II

(Preparatory Acts)

ECONOMIC AND SOCIAL COMMITTEE

Opinion on the proposed Commission Regulation on the application of Article 85(3) of the Treaty to certain categories of technology-transfer agreements [1]

(95/C 102/01)

On 13 September 1994, the Economic and Social Committee, acting under the second paragraph of Article 23 of its Rules of Procedure, decided to draw up an Opinion on the proposed Commission Regulation on the application of Article 85(3) of the Treaty to certain categories of technology-transfer agreements.

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 4 January 1995. The Rapporteur was Mr Little.

At its 322nd Plenary Session (meeting of 25 January 1995), the Economic and Social Committee adopted the following Opinion by a large majority with one abstention.

1. Introduction

1.1. The application of Article 85(3) of the Treaty is currently determined for certain categories of patent licensing agreements by Regulation 2349/84 of 23 July 1984 [2] and of know-how agreements by Regulation 556/89 of 30 November 1988 [3] both as amended by Regulation 151/93 of 23 December 1992.

1.2. The Commission proposes to combine those regulations into a single regulation covering technology-transfer agreements thus enabling the rules governing patent licensing agreements and know-how agreements to be harmonized as far as possible.

1.3. The underlying purpose of the regulations and the block exemptions determined therein is to encourage the dissemination of technical knowledge and to promote the manufacture of new and improved products within the European Union.

2. General comments

2.1. The Committee commends the initiative taken by the Commission in formulating plans to merge into one instrument the Regulation on patent licensing, now due for renewal, and the know-how Regulation which would, otherwise, continue to apply until 31 December 1999.

2.2. The Committee is supportive of the Commission's proposals subject to the qualifications expressed in subsequent parts of this Opinion and to certain key changes being made.

2.3. The Committee is pleased to note that the Commission continues to seek to encourage patent and know-how licensing as a means of promoting both the development of new products and the dissemination of technical knowledge within the EU. Both those objectives are essential for the EU's longer-term economic and social well-being not least because of the ability of less-developed economies to catch up with current European technology.

2.4. The Committee endorses the aim of the Commission in seeking to provide clarification of the rules and to simplify procedures by drawing on its experience of the operation of the block exemption legislation.

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(1) OJ No C 178, 30. 6. 1994, p. 3.
(2) OJ No L 219, 16. 8. 1984.
(3) OJ No L 61, 4. 3. 1989.

2.5. The current block exemption regulations appear to have given some of that essential encouragement to technology development and transfer within the EU and the Committee believes that the current regulations provide a reasonable balance between the stimulation of technical progress permitted under Article 85(3) and other competition policy rules.

2.6. The Committee concludes that certain of the detailed proposals should be beneficial, in particular the reduction of the 'black list' in Article 3. The Committee also welcomes the greater clarity which should be given by the specific references to mixed licensing agreements.

2.7.1. However, the draft Commission Regulation incorporates other detailed proposals where the Committee feels that insufficient weight is given to the need to stimulate investment in new technology and its transfer from one EU country to another. If implemented, these proposals would actively discourage the transfer of technology and thus prevent the stated prime objectives being realized.

2.7.2. It is essential that neither the granting of licences nor the acquisition of licences by European Union enterprises is undermined by undue complexity and ambiguity in the regulation of technology-transfer agreements. Certain elements of those proposals would also run counter to the Commission's stated aim of simplifying the rules and procedures governing technology transfer agreements and that would be a particular drawback for small- and medium-sized enterprises in Europe.

2.7.3. It appears to the Committee that inadequate weighting has been given, in drawing up those parts of the proposals, to the emphasis given within the Commission's own White Paper on Growth, Competitiveness and Employment to the necessity both to encourage the dissemination of new technology and to avoid unnecessary procedural burdens.

2.7.4. The Committee feels that the introduction of a market share criterion, as proposed by the Commission, would seriously upset the balanced position achieved in promoting technical development and dissemination within competition policy.

2.8. In the light of the volume of submissions already made to it, the Commission has published a Draft Regulation [1] extending the validity of Regulation 2349/84 by six months until 30 June 1995 and it has made arrangements to hold a Hearing on this subject on 31 January 1995. The Committee welcomes the decision by the Commission to extend the time period for consideration of its proposals.

[1] OJ No C 313, 10. 11. 1994.

3. **Specific comments**

3.1. *Market Share Limits*

3.1.1. The proposed Articles 1.5 and 1.6 of the draft Regulation would introduce the concept of a market share threshold as a condition for claiming the benefit of block exemption. The Committee feels that the concept behind these proposals is flawed and based on misconceptions and that the ambiguity and uncertainty generated would render the whole regulation unworkable.

3.1.2. Therefore, the Committee strongly urges the Commission to withdraw Articles 1.5 and 1.6 in their entirety.

3.1.3. The principles of Articles 1.5 and 1.6 should be incorporated in Article 7 as further particular cases in which the Commission could withdraw the benefit of block exemption if the consequences of the exemption would seriously prejudice competition.

