



The revised European Competition Law Approach to Technology Transfers: Innovation friendly?

By Yves Van Couter and Stéphanie De Smedt

The revised European Competition Law Approach to Technology Transfers: innovation friendly?

YVES VAN COUTER AND STEPHANIE DE SMEDT¹

1 Attorneys-at-law, members of the Brussels Bar, respectively Partner and Associate with Loyens & Loeff.

© Loyens & Loeff SCRL/CVBA 2014

This publication is made available by Loyens & Loeff SCRL/CVBA for educational purposes only as well as to give general information and a general understanding of the law, not to provide specific legal or tax advice. The receipt of this publication does alone create no attorney client relationship with Loyens & Loeff SCRL/CVBA. Any content of this publication should not be used as a substitute for competent legal or tax advice from a qualified attorney.

Loyens & Loeff SCRL/CVBA and all other entities, partnerships, persons and practices trading under the name "Loyens & Loeff", cannot be held liable for the consequences of making use of this publication without their further cooperation.

This publication contains personal views of the authors and therefore does not reflect the opinion of Loyens & Loeff SCRL/CVBA.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or in an automated database or disclosed in any form or by any means (electronic, mechanical, photocopy, recording or otherwise) without the prior written permission of Loyens & Loeff SCRL/CVBA.

The authors

Yves Van Couter

Yves is a Partner with Loyens & Loeff, and is a member of the Loyens & Loeff Litigation and Risk Management Practice Group.

Yves is in charge of the Automotive, Food & Beverages and Technologies Teams of the Brussels Loyens & Loeff office. He holds an Honorary International Chair at the National Taipei University of Technology in Taiwan (2014-2016) and is also a Guest Professor at the Graduate School of Materials Science – College of Humanities and Applied Science of the National Yunlin University of Science & Technology (Taiwan) (as from 2012).

Yves also holds an LL.M. in Intellectual Property Law from a joint program between the *Katholieke Universiteit Brussel* and the *KU Leuven* (Belgium, 2000) as well as an LL.M. in Common Law Studies from the *Georgetown University* (Washington D.C., U.S.A., 1994 – Fulbright Scholar).

Yves has been a member of the Brussels Bar since 1991.

Yves Van Couter

T : +32 2 2 773 23 69

E : yves.van.couter@loyensloeff.com

Stéphanie De Smedt

Stéphanie is an Associate with Loyens & Loeff, and is a member of the Loyens & Loeff Litigation and Risk Management Practice Group.

Stéphanie is a member of the Technologies Team of the Brussels office, with a particular focus on data protection and privacy. Stéphanie holds an LL.M. in European Competition and Intellectual Property law from the *Université de Liège* (Belgium).

Stéphanie has been a member of the Brussels Bar since 2012.

Stéphanie De Smedt

T : +32 2 773 23 77

E : stephanie.de.smedt@loyensloeff.com

Both authors have expertise in (international) commercial law, intellectual property and IT law (including technology transfers, trademarks and copyright licensing), distribution law (including franchising law) and market practices (including advertising, labelling and packaging). They both advise their clients in these fields, and represent them in court and arbitration proceedings relating to these topics.

Key abbreviations

ECJ	European Court of Justice
EC Treaty	Treaty establishing the European Community
EEA	European Economic Area
EU	European Union
FRAND	Fair, reasonable and non -discriminatory
IP	Intellectual property
IPR	Intellectual property right
R&D	Research and Development
RDBER	Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements (“Research and Development Block Exemption Regulation”)
SABER	Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements (“Specialisation Agreements Block Exemption regulation”)
SME	Small and Medium-sized Enterprise
TFEU	Treaty on the Functioning of the European Union
TTBER	Technology Transfer Block Exemption Regulation

TTBER 2004	Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements
Draft TTBER (2013)	Draft Commission Regulation C(2013) 921 draft on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements
TTBER 2014	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 Guidelines 2004	Commission Notice (2004/C-101/02) Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements
Draft TTBER Guidelines (2013)	Draft Communication from the Commission C(2013) 924 draft Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements
TTBER Guidelines 2014	Communication from the Commission (2014/C 89/03) Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements
VABER	Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (“Vertical Agreements Block Exemption Regulation”)

Table of contents

The authors	3
Key abbreviations	4
Introduction	8
§1. APPLICATION OF ARTICLE 101 TFEU TO TECHNOLOGY TRANSFER AGREEMENTS – GENERAL	11
§2. THE SCOPE OF APPLICATION OF THE TTBER	18
§3. THE CONDITIONS FOR APPLYING THE “SAFE HARBOUR” OFFERED BY THE TTBER	26
A. The applicable market share threshold is not exceeded	26
A.1. Determining the competitive relationship: competitors v. non-competitors	29
A.2. Identifying the relevant market(s) and calculation of market share	32
A.3. The applicable market share thresholds	34
A.4. Concrete application of the first test criterion (market share)	35
A.5. Schematic representation	36
B. The agreement does not contain hardcore restrictions	36
C. The agreement does not contain any excluded restrictions	45
D. The TTBER is not withdrawn	53
E. The TTBER is not declared to be inapplicable	55
F. Application of the TTBER in brief and schematically depicted	56
§4. INDIVIDUAL ASSESSMENT OUTSIDE THE SCOPE OF APPLICATION OF THE TTBER	57
A. The general assessment framework	57
B. Settlement agreements	59
C. Technology pools	62
C.1. The assessment of the formation and operation of technology pools	63
C.2. Assessment of individual restraints in agreements between the pool and its licensees	67
Conclusion	69
Annex 1 – TTBER 2014	71
Annex 2 – TTBER Guidelines 2014	78
Index	126

Introduction

1. The essential function of each intellectual property right (“IPR”) is to confer on its holder the exclusive right to prevent others from exploiting his intellectual property (“IP”) without his permission. Thus, the essence of intellectual property rights is to constitute a legal monopoly for the benefit of the holder. This, *in se*, implies the possibility of exploiting the IPR by issuing licences in favour of third parties.
2. The exploitation of IPR that often comes down to transfer of technology is indeed not immune from the scope of application of competition law. For decades, the European Court of Justice (or the “ECJ”) has particularly posited that Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”)² can be applied to agreements under which an IPR-holder gives a licence or where the IPR-holder refuses another party a licence to exploit his IP.³ However, the licensing of intellectual property/technology rights cannot in itself founder against any objection in a competition law context, since the grant of a licence leads precisely to the spread of technology and innovation and therefore, in and of itself, promotes competition.
3. The EU’s approach to the application of competition law to technology transfer agreements was, until 30 April 2014, covered by (i) a technology transfer block exemption regulation (“TTBER”) and (ii) accompanying guidelines (“TTBER Guidelines”), both adopted in 2004.⁴ The TTBER “*safe harbour*” exempted certain types of (non-problematic) technology transfer agreements, while the Guidelines addressed both the application of the TTBER and the assessment under EU competition law of technology transfer agreements that do not benefit from the “*safe harbour*”.

2 With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102 TFEU. For the purposes of this contribution, references to Articles 101 and/or 102 TFEU are to be understood as references to Articles 81 and/or 82 of the EC Treaty where appropriate.

3 See for instance ECJ, 16 March 2000, *Compagnie Maritime Belge Transports v. Comm.*, C-395/96 P and C-396/96 P, ECR 2000, I-1365, no. 130.

4 Commission Regulation (EC) No. 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (“TTBER 2004”), OJ L-123/11, 27 April 2004; Commission Notice – Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements (“TTBER Guidelines 2004”), OJ C-101/2, 27 April 2004.

4. This TTBER (hereinafter “TTBER 2004”) and related Guidelines (hereinafter “TTBER Guidelines 2004”) were set to expire on 30 April 2014. In view of the overall positive experience with their application and taking into account further experience acquired since their adoption, the Commission considered it appropriate to adopt and apply, as from 1 May 2014, a new block exemption regulation and guidelines. On 20 February 2013, the Commission published for consultation a draft of the revised TTBER and new TTBER Guidelines.⁵ The consultation period, seeking stakeholders’ views on these proposals, ended on 17 May 2013. Numerous contributions were submitted by (business related and academic) stakeholders (such as the International Chamber of Commerce, the Licensing Executive Society International, the American Chamber of Commerce to the European Union, Microsoft, the University of Strathclyde, etc.). Finally, on 21 March 2014, the final text of the revised TTBER (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, hereinafter “TTBER 2014”)⁶, and accompanying Guidelines (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, hereinafter “TTBER Guidelines 2014”)⁷ have been published.⁸

5. Hereinafter we will, while reminding the reader of the previous ‘2004 regime’ (which remains relevant until 30 April 2015 for agreements already in force on 30 April 2014), highlight the main changes of the new technology transfer exemption regime and assess their possible impact on the desired strengthening of future incentives for research and innovation. For a more in-depth analysis of the ‘2004 regime’, the

5 Draft Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements (“Draft TTBER”) (http://ec.europa.eu/competition/consultations/2013_technology_transfer/regulation_en.pdf); draft 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 (“Draft TTBER Guidelines”), (http://ec.europa.eu/competition/consultations/2013_technology_transfer/guidelines_en.pdf).

6 OJ L-93/17, 28 March 2014 (http://ec.europa.eu/competition/antitrust/legislation/technology_transfer_regulation_en.pdf).

7 OJ C 89/3, 28 March 2014 (http://ec.europa.eu/competition/antitrust/legislation/technology_transfer_guidelines_en.pdf).

8 See Press Release of the European Commission of 21 March 2014: http://europa.eu/rapid/press-release_IP-14-299_en.htm?locale=en.

reader is referred to Y. VAN COUTER and B. VANBRABANT, *License Agreements, Competition and the Internal Market*, Brussels, Larcier, 2008, 200 p.⁹

9 See also the more elaborated Dutch version of this book: Y. VAN COUTER and B. VANBRABANT, *Handboek licentieovereenkomsten*, Brussels, Larcier, 2008, 392 p.

§1. APPLICATION OF ARTICLE 101 TFEU TO TECHNOLOGY TRANSFER AGREEMENTS – GENERAL¹⁰

5. Article 101(1) TFEU contains a general prohibition on the formation of cartels, which are considered to be incompatible with the common market.¹¹
6. Applied to technology transfer agreements, Article 101(1) TFEU prohibits agreements whose object or effect is the restriction of inter-technology and/or intra-technology competition.¹²

Whether a licence agreement restricts *inter-* and/or *intra-*technology competition, has to be assessed in terms of the factual framework within which the competition would come into play but for the agreement with its purported restrictions.¹³ The degree to which the agreement affects (or could affect) *inter-* or *intra-*technology competition on the market, in principle has to be assessed on the basis of the following two questions:¹⁴

10 For a more detailed analysis, see Y. VAN COUTER and B. VANBRABANT, *License Agreements, Competition and the Internal Market*, Brussels, Larcier, 2008, p. 5-12.

11 “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 common 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.”

12 See (2004 and 2014) TTBER Guidelines, no. 10 in conjunction with no. 13, second sentence.

13 Cf. with ECJ, 30 June 1966, *Société Technique Minière v. Maschinenbau Ulm*, no. 56/65, ECR 1966, 337; See also ECJ, 28 May 1998, *John Deere v. Comm.*, C-7/95P, ECR 1998, I-3111 [76].

14 See (2004 and 2014) TTBER Guidelines, no. 12.

- A. *with regard to inter-technology competition*: does the licence agreement restrict the actual or potential competition that would have existed in the absence of the agreement in question?
- B. *with regard to intra-technology competition*: does the licence agreement restrict the actual or potential competition that would have existed but for the contractual restrictions contained therein?

A positive answer to either of the foregoing questions means that the licence agreement in question falls under Article 101(1) TFEU, at least where it can be said that there is an appreciable effect on competition within the common market and on trade between Member States.

7. The next question is then whether the restrictions on competition included in the agreement are restrictive in terms of their objective or their nature (so-called *hardcore restrictions*).

Where a licence agreement contains hardcore restrictions, it will automatically be caught by the prohibition of Article 101(1) TFEU and it will be very improbable that the prohibition can be circumvented by applying Article 101(3) TFEU (see below, §3.B).¹⁵

8. Where a licence agreement or contractual restrictions are not aimed at restricting (or are not of a nature such as to restrict) *inter-* and/or *intra-*technology competition, it must be examined whether they nevertheless have appreciable, actual or potential¹⁶ anti-competitive effects *“to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability”*.¹⁷
9. Finally, it should not be overlooked that Article 101 TFEU will only be applicable where the agreement as a whole has an appreciable effect on trade between Member States. To assess this, the Commission has issued guidelines aimed at giving direction for applying the notion of *“affecting trade”*.¹⁸ Where trade between

15 See (2004 and 2014) TTBER Guidelines, no. 18.

16 ECJ, 28 May 1998, *John Deere v. Comm.*, C-7/95P, ECR 1998, I-3111 [77].

17 See (2004 and 2014) TTBER Guidelines 2014, no. 15.

18 Commission Notice — Guidelines on the “effect on trade” concept contained in Articles 81 and 82 of the Treaty, OJ C-81/96, 27 April 2004.

Member States is not affected, the Member State competition authorities and courts will exclusively apply their national competition law.¹⁹

10. Once Article 101(1) TFEU applies, the licence agreement is prohibited and it will only escape annulment if the four cumulative conditions of Article 101(3) TFEU are fulfilled. In the case of an agreement falling under a block exemption (which offers a so-called “safe harbour” to the agreement in question), there is a presumption that it complies with the four conditions of Article 101(3) TFEU.²⁰ In relation to technology transfer agreements, the TTBER 2004 has been applied since 1 May 2004.²¹ The TTBER 2014 applies since 1 May 2014, and will in principle expire on 30 April 2026. Between 1 May 2014 and 1 May 2015 a transitional regime applies. During the given transitional period the prohibition laid down in Article 101(1) TFEU shall not apply to agreements already in force on 30 April 2014 provided that they comply at that moment with the TTBER 2004 exemption conditions.²²

Once the (technology rights transfer) agreement is covered by the TTBER, national law can no longer void it.²³ In the case of (technology rights transfer) agreements not covered by a block exemption, both the Commission and the national competition authorities and courts are nevertheless able to determine that licence agreements in restraint of competition within the meaning of Article 101(1) TFEU have the effect of promoting competition in the form of an improvement in efficiency (in terms of Article 101 (3) TFEU) that counters the effects by which they negatively affect competition, and are therefore eligible for an exemption to the prohibition of Article 101(1) TFEU.²⁴

19 See for example the Belgian Competition Act of 3 April 2013, Belgian Official Gazette, 26 April 2013, p. 25216 (inserted into the codified Economic Law Codex as “Title IV: Protection of Competition”, and entered into force on 6 September 2013).

20 With regard to technology licence agreements, see the TTBER Guidelines 2004, no. 65 and the TTBER Guidelines 2014, no. 79.

21 The TTBER 2004 had itself replaced Commission Regulation (EC) No. 240/96 of 31 January 1996 on the application of Article 85(3) of the Treaty to certain categories of technology transfer agreements (OJ L-31/2, 9 February 1996). For a brief summary of the legislative history and the underlying reasons for replacing Commission Regulation (EC) No. 240/96, the reader is referred to P. VOS, “De nieuwe technologievrijstelling”, *NTER* 2004, 8-9, 212.

22 See articles 10 and 11 TTBER 2014.

23 See the TTBER Guidelines 2004, no. 34, 36 and the TTBER Guidelines 2014, no. 40, 42.

24 See particularly no. 4 in Council Regulation (EC) No. 1/2003 of 16 December 2002, OJ L-1 [1], 4 January 2003, in conjunction with the TTBER Guidelines.

11. On the basis of the TTBER 2004 and the TTBER 2014 (and the related guidelines), a distinction is to be drawn amongst the following technology rights transfer agreements:

- A. two-party technology rights (including software related copyright) transfer agreements;
- B. three- or more-party technology rights transfer agreements;
- C. agreements setting-up technology pools²⁵, regardless of the number of parties;
- D. licence agreements under which copyright (other than software related) is licenced with the aim of reproduction and distribution of a protected work;
- E. licence agreements under which trade marks and other rights related to copyright are licenced (e.g. rental and public performance rights in particular for films or music).

Only *the first category* is capable of falling within the scope of the safe harbour of the (former and revised) TTBER, at least where the conditions for its application are fulfilled (see below, §3). The Commission and/or the national competition authorities and/or the national courts will test this first category in terms of the TTBER using the principles set forth in the TTBER Guidelines.

It is to be noted though that, as regards the licensing of software copyright for the purpose of *mere* reproduction and distribution of the protected work (e.g. the reproduction by the licensee according to a master copy of the software with a view of selling it on to end users, as opposed to the reproduction of the software by incorporating it into a device with which the software interacts)²⁶, this is not considered to be “production” within the meaning of the TTBER 2014 and the TTBER Guidelines 2014. Such reproduction for distribution where a licence is granted to reproduce the software on a carrier, regardless of the technical means by which the software is distributed, is instead meant to be covered by Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101 (3) TFEU (“VABER”) and is, according to the Commission, no longer considered to be of a similar nature as technology transfer agreements normally raising comparable

25 This concerns agreements under which technologies are combined with the aim of licensing the constituted packages of intellectual property rights to participants in the pool and/or third parties (see the TTBER Guidelines 2004, no. 210 and the TTBER Guidelines 2014, no. 244).

26 See the TTBER Guidelines 2014, no. 63.

issues.²⁷ The explanation that is given, namely that the TTBER applies to cases where technology rights are licenced “for the purposes of producing goods and services” and not where there is no “direct link between the licensed technology rights and a contract product”,²⁸ does not really convince. Indeed, and as opposed to a simple vertical (distribution) agreement, the contract product (software) is still obtained by an authorised use of the intellectual property right (copyright) concerned, which in and of itself does not exhaust the given intellectual property right until the first authorised sale has taken place. It is moreover to be noted that the fact that the licensee is also entitled to subsequently distribute the obtained contract product does not disqualify the licensing of patent protected software from TTBER coverage; there is in our view no reason to treat copyright protected software any differently. And how does one reconcile this different treatment with the maintained general rule that the Commission will apply the principles set out in the TTBER and the TTBER Guidelines (by analogy) when assessing the licensing of copyright other than software under Article 101 TFEU?²⁹

12. The *second, third and fourth categories* do not fall under the (former and revised) TTBER and therefore have to be tested individually in terms of Article 101(3) TFEU, albeit in this regard that the (former and revised) TTBER Guidelines apply (third category) or can at least be used as guidance *by analogy* in this exercise (second and fourth categories).³⁰
13. The *fifth category* also does not fall under the TTBER and will therefore require to be individually assessed in terms of the exemption conditions under Article 101 (3) TFEU. Moreover, owing to the somewhat specific nature of this sort of licence

27 See the TTBER Guidelines 2014, no. 62 and note the difference with the TTBER Guidelines 2004 where the production of copies for resale is considered to be similar to technology licensing (See the TTBER Guidelines 2004, no. 51). The TTBER Guidelines 2014 further clarify that the TTBER 2014 and related guidelines do not cover the licensing of software copyright and distribution of software by means of “shrink wrap” licenses or the licensing of software copyright and distribution of software by means of online downloading (see the TTBER Guidelines 2014, no. 62).

28 TTBER Guidelines 2014, no. 61.

29 See the TTBER Guidelines 2014, no. 48; see also below, under n° 21.

30 See the TTBER Guidelines 2004, no. 40 and the TTBER Guidelines 2014, no. 57 (regarding three- or more-party technology transfer licence agreements). See the TTBER Guidelines 2004, no. 51 and the TTBER Guidelines 2014, no. 47-48 (regarding not software related copyright protected works).

agreements, the TTBER Guidelines will not be able to be used as guidance or even as an analogy in this regard.³¹

14. However, and since the 2004 regime, the fact that certain IPR did not fall under the TTBER (e.g. trade marks and copyright, other than software copyright) did not mean that they cannot form part of the subject-matter of technology transfer agreements to which the TTBER is applicable, provided they bore a direct relation to the exploitation of the technology that was licensed and provided that they did not constitute the primary subject-matter of the agreement.³² Hence, a trade mark licence qualified for the TTBER safe harbour if it enabled the licensee to better exploit the licensed technology by making it easier for the consumer to make a link between the product and the features it conferred on the licensed technology and on condition that the trade mark was not a more important subject-matter of the licence agreement than the technology itself.³³

Under the TTBER 2004, the Commission thereto applied a monetary value test which came down to a technology transfer agreement not being covered by the TTBER as soon as the licensee paid more for the use of the trade mark than for the use of the technology (e.g. a patent).³⁴

Under the revised regime, to the extent that such trade mark (or copyright that is not a software copyright) is directly related to the production or sale of the contract products³⁵ and provided that the trade mark (or copyright that is not a software copyright) enables the licensee to better exploit the licenced technology, the TTBER will cover technology transfer agreements even if the principal interest of the parties lies in the exploitation of that trade mark (or copyright, other than software copyright) (e.g. the main object of the agreement is the trade mark where the value of the licenced technology to the licensee is limited because the licensee

31 See the TTBER Guidelines 2004, no. 52 and the TTBER Guidelines 2014, no. 49 (regarding the licensing of rental rights and public performance rights protected by copyright, in particular for films or music. With reference to Case 262/81, Coditel (II), (1982) ECR 3381 it is stated that in the application of article 101 TFEU the specificities of the work and the way it is exploited should be taken into account); see also the TTBER Guidelines 2004, no. 53 and the TTBER Guidelines 2014, no. 50 (regarding trade mark licences).

32 See TTBER 2004, recital no. 9 and art. 1(b); see also the TTBER Guidelines 2004, no. 50.

33 See the TTBER Guidelines 2004, no. 50.

34 Cfr. the TTBER Guidelines 2004, nos. 49-50.

35 Compare with the Draft revised TTBER, as published in 2013 that still read as follows: "(...) *directly and exclusively related to the production of the contract products (...)*" (no. 51).

already employs an identical or very similar technology).³⁶ Thus, even where the value to the licensee of the licenced technology is limited by comparison with the similarly licenced trade mark and although the primary subject-matter of the licence agreement is therefore the trade mark and not the technology, the TTBER will under the new test be applicable.³⁷ The new test thus avoids that identical licensing agreements are treated differently only because of the agreed value of the licenced technology. This indeed makes sense.

15. Where a technology transfer agreement meets the conditions laid down in the TTBER, the agreement in question is valid and legally enforceable. The exemption thus offered can only be put a (prospective) stop to by repeal of the TTBER (see below, §3.D)³⁸ or by the Commission declaring it to be inapplicable (see below, §3.E).³⁹ Only where a technology transfer agreement falls outside the scope of application of the TTBER, and also outside the scope of application of a “*safe harbour*” offered by any other block exemption, does it become relevant to assess the agreement in question in terms of Article 101 TFEU (see below, §4)⁴⁰.

36 See the TTBER Guidelines 2014, no. 47.

37 Cf. EC Commission Decision no. 90/186/EEC, 23 March 1990, *Moosehead/Whitbread*, OJ L-100/32, 20 April 1990.

38 See TTBER 2004, recitals no. 16 and 17 in conjunction with art. 6. See also the TTBER 2014, recitals no. 17 and 18 in conjunction with article 6.

39 See TTBER 2004 and the TTBER 2014, art. 7.

40 See TTBER 2004 as well as the TTBER 2014, recital no. 8; see also the TTBER Guidelines 2004, nos. 36 and 37 and the TTBER Guidelines 2014, nos. 42 and 43.

§2. THE SCOPE OF APPLICATION OF THE TTBER

16. The TTBER applies to (1) agreements (2) that concern the transfer of technology rights (3) between two undertakings (4) under which consent for the production of contract products is granted⁴¹ and (5) that contain restraints of competition within the meaning of Article 101(1) TFEU (*i.e.* have an effect on the territory of the EEA).⁴²

The exemption provided for in the TTBER also applies to provisions, in technology transfer agreements, which relate to the purchase of products by the licensee or which relate to the licensing or assignment of other intellectual property rights or know-how to the licensee, if, and to the extent that, those provisions are directly related to the production or sale of the contract products.⁴³

17. In this respect, the primary subject-matter of an agreement that concerns the transfer of technology rights, is the grant of permission by the licensor/holder of the intellectual property rights over the technology in question to the licensee (and/or its sub-contractors) for the production of contract products or services, directly or indirectly on the basis of that technology,⁴⁴ regardless of whether the technology is used in the production process or incorporated into the product or service itself.⁴⁵

41 Art. 2, first paragraph, TTBER 2004 and TTBER 2014; Art. 2, first paragraph of the Draft TTBER specified that the subject-matter is to be “*the production of contract products by the licensee and/or its subcontractor(s)*” [emphasis added]. This specification was deleted again in the final text of the TTBER 2014, but inserted into art. 1(1)(c)(i) TTBER 2014 (“*Technology transfer agreement means: a technology rights licensing agreement entered into between two undertakings for the purpose of the production of contract products by the licensee and/or its sub-contractor(s)*”).

42 Art. 2, second paragraph of the TTBER 2014 in conjunction with art. 1(1)(c)(i) TTBER 2014. For a more detailed overview and analysis of these five elements, we refer to Y. VAN COUTER and B. VANBRABANT, License Agreements, Competition and the Internal Market, Brussels, Larcier, 2008, p. 13-19.

43 Newly inserted in art. 2, third paragraph of the TTBER 2014.

44 Art. 1(1)(b) in conjunction with 1(1)(f) TTBER 2004. See also Article 1(1)(c) in conjunction with 1(1)(g) TTBER 2014.

45 See the TTBER Guidelines 2004, no. 43. See also the TTBER Guidelines 2014, no. 61.

The framework of the TTBER is indeed based on the premise that there is a direct link between the licenced technology rights and a contract product. In cases where no such link exists, that is to say where the purpose of the agreement is not to enable the production of a contract product, the analytical framework of the TTBER (Guidelines) is deemed not to be appropriate.⁴⁶

In other words, the technology licenced will (or should) first and foremost put the licensee in a position, with or without further input, to produce the contract products or services.⁴⁷ To that extent, it will even suffice if the licensor undertakes not to exercise his IPR against the licensee, for the TTBER to be of application.⁴⁸ It is also of no import whether the products or services produced under licence are intended

46 See the TTBER Guidelines 2014, no. 61.

47 See the TTBER Guidelines 2004, no. 46. See also the TTBER Guidelines 2014, no. 44 where it is further specified that the TTBER only applies in Member States where the licensor holds relevant technology rights. Otherwise, there are no technology rights to be transferred within the meaning of the TTBER.

48 See the TTBER Guidelines 2004, no. 43; TTBER Guidelines 2014, no. 53. Therefore the TTBER also covers so-called non-assertion agreements and settlement agreements whereby the licensor permits the licensee to produce within the scope of the IPR concerned.

for the licensor in the framework of a so-called subcontracting agreement,⁴⁹ or intended for sale to third parties.⁵⁰

18. By contrast, the 2004 TTBER was not applicable to an agreement whose subject-matter is the grant of a *sub-licence* rather than the production of contract products.⁵¹

Under the revised regime, the TTBER remains applicable even though the primary object is sublicensing; the TTBER simply does not apply to those parts of technology transfer agreements that allow for sublicensing.⁵²

19. Technology can also form a component of other kinds of agreements, which need to be distinguished from a technology rights transfer agreement.

49 In this regard we nevertheless point out that, according to the Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85 (1) of the EEC Treaty (OJ C-1/2, 3 January 1979), subcontracting agreements under which the supplier undertakes to produce certain products exclusively for the principal generally do not come within the ambit of the prohibition under art. 101(1) TFEU. Other restrictions imposed on the subcontractor (licensee) such as with respect to carrying out or exploiting own research and development can nonetheless fall under art. 101(1) TFEU (see Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85 (1) of the EEC Treaty (OJ C-1/2 [3], 3 January 1979) and can therefore trigger application of the TTBER (cf. M. Buydens & L. De Muyter, "Le nouveau règlement d'exemption par catégorie pour les accords de transfert de technologie", CJ 2004, 2, p. 128, no. 20, especially footnote 31). The TTBER Guidelines 2014 now further specify that "*subcontracting agreements whereby the contractor determines the transfer price of the intermediate contract product between subcontractors in a value chain of subcontracting generally fall outside Article 101 (1) provided the contract products are exclusively produced for the contractor*" (See TTBER Guidelines 2014, no. 64).

50 See the TTBER Guidelines 2004, no. 44, in which it is stressed that, where apparatus is made available by the licensor and to be used in the production of the goods and services, the technology licensed must continue to be the primary subject-matter of the agreement. For this type of subcontracting the TTBER Guidelines 2014 now change the test, requiring that the supplied equipment that is part of a technology transfer agreement is directly related to the production of the contract products without there being a need that the licensed technology constitutes the primary object of the agreement (see the TTBER Guidelines 2014, no. 64).

51 See the TTBER Guidelines 2004, no. 42, albeit that the Commission will by analogy apply the principles of the TTBER and the TTBER Guidelines to the main licence agreement. See also the TTBER Guidelines 2014, no. 60.

52 See the TTBER Guidelines 2014, no. 60.

A technology rights transfer agreement must indeed be distinguished from a so-called *specialisation agreement*, under which two or more undertakings agree to produce certain products jointly,⁵³ and from a *research and development agreement*, under which two or more undertakings agree to carry out joint research and development and/or to jointly exploit the results thereof.⁵⁴ The revised TTBER now clarifies that it will only apply if the block exemption regulation on R&D agreements (RDBER) and the block exemption regulation on specialisation agreements (SABER) are not applicable.⁵⁵

Thus, licensing between the parties and by the parties to a joint R&D entity in the frame of a R&D agreement will be subject only to Regulation (EU) No 1217/2010 (“RDBER”) and not to the TTBER.⁵⁶ However, if technology developed pursuant to the R&D agreement is subsequently licenced to third parties by that joint entity, this licensing activity will fall within the scope of the TTBER given the fact that these third parties are not party to the R&D agreement.⁵⁷

53 Art. 1(1)(d) of Regulation (EU) No 1218/2010 of December 14, 2010 on the application of Article 101(3) of the Treaty of the Functioning of the European Union to certain categories of specialisation agreements, OJ L-335, 18 December 2010, p. 43 (“SABER”).

54 See art. 1(1)(a) in conjunction with art. 1 (1)(m) of Regulation (EU) No 1217/2010 of December 14, 2010 on the application of Article 101(3) of the Treaty of the Functioning of the European Union to certain categories of research and development agreements, OJ 2010 L-335, 18 December 2010, p. 36 (“RDBER”). With reference to Article 1(1)(a)(vi) of the RDBER, the TTBER Guidelines 2014 (no. 73) explicitly state that the RDBER “covers paid-for research and development agreements whereby two or more undertakings agree that the research and development is carried out by one party and financed by another party, with or without exploitation of the results thereof”. Neither do the TTBER or TTBER Guidelines apply to agreements under which a technology is licensed in order to enable performance by the licensee (in the territory covered by the technology or other territories) of further *research and development* (whether or not with the aim of returning the improved technology package to the licensor) rather than to enable the licensee to manufacture contract products, possibly with an ancillary obligation on the part of the licensee also to carry out development activities on the fringe of production (See the TTBER Guidelines 2004, no. 45. See also the TTBER Guidelines 2014, no. 66, further clarifying that “the TTBER and the guidelines do not cover agreements whereby a technology is licensed for the purpose of enabling the licensee to carry out further research and development in various fields, **including further developing a product arising out of such research and development**” [emphasis added]).

