A technology transfer agreement is an agreement pursuant to which one party (the licensor) grants another party (the licensee) the right to use its intellectual property to produce goods and/or provide services.

The European Commission (the “Commission”) Technology Transfer Block Exemption Regulation (the “TTBER”) provides a safe harbour for technology transfer agreements that fulfil certain criteria. The Commission’s guidelines on technology transfer agreements provide guidance on the assessment of such agreements.

Market share threshold and duration of exemption

In order to benefit from the safe harbour provided for in the TTBER, the parties must satisfy the relevant market share thresholds:

- In the case of agreements between competitors, the TTBER will only apply if the parties’ combined market share is 20% or less on either the relevant product and geographic market or on the relevant technology market.
- In the case of agreements between non-competitors, the TTBER will only apply if the parties each have a market share of 30% or less on either the relevant product and geographic market or on the relevant technology market.

If the market share of the parties rises above the thresholds, the benefit of the TTBER will continue to apply for a period of two consecutive calendar years following the year in which the relevant threshold was first exceeded.

Hardcore restrictions

Technology transfer agreements containing ‘hardcore’ restrictions will not benefit from the safe harbour provided for by the TTBER.

In relation to agreements between competitors, the TTBER classifies the following as hardcore restrictions:

- price-fixing or any other restrictions of a party’s ability to determine its prices when selling to third parties;
- limitations regarding how much a party may produce and/or sell;
- any restriction of the territories into which, or the customers to whom, the licensee may sell the contract goods or services (with certain exceptions); and
- any restriction on the licensee’s ability to exploit its own technology or restrictions on either party’s ability to carry out research and development (except where they are necessary to prevent disclosure of licensed know-how to third parties).

In relation to agreements between non-competitors, the TTBER classifies the following as hardcore restrictions:

- price-fixing (other than imposing a maximum price or a recommended retail price);
- any restriction of the territories into which, or the customers to whom, the licensee may sell the contract goods or services (with certain exceptions); and
any restriction on active or passive sales to end-users by licensees which are members of a selective distribution system operating at the retail level of supply (although it is permitted to include a clause prohibiting a licensee from operating out of an unauthorised place of establishment).

Excluded restrictions

The following restrictions in a technology transfer agreement will not benefit from the safe harbour provided for by the TTBER, although the remainder of the agreement will still fall within the safe harbour (assuming it fulfils all the relevant criteria):

- any obligation on the licensee to grant an exclusive licence to the licensor or to a third party designated by the licensor in respect of its own improvements to, or its own new applications of, the licensed technology;
- any obligation on a party not to challenge the validity of intellectual property rights which the other party holds in the EU;
- in agreements between non-competitors, restrictions on the licensee's ability to exploit its own technology or restrictions on either party's ability to carry out research and development (except where necessary to prevent disclosure of licensed know-how to third parties).

Outside the safe harbour

If a technology transfer agreement does not fulfil the criteria of the TTBER and therefore does not benefit from the safe harbour, this does not mean there is a presumption that the agreement is unlawful. The agreement will require individual analysis with regard to the guidance provided in the Commission’s guidelines on technology transfer agreements.

If you have any questions in relation to the above, or related competition law issues, please do not hesitate to contact Gustaf Duhs, Beverley Whittaker or Beverley Flynn on 01483 302264.

This information is necessarily brief and is not intended to be an exhaustive statement of the law. It is essential that professional advice is sought before any decision is taken.

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