Admissibility of Hardcore Restrictions in License Agreements

Zulässigkeit von Kernbeschränkungen in Lizenzvereinbarungen

Invited paper

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***Abstract* —** TTBER contains a list of hardcore (essential/fundamental) restrictions of the competition that are not admissible. The classification of a restriction as a hardcore restriction of competition depends on its nature and is based on a long time experience, which shows that such restrictions are almost always anti-competitive. The restriction of competition may stem from the subject matter of the license agreement itself or from certain features of the particular contractual relations (i.e. particular rights/obligations). Where a technology transfer agreement contains a hardcore restriction of competition, the license agreement shal be deemed to remain outside the scope of the block exemption as a whole. For the purposes of the TTBER, hardcore restrictions cannot be separated from the rest of the agreement. In the context of an individual assessment of the agreement, hardcore competition restrictions are unlikely to fulfill the four conditions of Article 101, Para. 3 of the TFEU.

***Zusammenfassung* —** TT-GVO enthält eine Liste von Kernbeschränkungen (wesentlichen/grundlegenden) des Wettbewerbs, die nicht zulässig sind. Die Einstufung einer Beschränkung als Kernbeschränkung des Wettbewerbs hängt von ihrer Art ab und basiert sich auf langjähriger Erfahrung, die zeigt, dass solche Beschränkungen fast immer wettbewerbswidrig sind. Die Beschränkung des Wettbewerbs kann sich aus dem Gegenstand der Lizenzvereinbarung selbst oder aus bestimmten Merkmalen der jeweiligen Vertragsbeziehungen (d. H. Bestimmten Rechten / Pflichten) ergeben. Enthält ein Technologietransfervertrag eine Kernbeschränkung des Wettbewerbs, so bleibt die Lizenzvereinbarung außerhalb des Geltungsbereichs der gesamten TT-GVO. Für die Zwecke des TT-GVO können Kernbeschränkungen nicht vom Rest der Vereinbarung getrennt werden. Im Rahmen einer individuellen Bewertung von Lizenzvereinbarungen ist es unwahrscheinlich, dass die vier Bedingungen des Artikels 101, Abs. 3 des AEUV von den Kernbeschränkungen des Wettbewerbs erfüllt werden können.

I. Introduction

In the contemporary world of business, license agreements play a significant role and their importance for international technology transfer is growing [1]. Driven by the fast technological development and growing competition in the field of innovation, the entrepreneurs experience an increasing need for innovative products, which sometimes they are not able to create on their own. This makes them resort to cooperation with other business partners and thus leads to the increase of technology transfer, the main means of which is the license agreement [2]. Instead of doing their own research and development entrepreneurs issue new products by acquiring licenses for patented inventions and available know-how. Such approach is often more profitable and frequently is a standard business strategy for many entrepreneurs. As a consequence of the search for an adequate legal form of exchange of scientific and technical achievements in the conditions of globalization of scientific and technical progress and "capitalizing" on its results, the license agreement is firmly established in international contractual practice. Currently, it occupies ever more important place in international trade and contributes to the unimpeded dissemination of scientific and technical knowledge and experience. Today, the purchase and sale of licenses is one of the main forms of scientific and technical cooperation between separate countries. At present, trade in intangible intellectual property has become one of the most profitable transactions in the world, along with banking, capital exports, international transport and tourism. In the last 15-20 years alone, revenues from licensing transactions have increased tenfold [3].

According to the prevailing international view, the license agreement is a "sui generis" agreement, i.e. an independent type of contract. Although it shares certain common features with the contracts of sale, rent, lease, option and company, regulated in Bulgaria by the Obligations and Contracts Act ("OCA") [4] and the Commercial Act ("CA") [5], and allows the use by analogy of legal norms governing these types of contracts, it must basically be judged according to its own rules. The current Bulgarian legislation, and more precisely the CA, in Chapter Thirty-five, introduced a rather scarce legal regulation of the license agreements, which until now, with the exception of Art. 30, 31, 32 and 32a of the Patents and Registration of Utility Models Act[1] ("PRUMA") [6] were not regulated at all.

