Overview of Submissions Received from Stakeholders in the Public Consultation on the Draft proposal for a revised block exemption regulation for technology transfer agreements and for revised guidelines

1. Introduction

(1) The public consultation on the draft proposal for a revised block exemption for technology transfer agreements and for revised guidelines took place between 20 February and 17 May 2013. In this context, 58 submissions were received.

(2) Companies are getting used to self-assess the compliance of their agreements with Article 101 of the Treaty and in general support the effects-based approach to enforcement that the Commission has been promoting. The current system has given them flexibility to organise their cooperation, notably through the so called "safe harbours" provided for in the Block Exemption Regulation ("BER") and in the Guidelines. Therefore, companies welcomed the Commission's "evolution, not revolution" approach.

(3) In the light of the focus and the content of the contributions received, the main topics of interest in the public consultation were, in the draft Technology Transfer Block Exemption Regulation ("TTBER"), the scope, market share thresholds, hardcore restrictions, termination clauses, and grant backs. As regards the draft Guidelines the main areas of interest were patent pools and settlement agreements.

2. Comments regarding the draft TTBER and the draft Guidelines

(4) The following concise summary covers the main comments on the topics that received the most attention during the public consultation.

2.1. The Scope

(5) Two fifths of the stakeholders made comments on the scope. Many of these stakeholders welcome the clarifications in this area, in particular the clarifications made on the relationship between the different block exemption regulations. Some stakeholders find that this could be even further clarified.

2.2. Market Share Thresholds

(6) More than half of the submissions include comments on market share thresholds. Some stakeholders believe that market shares are difficult to determine and monitor (especially in technology markets) and that the market share thresholds therefore should be removed or substantially raised. Some stakeholders consider that the market share thresholds are not needed because of the hardcore lists.

(7) On the other hand, other stakeholders accept the need for market share thresholds, especially, from an economic effects perspective. Several stakeholders commend the Commission for the existing safe harbour in paragraph 144 of the draft Guidelines (based on number of substitutable technologies available on the market regardless of market shares of parties). Moreover, some stakeholders welcome the guidance given in paragraph 146 of the draft Guidelines and the assurance in paragraph 143 of the draft Guidelines that there is no presumption that Article 101(1) applies merely because the thresholds are exceeded.

(8) Finally, many stakeholders commented on the new Article 3(2) in the draft TTBER. Most of these stakeholders find that the new rule addresses a very rare and/or theoretical situation, which could only happen in the case of an exclusive license. These stakeholders, therefore, urge that the lower threshold of 20 % should either be abolished or only be applicable to exclusive licences. Moreover, several stakeholders find it to be inconsistent to use the threshold for competitors but the hardcore list for non-competitors in the case of substitute captive technologies.

2.3. Hardcore Restrictions

(9) More than half of the stakeholders submitted comments on hardcore restrictions. The vast majority of these comments concern the removal from the draft TTBER of the automatic exception for restrictions on passive sales between licensees for two years (concerning agreements between non-competitors). The situation when such initial passive sales restrictions can be justified between licensees are now instead described in the draft Guidelines. The main arguments of stakeholders are that the change might act as a disincentive to license out and that the TTBER and the block exemption regulation for vertical agreements ("VABER") need not be aligned, as the agreements covered by the respective block exemption regulations are very different. On the other hand, some stakeholders appreciate the change. They find that the removal would bring the TTBER into line with the VABER and thereby remove structural disparities in margin areas of application.

(10) Some stakeholders urged the Commission to simplify the hardcore list, as they find it to be difficult to read and interpret.

2.4. Termination Clauses

(11) Three fourths of the submissions contain comments on termination clauses. The majority of the stakeholders are against the inclusion of termination clauses in the list of excluded restrictions. Many arguments are put forward, the most common ones being that the change would act as a disincentive to license out, that the change would give too much leverage to the licensees and that the licensor should not be forced to stay in a contractual relationship with a licensee challenging the essence of the relationship. Several of these stakeholders, however, recognise the need for this change in regards to standard essential patents.

(12) On the other side, there are also some stakeholders supporting the change. These stakeholders recognized the aim of identifying and removing invalid IPRs and point out

that termination clauses often have the same effects as no-challenge clauses, because high sunk costs may significantly deter the licensees from challenging the validity of the licensed IPR. Moreover, these stakeholders find that the change would ensure that cross-license agreements do not shield invalid patents from challenge, further strengthen the pro-competitive effects of broad cross-licenses that parties enter into to achieve patent peace, and encourage the thinning of the patent thicket.

2.5. Exclusive Grant Backs

(13) Two thirds of the submissions contain comments on exclusive grant backs. The majority of the stakeholders are against the removal of the distinction between severable and non-severable improvements by treating both types of exclusive grant backs as excluded restrictions. Many of these stakeholders point out that when improvements are non-severable, the licensee would always be dependent on a licence to the underlying IPR, and that the licensor would thus have anyway the right under patent law to prevent the licensee from using his own improvement. Some stakeholders also point out that the licensor has a legitimate interest in using the improvements, that it would be a disincentive to license out in the first place, and that it would push a number of contracts into self-assessment, which would create more uncertainty.

(14) On the other hand, certain stakeholders welcome the change. These stakeholders point out that there is a need to differentiate between severable and non-severable improvements and they find the new rule simpler and easier to apply. Moreover, they find that treating both severable and non-severable improvements as excluded restrictions would encourage the licensee to improve the licensed technology and foster innovation.

2.6. Patent Pools

(15) More than half of the submissions contain comments on patent pools. The stakeholders strongly welcome the substantially expanded guidance and the clarifications made in the chapter on patent pools, which are found to be useful. Several submissions welcome that the definition of "essential" IPR is clarified to explicitly cover also standard essential patents. However, some stakeholders submit that further guidance would be helpful on certain issues, in particular in regard to FRAND royalty rates and how these rates are set.

(16) The majority of the submissions commend the Commission for including in its draft guidelines a comprehensive safe harbour for technology pools that covers both the creation of the pool and its subsequent operation. A few stakeholders, however, voice the concern that self-assessment will remain difficult even with the expanded guidance.

2.7. Settlement Agreements

(17) Two thirds of the submissions contain comments on settlement agreements. The stakeholders welcome the inclusion of an expanded section on settlement agreements in the draft Guidelines. In principle, they also welcome the recognition that “in cases where, in the absence of the licence, it is likely that the licensee could be excluded from the market, access to the technology at issue for the licensee by means of a settlement agreement is generally procompetitive”. They welcome that the Commission recognises

that settlement agreements are “in principle a legitimate way to find a mutually acceptable compromise to a bona fide legal disagreement".

(18) Some stakeholders, however, are concerned that there is too little guidance as to when reverse payment settlements could lead to a competition problem. The same critique was put forward as to the criteria when a non-challenge clause in a settlement agreement could lead to potential competition concerns. Some stakeholders comment that, in general, they do not believe that competition authorities are well placed to assess the validity of patents and that the question of whether patents are valid should therefore not play an important role in competition law assessment.