TECHNOLOGY TRANSFER AGREEMENTS IN HIGH-TECH INDUSTRIES

: A COMPETITION LAW ANALYSIS

Under the Guidance of

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...With profound gratitude

VIVEK SHUKLA
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Vivek Shukla
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Objective and Aim of the Project:

This project paper intends to study about the abuse of IP rights in technology transfer agreements concluded by high-tech industries. Project paper is analyzing the anti-competitiveness of various clauses of technology transfer agreements and also looks at balance between the two conflicting interests of competition policy and the protection of technology transfer agreements. This research work intends to find the space for Indian competition guidelines for technology transfer agreements in high-tech industries.

Research problem:

IP law and competition law are tools to be used in promoting wealth maximization. However competition law seeks to maximize efficiency by preventing abuse of monopolization or other anti-competitive practices and sometimes tension between these two laws arise. If IP right holder imposing conditions in that manner so that it would harm competition, how Indian competition authority will handle it. What is line between reasonable and unreasonable conditions under Competition Act, 2002? International regional and bilateral agreements are also required in order to control the anti-competitive practices relating to technology transfer.

Research Questions:

1. What are anti-competitive clauses in Technology Transfer Agreements?
2. Does section 3 of the Competition Act deals with Technology Transfer Agreements?
3. Does Competition Commission of India have power to deal technological aspects, while there is separate law exist?
4. Can a person having IPRs compete with himself?
5. What constitutes unreasonable conditions in Technology Transfer Agreements?
6. What is other developed countries law in this regard?
Hypothesis:

Globalization and commercialization of technologies sometimes calls for their transfer to third parties. Technology transfer agreements may limit use of a technology by imposing territorial or other restrictions, such as the transferee’s obligation to maintain certain production volumes or stick to determined price corridors. Such practices may qualify as anticompetitive concerted practices, i.e. resulting in restriction or elimination of competition in a particular market. Project paper proceeds with the hypothesis that IP right holder can impose only such conditions in Technology Transfer Agreements, which are conferred by law to protect his IP right and prevent infringement of that right and cannot impose any such conditions which adversely affect competition in the market. Those conditions should be restricted by Indian competition authority through guidelines.

Research Methodology:

In this project paper researcher has primarily used descriptive and analytical type of research. Researcher used doctrinal research method in this project paper. Researcher has gone through the books related to IPR and competition laws. Researcher has also relied upon many Articles of various scholars and some other reading material which found in different journals available in the Library and also web sources.

Limitations:

Project paper covers anti competitive clauses in technology transfer agreements in Indian scenario and also deals with EU and US law.

Mode of citation:

A uniform method of citation has been followed up during the paper.
CHAPTER 1

ABSTRACT

Technology transfer is the process by which a technology, expertise, knowhow or facilities developed by one individual, enterprise or organization is transferred to another individual, enterprise or organization. Effective technology transfer results in commercialization of a new product or service or in the improvement of an existing product or process. Technology transfer may happen from country to country, from industry to industry or from research laboratory to an existing or new business etc. In other sectors, where the market evolves incessantly as new products with new functions or designs appear on a regular basis, companies are forced to innovate by acquiring or developing new technologies. Technological innovation is therefore a crucial element of the competitive strategy of high-tech enterprise and the challenging issues for competition authority to provide appropriate application of the antitrust laws to high-tech industries such as pharmaceuticals, biotechnology, communications, international credit and finance, and various delivery systems for entertainment and news industries.

Licensing or transferring the technology is an important part of the innovation process, as it facilitates dissemination of new products and technologies and allows companies to integrate and use complementary technologies. However in some circumstances licensing agreements can also have a stifling effect on competition. When two competitors use a licensing agreement with the aim of dividing markets between them or when an important licensor excludes competing technologies from the market through conditions in its licensing agreements. Competition Commission of India has been vested with adequate powers of investigating, restraining and penalizing anti-competitive conduct of technology transfer agreements of patent and copyright holders if they impose such conditions on their license which may reduce or eliminate competition in the relevant market. It can inquire into and prohibit anti-competitive agreement and abuse of dominant position on its own motion or on receipt of information or on reference made by the government.
CHAPTER 2

INTRODUCTION

The fact that intellectual property laws grant exclusive rights of exploitation does not imply that intellectual property rights are immune from competition law intervention.\(^1\)

Technology transfer agreements are tools to fulfill technological requirements of high-tech industries like Aircraft and Spacecraft, Pharmaceuticals, Radio, TV, Communication equipment, Medical and Optimal instruments etc.\(^2\) Market of high-tech industries is based upon technological processes and use of advance technology. To procure or retain competitive edge in the market, enterprise acquires new updated technology by way of agreements with holder of technology or holder of license to use of technology.

The relationship between competition law and intellectual property (IP) rights can be best described as a "tale of uneasy bedfellows."\(^3\) That is why there is a strain between the existence and exercise of intellectual property rights and the application of competition law. The conventional view has been to suggest that intellectual property is a grant of monopoly by the state as a reward for innovation. Mere monopoly does not reflect adverse effect in the competition. But the monopoly granted to a holder of an IP right can create barriers to entry and give rise to market power, the abuse of which is prohibited by competition law. Monopolists and firms in the process of acquiring market power are subject to greater scrutiny of their behavior than other firms. A monopolist abuses dominance position if it has market power (power to raise

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prices or exclude competition in relevant market) and engages in anti-competitive conduct designed to maintain or extend that power.\textsuperscript{4}

The goal of competition law is not to prohibit monopoly. Instead, the goal is to prohibit anti-competitive conduct. An industry that achieves a monopoly without entering into anti-competitive conduct will not violate the principles of competition law at all.\textsuperscript{5} Competition law recognizes that monopoly is not curse for market fair competition because it may arise legitimately, and may reflect efficiencies and economies. Intellectual property rights confer an exclusive legal right on the owner to exploit the patent, copyright, trademark or any other IPR in question. Thus the IPR owner is able unilaterally to prevent unauthorized use of its intellectual property and has a monopoly over whether to exploit it itself or through licensing to third party.\textsuperscript{6} And the holder of Intellectual Property Rights has a near absolute right to stop any third party exploiting the subject matter. Report of high-level committee on competition policy (S.V.S Raghavan Committee report) also observed that there is possibility of anti-competitive conduct in practice of Intellectual Property Rights.\textsuperscript{7} Competition authority can restrict the abuse of Intellectual Property Rights to secure competition in the market. Competition regulation aims at restricting attempts to extend exploitation of an intellectual asset beyond the boundaries provided by IP law.\textsuperscript{8}