A license agreement is usually a contract under which one party – the licensor, grants the other party – the licensee the full or limited use of legally protected inventions, trademarks, industrial designs, utility models and / or knowledge and know-

[1] The mentioned articles refer to the license readiness, the contractual license and the compulsory license.

how [7], for a certain period[2], against certain remuneration. In this sense is formed the legal definition of the license agreement provided in Art. 587 (1) of the CA. Art. 587 (2) of the CA introduces for the first time in the Bulgarian legislation the formal nature of the license agreement. Therewith the written form of the license agreement is a condition for its validity. By granting a license, the licensor usually undertakes to provide the legal and factual possibility for the use of the licensed object, whereby restrictive conditions may be imposed on this use in respect of territory, time, scope and others, as long as they are admissible by the applicable competition law of the respective country.

If based of the principle of autonomy of the will, the parties can choose the applicable law to the license agreement, then the choice of the applicable competition law is not possible, as it is part of the public law of the state where the license agreement takes effect, i.e. its provisions are subject to the so-called “ordre public” of the party concerned and may not be altered by contractual provisions.

Although the parties have contractual freedom in defining the clauses in the license agreement, based on the wide recognized “principle of autonomy of their will”, they cannot act in conflict with the provisions of the competition (antitrust) legislation in the respective countries, such as for example the Competition Protection Law (“CPL”) [8], adopted in Bulgaria since 2008. They apply especially to such contractual restrictions, which are placed mainly on licensee, go beyond the content of the protected rights and restrict free competition (so-called “principle of impact of the contract on the market”). This should take into account such restrictive conditions in the license agreement as: vertical price fixing, market distribution, obligations to purchase raw materials and equipment, “field-of-use” restrictions, boycotting certain buyers, attempts for market monopolization, discriminatory prices and conditions of sale, export ban, etc., which are usually inadmissible under the competition law of most countries. Restrictions to the licensor are also possible, such as: restrictions of the contractual freedom and of the content of the license agreement, the most favored party clause, communication and provision of future inventions and other objects of industrial property, the arbitration clause, etc.

License agreements, although they seem inadmissible, may be approved by the relevant completion office if the economic freedom of the licensee or another undertaking is not unfairly restricted and the size of the restrictions does not significantly distort competition in the market.

Competition law issues are usually beyond the reach of small and medium-sized enterprises, which generally do not dispose with trained professionals in this field among their staff. Nevertheless, the compliance with the competition requirements is of great importance for the admissibility, validity and implementation of license agreements. In general, competition law matters should be respected well enough and the competent advice of a specialist in this field should be well considered. In any case, the parties to the license agreement should seek from the outset to avoid restrictive clauses leading to conflicts with the competition legislation, otherwise it would be inacceptable for the licensor to provide on the basis of a void contract (one that conflicts with the competition law) his know-how or for the licensee to undertake the implementation of significant unnecessary costs, which due to lack of legal ground (a valid contract) will not be reimbursed.

As one of the few studies of its kind on this complex issue in Bulgaria [9], the authors of this article aim to consider the competition law aspects of the admissibility of restrictive clauses in licensing agreements based on the legislation and case law in Bulgaria in comparison with the current European law and practice according to Regulation (EU) 316/2014 of the Commission of 21.03.2014 on the application of Art. 101, para. 3 of the Treaty on the Functioning of the European Union to Categories of Technology Transfer Agreements (“TTBER”)[3] [10], and the Guidelines for the Application of Art. 101 of the Treaty on the Functioning of the European Union with regard to technology transfer agreements [11].

II. License agreement for patents and know-how

The license agreement is a formal agreement. The legal requirement for this is contained in Art. 587 (2) of the CA and the form determined by law is the written form. By comparison, neither the German Patent Law [12], nor the European Patent Convention (“EPC”) [13], nor the Community Patent Convention (“PCA”) [14] prescribe a specific legal form for the license agreement. The written requirement in § 72 EPC and

§ 39 EPC applies only to the transfer of patent applications, respectively patents, through a commercial transaction, but does not apply to licensing. The 6th Amendment to the German Patent Law abolishes the provision of Art. 34, according to which license agreements that are relevant to competition must be concluded in writing, non-compliance with which leads to the nullity of the license agreement.