3.1.4. The Commission fails to recognize that insofar as a new product is being developed, the market will often be an oligopolistic one. By their very nature intellectual property rights frequently relate to unique products and it is quite likely that the relevant market would be defined by reference to these products. The resultant high market share would deprive the licensee and the licensor of the advantages of the block exemption. Hardly any new product manufactured under a licensing agreement would qualify for exemption. The inherent conflict between competition law and intellectual property rights should not be resolved in such a way as to stifle technical innovation.

3.1.5.1. The methodology for determining market share is not set out in the draft Regulation. Such methodology as set out in certain other regulations is ambiguous and difficult to apply. Contrary to the stated objective of the Commission, a potential licensee would be discouraged from taking the risks of investment in the development and promotion of new technology if it cannot be ascertained at the outset whether or not the available licence is exclusive. Because the need for legal certainty is critical, in many cases the substantial upfront financial outlays will not be made.

3.1.5.2. The estimation of market share would be extremely difficult, time-consuming and costly. In the first place the relevant market may be difficult or practically impossible to identify and its quantification requires expensive legal, technical and economic skills because of the lack of settled criteria for any particular

case. The use of prescribed Commission forms may be practicable in the case of a concentration with a near European dimension but a similar exercise is wholly inappropriate to ask of parties to licensing agreements. Moreover for the vast bulk of products, it is impossible to assess accurately the market share of competitors and a company's own share.

3.1.5.3. In many Member States, the licensor of new technology is frequently a small start-up business, a university research department or even a sole inventor lacking the resources to develop or market the product. For such businesses, the onus and cost of investigating and establishing market shares in order to take advantage of block exemption would be prohibitive.

3.1.6.1. When licensing does proceed, it is clear that more agreements would have to be notified to the Commission both because of uncertainty as to market share and because more agreements would, if market share can be assessed, fall out with the scope of the block exemption. The delays resulting from increased notification are commercially unacceptable. Contrary to the rationale of block exemptions, the burden on companies would increase and the burden on Commission resources would become even more strained.

3.1.6.2. It is wholly unrealistic to expect larger companies who do handle numerous licensing agreements to apply legal and economic analysis to each agreement in order to assess whether or not it qualifies for block exemption. Such assessments would still be inconclusive as the Commission, who would have even more difficulty in assessing market shares, might reach a different conclusion from the parties to the agreement.

3.1.6.3. The Committee considers that it would be regrettable if unnecessary bureaucratic burdens and uncertainty led to obligations to notify licensing agreements being ignored.

3.1.7. The above factors lead to the conclusion that companies will avoid licensing within the European Union in order to eliminate the uncertainty which would be inherent if the draft Regulation were to be implemented as it stands. Companies would be more attracted to the US and Japan to develop their technology and European competitiveness would be undermined.

3.1.8. The proposed market share test is unnecessary because the Commission has maintained the provision in Article 7 enabling it to withdraw the benefit of block exemption in any particular case. Article 7 amended to incorporate the principles stated in draft Articles 1.5 and 1.6, together with Articles 86 and 87 of the Treaty, would provide adequate means, in the Committee's opinion, for dealing with possible cases of abuse. It is clear that concentrated market structures with either single or multi-firm dominant positions will be subject to Article 86 even if block exempted [as illustrated by the Tetrapak decision (1)].

3.1.9. The Committee considers that the market share provisions, as proposed by the Commission, are misguided and unnecessary and the need for them is unsubstantiated. They would lead to greater uncertainty requiring companies to notify most agreements and creating an administrative burden and generating costs which SME's, at least, would be unable to bear. Successful technology would be penalized and the desired transfer of research results would be hampered. Thus, the Committee calls on the Commission to withdraw the market share proposals as set out in the draft Regulation.

3.2. *Territorial Protection*

3.2.1. Passive sales

3.2.1.1. In its previous Opinions on patent licensing agreements (Rapporteur: Mr Poeton) (2) and on know-how licensing agreements (Rapporteur: Mr Petersen) (3), the Committee supported the needs of licensor and licensee to have territorial protection against both active and passive sales.

3.2.1.2. A potential licensee will not invest unless he has the chance to build up a market of his own. Equally, the licensor needs assurance that he does not have to fear competition in his own market, or in those of his other licensees, straightaway. The Committee considers that a five-year period of territorial protection from passive sales, as the Commission proposes should continue, is inadequate and that similar protection should be given as from sales actively pursued by a licensee.

3.2.2. Starting point for time limit

3.2.2.1. Under proposed Articles 1.2, 1.3 and 1.4, exclusive territorial protection would apply to passive sales only for a period not exceeding five years from the

(1) 21st report on Competition Policy 1991, Part two, Chapter I, B.
(2) OJ No C 248, 17. 9. 1984.
(3) OJ No C 139, 24. 5. 1988.

date when the product is first put on the market within the common market by the licensor or one of his licensees.

