## Part A - Technology Licences

<table>
<thead>
<tr>
<th>1. Legislation/Rules</th>
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<tr>
<td>Articles 81 and 82 of the Treaty of Rome (EC Treaty): Prohibiting all agreements, which have as their object or effect the prevention, restriction or distortion of competition.</td>
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<td>Commission Regulation (EC) No 772/2004, the Technology Transfer Block exemption Regulations: a ‘block exemption’ from the provisions of Article 81 for ‘technology transfer agreements’. ‘Technology transfer agreement’ (TTA) means a patent licensing agreement, a know-how licensing agreement, a software copyright licensing agreement or a mixed patent, know how or software copyright licensing agreement, including any such agreement containing provisions which relate to the sale and purchase of products or which relate to the licensing of other intellectual property rights, provided that those provisions do not constitute the primary object of the agreement and are directly related to the production of the contract products; Assignments of patents, know-how, software copyright or a combination thereof where part of the risk associated with the exploitation of the technology remains with the assignor, in particular where the sum payable in consideration of the assignment is dependent on the turnover obtained by the assignee in respect of products produced with the assigned technology, the quantity of such products produced or the number of operations carried out employing the technology, are also deemed to be technology transfer agreements [Reg. Art 1].</td>
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<td>The <strong>Block exemption</strong> covers all such TTA’s provided they (a) are only between two undertakings [Reg. Art 2]; (b) do not contain certain defined types of provisions, which by intention or effect are anti-competitive [Reg. Art 4 “Hardcore” restrictions]; and (c) do not exceed certain market share thresholds [Reg. Art 3].</td>
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There is no general presumption that agreements which fall outside the **block exemption** restrict competition. All agreements or individual obligations that fall outside the scope of the **block exemption** must be individually assessed and their anti-competitive and pro-competitive effects balanced.

An agreement containing a **Hardcore** restriction will wholly fall outside the scope of the **block exemption**. Furthermore, when an agreement contains a **Hardcore** restriction it can normally be presumed that they will be prohibited by Article 81 on an individual assessment of the anti-competitive and pro-competitive effects [Guidelines para 37].

The regulation also details individual obligations which will not be **block exempt**. These are referred to as “**Excluded**” restrictions (Art 5). The exclusion of an individual obligation will not prevent the rest of the agreement from being **block exempt**.

In individual assessment of licence agreements which are of the same nature as those covered by the **block exemption** but which are concluded between more than two undertakings, the Commission will apply by analogy the principles set out in the Regulation.

### 2. Market Shares

**Treaty of Rome** (“de minimus” doctrine): Agreements which do not have an appreciable impact on competition or trade between Member States will fall outside the operation of Article 81(1). Under the European Commission de minimis notice [C368/13] there is a rebuttable presumption that agreements between Small and Medium-sized undertakings (less than 250 employees and an annual turnover less than €50 million, and/or an annual balance sheet total not exceeding €43 million) do not have an appreciable effect on trade [Annex to Commission Recommendation 2003/280/EC Title 1 Art 2].

Other agreements are viewed as not appreciably restricting competition if the parties’ aggregate market share on any of the relevant markets affected by the agreement does not exceed: (i) 10 % between competitors; (ii) 15 % between non-competitors, or (iii) in cases where it is difficult to classify as between competitors or non-competitors, 10 % [C368/13 point 7]. These thresholds may be reduced to 5% if there is a cumulative effect on competition from the effect of parallel agreements between different suppliers and distributors within a market (unlikely where less than 30% of the relevant market is covered by agreements [C368/13 point 8]).

**Block exemption Market Shares**: Competitors must not exceed 20% combined, and non-competitors 30% each, of the market share on the
affected relevant technology and product market [Reg. Art 3(1), 3(2)].

Should market share subsequently increase above these thresholds, any exemption will continue to apply for a period of two calendar years following the year in which the threshold was first exceeded.

