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— News —

Antitrust

New rules for technology transfer agreements: companies have one year to adapt their agreements to the new rules

The European Commission has published new competition rules for the analysis of technology transfer agreements, which update and replace the previous regime. The Block Exemption Regulation EU 316/2014 of 21 March 2014 and its accompanying guidelines (the "Regulation" and the "Guidelines") applies from 1 May 2014 to those agreements by way of which companies authorise the use of patents, know-how or software ("technology" in general) by another company for the production of goods and services.

In general, the European Commission acknowledges the pro-competitive nature of technology transfer agreements, which stimulate research and innovation. Nevertheless, under certain circumstances, these agreements may restrict competition through market sharing or the exclusion of competing technologies, in which case they are prohibited by Article 101 of the Treaty on the Functioning of the European Union (the "Treaty"). The new regime shares the methodology of the old regime: the Regulation provides a safe harbour which exempts from the prohibition of Article 101 of the Treaty certain restrictions contained in technology transfer agreements between companies with low market power which satisfy specific conditions, whereas the Guidelines establish the criteria to be followed for the analysis of restrictions non block exempted together with guidance on the implementation of the Regulation.

The new Regulation is entering into force on 1 May 2014, meaning that new technology transfer agreements entered into from such date onwards must meet the conditions provided therein in order to benefit from the block exemption. In addition, technology transfer agreements concluded under the old regime will have to conform to the conditions of the new Regulation by 30 April 2015 in order to continue benefitting from the safe harbour.

The Regulation introduces the following significant changes:

(i) It clarifies its scope of application. Licensing arrangements may be contained in agreements other than those specifically dealing with technology transfer (e.g. R+D or specialization agreements). The Regulation specifies that it will only be applicable if block exemption regulations on R+D and specialization agreements are not applicable.

(ii) Extension of the scope of application of the safe harbour. The Regulation will now be applicable to provisions contained in technology transfer agreements governing the acquisition of raw materials or the assignment of machinery by the licensor to the licensee, even where the value of this transaction is higher than that of the technology license. Under the previous regulation, these types of provisions were only covered by the safe harbour when their value was lower than that of the technology license.

(iii) The Regulation prohibits any type of restriction on passive sales between licensees. The former regulation allowed a two year grace period

during which passive sales of contractual products by a licensee to clients in a territory or to a group of clients assigned exclusively to another licensee could be restricted. Under the Regulation, any restriction on passive sales between licensees shall be considered a serious restriction entailing the exclusion of the agreement from the safe harbour.

(iv) The safe harbour will not be applicable to the obligation to grant an exclusive license to the licensor in respect of the licensee's improvements to the licensed technology. Pursuant to the former regulation, it was possible to establish an obligation (a grant-back clause) to grant an exclusive license to the licensor with regard to the licensee's improvements to the licensed technology, provided such improvements were not severable from the licensed technology. However, under the Regulation, any obligation on the licensee to grant such an exclusive license will be excluded from the safe harbour. Such an obligation must be analysed individually and could be considered contrary to Article 101 of the Treaty, even if the rest of the agreement may benefit from the safe harbour (as opposed to serious hardcore restrictions, which cause the entire agreement to be excluded from the safe harbour).

(v) Any obligation on the licensee not to challenge the validity of intellectual property rights held by the licensor in the EU is also excluded from the safe harbour, as well as the clauses providing for the termination of an agreement in the event that the licensee challenges the validity of the licensed technology in the case of a non-exclusive agreement. The 2004 regulation allowed such termination clauses in all technology transfer agreements (exclusive and non-exclusive); from now on, these termination clauses will only be block exempted in the case of exclusive agreements.

In addition, the Guidelines introduce the following significant changes in respect of settlement agreements and technology pools (defined as agreements through which two or more parties pool a package of technology for the purpose of licensing the same to participants or to third parties):

(i) As regards settlement agreements that may delay or limit the licensee's capacity to launch the product in any of the affected markets (e.g. pay for delay agreements), the Commission specifically states that particular attention will be paid to settlement agreements concluded between actual or potential competitors by way of which a significant value transfer from the licensor to the licensee is carried out, as well as to the risk that such agreements may lead to market sharing.

(ii) Concerning the technology pools, the new Guidelines provide that, as a general rule, the creation and operation of technology pools will fall outside the scope of Article 101 of the Treaty when they satisfy certain conditions, with emphasis on the requirement that only essential technologies are pooled. The Guidelines also define this concept, clarifying that essential technologies are considered to be those that (i) are necessary either to produce the product or carry out the process to which the pool relates, or (ii) are necessary either to produce the product or to carry out the process in question, complying with the standard supported by the pool.

In sum, the new Regulation provide for important changes that will apply not only to new agreements but also to those agreements concluded under the previous regime, which must be adapted by 30 April 2015 in order to continue benefitting from the block exemption. Therefore, companies have a year to analyse their agreements to transfer or receive technology and adapt them to the new rules.

Mergers

Spanish competition authority subjects the acquisition of Petrocat by Repsol to conditions

Repsol notified the Spanish competition authority (CNMC) of its intention to acquire exclusive control over Petrocat, an oil company owned at that time at 45% by Repsol; at 45% by Cepsa and at 10% by

the Institut Català d'Energia. Petrocat is active in the operation of gas stations and gas direct sales in Catalonia.