55 See the TTBER 2014, article 9 in conjunction with recital no. 7.

56 See the TTBER Guidelines 2014, no. 74.

57 Ibidem; cfr. the TTBER Guidelines 2004, no. 60.

As regards production joint ventures, the licensing of technology by the participating entities will be subject only to Regulation (EU) No 1218/2010 (“SABER”) and not to the TTBER.⁵⁸

20. Nor, regardless of the number of parties involved, is the TTBER applicable to agreements to set up so-called “*technology pools*” whereby two or more parties agree to group their respective technologies and licence them as a package, or pool, and in which the conditions are thus laid down for its functioning. The separate licences that are granted to third parties over the “*technology pool*” with a view to the production of contract products can however fall within the scope of application of the TTBER (see also below, §4.C).⁵⁹
21. The TTBR includes a comprehensive list of IPR that can cover technology and to which the TTBER can therefore apply.⁶⁰ In this respect, it is worth pointing out here that the licensing of copyright for the purposes of reproduction and distribution of a protected work (other than a software)⁶¹ was regarded by the Commission in 2004 as being comparable to the licensing of technology.⁶² The Commission therefore analysed this sort of licence by analogy in terms of the TTBER and the TTBER Guidelines.⁶³ The TTBER Guidelines 2014 does no longer refer to comparability with technology licensing but nevertheless maintain the *mutatis mutandis* assessment.⁶⁴

On the other hand, licence agreements for the performance of copyright-protected works and other rights related to copyright (such as the performance or rental of protected material such as films and music) are not liable to application of the

58 See the TTBER Guidelines 2014, no. 72.

59 See the TTBER Guidelines 2004, no. 41. See also the TTBER Guidelines 2014, no. 56 and no. 247, where the Commission clarifies that agreements establishing technology pools and licensing out from technology pools are generally multiparty agreements and are therefore (in general) not covered by the TTBER.

60 See art. 1(1)(b) TTBER 2014; See also the TTBER Guidelines 2004, no. 46 and the TTBER Guidelines 2014, no. 44.

61 The reasons why the TTBER does not apply to this type of licence agreement is due entirely to the legal fundament of the TTBER, which does not qualify copyright as an “industrial property right” (see art. 1(1)(b) Regulation No. 19/65/EEC of 2 March of the Council on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices, OJ 36/533, 6 March 1965).

62 See the TTBER Guidelines 2004, no. 51.

63 See the TTBER Guidelines 2004, no. 51 and the TTBER Guidelines 2014, no. 48.

64 See the TTBER Guidelines 2014, no. 48; see also above, under no. 11.

TTBER and the TTBER Guidelines by analogy owing to the so-called specific features of the works in question and their exploitation.⁶⁵

Owing to the fact that they are more akin to distribution agreements than technology licence agreements, trade mark licences will also not be analysed (by analogy) in terms of the principles of the TTBER (Guidelines).⁶⁶ In so far as a trade mark licence relates to the use, sale or resale of products and/or services (and not to the exploitation of licenced technology) and does not constitute the primary subject-matter of the vertical agreement in question, it will (nonetheless) fall within the scope of application of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101 (3) TFEU to categories of vertical agreements and concerted practices (“VABER”).⁶⁷

22. The notion of *transfer* means that the technology must pass from one undertaking to the other, generally in the form of a *licence or sub-licence*, whereby the licensor (or licensee) confers the right on the licensee (or sub-licensee) to use his technology in return for the payment of royalties.⁶⁸ However, (improper) sale of the aforementioned intellectual property rights can in certain circumstances also be deemed a technology transfer agreement if the *risk* that goes hand in hand with exploitation of the technology rights partly remains in the hands of the seller. This will notably be the case where the sum required to be paid for the sale is dependent on the turnover that the purchaser/licensee (subsequently) obtains from the products that are produced with the help of the technology transferred or on the

65 See the TTBER Guidelines 2004, no. 52. Compare with the TTBER Guidelines 2014, no. 49 (see also above, under no. 13). An *ad hoc* individual analysis in terms of art. 101 TFEU taking into account the specificities of the work and the way it is exploited will then be appropriate (see in the same sense the TTBER Guidelines 2014, no. 49. For examples of such *ad hoc* assessment reference is made to EC Commission Decision no. Comp/C2/38.014, 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty (IFPI “Simulcasting”), OJ L-107/58, 30 April 2003; see also EC Commission Decision no. Comp/C2/38.287, 29 December 2003 relating to a proceeding under Article 81 of the EC Treaty (*Telenor/Canal+/Canal Digital*) [www.worldlii.org/eu/cases/ECComm/2003/100.html].

66 See the TTBER Guidelines 2004, no. 53. See also the TTBER Guidelines 2014, no. 50. Things may be different however if the trade mark licence enables the licensee to better exploit a transferred technology (see above under no. 14).

67 See the TTBER Guidelines 2004, no. 53; TTBER Guidelines 2014, no. 50 in conjunction with art. 2(3) VABER.

68 See the TTBER Guidelines 2004, no. 48 and the TTBER Guidelines 2014, no. 51.

quantity of products that are produced or the number of transactions carried out using the technology in question.⁶⁹

23. Under the 2004 TTBER regime, technology transfer agreements could, in addition to the primary subject-matter described above, also contain provisions relating to the purchase and sale of products,⁷⁰ provided those provisions were only ancillary and bore a direct relationship to the production of the contract products and thus to the application of the licenced technology.⁷¹ Whereas the former test thus included an assessment as to whether the provision, for example purchase conditions for input to produce the products covered by the agreement, was more important than the actual licensing of technology, the new test only looks at whether the provisions are “*directly related*”⁷² to what the licensee produces or sells with the licenced technology. In practice, this means that even if the input bought from the licensor is worth more than the licenced technology, and its price therefore exceeds the royalties to be paid for the licenced technology, the provisions relating to the purchase will still be covered by the TTBER.⁷³ However, this does nothing to negate

69 Art. 1(1)(b) TTBER 2004. This will notably be the case where the sum required to be paid for the sale is dependent on the turnover that the purchaser/licensee (subsequently) obtains from the products that are produced with the help of the technology transferred or on the quantity of products that are produced or the number of transactions carried out using the technology in question. This example is no longer retained in the TTBER 2014 (Art. 1(1) (c)). However, there does not appear to be any reason to doubt on the validity of the given example, as it has been inserted in the TTBER Guidelines 2014 (no. 52).

70 For instance the obligation to purchase equipment or inputs for processes that are specifically designed for efficient exploitation of the licensed technology. However, the TTBER will not be applicable to the purchase of products that bear no relation to the products into which the licensed technology is incorporated where, for example, that purchase is not intended to be used with the products manufactured under licence but, by contrast, relates to an activity on a separate product market (see the TTBER Guidelines 2004, no. 49). For instance, where milk is sold together with the licensing of technology to produce cheese, only the milk used for the production of cheese with the licensed technology will be covered by the TTBER (See the TTBER Guidelines 2014, no. 46)

71 Art. 1(1)(b) TTBER 2004 in conjunction with recital no. 9 TTBER 2004.

72 Art. 2(3) TTBER 2014; Compare with no. 50 of the Draft TTBER Guidelines that read as follows: “*directly and exclusively related*” (emphasis added).

73 See TTBER Guidelines 2004, no. 49 and compare with the TTBER Guidelines 2014, no. 46.

the fact that the (*distribution*) *agreements* between the licensee and his customers/ distributors will be subject to the VABER and the Guidelines on vertical restraints.⁷⁴

24. The Commission's public consultation showed that many stakeholders welcome the above described clarifications as to the scope of the TTBER.⁷⁵

74 See the TTBER Guidelines 2004, no. 62-64 and the TTBER Guidelines 2014, no. 76-78. For a more detailed discussion, we refer to Y. VAN COUTER and B. VANBRABANT, *License Agreements, Competition and the Internal Market*, Brussels, Larcier, 2008, p. 17-18.

75 See European Commission, Overview of submissions received from stakeholders in the public consultation on the draft proposal for a revised block exemption for technology transfer agreements and for revised guidelines (source: http://ec.europa.eu/competition/consultations/2013_technology_transfer/index_en.html).

§3. THE CONDITIONS FOR APPLYING THE “SAFE HARBOUR” OFFERED BY THE TTBER⁷⁶

25. The TTBER 2014 came into force on 1 May 2014 and is set to expire on 30 April 2026. Until 30 April 2015, the “safe harbour” for existing agreements that comply with the TTBER 2004 exemption conditions shall last. As from 1 May 2015, such agreements will have to comply with the TTBER 2014.⁷⁷
26. The three exemption conditions laid down by the TTBER are as follows:
- (A) the applicable market share threshold is not exceeded;
 - (B) the agreement does not contain any hardcore restrictions;
 - (C) the agreement does not contain any excluded restrictions.

All of these criteria are discussed below.

A. *The applicable market share threshold is not exceeded*⁷⁸

27. The TTBER 2004 was based on the following two premises:
- (1) in the case of technology transfer agreements entered into *between competing undertakings*, it may be presumed that such agreements result in an improvement in production or product distribution and that consumers enjoy a reasonable share of the resulting benefits where the *joint market share* of the contract parties *is not greater than 20%* of the relevant markets;⁷⁹
 - (2) in the case of technology transfer agreements entered into *between non-competing undertakings*, it can be presumed that such agreements result

76 See Y. VAN COUTER and B. VANBRABANT, *License Agreements, Competition and the Internal Market*, Brussels, Larcier, 2008, p. 28-64.

77 See arts. 10-11 TTBER 2014.

78 The Commission illustrates this criterion by giving concrete examples in the TTBER Guidelines (see TTBER Guidelines 2004, no. 73, Draft TTBER Guidelines 2013, nr. 83, with a newly inserted third example, which disappeared again in the TTBER Guidelines 2014, no. 93).

79 See TTBER 2014, recital no. 10, in conjunction with art. 3(1) TTBER 2014.

in an improvement in production or product distribution and that consumers enjoy a reasonable share of the resulting benefits where the *individual market share* of each of the contract parties *is not greater than 30%* of the relevant markets.⁸⁰

28. The Draft revised TTBER, published in 2013, provided for the application of the market share threshold of 20%, up to which agreements between competitors are deemed unproblematic, also to the situation where, in an agreement between non-competitors, the licensee owns a technology which it only uses for in-house production and which is substitutable for the licenced technology.⁸¹

The aim was to capture the higher potential for anticompetitive effects of this type of agreement on the downstream product market or the upstream innovation market (as compared to a technology transfer agreement between non-competitors where the licensee does not own a technology used in-house). In this type of situation, the licensee could (under the 2004 TTBER) for instance foreclose potential entrants to the downstream product market by entering into an exclusive licence with the only company licensing out technology, but still benefit from the more beneficial market share thresholds for non-competitors (30%).⁸² The Commission intended to stop and prevent any such behaviour, by inserting a new article 3(2) in the TTBER 2014.

However, this proposition for the introduction of a third market share threshold was highly criticized by stakeholders as it complicated the exemption analysis covering basically theoretical situations. The Commission therefore decided to abandon this additional market share threshold in the TTBER 2014.⁸³

80 See TTBER 2014, recital no. 11, in conjunction with art. 3(2) TTBER 2014.

81 See the Draft TTBER, article 3(2).

82 See the Draft TTBER Guidelines, no. 72.

83 See Press Release of the European Commission of 21 March 2014: http://europa.eu/rapid/press-release_IP-14-299_en.htm?locale=en. See also the ICC's Comments on DG COMP's Draft proposal for a revised block exemption for technology transfer agreements and for revised guidelines, p. 2 (23 May 2013, source: http://ec.europa.eu/competition/consultations/2013_technology_transfer/icc_en.pdf), the LESI (Licensing Executives Society International) Comments on the proposed amendments to the Technology Transfer Block Exemption Regulation (TTBER), section 1, no. 5 (17 May 2013, source: http://ec.europa.eu/competition/consultations/2013_technology_transfer/icc_en.pdf), and the Consultation Response of the International League of Competition Law ad hoc Committee on the revision of the Technology Transfer Block Exemption Regulation, Section 2.3, p. 2.3 (17 May 2013, source: http://ec.europa.eu/competition/consultations/2013_technology_transfer/lidc_en.pdf).

29. Beneath the market share thresholds, licence agreements are presumed to qualify for the inapplicability provision under Article 101(1) TFEU, in terms of Article 101(3) TFEU.⁸⁴ Thus, it can be said that the market share thresholds constitute the major portal to the “safe harbour”.
30. The effectiveness of market share thresholds in evaluating the market power of the contract parties to technology rights licensing agreements remains however questionable as a result of the difficulty in identifying the relevant market(s) and owing to the rapid evolution of technology and the attendant fast evolution of the relevant market shares.⁸⁵

They are in particular meaningless if the technology is new (no market yet) or rapidly changing and they could therefore considerably undermine the degree of legal certainty offered by the TTBER.

Moreover, many SME's do not have the resources to invest in expensive studies for the definition of the relevant market and their respective market shares therein. In this respect it should be noted though that agreements between SME's will rarely be caught by Article 101(1) TFEU as they will in general not affect trade between Member States. A reminder of and reference to the Commission Notice –

84 This presumption is based on art. 2 in conjunction with arts. 3(1) and 3(2) TTBER 2014.

85 In this regard, see M. BUYDENS & L. DE MUYTER, “Le nouveau règlement d'exemption par catégorie pour les accords de transfert de technologie”, CJ 2004, 2, pp. 129-130, no. 29. See also A. PUTTEMANS, “Le règlement d'exemption (N° CE/772/2004) applicable aux licences de technologie (brevet, savoir-faire, droit d'auteur sur logiciel, dessin ou modèle)” in A. PUTTEMANS (ed.), *Aspects récents du droit de la concurrence*, Brussels, Bruylant, 2005, p. 90, no. 19. Also the outcome of the Commission's public consultation showed that the use of market share thresholds remains a heavily debated issue among the participating stakeholders. In this respect, it is for example argued that “Regulations where the kinks are linked to market share are likely to be particularly problematic. (...) In recognition of this, U.S. antitrust practice has increasingly de-emphasized specific market share thresholds relative to evidence directly connected to competitive effects. Moreover, concerns associated with product market definition and share calculation are likely to be particularly pronounced in the highly dynamic, rapidly evolving sectors where technology transfer agreements are most likely to be used.” (see the Joint Comments of the American Bar Association's section of antitrust law, section of intellectual property law, section of international law, and section of science and technology law on the European Commission draft proposal for a revised block exemption for technology transfer agreements and for revised guidelines, 16 May 2013, p. 2, source: http://ec.europa.eu/competition/consultations/2013_technology_transfer/aba_en.pdf).

Guidelines on the “effect on trade” concept⁸⁶ in the preamble of the TTBER⁸⁷ would therefore have been useful.

A.1. *Determining the competitive relationship: competitors v. non-competitors*

31. The applicable market share threshold depends on whether or not the contract parties are to be regarded as competitors.

For the application of the TTBER, “*competing undertakings*” are undertakings that compete on the relevant technology market and/or on the relevant product market⁸⁸ (to be understood as also including the “*relevant geographical market*”).⁸⁹

32. *Competing undertakings on the “relevant technology market”*⁹⁰ are undertakings that grant licences over competing technologies.⁹¹ It is worthy of note that what are concerned must be *actual competitors* on the technology market. Hence, no

86 Commission Notice — Guidelines on the “effect on trade” concept contained in Articles 81 and 82 of the Treaty, OJ C-81/96, 27 April 2004, 50.

87 Instead of in a footnote in the TTBER Guidelines 2014 (footnote no. 5).

88 See art. 1(1)(j) TTBER 2004. Compare with art. 1(1)(n) of the TTBER 2014.

89 See the TTBER Guidelines 2014, no. 23. See EC Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C-372/5, 9 December 1997. The TTBER now clarifies this by defining the “*relevant market*” as “(...) *the combination of the relevant product or technology market with the relevant geographic market*”. The latter is in its turn defined as comprising “*the area in which the undertakings concerned are involved in the supply and demand of products or the licensing of technology rights, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas*” (see the TTBER 2014, art. 1(1)(m) and 1(1)(l)).

90 The TTBER 2014 now separately defines the “*relevant technology market*” as comprising “*the licensed technology rights and their substitutes, that is to say all those technology rights which are regarded as interchangeable or substitutable by the licensee, by reason of the technology rights’ characteristics, the royalties payable in respect of those rights and their intended use*” (see art. 1(1)(k)).

91 The Draft TTBER added hereto the following specification: “*without committing any infringement of each other’s intellectual property rights or misappropriating each other’s know-how*” (see art. 1(1)(n)(i) Draft TTBER). In the final version of the TTBER 2014, this specification was dropped.

account is taken of potential competition on the technology market in determining the applicable market share thresholds.⁹²

33. *Competing undertakings on the “relevant product market”* are undertakings that, in the absence of a technology transfer agreement, would both be active on the relevant product and geographical market(s) (actual competitors) or that, on the basis of realistic expectations, would make the necessary additional investments or engage in other necessary conversion costs in order timely to be able to enter the relevant product and geographical market(s) in the case of a small but permanent increase in the relevant prices (potential competitors); activity on or entry in the relevant market will not be possible in case of a so-called blocking position.⁹³ For assessment of whether the market share thresholds are exceeded, therefore, account is taken of *both actual and potential competition* on the product market.⁹⁴ As regards potential competition, the TTBER 2014 and related Guidelines now specify that a likely (commercially viable) entry should be assessed on realistic grounds, that is to say, based on the facts of the case at hand and it should not just be a more theoretical possibility (e.g. the potential competitor possesses assets that can easily be used to enter the market without incurring important sunk costs or it has already developed actual plans to enter the market).⁹⁵
34. *In sum*, for the purposes of the TTBER the contract parties are competitors *unless*, at the time the contract is entered into:

92 See art. 1(1)(j)(i) TTBER 2004. See also art. 1(1)(n)(i) of the TTBER 2014. See the TTBER Guidelines 2004, no. 30, and no. 66. Potential competition on the technology market is nonetheless taken account of where the licence agreement falls outside the scope of application of the TTBER. This will not lead however to the application of the hardcore list relating to agreements between competitors; see also the TTBER Guidelines 2014, no. 36, where it is further clarified that the reason for not taking into account potential competition on the technology market lays in the generally more difficult assessment on the technology market as to whether the parties are potential competitors.

93 See the 2004 TTBER Guidelines, no. 29, 32; see also the TTBER Guidelines 2014, no. 29, 31 and 32. A blocking position will be deemed to exist where, for instance, a patent belonging to one party relates to the improvement of a technology protected by a patent belonging to the other party since, for exploitation of the improvement patent, a licence is needed over the base patent. A blocking position, and the attendant resulting position of being non-competitors, will have to be demonstrated on the basis of objective factors, such as judicial orders or compelling expert assessments.

94 See art. 1(1)(j)(ii) TTBER 2004, art. 1(1)(n)(ii) TTBER 2014.

95 See the TTBER Guidelines 2014, no. 31 and the TTBER 2014, art. 1(1)(n)(ii).

- (i) the licensor is neither an actual nor a potential supplier of products on the relevant product market(s) (the licensor is then, for example, exclusively an R&D centre), *and*
- (ii) the licensee is not yet present on those product market(s) or, where he is already present on those product market(s), does not confer licences over a competing technology, regardless of whether the licensee possesses a competing technology and is producing on the basis thereof (since, at the most, it can then only be said that there is potential competition on the technology market).⁹⁶

or unless, at the time the contract is entered into:

- (i) the licensor is an actual or potential supplier of products on the relevant product market(s), *and*
- (ii) the licensee, who does not grant licences over a competing technology, is not yet present on the product market(s), nor will he be able to enter it (them) in time in the case of a small but permanent increase in the relevant prices;

or unless, at the time the contract is entered into, the parties possess technologies that result in a one-way or two-way blocking position.⁹⁷

The assessment of the competitive relationship between the contract parties is done at the time at which the agreement is entered into.

35. Finally, we would point out that the competitive relationship between contract parties can be *reclassified in the course of the licence agreement* as an agreement between non-competitors where it can be demonstrated that the licensee's technology (say, the technology for producing vinyl records) has been surpassed and is no longer competitive with the licensor's technology (say, CD technology). At the time of the conclusion of the agreement the parties are however considered to be competitors if at that time it is not obvious that the licensee's technology is obsolete or uncompetitive.⁹⁸ The requirement of '*obviousness*' of the breakthrough nature of the technology is a high burden of proof that may discourage licensing.

96 See the TTBER Guidelines 2004, no. 68, and the TTBER Guidelines 2014, no. 28 et seq.

97 See TTBER Guidelines 2004, no. 32; see also the TTBER Guidelines 2014, no. 29.

98 See the TTBER Guidelines 2004, no. 33. See also the TTBER Guidelines 2014, no. 37.

Conversely, the contract parties can also become competitors during the term of the licence agreement. In that case, the list of hardcore restrictions between non-competitors will continue to be applicable unless an essential provision of the licence agreement should later be altered.⁹⁹ Reclassification as an agreement between competitors is not therefore in itself sufficient for the hardcore restrictions between competitors to become applicable. Nevertheless, prudence is advocated when amending such a licence agreement during its term since such alterations can result in a loss of exemption where, at the time the agreement was entered into, a hardcore restriction proscribed only between competitors was included and it was only after contracting that the contract parties actually became competitors.¹⁰⁰ The TTBER 2014 now further specifies that “such an amendment includes the conclusion of a new technology transfer agreement between the parties concerning competing technology rights”.¹⁰¹

A.2. *Identifying the relevant market(s) and calculation of market share*

36. In order to be able to calculate market shares, it is first necessary to define and delimit the relevant market(s).¹⁰²

For this purpose, reference can first and foremost be made to the general *Commission Notice on the definition of relevant market for the purposes of Community competition law*.¹⁰³ Since technology is an *input* that is processed into a product (*i.e.* the *output*) or into the production process for a product, the licensing of the technology can have an impact on both input markets (*i.e.* the technology markets) and output markets (*i.e.* the product markets).¹⁰⁴ In order to be able to take account of the specific nature of technology, the TTBER Guidelines contain a number of supplementary rules for determining the relevant market(s) in respect of a technology rights transfer agreement.¹⁰⁵

99 See art. 4(3) TTBER 2014.

100 In this regard, see also P.-M. LOUIS, “Le nouveau règlement d’exemption par catégorie des accords de transfert de technologie: une modernisation et une simplification”, *CDE* 2004, 3-4, p. 384.

101 See the TTBER 2014, art. 4(3), last sentence. See also the TTBER Guidelines 2014, nos 39 and 85.

102 See Y. VAN COUTER and B. VANBRABANT, *License Agreements, Competition and the Internal Market*, Brussels, Larcier, 2008, p. 32-34.

103 OJ C-372/5, 9 December 1997. See also the TTBER Guidelines 2004, no. 19 and the TTBER Guidelines 2014, no. 19, both of which expressly refer to this Notice.

104 See the TTBER Guidelines 2004, no. 20. See also the TTBER Guidelines 2014, no. 20.

105 See the TTBER Guidelines 2004, nos. 19-25. See also the TTBER Guidelines 2014, nos. 19 – 26.

37. The *relevant technology market* encompasses technology rights that are regarded by the licensees as interchangeable with or substitutable for the licenced technology rights, by reason of the technology rights' characteristics, their royalties and their intended use.¹⁰⁶

To determine the market share on the relevant technology market, the market share of the licensor is calculated on the basis of the sales by him and all his licensees of products into which the licenced technology is incorporated, and this is done for each relevant (downstream) product and geographical market separately.¹⁰⁷ For the avoidance of any doubt the TTBER 2014 now explicitly prescribes that “*the market share of a licensor on a relevant market for the licenced technology rights shall be calculated on the basis of the presence of the licenced technology rights on the relevant market(s) (that is the product market(s) and the geographic market(s)) where the contract products are sold, that is on the basis of the sales data relating to the contract products produced by the licensor and its licensees combined*” (emphasis added).¹⁰⁸ Only in this way – by contrast with a calculation on the basis of the share of the technology in question in the total licence revenues from royalties – is account also then taken of:

- (i) any potential competition from undertakings that are producing with their own technology and that are likely to start licensing in the event of a small but permanent increase in the price for licences;
- (ii) the actual competition on the downstream product market that, aside from the share of the licensor in total licence revenues, will determine the licensor's market power. In a highly competitive product market, an increase in the royalties upstream affects the costs of the licensee(s) and his/their competitiveness, necessarily causing him/them to lose sales.¹⁰⁹

A technology's market share on the product market is thus a good indicator of licensor market power on the technology market. Such a footprint at the product level is at least a better criterion to compute market share on the technology market than royalty income. Not only is it generally difficult to obtain royalty income data,

106 See art. 1(1)(j)(i) TTBER 2004. See art. 1(1)(k) of the TTBER 2014.

107 See art. 3(3) TTBER 2004 in conjunction with the TTBER Guidelines 2004, no. 70; art. 8(d) TTBER 2014 and TTBER Guidelines 2014, no. 86.

108 Art. 8(d) of the TTBER 2014.

109 See the TTBER Guidelines 2004, no. 23. See also the TTBER Guidelines 2014, no. 25 and no. 86 et seq. where further detailed guidance is provided.

but such data may also lead to an underestimation of market power in the event that royalty income is reduced, for instance as a result of cross-licensing.¹¹⁰

Where the contract parties are competitors on the technology market, in determining the joint market share on the relevant technology market, sales of products incorporating the licensee's own technology are combined with sales of products in which the licenced technology is incorporated.¹¹¹

38. The *relevant product market* includes (finished and semi-finished) products that are regarded by purchasers as mutually interchangeable or substitutable by reason of their characteristics, their prices and their intended use.¹¹²

A.3. *The applicable market share thresholds*

39. Where the contract parties are *not competitors* and the agreement does not contain any hardcore restrictions (see below, §3.B), the TTBER is applicable on condition that the market share of *each of the parties separately* on each of the technology and product markets in question (taking into account their respective relevant geographical dimension) *does not exceed 30%*.¹¹³

However, we would point out that, according to the *de minimis* notice,¹¹⁴ an agreement between non-competitors is not in principle appreciably anti-competitive where the market share of each of the parties to the agreement is not greater than 15% on any of the relevant markets on which the agreement has an effect.

110 See the TTBER Guidelines 2014, no. 87.

111 See the TTBER Guidelines 2004, no. 70. See also the TTBER Guidelines 2014, no. 93, Example 3.

112 See art. 1(1)(j)(ii) TTBER 2004, in conjunction with the TTBER Guidelines 2004, no. 21. See also the TTBER 2014, art. 1(1)(j) in conjunction with the TTBER Guidelines 2014, no. 21. Cf. EC Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C-372/5, 9 December 1997, no. 7.

113 See art. 3(2) TTBER 2004 and the TTBER 2014.

114 The '*De minimis*' regime is currently put under revision. The European Commission wishes to ensure that the notice appropriately reflects the development of the ECJ case law, having recently established that the concept of a non-appreciable impact on competition (*de minimis*) does not apply when the agreement in question contains a so-called "by object restriction" (which is a severe restriction presumed to be anti-competitive as such). (See Judgement of 13 December 2012, *Expedia Inc. v. Autorité de la concurrence, et al.*, case C-226/11, not yet published). From a pure technical perspective, the revision will also ensure that *de minimis* does not need to be updated every time another competition law regulation is revised.

Accordingly, in the case of licence agreements between non-competitors, the TTBER comes into play in the case of separate market shares of *between 15 and 30%*.¹¹⁵

40. Where the contract parties are *competitors* and the agreement does not contain any hardcore restrictions (see below, §3.B), the TTBER is applicable provided the market share of *both parties together* on each of the relevant technology and product markets (including the relevant geographical markets) *does not exceed 20%*.¹¹⁶ In the case of an agreement between competitors, again as a consequence of the *de minimis* notice, competition will generally not be appreciably affected if the combined market share of the parties to the agreement is no greater than 10% on any of the relevant markets impacted by the agreement. *Accordingly*, in the case of technology transfer agreements between competitors, the TTBER's main role comes into play with a cumulative market share of *between 10 and 20%*.¹¹⁷
41. Finally, it should not be overlooked that it can happen that, upon signing the agreement, the contract parties do not exceed the applicable market share threshold but that they do exceed it *in the course of the agreement*. In that event, the TTBER continues to apply for *two successive calendar years* following the year in which the applicable market share threshold is first exceeded.¹¹⁸

A.4. *Concrete application of the first test criterion (market share)*

42. The Commission usefully illustrates the test criterion described above by giving specific examples in the TTBER Guidelines 2004 and 2014.¹¹⁹

115 Cf. P.-M. LOUIS, "Le nouveau règlement d'exemption par catégorie des accords de transfert de technologie: une modernisation et une simplification", *CDE* 2004, 3-4, p. 403.

116 See art. 3(1) TTBER 2014.

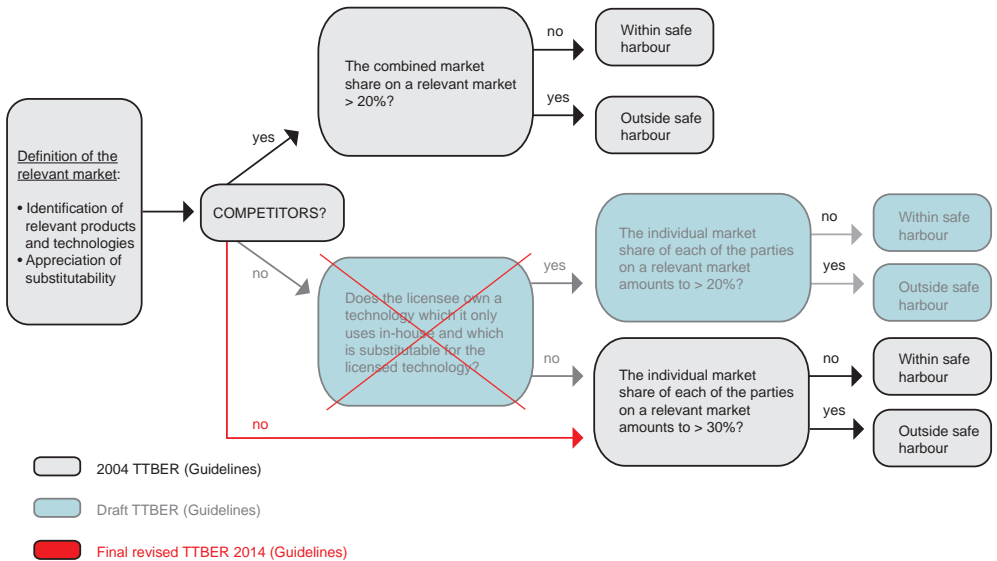
117 See P.-M. LOUIS, "Le nouveau règlement d'exemption par catégorie des accords de transfert de technologie: une modernisation et une simplification", *CDE* 2004, 3-4, p. 385.