As a rule, the license agreement is binding only between the parties (inter partes). According to the requirement of art. 590 of the CA, it is subject to registration in the State Register of the Patent Office. After the registration is completed the provisions of the license agreement may be opposed to third parties that obtained the same rights but after the registration has occurred. This means that the second acquirer of the exclusive right to the licensed intellectual property should comply with the rights granted to the first acquirer of rights to the licensed intellectual property, whose license agreement is registered. From the point of view of contract law in Bulgaria, the registration is not part of the form prescribed by law for the validity of the contract. Therefore, its validity will be present without being entered in the register [15]. For comparison, the German Patent Law provides for the possibility of registering only contracts that grant exclusive licenses [12, Art 30 (4)]. At the request of the patent owner or the licensee, the Patent Office of the Federal Republic of Germany may register an exclusive license if it is proved that the other party agrees. However, the application for registration of an exclusive license is inadmissible if a license readiness is declared [12, Art. 23 (1)].

Decisive for determining the subject of the license agreement is the protected scope of the patent, whereas the latter is determined by the content of the patent claims. License agreements, in which the obligations and the rights of the contracting parties are not clearly defined, must be interpreted on the basis of the good faith and the legal customs at the time of their conclusion[4]. The legal framework in the German law is identical [12, Art. 157]. Additional patents to improve or

[2] The parties may abstain from determining the duration of the license, if they cannot estimate the duration of the market demand for the licensed product. The termination in this case is done through a notice on the grounds of art. 589 of the CA within the contractually stipulated term determined by the parties, and if such is not stipulated, the provision provides for a 6 months' notice, but not earlier than one year from the first anniversary of the contract.

[3] The TTBER replaces Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements [16].

[4] The interpretation of contracts is regulated in Art. 20 of the Obligations and Contracts Act [4].

support the implementation of an already patented invention may be the subject of separate licensing agreements. A license on the main patent does not automatically extend to the additional patent [17].

Know-how licensing agreements play an important role in the exchange of technical knowledge. In the Bulgarian literature know-how is defined as: "a set of scientific and technical achievements, production experience, knowledge and information of various nature with practical applicability and a certain economic value, containing secrets, not covered by legal protection and intended for certain production or for performing a specific task with the least amount of effort, time and energy" [18].

Until recently, there was no uniform definition of know-how in the Bulgarian legislation. Unlike the pre-war Law against Unfair Competition of 1940, the CPA of 2008 contains in Paragraph 1, item 9 of its Additional Provisions, a legal definition of the term "production or trade secret". It provides that industrial or trade secrets (hereinafter referred to as "trade secrets") are facts, information, decisions and data related to a business activity, the keeping in secrecy of which is in the interest of the rightful owners, wherefore they have taken the necessary measures[5]. According to Art. 3 of the Trade Secrets Protection Act ("TSPA") of 2019 [21], trade secret means any commercial information, know-how and technological information that is not generally known or easily accessible, has commercial value and measures have been taken to keep it secret.

And in German literature there is no single definition of the term "know-how". Differences of opinion arise in particular as to whether the object of the know-how must necessarily be secret and also whether only technical or commercial knowledge can be the object of know-how. The secret nature of know-how, i.e. its inaccessibility for specialists in the field, cannot be interpreted. It is important that the specialized knowledge at the time of the conclusion of the license agreement is not well known, and that the licensees can develop this specialized knowledge only if they invest significant time and money for this [22].

Art. 1, letter "i" of TTBER [10] provides a legal definition of the term "know-how" as follows: 'know-how' means a package of practical information, resulting from experience and testing, which is:

i. secret, that is to say, not generally known or easily accessible,
ii. substantial, that is to say, significant and useful for the production of the contract products, and
iii. identified, that is to say, described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality.

In other words, TTBER is limited to technical manufacturing experience. The question of whether commercial (business) experience can be considered as know-how should be affirmatively answered. There is no important reason for the different treatment of technical and commercial know-how.

Based on the above, the authors conclude that the term "know-how" should be understood as knowledge and experience of production-technical, commercial and enterprise-managing (business) nature, which are not protected with exclusive rights, but are fully or partially kept secret or not easily accessible, have economic value and enable their user to carry out production and sale of goods and / or services, as well as to manage an enterprise [7].

[5] The term "production secrets" means confidential information of a technical and technological nature and confidential information such as management, commercial or trade information, which is typical for the trade secrets. Production secrets include, for example, operating costs within the company [19], [20].

