UDK: 347.77.043:346.545/546](4-672EU:497.11)
339.137.025

Aleksandra Vasić, LL.D.,[*]

ПРЕГЛЕДНИ НАУЧНИ РАД

Рад примљен: 29.01.2025.
Рад прихваћен: 22.04.2025.

DOI:10.5937/zrpfn1-56389

KNOW-HOW AS THE SUBJECT MATTER OF A LICENCE AGREEMENT UNDER COMPETITION LAW OF THE EUROPEAN UNION AND THE REPUBLIC OF SERBIA

Abstract*: This paper analyzes know-how as the subject matter of a license in the context of competition law of the European Union and the Republic of Serbia. Competition law of the European Union (EU) thoroughly addresses the block exemption of licensing agreements from the prohibition of restrictive agreements. Know-how, as the subject matter of a license agreement, must meet clearly defined requirements stipulated in the Technology Transfer Block Exemption Regulation (TTBER) in order for such an agreement to benefit from the safe harbour benefits. A know-how must be secret, substantial and identified. These major characteristics of a know-how are three cumulative conditions which must be met for the concerned package of practical information to qualify as a know-how under a technology transfer agreement* (*TTBER). In this paper, the author has thoroughly analyzed the key characteristics of know-how from the perspective of EU competition law. On the other hand, Serbian competition law has not yet standardised the institute of block exemption of licensing agreements from the prohibition of restrictive agreements. Block exemption of licensing agreements will be regulated after the adoption of a regulation on block exemption of technology transfer agreements. The Competition Protection Commission prepared the Proposal for a Regulation on technology transfer agreements exempted from the prohibition of restrictive agreements. This Regulation should regulate the conditions for exempting technology transfer agreements from the prohibition, bearing in mind the aforesaid agreements specificities. The subject of analysis in this paper will be the proposed solutions on know-how in the Proposal for a Regulation on technology transfer agreements.*

Keywords: *licence agreement, know-how, TTBER, competition law.*

[*] aleksandra@prafak.ni.ac.rs; ORCID 0000-0003-2228-6399

1. Introduction

Competition law of the European Union contains the rules exempting certain categories of agreements from the prohibition referred to in Article 101(1) of the Treaty on the Functioning of the European Union 2003 (TFEU).[1] Block exemptions relate to such categories of restrictive agreements that may be exempted from prohibition if they meet the prescribed conditions. Namely, certain types of agreements are recognised as agreements which fulfil the conditions referred to in Article 101(3) TFEU in a large number of cases.[2] The block exemption regulations specify the categories of agreements where the positive effects of market competition outweigh the negative effects. Characteristically for block exemption, a restrictive agreement which fulfils the conditions stipulated in the regulation governing the exemption for that category of agreement is considered to be exempt from the prohibition laid down by Article 101(1) TFEU without any special European Commission approval.[3] However, if an agreement is prohibited by Article 101(1) TFEU, it fulfils the conditions for block exemption and the participants in the agreement do not need to prove that the agreement fulfils the conditions referred to in Article 101(3) TFEU (Butorac Malnar, Pecotić Kaufman, Petrović, Akšamović, Liszt, 2021:230). Hence, a restrictive agreement is exempted from the prohibition of restrictive agreements under a relevant regulation.[4]

Block exemption of a licensing agreement from the application of Article 101(1) TFEU is regulated by the Regulation no. 316/14 on the application of Article 101(3) TFEU to categories of technology transfer agreements (hereinafter: Technology Transfer Block Exemption Regulation, TTBER).[5] Where a licensing agreement meets the conditions laid down by the TTBER, Article 101(1) TFEU shall not be applied. Article 2 of the TTBER stipulates that pursuant to Article

1 See: Art. 1 § 2 of the Regulation of the Council (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *Official Journal EU*, L 1, 04.01.2003, 1-25.

2 The possibility of exempting agreements from prohibition based on Article 101 (3) TFEU also refers to entire categories of agreements, decisions of market participants' associations, and harmonised practices of market participants (block exemption); therefore, the stated provision constitutes a legal ground for the adoption of regulations on block exemptions (Butorac Malnar, Pecotić Kaufman, Petrović, Akšamović, Liszt, 2021:227).