118 See art. 8(2) TTBER 2004. See also art. 8(e) TTBER 2014 in conjunction with the TTBER Guidelines 2014, no. 90.

119 See the TTBER Guidelines 2004, no. 73. See also the TTBER Guidelines 2014, no. 93. The first two examples concern licensing between non-competitors. The third example deals with licensing between competitors. A fourth example was inserted into the Draft TTBER Guidelines 2013, relating to licensing between non-competitors but covering the hypothesis where the licensee owns a substitute technology; however this example was no longer retained in the final version of the revised TTBER (see *supra* under no. 28).

A.5. Schematic representation

The following diagram gives a schematic depiction of the (contemplated) test in terms of the market share condition:



B. The agreement does not contain hardcore restrictions¹²⁰

43. *Regardless of the market shares of the relevant undertakings, technology transfer agreements cannot in principle benefit from the safe harbour offered by the TTBER and in particular by way of the applicable market share threshold (i.e. in fact the presumption that the four conditions of Article 101(3) TFEU are fulfilled by virtue of an acceptable market power) where they contain competitive restraints that are restrictive by dint of their objective/nature. These are so-called hardcore restrictions.¹²¹ When they are included in an agreement, it can be assumed that the*

¹²⁰ See Y. VAN COUTER and B. VANBRABANT, *License Agreements, Competition and the Internal Market*, Brussels, Larcier, 2008, p. 38-55.

¹²¹ See TTBER 2004 in conjunction with the TTBER Guidelines 2004, no. 74. See also the TTBER 2014, art. 4. in conjunction with the TTBER Guidelines 2014, no. 94. For a more detailed analysis, we refer to Y. VAN COUTER and B. VANBRABANT, *License Agreements, Competition and the Internal Market*, Brussels, Larcier, 2008, p. 38.

agreement will produce negative effects on the market and fall under the prohibition contained in Article 101(1) TFEU. The agreement is also directly presumed to be void as an effect of Article 101(2) TFEU¹²² and it will be unlikely that the prohibition can be evaded by individual application of Article 101(3) TFEU.¹²³

The TTBER Guidelines however specify that, in exceptional cases, hardcore restrictions may nevertheless be objectively necessary for an agreement of a particular type or nature and therefore not be caught by Article 101(1) TFEU.¹²⁴ In addition, they clarify that, in individual cases, undertakings may plead an efficiency defence under Article 101(3) TFEU.¹²⁵

44. It should be noted that the TTBER (again) takes a more stringent stance in relation to technology transfer agreements between competitors than between non-competitors.¹²⁶

It should first be pointed out that, for an assessment in terms of the hardcore restrictions, no account will be taken of potential competition on the technology market.¹²⁷

122 On the question of whether this results in the entire agreement being void, see below, no. 51 (see also for further details on this Y. VAN COUTER & G. BOGAERT, “De Groepsvrijstellingsverordening nr. 1400/2002: meer dan een “pit-stop” voor de automobielconcessieovereenkomsten...”, *TBH* 2003, 491-492). The hardcore restrictions can only not be severed from the rest of the agreement “for the purposes of the TTBER” (see the TTBER Guidelines 2004, no. 75; see also the TTBER Guidelines 2014, no. 95). Thus, in our view, it cannot be inferred from the TTBER Guidelines that the Commission proceeds on the basis that they necessarily result in the entire agreement being void (to that effect, see P.-M. LOUIS, “Le nouveau règlement d’exemption par catégorie des accords de transfert de technologie: une modernisation et une simplification”, *CDE* 2004, 3-4, 385-386).

123 See the TTBER Guidelines 2004, no. 18, 75. See also the TTBER Guidelines 2014, no. 18, 95 (note that the words “in exceptional circumstances” have now been slightly qualified and replaced by the word “unlikely”).

124 See the TTBER Guidelines 2014, no. 94 with reference to the Commission Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27 April 2004, p. 97, paragraph 18.

125 See the TTBER Guidelines 2014, no. 94 with reference to GC, 15 July 1994, *Matra v. Commission*, T-17/93, ECR 1994, II-595, paragraph 85.

126 In this regard, it is sufficient to compare the list of hardcore restrictions in art. 4(1) TTBER 2014 (concerning agreements between competitors) with the list of hardcore restrictions in art. 4(2) TTBER 2014 (concerning agreements between non-competitors). Compare also art. 4(1) with art. 4(2) of the TTBER 2004.

127 See the TTBER Guidelines 2004, no. 66. See also the TTBER Guidelines 2014 no. 83.

Furthermore, it has to be reiterated that it is sometimes only after signature of the agreement that the contract parties become competitors.¹²⁸ In these cases, the hardcore restrictions that apply to agreements between non-competitors continue to apply to the licence agreement, unless an essential aspect thereof is subsequently altered.¹²⁹ The TTBER 2014 now clarifies that the conclusion of a new technology transfer agreement between the parties concerning competing technology rights is to be considered as a material amendment.¹³⁰

45. Moreover, as regards hardcore restrictions in agreements between competing undertakings, in some cases the TTBER takes a stricter position toward reciprocal agreements than toward non-reciprocal agreements.¹³¹
36. Other than in the case of the exceptions expressly referred to in the TTBER, a technology transfer agreement does not qualify for the benefit of the TTBER if, in and of itself or in combination with other factors within the control of the parties, it is aimed at one or more of the following objectives:¹³²

As regards *agreements between competitors*:

- (i) price fixing;
- (ii) restriction of production;

128 See the TTBER Guidelines 2004, no. 31. See also the TTBER Guidelines 2014, no. 38. This will be so where the licensee develops or acquires and starts to exploit a competing technology during the term of the licence agreement or where it is only after signature of the licence agreement that the licensor becomes active on the relevant product market, whether on the basis of the licensed technology or on the basis of a new technology.

129 See art. 4(3) TTBER 2004. See also art. 4(3) of the TTBER 2014.

130 See the TTBER 2014, art. 4(3), last sentence, in conjunction with the TTBER Guidelines 2014, no. 39, last sentence.

131 See the TTBER Guidelines 2004, no. 78; see also the TTBER Guidelines 2014, no. 98. By contrast, between non-competitors, there is no reason at all to judge reciprocity of their agreements more stringent since, in terms of its consequences, a reciprocal agreement between non-competitors is actually equivalent to two separate licences (see the TTBER Guidelines 2004, no. 154 and the TTBER Guidelines 2014, no. 182). We will not go into further detail about this here. For a more detailed analysis of the different approach of the TTBER with regard to reciprocal / non-reciprocal agreements, the reader is referred to Y. VAN COUTER and B. VANBRABANT, *License Agreements, Competition and the Internal Market*, Brussels, Larcier, 2008, p. 40.

132 For a detailed discussion, the reader is referred to Y. VAN COUTER and B. VANBRABANT, *License Agreements, Competition and the Internal Market*, Brussels, Larcier, 2008, p. 40-51.

- (iii) division of markets or customers;
- (iv) restriction of the exploitation of own technology;
- (v) restriction of research and development possibilities.

The hardcore list applicable to agreements between competitors has been simplified in the TTBER 2014. The simplification does however not lead to any change on substance.

As regards *agreements between non – competitors*:

- (i) price fixing, except for maximum prices;
- (ii) territorial or customer related passive sales restrictions;
- (iii) active or passive sales restrictions to end-users in case of a selective distribution system

47. *In agreements between competitors* and regardless of *whether or not* the agreement is *reciprocal*, the following restrictions continue to be possible under the TTBER 2014 regime:

- (a) restrictions limiting the licensee to one or more product markets or technical fields of use;

Instead of qualifying those restrictions as exceptions to the hardcore restriction of *'allocation of markets or customers'*, these exceptions have been deleted from the TTBER 2014. TTBER 2014 Guidelines now clarify that such restrictions are no hardcore restrictions provided they do not go beyond the scope of the licenced technologies.¹³³

- (b) Sole licences

Instead of qualifying *"the obligation on the licensor not to licence the technology to another licensee in a particular territory"*, as an exception to the hardcore restriction of *'allocation of markets or customers'*, this exception has been deleted from the TTBER 2014. The TTBER 2014 Guidelines now clarify that such restriction does not constitute a hardcore restriction.¹³⁴

133 See the TTBER Guidelines 2014, no. 113 – 114.

134 See the TTBER Guidelines 2014, no. 109.

(c) Captive use restrictions

Captive use restrictions are requirements whereby the licensee may produce the products incorporating the licensed technology only for its own use. If the contract product is a component this implies that the licensee is to produce that component only for incorporation into its own products and can not to sell the components to other producers. The licensee must be able, however, to sell the components as spare parts for its own products and must thus be able to supply third parties that perform after sale services on these products.¹³⁵

48. Besides the restrictions mentioned in par. 47, in *non-reciprocal* agreements between competitors, the following restrictions are possible under the new TTBER regime:

- (a) output limitations concerning contract products, imposed on the licensee;¹³⁶
- (b) exclusive territorial licences;¹³⁷
- (c) restrictions of production to sales to a customer as an alternative source of supply;¹³⁸
- (d) restrictions of active and/or passive sales in the exclusive territory or to the exclusive customer group reserved to the other party;¹³⁹
- (e) restrictions on active sales in the territory or to the customer group reserved to another licensee on condition that, at the time the licence agreement was contracted, he was not a competitor of the licensor.¹⁴⁰

49. In *agreements between non-competitors*, the aforementioned contractual restrictions are and remain all the more possible *in addition* to the following restrictions:

- (a) the imposition of maximum prices or recommending a sale price;¹⁴¹

135 See the TTBER Guidelines 2014, no. 111.

136 See the TTBER Guidelines 2014, no. 103.

137 See the TTBER Guidelines 2014, no. 107.

138 See the TTBER Guidelines 2014, no. 112.

139 The TTBER Guidelines 2014 clarify that the exclusive reservation of a territory or customer group implies that also none of the other licensees are allowed to actively sell there (see no. 108).

140 See the TTBER Guidelines 2014, no. 110.

141 See the TTBER Guidelines 2014, no. 118.

- (b) active and/or passive sales restrictions imposed on the licensor;¹⁴²
- (c) active sales restrictions imposed on the licensee on condition that the licensee is not a member of a selective distribution system operating at retailer level;¹⁴³
- (d) restrictions of passive (and, all the more so, active) sales in an exclusive area or to an exclusive customer group reserved to the licensor;¹⁴⁴
- (e) restrictions imposed on the licensee operating at the wholesale level of trade not to (actively or passively) sell to end-users and hence only to sell to retailers;¹⁴⁵
- (f) where the licensee forms part of a selective distribution system, restrictions on the licensee against (actively or passively) selling to unauthorised distributors.¹⁴⁶

Under the 2004 TTBER regime, this list was completed by an exception for restrictions of passive (and, all the more so, active) sales in an exclusive sales area or to an exclusive customer group that is allotted to another licensee, for two years as from the date on which the protected licensee first trades in the products incorporating the licenced technology in his exclusive sales area or with his exclusive customer group.¹⁴⁷ However, under the new TTBER regime, the Commission has removed the latter passive sales restriction from the automatic exemption of the TTBER.¹⁴⁸ The idea is to align the TTBER with the VABER. However, in fact, the TTBER Guidelines 2014 still pass on the message that this type of passive sales restrictions can be allowed if the restraints are objectively necessary for the licensee to penetrate a new market. This should therefore be

142 See the TTBER Guidelines 2014, no. 120.

143 See the TTBER Guidelines 2014, no. 120 In conjunction with no. 125. If the licensee is a member of a selective distribution system operating at retailer level there remains the possibility of prohibiting a licensee from operating out of an unauthorised place of establishment.

144 See the TTBER Guidelines 2014, no. 121.

145 See the TTBER Guidelines 2014, no. 124.

146 The TTBER Guidelines 2014 clarify that for the TTBER to apply, a selective distribution system may not be combined with exclusive territories or exclusive customer groups as that would lead to a hardcore restriction of active or passive selling pursuant to Article 4(2)(c) of the TTBER 2014 (see also TTBER Guidelines 2014, no. 125).

147 See art. 4(2)(b)(ii) TTBER 2004; see also the TTBER Guidelines 2004, no. 101.

148 See the TTBER 2014, art. 4(2)(b) where the previous point (ii) has been dropped.

assessed on a case-by-case basis.¹⁴⁹ The given passive sales bans have thus passed from a regime of exemption for respectively five (TTBER 240/96)¹⁵⁰ and two years (TTBER 772/2004)¹⁵¹ to hardcore treatment, unless it can be objectively substantiated that such protection is required for a licensee to be willing to invest in the first place.

Unfortunately, this alignment idea in our view ignores the particular features of technology licensing and therefore appears to be misguided. The development, dissipation and commercial exploitation of a technology is indeed to be distinguished from the distribution of goods incorporating such technology¹⁵². The resulting lack of legal certainty risks to unnecessarily create a disincentive to the dissipation of new technologies.¹⁵³

50. Where a technology transfer agreement contains a hardcore restriction, it *falls entirely outside* the ambit of the TTBER and thus within the scope of Article 101(1) TFEU¹⁵⁴ since, *for the purposes of applying the TTBER*, hardcore restrictions cannot be separated off from the rest of the technology transfer agreement.¹⁵⁵ Furthermore, the Commission is of the view that, on an individual assessment, it is

149 It is indeed specified that restrictions on passive sales by licensees into an exclusive territory or customer group allocated to another licensee may fall outside Article 101(1) for a certain duration “*if the restraints are objectively necessary for the protected licensee to penetrate a new market. This may be the case where licensees have to commit substantial investments in production assets and promotional activities in order to start up and develop a new market*” and it generally takes “*up to two years from the date on which the contract product was first put on the market in the exclusive territory by the licensee in question or sold to its exclusive customer group*” to recoup those investments. See the TTBER Guidelines 2014, no. 126.

150 See the TTBER 1996, OJ L-31/2, 31 January 1996, art. 1.

151 See the TTBER 2004, art. 4(1)(b)(ii).

152 Indeed, a licensee that builds a production facility obviously faces far greater costs and risks as compared to the retailer of the resulting products.

153 Also the results of the Commission's public consultation process showed that many stakeholders are concerned that this change might act as a disincentive to licence out and that the TTBER and the VABER do not need to be aligned, as they cover very different kind of agreements. Cfr. the ICC's Comments on DG COMP's Draft proposal for a revised block exemption for technology transfer agreements and for revised guidelines, p. 3 (23 May 2013, source:http://ec.europa.eu/competition/consultations/2013_technology_transfer/icc_en.pdf).

154 See the TTBER 2004, and art. 4(1), first sentence, and art. 4(2), first sentence, TTBER 2004. See also the same articles and sentences in the TTBER 2014.

155 See the TTBER Guidelines 2004, no. 75. See also the TTBER Guidelines 2014, no. 95.

unlikely that hardcore restrictions will escape the four conditions in Article 101(3) TFEU.¹⁵⁶ As a consequence, the restrictions in question are likely to be prohibited and, in terms of Article 101(2) TFEU, void.

51. Under Belgian law, the court cannot temper a void agreement.¹⁵⁷ As far as the scope of the *nullity sanction* provided for in Article 101(2) TFEU is concerned, however, nullity *in principle* affects *only those clauses* of the agreement (hence, hardcore restrictions) that are incompatible with the cartel prohibition. This means that the agreement may only be partly void.¹⁵⁸ However, nullity *can affect the whole agreement* “if [the forbidden clauses] do not appear to be severable from the agreement itself”,¹⁵⁹ *i.e.* where they cannot be separated therefrom.¹⁶⁰
52. The following diagram schematically depicts assessment of the second condition for application of the (former and revised) TTBER (prohibition of hardcore restrictions):

156 See the TTBER Guidelines 2004, no. 18. Note that in the TTBER Guidelines 2014, no. 18, the Commission somewhat qualifies and refers to “*unlikely*” circumstances instead of “*exceptional*” circumstances.

157 See Brussels Court of Appeal, 28 June 1995, *Jaarboek Handelspraktijken & Mededinging 1995*, 576.

158 In line with this, see also P.- M. LOUIS, “Le nouveau règlement d’exemption par catégorie des accords de transfert de technologie: une modernisation et une simplification”, *CDE* 2004, 3-4, 385-386. ECJ, 14 December 1983, *Société de Vente de Ciments v. Kerpen and Kerpen*, no. 319/82, ECR 1983, 4173. Confirmed in relation to the automotive sector in ECJ, 18 December 1986, *VAG France v. Magne*, no. 10/86, ECR 1986, 4071.

159 See ECJ, 13 July 1966, *Consten and Grundig v. Comm.*, nos. 56/64 and 58/64, ECR 1966, 429.

160 See ECJ, 30 June 1966, *Société Technique Minière v. Maschinenbau Ulm*, no. 56/65, ECR 1966, 337. See also L. CORNELIS, *Algemene theorie van de verbintenissen*, Antwerp, Intersentia, 2000, no. 568, with reference to Cass. 27 February 1959, *Arr. Cass.*, 1959, 493, and Cass. 13 October 1960, *Pas.* 1960, I, 160. For a more detailed analysis of the severability issue and the consequences of the nullity of the agreement under Belgian law, the reader is referred to Y. VAN COUTER and B. VANBRABANT, *License Agreements, Competition and the Internal Market*, Brussels, Larcier, 2008, p. 52-53.

C. The agreement does not contain any excluded restrictions¹⁶¹

53. Where an agreement does not contain any hardcore restrictions and the market share thresholds are not exceeded, it can be concluded that the TTBER is applicable.¹⁶² Some restrictions do nothing to change the applicability of the TTBER to the other contract provisions but do not themselves benefit from the TTBER exemption. In each such case, an *individual assessment* of their anti-competitive and pro-competitive effects will be required.¹⁶³ Concerned are:

- (i) any direct or indirect *obligation on the licensee to grant an exclusive licence, in whole or in part to the licensor or a third party designated by the licensor in respect of its own improvements to, or its own new applications of, the licenced technology.*¹⁶⁴

This first restriction that comes within contemplation is thus the so-called exclusive “grant back” obligation (a provision where the licensee is obliged to license back to the licensor on an exclusive basis, and not even use itself, its own improvements to the licenced technology) over improvements to the licenced technology.¹⁶⁵

Another, comparable form of innovation that may not be restricted, is the development of new applications for the licenced technology.

The prohibition against such restrictions applies regardless of whether the licensor pays a consideration for obtaining an exclusive licence over the improvement or new application. However, in addition to the market position of the licensor on the technology market and the existence of

161 For a more detailed overview, see Y. VAN COUTER and B. VANBRABANT, *License Agreements, Competition and the Internal Market*, Brussels, Larcier, 2008, p. 56-59.

162 See art. 5 TTBER 2014.

163 See the TTBER Guidelines 2004, no. 107; see also the TTBER Guidelines 2014, no. 128.

164 Art. 5(1)(a) TTBER 2004. Note that article 5(1)(a) of the TTBER 2014 does not distinguish any longer between severable and non-severable improvements. The Commission’s public consultation showed that the majority of the stakeholders were against the removal of this distinction (source: http://ec.europa.eu/competition/consultations/2013_technology_transfer/index_en.html).

165 See the TTBER 2004, art. 5(1)(a); see also the TTBER Guidelines 2004, no. 109. A severable improvement is an improvement that can be exploited without infringing the licensed technology (see definition in art. 1(1)(n) TTBER 2004). Note that a severable improvement is no longer defined in the TTBER 2014.

parallel networks of licence agreements containing similar obligations, a consideration and the level thereof may constitute an important factor in the context of an individual assessment for the purposes of application of Article 101(3) TFEU.¹⁶⁶

Under the TTBER 2004 regime, an exclusive grant back obligation over a non-severable improvement did not fall under the prohibition since, by operation of intellectual property law, it cannot be exploited without the consent of the licensor in any case and therefore was deemed not to constitute a restriction of competition within the meaning of Article 101(1) TFEU.¹⁶⁷ Nor did a non-exclusive licence over improvements or new applications lead to inapplicability of the TTBER, regardless of whether or not it was reciprocal.¹⁶⁸

Whereas the 2004 regime thus only excluded from the safe harbour exclusive grant-back obligations concerning severable improvements, the new TTBER 2014 regime gives equal treatment to all **exclusive grant-backs**. All exclusive grant-backs (severable and non-severable) are therefore meant to fall outside the scope of the TTBER and will require an individual assessment. However, the rest of the agreement can still benefit from the safe harbour of the TTBER.

The aim of this change is to ensure that there are sufficient incentives for follow-on inventions. The question is however whether the expected

166 See the TTBER Guidelines 2004, no. 109-110. See also the TTBER Guidelines 2014, no. 129-130.

167 See the TTBER Guidelines 2004, no. 109. Under the new regime, such grant backs will no longer be covered by the TTBER (see the TTBER Guidelines 2014, no. 129).

168 See the TTBER 2004 Guidelines, no. 109. Commission Decision no. 87/100/EEC of 17 December 1986 relating to a proceeding under Article 85 of the EEC Treaty (*Mitchell Cotts v. Sofitra*), OJ L-41/31, 11 February 1987; Commission Decision no. 88/143/EEC of 22 December 1987 relating to proceedings under Article 85 of the EEC Treaty (*Rich Products v. Jus-rol*), OJ L-69/21, 15 March 1988; Commission Decision no. 88/563/EEC of 13 October 1988 relating to a proceeding under Article 85 of the EEC Treaty (*Delta Chemie v. DDD*), OJ L-309/34, 15 November 1988. Compare with the TTBER Guidelines 2014, no. 131.

positive effects on innovation¹⁶⁹ will outweigh the negative consequences of a decrease of legal certainty. Indeed, whereas under the 2004 TTBER regime the licensor could contractually guarantee his future capability to license his technology to its fullest extent (technology and non-severable follow-on improvements made by his licensees), under the new regime that contractual right to exclusive grant-backs of non-severable improvements may thus be challenged under competition law. As grant-backs of non-severable improvements are however not restricting competition (the licensee is prevented from exploiting the improvement by the licensor's IPR and not by the exclusive grant-back clause) such possible challenge does not appear to be justified from a competition perspective.¹⁷⁰ To the contrary, it may lead to licensing inefficiencies and duplication of costs given the fact that potential licensees interested in exploiting the full capacity of the licensor's technology may be required to negotiate and obtain a licence not only from the licensor but also from the licensee holding non-severable improvements.

All non-exclusive grant-backs will still be covered by the TTBER 2014.¹⁷¹

- (ii) any direct or indirect *obligation on the licensee to assign* to the licensor or a third party designated by the licensor all or part of *the rights over his own improvements to, or his own new applications of*, the licensed technology.¹⁷²

169 In practice, non-severable improvements, which can anyway not be exploited without the consent of the licensor, are usually exclusively licensed back to the licensor, who in turn licenses them back to the licensee under the terms of the original licence. It remains unclear how, on the field, taking the given exclusive grant-backs out of the TTBER coverage will increase innovation incentives for the licensee.

170 See also the Consultation Response of the International League of Competition Law *ad hoc* Committee on the revision of the Technology Transfer Block Exemption Regulation, Section 2.3, p. 2.3 (17 May 2013, source: http://ec.europa.eu/competition/consultations/2013_technology_transfer/lidc_en.pdf).

171 See TTBER 2014, Art. 5(1)(a).

172 Art. 5(1)(b) TTBER 2004; see, for instance, Commission Decision no. 85/410/EEC of 12 July 1985 relating to a proceeding under Article 85 of the EEC Treaty (*Velcro v. Aplix*), OJ L-233/22, 30 August 1985; see also Commission Decision No. 85/561/EEC of 13 December 1985 relating to a proceeding under Article 85 of the EEC Treaty (*Roses*), OJ L-369/9, 31 December 1985. Compare with art. 5(1) (a) of the TTBER 2014.

Note that the former Article 5(1)(b) TTBER 2004 with respect to the assignment hypothesis has been merged into the new Article 5(1)(a) TTBER, which does no longer distinguish between severable and non-severable improvements.

Since the competition consequences of an assignment are comparable to an exclusive licence, the principles explained above in relation to exclusive licences over severable improvements to, and new applications for, licensed technology will apply *mutatis mutandis* to an obligation to assign improvements or new applications.¹⁷³

Note that under the 2004 TTBER regime, contrary to an assignment, the obligation to grant the licensor an exclusive licence over *part* of the rights to a severable improvement or new application appeared not to constitute an excluded restriction.¹⁷⁴ Since there was no immediately apparent explanation for this difference between assignments and exclusive licences¹⁷⁵, the new Article 5(1)(a) of the TTBER gets rid of this 'anomaly' and covers the exclusive licence as well as the assignment of *all or part* of the rights.

- (iii) any direct or indirect *obligation on the licensee not to challenge the validity of intellectual property rights* owned by the licensor on the common market.¹⁷⁶

173 See the TTBER Guidelines 2004, nos. 109 and 110. Compare with the Draft TTBER Guidelines, nos. 119 and 120, and the TTBER Guidelines 2014, nos. 129 et seq..

174 P.-M. LOUIS, "Le nouveau règlement d'exemption par catégorie des accords de transfert de technologie: une modernisation et une simplification", *CDE* 2004, 3-4, 393.

175 See Y. VAN COUTER and B. VANBRABANT, *License Agreements, Competition and the Internal Market*, Brussels, Larcier, 2008, p. 57.

176 Art. 5(1)(c) TTBER 2004; Commission Decision no. 76/29/EEC of 2 December 1975 relating to a proceeding under Article 85 of the EEC Treaty (*AOIP v. Beyrard*), OJ L-6/8, 13 January 1976; Commission Decision no. 79/86/EEC of 10 January 1979 relating to a proceeding under Article 85 of the EEC Treaty (*Vaessen v. Moris*), OJ L-19/32, 26 January 1979; Commission Decision no. 83/400/EEC of 11 July 1983 relating to a proceeding under Article 85 of the EEC Treaty (*Windsurfing International*), OJ L-229/1, 20 August 1983; ECJ, 25 February 1986, *Windsurfing International v. Comm.*, no. 193/83, ECR 1986, 611; cf. ECJ, 27 September 1988, *Bayer and ors. v. Heinz Süllhöfer*, ECR 1988, 5249 (regarding a royalty-free licence); further, see also Commission Decision No. 85/561/EEC of 13 December 1985 relating to a proceeding under Article 85 of the EEC Treaty (*Roses*), OJ L-369/9, 31 December 1985. Compare with article 5(1)(b) of the TTBER 2014.

The restriction under consideration here is the so-called no-challenge clause, whereby the licensee undertakes not to challenge the validity of the licensor's intellectual property rights. Note that the Commission has made this excluded restriction reciprocal rather than limiting it to the licensee.¹⁷⁷ We do not immediately see an impact of this change given the fact that in practice non-challenge clauses are generally only imposed on the licensee.

Also, it should be noted that the licensor's ability to *terminate* the licence agreement if the validity of the licenced technology should be challenged by the licensee (so-called "*defensive termination*") did not constitute a prohibited restriction under the TTBER 2004 regime.¹⁷⁸ The Commission however proposed to exclude from the safe harbour of the TTBER this termination right in each case where a party to the technology transfer agreement challenges the validity of any of the IPR which the other party holds in the EU.¹⁷⁹ The rationale behind this laid in the consideration that particularly where the licensee has made substantial investments, a termination clause has very similar effects as a no-challenge clause and may thus foster the maintenance of invalid intellectual property rights.¹⁸⁰ The backside of the coin is however that the exclusion of termination clauses may reduce the licensor's incentives to license and the consequent dissemination of technological advancements. IPR owners may indeed be expected to think twice before entering into a licensing deal knowing that there is a risk that they will be forced to further cooperate (providing training, access to valuable know-how, improvements, etc.) with licensees with whom they are in litigation. As a consequence, one could question whether a general exclusion of termination clauses from the benefit of the TTBER, implying considerable interference with a company's freedom (not) to contract, was not too far-reaching knowing that the Commission has the possibility to withdraw the benefit of the TTBER in the probably exceptional

177 Art. 5(1)(b) of the TTBER 2014.

178 See art. 5(1)(c) TTBER 2004, in conjunction with the TTBER Guidelines 2004, no. 113.

179 See Art. 5(1)(b) of the Draft TTBER. The Commission's public consultation showed that the majority of the stakeholders were against the inclusion of termination clauses in the list of excluded restrictions (source: http://ec.europa.eu/competition/consultations/2013_technology_transfer/index_en.html). In this respect, reference is made to the well-argued counter-arguments developed by LESI (Licensing Executives Society International), Comments on the proposed amendments to the Technology Transfer Block Exemption Regulation (TTBER), section 3 (17 May 2013, source: http://ec.europa.eu/competition/consultations/2013_technology_transfer/lesi_en.pdf).

180 See the Draft TTBER Guidelines, no. 125; see also the TTBER Guidelines 2014, no. 136.

cases where termination clauses have truly anti-competitive effects.¹⁸¹ Additionally, this could lead to practices where, due to concerns about the loss of TTBER coverage, the given common clauses become subject to discussions for removal from many licence agreements within the EU and that proprietors of technology controlled outside the EU start hesitating to give access to such technology to the disadvantage of the EU economy.

It now seems that the Commission has (at least in part) followed the stakeholders' remarks on this issue. In the final version of the revised TTBER, the Commission indeed expressly specifies that the prohibition of no-challenge clauses is "*without prejudice to the possibility, in the case of an exclusive licence, of providing for termination of the technology transfer agreement in the event that the licensee challenges the validity of any of the licenced technology rights*".¹⁸² According to the Commission, in the case of exclusive licensing, termination clauses are usually less likely on balance to have anti-competitive effects. In this scenario, the incentives for innovation and for licensing out could be undermined if, for example, the licensor were to be locked into an agreement with an exclusive licensee which no longer makes significant efforts to develop, produce and market the product (to be) produced with the licensed technology rights. Automatically exempting termination clauses only in cases of exclusive licensing should lead to a proper balance between, on the one hand preserving incentives to innovate and licence out, and on the other ensuring that invalid IPR are removed as a barrier to innovation and economic activity. This is why the TTBER 2014 now includes an exemption for termination clauses contained in exclusive licensing agreements.¹⁸³ This should in particular support SME innovators to licence out their technology on an exclusive basis, without creating a situation of dependence towards their exclusive licensees.

181 See art. 6 TTBER 2004 and TTBER 2014.

182 Art. 5(1)(b) TTBER 2014.

183 See TTBER Guidelines 2014, no. 139.

It should finally be noted that the Commission takes the view that a prohibition can nonetheless be maintained to challenge the "validity" of *know-how* given that it is generally very difficult, if not impossible, to recover *know-how* once it has been disclosed.¹⁸⁴

- (iv) any direct or indirect *obligation that restricts the licensee's ability to exploit his own technology*,¹⁸⁵ provided, of course, that the licensee does not thereby infringe the licensor's technology. This concerns an excluded restriction in licensing relations *between non-competitors*.¹⁸⁶
- (v) any direct or indirect *obligation that restricts the ability of one of the parties to carry out research and development*¹⁸⁷ (also in areas falling under the licence). This concerns an excluded restriction in licensing relations *between non-competitors*.¹⁸⁸

Any agreement between parties that they will make future improvements in their respective technologies available to one another will not as such be regarded by the Commission as a restriction on independent research and development. In each case, the consequences of such arrangements will have to be assessed on the individual circumstances of the case.¹⁸⁹

184 See the TTBER Guidelines 2004, no. 112. Compare with the revised TTBER Guidelines, no. 140 where it is specified that not only non-challenge but also termination clauses solely concerning *know-how* are not excluded from the scope of the TTBER.

