

GERMANY



**Maiwald Patentanwalts
GmbH
Munich**

Marco Stief



*and
Heinrich Nemecek*

Revised TTBER and Guidelines

The European Commission has adopted a new Technology Transfer Block Exemption Regulation (TTBER) and new Technology Transfer Guidelines for the assessment of technology transfer agreements under EU antitrust rules with effect from May 1 2014. Although the TTBER provides for rather substantial restrictions on the stipulations in technology transfer agreements compared to the former TTBER 2004, many of the modifications that were laid down in the first drafts (such as adaption of the market-share thresholds) did not subsequently enter into force. The main changes introduced by the new TTBER are discussed below.

Passive sales

The restriction of passive sales into an exclusive territory or to an exclusive customer group allocated by the licensor to another licensee has been qualified as a non-hardcore restriction during the first two years (Art. 4(2)(b)(ii) TTBER 2004). Such an exemption has been excluded in the new TTBER. Restrictions of passive sales are therefore in many cases hardcore restrictions, which are not exempted from the prohibition on restrictive agreements.

Licensee improvements

TTBER 2004 allowed an obligation to be placed on the licensee to grant an exclusive licence to the licensor in respect of its own severable improvements. Article 5(1)(a) TTBER now excludes all forms of exclusive grant-back obligations without limiting these to severable improvements.

Termination clauses

Under TTBER 2004, the licensor was allowed to stipulate the right to terminate the technology transfer agreement in the event that the licensee challenged the validity of the IP right. This right

now applies only in respect of an exclusive licence. Where a non-exclusive licence is granted, the right to terminate the technology transfer agreement is not exempted from the prohibition on restrictive agreements (Article 5(1)(b) TTBER).

Settlement agreements

The Guidelines underline the legitimate necessity of settlement agreements to find a mutually acceptable compromise to a *bona fide* legal disagreement. The reasons for settlement agreements are in particular that the dispute might be too costly, time-consuming and/or uncertain regarding its outcome. Pay-for-delay agreements are, however, excluded from this view as they often do not involve the transfer of technology rights and have an anticompetitive effect.

Transitional period

Agreements that satisfied the requirements under the former TTBER 2004 shall remain exempted until April 30 2015, even if they do not meet the revised conditions.