Intellectual Property Rights are right to exclude and it means that strong IP protection may lead to both market expansion and market power effects. Stronger IPRs may enable the right


\textsuperscript{5} Kumar Pankaj, *The Interface Between IPRs and Competition: Indian Scenario*, Available at http://www.slideshare.net/pankaj7379/the-interface-between-iprs-and-competition-law


\textsuperscript{7} Clause 5.1.7 of Raghavan Committee Report- All forms of Intellectual Property have the potential to raise Competition Policy/Law problems. Intellectual Property provides exclusive rights to the holders to perform a productive or commercial activity, but this does not include the right to exert restrictive or monopoly power in a market or society. Undoubtedly, it is desirable that in the interest of human creativity, which needs to be encouraged and rewarded, Intellectual Property Right needs to be provided. This right enables the holder (creator) to prevent others from using his/her inventions, designs or other creations. But at the same time, there is a need to curb and prevent anti-competition behaviour that may surface in the exercise of the Intellectual Property Rights.

\textsuperscript{8} Clause 5.1.8 of Raghavan Committee Report- There is, in some cases, a dichotomy between Intellectual Property Rights and Competition Policy/Law. The former endangers competition while the latter engenders competition. There is a need to appreciate the distinction between the existence of a right and its exercise. During the exercise of a right, if any anti-competitive trade practice or conduct is visible to the detriment of consumer interest or public interest, it ought to be assailed under the Competition Policy/Law.
holder to charge monopoly prices. In exercise of intellectual property rights, the owners of these rights impose conditions on their licensees that go beyond the limits of the rights conferred on them by law and which conditions may reduce competition or eliminate competition in the relevant market. These agreements possess certain restraint clauses which may affect the competition in the market. Technology transfer agreements may also be used for anti-competitive purposes, e.g. where two competitors use a licensing agreement to share out markets between themselves or where an important license holder excludes competing technologies from the market. In these circumstances Intellectual property rights may limit the competition in the market. Whereas competition law aims to promote and sustain competition in the market as well as protect the interests of consumers and also ensure freedom of trade.

Any technology licensing agreements which lead to an abuse of a market position by imposing unreasonable conditions or other than essential for protection of such IP rights would be considered as anti-competitive, for example, for achieving and maintaining a monopolistic position, may be considered as an anti-competitive practice under competition law. For example, in the area of information and communication technologies where a number of patents owned by different patentees are involved in one product, a patent pool agreement may be sought by the patentees, which in turn may raise issues as to its effect on competition.

Technology transfer agreements are obligated to fulfill technological needs that are impossible to meet with local technical capabilities. Traditional devices of license transfer often fall within the purview of antitrust scrutiny and are deemed anti-competitive practices in general trade, as in the case of territorial restrictions in licensing. Antitrust laws, although fit to evaluate general trade agreements, often fail to address intricate problems involving in technology transfer agreements and therefore, lack the tools to adequately solve them. Section 3(5) of the

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9 Nguyen Thanh Tu, *Competition Law, technology Transfer and the TRIPS Agreement- Implication for Developing Countries*, Edward Elgar Publishing Ltd. UK, 2010, p. 28
13 Section 3(5) of the Competition Act, 2002- Nothing contained in this section shall restrict (i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under (a) the Copyright Act, 1957 (14 of 1957); (b) the Patents Act, 1970 (39 of 1970); (c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999); (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of
Indian Competition Act, 2002, talks about the rights of intellectual property holder. It states that IP holder has all rights to protect his IP right but conditions should be appropriate and essentially used for the right protection only. Unreasonable conditions are not covered in this section. The Competition Commission of India in *FICCI Multiple Association of India vs United Producers / Distributors* clearly affirmed an internationally recognized principle of competition law that any holder of any intellectual property right (in the context of the case, copyright on films) may impose only such conditions on buyers or consumers that are granted to him as rights under the intellectual property right. It means the intellectual property right of an individual cannot be exercised in such a manner so as to infringe upon any “competition law right” if we may use the phrase, of another individual.\(^\text{14}\)

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**CHAPTER 3**

**TECHNOLOGY TRANSFER AGREEMENTS**

The European Commission has in its Draft Commission Notice specified “technology” as covering patents and patent applications, utility models and applications for utility models, design rights, software copyright, know-how and other similar IP rights.\(^\text{15}\) To be considered a “transfer” the technology has to flow from one undertaking to another. This is normally done by a transfer agreement which gives the transferee the right to use the licensed technology and in return pay transferee fees. The transfer can also take the form of a sublicensing, in which case the licensee licenses the technology to a third party with the consent of the original licensor.\(^\text{16}\)

Technology transfer is the term used to describe the processes by which technological knowledge moves within or between organizations. International technology transfer means the

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\(^{14}\) *FICCI Multiple Association of India vs United Producers / Distributors* CASE NO. 01 OF 2009The intellectual property laws do not have any absolute overriding effect on the competition law. The extent of non obstante clause in section 3(5) of the Act is not absolute as is clear from the language used therein and it exempts the right holder from the rigors of competition law only to protect his rights from infringement. It further enables the right holder to impose reasonable conditions, as may be necessary for protecting such rights.

\(^{15}\) Draft Commission Notice, guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, p.46

\(^{16}\) *Ibid, at p.48*
movement of technological knowledge between countries. Importance of international technology transfer becomes very much high because by this developing countries gain access to technologies that are new to them.\textsuperscript{17} The sale and purchase of the exclusive rights to a patented technology or of the permission to use a given technology or know-how, takes place through legal relationships between the owner of the exclusive rights or the supplier of the know-how, called the \textit{transferor}, and the person or legal entity which acquires those rights or that permission or receives that know-how, called the \textit{transferee}.