185 Art. 5(2) TTBER 2004; see for instance Commission Decision no. 76/29/EEC of 2 December 1975 relating to a proceeding under Article 85 of the EEC Treaty (*AOIP v. Beyrard*), OJ L-6/8, 13 January 1976. See also art. 5(2) of the TTBER 2014.

186 See the TTBER Guidelines 2004, no. 115; cf. the TTBER Guidelines 2004, no. 95 (dealing with a comparable restriction between competitors, which, instead of constituting an excluded restriction, consists in a hardcore restriction). In the same sense, see nos. 141, 115 and 116 of the TTBER Guidelines 2014.

187 See art. 5(2) TTBER 2014.

188 See the TTBER Guidelines 2004, no. 114; cf. the TTBER Guidelines 2004, no. 94 (dealing with a comparable restriction between competitors, which, instead of constituting an excluded restriction, consists in a hardcore restriction). See also respectively nos. 141 and 115 of the TTBER Guidelines 2014.

189 See the TTBER Guidelines 2014, no. 115.

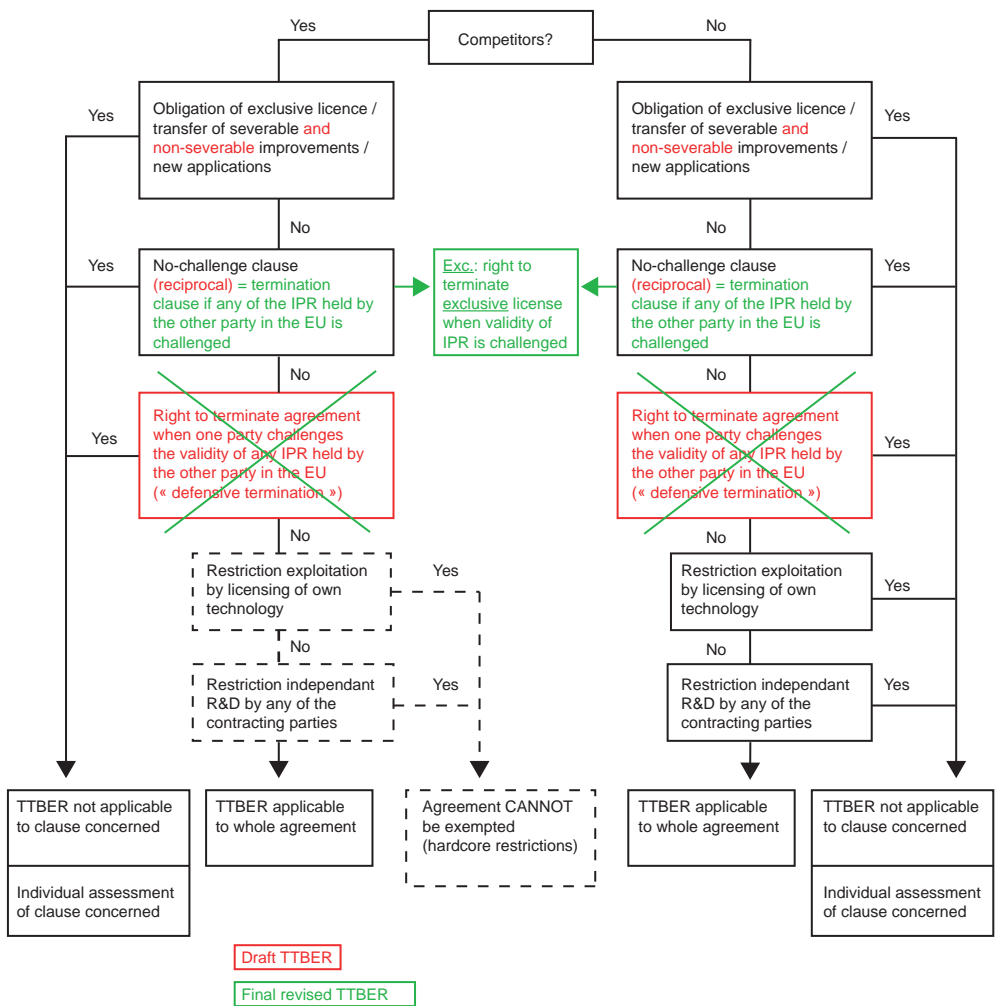
Finally, it should be pointed out that restrictions on carrying out research and development activities with third parties are nonetheless not prohibited provided the restrictions are intended to protect the know-how of the licensor against public disclosure and are also necessary and proportionate for ensuring that protection.¹⁹⁰

54. Where a technology transfer agreement contains one of the foregoing so-called excluded restrictions, it is *only the provision in question itself* that will be unaffected by the TTBER and, hence, by contrast with any hardcore restrictions, it is *separated*¹⁹¹ from the rest of the technology transfer agreement as far as application of the TTBER is concerned, and subject to individual assessment.¹⁹²
55. The following diagram schematically depicts how the prohibition against excluded restrictions is assessed under the TTBER 2014 regime:

190 See the TTBER Guidelines 2004, no. 114, in conjunction with the TTBER Guidelines 2004, no. 94. See also respectively nos. 141 and 115 of TTBER Guidelines 2014.

191 See the TTBER Guidelines 2004, no. 107. See also the TTBER Guidelines 2014, no. 128.

192 See the TTBER 2004 recital 14, in conjunction with arts. 5(1) and 5(2) TTBER 2004. See also the TTBER 2014, recital [15] in conjunction with arts. 5(1) and 5(2) of the TTBER 2014.



D. The TTBER is not withdrawn¹⁹³

56. The market share thresholds, the exclusion of technology transfer agreements that contain strong anti-competitive restrictions (so-called hardcore restrictions) and the exclusion of certain (less anti-competitive) restrictions in such agreements (whereby not the whole agreement is disqualified under the TTBER) ought normally to offer sufficient guarantee that the agreements qualifying under the TTBER do

193 See also Y. VAN COUTER and B. VANBRABANT, *License Agreements, Competition and the Internal Market*, Brussels, Larcier, 2008, p. 60-62.

not enable the contract parties to eliminate competition for a significant part of the products in question.¹⁹⁴

57. Nevertheless, where, in individual cases, agreements that meet the TTBER's conditions nonetheless have consequences that are incompatible with Article 101(3) TFEU, the Commission can withdraw the benefit of the TTBER.¹⁹⁵ This is particularly possible where the agreement restricts the incentives for innovation or hinders access to markets.¹⁹⁶ For the same reasons, the competent authorities in the Member States may deny the benefit of the TTBER where the aforementioned negative consequences arise in their territory or any part thereof and that territory bears the features¹⁹⁷ of a separate geographical market.¹⁹⁸

In particular, the TTBER may be withdrawn where a given agreement does not satisfy (or no longer satisfies) one or more of the four conditions under Article

194 See recital no 16 of the TTBER 2014.

195 Art. 6(1) TTBER 2004, in conjunction with art. 29(1) Council Regulation (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, OJ L-1/1, 4 January 2003, last amended by Council Regulation (EC) no. 411/2004 of 26 February 2004, OJ L-68/1, 6 March 2004. See also art. 6(1) of the TTBER 2014 in conjunction with the same art. 29(1) Council Regulation (EC) no. 1/2003.

196 See the TTBER 2004, recital no. [16]. See also the TTBER 2014, recital no. [17]. This may occur when access to third party's technologies is hindered by the cumulative effect of parallel networks of similar agreements prohibiting licensees to use third party technologies, or when access of potential licensees to the market is restricted due to the cumulative effect of parallel networks of similar agreements preventing licensors to license to other licensees (see the TTBER Guidelines 2014, nos. 147 – 148).

197 See art. 6(2) TTBER 2004, in conjunction with art. 29(2) Council Regulation (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, OJ L-1/1, 4 January 2003. Withdrawal by a national antitrust authority is effected by a decision on the basis of art. 5 Council Regulation (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, OJ L-1/1, 4 January 2003. See also art. 6(2) of the TTBER 2014 in conjunction with the same art. 29(2) Council Regulation (EC) no. 1/2003.

198 See Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C-372/5 [8], 9 December 1997.

101(3) TFEU.¹⁹⁹ Where a withdrawal decision is issued, it is up to the withdrawing authority to prove that (i) the agreement falls within the scope of Article 101(1) TFEU and (ii) it falls foul of (one of) the four conditions in Article 101(3) TFEU.²⁰⁰

58. As regards the consequences, the benefit of the TTBER is only lost as from the date of withdrawal, so that there can only be an infringement of Article 101 TFEU where the undertakings in question continue to perform their agreement unchanged after withdrawal.²⁰¹

E. The TTBER is not declared to be inapplicable²⁰²

59. The TTBER offers the Commission the possibility²⁰³ to issue a regulation excluding parallel networks of similar agreements that affect more than 50% of a relevant market from the sphere of operation of the TTBER.²⁰⁴ Once such a regulation is issued making the TTBER inapplicable for a given market, all restrictions have to be assessed individually in terms of Articles 101(1) or 101(3) TFEU taking as a basis the existing case law from the European courts and communications and previous decisions from the Commission. If need be, the Commission will issue a decision in an individual case that can be used as guidance for all the undertakings involved.²⁰⁵

The TTBER provides for a transitional period of six months to enable the undertakings concerned to adjust their agreements to the declaration that the TTBER is inapplicable.²⁰⁶ A declaration of inapplicability regulation has no effect on the applicability of the TTBER to the agreements in question during the period prior to the date on which the declaration of inapplicability regulation comes into force.²⁰⁷

199 Art. 6(1)(a)-(c) TTBER 2004. See also art. 6(1)(a)-(b) of the TTBER 2014. See also the TTBER Guidelines 2004, no. 121-122, and the TTBER Guidelines 2014, no. 145 et seq. Cf. EC Commission Decision of 26 July 1988 relating to a proceeding under Articles 85 and 86 of the EEC Treaty (*Tetra Pak I BTG licence*), OJ L-272/27, 4 October 1988.

200 See the TTBER Guidelines 2004, no. 119. See also the TTBER Guidelines 2014, no. 146.

201 Cf. the TTBER Guidelines 2004, no. 34; and the TTBER Guidelines 2014, no. 40.

202 See also Y. VAN COUTER and B. VANBRABANT, *License Agreements, Competition and the Internal Market*, Brussels, Larcier, 2008, p. 62-63.

203 See the TTBER Guidelines 2004, no. 123 et seq.; see also the TTBER Guidelines 2014, no. 149.

204 Art. 7(1) TTBER 2004. See also Art. 7(1) of the TTBER 2014.

205 See the TTBER Guidelines 2004, no. 124. See also the TTBER Guidelines 2014, no. 150.

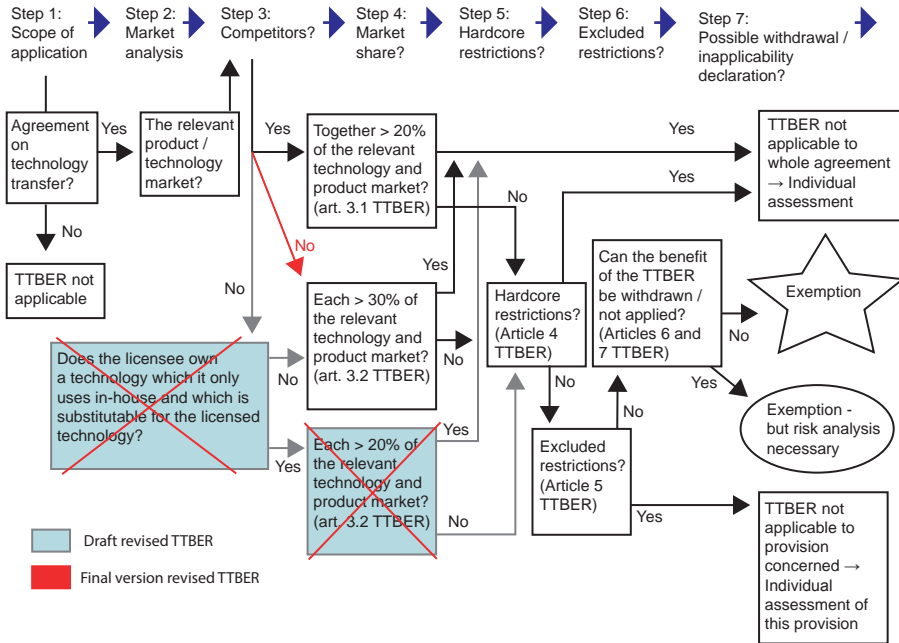
206 See art. 7(2) TTBER 2004. See also art. 7(2) of the TTBER 2014.

207 See the TTBER Guidelines 2004, no. 129. See also the TTBER Guidelines 2014, no. 155.

F. Application of the TTBER in brief and schematically depicted

60. The following schematically shows in the form of a flow chart the manner in which a technology transfer agreement is assessed in terms of the TTBER 2004 and 2014.²⁰⁸

The TTBER exemption: Step by step



208 The diagram is based on appendix 1 to Freshfields, Bruckhaus, Deringer, *Reform of the European competition rules on technology transfer, A guide to the new technology transfer block exemption and guidelines*, May 2004, 20.

§4. INDIVIDUAL ASSESSMENT OUTSIDE THE SCOPE OF APPLICATION OF THE TTBER

A. *The general assessment framework*²⁰⁹

61. It is in practice only relevant to assess technology transfer agreements in terms of Article 101 TFEU where the TTBER is inapplicable and the agreement in question fails to qualify for the benefit of other block exemptions.²¹⁰

In this respect it is important to note that the Commission itself formulates an additional general – favourable – assessment rule (safe harbour) via the TTBER Guidelines (and hence outside the bounds of the TTBER) by stating that “*outside the area of hardcore restrictions Article 81 (101) is unlikely to be infringed where there are four or more independently controlled technologies in addition to the technologies controlled by the parties to the agreement that may be substitutable for the licenced technology at a comparable cost to the user*”.²¹¹ The alternatives must be commercially viable in order to ensure adequate competitive constraint. Only then “*as for the market share safe harbour of the TTBER, [will] this additional safe harbour ... [create] a presumption that the agreement is not prohibited by Article 101*”.²¹² The purpose of this additional safe harbour is, first *to promote predictability ... and to confine detailed analysis to cases that are likely to present real competition concerns*²¹³ and, second, to cater for the problem that market share “*may not always be a good indication of the relative strength of available technologies*”.²¹⁴

209 See Y. VAN COUTER and B. VANBRABANT, *License Agreements, Competition and the Internal Market*, Brussels, Larcier, 2008, p. 65-66.

210 See the TTBER Guidelines 2004, nos. 36 and 37. See also the TTBER Guidelines 2014, nos. 42 and 43.

211 See the TTBER Guidelines 2004, no. 131. See also the TTBER Guidelines 2014, no. 157.

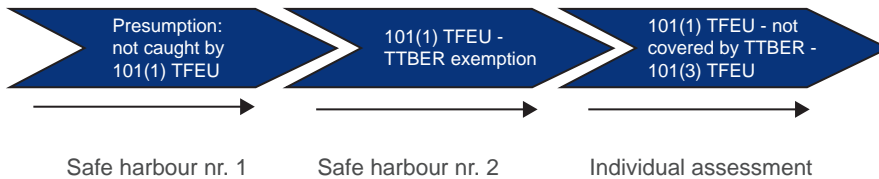
212 See the TTBER Guidelines 2004, no. 131. See also the TTBER Guidelines 2014, no. 158.

213 See the TTBER Guidelines 2004, no. 131. See also the TTBER Guidelines 2014, no. 157.

214 See the TTBER Guidelines 2004, no. 24. Compare with the TTBER Guidelines 2014, no. 25 in conjunction with no. 162.

62. It is certainly helpful that the TTBER Guidelines 2014 continue to provide for the alternative of a sufficient number of independently controlled substitutable technologies as a factor to be taken into account in the exemption assessment.²¹⁵ However, for new technologies that have not yet been exploited in respect of the territory, field of use or customer group concerned, the ‘*substitutable technologies*’-test is not really of practical use. For those technologies the insertion of a grace period during which the TTBER would apply irrespective of the market share that is acquired in the course of the given period and/or the use of a sufficient number of independently controlled research centres carrying on research in the same field of technology may indeed be more workable alternatives for the market share approach.

63. In the following, the assessment of a technology transfer agreement in terms of current competition law is presented in the form of a flow chart:



- Safe harbour nr. 1:
 - 4 or more technology substitutes *or*, below *de minimis* *or* no noticeable influence or interstate trade
 - no hardcore restriction

- Safe harbour nr. 2:
 - under TTBER market share threshold, *and*
 - no hardcore restriction

- Individual assessment:
 - the market position of the parties, competitors and purchasers (market power)
 - market access thresholds
 - maturity of the market
 - other factors (e.g. length of the agreement, regulatory frame, etc.)

215 See the TTBER Guidelines 2014, no. 157. Incorporation of this alternative to market share limits in the Regulation itself could have provided for a preferable increased legal certainty.

64. Outside the aforementioned “safe harbours” (TTBER and alternative independent technologies), a separate, detailed examination of the technology transfer agreement will be necessary.²¹⁶ Given the absence of notable changes in the assessment process under the new TTBER 2014 regime, we will hereinafter limit ourselves to the phenomenon of technology transfers in the frame of settlement agreements (B) and technology pools (C) for which the Commission nevertheless proposes some material changes in the TTBER Guidelines.

B. Settlement agreements

65. A technology transfer agreement can also be entered into to prevent one party from exercising its IPR and thereby preclude the other party from exploiting his own technology rights, or to amicably settle infringement disputes relating to IPR.²¹⁷

66. Where it is possible that, but for the licence, the licensee could be excluded from the market (a so-called blocking position), the agreement is in principle pro-competitive and is therefore not caught by Article 101(1) TFEU.²¹⁸ Where, on the other hand, the contract parties know that there exists no blocking position, the technology transfer agreement can constitute a means of restricting competition between competitors and the hardcore list in Article 4(1) TTBER may then be applicable.²¹⁹

67. In the TTBER Guidelines 2014, the Commission now clarifies that settlement agreements involving a licence may run counter to Article 101 TFEU, in particular where a licensee agrees, against a value transfer from the licensor, to more restrictive terms than the licensee would have accepted solely on the strength of the licensor’s technology.²²⁰ This type of agreements is commonly referred to

216 For a more in depth analysis of the factors that will be relevant in that respect and the importance of each factor, reference is made to Y. VAN COUTER and B. VANBRABANT, *License Agreements, Competition and the Internal Market*, Brussels, Larcier, 2008, p. 67.

217 See the TTBER Guidelines 2004, no. 204. See also the TTBER Guidelines 2014, no. 234.

218 See the TTBER Guidelines 2004, no. 206; cf. partitioning agreements in relation to trade marks (see for example EC Commission Decision no. 82/897/EEC of 15 December 1982 relating to a proceeding under Article 85 of the EEC Treaty (*Toltecs v. Dorcet*) OJ L-379/19, 31 December 1982; see also ECJ 30 January 1985, *BAT v. Comm.*, no. 35/83, ECR 1985, 363. See also the TTBER Guidelines 2014, no. 236.

219 See the TTBER Guidelines 2004, no. 205.

220 Such practices were detected and criticized in the Commission’s pharmaceutical sector enquiry (Pharmaceutical Sector Enquiry Final Report, 8 July 2009, point 2.4).

as “pay-for-restriction”/“pay-for-delay” agreements or “reverse payment patent settlements”. The term “reverse payment” refers to the fact that the payment moves in the opposite direction compared to what would ordinarily be expected in patent law (where a potential infringer often pays the patent holder for the right to enter the market).²²¹ Such clauses may indeed lead to competition concerns when they are used to avoid the introduction on the market of a substitute product after expiry of the IP protection on the original product or when they lead to a delayed or otherwise limited ability for the licensee to launch the product on any of the markets concerned.²²² In the revised TTBER Guidelines 2014, the Commission further specifies that it will pay particular attention (i) where the parties to a settlement agreement are (actual or potential) competitors, and (ii) there is a ‘significant’ value transfer from the licensor to the licensee.²²³ In such cases, concerns will, in view of the Commission, arise as to the risk of market sharing.

No such concerns will be present however if, with the aim of for instance avoiding further litigation at the appellate level, the prevailing IP holder nevertheless compensates for (part of the) incurred litigation costs, without prejudice to the merits of its legal position. Also, depending on the risks of (patent) litigation involved and in particular where these risks are asymmetrical (e.g. substantial investment costs made by the patentee that may be lost in case of invalidation as opposed to the loss of an opportunity to continue to sell for the licensee), a reverse payment settlement may make perfect economic sense and is in the end a commercial, business decision. Taking into account that it is common in settlement agreements for consideration to flow between the parties to avoid or to stop litigation and that by their very nature settlement agreements are the result of negotiation between the parties, the proposed test is to be applied with great care. A settlement agreement should in our view indeed only become subject to antitrust scrutiny if it is crystal clear that the underlying dispute is a sham.²²⁴ If not, the risk of

221 See the TTBER Guidelines 2014, nos. 238-239.

222 See the TTBER Guidelines 2014, nos. 238-239; Such concerns appear to have been generated by the Commission investigations of pharmaceutical settlement agreements and by the AstraZeneca case (ECJ, 6 December 2012, *AstraZeneca AB and AstraZeneca plc v Commission*, C-457-10 P, not yet published).

223 See the TTBER Guidelines 2014, no. 239.

224 See, e.g. ECJ, 30 January 1985, *BAT Cigaretten – Fabriken GmbH v Commission*, 35/83, ECR 1985, 363, 33.

invalid settlement agreements increases and, together with it, a to-be-avoided legal uncertainty.²²⁵

68. In case of cross–licensing in settlement agreements where the parties have a significant degree of market power and the agreement imposes restrictions that clearly go further than what is necessary to eliminate a blocking position (for instance market division and the imposition of mutual running royalties that have a significant influence on market prices), Article 101(1) TFEU will be applicable, regardless of whether there is likely to be a mutual blocking position.²²⁶
69. Article 101(1) TFEU will also be applicable where the agreement prevents the parties from obtaining a competitive advantage vis-à-vis each other because the parties agree to share future developments/innovations with each other. Such additional restrictions will generally be regarded as not being necessary for the intended aim, viz. avoiding a block, and will accordingly also not be able to qualify for the application of Article 101(3) TFEU.²²⁷
70. We also point out that, since the essential aim of the agreement is to resolve disputes and/or prevent future disputes, no-challenge clauses in settlement agreements are in principle considered as falling outside the scope of Article 101(1) TFEU.²²⁸

In the TTBER Guidelines 2014, the Commission now however clarifies that such is solely valid in case of a settlement providing for the no–challenge (*ex post*) of the intellectual property rights that were “*the centre of the dispute*”.²²⁹ Moreover, clauses in settlement agreements not to challenge a patent in the future may be caught by article 101(1) TFEU where the patent was granted following the provision

225 See in this respect, for example, the well-argued counter-arguments developed by the International League of Competition Law ad hoc Committee on the revision of the Technology Transfer Block Exemption Regulation, Consultation Response, Section 2.6 (17 May 2013, source: http://ec.europa.eu/competition/consultations/2013_technology_transfer/lidc_en.pdf); See also the criticisms submitted by LESI, Comments on the proposed amendments to the Technology Transfer Block Exemption Regulation (TTBER), section 4 (17 May 2013, source: http://ec.europa.eu/competition/consultations/2013_technology_transfer/les_en.pdf).

226 See the TTBER Guidelines 2004, no. 207. See also the TTBER Guidelines 2014, no. 240.

227 See the TTBER Guidelines 2004, no. 208. See also the TTBER Guidelines 2014, no. 241.

228 See the TTBER Guidelines 2004, no. 209; cf. in this regard ECJ, 27 September 1988, *Bayer and ors. v. Heinz Sülhörer*, ECR 16988, 5249. See also the TTBER Guidelines 2014, no. 242.

229 See the TTBER Guidelines 2014, no. 242.

of incorrect or misleading information, where the licensor induces, financially or otherwise, the licensee to agree not to challenge the validity of the technology rights or where the technology rights are a necessary input for the licensee's production.²³⁰

Finally, it is worth of note that no-challenge clauses in settlement agreements are generally not caught by Article 101(1) TFEU, irrespective of whether they serve to terminate litigation or to avoid litigation.²³¹

C. *Technology pools*

71. A *technology pool* is an arrangement under which two or more parties bring together a technology package that is licenced to both the pool members and third parties.²³² Such pools enable cost efficient “*one-stop*” licensing of the technologies contained in the pool and can (wholly or partially) support a (*de facto* or *de iure*) industrial norm (standard).²³³

72. The TTBER 2004 distinguished between technology transfer agreements entered into between the pool and a third-party licensee that fell within the scope of application of the TTBER²³⁴ and agreements for setting up a pool including the conditions for its functioning together with the licence conditions amongst the pool participants, that by contrast did not fall within the scope of application of the TTBER²³⁵ but were assessed on the basis of the TTBER Guidelines.²³⁶

230 See the TTBER Guidelines 2014, no. 243. The text of the Draft TTBER Guidelines (no. 227) added that clauses in settlement agreements not to challenge a patent could in particular be problematic if the patent holder knew or “*could reasonably be expected to know*” that the patent did not meet the patentability criteria. In our view, the “*should reasonably have known*” wording provided insufficient guidance for the parties to a settlement agreement to assess the validity thereof. Note that, in the final version of the TTBER Guidelines, the Commission decided to leave out this wording.

231 This is in our view to be concluded – albeit implicitly – from the TTBER Guidelines 2014, no. 242.

232 See the TTBER Guidelines 2004, no. 210. See also the TTBER Guidelines 2014, no. 244.

233 See the TTBER Guidelines 2004, no. 211. See also the TTBER Guidelines 2014, no. 245. See the press release issued by the European Commission on 12 November 2002 – IP/02/1651. See also the TTBER Guidelines 2014, footnote 94.

234 See the TTBER Guidelines 2004, no. 212 and no. 223. This type of agreement can be assessed against the general analysis of technology transfer agreements.

235 See the TTBER Guidelines 2004, no. 223. See also the TTBER Guidelines 2014, no. 247.

236 See the TTBER Guidelines 2004, nos. 210 to 235. See the TTBER Guidelines 2014, nos. 248 to 265.

73. In the TTBER Guidelines 2014, the Commission has now abolished this distinction. According to the Commission, technology transfer agreements between a pool and third parties in principle also fall outside the scope of the TTBER. This is because licensing out from a pool is normally considered to be a multiparty agreement given that contributors in general determine together the conditions for such licensing.²³⁷

The section on pools in the TTBER Guidelines 2014 now provides a comprehensive safe harbour for pools, covering not only the creation of the pool but also its subsequent licensing out. By structuring their pool and the subsequent technology transfer agreements from the pool in such a way that the safe harbour conditions are fulfilled, the pool contributors can be certain that the pool is considered to be pro-competitive, regardless of the market share the pool could obtain. This is expected to give further incentives to the creation of pro-competitive pools.

C.1. The assessment of the formation and operation of technology pools

74. The inclusion in a pool of *substitute technologies*²³⁸ will generally infringe Article 101(1) TFEU and, furthermore, it is unlikely that the conditions in Article 101(3) TFEU will be met if the pool in question to a significant degree comprises substitute technologies.²³⁹

237 See the TTBER Guidelines 2014, nos. 247 and 266. According to the Commission's public consultation, these changes appear to be generally welcomed by the majority of the stakeholders (source: http://ec.europa.eu/competition/consultations/2013_technology_transfer/index_en.html).

238 These are technologies that are substitutes in the sense that the holder (licensee) can produce the product or carry out the process to which the technologies relate with one of the technologies (see the TTBER Guidelines 2004, no. 216; see also the TTBER Guidelines 2014, no. 251) and, without the pool, the licensee therefore would not have asked for both technologies (see the TTBER Guidelines 2004, no. 219; see also the TTBER Guidelines 2014, no. 255). Where it is probable as a result of the efficiency improvements and economic benefits thus resulting from the integration of two technologies that, but for the pool, the licensees would want to take a licence over both technologies, we do not speak of substitute technologies but of complementary technologies (see the TTBER Guidelines 2004, no. 218; see also the TTBER Guidelines 2014, no. 254).

239 See the TTBER Guidelines 2014, no. 255.

75. Where a pool comprises exclusively *essential technologies*,²⁴⁰ formation of the pool will in principle fall outside the scope of application of Article 101(1) TFEU, regardless of the market position of the parties.²⁴¹ The TTBER Guidelines 2014 specify that a technology can be essential either “(a) to produce a particular product or carry out a particular process to which the pooled technology relate or (b) to produce such product or carry out such a process in accordance with a standard which includes the pooled technologies”.²⁴² In the first case, a technology is essential if there are no ‘commercially or technically viable’ substitutes inside or outside the pool and the given technology constitutes a necessary part of the package of technologies for the purposes of manufacturing the product(s) or carrying out the process(es) to which the pool relates. In the second case a technology is essential if it constitutes a necessary part (that is to say, there are ‘no viable substitutes’) of the pooled technologies needed to comply with the standard supported by the pool.²⁴³ In other words, if you need both A and B to produce X or to comply with standard Y, and there are no viable alternatives for A and B, then A and B are essential. The Commission also further clarifies that the fact that a technology owner declares that a technology is essential does not imply that such a technology is essential according to the criteria mentioned in the Guidelines.²⁴⁴
76. However, arrangements between the participants in relation to the conditions under which licences are granted can fall under the scope of Article 101(1) TFEU.²⁴⁵

In the TTBER Guidelines 2014, the Commission now clarifies that this will not be the case if all of the following cumulative conditions are fulfilled²⁴⁶:

240 These are technologies for which there are no substitutes and that therefore form a necessary component of the technology package for production of the product or for carrying out the process or processes to which the pool relates (see the TTBER Guidelines 2004, no. 216; see also the TTBER Guidelines 2014, no. 251). Essential technologies are naturally also complementary in the sense that they are required to produce the product or carry out the process to which the technologies relate and therefore are not substitutes for one another (see also the TTBER Guidelines 2004, no. 216; see also the TTBER Guidelines 2014, no. 252).