3 For instance, see Art. 2 § 1 of the TTBER (2014).

4 In case of a vertical restrictive agreement, Regulation 2022/720 shall be applied. If the conditions referred to in that Regulation have been met, Article 101(1) TFEU shall not be applied to the concerned agreement (Labus, 2010: 31).

5 Commission Regulation (EU) No. 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements (TTBER), *Official Journal EU*, L 93, 28.3.2014, 17–23.

101(3) TFEU and in compliance with the provisions of the TTBER, Article 101(1) TFEU shall not be applied to technology transfer agreements.[6]

Namely, there is a legal presumption that such agreements meet the conditions referred to in Article 101(3) TFEU (Klawitter, 2015:23; Pellmann, 2022:73). Thus, it is assumed that the concerned licensing agreement contributes to economic efficiency, that the contained restrictions are necessary to achieve the desired efficiency, that consumers get a fair share of benefits, and that such agreement does not allow the contracting parties to fully eliminate competition on the relevant market (Klawitter, 2015:20).

The contracting parties to licensing agreements are not obliged to assess whether the concerned licensing agreement meets the conditions referred to in Article 101(3) TFEU. Instead, they should assess whether such licensing agreement meets the conditions prescribed under the TTBER. If a licensing agreement meets the conditions stipulated under the TTBER, Article 101(1) TFEU shall not be applied (Busche, Röhling, 2016:1189; Scheuer, 2008:80) Such licensing agreement is valid and permitted. Therefore, the TTBER is a "safe harbour" for restrictive licensing agreements meeting the conditions prescribed under the Regulation. Such a safe harbour concept aims to provide legal safety to market participants, as well as to ensure uniformity in the application of regulations in the area of competition rights at the EU level (Busche, Röhling, 2016:1189). On the other hand, restrictive licensing agreements that fail to meet the conditions for the application of the TTBER are outside the "safe harbour".

If a licensing agreement fails to meet the conditions referred to in the TTBER, there is no assumption that such an agreement is prohibited (Klawitter, 2015:23). Such licensing agreements require individual assessment in a self-assessment procedure. In this procedure, the contracting parties have to establish whether the concerned agreement meets the conditions referred to in Art. 101(3) of the TFEU. During the self-assessment procedure, the contracting parties may rely to the principles and rules set out by the European Commission in the TTBER Guidelines for the assessment of technology transfer agreements (2014).[7]

Domestic competition law has not standardised the institute of block exemption of licensing agreements from the prohibition of restrictive agreements. Block exemption of licensing agreements will be regulated after the adoption of a regulation on block exemption of technology transfer agreements. Namely, the Competition Protection Commission (CPC) of the Republic of Serbia prepared the Proposal for a Regulation on technology transfer agreements

6 See Art. 2 § 1 of the TTBER (2014).

7 Communication from the Commission — Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, Official Journal EU C 89, 28.3.2014, p. 3–50, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2014.089.01.0003.01.ENG

exempted from the prohibition of restrictive agreements (hereinafter: the CPC Proposal for a Regulation RS).[8] This Regulation should regulate the conditions for exempting technology transfer agreements from the prohibition, bearing in mind the mentioned agreements specificities. The subject matter of analysis in this paper are the proposed solutions on know-how in the CPC Proposal for a Regulation on technology transfer agreements.

2. Technology right as the subject matter of licensing agreements in competition law

Pursuant to Article 1 of the Technology Transfer Block Exemption Regulation (TTBER), technology rights include know-how, as well as a number of other rights or a combination thereof, including applications or requests for the registration of such rights: patents, utility models, design rights, topographies of semiconductor products, supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained, plant breeder's certificates, and software copyrights (Art. 1 (b) of the TTBER). In view of this definition, it can be concluded that a technology right includes know-how and seven other intellectual property rights, as well as applications or requests for the registration of these rights (Pellmann, 2022:103; Bechtold, Bosch, Brinker, 2014:524). Other intellectual property rights, such as trademarks or copyrights (except for software copyrights), are not covered by the technology rights concept.