The fifth transitory provision of the Spanish Act 11/2013 limited the possibility for Repsol of acquiring gas stations in regions where it already held a market share at retail level of more than 30%. This was the case in Catalonia and Madrid. The market test carried out by the CNMC showed that the operation would have a negative impact on competition given that it strengths the vertical integration of Repsol; increases its share in the market of direct sales of gas oil C -especially in Tarragona- and implies the elimination of an important competitor in Catalonia.

Consequently, Repsol has offered a set of commitments which has been accepted by the CNMC as satisfactory. These commitments consist on: (i) the sale of 23 gas stations prior to the CNMC's authorisation; (ii) a minimum stock of petrol and diesel from gas stations managed by Petrocat shall be provided by operators other than Repsol for a fixed period of time; and (iii) the transfer of the gas station owned by Repsol and managed by Petrocat in Tagament (Barcelona).

— *Case-law & Analysis* —

Data Retention Directive declared invalid by the Court of Justice of the EU (Judgment of 8 April 2014, *Digital Rights Ireland and Seitlinger and Others*, Joined Cases C-293/12 and C-594/12)

The judgment was prompted by complaints from Austria and Ireland, which led to two national courts asking the Court of Justice to decide whether Directive 2006/24/EC on Data Retention complied with the fundamental rights to respect for private life and to the protection of personal data, both recognised in the EU Charter of Fundamental Rights.

The Directive in question allows storage of data on a person's identity, time of communications, the place from which communications are made and the frequency of communications for the purpose of preventing, investigating, detecting and prosecuting serious crimes, such as, organised crime and terrorism.

The Court of Justice has indicated that "*by requiring the retention of those data and by allowing the competent national authorities to access those data, the directive interferes in a particularly serious manner with the fundamental rights to respect for private life and to the protection of personal data".* In this sense, the Court has acknowledged that data retention was justified to fight against serious crime and to safeguard public security, but that the Directive failed to comply with the principle of proportionality.

In addition, the Directive covers all individuals in general, without any differentiation, limitation or exception with regard to the objective of fighting serious crime. Furthermore, it does not ensure sufficient safeguards against the risk abuse of personal data and it also lacks clarity concerning the basis for retaining data for a minimum of six months or a maximum of two years.

Cecilia Malmström, EU Commissioner for Home Affairs, has already stated that the European Commission will carefully asses this judgment and its impact. The Commission will take its work forward in light of progress made in relation to the revision of the e-Privacy Directive, taking into account the negotiations on the data protection framework.

General Court of the EU dismisses the appeal brought by the Spanish confederation of gas stations (Judgment of 6 February 2014, *CEEES and Asociación de Gestores de Estaciones de Servicio v Commission*, Case T-342/11)

The European Commission initiated an investigation against the Spanish oil company Repsol for an alleged infringement of Article 101 TFEU in 2004. Repsol avoided a fine by offering commitments which were made legally binding by the Commission in 2006. Among these commitments, Repsol undertook not to restrict the rights of gas stations to fix retail prices, that is, the

company was allowed to give recommendations or to fix a maximum price but not a fixed or a minimum price.

However, in 2007 the Spanish federation of gas stations (CEES) and the association of gas station managers (AGES) filed a complaint before the Commission arguing that Repsol did not comply with the above mentioned commitment.

Meanwhile, the Spanish competition authority adopted a decision in 2009 against three oil companies including Repsol for an infringement of Article 101 TFEU consisting of retail price fixing on their own gas stations. Repsol was fined 5 million EUR.

In view of the decision adopted by the Spanish competition authority, the Commission decided to reject CEES and AGES's complaint, which led to the associations' appeal to this rejection before the General Court of the EU in 2011. The applicants requested the Commission to reopen the proceedings and to impose a fine to Repsol for failure to comply with the 2006 binding commitments.

The General Court has first reminded that Article 9(2) of Regulation 1/2003 grants the Commission a wide margin of appreciation with regard to reopening a procedure in case of failure to comply with legally binding commitments. Same could be said about the faculty of imposing fines. In other words, Article 9 (2) does not provide for an automatic reopening of proceedings.

The Court has also considered that the purposes of the Commission imposing an eventual fine on Repsol and the purposes of the decision of the Spanish competition authority were convergent. Both had the objective of forcing Repsol to cease in the oil price fixing. In this sense, the Commission was right to consider that based on the decision of the Spanish authority against Repsol, an EU additional intervention was not convenient for the EU interests, without analyzing the substance of the case or taking into account other criteria such as the gravity of the infringement; the Spanish market structure or the impact of Repsol's behaviour in that market.

— *Currently at GA&P Brussels* —

Gómez-Acebo & Pombo wins Chambers Award 2014 as the Spanish law firm with the best customer service

Chambers & Partners, which already awarded the prize to Gómez-Acebo & Pombo in 2010, described the firm as "a solid firm with a highly developed domestic presence, Gómez-Acebo & Pombo attracts praise for its dedicated customer service and business-oriented advice. Its intellectual property and public law teams have led the market for many years, whilst its environmental law, corporate compliance and wealth management departments all fortified their market positions over the last twelve months."