

Contrats relatifs à la propriété intellectuelle sous l'angle de l'article 81 CE

Benoît Merkt

Avocat, Genève

Etude Lenz & Staehelin

Cédric Rimella

Corp. Counsel

Logitech

Introduction: Plan

I. Modernisation

III. Propriété intellectuelle et concurrence

IV. Règlement 772/2004 concernant l'application de l'art. 81(3) CE à des accords de transfert de technologie

IV. L'exemple de Logitech

V. Conclusions et perspectives suisses

I. Modernisation (1)

Règlement 1/ 2003

Règlement
d'application de
la Commission
773/2004

Communication
"Réseau"

Communication
"Juridiction
nationale"

Communication
"Questions
nouvelles"

Communication
"Traitement des
plaintes"

Lignes
directrices
"Affectation du
commerce"

Lignes
directrices "Art.
81(3) CE"

I. Modernisation (2)

Principaux changements:

- Art. 81 (3) CE est directement applicable
- Compétence partagée de la Commission d'appliquer l'art. 81 (3) CE avec les autorités nationales de la concurrence et les juridictions nationales
- Abolition des exemptions individuelles
- Importance accrue des Règlements d'exemption par catégorie
- Règlement 240/96 remplacé par le Règlement 772/2004

II. Propriété intellectuelle et concurrence

Objectifs communs et tensions

- Stimuler la recherche et le développement en assurant un retour de l'investissement
- Mais pouvoir de monopole conféré par la propriété intellectuelle
- Risque que la propriété intellectuelle conduise à un cloisonnement du marché commun
- Illustration de ces tensions en droit communautaire:
 - libre circulation et épuisement des droits de propriété intellectuelle
 - licence obligatoire
 - accords de transfert de technologie

III. Transfert de technologie

de minimis	Positive safe harbor seuils d'exemption	Negative safe harbour	Restrictions caractérisées	Restrictions exclues
Conc. (horizont) 10%	2790/99 30% (art. 3)		2790/99 (art. 5)	2790/99 (art. 4)
Non-conc. (vert.) 15%	772/2004 conc.: 20% non-c.: 30% (art. 3)	Existence de au moins 4 technologies indépendante (guidelines commission N°131)	772/2004 (art. 5)	772/2004 (art. 4)

III. Transfert de technologie

- **Notion d'accord de « technologie »:**

Accord de licence de brevet, de savoir-faire (= « secret », « substantiel » et « identifié ») ou de droits d'auteur sur logiciels, ou accord mixte, y compris tout accord de ce type contenant des dispositions relatives à la vente et à l'achat de produits à condition que celles-ci ne constituent pas l'objet principal de l'accord.

III. Transfert de technologie

Distinction concurrents et non-concurrents

- Approche plus stricte à l'égard des accord entre concurrents que des accords entre non-concurrents (parts de marché; liste des restrictions caractérisées)
- Sont concurrents:
 - Les concurrents actuels ou potentiels sur le marché de produit pertinent
 - Les concurrents actuels sur le marché de technologie pertinent

III. Transfert de technologie

Distinction concurrents et non-concurrents (suite)

- Sont non-concurrents les parties à un accord lorsque le donneur n'est ni un fournisseur actuel ni un fournisseur potentiel des produits sur le marché pertinent et le preneur ne license pas une technologie concurrente
- Approche « ex-ante »

III. Transfert de technologie

Calcul des parts de marché de technologie:

« the licensor's market share is 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. Where the parties are competitors on the technology market, sales of products incorporating the licensee's own technology must be combined with the sales of products incorporating the licensed technology »
(Guidelines Commission, N°70)

III. Transfert de technologie

Calcul des parts de marché de produit:

« the licensee's market share is to be calculated on the basis of the licensee's sales of products incorporating the licensor's technology and competing products, i.e. the total sales of the licensee on the product market in question. Where the licensor is also a supplier of products on the relevant market, the licensor's sales on the product market in question must also be taken into account. In the calculation of market shares for product markets, however, sales made by other licensees are not taken into account when calculating the licensee's and/or licensor's market share» (Guidelines Commission, N°71)