III. Hardcore restrictions of the competition according to Art. 4 of the TTBER

Article 4 of the TTBER [10] contains a list of hardcore (essential/fundamental) restrictions of the competition that are not admissible. The classification of a restriction as a hardcore restriction of competition depends on its nature and is based on a long time experience, which shows that such restrictions are almost always anti-competitive [11, Para. 94]. The restriction of competition may stem from the subject matter of the license agreement itself or from certain features of the particular contractual relations (i.e. particular rights/obligations). Where a technology transfer agreement contains a hardcore restriction of competition [10, Art. 4, Para 1 – 2], the license agreement shall be deemed to remain outside the scope of the block exemption as a whole [11, Para. 95]. For the purposes of the TTBER, hardcore restrictions cannot be separated from the rest of the agreement. In the context of an individual assessment of the agreement, hardcore competition restrictions are unlikely to fulfill the four conditions of Article 101, Para. 3 of the TFEU.

A. Agreements between competitors

1) Differentiation between reciprocal and non-reciprocal license agreements between competitors

A number of hardcore restrictions in the TTBER distinguish between reciprocal and non-reciprocal agreements, and the hardcore restrictions for reciprocal license agreements between competitors are more demanding compared to the hardcore restrictions for non-reciprocal license agreements between competitors [11, Para. 98]. Reciprocal license agreements are agreements on cross-licensing of technologies that are competitive or that can be used to produce competing products. Non-reciprocal license agreements are agreements whereby only one party licenses its rights over a technology to the other party, or where, in the case of cross-licensing, the rights to the licensed technologies are not competing and cannot be used to produce competing products. A license agreement that contains an obligation of the licensee to transfer the improvements, or to counter-license its own improvements to the licensed technology to the licensor, does not qualify as reciprocal.

2) Price restrictions between competitors

Agreements between competitors aimed at fixing prices for products sold to third parties, including products containing the licensed technology, are inadmissible for the application of the TTBER [10, Art. 4, Para. 1]. Fixing prices between competitors is a restriction of competition by its purpose [11, Para. 99]. It can take the form of a direct agreement for a certain price to be invoiced, a price list with certain allowed maximum discounts, etc., regardless of whether the agreement refers to fixed, minimum, maximum or recommended prices. Price fixing can also be implemented indirectly by using deterrents against deviations from the agreed price level. An example in this sense would be stipulating the right on an increase of the license fee to be increased, if product prices fall below a certain level. However, the payment of a certain minimum license fee does not qualify as a case of price fixing.

Where the license fee is calculated on the basis of individual sales of the product, its amount has a direct effect on the marginal cost of the product and therefore has a direct effect on the prices of the product[6]. If competitors use cross-licensing with reciprocal current royalties as a means of increasing downstream product market prices, these cross-licensing with reciprocal current royalties will be treated as price fixing if the agreement does not contain competition enhancing objectives [11, Para. 100]. As long as it does not benefit the consumer, it has no valid economic justification and is a cartel.

3) Restriction of production between competitors

The hardcore restriction of competition referred to in Article 4, Para. 1, letter "b" of the TTBER, applies only to reciprocal restrictions on production[7] imposed on the parties [11, Para. 103]. This restriction does not apply to non-reciprocal agreements or to reciprocal agreements with restrictions on production imposed on one of the licensees (if the technology is licensed to more than one licensee), provided that the restriction on production only affects products manufactured with the licensed technology. Thus, hardcore restrictions are defined as reciprocal restrictions on the production of the parties, as well as restrictions on the production of the licensor with regard to his own technology. The purpose and the likely impact of such agreements is to reduce market volumes. Also unacceptable for the application of TTBER are agreements that reduce the parties' incentive to expand production, for example by applying reciprocal current royalties per unit of production, which increase with the increase in production, or by mutually obliging each other to pay compensation to the other party, if a certain volume of production is exceeded. More favorable treatment of non-reciprocal quantitative restrictions is based on the consideration that a unilateral restriction does not necessarily lead to smaller volumes of products intended for the market, as well and due to the probability that the license agreement is not signed in bona fide when the restriction is non-reciprocal [11, Para .104].