The Proposal for a Regulation on technology transfer agreements (2025), proposed by the Competition Protection Commission (CPC), defines the concept of technology. Technology includes know-how as well as all or specific intellectual property rights: patent, petty patent, industrial design right, topographies of semiconductor products, supplementary protection certificates for medicinal products or plant health products, plant breeder's certificates and software copyrights, including applications or requests for the registration of those rights (Art. 3 § 1 (2) of the Proposal for a Regulation). Given that the Proposal for a Regulation provides that a licensing agreement transfers the technology rights for the purpose of producing the contract product by the licensee and/or their subcontractors, the author thinks that Art. 3 § 1(2) of the Proposal for a Regulation should be amended so that the concept of technology rights includes both know-how and all the aforesaid intellectual property rights.

8 The Proposal for a Regulation on technology transfer agreements exempted from the prohibition of restrictive agreements (2025) has been available on the Competition Protection Commission (CPC) website since January 2025; See: Komisija za zaštitu konkurencije RS (2025). Predlog uredbe o kategorijama vertikalnih sporazuma izuzetih od zabrane restriktivnih sporazuma, 21.1.2025; https://kzk.gov.rs/2025/01/21 (accessed on 21.1.2025)

3. Know-how as a subject matter of a licence agreement in EU Competition Law and Serbian Competition Law

Under the TTBER (2014) and the CPC Proposal for a Regulation on technology transfer agreements (2025),[9] the concept of "technology right" includes know-how. In the TTBER, know-how is defined as "a package of practical information, resulting from experience and testing, which is: 1) secret; 2) substantial; and 3) identified" (Article 1 (i) of the TTBER).[10] A package of practical information means that know-how may be based on a great deal of information, which individually might not be secret but it is necessary that a concrete package of such information is secret. In particular, some scholars emphasize the fact that know-how, as a package of practical information, must be a result of experience and testing (Bechtold, Bosch, Brinker, 2014:530).

The essential characteristics of know-how are secrecy, substantiality and identifiability. These characteristics are also three requirements that must be met cumulatively so that the concerned package of practical information represents know-how in terms of the TTBER.

3.1. Secrecy

The first condition that a package of information should meet is secrecy. A package of information can be considered secret if it is not generally known or easily accessible.[11] The TTBER Guidelines (2014) do not offer any detailed explanation on this characteristic.[12]

In legal theory, secret information is defined as information inaccessible to stakeholders (Marković, Popović, 2020: 310). There is a distinction between absolute and relative secrecies. Absolute secrecy implies that no one else possesses a package of information that represents know-how, while relative secrecy means that one or more competitors in the concrete industry do not possess a package of information that represent know-how (Caenegem, 2012:35-36). The prevailing attitude in Serbian legal theory is that know-how meets the condition of secrecy if it meets the requirements of relative secrecy (Marković, Popović, 2020: 310). Some legal theorists also point out that the level of information secrecy in know-how is hardly ever raised in practice. Namely, in order to obtain information, a stakeholder has to addresses the holder of secret information; this very fact leads to the conclusion that that information is sufficiently in-

9 See: Art. 1 § 1 (b) of the TTBER (2014); Art 3 § 1 (2) of the Proposal for a Regulation (2025),

10 While it is indisputable that know-how represents information, some authors use the term know-how to refer only to information of economic character, which is defined as structured, semantic and factual data (Floridi, 2010: 88).

11 Art. 1 § (i) sub-item 1 of the TTBER

12 See: item 45 (a) TTBER Guidelines (2014).

accessible. Otherwise, a stakeholder would find another (cheaper and more rational) way to obtain it. For this reason, as pointed out in theory, secrecy is the essence of know-how, i.e. a pre-condition for its existence (Busche, Röhling, 2016:1234; Marković, 1993: 1630; Silva, 2014: 929-930).

Persons that possess know-how must take specific actions for the purpose of preserving its secrecy. Namely, for a package of information to have any commercial value, it is necessary for the person who possesses it to take adequate actions in order to protect the secrecy thereof. Thus, one has to ensure that the package of information representing know-how is not easily accessible (Busche, Röhling, 2016:1235).[13] The domestic doctrine states that know-how does not refer to all commercially valuable secret information but only to the confidential information in respect of which the person, who legally controls such information, has taken reasonable measures to preserve the secrecy of information (Šokinjov, 2018:402).