3. **Duration**

   (a) intellectual property rights, generally: The **block exemption** applies for as long as the licensed property right has not lapsed, expired or been declared invalid [Reg. Art 2].

   (b) know-how: The **block exemption** applies as long as the licensed know-how remains secret, except where the know-how becomes publicly known as a result of action by the licensee, in which case the exemption shall apply for the duration of the agreement [Reg. Art 2].

4. **Regulation of Price**

   Agreements between Competitors: No, price regulation is a **Hardcore restriction**.

   Agreements between Non-competitors: Price regulation is a **Hardcore restriction**, except for the setting of maximum sale prices or recommended sale prices, provided these do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties [Reg. Art 4(1)(a)].

5. **Limitation of Production**

   Competitors: A limitation on production is a **Hardcore restriction** except in a non-reciprocal agreement or if only imposed on one party in a reciprocal agreement. [Reg. Art 4(1)(b)]. Non-competitors: No such restriction applies.

6. **Tie-in Clauses**

   Yes, within the Market Thresholds of the **Block exemption** (see above). With combined market share exceeding the market thresholds it is necessary to balance the pro-competitive and anti-competitive effects of tying [Reg. Art 3, Guidelines para 192].

7. **General Restrictions**

   Generally, market sharing and customer allocation in agreements between competitors are **Hardcore restrictions**. Restriction of territory and passive (not active) sales to customers in agreements between non-competitors are **Hardcore restrictions**.

   There are exceptions to these **Hardcore restrictions**, which will potentially allow **block exemption**. These exemptions are:

   (a) specified customers: Competitors and non-competitors: An obligation in non-reciprocal agreement to produce products for a particular
customer in order to create an alternative source of supply for that customer.

(b) Customer groups: In a **non-reciprocal** agreement between competitors: **Active/passive sales** to an exclusive customer group reserved to the other party may be restricted [Reg. Art 4 (1)(c)(iv)]; **active sales** by a licensee to an exclusive customer group allocated to another licensee may be restricted, provided the latter was not a competing undertaking of the licensor at the conclusion of its own licence [Reg. Art 4 (1)(c)(v)]. **Non-competitors:** All **active sales** may be restricted. **Passive sales** to an exclusive customer group reserved for the licensor [Reg. Art 4 (2)(b)(i)]; and **passive sales** to the exclusive customer group allocated to another licensee during the first two years that the other licensee is selling contract products to that customer group may also be restricted [Reg. Art 4 (2)(b)(ii)].

(c) **Field of use:** Between competitors: Obligations on a licensee to produce only within one or more technical fields [Reg. Art 4 (1)(c)(i)]. Between non-competitors: such obligations are not **Hardcore restrictions**.

(d) **Territory:** In a **non-reciprocal** agreement between competitors: **Active/passive sales** to an exclusive territory reserved to the other party may be restricted [Reg. Art 4 (1)(c)(iv)]; **active sales** by a licensee to an exclusive territory allocated to another licensee may be restricted, provided the latter was not a competing undertaking of the licensor at the conclusion of its own licence [Reg. Art 4 (1)(c)(v)]. In an agreement between non-competitors: All **active sales** may be restricted; **passive sales** to an exclusive territory reserved for the licensor may be restricted [Reg. Art 4 (2)(b)(i)]; and **passive sales** to the exclusive territory allocated to another licensee during the first two years that the other licensee is selling contract products to that territory may also be restricted [Reg. Art 4 (2)(b)(ii)].