3.2.2.2. In order to be eligible for territorial protection, enterprises would need to have all licences in respect of one product executed at the same time: this would be impractical particularly for SME's which need to build up interest in a product and test it in one market first. No account would be taken of cases where the licensor may not have been in a position to license the product during the first five years after it goes on the market.

3.2.2.3. The licensor's exploitation of the product is generally a separate step from licensing. To encourage licensing as a spur to technical diffusion, there needs to be a reasonable period of exclusive territorial protection after the licensing stage begins.

3.2.2.4. The Committee proposes that a more reasonable starting point would be the date of first marketing in any part of the licensed territory or the date of the first licence for that territory, whichever is the later. At the very least, the time limit should begin only when the first licensee puts the goods on the market within the European single market.

3.2.2.5. The Committee also recommends that the starting point suggested in paragraph 3.2.2.4 should also apply to the ten-year period proposed by the Commission under Article 1.3.

3.3. *The 'Opposition Procedure'*

3.3.1. Under current legislation, the Commission may oppose exemption in a particular case, and can be requested by a Member State to so do. The Commission is proposing to abolish this procedure.

3.3.2. The fact that little use is made of the procedure does not justify abolition; it remains a useful facility and it is likely to be more effective given that the scope of Article 3 (listing unpermissible clauses) has been reduced. The Committee recommends that the procedure be retained and improved by reducing the period of six months for the Commission to make a decision.

3.4. *Transitional Provisions*

3.4.1. The transitional provisions which are embodied in Article 9 of the draft Regulation are considered by the Committee to be unsatisfactory.

3.4.2. In the Committee's view, it would be unreasonable — and extremely burdensome on business and on the Commission itself — were existing patent agreements to be subjected to the new rules. It should, therefore, be made clear that the new block exemption rules and procedures should apply only to new agreements coming into effect after the date of entry into force of the new Regulation.

3.4.3. The transition period for patent licences is too short and should be at least one year from the date of entry into force of the new Regulation.

4. Additional comments on the text of the draft Regulation

4.1. *Article 1*

4.1.1. Articles 1.5 and 1.6 should be deleted.

4.2. *Article 2*

4.2.1. The Committee suggests reinstatement of a provision similar to Article 2(1)4(a) of Regulation 556/89 on know-how to the effect that the freedom of the licensee to use his own improvements or licensing them to other parties should not lead to disclosure of the know-how supplied by the licensor.

4.2.2. Article 2.1.14 allows quantity limitations for the purpose of second sourcing only in the case of know-how licensing. The need for a second source of supply can also exist in cases of patent licensing and there is no justification for exempting know-how licences only. The reference in this provision to a 'know-how-licence' should, therefore, be amended to read 'patent, know-how or mixed licence'.

4.3. *Article 7*

4.3.1. The principles of Articles 1.5 and 1.6 should be incorporated in Article 7 as further particular cases justifying withdrawal of exemption.

4.4. *Article 11*

4.4.1. The Committee suggests that a period for application of the Regulation of only eight years is too

short and that a ten-year period — as applies to the two current regulations — is desirable for the purposes of legal certainty, especially as licensing agreements are often drawn up to cover an extensive period of time.

Done at Brussels, 25 January 1995.

The President
of the Economic and Social Committee
Carlos FERRER

Opinion on the proposal for a Council Directive on the harmonization of the conditions for obtaining national boatmasters' certificates for the carriage of goods and passengers by inland waterway in the Community [1]

(95/C 102/02)

On 29 September 1994, the Council decided to consult the Economic and Social Committee, under Article 75 of the Treaty establishing the European Community, on the abovementioned proposal.

The Section for Transport and Communications, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 11 January 1995. The Rapporteur was Mr Colombo.

At its 322nd Plenary Session (meeting of 25 January 1995), the Economic and Social Committee adopted the following Opinion by a large majority with one abstention.

1. Justification for the proposal

1.1. The proposal is prompted by differences in Member States' conditions for granting national boatmasters' certificates for inland waterway transport, particularly as regards minimum age, physical fitness, and professional experience and knowledge.

1.2. Obviously these differences can distort competition between carriers in some Member States.

1.3. Furthermore, the steady increase in the size of transport units and the growth in the shipment of dangerous substances make the establishment of optimum safety conditions and upward harmonization of the requisite standards a matter of urgency.

Where necessary, improved safety conditions must be introduced not only for the sake of waterway vessels and, more especially, the protection of human life, but also for the sake of environmental protection.

1.4. The Committee endorses the justification and content of the Directive, subject to the following remarks:

2. General considerations

2.1. Since, under Article 75 of the Treaty, competence lies exclusively with the Community, the Committee hopes that the conditions governing the granting of boatmasters' certificates can be harmonized without delay.

2.1.1. The limited scope of this harmonization is due to the fact that the Directive aims to complement the provisions of Directive 91/672/EEC [2], which deals with the same issues.

2.2. The Committee would ask the Commission to bear in mind the need to require identical qualifications from boatmasters from third countries.

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[1] OJ No C 280, 6. 10. 1994, p. 5.

[2] OJ No L 373, 31. 12. 1991, p. 29.