

Business Europe/ By Ian Harvey

A License to Kill Europe's Tech Sector

If the European Commission were looking for a way to cripple technological innovation in Europe, it could hardly have come up with a better proposal than its proposed rules on "technology transfer."

Far from being an insignificant and arcane piece of legalese, the proposed new restrictions on licensing agreements in the EU would be a disaster for European innovators and companies and put them at a major disadvantage vis-à-vis their counterparts in the U.S. or Asia. At one stroke it would discourage the import of technology into Europe; encourage the export of technology away from Europe; and create great uncertainties for Europe-based companies licensing in new technologies.

Outside Europe, a company or university that has developed a technology has three choices. It can keep and develop the technology itself. It can sell the technology outright. It can license the technology to another company to develop and then share the returns. Subject to broad competition rules, there is a level playing field across these three allowing the innovator to extract maximum value, and the technology to find its best route to market.

But unlike its major trading competitors, Europe has chosen to discriminate against the third route, licensing. For years the EU has required explicit commission approval for any license agreement, unless it falls into certain categories—the so-called block exemption. That is, licensing is held to be anticompetitive unless demonstrated otherwise. This is illogical, it discriminates against technologies that would be best developed by licensing and has no economic or empirical analysis to justify it. It is also diametrically opposed to the U.S. view that licensing is pro-competitive unless demonstrated otherwise. Licensing is a very

efficient mechanism for spreading risk in exchange for value sharing. Without it many of the best ideas would never reach the market.

Incredibly, the latest EU proposals would magnify this problem by further limiting those eligible for the block exemption to those cases in which the licensee

and licensor have less than a certain market share. In essence, the new block exemption would apply only

for licenses to a company where the combined market share was less than 20% (if they are competitors), or less than 30% (if noncompetitors). Previously, it was technically possible to get approval for licenses falling outside the block exemption—even though the process took one to two years, an eternity in high-technology industries.

Under the proposed rules, not only would the block exemption be much narrower, but the EU will not provide any form of prior approval or comfort. A company that enters into licensing agreements will now need to make its own assessments of whether it can benefit from the block exemption. The penalties for getting it wrong will be a void agreement, not to mention possible imprisonment and fines based on a percentage of the company's revenue. The uncertainty these proposals would create for Europe's most successful international companies would be intensely damaging to Europe's research-intensive sectors. Subject to the broad rules on competition (some of which may be specific to licensing), companies should be free to commercialize technologies acquired via any route (invent, buy or license). Inventors should be free to develop, sell or license their inventions based on an even-handed analysis of the three routes. It makes no economic sense to allow a company to build its market share above the thresholds based on its own technology and yet stop it from doing so if it has licensed-in the technology from someone else.

The final flaw in the proposed regulation is that it would be retrospective. A license that had been covered by the block exemption when the agreement was made would no longer be covered if, for a two-year period, the aggregate market shares exceeded the 20% or 30% share that had allowed it to benefit initially from the block exemption. And any existing agreement under the current block exemption would be retrospectively subject to the new market-share rules after a one-year grace period (that is, starting in October 2005). There are some minor exceptions in the market-share proposals but they do not change the substance. This could be disastrous for the existing business of European research-based companies.

Consider the pharmaceutical industry, where about 30% of the revenues of the top 10 global pharmaceutical companies come from products they have licensed in. Suppose AstraZeneca had licensed an early-stage drug lead from a university for a disease that had no treatment at the time the license was signed. After, say, 12 years and \$700 million of development and clinical trials, a new drug is launched. Two years later the drug achieves a 30% market share, and—presto—the commission can void the license, leaving AstraZeneca with no rights to the compound (and the university with no commercial outlet to sell it). With this kind of uncertainty, how could a European pharma company take the risk of developing drugs based on a license from a university or biotech company? American and Asian companies would be the beneficiaries since the commission's proposals are unique to the EU. And for all the difficulties it would cause big companies, the problems this will create for the smaller innovative companies could be far more severe.

The proposals would be very damaging to European global competitiveness. They discriminate against licensing, so that an inventor would be more likely to develop the technology themselves or to sell it outright, rather than to license and have the indefinite uncertainty created by the block exemption. The rules will encourage European technology owners (both companies and universities) to license their technology to firms outside Europe, where they would not be subject to the uncertainties of the block exemption, or to sell it outright and forgo any future benefits from owning the discovery. For companies with a license that has benefited from the new block exemption at the time of the initial agreement, there will be the continuing uncertainty that, should the company be very successful (possibly after major investment, particularly in the case of pharma or biotech), its license can be re-examined and made nonexclusive or even terminated by the commission. This will discriminate against European companies wanting to license technology from outside the EU.

These proposals represent self-destructive European legislation on a grand scale. Not only must the current proposals be stopped dead in their tracks, but also the whole concept of discriminating against technology licensing must be overturned.

Mr. Harvey is chief executive of BTG PLC, chairman of the U.K. government's Intellectual Property Advisory Committee and chairman of the Intellectual Property Institute. These are his personal views.



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