4) Distribution of markets and customers between competitors

Agreements by which competitors share markets and customers are intended to restrict competition [10, Art. 4, Para. 1(c)]. A reciprocal agreement whereby competitors agree not to produce in certain territories or not to carry out active and / or passive sales in certain territories, or to certain customers reserved for the other party, is considered a strict restriction of the competition by TTBER [11, Para. 105]. For example, reciprocal exclusive licensing between competitors is considered market sharing. There is no hard limit when, in a non-reciprocal agreement, the licensor grants an exclusive license to the licensee to produce in a given territory on the basis of the licensed technology and thus agrees not to produce the contract products in that territory or to supply them from it [10, Art. 4, Para. 1(b)-ii]. Such exclusive licenses do not exclude the application of TTBER regardless of the limits of the territory stipulated in the license agreement [11, Para. 107]. For the same reason, the block exemption also applies to non-reciprocal agreements whereby the parties agree not to sell actively or passively in an exclusive territory or to a group of exclusive customers reserved for the other party [10, Art. 4, Para. 1(b)-i]. For the implementation of the TTBER, the Commission interprets "active" and "passive" sales as defined in the Guidelines on Vertical Restraints [23]. Restrictions on a licensee or licensor to make active and/or passive sales in the territory or to a group of customers "belonging" to the other party to the agreement shall be block exempted, only if the territory or group of customers is exclusively reserved for that other party [11, Para. 108].

Whether reciprocal or non-reciprocal, a license agreement whereby the licensor designates a single licensee in a territory, which means that third parties will not be licensed to produce in the territory in question on the basis of the licensor's technology, is also not a hard limit [11, Para. 109]. This is because the agreement does not affect the ability of the parties to fully exploit the rights to their own technology in their respective territories.

Restrictions on licensees to non-reciprocal license agreements to execute active sales in the territory or to a group of customers allocated by the licensor to another licensee shall be block exempted up to the market share threshold [10, Art. 4, Para. 1(c)-v]. However, this implies that the protected licensee was not a competitor of the licensor when the agreement was concluded [11, Para. 110]. By allowing the licensor to provide a licensee, who has not previously been present on a certain market, with protection against active sales made by licensees, who are competitors of the licensor and who have established themselves on the respective market, is expected that the protected licensee will use the licensed technology more efficiently. However, it is not permissible for licensees to agree among themselves not to sell actively or passively in certain territories or to certain groups of customers. Such an agreement is considered a cartel between the licensees.

Restrictions for own use, i.e. requirements that the licensee may produce products incorporating the licensed technology only for his own use are also block exempted and do not constitute hardcore restrictions [10, Art. 4, Para. 1(c)-iii]. Where the product manufactured as per the license agreement is component of a machine, device or equipment, the licensee may be obliged to produce that component only in order to be included in its own products, but not to sell it to other producers. However, it must be able to sell the components as spare parts for its own products (machines, devices, equipment) and must therefore be able to supply components to third parties that provide after-sales services for those same products [11, Para. 111].

The list of hardcore restrictions excludes the licensee's obligation under a non-reciprocal agreement to produce the contract products only for a specific customer in order to create an alternative source of supply for that customer [10, Art. 4, Para. 1(c)-iv]. One of the conditions for applying this exception to the hard limit is that the license is limited to the creation of an alternative source of supply for that particular customer [11, Para. 112]. However, this is not a condition for granting only one such license; more than one company may be licensed to make deliveries to the same specific customer.

Restrictions in agreements between competitors that limit the license to one or more product markets or technology areas of use do not constitute hardcore restrictions [11. Para. 113]. Such restrictions are block exempted up to a market share threshold of 20%, regardless whether the agreement is reciprocal or not. However, the block exemption applies provided that the restrictions on the scope do not go beyond the scope of the licensed technology, because where licensees are also restricted on the technical field in which they can exercise their own technology rights, the agreement is in fact a sharing of market.

The block exemption applies regardless of whether the scope of the restriction is symmetrical or asymmetrical, and the asymmetrical scope restriction in a reciprocal license agreement implies that both parties are only allowed to use the respective licensed technologies in different uses [11, Para. 114].

[6] Point 98 of the Guidelines [11] concerning the application of Art. 81, Para. 3 of the EU Treaty.

[7] Limitation on the production represents the limitation in the volumes that a party is allowed to produce and sell.