III. Transfert de technologie

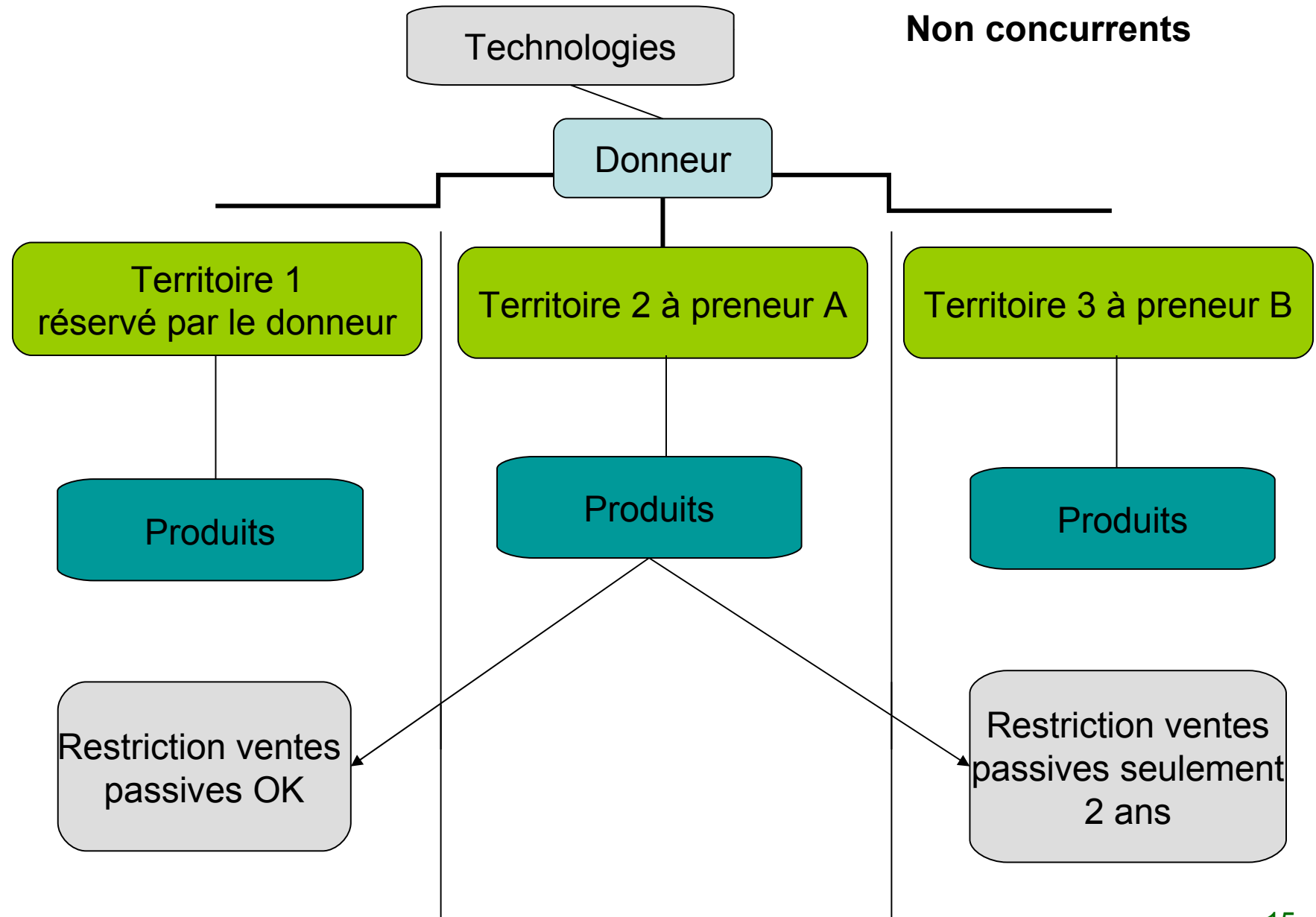
- Cas de **restrictions caractérisées** selon l'art. 4 du Règlement **772/2004**:
 - **entre concurrents**:
 - restriction de capacité de déterminer prix de vente
 - limitation de la production, sauf au preneur pour les produits contractuels dans un accord non réciproque ou à un seul des preneurs dans un accord réciproque
 - répartition des marchés ou des clients (avec nombreuses exceptions)
 - restriction d'utiliser sa propre technologie

III. Transfert de technologie

- Cas de **restrictions caractérisées** (suite 1):
 - **entre non-concurrents:**
 - restriction de prix, sauf les prix de vente maxima ou recommandés, pour autant que ces derniers n'équivalent pas à des prix de vente fixes ou minimaux
 - restrictions relatives aux ventes passives, sauf pour un territoire ou un groupe de clients réservé (i) au donneur ou (ii) à un autre preneur pendant 2 ans