"Technology transfer" means the transfer of technology from one sector of the economy to another, including the transfer of military technology to civilian applications, civilian technology to military applications, or technology from public or private research laboratories to military or civilian applications.\textsuperscript{18}

According to Article 1 (1) (b) of Technology Transfer Block Exemption Regulation\textsuperscript{19}, technology transfer agreement can comprise:

- A pure patent\textsuperscript{20} licensing agreement,
- A pure know-how\textsuperscript{21} agreement,
- A pure software copyright license,
- A pure design license,

\textsuperscript{17} http://waccglobal.org/en/20062-communicating-with-angels-being-digital-being-human/585--What-is-technology-transfer.html (Last Accessed on 14th February, 2013 at 17:00 pm)

\textsuperscript{18} http://definitions.uslegal.com/t/technology-transfer/ (Last Accessed on 14th February 2013 at 17:25 pm)

\textsuperscript{19} ‘Technology transfer agreement’ 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 or the assignment of 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, shall also be deemed to be technology transfer agreements;

\textsuperscript{20} Article 1 (1) (h) of TTBER- ‘patents’ means patents, patent applications, utility models, applications for registration of utility models, designs, topographies of semiconductor products, supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained and plant breeder’s certificates;

\textsuperscript{21} Article 1 (1) (i) of TTBER- ‘know-how’ means a package of non-patented 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 fulfills the criteria of secrecy and substantiality;
• A mixed agreement, by which two or more of the above rights (patents, know-how, software copyrights, design) are licensed together,
• An agreement which comprises a license of one of the above rights.

Moreover, in international technology transfer there is a distinction between horizontal and vertical transfers. Horizontal technology transfer consists of the movement of an established technology from one operational environment to another (for instance from one company to another). Vertical technology transfer, in contrast, refers to the transmission of new technologies from their generation during research and development activities in science and technology organizations, for instance, to application in the industrial sectors.22

There are number of instances wherein IPR protected monopoly has been abused to curb competition. Following instances of technology transfer agreement may be called anti-competitive, such as: (1) Patent Pooling wherein two or more companies come together and cross license the technology relating to a particular technology to each other so as to restrict others to acquire it. (2) Tie in arrangements to tie a product with other product which is patented so that the acquirer has to get the other product also from the patentee. (3) Prohibiting licensee to use technology from rival company. (4) Prohibiting licensee from challenging validity of IPR. (5) Price-fixation for the licensee to sell the licensed product, etc. These types of clauses imposed in the technology transfer agreements by the IP right holder or licensee are called anti-competitive for the market, hence shall be void.

CHAPTER 4

ANTI COMPETITIVENESS IN TECHNOLOGY TRANSFER AGREEMENTS

The key characteristic of the technology transfer license is the grant of a permission to the licensee to exploit the technology in question; without such permission, no exploitation will be possible. By virtue of an IPR, the holder can restrict exploitation and may dictate the terms on

22 Supra Note, at 17
which such exploitation may be made. Such restrictive provisions may qualify as anti-competitive concerted practices; i.e. resulting in restriction or elimination of competition in a particular market.

Patentee may impose only such conditions on their licensees that are an exercise of their rights granted under a patent issued to them and beyond that, patentees or owner of any other intellectual property rights cannot directly or indirectly interfere with the competitive process. But usually patentees resort to resale price maintenance and impose other restriction on their licensees. Sometimes competitors also cross license their patents and allocate territories among themselves and create entry barriers. 23

Article 40 of the TRIPS 24 addresses issues related to control of anti-competitive practices in contractual licenses, specifying the approach to dealing with this issue, beginning with the following point of understanding: Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology. Article 101 of the Treaty on the Functioning of the European Union 25 prohibits cartels and other agreements that could disrupt free competition in the European Economic Area's internal market. Article 101 states that any agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and

23 Supra Note at 10
24 Article 40 of the TRIPS states- (1) Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology. (2) Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grant-back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.
25 1. The following shall be prohibited as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) Directly or indirectly fix purchase or selling prices or any other trading conditions; (b) Limit or control production, markets, technical development or investment; (c) Share markets or sources of supply; (d) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. 2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.
which have as their object or effect the prevention, restriction or distortion of competition within the common market, shall be void.\textsuperscript{26}

4.1 \textbf{EXCLUSIVITY IN TECHNOLOGY TRANSFER AGREEMENTS}

Competition law does not seek to prohibit exclusivity per se; it aims to prevent the misuse or abuse of exclusivity in certain circumstances. This is evidenced by the prohibition of exclusivity agreements only where enterprises in a vertical relationship enjoy market power or where exclusivity arrangements are imposed by a dominant enterprise.\textsuperscript{27}

The grant of exclusive licensee even bars the licensor to practice the invention unless he has specifically reserved the right to do so. The grant of exclusive license precludes the licensor from competing with the licensee in respect to the subject-matter of the license and competition issue arises, particularly where the licensor and the licensee would be actual or potential competitors but for the license.\textsuperscript{28}

There are two type of exclusivity in technology transfer agreements that may give rise to competition concerns\textsuperscript{29} -

1. Exclusive licensing
2. Exclusive dealing

4.1.1 \textbf{Exclusive Licensing}

These are agreements which restrict the right of the licensor to license others and possibly also to use the technology itself.\textsuperscript{30} When granting an exclusive license to a particular licensee, the licensor gives up his rights to practice the technology as well as the right to grant additional

\textsuperscript{26} http://www.steptoe.com/publications-3863.html (Last Accessed on 19th February 2013 at 03:00 PM)
\textsuperscript{27} Supra Note, at 3
\textsuperscript{28} Roy Abir and Jayant Kumar, \textit{Competition Law in India}, Eastern Law House Pvt. Ltd. Kolkata, 2008, pp. 195-196
\textsuperscript{29} Anti-trust IP Guidelines, Sections 4.1.2 and 5.4.
\textsuperscript{30} Anti-trust IP Guidelines, Sections 4.1.2
licenses. Generally exclusive licenses are given for a limited territory, field of use or a particular group of customers.\textsuperscript{31}