5) Restrictions on the ability of the parties to carry out research and development

Hardcore restrictions on competition are restrictions imposed on the ability of either party to carry out research and development, as both parties must have unrestricted freedom to carry out independent research and development [10, Art. 4, Para. 1(d)]. This rule applies whether the restrictions apply to an area covered by the license or to other areas [11, Para. 115]. Reciprocal obligation of the licensee to provide the future improvements of the licensed technology to the licensor is not considered a restriction on independent research and development. Furthermore, a restriction imposed to the licensee to carry out research and development with third parties is not considered a hardcore restriction, where the restriction is needed so that the licensor could protect its know-how from disclosure.

6) Restrictions imposed on the licensee to use own technology

Licensee should also not be restricted from using the rights to its own competing technology, provided that it uses the rights to the technology for which it has been licensed by the licensor [[10, Art. 4, Para. 1(d)]. As regards the licensee's rights over its own competing technology, it must not be subject to restrictions on the place where it manufactures or sells, on the technological uses or product markets in which it produces, on the volumes produced or sold and the respective sell prices [11, Para. 116].

B. Agreements between non-competitors

Article 4, Para. 2 of the TTBER defines the strict licensing restrictions between non-competitors.

1) Fixing prices

A hardcore restriction on competition is the fixing of prices when selling products to third parties [10, Art. 4, Para. 2(a)]. In particular subject to this provision are restrictions which have as a direct or indirect purpose the setting of fixed or minimum selling prices, or a fixed or minimum price level that has to be observed by the licensor or licensee when selling products to third parties [11, Para. 118]. The limitation is evident in agreements where the selling price is directly determined, but the fixing of selling prices can also be achieved indirectly by fixing margins, the maximum level of discounts whereby the selling prices are tied to the selling prices of competitors, threats, intimidation, warnings, sanctions or termination of agreements in connection with non-compliance with a certain agreed price level. Direct or indirect methods for fixing prices may become more effective when combined with measures to detect price reductions, for example by introducing a price control system or an obligation on the licensee to report price deviations or when combined with measures, which reduce the licensee's motivation to lower its own selling price, for example by obliging the licensee to apply a "most-favored-customer clause", i.e. the obligation towards a customer to be provided with more favorable terms than any other customer. However, the mere provision of a list of recommended prices or the imposition of maximum prices on the licensee by the licensor shall not be deemed to lead to fixed or minimum selling prices.

2) Restriction of passive sales of the licensor

Hardcore restrictions of competition are defined as agreements or concerted practices having as a direct or an indirect purpose to limit passive sales to licensees of products that contain the licensed technology [10, Art. 4, Para. 2(b)]. Restrictions on passive sales imposed on the licensor may be the result of direct obligations (not to sell to certain customers or customers in certain territories or orders from such customers to be forwarded to other licensees) or indirect measures aimed at making the licensor abstain from such sales (financial incentives and introduction of a system for control and verification of the destination of the licensed products) [11, Para. 119]. Quantitative restrictions on the production or distribution of licensed products may be an indirect means of limiting passive sales, but they alone cannot serve such purpose. The general hardcore restriction covering passive sales by licensors is subject to a number of exceptions, which are presented in the following paragraphs.

Restrictions on sales (active and passive) imposed on the licensor do not fall within the scope of Art. 4, Para. 2, letter "b" of the TTBER and all restrictions on the licensor's sales (active and passive) are block exempted up to the market share threshold of 30% [11, Para. 119]. The same applies to all restrictions on the active sales of the licensor, with the exception of active sales according to Art. 4, Para. 2, letter "b", item "v" of the TTBER. The exemption of restrictions on active sales is based on the assumption that such restrictions encourage investment, non-price competition and improvements in the quality of services provided by licensees by solving free rider problems and hold-up problems.

Restrictions on active and passive sales to licensor in an exclusive territory or to a group of customers with exclusive rights reserved to the licensor do not constitute hard restrictions on competition and are block exempted [10, Art. 4, Para. 2(b)-i]. It is considered that up to the market share threshold, these restrictions, while restricting competition, encourage the proliferation of anti-competitive technologies and the integration of these technologies into the licensee's producing assets [11, Para. 121]. The licensor is not required to manufacture with the licensed technology in this territory or for this group of customers, in order this territory or group of customers to be reserved by him.

The restriction by which the licensor undertakes to produce products incorporating the licensed technology only for its own use is also block exempted [10, Art. 4, Para. 2(b)-ii]. Where the contracted product is a component from a device, machine or equipment, the licensor may be obliged to use that product only to be included in its own products and not to sell it to other manufacturers [11, Para. 122].