241 See the TTBER Guidelines 2004, no. 220, TTBER Guidelines 2014, no. 261.

242 See the TTBER Guidelines 2014, no. 252.

243 Ibidem. The definition of ‘essential’ technology is thus widened.

244 See the TTBER Guidelines 2014, no. 252.

245 See the TTBER Guidelines 2004, no. 220.

246 See the TTBER Guidelines 2014, no. 261.

- a. Participation in the pool creation is open to all interested technology rights owners;

In that case it is more likely that technologies for inclusion into the pool are selected on the basis of price and/or quality considerations than when the pool is set up by a limited group of technology owners.²⁴⁷

- b. Sufficient safeguards are adopted to ensure that only essential (and therefore also complementary) technologies are pooled;

The involvement in the selection process of independent experts can contribute to ensuring that a commitment to include only essential technologies is implemented in practice.²⁴⁸

- c. Sufficient safeguards are adopted to ensure that exchange of sensitive information is restricted to what is necessary for the creation and the operation of the pool;

The Commission is in particular concerned about collusion based on the exchange of sensitive data such as pricing and output data in oligopolistic markets. In such circumstances an independent expert or licensing body may play an important role by ensuring that the given sensitive data are not disclosed in the frame of computing or checking royalties to undertakings that compete on affected markets.²⁴⁹

- d. The pooled technologies are licenced into the pool on a non-exclusive basis;

- e. The pooled technologies are licenced out to all potential licensees on fair, reasonable and non-discriminatory (FRAND) terms;²⁵⁰

- f. The parties contributing technologies to the pool and the licensees are free to challenge the validity and the essentiality of the pooled technologies;

247 See the TTBER Guidelines 2014, no. 249.

248 See the TTBER Guidelines 2014, no. 256

249 See the TTBER Guidelines 2014, no. 257.

250 Note the rather general application of FRAND terms whereas the TTBER Guidelines 2004 only envisage licensing on FRAND terms in the case of a standard and in case of a position of dominance of the pool (see the TTBER Guidelines 2004, no. 226).

The Commission is concerned about pooling that shield invalid patents thus possibly obliging licensees to pay higher royalties and preventing innovation in the field covered by the invalid patent.²⁵¹ The involvement of independent experts may contribute to avoid the inclusion of invalid patents.²⁵²

- g. The parties contributing technology to the pool and the licensee remain free to develop competing products and technology.

77. Where *non-essential but complementary* IPR (e.g. in the form of patents) are included in a pool, there may be possible pro-efficiency effects,²⁵³ but there is nonetheless still a risk of incompatibility with Article 101(1) TFEU as a result of exclusion of the technologies of third parties or by royalties being paid for technologies that the licensees may not need. However, there are various ways in which to mitigate this risk and hence to enhance the chances of successfully invoking an exemption under Article 101(3) TFEU.²⁵⁴
78. Where there are various applications for the pooled technologies, a prohibited collective bundling can be avoided by offering a variety of packages to avoid technologies that are not essential for a given product or process being coupled to essential technologies, thus avoiding the licensee paying for a technology that he does not need.²⁵⁵
79. In the TTBER Guidelines 2014, the Commission further clarifies that the conditions of Article 101(3) TFEU are likely to be fulfilled in case of the inclusion of non-essential patents in a given pool, provided that (i) all the other criteria of the safe

251 See the TTBER Guidelines 2014, no. 272

252 See the TTBER Guidelines 2014, no. 257.

253 These are the result of a possible reduction in the transaction costs borne by the licensee *“because the parties are in a position to fix a common royalty for the package as opposed to each party fixing a royalty for its own technology while not taking into account that a higher royalty for one technology will usually decrease the demand for complementary technologies”* (see the TTBER Guidelines 2004, no. 217; see also the TTBER Guidelines 2014, no. 253).

254 See the TTBER Guidelines 2004, no. 221-222. See also the TTBER Guidelines 2014, no. 262 and no. 264. For example, if the technology pool includes non-essential patents but fulfils all the other criteria of the safe harbour, where there are pro-competitive reasons for including non-essential patents in the pool and where licensees have the possibility of obtaining a licence for only part of the package with a corresponding reduction of royalties, the conditions of Article 101(3) TFEU are likely to be fulfilled (see TTBER Guidelines 2014, no. 265).

255 See the TTBER Guidelines 2004, no. 222(c). See also the TTBER Guidelines 2014, no. 264(c).

harbour listed above²⁵⁶ are met, (ii) there are pro-competitive reasons for including non-essential patents in the pool²⁵⁷ and (iii) the licensees are free to obtain a licence for only part of the package with a corresponding reduction of royalties.²⁵⁸

C.2. Assessment of individual restraints in agreements between the pool and its licensees

80. Where the agreement to set up a technology pool does not infringe Article 101 TFEU, the next step is to assess the competitive impact of the licences agreed between the pool and its licensees.²⁵⁹
81. In making such assessment, the Commission will be guided by the following principles:
- a. The stronger the market position of the pool, the greater the risk of anti-competitive effects;²⁶⁰
 - b. The stronger the market position of the pool, the more likely that agreeing not to license to all potential licensees or to license on discriminatory terms will infringe Article 101 TFEU.²⁶¹ Therefore, where the pool has a dominant position all licensing terms should be fair, reasonable and non-discriminatory (e.g. the royalties)²⁶² and licences should be non-exclusive, so that the pool does not result in foreclosure or other anti-competitive consequences on the downstream markets²⁶³.

256 See no. 76 above.

257 For instance, due to the costs of assessing whether all the technologies are essential in view of the high number of technologies (see the TTBER Guidelines 2014, no. 264 (a)).

258 See the TTBER Guidelines 2014, no. 264(d).

259 See the TTBER Guidelines 2014, no. 266.

260 See the TTBER Guidelines 2004, no. 224(1); see also the TTBER Guidelines 2014, no. 267(a).

261 See the TTBER Guidelines 2004, no. 224(2); see also the TTBER Guidelines 2014, no. 267(b).

262 Where the pool has no dominant position, the parties are free to negotiate and fix the royalties for the technology packet. However, the licensees must always be given the freedom to determine the price for the products produced under licence (see the TTBER Guidelines 2004, no. 225; see also the TTBER Guidelines 2014, no. 268 where the freedom to negotiate and fix royalties is however, and even in the absence of dominance, made "*subject to any commitment given to license on fair, reasonable and non-discriminatory terms*").

263 See the TTBER Guidelines 2004, no. 226; See also the TTBER Guidelines 2014, no. 269.

- c. Pools should not unduly foreclose third party technologies or limit the creation of alternative pools.²⁶⁴

To avoid a pool hindering the development of new, improved technologies and standards, *non-compete obligations* must in principle be avoided and licensors and licensees therefore have to be free to develop and acquire competing products and standards outside the pool in question.²⁶⁵ For the same reason, grant-back obligations ought not to be exclusive and should remain limited to developments that are essential or important for using the pooled technology.²⁶⁶ In line with the same rationale, the right to terminate a licence where the validity of IPR is challenged should be restricted to the technology/ies against which the claim is levied, for, otherwise, the pool might protect invalid intellectual property rights and thus hinder innovation in the field covered by the invalid intellectual property rights.²⁶⁷ As regards the latter, the Commission has brought things in line with its decision to exclude from the safe harbour of the TTBER the right for the licensor to terminate the agreement if the (non - exclusive) licensee challenges the validity of any of the IPR that the licensor holds in the EU, and therefore states that “*non-challenge clauses, including termination clauses, in a technology transfer agreement between the pool and third parties are likely to fall within Article 101(1)*”.²⁶⁸

- d. The TTBER Guidelines 2014 finally add that the technology rights transfer agreements should not contain any of the hardcore restrictions listed in Article 4 TTBER.²⁶⁹

264 See the TTBER Guidelines 2004, no. 224(3); see also the TTBER Guidelines 2014, no. 267(c).

265 See the TTBER Guidelines 2004, nos. 224(3) and 227. Compare with the TTBER Guidelines 2014, nos. 267(c) and 270.

266 See the TTBER Guidelines 2004, no. 228. See also the TTBER Guidelines 2014, no. 271. Inclusion of such grant-back obligations is advisable in any case to avoid exploitation of the pooled technology being blocked by licensees (including their subcontractors) that might acquire essential patents.

267 See the TTBER Guidelines 2004, no. 229 and the TTBER Guidelines 2014, no. 272.

268 See the TTBER Guidelines 2014, no. 272.

269 See also the TTBER Guidelines 2014, no. 267(d).

Conclusion

82. The *grant* of a licence (technology transfer) forms part and parcel of the normal exercise of an intellectual property right. Hence, the technology transfer agreement *per se* does not founder on any consideration of competition law since a grant of the right of use leads precisely to a pro-competitive spread of technology, competition on the product market and innovation.

Nonetheless, the *terms* allied to a licence (technology transfer) can constitute restraints of competition (e.g. production and/or sales restrictions), which have to be assessed in accordance with Article 101 TFEU and/or the equivalent Member State competition law provision.

83. As has been the case since 1 May 2004, the assessment of technology transfer agreements under EU competition law will also as from 1 May 2014 be governed by two instruments, the TTBER and the TTBER Guidelines, both of which proceed on the basis of the probable economic consequences of a technology transfer agreement on the relevant market(s). At least at Community level, the parties will continue to have several so-called “*safe harbours*” available to them. Some suppose that competition is not appreciably affected because there are four or more commercially and technically viable substitute technologies in existence on the relevant market(s) and/or because the agreement qualifies under the *de minimis* notice, or alternatively that there is no appreciable effect on trade between Member States. Another “*safe harbour*” offers protection where the applicable market share thresholds are not exceeded. Access to the mentioned safe harbours is nevertheless – in principle – blocked once the technology transfer agreement in question contains a so-called “*hardcore*” restriction. Moreover, access to the safe harbours will remain more easily gained by non-competitors than by competitors. Outside the safe harbours, *individual assessment* will continue to be imperative, usually on the basis of the principles developed under the TTBER (Guidelines) and with market power as the central touchstone.
84. In short, the assessment of existing and planned technology transfer agreements in terms of the European cartel rules will continue to be a *dynamic* and *multi-disciplinary legal-economic* process in which determination of the relevant market(s) and the level of market power is meant to consistently stand central.

85. However, as regards (new and / or rapidly changing) technologies, relevant markets are often difficult to determine and market shares are in many cases not easier to estimate. Therefore, market share thresholds or the existence of a sufficient number of commercially and technically viable substitute technologies risk to also in the future remain of little practical use in the assessment process.

At least in this respect, and despite various welcome clarifications and simplifications brought to the '*ancient regime*' (e.g. the introduction of the new test for determining whether provisions in a technology transfer agreement concerning purchases of raw material or equipment from a licensor or the use of the licensors trade mark, are exempted from Article 101 TFEU together with the technology transfer agreement itself; the simplification of the hardcore list applicable to technology transfer agreements between competitors and the provision of a comprehensive safe harbour for pools covering not only the creation of the pool but also its subsequent licensing out), the new regime will thus in our view not fundamentally increase the desired legal and commercial certainty for parties engaging in technology transfer in Europe. What more is, the (albeit limited) changes to the TTBER (Guidelines) represent in parts potentially important shifts towards a more restrictive regime, aimed at or at least resulting in limiting the "safe harbour" protection that technology transfer agreements currently enjoy (e.g. for restrictions in an agreement between non – competitors of passive sales in an exclusive sales area or to an exclusive customer group that is allotted to another licensee, for two years as from the date on which the protected licensee first trades in the products incorporating the licenced technology in his exclusive sales area or with his exclusive customer group; for exclusive grant back clauses on non-severable improvements).

86. This in our view unfortunately and on balance leads to less legal and commercial certainty and thus risks undermining the incentives for research and innovation and the diffusion of intellectual property, aimed at.

Annex 1 – TTBER 2014

28.3.2014

EN

Official Journal of the European Union

L 93/17

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

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

providing adequate legal security for undertakings. The pursuit of those objectives should take account of the need to simplify administrative supervision and the legislative framework to as great an extent as possible.

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation No 19/65/EEC of the Council of 2 March 1965 on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices⁽¹⁾, and in particular Article 1 thereof,

- (4) Technology transfer agreements concern the licensing of technology rights. Such agreements will usually improve economic efficiency and be pro-competitive as they can reduce duplication of research and development, strengthen the incentive for the initial research and development, spur incremental innovation, facilitate diffusion and generate product market competition.

Having published a draft of this Regulation,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

- (1) Regulation No 19/65/EEC empowers the Commission to apply Article 101(3) of the Treaty by regulation to certain categories of technology transfer agreements and corresponding concerted practices to which only two undertakings are party which fall within Article 101(1) of the Treaty.

- (5) The likelihood that such efficiency-enhancing and pro-competitive effects will outweigh any anti-competitive effects due to restrictions contained in technology transfer agreements depends on the degree of market power of the undertakings concerned and, therefore, on the extent to which those undertakings face competition from undertakings owning substitute technologies or undertakings producing substitute products.

- (2) Pursuant to Regulation No 19/65/EEC, the Commission has, in particular, adopted Commission Regulation (EC) No 772/2004⁽²⁾. Regulation (EC) No 772/2004 defines categories of technology transfer agreements which the Commission regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty. In view of the overall positive experience with the application of that Regulation, which expires on 30 April 2014, and taking into account further experience acquired since its adoption, it is appropriate to adopt a new block exemption regulation.

- (6) This Regulation should cover only technology transfer agreements between a licensor and a licensee. It should cover such agreements even if the agreement contains conditions relating to more than one level of trade, for instance requiring the licensee to set up a particular distribution system and specifying the obligations the licensee must or may impose on resellers of the products produced under the licence. However, such conditions and obligations should comply with the competition rules applicable to supply and distribution agreements set out in Commission Regulation (EU) No 330/2010⁽³⁾. Supply and distribution agreements concluded between a licensee and buyers of its contract products should not be exempted by this Regulation.

- (3) This Regulation should meet the two requirements of ensuring effective protection of competition and

⁽¹⁾ OJ 36, 6.3.1965, p. 533/65.

⁽²⁾ Commission Regulation (EC) No 772/2004 of 7 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (OJ L 123, 27.4.2004, p. 11).

⁽³⁾ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 102, 23.4.2010, p. 1).

- (7) This Regulation should only apply to agreements where the licensor permits the licensee and/or one or more of its sub-contractors to exploit the licensed technology rights, possibly after further research and development by the licensee and/or its sub-contractors, for the purpose of producing goods or services. It should not apply to licensing in the context of research and development agreements which are covered by Commission Regulation (EU) No 1217/2010 ⁽¹⁾ or to licensing in the context of specialisation agreements which are covered by Commission Regulation (EU) No 1218/2010 ⁽²⁾. It should also not apply to agreements, the purpose of which is the mere reproduction and distribution of software copyright protected products as such agreements do not concern the licensing of a technology to produce but are more akin to distribution agreements. Nor should it apply to agreements to set up technology pools, that is to say, agreements for the pooling of technologies with the purpose of licensing them to third parties, or to agreements whereby the pooled technology is licensed out to those third parties.
- (8) For the application of Article 101(3) of the Treaty by regulation, it is not necessary to define those technology transfer agreements that are capable of falling within Article 101(1) of the Treaty. In the individual assessment of agreements pursuant to Article 101(1), account has to be taken of several factors, and in particular the structure and the dynamics of the relevant technology and product markets.
- (9) The benefit of the block exemption established by this Regulation should be limited to those agreements which can be assumed with sufficient certainty to satisfy the conditions of Article 101(3) of the Treaty. In order to attain the benefits and objectives of technology transfer, this Regulation should not only cover the transfer of technology as such but also other provisions contained in technology transfer agreements if, and to the extent that, those provisions are directly related to the production or sale of the contract products.
- (10) For technology transfer agreements between competitors it can be presumed that, where the combined share of the relevant markets accounted for by the parties does not exceed 20 % and the agreements do not contain certain severely anti-competitive restrictions, they generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.
- (11) For technology transfer agreements between non-competitors it can be presumed that, where the individual share of the relevant markets accounted for by each of the parties does not exceed 30 % and the agreements do not contain certain severely anti-competitive restrictions, they generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.
- (12) If the applicable market-share threshold is exceeded on one or more product or technology markets, the block exemption should not apply to the agreement for the relevant markets concerned.
- (13) There can be no presumption that, above those market-share thresholds, technology transfer agreements fall within the scope of Article 101(1) of the Treaty. For instance, exclusive licensing agreements between non-competing undertakings often fall outside the scope of Article 101(1). There can also be no presumption that, above those market-share thresholds, technology transfer agreements falling within the scope of Article 101(1) will not satisfy the conditions for exemption. However, it can also not be presumed that they will usually give rise to objective advantages of such a character and size as to compensate for the disadvantages which they create for competition.
- (14) This Regulation should not exempt technology transfer agreements containing restrictions which are not indispensable to the improvement of production or distribution. In particular, technology transfer agreements containing certain severely anti-competitive restrictions, such as the fixing of prices charged to third parties, should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market shares of the undertakings concerned. In the case of such hardcore restrictions the whole agreement should be excluded from the benefit of the block exemption.
- (15) In order to protect incentives to innovate and the appropriate application of intellectual property rights, certain restrictions should be excluded from the benefit of the block exemption. In particular certain grant back obligations and non-challenge clauses should be excluded. Where such a restriction is included in a licence agreement only the restriction in question should be excluded from the benefit of the block exemption.
- ⁽¹⁾ Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements (OJ L 335, 18.12.2010, p. 36).
- ⁽²⁾ Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements (OJ L 335, 18.12.2010, p. 43).

- (16) The market-share thresholds and the non-exemption of technology transfer agreements containing the severely anti-competitive restrictions and the excluded restrictions provided for in this Regulation will normally ensure that the agreements to which the block exemption applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the products in question.
- (17) The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Council Regulation (EC) No 1/2003⁽¹⁾, where it finds in a particular case that an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty. This may occur in particular where the incentives to innovate are reduced or where access to markets is hindered.
- (18) The competition authority of a Member State may withdraw the benefit of this Regulation pursuant to Article 29(2) of Regulation (EC) No 1/2003 in respect of the territory of that Member State, or a part thereof where, in a particular case, an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty in the territory of that Member State, or in a part thereof, and where such territory has all the characteristics of a distinct geographic market.
- (19) In order to strengthen supervision of parallel networks of technology transfer agreements which have similar restrictive effects and which cover more than 50 % of a given market, the Commission may by regulation declare this Regulation inapplicable to technology transfer agreements containing specific restrictions relating to the market concerned, thereby restoring the full application of Article 101 of the Treaty to such agreements,
- (i) patents,
- (ii) utility models,
- (iii) design rights,
- (iv) topographies of semiconductor products,
- (v) supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained,
- (vi) plant breeder's certificates and
- (vii) software copyrights;
- (c) 'technology transfer agreement' means:
- (i) a technology rights licensing agreement entered into between two undertakings for the purpose of the production of contract products by the licensee and/or its sub-contractor(s),
- (ii) an assignment of technology rights between two undertakings for the purpose of the production of contract products where part of the risk associated with the exploitation of the technology remains with the assignor;
- (d) 'reciprocal agreement' means a technology transfer agreement where two undertakings grant each other, in the same or separate contracts, a technology rights licence, and where those licences concern competing technologies or can be used for the production of competing products;

HAS ADOPTED THIS REGULATION:

Article 1

Definitions

1. For the purposes of this Regulation, the following definitions shall apply:

- (a) 'agreement' means an agreement, a decision of an association of undertakings or a concerted practice;
- (b) 'technology rights' means know-how and the following rights, or a combination thereof, including applications for or applications for registration of those rights:
- (f) 'product' means goods or a service, including both intermediary goods and services and final goods and services;
- (g) 'contract product' means a product produced, directly or indirectly, on the basis of the licensed technology rights;
- (h) 'intellectual property rights' includes industrial property rights, in particular patents and trademarks, copyright and neighbouring rights;
- (1) Council Regulation (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 (OJ L 1, 4.1.2003, p. 1).

- (i) 'know-how' means a package of 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 fulfils the criteria of secrecy and substantiality;
- (j) 'relevant product market' means the market for the contract products and their substitutes, that is to say all those products which are regarded as interchangeable or substitutable by the buyer, by reason of the products' characteristics, their prices and their intended use;
- (k) 'relevant technology market' means the market for the licensed technology rights and their substitutes, that is to say all those technology rights which are regarded as interchangeable or substitutable by the licensee, by reason of the technology rights' characteristics, the royalties payable in respect of those rights and their intended use;
- (l) 'relevant geographic market' means the area in which the undertakings concerned are involved in the supply of and demand for products or the licensing of technology rights, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas;
- (m) 'relevant market' means the combination of the relevant product or technology market with the relevant geographic market;
- (n) 'competing undertakings' means undertakings which compete on the relevant market, that is to say:
- (i) competing undertakings on the relevant market where the technology rights are licensed, that is to say, undertakings which license out competing technology rights (actual competitors on the relevant market),
 - (ii) competing undertakings on the relevant market where the contract products are sold, that is to say, undertakings which, in the absence of the technology transfer agreement, would both be active on the relevant market(s) on which the contract products are sold (actual competitors on the relevant market) or which, in the absence of the technology transfer agreement, would, on realistic grounds and not just as a mere theoretical possibility, in response to a small and permanent increase in relative prices, be likely to undertake, within a short period of time, the necessary additional investments or other necessary switching costs to enter the relevant market(s) (potential competitors on the relevant market);
- (o) 'selective distribution system' means a distribution system where the licensor undertakes to license the production of the contract products, either directly or indirectly, only to licensees selected on the basis of specified criteria and where those licensees undertake not to sell the contract products to unauthorised distributors within the territory reserved by the licensor to operate that system;
- (p) 'exclusive licence' means a licence under which the licensor itself is not permitted to produce on the basis of the licensed technology rights and is not permitted to license the licensed technology rights to third parties, in general or for a particular use or in a particular territory;
- (q) 'exclusive territory' means a given territory within which only one undertaking is allowed to produce the contract products, but where it is nevertheless possible to allow another licensee to produce the contract products within that territory only for a particular customer where the second licence was granted in order to create an alternative source of supply for that customer;
- (r) 'exclusive customer group' means a group of customers to which only one party to the technology transfer agreement is allowed to actively sell the contract products produced with the licensed technology.
2. For the purposes of this Regulation, the terms 'undertaking', 'licensor' and 'licensee' shall include their respective connected undertakings.
- 'Connected undertakings' means:
- (a) undertakings in which a party to the technology transfer agreement, directly or indirectly:
 - (i) has the power to exercise more than half the voting rights, or
 - (ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
 - (iii) has the right to manage the undertaking's affairs;

- (b) undertakings which directly or indirectly have, over a party to the technology transfer agreement, the rights or powers listed in point (a);
- (c) undertakings in which an undertaking referred to in point (b) has, directly or indirectly, the rights or powers listed in point (a);
- (d) undertakings in which a party to the technology transfer agreement together with one or more of the undertakings referred to in points (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in point (a);
- (e) undertakings in which the rights or the powers listed in point (a) are jointly held by:
 - (i) parties to the technology transfer agreement or their respective connected undertakings referred to in points (a) to (d), or
 - (ii) one or more of the parties to the technology transfer agreement or one or more of their connected undertakings referred to in points (a) to (d) and one or more third parties.

Article 2

Exemption

1. Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, Article 101(1) of the Treaty shall not apply to technology transfer agreements.
2. The exemption provided for in paragraph 1 shall apply to the extent that technology transfer agreements contain restrictions of competition falling within the scope of Article 101(1) of the Treaty. The exemption shall apply for as long as the licensed technology rights have not expired, lapsed or been declared invalid or, in the case of know-how, for as long as the know-how remains secret. However, where know-how becomes publicly known as a result of action by the licensee, the exemption shall apply for the duration of the agreement.
3. The exemption provided for in paragraph 1 shall also apply to provisions, in technology transfer agreements, which relate to the purchase of products by the licensee or which relate to the licensing or assignment of other intellectual property rights or know-how to the licensee, if, and to the extent that, those provisions are directly related to the production or sale of the contract products.

Article 3

Market-share thresholds

1. Where the undertakings party to the agreement are 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 relevant market(s).

2. Where the undertakings party to the agreement are 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 relevant market(s).

Article 4

Hardcore restrictions

1. Where the undertakings party to the agreement are competing undertakings, the exemption provided for in Article 2 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object any of the following:

- (a) the restriction of a party's ability to determine its prices when selling products to third parties;
- (b) the limitation of output, except limitations on the output of contract products imposed on the licensee in a non-reciprocal agreement or imposed on only one of the licensees in a reciprocal agreement;
- (c) the allocation of markets or customers except:
 - (i) the obligation on the licensor and/or the licensee, in a non-reciprocal agreement, not to produce with the licensed technology rights within the exclusive territory reserved for the other party and/or not to sell actively and/or passively into the exclusive territory or to the exclusive customer group reserved for the other party,
 - (ii) the restriction, in a non-reciprocal agreement, of active sales by the licensee into the exclusive territory or to the exclusive customer group allocated by the licensor to another licensee provided the latter was not a competing undertaking of the licensor at the time of the conclusion of its own licence,
 - (iii) the obligation on the licensee to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products,
 - (iv) the obligation on the licensee, in a non-reciprocal agreement, to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer;

(d) the restriction of the licensee's ability to exploit its own technology rights or the restriction of the ability of any of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.

2. Where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 2 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object any of the following:

- (a) the restriction of a party's ability to determine its prices when selling products to third parties, without prejudice to the possibility of imposing a maximum sale price or recommending a sale price, provided that it does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- (b) the restriction of the territory into which, or of the customers to whom, the licensee may passively sell the contract products, except:
 - (i) the restriction of passive sales into an exclusive territory or to an exclusive customer group reserved for the licensor,
 - (ii) the obligation to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products,
 - (iii) the obligation to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer,
 - (iv) the restriction of sales to end-users by a licensee operating at the wholesale level of trade,
 - (v) the restriction of sales to unauthorised distributors by the members of a selective distribution system;
- (c) the restriction of active or passive sales to end-users by a licensee which is a member of a selective distribution system and which operates at the retail level, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.

3. Where the undertakings party to the agreement are not competing undertakings at the time of the conclusion of the agreement but become competing undertakings afterwards, paragraph 2 and not paragraph 1 shall apply for the full life of the agreement unless the agreement is subsequently amended

in any material respect. Such an amendment includes the conclusion of a new technology transfer agreement between the parties concerning competing technology rights.

Article 5

Excluded restrictions

1. The exemption provided for in Article 2 shall not apply to any of the following obligations contained in technology transfer agreements:

- (a) any direct or indirect obligation on the licensee to grant an exclusive licence or to assign rights, in whole or in part, to the licensor or to a third party designated by the licensor in respect of its own improvements to, or its own new applications of, the licensed technology;
- (b) any direct or indirect obligation on a party not to challenge the validity of intellectual property rights which the other party holds in the Union, without prejudice to the possibility, in the case of an exclusive licence, of providing for termination of the technology transfer agreement in the event that the licensee challenges the validity of any of the licensed technology rights.

2. Where the undertakings party to the agreement are not competing undertakings, the exemption provided for in Article 2 shall not apply to any direct or indirect obligation limiting the licensee's ability to exploit its own technology rights or limiting the ability of any of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.

Article 6

Withdrawal in individual cases

1. The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Regulation (EC) No 1/2003, where it finds in any particular case that a technology transfer agreement to which the exemption provided for in Article 2 of this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty, and in particular where:

- (a) access of third parties' technologies to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements prohibiting licensees from using third parties' technologies;
- (b) access of potential licensees to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements prohibiting licensors from licensing to other licensees or because the only technology owner licensing out relevant technology rights concludes an exclusive license with a licensee who is already active on the product market on the basis of substitutable technology rights.

2. Where, in any particular case, a technology transfer agreement to which the exemption provided for in Article 2 of this Regulation applies has effects which are incompatible with Article 101(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of this Regulation, pursuant to Article 29(2) of Regulation (EC) No 1/2003, in respect of that territory, under the same circumstances as those set out in paragraph 1 of this Article.

Article 7

Non-application of this Regulation

1. Pursuant to Article 1a of Regulation (EC) No 19/65/EEC, the Commission may by regulation declare that, where parallel networks of similar technology transfer agreements cover more than 50 % of a relevant market, this Regulation is not to apply to technology transfer agreements containing specific restrictions relating to that market.

2. A regulation pursuant to paragraph 1 shall not become applicable earlier than six months following its adoption.

Article 8

Application of the market-share thresholds

For the purposes of applying the market-share thresholds laid down in Article 3 the following rules shall apply:

- (a) the market share shall be calculated on the basis of market sales value data; if market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the undertaking concerned;
- (b) the market share shall be calculated on the basis of data relating to the preceding calendar year;
- (c) the market share held by the undertakings referred to in point (e) of the second subparagraph of Article 1(2) shall be apportioned equally to each undertaking having the rights or the powers listed in point (a) of the second subparagraph of Article 1(2);

(d) the market share of a licensor on a relevant market for the licensed technology rights shall be calculated on the basis of the presence of the licensed technology rights on the relevant market(s) (that is the product market(s) and the geographic market(s) where the contract products are sold, that is on the basis of the sales data relating to the contract products produced by the licensor and its licensees combined;

(e) if the market share referred to in Article 3(1) or (2) is initially not more than 20 % or 30 % respectively, but subsequently rises above those levels, the exemption provided for in Article 2 shall continue to apply for a period of two consecutive calendar years following the year in which the 20 % threshold or 30 % threshold was first exceeded.

Article 9

Relationship with other block exemption regulations

This Regulation shall not apply to licensing arrangements in research and development agreements which fall within the scope of Regulation (EU) No 1217/2010 or in specialisation agreements which fall within the scope of Regulation (EU) No 1218/2010.

Article 10

Transitional period

The prohibition laid down in Article 101(1) of the Treaty shall not apply from 1 May 2014 until 30 April 2015 to agreements already in force on 30 April 2014 which do not satisfy the conditions for exemption provided for in this Regulation but which, on 30 April 2014, satisfied the conditions for exemption provided for in Regulation (EC) No 772/2004.

Article 11

Period of validity

This Regulation shall enter into force on 1 May 2014.

It shall expire on 30 April 2026.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 21 March 2014.

