

An introduction to EC Competition Law for participants in FP7 projects

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Last updated December 2007

1. Introduction

Competition Law is something that needs to be taken into account when it comes to license results under the Seventh Framework Programme (FP7). Although there is no explicit mention to this, unlike under the previous programme, it is clear that any agreement licensing participants/third parties should respect Competition Law... But what is meant by Competition Law? What is relevant to FP7 participants in this regard? This brief document will try to give an overview of the basics of this branch of law at the EC level.

2. What is Competition Law?

Competition Law is the branch of law (halfway between law and economics) that tries to protect the free market system. It therefore comes into play where significant distortions of competition take place in a particular market. Competition Law does not protect competitors but promotes competition.

EC Competition Law finds its main rules in the Treaty establishing the European Community (the [EC Treaty](#)). Just two articles (81 and 82) have given rise to thousands of cases and practice. There are two kinds of conduct that are tackled by EC Competition Law (which is mirrored at national level in the EU Member States), namely: collusive practices affecting competition within the common market and the abuse of a dominant position¹.

Forbidden conduct

2.1.1 Collusive practices

As regards the first type of conduct, art. 81.1 of the EC Treaty prohibits all agreements between undertakings (i.e. any entity/person engaged in economic activities), 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 common market).

In principle, any contract between two or more undertakings might fall into this category if it produces a considerable restriction of competition in the relevant market.

Art. 81.1 EC Treaty contains an indicative list of forbidden conduct (i.a., directly or indirectly fixing purchase or selling prices; sharing markets or sources of supply; applying dissimilar conditions to equivalent transactions, thereby placing certain trading parties at a competitive disadvantage, or making the conclusion of contracts subject to acceptance of supplementary obligations that have no connection to the subject of such contracts).

In principle, any agreement that is incompatible with the common market is automatically void (art. 81.2). However, the conduct considered against competition under art. 81.1 can be authorised under certain conditions, namely:

- where some economic and societal benefits outweigh the competition concerns;
- no restrictions which are not indispensable to achieve such benefits are imposed; and

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- the conduct or agreement in question does not give the undertakings concerned the possibility of eliminating competition with respect to a substantial part of the products in question (art. 81.3)

It is in art. 81.3 that [Commission Regulation 2659/2000 on R&D agreements](#) and [Commission Regulation 772/2004 on technology transfer agreements](#) ("block exemption regulations") find their roots.

When an R&D agreement (e.g. a consortium agreement) or a licensing agreement is planned under an FP7 project, the participants concerned should ensure that no distortion of competition takes place either because it is a completely white agreement or because it fits the requirements of the Regulation and benefits of the block exemption².

Of course, no agreement can benefit from the block exemption if it contains severely anti-competitive restraints (hardcore restrictions). Some agreements may be block exempted with the exception of provisions that include anti-competitive restrictions (singular restrictions)³.

2.1.2 Abuse of a dominant position

Art.82 EC Treaty prohibits the abuse of a dominant position (i.e., one or more undertakings enjoy a dominant position in the relevant market and taking advantage of such a position they act or impose conditions on others that can be deemed abusive). This article mentions some examples of abusive practices (such as directly or indirectly imposing unfair purchase or selling prices; limiting production, markets or technical development to the prejudice of consumers; applying dissimilar conditions to equivalent transactions with other trading parties, etc.) It is thus the same (indicative) conduct found in art. 81.1 but performed just by one entity.

Already enjoying a dominant position in the relevant market is the main requirement for this category.

As concerns FP7 projects, conduct defined by article 81 and derived legislation may be more probable than that in article 82. In any case, it seems clear that licensing a few entities from a medium-size project is not likely to cause significant distortion of competition in the common market. Participants should be most careful where big companies or companies with a strategic position in a relevant market are involved in the agreement or when massive licensing to associated enterprises is foreseen at consortium level, since this increases the risks.

3. Unfair Competition Law

Just for clarification, broadly speaking, the Law of Unfair Competition tries to ensure "fair play" within the market, preventing competitors' strategies from turning into dishonest practices.

Upon this premise, the Law of unfair competition usually envisages a wide range of practices that can be deemed contrary to fair competition. It is worth mentioning that, typically, it is this branch of Law that protects trade secrets.

Depending on the applicable law, one can define the following as unfair practices: acting in a way that is objectively contrary to good faith; confusing consumers as to the origin of the product or service, taking advantage of others' reputation; denigrating acts (i.e., prejudicing competitors' reputation); false or misleading advertising (e.g. stating "patent pending" on a product when no patent has been applied for), comparative advertising under some conditions, "bait and switch" selling practices, inducing breach of a contract⁴, and so on.

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1. U.S. Antitrust Law (what is called Competition Law in Europe) does not address “abuses” of a given dominant position but rather “monopolisation”.
2. As of May 2004 (by the Regulation No 772/2004) the responsibility of assessing whether technology transfer (TT) agreements are compatible with EC Competition Law or not, lies within the contracting parties, whereas the former general system (under the TT block exemption Regulation (EC) No 240/96) provided that the Commission could be asked to give permission for singular cases.
3. It is important that parties to RTD agreements under FP7 projects consult these instruments to determine what agreements and/or clauses may be valid and which are not. Commission Notices [2001/C 3/02](#) and [2004/C 101/02](#) provide guidance on the application of the “R&D block exemption Regulation” and the “Technology Transfer block exemption Regulation”, respectively.
4. Under this supposition, there is legislation that considers it unfair trade practice for a competitor to induce the infringement of the basic obligations or commitments they have already assumed (notably by employees, suppliers and clients).

The [IPR-Helpdesk](#) project is coordinated by the University of Alicante, which is supported by the Intellectual Property Law Institute of Jagiellonian University in Cracow and European Research and Project Office GmbH in Saarbrücken.

Project Management Office
IPR-Helpdesk
Edificio Germán Bernácer
Universidad de Alicante
P.O. Box 99
03080 Alicante
España

e-mail: ipr-helpdesk@ua.es
Tel.: +34 965 90 97 18
Fax: +34 965 90 97 15

Representative Office
IPR-Helpdesk
98, Rue du Trône
B-1050 Brussels

e-mail: ipr-helpdesk@ua.es
Tel.: +32 (0) 2 213 41 63
Fax: +32 (0) 2 213 41 69