The block exemption also applies to agreements whereby the licensor undertakes to manufacture the contract products only for a specific customer in order to provide that customer with an alternative source of supply [10, Art. 4, Para. 2(b)-iii]. In agreements between non-competitors, such restrictions are unlikely to fall within the scope of Article 101, para. 1 of the TFEU [11, Para. 123].

The block exemption also applies to agreements with licensees that operate at the "wholesale trade" level, whereby the same are obliged to sell only to retailers [10, Art. 4, Para. 2(b)-v]. This obligation allows the licensor to entrust the licensee with the "wholesale trade" [11, Para. 124] function and usually remains outside the scope of Article 101, para. 1 [24].

The block exemption also includes a restriction on the licensee to sell to unauthorized distributors [10, Art. 4, Para. 2(b)-iv]. Thus, the licensor may impose on the licensees the obligation to become part of a selective distribution system, provided that the licensees are allowed to sell both actively and passively to end users, without prejudice to the possibility for the licensee to be restricted by the "Wholesale trade" function [11, Para. 125]. In the territory in which the licensor uses a selective distribution system, it may not be combined with the designation of exclusive territories or groups of customers with exclusive rights where this would limit active or passive sales to end-users,[8] but may prohibit the licensee to carry out its activity from a place of establishment from which it is not allowed to carry out activity.

Restrictions on passive sales made by licensees in an exclusive territory or group of customers intended for another licensee, although usually a firm restriction, may fall outside the scope of Art. 101 (1) TFEU for some time, if the restrictions are objectively necessary for the protected licensee to enter a new market [11, Para. 126]. This is the case where licensees have to commit significant investments in production assets and promotional activities in order to enter and develop a new market. The risks to a new licensee may therefore be significant, as promotional costs and investments in assets are often irrecoverable, which means that upon termination of that particular activity, the investment cannot be used by the licensee for other activities or sold without significant losses. In most cases, a period of two years, from the date on which the licensee in question first places the contractual product on the market in the exclusive territory or has started to sell it to his exclusive group of customers, shall be considered sufficient for the licensee to recover investment, but in some special cases, however, a longer period of protection may be required. Also, the prohibition imposed on all licensees not to sell to certain categories of end-users may not restrict competition where such a restriction is objectively necessary for reasons of protection of the safety or health of the end-user due to the dangerous nature of the licensed product [11, Para. 127].

IV. Inadmissible restrictions

Article 5 of the TTBER regulates three types of restrictions which are not block exempted and therefore the positive and negative effects on competition must be assessed individually [11, Para. 128]. Thus, the block exemption of agreements which have as their object or effect:

- licensing or transferring in favor of the licensor the improvements to the licensed technology made by the licensee [10, Art. 5, Para 1(a)];
- non-challenge (i.e. direct or indirect obligations not to challenge the validity of the licensor's intellectual property), without prejudice to the possibility for the licensee to terminate the technology transfer agreement in case of an exclusive license, if the licensee disputes the validity of the license rights technology [10, Art. 5, Para 1(b)]; and
- limiting the licensee's ability to exercise its own technology rights, respectively limiting the ability of the parties to carry out research and development, unless this restriction is strictly necessary to prevent the disclosure of the license know-how to third parties [10, Art. 5, Para 2].

Even if the license agreement contains any of the restrictions regulated in Art. 5 of the TTBER, the block exemption may be applied to the agreement, if the admissible restrictions that are not affected by Art. 5 of the TTBER can be fulfilled separately from the inadmissible restrictions.

V. Conclusion

The group exemption of certain categories of technology transfer agreements is based on the presumption that, despite the fact that they fulfill the hypothesis of Art. 101, paragraph 1 of the TFEU, also fulfill the four conditions set out in Art. 101, paragraph 3 of the TFEU. However, if an agreement is outside the block exemption, it must first be analyzed whether in individual cases it falls within the scope of Art. 101, paragraph 1 of the TFEU and if so, whether the conditions of Art. 101, paragraph 3 are met. There is no presumption that the agreements for technology transfer, which remain outside the block exemption, fall within the scope of art. 101, paragraph 1, or that they do not meet the conditions of art. 101, paragraph 3. When the market shares of the parties exceed the thresholds of the market share, specified in art. 3 of the TTBER, is not a sufficient reason to conclude that the agreement falls within the scope of Art. 101, paragraph 1. In such cases, an individual assessment of the likely effects of the agreement shall be made. It can usually be presumed that the agreements are prohibited by Art. 101 only when they contain strict restrictions of competition.