US and EU competition authorities looks up three circumstances in exclusivity of technology transfer agreements. First, when exclusive licensing creates a market allocation cartel between the licensor and licensee.\textsuperscript{32} In the case of \textit{Palmer vs BRG of Georgia}\textsuperscript{33}, both parties were competitors in providing bar review courses in Georgia before concluding the exclusive licensing agreement. The licensor gave the licensee an exclusive license to market the licensor’s copyrighted materials in Georgia, and the licensee would not compete with the licensor outside the state. The U.S Supreme Court held this agreement to be an illegal allocation of markets, hence anti-competitive. Second is when exclusive license creates a market division between licensees. The exclusivity clause restricted competition among licensors and licensees. Third, when a licensee who has market power in the product or technology market gains an exclusive license from the licensor in order to abuse its dominant position. Such an exclusive licensing arrangement raises substantial barriers to market entry and gives the licensee the power to exclude competition.\textsuperscript{34} In \textit{Tetra Pak vs European Commission}\textsuperscript{35}, Commission held that the acquiring of exclusive license by a dominant firm for the only technology that competed with the one already belonging to that firm is abuse of dominant position.

It is prohibited to oblige the licensee to grant an exclusive license to the licensor or a third party for any own severable improvement and new application of the licensed technology under EU Competition Law. It is also prohibited to restrict either party from competing with the other party in respect of research and development, manufacture, use or sale of any own developed product, improvement and new application of the technology in question.\textsuperscript{36}

\textsuperscript{31} Supra Note, at 9, P. 99  
\textsuperscript{32} Ibid at P. 101  
\textsuperscript{33} U.S. 46 (1990), 498  
\textsuperscript{34} Supra Note, at p.102  
\textsuperscript{35} Case T- 51/89, (1990)  
\textsuperscript{36} www.roche.com/behaviour_in_competition.pdf (Last Accessed on 20th February at 02:00 PM)
4.1.2 **Exclusive Dealing**

In the technology transfer agreements, exclusive dealing or non-compete obligation occurs when a technology transfer agreement prevents the licensee from using competing technologies. It prevent the so called ‘inter- technology free riding’ to assure the licensor that the technology transferred to the licensee will not be used to benefit the licensor’s competitors.\(^{37}\) Exclusive dealing may be anti-competitive by foreclosing the licensor’s competitors or raising their costs of market entry. If a licensor establishes a network of exclusive dealing, many licensees are restricted from dealing with competing technologies. Then access to competing technologies owned by other licensor can be substantially restricted by unavailability of licensees. In *US vs Microsoft Corporation*\(^{38}\), Microsoft’s exclusive dealing arrangements with its partners regarding Microsoft’s Internet Explorer were declared to be exclusionary, violation of abuse of dominant position. Those contents of exclusive dealing arrangements which directly or indirectly are inconsistent with competition in the market shall be void. US authority held that an owner of intellectual property does not have absolute right to use property in any manner without restrictions. It would violate the competition law if a company possesses monopoly power and there is willful acquisition or maintenance of that power which an enterprise as distinguish from growth or development as a consequence of superior product, business acumen or historic accident.\(^{39}\)

### 4.2 NON-COMPETE CLAUSES

A non-compete obligation in the context of technology licensing is an obligation on the licensee not to use third party technologies which compete with the licensed technology. This type of clause clearly hinders inter-technology competition, though only in the presence of significant market power. Therefore, the TTBE exempts non-compete obligations both among

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\(^{37}\) *Supra Note*, at 9, p. 103  
\(^{38}\) 253 F.3d 34 (DC. Cir. 2001)  
\(^{39}\) U.S v Grinnel Corp. 384 US 563 (1966)
competitors and among non-competitors up to the market share thresholds of 20% and 30% respectively.\footnote{Ritter Cyri,\textit{ The New Technology Transfer Block Exemption under EC Competition Law, Legal Issues of Economic Integration}\textit{ (2004), Vol. 31(3), p. 179. Available at \textit{See also} EC Guidelines of Technology Transfer Agreement.}}

Under the EU competition law it is prohibited to agree an exclusive supply agreement if the buyer is dominant or to agree the exclusive supply of the ordered product if the supplier is capable of producing the product in question without the know-how and the auxiliaries of the buyer. Activities to forbid the competition by the buyer or the seller with their own developed products, improvements or new applications of the technology in question in so far as these are severable from the know-how of the supplied product.\footnote{Supra Note at 36}

\section*{4.3 Refusal to License:}

Although a mere refusal to license cannot be an infringement of competition law because it derives from the right to exclude. However in some circumstances refusal to license can be in breach of competition law.\footnote{Supra Note, at 9, p. 297} According to EU approach, a refusal to license will violate the competition law if the following four-requirement test is satisfied.

1. The indispensability of technology- the technology in question is indispensable for activities in the downstream market; it must involve essential non-substitutable technological input used to produce technological output.
2. The hindrance of the emergence of new products for which there is potential consumer demand.
3. Competition elimination- the refusal excludes all competition in downstream markets.
4. Non-justification- the right to exclude under domestic Intellectual property law alone cannot justify the refusal.

Refusal to license in the case of patent pools, cross-licensing and concentration of patents can hardly constitute a proper exercise of patent right, and if the business activities of the other
undertaking or newcomer are excluded by the refusal, it would amount to violation of competition law.

4.4 Tying Arrangements:

Tying arrangements, in which a party agrees "to sell one product but only on the condition that the buyer also purchases a different product, or at least agrees that he will not purchase that product from any other supplier, have also been held as anti-competitive and in violation of antitrust laws in various jurisdictions.