For the Commission,
On behalf of the President,
Joaquín ALMUNIA
Vice-President

Annex 2 – TTBER Guidelines 2014

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

(2014/C 89/03)

TABLE OF CONTENTS

1.	INTRODUCTION	5
2.	GENERAL PRINCIPLES	5
2.1.	Article 101 of the Treaty and intellectual property rights	5
2.2.	The general framework for applying Article 101	6
2.3.	Market definition	8
2.4.	The distinction between competitors and non-competitors	10
3.	APPLICATION OF THE TTBER	12
3.1.	The effects of the TTBER	12
3.2.	Scope and duration of the TTBER	12
3.2.1.	The concept of technology transfer agreements	12
3.2.2.	The concept of ‘transfer’	13
3.2.3.	Agreements between two parties	14
3.2.4.	Agreements for the production of contract products	14
3.2.5.	Duration	16
3.2.6.	Relationship with other block exemption regulations	16
3.2.6.1.	The Block Exemption Regulations on specialisation and R&D agreements	16
3.2.6.2.	The Block Exemption Regulation on vertical agreements	17
3.3.	The market share thresholds of the safe harbour	17
3.4.	Hardcore restrictions of competition under the Block Exemption Regulation	20
3.4.1.	General principles	20
3.4.2.	Agreements between competitors	20
3.4.3.	Agreements between non-competitors	25
3.5.	Excluded restrictions	27
3.6.	Withdrawal and non-application of the Block Exemption Regulation	30
3.6.1.	Withdrawal procedure	30
3.6.2.	Non-application of the Block Exemption Regulation	31
4.	APPLICATION OF ARTICLE 101(1) AND 101(3) OF THE TREATY OUTSIDE THE SCOPE OF THE TTBER	31
4.1.	The general framework for analysis	31
4.1.1.	The relevant factors	32
4.1.2.	Negative effects of restrictive licence agreements	33
4.1.3.	Positive effects of restrictive licence agreements and the framework for analysing such effects	34
4.2.	Application of Article 101 to various types of licensing restraints	36
4.2.1.	Royalty obligations	36
4.2.2.	Exclusive licensing and sales restrictions	37
4.2.2.1.	Exclusive and sole licences	37

4.2.2.2. Sales restrictions	38
4.2.3. Output restrictions	39
4.2.4. Field of use restrictions	40
4.2.5. Captive use restrictions	41
4.2.6. Tying and bundling	42
4.2.7. Non-compete obligations	43
4.3. Settlement agreements	44
4.4. Technology pools	45
4.4.1. The assessment of the formation and operation of technology pools	46
4.4.2. Assessment of individual restraints in agreements between the pool and its licensees	49

1. INTRODUCTION

1. These guidelines set out the principles for the assessment of technology transfer agreements under Article 101 of the Treaty on the Functioning of the European Union⁽¹⁾ (‘Article 101’). Technology transfer agreements concern the licensing of technology rights where the licensor permits the licensee to exploit the licensed technology rights for the production of goods or services, as defined in Article 1(1)(c) of 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 (‘the TTBER’)⁽²⁾.
2. The purpose of these guidelines is to provide guidance on the application of the TTBER as well as on the application of Article 101 of the Treaty on the Functioning of the European Union (‘the Treaty’) to technology transfer agreements that fall outside the scope of the TTBER. The TTBER and the guidelines are without prejudice to the possible parallel application of Article 102 of the Treaty to technology transfer agreements⁽³⁾.
3. The standards set forth in these guidelines must be applied in the light of the circumstances specific to each case. This excludes a mechanical application. Each case must be assessed on its own facts and these guidelines must be applied reasonably and flexibly. Examples given serve as illustrations only and are not intended to be exhaustive.
4. These guidelines are without prejudice to the interpretation of Article 101 and the TTBER that may be given by the Court of Justice and the General Court.

2. GENERAL PRINCIPLES

2.1. Article 101 of the Treaty and intellectual property rights

5. The aim of Article 101 of the Treaty as a whole is to protect competition on the market with a view to

promoting consumer welfare and an efficient allocation of resources. Article 101(1) prohibits all agreements and concerted practices between undertakings and decisions by associations of undertakings⁽⁴⁾ which may affect trade between Member States⁽⁵⁾ and which have as their object or effect the prevention, restriction or distortion of competition⁽⁶⁾. As an exception to this rule Article 101(3) provides that the prohibition contained in Article 101(1) may be declared inapplicable in the case of agreements between undertakings which contribute to improving the production or distribution of products or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits and which do not impose restrictions which are not indispensable to the attainment of these objectives and do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned.

6. Intellectual property laws confer exclusive rights on holders of patents, copyright, design rights, trademarks and other legally protected rights. The owner of intellectual property is entitled under intellectual property laws to prevent unauthorised use of its intellectual property and to exploit it, for example, by licensing it to third parties. Once a product incorporating an intellectual property right, with the exception of performance rights⁽⁷⁾, has been put on the market inside the European Economic Area (EEA) by the holder or with its consent, the intellectual property right is exhausted in the sense that the holder can no longer use it to control the sale of the product (principle of Union exhaustion)⁽⁸⁾. The right holder has no right under intellectual property laws to prevent sales by licensees or buyers of such products incorporating the licensed technology. The principle of Union exhaustion is in line with the essential function of intellectual property rights, which is to grant the holder the right to exclude others from exploiting its intellectual property without its consent.

⁽⁴⁾ In the following the term ‘agreement’ includes concerted practices and decisions of associations of undertakings.

⁽⁵⁾ See Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101, 27.4.2004, p. 81.

⁽⁶⁾ In the following the term ‘restriction’ includes the prevention and distortion of competition.

⁽⁷⁾ Which includes rental rights. See in this respect Case 158/86, *Warner Brothers and Metronome Video*, [1988] ECR 2605 and Case C-61/97, *Foreningen af danske videogramdistributører*, [1998] ECR I-5171.

⁽⁸⁾ This principle of Union exhaustion is for example enshrined in Article 7(1) of Directive 2008/95/EC to approximate the laws of the Member States relating to trade marks (OJ L 299, 8.11.2008, p. 25), which provides that the trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Union under that trade mark by the proprietor or with its consent, and Article 4(2) of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ L 111, 5.5.2009, p. 16), which provides that the first sale in the Union of a copy of a program by the right holder or with its consent shall exhaust the distribution right within the Union of that copy, with the exception of the right to control further rental of the program or a copy thereof. See in this respect C-128/11, *UsedSoft GmbH v. Oracle International Corp.*, [2012] ECR not yet published.

⁽¹⁾ With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union (‘TFEU’). The two sets of provisions are, in substance, identical. For the purposes of these Guidelines, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of ‘Community’ by ‘Union’ and ‘common market’ by ‘internal market’. The terminology of the TFEU will be used throughout these Guidelines.

⁽²⁾ OJ L 93, 28.3.2014, p. 17. The TTBER replaces Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (OJ L 123, 27.4.2004, p. 11).

⁽³⁾ See by analogy Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge*, [2000] ECR I-1365, paragraph 130, and point 106 of the Commission Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

7. The fact that intellectual property laws grant exclusive rights of exploitation does not imply that intellectual property rights are immune from competition law intervention. Article 101 of the Treaty is in particular applicable to agreements whereby the holder licenses another undertaking to exploit its intellectual property rights⁽⁹⁾. Nor does it imply that there is an inherent conflict between intellectual property rights and the Union competition rules. Indeed, both bodies of law share the same basic objective of promoting consumer welfare and an efficient allocation of resources. Innovation constitutes an essential and dynamic component of an open and competitive market economy. Intellectual property rights promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. So does competition by putting pressure on undertakings to innovate. Therefore, both intellectual property rights and competition are necessary to promote innovation and ensure a competitive exploitation thereof.

8. In the assessment of licence agreements under Article 101 of the Treaty it must be kept in mind that the creation of intellectual property rights often entails substantial investment and that this is often a risky endeavour. In order not to reduce dynamic competition and to maintain the incentive to innovate, the innovator must not be unduly restricted in the exploitation of intellectual property rights that turn out to be valuable. For these reasons the innovator should be free to seek appropriate remuneration for successful projects that is sufficient to maintain investment incentives, taking failed projects into account. Technology rights licensing may also require the licensee to make significant sunk investments (that is to say, that upon leaving that particular field of activity the investment cannot be used by the licensee for other activities or sold other than at a significant loss) in the licensed technology and production assets necessary to exploit it. Article 101 cannot be applied without considering such *ex ante* investments made by the parties and the risks relating thereto. The risk facing the parties and the sunk investment that must be committed may thus lead to the agreement falling outside Article 101(1) or fulfilling the conditions of Article 101(3), as the case may be, for the period of time required to recoup the investment.

9. In assessing licensing agreements under Article 101 of the Treaty, the existing analytical framework is sufficiently flexible to take due account of the dynamic aspects of technology rights licensing. There is no presumption that intellectual property rights and licence agreements as such give rise to competition concerns. Most licence agreements do not restrict competition and create pro-

competitive efficiencies. Indeed, licensing as such is pro-competitive as it leads to dissemination of technology and promotes innovation by the licensor and licensee(s). In addition, even licence agreements that do restrict competition may often give rise to pro-competitive efficiencies, which must be considered under Article 101(3) and balanced against the negative effects on competition⁽¹⁰⁾. The great majority of licence agreements are therefore compatible with Article 101.

2.2. The general framework for applying Article 101

10. Article 101(1) of the Treaty prohibits agreements which have as their object or effect the restriction of competition. Article 101(1) applies both to restrictions of competition between the parties to an agreement and to restrictions of competition between any of the parties and third parties.

11. The assessment of whether a licence agreement restricts competition must be made within the actual context in which competition would occur in the absence of the agreement with its alleged restrictions⁽¹¹⁾. In making this assessment it is necessary to take account of the likely impact of the agreement on inter-technology competition (that is to say, competition between undertakings using competing technologies) and on intra-technology competition (that is to say, competition between undertakings using the same technology)⁽¹²⁾. Article 101(1) prohibits restrictions of both inter-technology competition and intra-technology competition. It is therefore necessary to assess to what extent the agreement affects or is likely to affect these two aspects of competition on the market.

12. The following two questions provide a useful framework for making this assessment. The first question relates to the impact of the agreement on inter-technology competition while the second question relates to the impact of the agreement on intra-technology competition. As restrictions may be capable of affecting both inter-technology competition and intra-technology competition at the same time, it may be necessary to analyse a restriction in the light of the two questions in points (a) and (b) before it can be concluded whether or not competition within the meaning of Article 101(1) is restricted:

⁽¹⁰⁾ The methodology for the application of Article 101(3) is set out in the Commission Guidelines on the application of Article 81(3) of the Treaty, cited in footnote 3.

⁽¹¹⁾ See Case 56/65, *Société Technique Minière*, [1966] ECR 337, and Case C-7/95 P, *John Deere*, [1998] ECR I-3111, paragraph 76.

⁽¹²⁾ See in this respect e.g. judgment in *Consten and Grundig* cited in footnote 9.

⁽⁹⁾ See e.g. Joined Cases 56/64 and 58/64, *Consten and Grundig*, [1966] ECR 429.

- (a) Does the licence agreement restrict actual or potential competition that would have existed without the contemplated agreement? If so, the agreement may be caught by Article 101(1). In making this assessment it is necessary to take into account competition between the parties and competition from third parties. For instance, where two undertakings established in different Member States cross licence competing technologies and undertake not to sell products in each other's home markets, (potential) competition that existed prior to the agreement is restricted. Similarly, where a licensor imposes obligations on its licensees not to use competing technologies and these obligations foreclose third party technologies, actual or potential competition that would have existed in the absence of the agreement is restricted.
- (b) Does the licence agreement restrict actual or potential competition that would have existed in the absence of the contractual restraint(s)? If so, the agreement may be caught by Article 101(1). For instance, where a licensor restricts its licensees, who were not actual or potential competitors before the agreement, from competing with each other, (potential) competition that could have existed between the licensees in the absence of the restraints is restricted. Such restrictions include vertical price fixing and territorial or customer sales restrictions between licensees. However, certain restraints may in certain cases not be caught by Article 101(1) when the restraint is objectively necessary for the existence of an agreement of that type or that nature⁽¹³⁾. Such exclusion of the application of Article 101(1) can only be made on the basis of objective factors external to the parties themselves and not the subjective views and characteristics of the parties. The question is not whether the parties in their particular situation would not have accepted to conclude a less restrictive agreement, but whether, given the nature of the agreement and the characteristics of the market, a less restrictive agreement would not have been concluded by undertakings in a similar setting⁽¹⁴⁾. Claims that in the absence of a restraint the supplier would have resorted to vertical integration are not sufficient. Decisions on whether or not to vertically integrate depend on a broad range of complex economic factors, a number of which are internal to the undertaking concerned.
13. The fact that Article 101(1) of the Treaty distinguishes between those agreements that have a restriction of competition as their object and those agreements that have a restriction of competition as their effect should be taken into account in the application of the analytical framework set out in point (12) of these guidelines. An agreement or contractual restraint is only prohibited by Article 101(1) if its object or effect is to restrict inter-technology competition and/or intra-technology competition.
14. Restrictions of competition by object are those that by their very nature restrict competition. These are restrictions which in the light of the objectives pursued by the Union competition rules have such a high potential for negative effects on competition that it is not necessary for the purposes of applying Article 101(1) to demonstrate any effects on the market⁽¹⁵⁾. Moreover, the conditions of Article 101(3) are unlikely to be fulfilled in the case of restrictions by object. The assessment of whether or not an agreement has as its object a restriction of competition is based on a number of factors. These factors include, in particular, the content of the agreement and the objective aims pursued by it. It may also be necessary to consider the context in which it is (to be) applied or the actual conduct and behaviour of the parties on the market⁽¹⁶⁾. In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction by object of competition. The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect. Evidence of subjective intent on the part of the parties to restrict competition is a relevant factor but not a necessary condition. An agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives⁽¹⁷⁾. For licence agreements, the Commission considers that the restrictions covered by the list of hardcore restrictions of competition set out in Article 4 of the TBER are restrictive by their very object⁽¹⁸⁾.
15. If an agreement is not restrictive of competition by object it is necessary to examine whether it has restrictive effects on competition. Account must be taken of both actual
- ⁽¹³⁾ See in this respect e.g. Case C-49/92 P, *Anic Partecipazioni*, [1999] ECR I-4125, paragraph 99.
- ⁽¹⁴⁾ See Joined Cases 29/83 and 30/83, *CRAM and Rheinzink*, [1984] ECR 1679, paragraph 26, and Joined Cases 96/82 and others, *ANSEAU-NAVEWA*, [1983] ECR 3369, paragraphs 23-25. Case T-491/07 *Groupement des cartes bancaires v Commission*, judgment of 29 November 2012, paragraph 146.
- ⁽¹⁵⁾ Case C-209/07 *Beef Industry Development Society and Barry Brothers* [2008] ECR I-8637, paragraph 21.
- ⁽¹⁶⁾ Further guidance with regard to the notion of restriction of competition by object can be obtained in the Commission Guidelines on the application of Article 81(3) of the Treaty, cited in footnote 3. See also Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291, paragraphs 59 to 64; Case C-209/07 *Beef Industry Development Society and Barry Brothers* [2008] ECR I 8637, paragraphs 21 to 39; Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraphs 31 and 36 to 39 and Case C 32/11 *Allianz Hungária Biztosító and Others*, judgment of 14 March 2013, paragraphs 33 to 38.

⁽¹³⁾ See in this respect the judgment in *Société Technique Minière* cited in footnote 11 and Case 258/78, *Nungesser*, [1982] ECR 2015.

⁽¹⁴⁾ For examples see points (126) to (127).

and potential effects⁽¹⁹⁾. In other words the agreement must have likely anti-competitive effects. For licence agreements to be restrictive of competition by effect they must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability. The likely negative effects on competition must be appreciable⁽²⁰⁾. Appreciable anti-competitive effects are likely to occur when at least one of the parties has or obtains some degree of market power and the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power. Market power is the ability to maintain prices above competitive levels or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a not insignificant period of time⁽²¹⁾. The degree of market power normally required for a finding of an infringement under Article 101(1) is less than the degree of market power required for a finding of dominance under Article 102⁽²²⁾.

16. For the purposes of analysing restrictions of competition by effect it is normally necessary to define the relevant market and to examine and assess, in particular, the nature of the products and technologies concerned, the market position of the parties, the market position of competitors, the market position of buyers, the existence of potential competitors and the level of entry barriers. In some cases, however, it may be possible to show anti-competitive effects directly by analysing the conduct of the parties to the agreement on the market. It may for example be possible to ascertain that an agreement has led to price increases.
17. However, licence agreements may also have substantial pro-competitive potential and the vast majority of those agreements are indeed pro-competitive. Licence agreements may promote innovation by allowing innovators to earn returns to cover at least part of their research and development costs. Licence agreements also lead to a dissemination of technologies, which may create value by reducing the production costs of the licensee or

by enabling it to produce new or improved products. Efficiencies at the level of the licensee often stem from a combination of the licensor's technology with the assets and technologies of the licensee. Such integration of complementary assets and technologies may lead to a cost/output configuration that would not otherwise be possible. For instance, the combination of an improved technology of the licensor with more efficient production or distribution assets of the licensee may reduce production costs or lead to the production of a higher quality product. Licensing may also serve the pro-competitive purpose of removing obstacles to the development and exploitation of the licensee's own technology. In particular in sectors where large numbers of patents are prevalent licensing often occurs in order to create design freedom by removing the risk of infringement claims by the licensor. When the licensor agrees not to invoke its intellectual property rights to prevent the sale of the licensee's products, the agreement removes an obstacle to the sale of the licensee's product and thus generally promotes competition.

18. In cases where a licence agreement is caught by Article 101(1) of the Treaty the pro-competitive effects of the agreement must be balanced against its restrictive effects in the context of Article 101(3). When all four conditions of Article 101(3) are satisfied, the restrictive licence agreement in question is valid and enforceable, with no prior decision to that effect being required⁽²³⁾. Hardcore restrictions are unlikely to fulfil the conditions of Article 101(3). Such agreements generally fail (at least) one of the first two conditions of Article 101(3). In general they do not create objective economic benefits or benefits for consumers. Moreover, these types of agreements generally fail the indispensability test (under the third condition). For example, if the parties fix the price at which the products produced under the licence must be sold, this will in principle lead to a lower output and a misallocation of resources and higher prices for consumers. The price restriction is also not indispensable to achieve the possible efficiencies resulting from the availability to both competitors of the two technologies.

2.3. Market definition

19. The Commission's approach to defining the relevant market is laid down in its Notice on the definition of the relevant market for the purposes of Community competition law⁽²⁴⁾. These guidelines only address

⁽¹⁹⁾ See the judgment in *John Deere*, [1998] cited in footnote 11.

⁽²⁰⁾ Guidance on the issue of appreciability can be found in the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (OJ C 368, 22.12.2001, p. 13). This Notice defines appreciability in a negative way. Agreements, which fall outside the scope of the *de minimis* notice, do not necessarily have appreciable restrictive effects. An individual assessment is required.

⁽²¹⁾ Case T-321/05 *Astra Zeneca v Commission* [2010] ECR II-2805, paragraph 267.

⁽²²⁾ Commission Guidelines on the application of Article 81(3) of the Treaty, point 26, cited in footnote 3.

⁽²³⁾ See Article 1(2) of Council Regulation (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 (OJ L 1, 4.1.2003, p. 1), last amended by Council Regulation (EC) No 1419/2006 of 25 September 2006 (OJ L 269, 28.9.2006, p. 1).

⁽²⁴⁾ OJ C 372, 9.12.1997, p. 5.

- aspects of market definition that are of particular importance in the field of technology rights licensing.
20. Technology is an input, which is integrated either into a product or a production process. Technology right licensing can therefore affect competition both upstream in input markets and downstream in output markets. For instance, an agreement between two parties which sell competing products downstream and which also cross license technology rights relating to the production of these products upstream may restrict competition on the downstream goods or services market concerned. The cross licensing may also restrict competition on the upstream market for technology and possibly also on other upstream input markets. For the purposes of assessing the competitive effects of licence agreements it may therefore be necessary to define the relevant product market(s) as well as the relevant technology market(s) ⁽²⁵⁾.
 21. The relevant product market comprises the contract products (incorporating the licensed technology) and products which are regarded by the buyers as interchangeable with or substitutable for the contract products, by reason of the products' characteristics, their prices and their intended use. Contract products can be part of a final and/or an intermediate product market.
 22. The relevant technology markets consist of the licensed technology rights and its substitutes, that is to say, other technologies which are regarded by the licensees as interchangeable with or substitutable for the licensed technology rights, by reason of the technologies' characteristics, their royalties and their intended use. Starting from the technology which is marketed by the licensor, it is necessary to identify those other technologies to which licensees could switch in response to a small but permanent increase in relative prices, that is to say, to the royalties. An alternative approach is to look at the market for products incorporating the licensed technology rights (cf. point (25) below).
 23. The term 'relevant market' used in Article 3 of the TTBER and defined in Article 1(1)(m) refers to the relevant product market and the relevant technology market in both their product and geographic dimension.
 24. The 'relevant geographic market' is defined in Article 1(1)(l) of the TTBER and comprises the area in which the undertakings concerned are involved in the supply of and demand for products or the licensing of technology, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas. The geographic market of the relevant technology market(s) can differ from the geographic market of the relevant product market(s).
 25. Once relevant markets have been defined, market shares can be assigned to the various sources of competition in the market and used as an indication of the relative strength of market players. In the case of technology markets, one way to proceed is to calculate market shares on the basis of each technology's share of total licensing income from royalties, representing a technology's share of the market where competing technologies are licensed. However, this may often be a merely theoretical and not a practical way to proceed because of lack of clear information on royalties. Another approach, which is the one used for calculating the safe harbour, as explained in Article 8(d) of the TTBER, is to calculate market shares on the technology market on the basis of sales of products incorporating the licensed technology on downstream product markets (see for more details point (86) ff.). In individual cases outside the safe harbour of the TTBER it may be necessary, where practically possible, to apply both of the described approaches in order to assess the market strength of the licensor more accurately and to take into account other available factors which give a good indication of the relative strength of the available technologies (see for more factors points (157) and (159) ff.) ⁽²⁶⁾.
 26. Some licence agreements may affect competition in innovation. In analysing such effects, however, the Commission will normally confine itself to examining the impact of the agreement on competition within existing product and technology markets ⁽²⁷⁾. Competition on such markets may be affected by agreements that delay the introduction of improved products or new products that over time will replace existing products. In such cases innovation is a source of potential competition which must be taken into account when assessing the impact of the agreement on product markets and technology markets. In a limited number of cases, however, it may be useful and necessary to also analyse the effects on competition in innovation separately. This is particularly

⁽²⁵⁾ See for example Commission Decision COMP/M.5675 *Syngenta/Monsanto* where the Commission analysed the merger of two vertically integrated sunflower breeders by examining both (i) the upstream market for the trading (namely the exchange and licensing) of varieties (parental lines and hybrids) and (ii) the downstream market for the commercialisation of hybrids. In COMP/M.5406, *IPIC/MAN Ferrostaal AG*, the Commission defined besides a market for the production of high-grade melamine also an upstream technology market for the supply of melamine production technology. See also COMP/M.269, *Shell/Montecatini*.

⁽²⁶⁾ See also Commission Decision COMP/M.5675 *Syngenta/Monsanto* and Decision COMP/M.5406 *IPIC/MAN Ferrostaal AG*.

⁽²⁷⁾ See also points 119 to 122 of the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (Horizontal Guidelines), OJ C 11, 14.1.2011, p. 1.

the case where the agreement affects innovation aiming at creating new products and where it is possible at an early stage to identify research and development poles⁽²⁸⁾. In such cases it can be analysed whether after the agreement there will be a sufficient number of competing research and development poles left for effective competition in innovation to be maintained.

2.4. The distinction between competitors and non-competitors

27. In general, agreements between competitors pose a greater risk to competition than agreements between non-competitors. However, competition between undertakings that use the same technology (intra-technology competition between licensees) constitutes an important complement to competition between undertakings that use competing technologies (inter-technology competition). For instance, intra-technology competition may lead to lower prices for the products incorporating the technology in question, which may not only produce direct and immediate benefits for consumers of these products, but also spur further competition between undertakings that use competing technologies. In the context of licensing the fact that licensees are selling their own product must also be taken into account. They are not re-selling a product supplied by another undertaking. There may thus be greater scope for product differentiation and quality-based competition between licensees than in the case of vertical agreements for the resale of products.
28. In order to determine the competitive relationship between the parties it is necessary to examine whether the parties would have been actual or potential competitors in the absence of the agreement. If without the agreement the parties would not have been actual or potential competitors in any relevant market affected by the agreement they are deemed to be non-competitors.
29. In principle, the parties to an agreement are not considered competitors if they are in a one-way or two-way blocking position. A one-way blocking position exists where a technology right cannot be exploited without infringing upon another valid technology right, or where one party cannot be active in a commercially viable way on the relevant market without infringing the other party's valid technology right. This is, for instance, the case where one technology right covers an improvement of another technology right and the improvement cannot be legally used without a licence of the basic technology right. A two-way blocking position exists where neither technology right can be exploited without infringing upon the other valid technology right or where neither party can be active in a commercially viable way on the relevant market without infringing the other party's valid technology right and where the parties thus need to obtain a licence or a waiver from each other.⁽²⁹⁾ However, in

practice there will be cases where there is no certainty whether a particular technology right is valid and infringed.

30. The parties are actual competitors on the product market if prior to the agreement both are already active on the same relevant product market. The fact that both parties are already active on the same relevant product market, without having entered into a licensing arrangement, is a strong indicator that the parties are not blocking each other. In such a scenario, the parties can be presumed to be actual competitors, unless and until a blocking position is proven (in particular by a final court judgment).
31. The licensee can be considered a potential competitor on the product market if it is likely that, in the absence of the agreement, it would undertake the necessary additional investments to enter the relevant market in response to a small but permanent increase in product prices. Likely entry should be assessed on realistic grounds, that is to say based on the facts of the case at hand. Entry is more likely if the licensee possesses assets that can easily be used to enter the market without incurring significant sunk costs or if it has already developed plans, or otherwise started to invest, to enter the market. There have to be real concrete possibilities for the licensee to enter the relevant market and compete with established undertakings⁽³⁰⁾. Accordingly, the licensee cannot be described as a potential competitor if its entry into a market is not an economically viable strategy⁽³¹⁾.
32. In the specific context of intellectual property rights, an additional factor for assessing whether the parties are potential competitors on a particular market is the possibility that their intellectual property rights are in a blocking position, that is to say that the licensee cannot enter the respective market without infringing the intellectual property rights of the other party.
33. In the absence of certainty, for example in the form of a final court decision, that a blocking position exists, the parties, when addressing the question whether they are potential competitors, will have to base themselves on all the available evidence at the time, including the possibility that intellectual property rights are infringed and whether there are effective possibilities to work around existing intellectual property rights. Substantial investments already made or advanced plans to enter

⁽²⁸⁾ See also point (157).

⁽²⁹⁾ In a scenario where undertakings have given a general commitment to license certain intellectual property rights, for instance a License of Right or a FRAND commitment, the parties cannot be considered to be in a blocking position on the basis of these intellectual property rights.

⁽³⁰⁾ Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services and Others v Commission* [1998] ECR II-3141, paragraph 137.

⁽³¹⁾ Case T-461/07, *Visa Europe Ltd and Visa International Service v European Commission* [2011] ECR II-1729, paragraph 167.

a particular market, can support the view that the parties are at least potential competitors, even if a blocking position cannot be excluded. Particularly convincing evidence of the existence of a blocking position may be required where the parties have a common interest in claiming the existence of a blocking position in order to be qualified as non-competitors, for instance where the alleged blocking position concerns technologies that are technological substitutes (see point (22)) or if there is a significant financial inducement from the licensor to the licensee.

34. In order to constitute a realistic competitive constraint entry has to be likely to occur within a short period⁽¹²⁾. Normally a period of one to two years is appropriate. However, in individual cases longer periods can be taken into account. The period of time needed for undertakings already on the market to adjust their capacities can be used as a yardstick to determine this period. For instance, the parties are likely to be considered potential competitors on the product market where the licensee produces on the basis of its own technology in one geographic market and starts producing in another geographic market on the basis of a licensed competing technology. In such circumstances, it is likely that the licensee would have been able to enter the second geographic market on the basis of its own technology, unless such entry is precluded by objective factors, including the existence of blocking intellectual property rights.
35. The parties are actual competitors on the technology market if they are either already both licensing out substitutable technology rights, or the licensee is already licensing out its technology rights and the licensor enters the technology market by granting a license for competing technology rights to the licensee.
36. The parties are considered to be potential competitors on the technology market if they own substitutable technologies and the licensee is not licensing-out its own technology, provided that it would be likely to do so in the event of a small but permanent increase in technology prices. In the case of technology markets, it is generally more difficult to assess whether the parties are potential competitors. This is why, for the application of the TTBER, potential competition on the technology market is not taken into account (see point (83)) and the parties are treated as non-competitors.
37. In some cases it may also be possible to conclude that while the licensor and the licensee produce competing products, they are non-competitors on the relevant product market and the relevant technology market
- because the licensed technology represents such a drastic innovation that the technology of the licensee has become obsolete or uncompetitive. In such cases the licensor's technology either creates a new market or excludes the licensee's technology from the existing market. It is, however, often not possible to come to this conclusion at the time the agreement is concluded. It is usually only when the technology or the products incorporating it have been available to consumers for some time that it becomes apparent that the older technology has become obsolete or uncompetitive. For instance, when CD technology was developed and players and discs were put on the market, it was not obvious that this new technology would replace LP technology. This only became apparent some years later. The parties will therefore be considered to be competitors if at the time of the conclusion of the agreement it is not obvious that the licensee's technology is obsolete or uncompetitive. However, given that both Articles 101(1) and Article 101(3) of the Treaty must be applied in the light of the actual context in which the agreement occurs, the assessment is sensitive to material changes in the facts. The classification of the relationship between the parties will therefore change into a relationship of non-competitors, if at a later point in time the licensee's technology becomes obsolete or uncompetitive on the market.
38. In some cases the parties may become competitors subsequent to the conclusion of the agreement because the licensee develops or acquires and starts exploiting a competing technology. In such cases the fact that the parties were non-competitors at the time of conclusion of the agreement and that the agreement was concluded in that context must be taken into account. The Commission will therefore mainly focus on the impact of the agreement on the licensee's ability to exploit its own (competing) technology. In particular, the list of hardcore restrictions applying to agreements between competitors will not be applied to such agreements unless the agreement is subsequently amended in any material respect after the parties have become competitors (see Article 4(3) of the TTBER).
39. The undertakings party to an agreement may also become competitors subsequent to the conclusion of the agreement where the licensee was already active on the relevant market where the contract product is sold prior to the licence and where the licensor subsequently enters the relevant market either on the basis of the licensed technology rights or a new technology. In this case also the hardcore list relevant for agreements between non-competitors will continue to apply to the agreement unless the agreement is subsequently amended in any material respect (see Article 4(3) of the TTBER). A material amendment includes the conclusion of a new technology transfer agreement between the parties concerning competing technology rights which can be used for the production of products competing with the contract products.

⁽¹²⁾ Case T-461/07, *Visa Europe Ltd and Visa International Service v European Commission* [2011] ECR II-1729, paragraph 189.

3. APPLICATION OF THE TTBER

3.1. The effects of the TTBER

40. Categories of technology transfer agreements that fulfil the conditions set out in the TTBER are exempted from the prohibition rule contained in Article 101(1) of the Treaty. Block exempted agreements are legally valid and enforceable. Such agreements can only be prohibited for the future and only upon withdrawal of the block exemption by the Commission and the competition authorities of the Member States. Block exempted agreements cannot be prohibited under Article 101 by national courts in the context of private litigation.
41. Block exemption of categories of technology transfer agreements is based on the presumption that — to the extent that they are caught by Article 101(1) of the Treaty — those agreements fulfil the four conditions laid down in Article 101(3). It is thus presumed that the agreements give rise to economic efficiencies, that the restrictions contained in the agreements are indispensable to the attainment of these efficiencies, that consumers within the affected markets receive a fair share of the efficiency gains and that the agreements do not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question. The market share thresholds (Article 3), the hardcore list (Article 4) and the excluded restrictions (Article 5) set out in the TTBER aim at ensuring that only restrictive agreements that can reasonably be presumed to fulfil the four conditions of Article 101(3) are block exempted.
42. As set out in section 4 of these guidelines, many licence agreements fall outside Article 101(1) of the Treaty, either because they do not restrict competition at all or because the restriction of competition is not appreciable⁽³³⁾. To the extent that such agreements would anyhow fall within the scope of the TTBER, there is no need to determine whether they are caught by Article 101(1)⁽³⁴⁾.
43. Outside the scope of the block exemption it is relevant to examine whether in the individual case the agreement is caught by Article 101(1) of the Treaty and if so, whether the conditions of Article 101(3) are satisfied. There is no presumption that technology transfer agreements falling outside the block exemption are caught by Article 101(1) or fail to satisfy the conditions of Article 101(3). In particular, the mere fact that the market shares of the parties exceed the market share thresholds set out in Article 3 of the TTBER is not a sufficient basis for finding that the agreement is caught by Article 101(1).