II. Transfert de technologie

- Cas de **restrictions caractérisées** (suite 2):
 - **entre non-concurrents:**
 - restrictions de ventes actives ou passives aux utilisateurs finals par les membres d'un système de distribution sélective opérant en tant que détaillants



III. Transfert de technologie

- Cas de **restrictions exclues** selon l'art. 5 du Règlement **772/2004**:
 - Obligation du preneur d'accorder au donneur une licence ***exclusive*** sur les améliorations dissociables qu'il aura lui-même apportées
 - Obligation du preneur de céder au donneur tout ou partie de ses droits sur de telles améliorations
 - Obligation du preneur de ne pas mettre en cause la validité des droits de PI du donneur
 - Pour les entreprises *non-concurrentes*, obligations limitant la capacité du preneur d'exploiter sa technologie ou de faire de la R & D

IV. L'exemple de Logitech

Company Background

- **Logitech is a multinational corporation which designs, manufactures and sells peripheral devices used with computers (e.g., mice, trackballs, keyboards, webcams, speakers, digital pens), game consoles, cell phones, and televisions and consumer electronic devices.**
- The Logitech group is a group of companies owned directly or indirectly by Logitech International SA, a Swiss corporation, whose securities are traded on the Swiss Exchange and on Nasdaq.
- The Logitech group consists of over 30 subsidiaries. The key operating subsidiary is Logitech Europe SA, a Swiss corporation.¹⁷

Some challenges for Logitech

- Logitech has a healthy market share in most of the markets in which it sells products.
- The market share range varies from product line to product line and depends on the geographic location of the market.
- Logitech enters into a variety of technology development and license agreements with third parties, many of which are leading companies in the semiconductor and sensor industries.
- Logitech generally has limited or no information regarding the market shares of these third parties in their respective markets.

Some Pros and Cons in a nutshell

- Increased commercial freedom for companies in designing their licensing arrangements.
- Broader in Scope:
 - software licenses are included
 - Includes non-assertion and settlement agreements (G43)
- 8. Abolition of Arbitrary Duration Limits:
 - New TTBE applies for as long as the IPRs in the licensed technology remain valid or for as long as the know-how remains secret

Some Pros and Cons in a nutshell

2. Market definition / Market share issue

- Need to do thorough market analysis is expensive and, in many cases, unrealistic
- License covered by TTBE can fall outside in the future due to growth or changes in the market (2 years grace period) : requirement to monitor market shares over time

7. Competitors and Non-Competitors

- Ex ante approach → parties treated as non-competitors throughout the length of the licence (unless material amendment to the agreement)