Tying is also popular anti-competitive clause incorporated into technology transfer agreements in high-tech industries. There are five basic points should be taken into consideration for declaring anti-competitive arrangement of technology transfer agreement.43

1. The tying technology or technology embodied product and tied product are separate.
2. The undertaking concerned is dominant in the tying technology market
3. The undertaking concerned does not give buyers a choice to obtain the tying technology without the tied product.
4. Tying forecloses competition
5. Tying is not objectively justified.

A license may be required to acquire particular goods solely from the patentee, thus foreclosing the opportunities of other producers. Although tying may harm competition both in the main technology market and the tied product market, but prime consideration of competition should be focused in the tied product market, which most adversely affects competition in the markets.

Under section 3 (4) (A)44 of the Competition Act, 2002 such tie in agreements are anti-competitive. Such tie in agreements are very much prone in the products wherein the main product is protected by patent and has considerable market capitalization and the tying product

43 Supra Note, at 9, P. 299
44 Section 3 (4)- Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution storage, sale or price of, or trade in goods or provision of services, including (a) tie-in arrangement; (b) exclusive supply agreement; (c) exclusive distribution agreement; (d) refusal to deal; (e) resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.
has its substitutes in market but the illegal extension of patent protected monopoly restricts the consumers to use the substitutes of the tying product.

Tying coupled with effective foreclosure can deny consumer's access to the variety of downstream products that they could obtain with unbundled access. For example, Microsoft which has a dominant position in computer operating system also take its word processing program MS word. The result will not be necessarily be that Microsoft can charge a higher price for the OS / word combination than it could under separate sales. Further it would be much more difficult for developers of competing word processing programs to find market access, and some of them might even be forced to quit the market altogether. Alternatively, it could deny them sales, which could increase their per unit development costs, thus forcing them to charge higher prices for their product and this would make Microsoft's product relatively more attractive in the market.45

4.5 TERRITORIAL RESTRICTIONS:

Territorial restrictions imposed in technology transfer agreements, using to allocate customers or market are anti competitive and would be a per se violation of competition law.46 IP holder should avoid territorial restrictions in the license agreement with its competitors because they can appear to be an allocation of markets.47

4.6 PATENT POOLING:

In the patent pooling arrangements two or more patent owners agree to waive exclusive rights under their respective patents so as to grant each other rights and / or to jointly grant rights to others under their respective patents. Patent pooling is a restrictive practice under competition law. This happens when the firms in a manufacturing industry decide to pool their patents and

45 Supra Note, at 4, p. 21-23
46 Timken Roller Bearing Co. vs United States (1951) 341 US 593 (598-99)
47 Supra Note, at 28, p. 198
agree not to grant licenses to third parties, at the same time fixing quotas and prices. By pooling they may earn supra-normal profits and keep new entrants out of the market. Meaning is that if all the technology is locked in a few hands by a pooling in technology transfer agreement, it will be difficult for outsiders to compete.48

4.7 CROSS LICENSING:

This is interchange of intellectual property rights between two or more enterprises. Competition concern comes if the technology licensed is substitute rather than complimentary in nature. The validity of these licenses depends upon many factors like as, the nature of technology license, the behavior of enterprises, effect on market and structure of royalty payment. It can also be used by entities to face tacit collusion. Tacit collision refers to an implicit agreement to keep prices high or quantities low, which can disturb the market equilibrium. The most often menace of cross license is increased prices, cutbacks in production and reduced innovation. Probability of this is more likely to happen when the cross license is between competing entities because in that case, the competition between those entities will no longer exist and together, they will get market power. And when the number of competitors in the market is less, cross licensing may result into abuse of monopolization in the market.49

In Hartford- Empire co. United States50 competitor's cross-licensed amongst themselves their patents relating to the manufacture of glass making machinery, and as a result of the monopoly acquired through these patents, others were excluded from a fair opportunity to freely engage in commerce in such machinery and in the manufacture and distribution of glass products. All the patents had, by cross-licensing agreements, merged into a pool that effectually controlled the industry. 94% of the glass containers manufactured in the country on feeders and farmers were made on machinery licensed under the pooled patents. The US Supreme Court confirmed that there was violation of anti-trust laws.51

48 Ibid, p. 204
49 Ibid, p. 204
49 Supra Note, at 28, p. 201
50 323 US 386 (1945)
51 Supra Note, at 10, p. 112
4.8 GRANT- BACK CLAUSE:

A technology transfer agreement with grant-back clause is likely to augment the market power of the licensor in an unjustified and anti-competitive manner. A licensee may require to grant back to the licensor any knowhow or IPR acquired and not to grant licenses to anyone else. This is likely to augment the market power of the licensor in an unjustified and anti-competitive manner.

There may be more clauses in the technology transfer agreements between high-tech industries, which may affect competition or may harm the fair market situation. Undue restriction on licensee's business could be anticompetitive. For instance, the field of use of a drug could be a restriction on the licensee, if it is stipulated that it should be used as medicine only for humans and not animals, even though it could be used for both. Limiting the maximum amount of use the licensee may make of the patented invention may affect competition. A licensee may be coerced by the licensor to take several licenses in intellectual property even though the former may not need all of them. This is known as package licensing which may be regarded as anti-competitive.\(^{52}\)

**CHAPTER 5**

TEST FOR VALIDITY OF TECHNOLOGY TRANSFER AGREEMENT

Competition concerns arise when arrangements of the agreement harms competition among entities that would have been actual or likely potential competitors in a relevant market in the absence of the agreement. There are two basic principles to determine anti-competitive effects or likely to adverse effect in the market. First is *Per Se* approach and second is *Rule of Reason* approach.

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\(^{52}\) Advocacy Booklet on Intellectual Property Rights provided by Competition Commission of India.
5.1 **PER SE APPROACH:**

Under per se approach it should be taken in consideration that restraints nature and necessary effect of the agreement is so plainly anti-competitive that it would be treated unlawful per se, without an elaborate inquiry into restraint’s likely competitive effect. There may be some clauses in technology transfer licensing, which directly harm potential competition, and same can be declared void through per se rule.