3.2. Substantiality

The TTBER stipulates that know-how must be substantial (Art. 1 § (i) 2 of the TTBER). Know-how, as a package of practical information resulting from experience and testing, meets the requirement of being substantial if it is "significant and useful for the production of the contract products".[14] This condition is explained in detail in the TTBER Guidelines: "Substantial" means that know-how includes information that is significant and useful for the production of the products that are the subject-matter of a licensing agreement or for the process included in the licensing agreement.[15] Some authors point out that this information must substantially contribute to or facilitate the production of the contract products (Groß, 2007:359). In cases when the licensed know-how refers to a product rather than a process, the condition is that such know-how must be useful for the production of the contract product.[16] The European Commission takes the stand that the condition is not met if the contract product can be produced on the basis of some generally available technology.[17] However, the condition does not imply that the contract product has a higher value than any products produced with the application of some other generally available technology. On the other hand, if such technology refers to a process, this condition implies that such know-how is useful in the sense that, it can

13 In practice, non-disclosure agreements (NDA) are concluded to protect the confidentiality of know-how.

14 See: Art. 1 § 1 (i) sub-item 2 of the TTBER.

15 See: Item 45 (b) of the TTBER Guidelines.

16 See: Item 45 (b) of the TTBER Guidelines.

17 See: Item 45 (b) of the TTBER Guidelines.

reasonably be expected, at the time of concluding the agreement, that it will substantially improve the competitive position of the licensee, for example by reducing the production costs.[18]

In addition to the provision that know-how is considered substantial if it is significant for the production of contract products, the TTBER also envisages that is has to be useful (Art. 1 § 1 item (i) of the TTBER). The condition of utility is defined as a substantial contribution of a specific invention to a technical progress.[19] In theory, there are opinions that the TTBER provides stricter conditions for know-how (in order to ensure that it is covered by the technology rights concept) than it is the case with the industrial property rights (which are already covered by that concept) (Korah, 2004: 252; Dolmans, Piilola, 2003:560; Carlin, Pautke, 2004:609). The condition of utility is not stipulated in most legislations even for acquiring a patent; thus, the condition of being substantial stipulated in such a manner in the TTBER is more restrictive in relation to the conditions stipulated for acquiring legal protection in the form of a patent.[20] The consequence of such a solution is that know-how which fails to meet the stated condition will not be included in the concept of technology rights, nor in the TTBER-based block exemption. In practice, this could raise certain issues. There is a possibility that persons possessing know-how will not have any interest to conclude a licensing agreement because it could not be exempted from the application of Article 101(1) TFEU on the basis of the TTBER.[21]

18 See: Item 45 (b) of the TTBER Guidelines.

19 Thus, the US patent law stipulates the requirement that an invention must be useful in order to be protected by a patent*;* See: United States Code, 35 U.S.C. § 101 (2021)*;* https://www.uspto.gov/web/offices/pac/mpep/s2104.html (accessed on 22.12.2024)

20 Most European countries stipulate three substantive law conditions for obtaining patent protection: to be patentable, a patent must be new, inventive, and commercially applicable (e.g., see Art. 7 § 1 of the Law on Patents RS). In some laws, such as the US patent law, an invention must also meet the condition of utility in order to enjoy patent protection. This condition entails the requirement of industrial applicability, but it also has a broader reach, as it seeks a specific answer to the questions what such invention serves for, i.e. whether the purpose of such invention is socially acceptable or not (Marković, 1997: 138). In domestic doctrine, the requirement for a know-how to be substantial (as defined in the TTBER) is referred to as "qualified industrial applicability"(Šokinjov, 2018: 404).

21 Interestingly, the previously valid regulations on block exemption of a licensing agreement regulated the condition of being substantial in a less restrictive manner. Regulation 240/96, which was valid until 2002, prescribed that this condition was met if it included information which had to be useful, i.e. could have been reasonably expected to improve the competitive position of the licensee after the transfer (e.g., by allowing him to enter a new market, etc.) (Art. 10 § 1 (2) of Regulation 240/96). The European Commission Regulation 772/04 introduced a more restrictive approach in defining the requirement that a know-how must be substantial by defining the concept in the same manner as the applicable TTBER (Art. 1 § 1 (g) of the Regulation 772/04). From the aspect of industrial property rights included

Ultimately, it could negatively affect any spread of technology. In legal theory, there are opinions that it is not necessary at all to envisage the condition on the substantial character of know-how as a prerequisite for applying the TTBER. Several German authors point out that the licensee has a commercial interest to conclude a licensing agreement for know-how, which is sufficient evidence that such know-how is important and useful for the production of contract products, and that condition is met (Bechtold, Bosch, Brinker, 2014: 530).