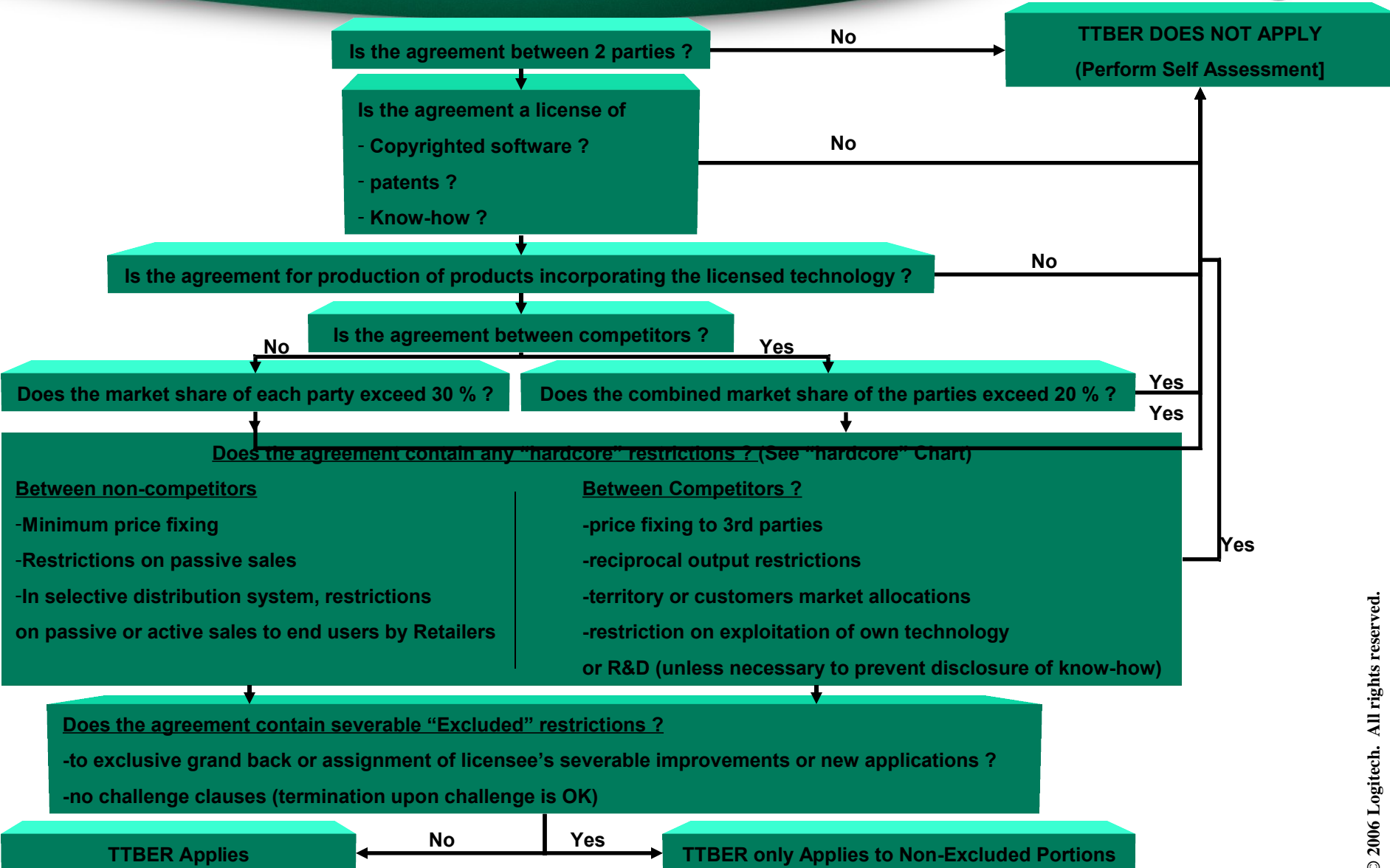
Conclusions

Below the market share thresholds, parties have much greater commercial freedom than under Regulation 240/96

BUT

- More complex system requiring greater *ex ante* analysis by the parties
- What is the competitive relationship?
- What is the relevant market(s)?
- On-going requirement to monitor market evolution