5.2 **Rule of Reason Approach:**

Under this approach authority inquires whether the restraints imposed in agreement are likely to have anti-competitive effects and if so, whether those restraints are reasonably necessary to achieve pro-competitive benefits that outweigh those anti-competitive effects. The rule of reason approach requires the fact finder to weigh all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing unreasonable restraint on competition.

Technology transfer may limit use of a technology by imposing territorial or other restrictions such as the transfer's obligation to maintain certain production volumes or stick to determined price corridors. Sometimes conditions imposed in technology transfer agreements originate adverse effect in the competitive market.

5.3 **TECHNOLOGY MARKET:**

Technology markets consist of the intellectual property that is licensed and its close substitutes, i.e. other technologies which customers could use as a substitute. The technology market consists of the licensed technology and its substitutes. 

Substitutes is defined from a customer perspective. If a customer could use another technology as a substitute, it falls within the same technology market. Once the market definition is made, the market shares can be assessed. In relation to the technology market, the market share shall be calculated on the basis
of the sales of the licensor and all his licensees of products incorporating the licensed technology and this for each relevant market separately. All sales are taken into account.53

5.4 PRODUCT MARKET:

The TTBER uses market definitions when assessing the competitive effects of license agreements. Two markets must be defined, the relevant goods and service market (product market) and the technology market. The product market is defined in Article 3 of the TTBER. It refers to the relevant goods and service markets in both their geographic and product dimension.

CHAPTER 6

TRIPS OBLIGATION FOR TECHNOLOGY TRANSFERS

The TRIPS under Article 4054, permits member states to prevent abuse of Intellectual Property through anti-trust legislations. The Article states the recognition of member states that certain licensing practices or conditions relating to intellectual property rights that restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology. Members are free to bring in legislation specifying what licensing practices or conditions may in particular cases constitute an abuse of IPRs having an adverse effect on competition in relevant market. Section 140 of The patents Act, 197055 prohibits terms in technology transfer agreements, such as tying- in, exclusive dealing, exclusive grant- back, coercive package licensing.

The potential outcome of Trade Related Aspects of Intellectual Property Rights is that stronger IPR protection strengthens the market power of Foreign Transnational Corporations,


54 Article 40 of the TRIPS states- (1)

55 Section 140- Avoidance of certain restrictive conditions. (1) It shall not be lawful to insert (i) in any contract for or in relation to the sale or lease of a patented article or an article made by a patented process; or (ii) in licence to manufacture or use a patented article; or (iii) in a licence to work any process protected by a patent, a condition the effect of which may be (d) to provide exclusive grant back, prevention to challenges to validity of Patent & Coercive package licensing, and any such condition shall be void.
which may lead to reduced sales and higher prices, and which can limit the extent of technology diffusion. In addition, enhanced market power may restrict entry and can lower the rate of innovation. Enhanced market power through stronger IPR protection may facilitate other forms of anti-competitive behavior, including selling practices and licensing restrictions. These include:

1. The cartelization of potential competitors through cross licensing agreements that fix prices, limit output or divide markets;
2. The use of IPR-based licensing agreements to exclude competitors in particular markets by raising entry barriers through tie-in sales or restrictions on the use of related technology;
3. The use of IPR protection to predate competitors by threatening or initiating bad faith litigation and opposition proceedings, which may raise market entry barriers particularly for new and small enterprises.56

CHAPTER 7

APPROACH OF DEVELOPED COUNTRIES

7.1 US APPROACH

In the US, the Department of Justice and the FTC have issued the Anti-trust guidelines for the licensing of intellectual property 1995, which states their anti-trust enforcement policy with respect to the licensing of intellectual property protected by patent, copyright and trade secret law, and know-how. The guidelines are intended to assist those seeking to know the approach these two agencies would adopt in evaluating a practice for its anti-competitive nature. Admittedly, the matter will have to be ultimately decided by the courts.57

After many years of controversies resulting from the so-called antitrust revolution of the 1980s, the antitrust law enforcement authorities of the USA have issued Guidelines for

57 Supra Note, at 10, p. 116
Licensing of Intellectual Property, which are based on general principles set forth by Federal Trade Commission and Department of Justice of US\textsuperscript{58}, which taken together, affirm the legitimacy of a wide variety of IP licensing terms and arrangements:

1. Intellectual property is regarded as being essentially comparable to any other form of property; therefore no particular rules should apply to IPR-related restraints of competition.
2. There is no presumption that intellectual property by itself creates market power.
3. Generally licensing agreements, concluded between competitors (or at least actual-potential competitors), harm competition not otherwise.
4. Unless the combined market shares of the parties to a license agreement exceed 20\% of the relevant markets, the antitrust authorities will not intervene (so called “safe haven”).

\textbf{7.2 EU APPROACH}

On 1 May 2004, the new EU Regulation on Technology Transfer Agreements entered into force. This Regulation is the result of the EU’s overhauling and “modernizing” its entire enforcement system as well as reconsidering its policies vis-a-vis horizontal and vertical cooperation, and, in particular, its policy vis-a-vis licensing agreements. By a “more economic approach” the Regulation clearly distinguishes between licensing agreements concluded between competitors and those between non-competitors. A broadly defined (automatic) block exemption is granted, for competing undertakings, where the combined market share of the undertakings party to an agreement does not exceed 20\% of the affected relevant technology and product market. For non-competing undertakings, the automatic block exemption is granted where the market share of each of the parties to the agreement does not exceed 30\% of the affected relevant technology and product market. Above these market shares even horizontal agreements would still benefit from a broad rule of reason analysis of each individual case, the more economic approach being oriented toward an efficiency test similar to that applied in the U.S. A further requirement is that the agreement does not fall under one of the specifically listed hardcore

\textsuperscript{58} \textit{Supra Note}, at 28, pp. 190-191
restrictions. Finally, the Regulation provides for the possibility to refuse the block exemption to individual obligations in otherwise exempted agreements.\(^59\)

### 7.3 MARKET SHARE THRESHOLD: SAFE HARBOR

The Block exemption Regulation of European Treaty does not exempt vertical agreements containing restrictions which are likely to restrict competition and harm consumers or which are not indispensable to the attainment of the efficiency-enhancing effects. In particular, vertical agreements containing certain types of severe restrictions of competition such as minimum and fixed resale-prices, as well as certain types of territorial protection are excluded from the benefit of the block exemption established by this Regulation irrespective of the market share of the undertakings concerned.