The condition on the substantial character of know-how is not the only disputable issue which has to be addressed for the purpose of applying the TTBER. Another disputable issue is the European Commission's interpretation that know-how fails to meet the condition of utility for the production of a contract product if the contract product can be produced based on some general freely available technology (Item 45 (b) of the TTBER Guidelines). In practice, a situation may arise where the contract product can be produced on the basis of freely available technology but, when applying a licensed technology based on know-how, it is possible to achieve certain competitive advantages, such as reduction of production costs, better product quality, etc.[22] In that sense, it is indisputable that the licensee has an interest to use the licensed know-how. In such a case, the licensed know-how could be useful for the licensee if it, for example, enables them to start producing the contract product right away without collecting information on freely available technologies (Busche, Röhling, 2016:1236). Thus, the licensed know-how would improve its competitive position. The fact that the contract product can also be manufactured by using freely available technology should have no bearing on the assessment of compliance with that condition. Otherwise, such know-how will not meet the conditions laid down by the TTBER. Such a rigid condition has a direct effect of restricting the possibilities of the contracting parties to an agreement on licensing know-how to use the benefits of the TTBER in terms of block exemption from the application of Art. 101 § 1 of the TFEU. Furthermore, the European Commission interpretation could also have an adverse effect on the contracting parties in the process of assessing the fulfilment the conditions for the application of Article

under block exemption, the EC Regulation 772/04 provisions were qualitatively better solutions than the previously valid regulations on block exemption of a licensing agreement; this Regulation adopted an economic approach when regulating the institute of block exemption of a licensing agreement. For these reasons, there is no justifiable reason for a more restrictive regulation of the condition of substantiality.

22 The EC Regulation772/04 prescribed an identical condition (Art. 1 (i) of the Regulation 772/04), which was criticised in German theory at the time. Some authors considered that the European Commission should define more precisely the conditions that know-how should meet, and pointed out that know-how meets the condition of being substantial if the conclusion of an agreement on licensing know-how would significantly improve the licensee's competitive position, e.g. by reducing production costs (M. Groß, 2007: 359).

101 § 3 TFEU because the contracting parties are also guided by the principles referred to in the TTBER Guidelines during the self-assessment procedure.[23]

3.3. Identifiability

The third condition to be cumulatively met by a know-how is the condition of being identifiable. It means that know-how must be described in a sufficiently extensive way to facilitate the verification that the licenced know-how meets the criteria of secrecy and substantiality (Article 1 §1 (i) of the TTBER; Item 45 (c) of the TTBER Guidelines).[24] This condition is considered to be met if the know-how is described in manuals or another written form.[25] The European Commission recognizes that, in some cases, this may not be reasonably possible to implement in practice The TTBER Guidelines emphasise that the licensed know-how may consist of practical knowledge possessed by the licensor's employees (about a production process which is passed on to the licensee). In such situations, it is sufficient to describe the general nature of the know-how in the licensing agreement and to list the employees that will be or have been involved in passing the process to the licensee (Item 45(c) of the TTBER Guidelines).

In the doctrine, there is a stance that the know-how must be precisely described for this condition to be met (Hull, 2009: 209).[26] In German theory, this condition is considered to be referring to documentation, e.g. in the form of descriptions, recipes, formulas, samples or drawings. Thus, on the one hand, the documentation serves to test if the concerned know-how meets the criteria of secrecy and substantiality; on the other hand, it contributes to legal safety so that unjustified restrictions are not imposed on the licensee regarding the use of their own technology (Bechtold, Bosch, Brinker, 2014: 530).

---

23 Such a definition on the condition for the substantial nature of know-how for the purposes of applying the TTBER was also criticized in international theory (Dolmans, Piilola, 2004: 358).

