard-essential patent scenarios, the parties to licence agreements will sometimes be able to benefit from the guidance in paragraphs 136 and 137 of the Commission's new Guidelines.

The Commission's new Guidelines contain two important paragraphs in relation to no challenge clauses, specifically in the context of dispute settlement agreements concerning the validity of intellectual property rights. Paragraph 242 states that in the context of a settlement agreement, no challenge clauses are generally considered to fall outside Article 101 (1) TFEU because it is inherent in such agreements that the parties agree not to challenge the intellectual property rights which were the subject of the dispute. This is essentially a repetition of a statement in the previous version of the Guidelines. However, the new Guidelines then set out a new paragraph 243 which states that no challenge clauses in settlement agreements can under specific circumstances be anti-competitive and infringe Article 101 (1), for example where an intellectual property right was granted following the provision of incorrect or misleading information, or where the licensor induces, financially or otherwise, the licensee to agree not to challenge the validity of the technology rights. The first of these exceptions appears reasonable, though it is worth noting that the Commission cites the *AstraZeneca* case[xxiv]. The situation covered by the *AstraZeneca* case was an exceptional situation where the grant of an intellectual property right was held to be based on incorrect or misleading information. Arguably the Commission's Guidelines should not focus so strongly on exceptional circumstances such as these which are sector-specific (to pharmaceuticals) or even case-specific.

As regards the second exception, which concerns financial inducement to accept a no challenge obligation, arguably all settlement agreements involve some financial inducement in that they all involve the conclusion of a bargain between the two parties on the basis of which the proceedings are settled and terminated. Therefore the acceptance by the licensee of a no challenge obligation will inevitably be part of a process of giving and receiving benefits, financial or otherwise, under the agreement, and will therefore be part of an overall inducement process. Arguably therefore this criterion has been expressed too broadly by the Commission and it could be impractical to apply.

The new Guidelines further state, in paragraph 243, that no challenge clauses in settlement agreements may also require scrutiny where the technology rights are a necessary input for the licensee's production. Here the Commission is referring[xxv] to the context of standard-essential patents, where in order to produce a standard-compliant product, the licensee will necessarily have to use all the patents comprised in the standard. In such cases, licensees have no choice other than to use the standard and therefore the standard-essential patents under licence from the patent owner. In the Commission's view, a no challenge clause in this context, even in a settlement agreement, may infringe Article 101(1).

7 Conclusions

The new block exemption Regulation continues for the most part the rules that applied under the previous Regulation. However, in certain respects it reduces the scope of the automatic exemption available under the Regulation and therefore reduces legal certainty for the parties to technology licence agreements. In such instances, the Commission's new Guidelines provide guidance enabling self-assessment, in appropriate circumstances, that Article 101 will not be infringed, because the restriction in question either is not caught by Article 101(1) or may be considered eligible for favourable individual assessment under Article 101(3). Restrictions which on this basis may be considered not to be caught by Article 101(1) include field of use restrictions (in particular in agreements between competitors), and a two-year restriction on passive selling into the exclusive territory (or customer group) of another licensee where substantial investment is required to develop a market, in agreements between non-competitors. Instances where the parties may be able to form the view that Article 101(3) may apply on an individual assessment, may include agreements for the licensing of software copyright for mere reproduction and distribution of the software, by analogy with the Vertical Agreements block exemption Regulation 330/2010; non-reciprocal sole or exclusive technology licences in agreements between competitors; and (in appropriate circumstances) a right of termination by the licensee in the event of a challenge to the validity of the licensed intellectual property.

Overall, one may also take the view that the gradual erosion of the scope of automatic exemption under such a block exemption, and the greater emphasis now being placed on Guidelines, reflect the prominence now given to individual assessment under Article 101(3). This has increasingly been the case since the entry into force of Regulation 1/2003 in 2004, when the individual notification and exemption regime was ended.

Endnotes

i OJ (2014) L93/17.
ii OJ (2004) L123/11.
iii 2014/C 89/03, OJ (2014) C89/3.
iv 2004/C 101/02, OJ (2004) C101/2.
v Utility models, designs, topographies of semi-conductor products, supplementary protection certificates for medicinal products and plant breeder's certificates.
vi Paragraph 85.
vii Utility models, topographies of semi-conductor products, supplementary protection certificates for medicinal products and plant breeder's certificates.
viii OJ (2010) L102/1.
ix Article 2(3).
x Paragraph 107.
xi Paragraph 109.
xii See the new Guidelines, paragraph 211 (last sentence).
xiii See paragraph 209 of the Guidelines.
xiv Paragraph 210.
xv Article 4(2)(b)(i)-(iv).
xvi Article 4(2)(b)(v) and 4(2)(c).
xvii Article 4(2)(a).
xviii Paragraph 126.
xix Paragraph 109.
xx Paragraph 129.
xxi Paragraph 131.
xxii Paragraph 136.
xxiii Paragraph 137.
xxiv Case C-457/10P, *AstraZeneca v Commission*.
xxv The Commission cross-refers to paragraph 136 of the Guidelines.

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