The TTBE Logitech Decision Tree



Hardcore Restrictions

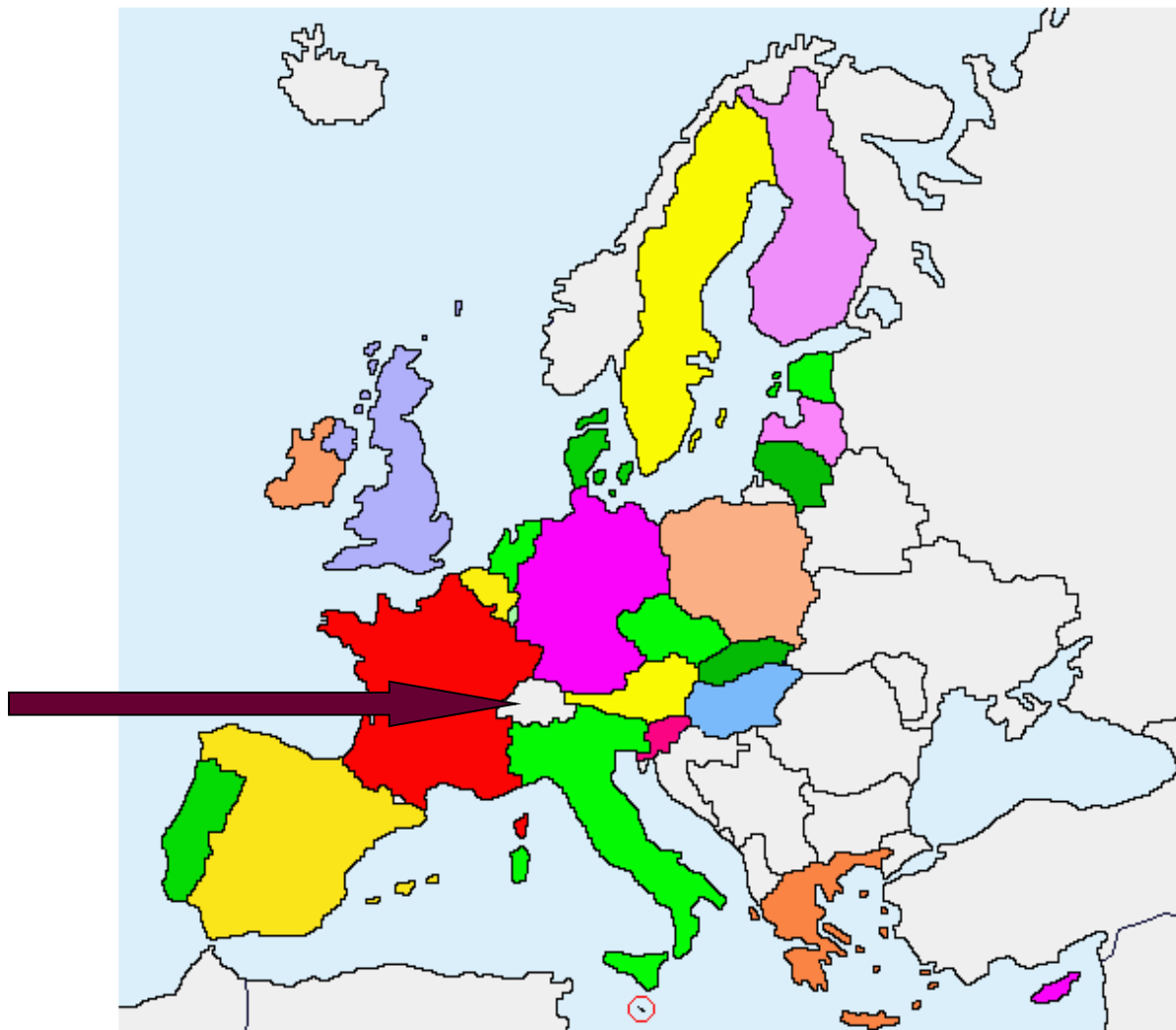


Type	Competitors/Horizontal	Non-Competitors/Vertical
Price	Restrictions on price or price standards/levels	Any Restriction on Minimum Pricing by Licensee (MSRP and maximum price restrictions are OK)
Production/Field of Use	<p>Any limitation on Output/Production, except:</p> <ul style="list-style-type: none"> Non-reciprocal limitation on licensee regarding licensed product Imposed only on one party in reciprocal agreement Agreement only to produce in specified fields of use or product markets Non reciprocal agreement by licensor/licensee not to use licensed technology in a field or territory reserved to other party Obligation not to licensee to another licensee in a particular territory 	
Territories	<p>Any Allocation of Sales Territory, except:</p> <ul style="list-style-type: none"> Non reciprocal agreement active/passive sales into territory reserved for self, other party, or non competitor third party 	<p>Any Passive Sales Restriction, except:</p> <ul style="list-style-type: none"> Into exclusive territory reserved to licensor Into exclusive territory reserved to third party for 1st 2 years of sales
Customers	<p>Any Allocation of Customers, except:</p> <ul style="list-style-type: none"> Non reciprocal agreement active/passive sales to customer reserved to self, other party or non competitor third party Only as a second source for specific customer in non reciprocal agreement Internal use only (plus spare parts) 	<p>Any Passive Sales Restriction, except:</p> <ul style="list-style-type: none"> To customers reserved to licensee Customers reserved to third party for 1st two years of sales Internal use only (plus spare parts) Only as a second source Sales by wholesales to end-user To authorized distributors in selective distribution systems <p>Any Passive or active sales by retailers in selective distribution systems to end-users (except ok to prohibit operating out of unauthorized location)</p>
Use of Other Technology	<p>Any restriction on use of own technology</p> <p>Any restriction on R&D unless indispensable to prevent disclosure of know-how</p>	(see "Excluded Restrictions")

Excluded Restrictions That Can Be Severed

- No Challenge clause against EU IP rights of licensor (termination of licensee upon challenge is ok)
- Exclusive grant back or assignment to severable improvements or new applications of IP
- Non-competitor restrictions on exploitation of own technology or on R&D (unless R&D restrictions indispensable to prevent disclosure of know-how); "Hardcore" if between competitors

V. Conclusions et perspectives suisses



Merci de votre attention!