⁽³³⁾ See in this respect the Notice on agreements of minor importance cited in footnote 20.

⁽³⁴⁾ According to Article 3(2) of Regulation (EC) No 1/2003, agreements which may affect trade between Member States but which are not prohibited by Article 101 can also not be prohibited by national competition law.

Individual assessment of the likely effects of the agreement is required. It is only where agreements contain hardcore restrictions of competition, that it can normally be presumed that they are prohibited by Article 101.

3.2. Scope and duration of the TTBER

3.2.1. The concept of technology transfer agreements

44. The TTBER and these guidelines cover agreements for the transfer of technology. According to Article 1(1)(b) of the TTBER the concept of 'technology rights' covers know-how as well as 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 or a combination thereof as well as applications for these rights and for registration of these rights. The licensed technology rights should allow the licensee, with or without other input, to produce the contract products. The TTBER only applies in Member States where the licensor holds relevant technology rights. Otherwise, there are no technology rights to be transferred within the meaning of the TTBER.
45. Know-how is defined in Article 1(1)(i) of the TTBER as a package of practical information, resulting from experience and testing, which is secret, substantial and identified:

- (a) 'Secret' means that the know-how is not generally known or easily accessible.
- (b) 'Substantial' means that the know-how includes information which is significant and useful for the production of the products covered by the licence agreement or the application of the process covered by the licence agreement. In other words, the information must significantly contribute to or facilitate the production of the contract products. In cases where the licensed know-how relates to a product as opposed to a process, this condition implies that the know-how is useful for the production of the contract product. This condition is not satisfied where the contract product can be produced on the basis of freely available technology. However, the condition does not require that the contract product is of higher value than products produced with freely available technology. In the case of process technologies, this condition implies that the know-how is useful in the sense that it can reasonably be expected at the date of conclusion of the agreement to be capable of significantly improving the competitive position of the licensee, for instance by reducing its production costs.

- (c) 'Identified' means that it is possible to verify that the licensed know-how fulfils the criteria of secrecy and substantiality. This condition is satisfied where the licensed know-how is described in manuals or other written form. However, in some cases this may not be reasonably possible. The licensed know-how may consist of practical knowledge possessed by the licensor's employees. For instance, the licensor's employees may possess secret and substantial knowledge about a certain production process which is passed on to the licensee in the form of training of the licensee's employees. In such cases it is sufficient to describe in the agreement the general nature of the know-how and to list the employees that will be or have been involved in passing it on to the licensee.
46. Provisions in technology transfer agreements relating to the purchase of products by the licensee are only covered by the TTBER if, and to the extent that, those provisions are directly related to the production or sale of the contract products. Therefore the TTBER does not apply to those parts of a technology transfer agreement relating to input and/or equipment that are used for other purposes than the production of the contract products. For instance, where milk is sold together with licensing of technology to produce cheese, only the milk used for the production of cheese with the licensed technology will be covered by the TTBER.
47. Provisions in technology transfer agreements relating to the licensing of other types of intellectual property such as trademarks and copyright, other than software copyright (on software copyright see points (44) and (62)), are only covered by the TTBER if, and to the extent that, they are directly related to the production or sale of the contract products. This condition ensures that provisions covering other types of intellectual property rights are block exempted to the extent that these other intellectual property rights serve to enable the licensee to better exploit the licensed technology rights. For instance, where a licensor authorises a licensee to use its trademark on the products incorporating the licensed technology, this trademark licence may allow the licensee to better exploit the licensed technology by allowing consumers to make an immediate link between the product and the characteristics imputed to it by the licensed technology rights. An obligation on the licensee to use the licensor's trademark may also promote the dissemination of technology by allowing the licensor to identify itself as the source of the underlying technology. The TTBER covers technology transfer agreements in this scenario even if the principal interest of the parties lies in the exploitation of the trademark rather than the technology⁽³⁵⁾.
48. The TTBER does not cover licensing of copyright other than software copyright (except for the situation set out in point (47)). The Commission will, however, as a general rule apply the principles set out in the TTBER and these guidelines when assessing licensing of copyright for the production of contract products under Article 101 of the Treaty.
49. On the other hand, the licensing of rental rights and public performance rights protected by copyright, in particular for films or music, is considered to raise particular issues and it may not be warranted to assess such licensing on the basis of the principles developed in these guidelines. In the application of Article 101 the specificities of the work and the way in which it is exploited must be taken into account⁽³⁶⁾. The Commission will therefore not apply the TTBER and the present guidelines by way of analogy to the licensing of these other rights.
50. The Commission will also not extend the principles developed in the TTBER and these guidelines to trademark licensing (except for the situation set out in point (47)). Trademark licensing often occurs in the context of distribution and resale of goods and services and is generally more akin to distribution agreements than technology licensing. Where a trademark licence is directly related to the use, sale or resale of goods and services and does not constitute the primary object of the agreement, the licence agreement is covered by Commission Regulation (EU) No 330/2010⁽³⁷⁾.
- 3.2.2. *The concept of 'transfer'*
51. The concept of 'transfer' implies that technology must flow from one undertaking to another. Such transfers normally take the form of licensing whereby the licensor grants the licensee the right to use its technology rights against payment of royalties.
52. As set out in Article 1(1)(c) of the TTBER, assignments where part of the risk associated with the exploitation of the technology rights remains with the assignor are also deemed to be technology transfer agreements. In particular, this is the case 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.

⁽³⁵⁾ The TTBER could now cover the technology transfer agreement assessed in the Commission Decision in *Moosehead/Whitbread* (OJ L 100, 20.4.1990, p. 32), see in particular paragraph 16 of that decision.

⁽³⁶⁾ See in this respect Case 262/81, *Coditel (II)*, [1982] ECR 3381.

⁽³⁷⁾ OJ L 102, 23.4.2010, p. 1.

53. An agreement whereby the licensor commits not to exercise its technology rights against the licensee can also be seen as a transfer of technology rights. Indeed, the essence of a pure patent licence is the right to operate inside the scope of the exclusive right of the patent. It follows that the TTBER also covers so-called non-assertion agreements and settlement agreements whereby the licensor permits the licensee to produce within the scope of the patent ⁽³⁸⁾.

3.2.3. Agreements between two parties

54. According to Article 1(1)(c) of the TTBER, the Regulation only covers technology transfer agreements 'between two undertakings'. Technology transfer agreements between more than two undertakings are not covered by the TTBER ⁽³⁹⁾. The decisive factor in terms of distinguishing between agreements between two undertakings and multiparty agreements is whether the agreement in question is concluded between more than two undertakings.

55. Agreements concluded by two undertakings fall within the scope of the TTBER even if the agreement stipulates conditions for more than one level of trade. For instance, the TTBER applies to a licence agreement concerning not only the production stage but also the distribution stage, stipulating the obligations that the licensee must or may impose on resellers of the products produced under the licence ⁽⁴⁰⁾.

56. Agreements establishing technology pools and licensing out from technology pools are generally multiparty agreements and are therefore not covered by the TTBER ⁽⁴¹⁾. The notion of technology pools covers agreements whereby two or more parties agree to pool their respective technologies and license them as a package. The notion of technology pools also covers arrangements whereby two or more undertakings agree to license a third party and authorise it to license-out the package of technologies.

57. Licence agreements concluded between more than two undertakings often give rise to the same issues as

licence agreements of the same nature concluded between two undertakings. In its individual assessment of licence agreements which are of the same nature as those covered by the block exemption but which are concluded between more than two undertakings, the Commission will apply by analogy the principles set out in the TTBER. However, technology pools and licensing out from technology pools are specifically dealt with in section 4.4.

3.2.4. Agreements for the production of contract products

58. It follows from Article 1(1)(c) of the TTBER that for licence agreements to be covered by it they must be entered into 'for the purpose of the production of contract products', that is to say, products incorporating or produced with the licensed technology rights. The licence must permit the licensee and/or its sub-contractor(s) to exploit the licensed technology for the purpose of producing goods or services (see also recital 7 in the preamble of the TTBER).

59. Where the purpose of the agreement is not the production of contract products but, for instance, merely to block the development of a competing technology, the licence agreement is not covered by the TTBER and these guidelines may also not be appropriate for the agreement's assessment. More generally, if the parties refrain from exploiting the licensed technology rights, no efficiency enhancing activity takes place, in which case the very rationale of the block exemption is absent. However, exploitation does not need to take the form of an integration of assets. Exploitation also occurs where the licence creates design freedom for the licensee by allowing it to exploit its own technology without facing the risk of infringement claims by the licensor. In the case of licensing between competitors, the fact that the parties do not exploit the licensed technology may be an indication that the arrangement is a disguised cartel. For these reasons the Commission will examine cases of non-exploitation very closely.

60. The TTBER applies to licence agreements for the purpose of the production of contract products by the licensee and/or its sub-contractor(s). Therefore, the TTBER does not apply to (those parts of) technology transfer agreements that allow for sublicensing. However, the Commission will apply by analogy the principles set out in the TTBER and these guidelines to 'master licensing' agreements between licensor and licensee (that is to say an agreement whereby the licensor allows the licensee to sublicense the technology). Agreements between the licensee and sub-licensees for the production of contract products are covered by the TTBER.

⁽³⁸⁾ The terms 'licensing' and 'licensed' used in these Guidelines also include non-assertion and settlement arrangements as long as a transfer of technology rights takes place as described in this section. See further on settlement agreements points (234) ff.

⁽³⁹⁾ Under Regulation (EEC) No 19/65 of the Council of 2 March 1965 on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices, OJ Special Edition Series I 1965-1966, p. 35, the Commission is not empowered to block exempt technology transfer agreements concluded between more than two undertakings.

⁽⁴⁰⁾ See recital 6 of the TTBER and further section 3.2.6.

⁽⁴¹⁾ See for more details point (247).

61. The term 'contract products' encompasses goods and services produced with the licensed technology rights. This is the case both where the licensed technology is used in the production process and where it is incorporated into the product itself. In these guidelines the term 'products incorporating the licensed technology' covers both situations. The TTBER applies in all cases where technology rights are licensed for the purposes of producing goods and services. The framework of the TTBER and these guidelines is based on the premise that there is a direct link between the licensed technology rights and a contract product. In cases where no such link exists, that is to say where the purpose of the agreement is not to enable the production of a contract product, the analytical framework of the TTBER and these guidelines may not be appropriate.
62. The licensing of software copyright for the purpose of mere reproduction and distribution of the protected work, that is to say, the production of copies for resale, is not considered to be 'production' within the meaning of the TTBER and thus is not covered by the TTBER and these guidelines. Such reproduction for distribution is instead covered by analogy by Commission Regulation (EU) No 330/2010⁽⁴²⁾ and the Guidelines on Vertical Restraints⁽⁴³⁾. Reproduction for distribution exists where a licence is granted to reproduce the software on a carrier, regardless of the technical means by which the software is distributed. For instance, the TTBER and these guidelines do not cover the licensing of software copyright whereby the licensee is provided with a master copy of the software in order to reproduce and sell on the software to end users. Nor do they cover the licensing of software copyright and distribution of software by means of 'shrink wrap' licences, that is, a set of conditions included in the package of the hard copy which the end user is deemed to have accepted by opening the wrapping of the package, or the licensing of software copyright and distribution of software by means of online downloading.
63. However, where the licensed software is incorporated by the licensee in the contract product this is not considered as mere reproduction but production. For instance, the TTBER and these guidelines cover the licensing of software copyright where the licensee has the right to reproduce the software by incorporating it into a device with which the software interacts.
64. The TTBER covers 'subcontracting' whereby the licensor licenses technology rights to the licensee who undertakes to produce certain products on the basis thereof exclusively for the licensor. Subcontracting may also involve the supply of equipment by the licensor to be used in the production of the goods and services covered by the agreement. For the latter type of subcontracting to be covered by the TTBER as part of a technology transfer agreement, the supplied equipment must be directly related to the production of the contract products. Subcontracting is also covered by the Commission Notice on subcontracting agreements⁽⁴⁴⁾. According to that notice, which remains applicable, subcontracting agreements whereby the subcontractor undertakes to produce certain products exclusively for the contractor generally fall outside Article 101(1) of the Treaty. Subcontracting agreements whereby the contractor determines the transfer price of the intermediate contract product between subcontractors in a value chain of subcontracting generally also fall outside Article 101(1) provided the contract products are exclusively produced for the contractor. However, other restrictions imposed on the subcontractor such as the obligation not to conduct or exploit its own research and development may be caught by Article 101⁽⁴⁵⁾.
65. The TTBER also applies to agreements whereby the licensee must carry out development work before obtaining a product or a process that is ready for commercial exploitation, provided that a contract product has been identified. Even if such further work and investment is required, the object of the agreement is the production of an identified contract product, that is to say, products produced with the licensed technology rights.
66. The TTBER and these guidelines do not cover agreements whereby technology rights are licensed for the purpose of enabling the licensee to carry out further research and development in various fields, including further developing a product arising out of such research and development⁽⁴⁶⁾. For instance, the TTBER and the guidelines do not cover the licensing of a technological research tool used in the process of further research activity. Nor do they cover research and development sub-contracting whereby the licensee undertakes to carry out research and development in the field of the licensed

⁽⁴²⁾ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, p. 1.

⁽⁴³⁾ OJ C 130, 19.5.2010, p. 1.

⁽⁴⁴⁾ Commission Notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty, OJ C 1, 3.1.1979, p. 2.

⁽⁴⁵⁾ See point 3 of Commission Notice on subcontracting agreements cited in footnote 44.

⁽⁴⁶⁾ See also section 3.2.6.1.

technology and to hand back the improved technology package to the licensor⁽⁴⁷⁾. The main object of such agreements is the provision of research and development services aimed at improving the technology as opposed to the production of goods and services on the basis of the licensed technology.

3.2.5. Duration

67. Subject to the duration of the TTBER, which expires on 30 April 2026, the block exemption applies for as long as the licensed property right has not lapsed, expired or been declared invalid. In the case of know-how the block exemption applies as long as the licensed know-how remains secret, except where the know-how becomes publicly known as a result of action by the licensee, in which case the exemption applies for the duration of the agreement (see Article 2 of the TTBER).
68. The block exemption applies to each licensed technology right covered by the agreement and ceases to apply on the date of expiry, invalidity or the coming into the public domain of the last technology right within the meaning of the TTBER.

3.2.6. Relationship with other block exemption regulations

69. The TTBER covers agreements between two undertakings concerning the licensing of technology rights for the purpose of the production of contract products. However, technology rights can also be an element of other types of agreements. In addition, the products incorporating the licensed technology are subsequently sold on the market. It is therefore necessary to address the interface between the TTBER and Commission Regulation (EU) No 1218/2010⁽⁴⁸⁾ on specialisation agreements, Commission Regulation (EU) No 1217/2010 on research and development agreements⁽⁴⁹⁾ and Commission Regulation (EU) No 330/2010⁽⁵⁰⁾ on vertical agreements.

3.2.6.1. The Block Exemption Regulations on specialisation and R&D agreements

70. The TTBER does not apply to licensing in the context of specialisation agreements which are covered by Regulation (EU) No 1218/2010 or to licensing in the context of research and development agreements which are covered by Regulation (EU) No 1217/2010 (see recital 7 and Article 9 of the TTBER).

71. According to Article 1(1)(d) of Regulation (EU) No 1218/2010 on specialisation agreements, that Regulation covers, in particular, joint production agreements by virtue of which two or more parties agree to produce certain products jointly. The Regulation extends to provisions concerning the assignment or use of intellectual property rights, provided that they do not constitute the primary object of the agreement, but are directly related to and necessary for its implementation.

72. Where undertakings establish a production joint venture and license the joint venture to exploit technology, which is used in the production of the products produced by the joint venture, such licensing is subject to Regulation (EU) No 1218/2010 on specialisation agreements and not to the TTBER. Accordingly, licensing in the context of a production joint venture normally falls to be considered under Regulation (EU) No 1218/2010. However, where the joint venture engages in licensing of the technology to third parties, the activity is not linked to production by the joint venture and therefore not covered by that Regulation. Such licensing arrangements, which bring together the technologies of the parties, constitute technology pools, which are dealt with in section 4.4 of these guidelines.

73. Regulation (EU) No 1217/2010 on research and development agreements covers agreements whereby two or more undertakings agree to jointly carry out research and development and to jointly exploit the results thereof. According to Article 1(1)(m) of that Regulation, research and development and the exploitation of the results are carried out jointly where the work involved is carried out by a joint team, organisation or undertakings, jointly entrusted to a third party or allocated between the parties by way of specialisation in research, development, production and distribution, including licensing. That Regulation also covers paid-for research and development agreements whereby two or more undertakings agree that the research and development is carried out by one party and financed by another party, with or without joint exploitation of the results thereof (see Article 1(1)(a) (vi) of Regulation (EU) No 1217/2010).

74. It follows that Regulation (EU) No 1217/2010 on research and development agreements covers licensing between the parties and by the parties to a joint entity in the context of a research and development agreement. Such licensing is subject only to Regulation (EU) No 1217/2010 and not to the TTBER. In the context of such agreements the parties can also determine the conditions for licensing the fruits of the research and development agreement to third parties. However, since third party licensees are not party to the research and development agreement, the individual licence agreement

⁽⁴⁷⁾ However, this last example is covered by Regulation (EU) No 1217/2010 cited in footnote 49, see also section 3.2.6.1. below.

⁽⁴⁸⁾ Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, OJ L 335, 18.12.2010, p. 43.

⁽⁴⁹⁾ Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, OJ L 335, 18.12.2010, p. 36.

⁽⁵⁰⁾ Cited in footnote 42.

concluded with third parties is not covered by Regulation (EU) No 1217/2010. That licence agreement is covered by the block exemption in the TTBER if the conditions of it are fulfilled.

3.2.6.2. The Block Exemption Regulation on vertical agreements

75. Commission Regulation (EU) No 330/2010 on vertical agreements covers agreements entered into between two or more undertakings each operating, for the purposes of the agreement, at different levels of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services. It thus covers supply and distribution agreements⁽³¹⁾.
76. Given that the TTBER only covers agreements between two parties and that a licensee, selling products incorporating the licensed technology, is a supplier for the purposes of Regulation (EU) No 330/2010, those two block exemption regulations are closely related. The agreement between licensor and licensee is subject to the TTBER whereas agreements concluded between a licensee and buyers of the contract products are subject to Regulation (EU) No 330/2010 and the Guidelines on Vertical Restraints⁽³²⁾.
77. The TTBER also exempts agreements between the licensor and the licensee where the agreement imposes obligations on the licensee as to the way in which it must sell the products incorporating the licensed technology. In particular, the licensee can be obliged to establish a certain type of distribution system such as exclusive distribution or selective distribution. However, the distribution agreements concluded for the purposes of implementing such obligations must, in order to be covered by a block exemption, comply with Regulation (EU) No 330/2010. For instance, the licensor can oblige the licensee to establish a system based on exclusive distribution in accordance with specified rules. However, it follows from Article 4(b) of Regulation (EU) No 330/2010 that generally distributors must be free to make passive sales into the territories of other exclusive distributors of the licensee.
78. Furthermore, under Regulation (EU) No 330/2010 on vertical agreements distributors must in principle be free to sell both actively and passively into territories covered by the distribution systems of other suppliers, that is to say, other licensees producing their own products on the basis of the licensed technology rights. This is because for

the purposes of Regulation (EU) No 330/2010 each licensee is a separate supplier. However, the reasons underlying the block exemption of active sales restrictions within a supplier's distribution system contained in that Regulation, may also apply where the products incorporating the licensed technology are sold by different licensees under a common brand belonging to the licensor. When the products incorporating the licensed technology are sold under a common brand identity there may be the same efficiency reasons for applying the same types of restraints between licensees' distribution systems as within a single vertical distribution system. In such cases the Commission would be unlikely to challenge restraints where by analogy the requirements of Regulation (EU) No 330/2010 are fulfilled. For a common brand identity to exist the products must be sold and marketed under a common brand, which is predominant in terms of conveying quality and other relevant information to the consumer. It does not suffice that in addition to the licensee's brands the product carries the licensor's brand, which identifies it as the source of the licensed technology.

3.3. The market share thresholds of the safe harbour

79. According to Article 3 of the TTBER, the block exemption of restrictive agreements, or in other words the safe harbour of the TTBER, is subject to market share thresholds, confining the scope of the block exemption to agreements that although they may be restrictive of competition can generally be presumed to fulfil the conditions of Article 101(3) of the Treaty. Outside the safe harbour created by the market share thresholds individual assessment is required. The fact that market shares exceed the thresholds does not give rise to any presumption either that the agreement is caught by Article 101(1) or that the agreement does not fulfil the conditions of Article 101(3). In the absence of hardcore restrictions as set out in Article 4 of the TTBER, market analysis is required.

Relevant market share thresholds

80. The market share threshold to be applied for the purpose of the safe harbour of the TTBER depends on whether the agreement is concluded between competitors or non-competitors.
81. The market share thresholds apply both to the relevant market(s) of the licensed technology rights and the relevant market(s) of the contract products. If the applicable market share threshold is exceeded on one or several product and technology market(s), the block exemption does not apply to the agreement for that relevant market(s). For instance, if the licence agreement concerns two separate product markets, the block exemption may apply to one of the markets and not to the other.

⁽³¹⁾ See also the brochure 'Competition policy in Europe — The competition rules for supply and distribution agreements', European Commission, Publications Office of the European Union 2012, Luxembourg.

⁽³²⁾ Respectively OJ L 102, 23.4.2010, p. 1, and OJ C 130, 19.5.2010, p. 1.

82. According to Article 3(1) TTBER the safe harbour provided for in Article 2 TTBER applies to agreements between competitors on condition that the combined market share of the parties does not exceed 20 % on any relevant market. The market share threshold of Article 3(1) of the TTBER is applicable if the parties are actual competitors or potential competitors on the product market(s) and/or actual competitors on the technology market (for the distinction between competitors and non-competitors, see points (27) ff).
83. Potential competition on the technology market is not taken into account for the application of the market share threshold or the hardcore list relating to agreements between competitors. Outside the safe harbour of the TTBER potential competition on the technology market is taken into account but does not lead to the application of the hardcore list relating to agreements between competitors.
84. Where the undertakings party to the licensing agreement are not competitors, the market share threshold of Article 3(2) of the TTBER applies. An agreement between non-competitors is covered if the market share of each party does not exceed 30 % on the affected relevant technology and product markets.
85. Where the parties become competitors within the meaning of Article 3(1) TTBER at a later point in time, for instance where the licensee was already present, before the licensing, on the relevant market where the contract products are sold and the licensor subsequently becomes an actual or potential supplier on the same relevant market, the 20 % market share threshold will apply from the point in time when they became competitors. However, in that case the hardcore list relevant for agreements between non-competitors will continue to apply to the agreement unless the agreement is subsequently amended in any material respect (see Article 4(3) of the TTBER and point (39) of these guidelines).

Calculating market shares for technology market(s) for the application of the safe harbour

86. The calculation of market shares on the relevant markets where the technology rights are licensed, under the TTBER, deviates from the usual practice for the reasons explained in point (87) of these guidelines. In the case of technology markets, it follows from Article 8(d) of the TTBER that, both for the product and the geographic dimension of the relevant market, the licensor's market share is to be calculated on the basis of the sales of the licensor and all its licensees of products incorporating the licensed technology. Under this approach the combined sales of the licensor and its licensees of contract products are calculated as part of all sales of competing products, irrespective of whether these competing products are produced with a technology that is being licensed.
87. This approach of calculating the market share of the licensor on the technology market as its 'footprint' at the product level, has been chosen because of the practical difficulties in calculating a licensor's market share based on royalty income (see point (25)). In addition to the general difficulty of obtaining reliable royalty income data, the actual royalty income may also seriously underestimate a technology's position on the market in the event that royalty payments are reduced as a result of cross licensing or of the supply of tied products. Basing the licensor's market share on the technology market on the products produced with that technology as compared with products produced with competing technologies would not carry that risk. Such a footprint at the product level will in general reflect the market position of the technology well.
88. Ideally that footprint would be calculated by excluding from the product market the products produced with in-house technologies that are not licensed out, as those in-house technologies are only an indirect constraint on the licensed technology. However, as it may be difficult in practice for licensor and licensees to know whether other products in the same product market are produced with licensed or in-house technologies, the calculation of the technology market share, for the purposes of the TTBER, is based on the products produced with the licensed technology as part of all products sold in that product market. This approach based on the technology's footprint on the overall product market(s) can be expected to reduce the calculated market share by including products produced with in-house technologies, but will nonetheless in general provide a good indicator of the strength of the technology. First, it captures any potential competition from undertakings that are producing with their own technology and that are likely to start licensing in the event of a small but permanent increase in the price for licenses. Secondly, even where it is unlikely that other technology owners would start licensing, the licensor does not necessarily have market power on the technology market even if it has a high share of licensing income. If the downstream product market is competitive, competition at this level may effectively constrain the licensor. An increase in royalties upstream affects the costs of the licensee, which makes it less competitive and thereby may cause it to lose sales. A technology's market share on the product market also captures this element and is thus normally a good indicator of licensor market power on the technology market.

89. To estimate the strength of the technology, the geographic dimension of the technology market has also to be taken into account. This might sometimes differ from the geographic dimension of the respective downstream product market. For the purpose of applying the TTBER, the geographic dimension of the relevant technology market is also determined by the product market(s). However, outside the TTBER safe harbour it may be appropriate to also consider a possibly wider geographic area, in which the licensor and licensees of competing technologies are involved in the licensing of these technologies, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

90. In the case of new technologies that did not generate any sales in the preceding calendar year, a zero market share is assigned. When sales commence the technology will start accumulating market share. If the market share rises subsequently above the relevant threshold of 20 % or 30 %, the safe harbour will continue to apply for a period of two consecutive calendar years following the year in which the threshold was exceeded (see Article 8(e) of the TTBER).

Calculating market shares for product market(s) for the application of the safe harbour

91. In the case of relevant markets where the contract products are sold, 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, that is to say, 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.

92. Market shares should be calculated on the basis of sales value data of the preceding year where such data are available. Such data normally provide a more accurate indication of the strength of a technology than volume data. However, where value based data are not available, estimates based on other reliable market information may be used, including market sales volume data.

93. The principles set out in section 3.3 of these guidelines can be illustrated by the following examples:

Licensing between non-competitors

Example 1

Company A is specialised in developing bio-technological products and techniques and has developed a new product Xeran. It is not active as a producer of Xeran, for which it has neither the production nor the distribution facilities.

Company B is one of the producers of competing products, produced with freely available non-proprietary technologies. In year 1, B sold EUR 25 million worth of products produced with the freely available technologies. In year 2, A gives a licence to B to produce Xeran. In that year B sells EUR 15 million produced with the help of the freely available technologies and EUR 15 million of Xeran. In year 3 and the following years B produces and sells only Xeran worth EUR 40 million annually. In addition in year 2, A also licenses to C. C was not active on that product market before. C produces and sells only Xeran, EUR 10 million in year 2 and EUR 15 million in year 3 and thereafter. It is established that the total market of Xeran and its substitutes where B and C are active is worth EUR 200 million in each year.

In year 2, the year the licence agreements are concluded, A's market share on the technology market is 0 % as its market share has to be calculated on the basis of the total sales of Xeran in the preceding year. In year 3 A's market share on the technology market is 12,5 %, reflecting the value of Xeran produced by B and C in the preceding year 2. In year 4 and thereafter A's market share on the technology market is 27,5 %, reflecting the value of Xeran produced by B and C in the preceding year.

In year 2 B's market share on the product market is 12,5 %, reflecting B's EUR 25 million sales in year 1. In year 3 B's market share is 15 % because its sales have increased to EUR 30 million in year 2. In year 4 and thereafter B's market share is 20 % as its sales are EUR 40 million annually. C's market share on the product market is 0 % in year 1 and 2, 5 % in year 3 and 7,5 % thereafter.

As the licence agreements between A and B, and between A and C, are between non-competitors and the individual market shares of A, B and C are below 30 % each year, each agreement falls within the safe harbour of the TTBER.

Example 2

The situation is the same as in example 1, however now B and C are operating in different geographic markets. It is established that the total market of Xeran and its substitutes is worth EUR 100 million annually in each geographic market.

In this case, A's market share on the relevant technology markets has to be calculated on the basis of product sales data of each of the two geographic product markets separately. In the market where B is active A's market share depends on the sale of Xeran by B. As in this example the total market is assumed to be EUR 100 million, that is to say, half the size of the market in example 1, the market share of A is 0 % in year 2, 15 % in year 3 and 40 % thereafter. B's market share is 25 % in year 2, 30 % in year 3 and 40 % thereafter. In year 2 and 3 both A's and B's market share does not exceed the 30 % threshold. The threshold is however exceeded from year 4 and

this means that, in line with Article 8(e) of the TTBER, after year 6 the licence agreement between A and B can no longer benefit from the safe harbour but has to be assessed on an individual basis.

In the market where C is active A's market share depends on the sale of Xeran by C. A's market share on the technology market, based on C's sales in the previous year, is therefore 0 % in year 2, 10 % in year 3 and 15 % thereafter. The market share of C on the product market is the same: 0 % in year 2, 10 % in year 3 and 15 % thereafter. The licence agreement between A and C therefore falls within the safe harbour for the whole period.

Licensing between competitors

Example 3

Companies A and B are active on the same relevant product and geographic market for a certain chemical product. They also each own a patent on different technologies used to produce this product. In year 1 A and B sign a cross licence agreement licensing each other to use their respective technologies. In year 1 A and B produce only with their own technology and A sells EUR 15 million of the product and B sells EUR 20 million of the product. From year 2 they both use their own and the other's technology. From that year onward A sells EUR 10 million of the product produced with its own technology and EUR 10 million of the product produced with B's technology. From year 2 B sells EUR 15 million of the product produced with its own technology and EUR 10 million of the product produced with A's technology. It is established that the total market of the product and its substitutes is worth EUR 100 million in each year.

To assess the licence agreement under the TTBER, the market shares of A and B have to be calculated both on the technology market and the product market. The market share of A on the technology market depends on the amount of the product sold in the preceding year that was produced, by both A and B, with A's technology. In year 2 the market share of A on the technology market is therefore 15 %, reflecting its own production and sales of EUR 15 million in year 1. From year 3 A's market share on the technology market is 20 %, reflecting the EUR 20 million sale of the product produced with A's technology and produced and sold by A and B (EUR 10 million each). Similarly, in year 2 B's market share on the technology market is 20 % and thereafter 25 %.

The market shares of A and B on the product market depend on their respective sales of the product in the previous year, irrespective of the technology used. The market share of A on the product market is 15 % in year 2 and 20 % thereafter. The market share of B on the product market is 20 % in year 2 and 25 % thereafter.