Article 3 of the TTBER\(^60\) of EU law provides that the block exemption applies on condition that specified market share thresholds are not exceeded on affected technology and product markets. Where the parties are competitors the relevant market share is 20% and where the parties are non competitors the relevant market is 30%. So this provision set out the market share thresholds which provide the ‘safe harbour’\(^61\)

The market share threshold applies both to technology markets and markets of products incorporating the licensed technology. If the applicable market threshold is exceeded on an affected relevant market, the block exemption does not apply to the agreement for that relevant market. For instance if the license agreement concerns two separate product markets or two separate geographical markets, the block exemption may apply to one of the markets and not to other. If the parties of the agreement are competitors then combined market share should be

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\(^59\) Infra Note, at 66  
\(^60\) Market-share thresholds- (1) where the undertakings party to the agreement is competing undertakings, the exemption provided for in Article 2 shall apply on condition that the combined market share of the parties does not exceed 20 % on the affected relevant technology and product market. (2)Where the undertakings party to the agreement is not competing undertakings, the exemption provided for in Article 2 shall apply on condition that the market share of each of the parties does not exceed 30 % on the affected relevant technology and product market.  
\(^61\) Jones Alison and Brenda Sufrin, *EU Competition Law- Text, Cases and Materials*, Oxford University Press, NewYork, 4\(^{th}\) ed. 2011, p. 740
taken in consideration and in the case of non-competitors it is the market share of each of the parties that is relevant.\textsuperscript{62}

7.4 **FRAND COMMITMENT**

FRAND is a legal term that stands for "Fair, Reasonable, and Non-Discriminatory" and is typically used to describe patent licensing terms. It is normal for companies to have to agree to licensing a patent in FRAND terms before it will be accepted to become part of a standards body approved technical standard. FRAND reflects the license conditions that should be respected by dominant patent holders. These commitments are promises by holders of patents that are technically essential to an industry standard that they will grant licenses to such patents on Fair, Reasonable and Non-Discriminatory (FRAND) terms. Standard-setting organizations commonly have rules that govern the ownership of patent rights that apply to the standards they adopt. One of the most common rules is that a patent that applies to the standard must be adopted on "reasonable and non-discriminatory terms" (RAND) or on "fair, reasonable, and non-discriminatory terms" (FRAND). The two terms are generally interchangeable; FRAND seems to be preferred in Europe and RAND in the U.S.

For example, if Phillips typically licenses all its DVD patents under FRAND terms to DVD reader manufacturers, but then suddenly decides to charge Apple 100\% more to make their own DVD reader drives, a court may force Phillips to license those patents to Apple under terms that are less discriminatory.

In some cases, product injunctions, or exclusion orders, may be incompatible with a patent holder's FRAND commitment to a standards-setting body. A patent holder may, for example, wield an injunction "to reclaim some of its enhanced market power over firms that relied on the assurance" that the FRAND patents would be available for reasonable licenses. But injunctions may still be appropriate in cases where the target company refuses to take a license or pay royalties on a FRAND patent, or when the target company is outside U.S. jurisdiction. There must be "caution" in the use of injunctions in FRAND patent cases. "Department of Justice and

\textsuperscript{62}Ibid, p. 741
US Patent and Trade Mark Office strongly support the protection of intellectual property rights and believe that a patent holder who makes a FRAND commitment should receive appropriate compensation that reflects the value of the technology contributed to the standard. It is important for innovators to continue to have incentives to participate in standards-setting activities and for technological breakthroughs in standardized technologies to be fairly rewarded.\textsuperscript{63}

Once the patents that are essential to the standard have been identified, the relevant patentees are required to give a commitment to license those patents on FRAND terms to all would be users of that standard, whether competitors or not. To comply with competition law, the patentee\textquoteleft s commitment must be irrevocable and provided in writing prior to adoption of the standard. The patentee must also ensure that any company to which it transfers the patent, including the right to license it, will be bound by the commitment. This ensures that any manufacturer adopting the technology embodied in the standard is protected from the start and continues to protect.\textsuperscript{64}

In latest case of \textit{Motorola v. Microsoft}, Motorola wanted to ban the Xbox 360, among other things. The International Trade Commission agreed that Microsoft\textquotesingle s products infringed. Microsoft claimed that Motorola wanted too much money to license the so-called standards-essential patents, and attempted to fight the ban. Now, two weeks after a trial kicked off in Seattle, common sense appears to have prevailed. US District Court Judge Robart has agreed to dismiss Motorola\textquotesingle s attempts for injunctive relief based on its fair, reasonable and non-discriminatory (FRAND) patents, effectively saying that Motorola will have to pursue money (in the form of royalties) rather than attempt to ban products.

The order suggests that the court may not be friendly to attempts to use FRAND patents to ban products at all. The entire idea behind FRAND is that companies which participate agree to license standards-essential patents to other companies at a fair rate to spur their wide adoption, and many (including FTC chairman Jon Leibowitz) are concerned that if companies simply turn ________________

\textsuperscript{63} \url{http://www.infoworld.com/d/the-industry-standard/uspto-doj-injunctions-frand-patents-can-be-anticompetitive-210399}

\textsuperscript{64} \url{www.mayerbrown.com/Files/.../Frond_Smartphone_Sproul.pdf} (Last accessed on 22nd February, 2013 at 05:00 PM)
around and sue using those patents, such standards won't take off. Judge Robart decided that "because Motorola cannot show irreparable harm or that monetary damage would be inadequate; the court agrees with Microsoft that injunctive relief is improper in this matter and grants Microsoft® motion.65