24 Some theoreticians point out that the aim of the three cumulative conditions to be met by the know-how in terms of the TTBER Guidelines is to prevent the exemption of some agreements on licensing know-how (aimed at dividing the market) from the application of Art. 101 § 1 of the TFEU (Schröter, Jakob, Klotz, Mederer, 2014: 725).

25 In German literature, there is an interpretation that the TTBER Guidelines do not stipulate formal requirements for testing the fulfilment of the stated condition (Busche, Röhling, 2016: 1237).

26 Some authors point out that the condition of being identified would not be met if the know-how was "written" in the employees' heads only (Busche, Röhling, 2016: 1237).

4. Legal Solutions on know-how in the Proposal for a Regulation (Serbia)

The Proposal for a Regulation on technology transfer agreements exempted from the prohibition of restrictive agreements (2025), proposed by the Competition Protection Commission (CPC) of the Republic of Serbia, stipulates that technology includes know-how (Art. 3 § 1 (2) of the Proposal for a Regulation). In compliance with the TTBER, the Proposal for a Regulation defines the term know-how as a set of non-patented practical knowledge and information, acquired through experience and verification by the licensor, which is secret, significant, and identifiable, whereby: (1) "secret" means that it is not generally known or easily accessible; (2) "significant" means that the know-how is important and useful for the production of the contracted product or the application of the contracted process; (3) "identifiable" means that the know-how is described in a sufficiently understandable manner to enable verification of the conditions of secrecy and significance (Art. 3 § 1 (6) of the Proposal for a Regulation). It follows that a package of information (know-how) must be secret, substantial and identified.[27]

Unlike the TTBER, the Proposal for a Regulation provides that "special knowledge" (know-how) is a set of non-patented practical knowledge and information. In the author's opinion, it is not necessary to emphasise that it relates to non-patented practical knowledge and information because, in the event that they are patented or the procedure for obtaining patent protection has been initiated, the condition of secrecy could not be met.

5. Conclusion

In EU Competition Law, licensing agreements are known to contribute to developing new technologies, encouraging research, lowering prices and ensuring better quality of products and services. Bearing in mind that the subject matter of license agreements is the transfer of intellectual property rights, which are exclusive rights, these agreements can be restrictive. Due to the positive effects of license agreements in practice, the European Commission adopted the Technology Transfer Block Exemption Regulation (TTBER), which thoroughly regulates block exemption of a licensing agreement from the prohibition of restrictive agreements. The TTBER stipulates that the subject of the licensing agreement in competition law is a technology right. Technology rights include know-how, as well as the following rights or their combination, including applications or requests for the registration of such rights: patents,

27 The conditions are taken from the TTBER but, in comparison to the TTBER which uses the term "know-how", the Proposal for a Regulation (2025) uses the term "posebno znanje" (literally - special knowledge) for know-how.

utility models, design rights, topographies of semiconductor products, supplementary protection certificates for medical products or other products for which supplementary protection certificates may be obtained, plant breeder's certificates, and software copyrights. Thus, in addition to know-how that is defined in the TTBER, it can be concluded that the technology right includes seven intellectual property rights, as well as applications or requests for the registration of these rights.

The concept of know-how is defined by three essential characteristics that must be met cumulatively, as outlined in the Technology Transfer Block Exemption Regulation (TTBER) and the Proposal for a Regulation on Technology Transfer Agreements (2025) in Serbia. These essential characteristics of know-how are secrecy, substantiality and identifiability. The first condition that know-how should meet is secrecy. A package of non-patented practical knowledge and information is considered secret if it is not generally known or easily accessible. Persons that possess know-how must take specific actions to preserve its secrecy, and thus ensure that the package of information representing know-how is not easily accessible. The second condition to be cumulatively met is substantiality. A package of practical information (know-how) meets the condition of being substantial if it is important and useful for the production of the contract products. Substantiality implies that know-how includes information that is significant and useful for the productions of the products that are the subject-matter of a licensing agreement, or the application of the processes included in licensing agreement. In addition to prescribing that know-how is considered substantial if relevant to the production of contract products, the TTBER also prescribes the condition that a know-how has to be useful. However, the downside of such a solution is that the know-how which fails to meet this condition will not be included in the concept of technology rights, nor in the TTBER based block exemption. This may raise certain issues in practice. There is a possibility that persons possessing know-how will not have any interest to conclude a licensing agreement because they could not be exempted from the application of Article 101(1) TFEU on the basis of the TTBER. It may have a negative impact on the spread of technology. The third condition to be cumulatively met is the condition of being identifiable. It means that the package of information representing know-how must be described in a sufficiently extensive way to enable verification of whether it meets the conditions of secrecy and substantiality. This condition is typically met when the know-how is documented in a written form, such as manuals or detailed descriptions, which allow the verification of its essential characteristics.