Agreements between competitors which contain strict restrictions on the freedom to set product prices are absolutely inadmissible. The TTBER does not allow any reservations, whether direct or indirect, which in any way limit the autonomous and independent decision to determine each of the parties. This applies to both reciprocal and non-reciprocal agreements. This approach must also be maintained in the adoption of the next technology transfer block exemption regulation (the current TTBER expires in 2026).

Restrictions on final output between competitors are also inadmissible, but unlike price restrictions, the TTBER allows exceptions in the case of non-reciprocal agreements and in the case of reciprocal agreements with several licensees but imposed on only one of them. The freer regime for imposing restrictions on final production than for imposing price restrictions leads to the conclusion that the Commission considers that production restrictions in the case of non-reciprocal agreements do not have competition distorting effect, while price restrictions in non-reciprocal agreements to be anti-competitive. Given that the price of the product is a function of the volume of products issued (usually a higher volume of production leads to a lower price of the unit), the production constraint results a certain price constraint. For this reason, the authors consider that restrictions on production must also be declared inadmissible in the same way as price restrictions are inadmissible.

The formulation of the admissibility of the distribution of markets and customers among competitors according to art. 4, para. 1, letter. "c", items "i" – "iv" of the TTBER can be defined as balanced in view of the requirements for having a properly functioning competition on the respective market. The same can be stated about the inadmissibility for limiting the opportunities for carrying out research and development activities according to Art. 4, para. 1, letter. "d" of the TTBER.

In agreements between non-competitors, unlike those between competitors, there is no absolute prohibition on price restrictions. There is a general ban on price restrictions, but some exceptions are allowed. It is permissible for one party to set maximum or recommended prices for the other, if these are not equal to a fixed or minimum selling price as a result of pressure or incentives offered by one of the parties. The possibility of allowing price restrictions between non-competitors, albeit in some specific cases, has its effects both on the development of competitive market relations in direct effect and on the development of technologies in indirect effect. When the non-competitor licensee is limited to determine the selling price of its products, due to contractual restrictions, and hence be deprived of the opportunity to take advantage of possible market opportunities for the sale of its products above the expected level, it fails to realize a benefit that it could convert both into capital and product development, and hence into finding innovative solutions that benefit the end-user. For this reason, the authors consider that price

[8] This would lead to hardcore restriction in the sense of Art. 4, Para. 2, letter "c" TTBER.

restrictions between non-competitors should be arranged in the same mode as the regime of price restrictions between competitors.

The TTBER does not prohibit restrictions on production between non-competitors, unlike the same relations between competitors, but sets certain requirements for the distribution of markets and customers. Unlike the distribution of markets and customers between competitors, where it is permissible to limit only certain active sales, in the distribution of markets and customers between non-competitors, any restriction of active sales is permissible. The absence of a prohibition on restricting the production of non-competitors is not beneficial to competitors in the relevant market, given the fact that agreements between non-competitors for a given market usually are much more than agreements between competitors. Thus, the possibility of limiting production affects the price of the product, and hence the potential and level of development of competition in the market in general. Regarding the admissibility of any restrictions on active sales between non-competitors, it should be noted that such an approach also has a negative effect on competition and the development of the relevant market, as the deprivation of the right to active sales in a territory or customers for which exclusive license is not issued prevents the full development of the economic potential of the respective party to the licensing agreement with a view to the acquisition of new markets and the better realization and capitalization of investment and / or marketing decisions of the same.

The inadmissible restrictions according to art. 5 of the TTBER does not allow the group exemption of agreements that may reduce the incentives for innovation. Although the license agreement contains any of the excluded restrictions, the block exemption may apply to the agreement if the obligations not affected by the excluded restrictions can be performed separately from the obligations that fall under the excluded restrictions.

Finally, it could be concluded that in any case, the parties to the license agreement should strive from the outset not to include restrictive clauses that are contrary to competition law, as these might be null and void, and they often lead to the nullity of the license agreement itself. Otherwise, it would be impossible for licensor to regain the know-how provided, and the significant costs incurred by licensee would not be reimbursed due to lack of legal grounds.

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