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<tr>
<th>8. Active/Passive Sales Restrictions</th>
<th>See Part A 7(d)</th>
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<tr>
<td>9. Restriction on exploitation of Licensee IP</td>
<td>Between competitors: No, restriction of the licensee’s ability to exploit its own technology or of the ability of any of the parties to carry out research and development is a <strong>Hardcore restriction</strong>, unless it is indispensable to prevent the disclosure of the licensed know-how to third parties. [Reg. Art 4 (1)(d)]. Between non-competitors: the same restriction as between competitors except the restriction is an <strong>Excluded restriction</strong> rather than a <strong>Hardcore restriction</strong> and thus subject to individual assessment of competitive effect [Reg. 5(2)].</td>
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<td>10. Improvements</td>
<td>(a) an assignment of severable improvements: <strong>Excluded</strong> from the <strong>block exemption</strong> (including obligations on a licensee to assign severable</td>
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<td><strong>Part B - Distribution Agreements</strong></td>
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<tr>
<td><strong>1. Legislation/Rules</strong></td>
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<tr>
<td>Commission Regulation (EC) 2790/1999: <strong>block exemption</strong> to the general anti-competition provisions contained within the Treaty of Rome (see above).</td>
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<td>Seller’s market share must not exceed 30%. Agreements containing exclusive supply obligations, the buyers market share must also not exceed 30% [Reg. Art 3(1),(2)].</td>
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<td>The restrictions operate in the same manner as those to Regulation 772/2004 (see above). There is a list of <strong>Hardcore restrictions</strong> [Reg. Art 4] and a list of <strong>Excluded obligations</strong> [Reg Art 5].</td>
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<td><strong>2. Regulation of Price</strong></td>
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<td>Generally, the <strong>block exemption</strong> does not apply to vertical agreements which have as their object the restriction of the reseller’s ability to determine its sale price.</td>
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<td>(a) recommended sales prices: A supplier may recommend a sales price, provided this does not amount to a fixed or minimum sale price [Reg. Art 4(a)].</td>
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<td>(b) minimum sales prices: The setting of minimum sales prices is a <strong>Hardcore restriction</strong>.</td>
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(c) maximum sales prices: A supplier may set a maximum sales price, provided this does not amount to a fixed price [Reg. Art 4(a)].

3. Restrictions

(a) territories: This is a **Hardcore restriction** with the exception of a restriction of **active sales** into the exclusive territory reserved to the supplier or allocated by the supplier to another reseller, where such a restriction does not limit sales by the customers of the reseller [Reg. Art 4(b)].

(b) customers: This is a **Hardcore restriction** [Reg. Art 4(b)].

(c) customer groups: This is a **Hardcore restriction** with the exception of the restriction of **active sales** to an exclusive customer group reserved to the supplier or allocated by the supplier to another reseller, where such a restriction does not limit sales by the customers of the buyer [Reg. Art 4(b)].

4. Active/Passive Sales Restrictions

See (Part B, 3 Restrictions) above.

**Hardcore restriction** with the exception of restriction of **active** or **passive sales** to end users by members of a **selective distribution system** operating at the retail level of trade.

5. Non-compete provisions

During term of agreement: **Non-compete** obligations exceeding 5 years in duration are **Excluded** from the **block exemption** unless the reseller is selling goods or services from property or land owned or leased by the supplier where the term may not exceed the term of occupancy be the reseller [Reg. Art 5(a)].

After term of agreement: **Non-compete** obligations are **Excluded** unless they relate to goods or services which compete with the contract goods and services and are limited to the premises and land from which the reseller has operated during the contract period and is indispensable to protect know-how transferred by the supplier to the buyer. In this case, the **non-compete** obligation should not exceed one year beyond the date of termination of the agreement [Reg. Art 5(b)].

6. Restrictions on competing products

Such obligations of indefinite duration or of greater than 5 years are **Excluded** from the **block exemption** [Reg. Art 5(a)] Regulation Guidelines OJ2000 C291/01 para 58]. (Less than 5 years may be **block exempt**)

If applied to **competing brands in general** within a **selective distribution system** such restrictions may still be **Block exempt** [Reg. 5(c)].

However these restrictions are **Excluded** if only applied to specific
| 7. Severability | **Hardcore restrictions** result in the whole agreement being void and may not be severed. **Excluded restrictions** may be severed. |