In the Republic of Serbia, the CPC Proposal for a Regulation on technology transfer agreements exempted from the prohibition of restrictive agreements (2025) stipulates that the technology includes know-how. The Proposal

for a Regulation defines the concept of know-how as a package of non-patented practical knowledge and information, acquired through experience and verification by the licensor, which is secret, significant, and identifiable. After analyzing the solutions presented in Proposal for a Regulation, the author concludes that the conditions which know-how as a package of non-patented practical knowledge and information must meet are the same as the conditions stipulated by TTBER.

References

Bechtold, R., Bosch, W., Brinker, I. (2014). *EU-Kartellrecht: EU-Kartell*. C.H. Beck, München.

Butorac Malnar, V., Pecotić Kaufman, J., Petrović, S., Akšamović, D., & Liszt, M. (2021). *Pravo tržišnog natjecanja i državnih potpora*. Narodne novine, Zagreb.

Busche, J., Röhling, A. (Hrsg.). (2016). *Kölner Kommentar zum Kartellrecht: Band 3: Europäisches Kartellrecht, Art. 101–106 AEUV, Gruppenfreistellungsverordnungen*. Carl Heymanns Verlag, Köln.

Carlin, F., Pautke, S. (2004). The Last of its Kind: The Review of the Technology Transfer Block Exemption Regulation. *Northwestern Journal of International Law & Business*. 3. 601–618.

Dolmans, M., Piilola, A. (2003). The Proposed New Technology Transfer Block Exemption: Is Europe really better off than with the current regulation? *World Competition,* 4. 541–565.

Dolmans, M., Piilola, A. (2004). The New Technology Transfer Block Exemption: A Welcome Reform, After All. *World Competition*. 3. 351–363.

Groß, M. (2007). *Der Lizenzvertrag*. Peter Lang, Frankfurt am Main.

Hull, J. (2009). Trade secret licensing: the art of the possible. *Journal of Intellectual Property Law & Practice*. 3. 203–212.

Klawitter, C. (2015). *Lizenzverträge und Kartellrecht*. Nomos, Baden-Baden.

Korah, V. (2004). Draft Block Exemption for Technology Transfer. *European Competition Law Review*. 5. 247–262.

Лабус, М. (2010). Минималне малопродајне цене - легализам наспрам ефикасности. *Анали Правног факултета у Београду*. 1. 5–35.

Марковић, С. (1993). Пословна тајна као предмет уговора о преносу индустријске својине. *Правни живот*. 11–12. 1631–1648.

Марковић, С., Поповић, Д. (2020). *Право интелектуалне својине*. Службени гласник, Београд.

Pellmann, U. (2022). *Die EU-kartellrechtliche Beurteilung von Technologietransfer-Vereinbarungen nach der Verordnung (EU) Nr. 316/2014 und den*

Technologietransfer-Leitlinien. Jenaer Wissenschaftliche Verlagsgesellschaft (JWV), Jena.

Schröter, H., Jakob, T., Klotz, R., & Mederer, W. (Hrsg.). (2014). *Europäisches Wettbewerbsrecht*. Nomos, Baden-Baden.

Scheuer, J. (2008). *Technologietransfer im Kartellrecht: Eine rechtsökonomische und rechtsvergleichende Perspektive*. Gabler Verlag, Wiesbaden.

Sousa e Silva, N. (2014). What exactly is a trade secret under the proposed directive? *Journal of Intellectual Property Law & Practice*. 11. 923–932.