7.5 OTHER REGIONAL AGREEMENTS

Other regional agreements, such as the North American Free Trade Agreement (NAFTA), oblige Parties to take appropriate action against anticompetitive practices; they are also not IPRs-specific, but of a general character. Likewise, the Mercosur rules apparently are of a general nature and are not fully implemented.66

CHAPTER 8

INDIAN APPROACH

ADEQUACY OF SECTION 3 (5) OF THE COMPETITION ACT, 2002

Competition Commission of India (CCI) established by the Competition Act, 2002 is mandated to prohibit anti-competitive agreements that cause or likely to cause appreciable adverse effects on competition in markets within India and also prohibits abuse of dominance by enterprises. Under Section 3(5) (a) to (f), technology holder has every right to measures to restrain the infringement of any of his rights or impose reasonable conditions only necessary for

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66 https://docs.google.com/viewer?u=a+v&q=cache:sc3bTu0nWmoJ:www.iprsonline.org/unctadictsd/docs/3.IPRSandCompetition_update.pdf+&hl=en&gl=in&pid=bl&srcid=ADGEESjkiOj-DKeDrvf7f4SbjrsvjT-DO5WW7VvZt1AX5XMxMgCHkUn80ECgtXnX44cmyC9wMIZybXWS3CDIRqegCr90mYvbHj91LUrLQspCJ2u37Kldb-4sigdpNC7W0Xvn1qd&sig=AHIEtbSfFWgCOJPQqr-keafoBlgbxpPYQ (Last Accessed on 20 February, 2013 at 04:00 PM)
the protection of any of his Intellectual property right. It clearly states that conditions other than necessary to protect IP right cannot be imposed by technology holder if those conditions adversely affect the market. Agreements that fix prices or allocate territories may be treated as per se illegal and others may be examined under the rule of reason.67

Some of arrangements described above in technology transfer agreements are likely to affect adversely the prices, quantities, quality or varieties of goods and services will fall within the contours of competition law as long as they are not in reasonable juxtaposition with the bundle of rights that go with IPRs. Therefore the unreasonable conditions are not covered under the protection given by Section 3 (5) of Indian Competition Act and therefore Competition Commission of India may be called upon to take note of anti-competitive agreement under Section 19 of the Act and such agreements can be declared void.

**Penalty**

The Commission is empowered to inquire into any unreasonable conditions imposed in the technology transfer agreements and CCI can impose penalty upon each of such right holder or enterprises which are parties to such agreements or abuse, which shall be not more than ten percent of the average turnover for the last three preceding financial years.68 In case of abuse of

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67 Supra Note, at 10, p. 114
68 Section 27 of the Competition Act, 2002. Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely: (a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be; (b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse: [Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent. of its turnover for each year of the continuance of such agreement, whichever is higher.] (c) [Omitted by Competition (Amendment) Act, 2007] (d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission; (e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any: (f) [Omitted by Competition (Amendment) Act, 2007] (g) pass such other [order or issue such directions] as it may deem fit. [Provided that while passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group as defined in clause(b) of the Explanation to section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group.]
dominant position under section 4 by virtue of an IPR by an enterprise, in addition to the above penalties, the Commission has the power to order division of enterprise under section 28.69

CHAPTER 9

CONCLUSION AND SUGGESTIONS

Technology transfer can be understood as licensing between two unconnected firms, which is directly related to the production or assignment of the technology.

Although in some countries like South Korea and Taiwan, there are some immunity relating IPRs, or some relaxation is granted to some extent. Section 3 (5)(i) of Indian Competition Act of 2002 provides protection to an IPR holder to impose reasonable conditions as may be necessary to protect any of his/ her rights, which have been or may be conferred upon him under Indian IP Act. Technology transfer licenses in high-tech industries that impose unreasonable restrictions are not come under the protection given by section 3(5) of the competition Act, 2002. Therefore in India it is clear that Competition law would be attracted if there is abuse in the exercise of the rights protected and granted under IP statutes. Competition Commission of India has power to scrutinize any unreasonable conditions incorporated in licensing agreements, which are regarded as adversely affecting competition in the markets.

The TRIPS agreement sets global minimum standards of IP protection. But there must be general guidelines for better application of domestic competition law in technology transfer in

69 Section 28 of the Competition Act, 2002- (1) The [Commission] may, notwithstanding anything contained in any other law for the time being in force, by order in writing, direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position. (2) In particular, and without prejudice to the generality of the foregoing powers, the order referred to in sub-section (1) may provide for all or any of the following matters, namely: (a) the transfer or vesting of property, rights, liabilities or obligations; (b) the adjustment of contracts either by discharge or reduction of any liability or obligation or otherwise; (c) the creation, allotment, surrender or cancellation of any shares, stocks or securities; (d) [Omitted by Competition (Amendment) Act, 2007] (e) the formation or winding up of an enterprise or the amendment of the memorandum of association or articles of association or any other instruments regulating the business of any enterprise; (f) the extent to which, and the circumstances in which, provisions of the order affecting an enterprise may be altered by the enterprise and the registration thereof; (g) any other matter which may be necessary to give effect to the division of the enterprise. (3) Notwithstanding anything contained in any other law for the time being in force or in any contract or in any memorandum or articles of association, an officer of a company who ceases to hold office as such in consequence of the division of an enterprise shall not be entitled to claim any compensation for such cesser.
India. Having a well-drafted guideline is extremely useful and provides a level of legal certainty for businesses. Business executives want to know, in simple terms, whether they are allowed to include certain terms in their technology transfer agreements and how those terms should be drafted to avoid ant-competitive practices under Indian competition law concern.

There is a need to have distinct guidelines in Indian competition law like US Antitrust Guidelines and EC Technology transfer Block Exemption Rules. Under section 66 of the Competition Act CCI has power to make regulation in this regard. Researcher is suggesting a slab of prohibiting action and allowed actions for technology transfer agreements in high-tech industries. A category system can be developed so that industries would be able to determine the thin line between reasonable and unreasonable conditions under technology transfer agreements. For better understanding technological aspect in competition law, there must be clear definition of three sets of markets- product market, technology market and R&D markets.
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