Шокињов, С. (2018). Пословна тајна и *know-how* у праву Европске уније. *Зборник радова "Усклађивање правног система Србије са стандардима ЕУ"*, Крагујевац, 399–415.

Van Caenegem, W. (2007). *Intellectual Property Law and Innovation*. Cambridge University Pres, Cambridge, UK.

Васић, А. (2024). Уговор о лиценци као рестриктивни споразум у праву конкуренције Европске уније и Републике Србије (докторска дисертација), Правни факултет, Универзитет у Новом Саду, 2024; https://nardus.mpn.gov.rs/handle/123456789/22644

Legal documents

Commission Regulation (EU) No. 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements (TTBER), *Official Journal EU*, L93, 28.3.2014, 17–23; https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.093.01.0017.01.ENG|

Communication from the Commission: Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, OJ EU, C 89, 28.3.2014, 3–50, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2014.089.01.0003.01.ENG

Regulation (EC) No 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *Official Journal EU*, L1, 04.01.2003, 1-25.

Regulation (EC) No 240/96 of the Council of 31 January 1996 on the application of Articles 85 and 86 of the EC Treaty to certain categories of vertical agreements and concerted practices. *Official Journal EU*, L 031, 9.2.1996, 1.

Regulation (EC) No 772/2004 of the European Parliament and of the Council of 27 April 2004 on the application of Articles 81 and 82 of the EC Treaty to technology transfer agreements. *Official Journal EU,* L 123, 27.4.2004, 11.

United States Code, 35 U.S.C. § 101 (2021) https://www.uspto.gov/web/offices/pac/mpep/s2104.html

Zakon o patentima (Patents Act RS), *Službeni glasnik Republike Srbije*, br. 99/2011, 113/2017, 95/2018, 66/2019 and 123/2021; https://www.paragraf.rs/propisi/zakon_o_patentima.html

Komisija za zaštitu konkurencije RS (2025). Predlog uredbe o kategorijama vertikalnih sporazuma izuzetih od zabrane restriktivnih sporazuma (Proposal for a Regulation on technology transfer agreements exempted from the prohibition of restrictive agreements, Competition Protection Commission (CPC), RS, 21.1.2025; https://kzk.gov.rs/2025/01/21

Др Александра Васић,
Доктор правних наука

ЗНАЊЕ И ИСКУСТВО (KNOW-HOW) КАО ПРЕДМЕТ ЛИЦЕНЦЕ У ПРАВУ КОНКУРЕНЦИЈЕ ЕВРОПСКЕ УНИЈЕ И РЕПУБЛИКЕ СРБИЈЕ

Резиме

У раду се анализира знање и искуство као предмет лиценце у контексту права конкуренције Европске уније и Републике Србије. Право конкуренције Европске уније на детаљан нагулише групно изузеће уговора о лиценци од забране рестриктивних споразума у Уредби ТТБЕР (Technology Transfer Block Exemption Regulation, TTBER, 2014). Знање и искуство, као предмет лиценце, мора да испуњава јасно дефинисне услове у Уредби ТТБЕР како би такав уговор могао да ужива погодности сигурне луке. Главне карактеристике знања и искуства су тајност, значајност и препознатљивост. Поменуте карактеристике представљају три услова који кумулативно морају бити испуњени како би предметни скуп практичних информација представљао знање и искуство у смислу Уредбе ТТБЕР. Аутор је у раду на детаљан начин анализирао кључне карактеристе знања и искуства са аспекта права конкреунције ЕУ. С друге стране, српско право конкуренције још увек не нормира институт групног изузећа уговора о лиценци од забране рестриктивних споразума. Групно изузеће уговора о лиценци биће регулисано након што уредба о групном изузећу споразума о трансферу технологије буде донета. Наиме, Комисија за заштиту конкуренције Републике Србије припремила је Предлог уредбе о категоријама споразума о трансферу технологије изузетих од забране рестриктивних споразума (2025). Поменута уредба требало би да уреди услове за изузеће од забране споразума о трансферу технологије, имајући у виду специфичности поменутих споразума. Предложена решења у поменутом нацрту уредбе која се односе на знање и искуство предмет су анализе у раду.

***Кључне речи**: уговор о лиценци, знање и искуство, ТТБЕР, право конкуренције.*