As the agreement is between competitors, their combined market share, both on the technology and on the product market, has to be below the 20 % market share threshold in order to benefit from the safe harbour. It is clear that this is not the case here. The combined market share on the technology market and on the product market is 35 % in year 2 and 45 % thereafter. This agreement between competitors will therefore have to be assessed on an individual basis.

3.4. Hardcore restrictions of competition under the Block Exemption Regulation

3.4.1. General principles

94. Article 4 of the TTBER contains a list of hardcore restrictions of competition. The classification of a restraint as a hardcore restriction of competition is based on the nature of the restriction and experience showing that such restrictions are almost always anti-competitive. In line with the case law of the Court of Justice and the General Court⁽³³⁾ such a restriction may result from the clear objective of the agreement or from the circumstances of the individual case (see point (14)). Hardcore restrictions may be objectively necessary in exceptional cases for an agreement of a particular type or nature⁽³⁴⁾ and therefore fall outside Article 101(1) of the Treaty. In addition, undertakings can always plead an efficiency defence under Article 101(3) in an individual case⁽³⁵⁾.

95. It follows from Article 4(1) and 4(2) of the TTBER that, when a technology transfer agreement contains a hardcore restriction of competition, the agreement as a whole falls outside the scope of the block exemption. For the purposes of the TTBER hardcore restrictions cannot be severed from the rest of the agreement. Moreover, the Commission considers that in the context of individual assessment it is unlikely that hardcore restrictions of competition fulfil the four conditions of Article 101(3) (see point (18)).

96. Article 4 of the TTBER distinguishes between agreements between competitors and agreements between non-competitors.

3.4.2. Agreements between competitors

97. Article 4(1) TTBER lists the hardcore restrictions for licensing between competitors. According to Article 4(1), the TTBER does not cover agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object any of the following:

- (a) the restriction of a party's ability to determine its prices when selling products to third parties;

⁽³³⁾ See e.g. the case law cited in footnote 16.

⁽³⁴⁾ See point 18 of the Commission Guidelines on the application of Article 81(3) of the Treaty, cited in footnote 3.

⁽³⁵⁾ Case T-17/93 *Matra* [1994] ECR II-595, paragraph 85.

- (b) the limitation of output, except limitations on the output of contract products imposed on the licensee in a non-reciprocal agreement or imposed on only one of the licensees in a reciprocal agreement;
- (c) the allocation of markets or customers except:
- (i) the obligation on the licensor and/or the licensee, in a non-reciprocal agreement, not to produce with the licensed technology rights within the exclusive territory reserved for the other party and/or not to sell, actively and/or passively, into the exclusive territory or to the exclusive customer group reserved for the other party;
 - (ii) the restriction, in a non-reciprocal agreement, of active sales by the licensee into the exclusive territory or to the exclusive customer group allocated by the licensor to another licensee provided that the latter was not a competing undertaking of the licensor at the time of the conclusion of its own licence;
 - (iii) the obligation on the licensee to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products;
 - (iv) the obligation on the licensee, in a non-reciprocal agreement, to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer;
- (d) the restriction of the licensee's ability to exploit its own technology rights or the restriction of the ability of any of the parties to the agreement to carry out research and development, unless such latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.

Distinction between reciprocal and non-reciprocal agreements between competitors

98. For a number of hardcore restrictions the TTBER makes a distinction between reciprocal and non-reciprocal agree-

ments. The hardcore list is stricter for reciprocal agreements than for non-reciprocal agreements between competitors. Reciprocal agreements are cross licensing agreements where the licensed technologies are competing technologies or can be used for the production of competing products. A non-reciprocal agreement is an agreement where only one of the parties is licensing its technology rights to the other party or where, in the case of cross licensing, the licensed technologies rights are not competing technologies and the rights licensed cannot be used for the production of competing products. An agreement is not reciprocal for the purposes of the TTBER merely because the agreement contains a grant back obligation or because the licensee licenses back own improvements of the licensed technology. Where a non-reciprocal agreement subsequently becomes a reciprocal agreement due to the conclusion of a second licence between the same parties, those parties may have to revise the first licence in order to avoid the agreement containing a hardcore restriction. In the assessment of the individual case the Commission will take into account the time lapsed between the conclusion of the first and the second licence.

Price restrictions between competitors

99. The hardcore restriction of competition contained in Article 4(1)(a) TTBER concerns agreements between competitors that have as their object the fixing of prices for products sold to third parties, including the products incorporating the licensed technology. Price fixing between competitors constitutes a restriction of competition by its very object. Price fixing can take the form of a direct agreement on the exact price to be charged or on a price list with certain allowed maximum rebates. It is immaterial whether the agreement concerns fixed, minimum, maximum or recommended prices. Price fixing can also be implemented indirectly by applying disincentives to deviate from an agreed price level, for example, by providing that the royalty rate will increase if product prices are reduced below a certain level. However, an obligation on the licensee to pay a certain minimum royalty does not in itself amount to price fixing.

100. When royalties are calculated on the basis of individual product sales, the amount of the royalty has a direct impact on the marginal cost of the product and thus a direct impact on product prices⁽³⁶⁾. Competitors can therefore use cross licensing with reciprocal running royalties as a means of coordinating and/or increasing

⁽³⁶⁾ See in this respect point 98 of the Guidelines on the application of Article 81(3) of the Treaty cited in footnote 3.

prices on downstream product markets⁽⁵⁷⁾. However, the Commission will only treat cross licences with reciprocal running royalties as price fixing where the agreement is devoid of any pro-competitive purpose and therefore does not constitute a bona fide licensing arrangement. In such cases where the agreement does not create any value and therefore has no valid business justification, the arrangement is a sham and amounts to a cartel.

101. The hardcore restriction contained in Article 4(1)(a) TTBER also covers agreements whereby royalties are calculated on the basis of all product sales irrespective of whether the licensed technology is being used. Such agreements are also caught by Article 4(1)(d) according to which the licensee must not be restricted in its ability to use its own technology rights (see point (116) of these guidelines). In general such agreements restrict competition since the agreement raises the cost of using the licensee's own competing technology rights and restricts competition that existed in the absence of the agreement⁽⁵⁸⁾. This is so both in the case of reciprocal and non-reciprocal arrangements.

102. Exceptionally, however, an agreement whereby royalties are calculated on the basis of all product sales may fulfil the conditions of Article 101(3) in an individual case where on the basis of objective factors it can be concluded that the restriction is indispensable for pro-competitive licensing to occur. This may be the case where in the absence of the restraint it would be impossible or unduly difficult to calculate and monitor the royalty payable by the licensee, for instance because the licensor's technology leaves no visible trace on the final product and practicable alternative monitoring methods are unavailable.

Output restrictions between competitors

103. The hardcore restriction of competition set out in Article 4(1)(b) TTBER concerns reciprocal output restrictions on the parties. An output restriction is a limitation on how much a party may produce and sell. Article 4(1)(b) does not apply to output limitations on the licensee in a non-reciprocal agreement or output limitations on one of the licensees in a reciprocal agreement provided that the output limitation only concerns products produced with the licensed technology. Article 4(1)(b) thus identifies as hardcore restrictions reciprocal output restrictions on the parties and output restrictions on the licensor in respect of its own tech-

nology. When competitors agree to impose reciprocal output limitations, the object and likely effect of the agreement is to reduce output in the market. The same is true of agreements that reduce the incentive of the parties to expand output, for example by applying reciprocal running royalties per unit which increase as output increases or by obliging each party to make payments if a certain level of output is exceeded.

104. The more favourable treatment of non-reciprocal quantity limitations is based on the consideration that a one-way restriction does not necessarily lead to a lower output on the market while the risk that the agreement is not a bona fide licensing arrangement is also lower when the restriction is non-reciprocal. When a licensee is willing to accept a one-way restriction, it is likely that the agreement leads to a real integration of complementary technologies or an efficiency enhancing integration of the licensor's superior technology with the licensee's productive assets. Similarly, in a reciprocal agreement an output restriction on only one of the licensees is likely to reflect the higher value of the technology licensed by one of the parties and may serve to promote pro-competitive licensing.

Market and customer allocation between competitors

105. The hardcore restriction of competition set out in Article 4(1)(c) TTBER concerns the allocation of markets and customers. Agreements whereby competitors share markets and customers have as their object the restriction of competition. An agreement whereby competitors agree, in a reciprocal agreement, not to produce in certain territories or not to sell actively and/or passively into certain territories or to certain customers reserved for the other party, is considered a hardcore restriction. Thus for instance reciprocal exclusive licensing between competitors is considered market sharing.

106. Article 4(1)(c) applies irrespective of whether the licensee remains free to use its own technology rights. Once the licensee has tooled up to use the licensor's technology to produce a given product, it may be costly to maintain a separate production line using another technology in order to serve customers covered by the restrictions. Moreover, given the anti-competitive potential of the restraints the licensee may have little incentive to produce under its own technology. Such restrictions are also highly unlikely to be indispensable for pro-competitive licensing to occur.

⁽⁵⁷⁾ This is also the case where one party grants a licence to the other party and accepts to buy a physical input from the licensee. The purchase price can serve the same function as the royalty.

⁽⁵⁸⁾ See in this respect Case 193/83, *Windsurfing International*, [1986] ECR 611, paragraph 67.

107. Under Article 4(1)(c)(i) it is not a hardcore restriction for the licensor in a non-reciprocal agreement to grant the licensee an exclusive licence to produce on the basis of the licensed technology in a particular territory and thus agree not to produce itself the contract products in or provide the contract products from that territory. Such exclusive licences are block exempted irrespective of the scope of the territory. If the licence is world-wide, the exclusivity implies that the licensor will abstain from entering or remaining on the market. The block exemption also applies if in a non-reciprocal agreement the licensee is not allowed to produce in an exclusive territory reserved for the licensor. The purpose of such agreements may be to give the licensor and/or licensee an incentive to invest in and develop the licensed technology. The object of the agreement is therefore not necessarily to share markets.
108. According to Article 4(1)(c)(i) and for the same reason, the block exemption also applies to non-reciprocal agreements whereby the parties agree not to sell actively or passively into an exclusive territory or to an exclusive customer group reserved for the other party. For the application of the TTBER, the Commission interprets 'active' and 'passive' sales as defined in the Guidelines on Vertical Restraints.⁽³⁹⁾ Restrictions on licensee or licensor to sell actively and/or passively into the other party's territory or customer group are only block exempted if that territory or customer group has been exclusively reserved to that other party. However, in some specific circumstances, agreements containing such sales restrictions may, in an individual case, also fulfil the conditions of Article 101(3) if the exclusivity is shared on an ad hoc basis, for instance if necessary to alleviate a temporary shortage in the production of the licensor or licensee to which the territory or customer group is exclusively allocated. In such cases, the licensor or licensee is still likely to be sufficiently protected against active and/or passive sales to have the incentive to license its technology or invest to work with the licensed technology. Such restraints, even where restrictive of competition, would promote pro-competitive dissemination and integration of that technology into the production assets of the licensee.
109. By implication the fact that the licensor appoints the licensee as its sole licensee in a particular territory, implying that third parties will not be licensed to produce on the basis of the licensor's technology in the territory in question, does not constitute a hardcore restriction either. In the case of such sole licences the block exemption applies irrespective of whether the agreement is reciprocal or not given that the agreement does not affect the ability of the parties to fully exploit their own technology rights in their respective territories.
110. Article 4(1)(c)(ii) excludes from the hardcore list, and thus block exempts up to the market share threshold, restrictions in a non-reciprocal agreement on active sales by a licensee into the territory or to the customer group allocated by the licensor to another licensee. However, this presupposes that the protected licensee was not a competitor of the licensor when the agreement was concluded. It is not warranted to treat such restrictions in that situation as hardcore restrictions. By allowing the licensor to grant a licensee, who was not already on the market, protection against active sales by licensees which are competitors of the licensor and which for that reason were already established on the market, such restrictions are likely to induce the licensee to exploit the licensed technology more efficiently. On the other hand, if the licensees were to agree between themselves not to sell actively or passively into certain territories or to certain customer groups, the agreement would amount to a cartel amongst the licensees. Given that such an agreement does not involve any transfer of technology it would in addition fall outside the scope of the TTBER.
111. Article 4(1)(c)(iii) contains a further exception to the hardcore restriction of Article 4(1)(c), namely captive use restrictions, that is to say, requirements whereby the licensee may produce the products incorporating the licensed technology only for its own use. Where the contract product is a component the licensee can thus be obliged to produce that component only for incorporation into its own products and can be obliged not to sell the components to other producers. The licensee must be able, however, to sell the components as spare parts for its own products and must thus be able to supply third parties that perform after sale services on these products. Captive use restrictions may be necessary to encourage the dissemination of technology, particularly between competitors, and are covered by the block exemption. Such restrictions are also dealt with in section 4.2.5.
112. Finally, Article 4(1)(c)(iv) excludes from the hardcore list an obligation on the licensee in a non-reciprocal agreement to produce the contract products only for a particular customer with a view to creating an alternative source of supply for that customer. It is thus a condition for the application of Article 4(1)(c)(iv) that the licence is limited to creating an alternative source of supply for that particular customer. It is not a condition, however, that only one such licence is granted. Article 4(1)(c)(iv) also covers situations where more than one undertaking is licensed to supply the same specified customer.

⁽³⁹⁾ OJ C 130, 19.5.2010, p. 1, point 51.

Article 4(1)(c)(iv) applies regardless of the duration of the licence agreement. For instance, a one-off licence to fulfil the requirements of a project of a particular customer is covered by this exception. The potential of such agreements to share markets is limited where the licence is granted only for the purpose of supplying a particular customer. In such circumstances it can, in particular, not be assumed that the agreement will cause the licensee to cease exploiting its own technology.

113. Restrictions in agreements between competitors that limit the licence to one or more product markets or technical fields of use⁽⁶⁹⁾ are not hardcore restrictions. Such restrictions are block exempted up to the market share threshold of 20 % irrespective of whether the agreement is reciprocal or not. Such restrictions are not considered to have as their object the allocation of markets or customers. It is a condition for the application of the block exemption, however, that the field of use restrictions do not go beyond the scope of the licensed technologies. For instance, where licensees are also limited in the technical fields in which they can use their own technology rights, the agreement amounts to market sharing.

114. The block exemption applies irrespective of whether the field of use restriction is symmetrical or asymmetrical. An asymmetrical field of use restriction in a reciprocal licence agreement implies that both parties are allowed to use the respective technologies that they license-in only within different fields of use. As long as the parties are unrestricted in the use of their own technologies, there is no assumption that the agreement leads the parties to abandon or refrain from entering the field(s) covered by the licence to the other party. Even if the licensees tool up to use the licensed technology within the licensed field of use, there may be no impact on assets used to produce outside the scope of the licence. It is important in this regard that the restriction relates to distinct product markets, industrial sectors or fields of use and not to customers, allocated by territory or by group, who purchase products falling within the same product market or technical field of use. The risk of market sharing is considered substantially greater in the latter case (see point (106) above). In addition, field of use restrictions may be necessary to promote pro-competitive licensing (see point (212) below).

⁽⁶⁹⁾ Field of use restrictions are further dealt with in points (208) ff.

Restrictions on the parties' ability to carry out research and development

115. The hardcore restriction of competition set out in Article 4(1)(d) covers restrictions on any of the parties' ability to carry out research and development. Both parties must be free to carry out independent research and development. This rule applies irrespective of whether the restriction applies to a field covered by the licence or to other fields. However, the mere fact that the parties agree to provide each other with future improvements of their respective technologies does not amount to a restriction on independent research and development. The effect on competition of such agreements must be assessed in the light of the circumstances of the individual case. Article 4(1)(d) also does not extend to restrictions on a party to carry out research and development with third parties, where such restriction is necessary to protect the licensor's know-how against disclosure. In order to be covered by the exception, the restrictions imposed to protect the licensor's know-how against disclosure must be necessary and proportionate to ensure such protection. For instance, where the agreement designates particular employees of the licensee to be trained in and responsible for the use of the licensed know-how, it may be sufficient to oblige the licensee not to allow those employees to be involved in research and development with third parties. Other safeguards may be equally appropriate.

Restrictions on the use of the licensee's own technology

116. According to Article 4(1)(d) the licensee must also be unrestricted in the use of its own competing technology rights provided that in doing so it does not make use of the technology rights licensed from the licensor. In relation to its own technology rights the licensee must not be subject to limitations in terms of where it produces or sells, the technical fields of use or product markets within which it produces, how much it produces or sells and the price at which it sells. It must also not be obliged to pay royalties on products produced on the basis of its own technology rights (see point (101)). Moreover, the licensee must not be restricted in licensing its own technology rights to third parties. When restrictions are imposed on the licensee's use of its own technology rights or its right to carry out research and development, the competitiveness of the licensee's technology is reduced. The effect of this is to reduce competition on existing product and technology markets and to reduce the licensee's incentive to invest in the development and improvement of its technology. Article 4(1)(d) does not extend to restrictions on the licensee's use of third party technology which competes with the licensed technology. Although such non-compete obligations may have foreclosure effects on third party

technologies (see section 4.2.7), they usually do not have the effect of reducing the incentive of licensees to invest in the development and improvement of their own technologies.

3.4.3. Agreements between non-competitors

117. Article 4(2) TTBER lists the hardcore restrictions for licensing between non-competitors. According to this provision, the TTBER does not cover agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object any of the following:

- (a) the restriction of a party's ability to determine its prices when selling products to third parties, without prejudice to the possibility to impose a maximum sale price or recommend a sale price, provided that it does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- (b) the restriction of the territory into which, or of the customers to whom, the licensee may passively sell the contract products, except:
 - (i) the restriction of passive sales into an exclusive territory or to an exclusive customer group reserved for the licensor;
 - (ii) the obligation to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products;
 - (iii) the obligation to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer;
 - (iv) the restriction of sales to end users by a licensee operating at the wholesale level of trade;
 - (v) the restriction of sales to unauthorised distributors by the members of a selective distribution system;
- (c) the restriction of active or passive sales to end users by a licensee which is a member of a selective

distribution system and which operates at the retail level, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.

Price fixing

118. The hardcore restriction of competition set out in Article 4(2)(a) concerns the fixing of prices charged when selling products to third parties. More specifically, that provision covers restrictions which have as their direct or indirect object the establishment of a fixed or a minimum selling price or a fixed or minimum price level to be observed by the licensor or the licensee when selling products to third parties. In the case of agreements that directly establish the selling price, the restriction is clear-cut. However, the fixing of selling prices can also be achieved through indirect means. Examples of the latter are agreements fixing margins, fixing the maximum level of discounts, linking the sales price to the sales prices of competitors, threats, intimidation, warnings, penalties, or contract terminations in relation to observance of a given price level. Direct or indirect means of achieving price fixing can be made more effective when combined with measures to identify price-cutting, such as the implementation of a price monitoring system, or the obligation on licensees to report price deviations. Similarly, direct or indirect price fixing can be made more effective when combined with measures that reduce the licensee's incentive to lower its selling price, such as the licensor obliging the licensee to apply a most-favoured-customer clause, that is to say, an obligation to grant a customer any more favourable terms granted to any other customer. The same means can be used to make maximum or recommended prices work as fixed or minimum selling prices. However, the provision of a list of recommended prices to or the imposition of a maximum price on the licensee by the licensor is not considered in itself as leading to fixed or minimum selling prices.

Restrictions on passive sales by the licensee

119. Article 4(2)(b) identifies as hardcore restrictions of competition agreements or concerted practices that have as their direct or indirect object the restriction of passive sales⁽⁶¹⁾ by licensees of products incorporating the licensed technology⁽⁶²⁾. Passive sales restrictions on the licensee may be the result of direct obligations, such

⁽⁶¹⁾ For a definition of passive sales, see point (108) of these guidelines and the Guidelines on Vertical Restraints cited in footnote 52, point 51.

⁽⁶²⁾ This hardcore restriction applies to technology transfer agreements concerning trade within the Union. In so far as technology transfer agreements concern exports outside the Union or imports/re-imports from outside the Union see judgment of the Court of Justice in Case C-306/96, *Javico v Yves Saint Laurent* [1998] ECR I-1983. In that judgment the ECJ held in paragraph 20 that 'an agreement in which the reseller gives to the producer an undertaking that it will sell the contractual products on a market outside the Community cannot be regarded as having the object of appreciably restricting competition within the common market or as being capable of affecting, as such, trade between Member States'.

- as the obligation not to sell to certain customers or to customers in certain territories or the obligation to refer orders from these customers to other licensees. It may also result from indirect measures aimed at inducing the licensee to refrain from making such sales, such as financial incentives and the implementation of a monitoring system aimed at verifying the effective destination of the licensed products. Quantity limitations may be an indirect means to restrict passive sales. The Commission will not assume that quantity limitations as such serve this purpose. However, it will assume otherwise where quantity limitations are used to implement an underlying market partitioning agreement. Indications thereof include the adjustment of quantities over time to cover only local demand, the combination of quantity limitations and an obligation to sell minimum quantities in the territory, as well as minimum royalty obligations linked to sales in the territory, differentiated royalty rates depending on the destination of the products and the monitoring of the destination of products sold by individual licensees. The general hardcore restriction covering passive sales by licensees is subject to a number of exceptions, which are dealt with in points (120) to (125).
120. Exception 1: Article 4(2)(b) does not cover sales restrictions (both active and passive) on the licensor. All sales restrictions on the licensor are block exempted up to the market share threshold of 30 %. The same applies to all restrictions on active sales by the licensee, with the exception of what is said on active selling in point (125). The block exemption of restrictions on active selling is based on the assumption that such restrictions promote investments, non-price competition and improvements in the quality of services provided by the licensees by solving free rider problems and hold-up problems. In the case of restrictions of active sales between licensees' territories or customer groups, it is not necessary that the protected licensee has been granted an exclusive territory or an exclusive customer group. The block exemption also applies to active sales restrictions where more than one licensee has been appointed for a particular territory or customer group. Efficiency enhancing investment is likely to be promoted where a licensee can be sure that it will only face active sales competition from a limited number of licensees inside the territory and not also from licensees outside the territory.
121. Exception 2: Restrictions on active and passive sales by licensees into an exclusive territory or to an exclusive customer group reserved for the licensor do not constitute hardcore restrictions of competition (see Article 4(2)(b)(i)) and are block exempted. It is presumed that up to the market share threshold such restraints, where restrictive of competition, promote pro-competitive dissemination of technology and integration of such technology into the production assets of the licensee. For a territory or customer group to be reserved for the licensor, the licensor does not actually have to be producing with the licensed technology in the territory or for the customer group in question. A territory or customer group can also be reserved by the licensor for later exploitation.
122. Exception 3: Article 4(2)(b)(ii) brings under the block exemption a restriction whereby the licensee is obliged to produce products incorporating the licensed technology only for its own (captive) use. Where the contract product is a component the licensee can thus be obliged to use that product only for incorporation into its own products and can be obliged not to sell the product to other producers. The licensee must however be able to actively and passively sell the products as spare parts for its own products and must thus be able to supply third parties that perform after sale services on these products. Captive use restrictions are also dealt with in section 4.2.5.
123. Exception 4: As in the case of agreements between competitors (see point (112) above) the block exemption also applies to agreements whereby the licensee is obliged to produce the contract products only for a particular customer in order to provide that customer with an alternative source of supply, regardless of the duration of the licence agreement (cf. Article 4(2)(b)(iii)). In the case of agreements between non-competitors, such restrictions are unlikely to be caught by Article 101(1) of the Treaty.
124. Exception 5: Article 4(2)(b)(iv) brings under the block exemption an obligation on the licensee, if operating at the wholesale level of trade, not to sell to end users and thus only to sell to retailers. Such an obligation allows the licensor to assign the licensee to the wholesale distribution function and normally falls outside Article 101(1) ⁽⁶³⁾.
125. Exception 6: Finally Article 4(2)(b)(v) brings under the block exemption a restriction on the licensee not to sell to unauthorised distributors. This exception allows the licensor to impose an obligation on the licensees to form part of a selective distribution system. In that case, however, the licensees must according to Article 4(2)(c) be permitted to sell both actively and passively to end users, without prejudice to the possibility to restrict the licensee to a wholesale function as provided for in Article 4(2)(b)(iv) (see point (124)). Within the territory where the licensor operates a selective distribution system, this system may not be combined with exclusive territories or exclusive customer groups where this would lead to a restriction of active or passive sales to end-users as that would lead to a hardcore restriction under Article 4(2)(c), without prejudice to the possibility of prohibiting a licensee from operating out of an unauthorised place of establishment.

⁽⁶³⁾ See in this respect Case 26/76, *Metro (I)*, [1977] ECR 1875.

126. Restrictions on passive sales by licensees into an exclusive territory or customer group allocated to another licensee, while normally a hardcore restriction, may fall outside Article 101(1) of the Treaty for a certain duration if the restraints are objectively necessary for the protected licensee to penetrate a new market. This may be the case where licensees have to commit substantial investments in production assets and promotional activities in order to start up and develop a new market. The risks facing a new licensee may therefore be substantial, in particular since promotional expenses and investment in assets required to produce on the basis of a particular technology are often sunk, that is to say, that upon leaving that particular field of activity the investment cannot be used by the licensee for other activities or sold other than at a significant loss. For instance, the licensee may be the first to produce and sell a new type of product or the first to apply a new technology. In such circumstances, it is often the case that licensees would not enter into the licence agreement without protection for a certain period of time against (active and) passive sales into their territory or to their customer groups by other licensees. Where substantial investments by the licensee are necessary to start up and develop a new market, restrictions of passive sales by other licensees into such a territory or to such a customer group fall outside Article 101(1) for the period necessary for the licensee to recoup those investments. In most cases a period of up to two years from the date on which the contract product was first put on the market in the exclusive territory by the licensee in question or sold to its exclusive customer group would be considered sufficient for the licensee to recoup the investments made. However, in an individual case a longer period of protection for the licensee might be necessary in order for the licensee to recoup the costs incurred.
127. Similarly, a prohibition imposed on all licensees not to sell to certain categories of end users may not be restrictive of competition if such a restraint is objectively necessary for reasons of safety or health related to the dangerous nature of the product in question.

3.5. Excluded restrictions

128. Article 5 of the TTBER lists three types of restrictions that are not block exempted and which thus require individual assessment of their anti-competitive and pro-competitive effects. The purpose of Article 5 is to avoid block exemption of agreements that may reduce the incentive to innovate. It follows from Article 5 that the inclusion in a licence agreement of any of the restrictions contained in that Article does not prevent the application of the block exemption to the rest of the agreement, if the remainder is severable from the excluded restriction(s). It is only the individual restriction in question that is not covered by the block exemption, implying that individual assessment is required.
- Exclusive grant backs*
129. Article 5(1)(a) TTBER concerns exclusive grant backs (that is to say an exclusive licence back to the licensor of the licensee's improvement) or assignments to the licensor of improvements of the licensed technology. An obligation to grant the licensor an exclusive licence to improvements of the licensed technology or to assign such improvements to the licensor is likely to reduce the licensee's incentive to innovate since it hinders the licensee in exploiting the improvements, including by way of licensing to third parties. An exclusive grant back is defined as a grant back which prevents the licensee (which is the innovator and licensor of the improvement in this case) from exploiting the improvement (either for its own production or for licensing out to third parties). This is the case both where the improvement concerns the same application as the licensed technology and where the licensee develops new applications of the licensed technology. According to Article 5(1)(a) such obligations are not covered by the block exemption.
130. The application of Article 5(1)(a) does not depend on whether or not the licensor pays consideration in return for acquiring the improvement or for obtaining an exclusive licence. However, the existence and level of such consideration may be a relevant factor in the context of an individual assessment under Article 101. When grant backs are made against consideration it is less likely that the obligation creates a disincentive for the licensee to innovate. In the assessment of exclusive grant backs outside the scope of the block exemption the market position of the licensor on the technology market is also a relevant factor. The stronger the position of the licensor, the more likely it is that exclusive grant back obligations will have restrictive effects on competition in innovation. The stronger the position of the licensor's technology the more important it is that the licensee can become an important source of innovation and future competition. The negative impact of grant back obligations can also be increased in case of parallel networks of licence agreements containing such obligations. When available technologies are controlled by a limited number of licensors that impose exclusive grant back obligations on licensees, the risk of anti-competitive effects is greater than where there are a number of technologies only some of which are licensed on exclusive grant back terms.

131. Non-exclusive grant back obligations are covered by the safe harbour of the TTBER. This is the case even where they are non-reciprocal, that is to say, only imposed on the licensee, and where under the agreement the licensor is entitled to feed-on the improvements to other licensees. A non-reciprocal grant back obligation may promote the dissemination of new technology by permitting the licensor to freely determine whether and to what extent to pass on its own improvements to its licensees. A feed-on clause may also promote the dissemination of technology, in particular when each licensee knows at the time of contracting that it will be on an equal footing with other licensees in terms of the technology on the basis of which it is producing.
132. Non-exclusive grant back obligations may in particular have negative effects on innovation in the case of cross licensing between competitors where a grant back obligation on both parties is combined with an obligation on both parties to share improvements of its own technology with the other party. The sharing of all improvements between competitors may prevent each competitor from gaining a competitive lead over the other (see also point (241) below). However, the parties are unlikely to be prevented from gaining a competitive lead over each other where the purpose of the licence is to permit them to develop their respective technologies and where the licence does not lead them to use the same technological base in the design of their products. This is the case where the purpose of the licence is to create design freedom rather than to improve the technological base of the licensee.

Non-challenge and termination clauses

133. The excluded restriction set out in Article 5(1)(b) TTBER concerns non-challenge clauses, that is to say, direct or indirect obligations not to challenge the validity of the licensor's intellectual property, without prejudice to the possibility, in the case of an exclusive licence, for the licensor to terminate the technology transfer agreement in the event that the licensee challenges the validity of any of the licensed technology rights.
134. The reason for excluding non-challenge clauses from the scope of the block exemption is the fact that licensees are normally in the best position to determine whether or not an intellectual property right is invalid. In the interest of undistorted competition and in accordance with the principles underlying the protection of intellectual property, invalid intellectual property rights should be eliminated. Invalid intellectual property stifles innovation rather than promoting it. Article 101(1) of the Treaty is likely to apply to non-challenge clauses where the licensed technology is valuable and therefore creates a competitive disadvantage for undertakings that are prevented from using it or are only able to use it against payment of royalties. In such cases the conditions of Article 101(3) are unlikely to be fulfilled. However, if the licensed technology is related to a technically outdated process which the licensee does not use, or if the licence is granted for free, no restriction of competition arises⁽⁶⁴⁾. As to non-challenge clauses in the context of settlement agreements see points (242) and (243).
135. Generally a clause obliging the licensee not to challenge the ownership of the technology rights does not constitute a restriction of competition within the meaning of Article 101(1). Whether or not the licensor has the ownership of the technology rights, the use of the technology by the licensee and any other party is dependent on obtaining a licence in any event, and competition would thus generally not be affected⁽⁶⁵⁾.
136. Article 5(1)(b) TTBER also excludes from the safe harbour of the block exemption the right, in the context of non-exclusive licences, for the licensor to terminate the agreement in the event that the licensee challenges the validity of any of the intellectual property rights that the licensor holds in the Union. Such a termination right can have the same effect as a non-challenge clause, in particular where switching away from the licensor's technology would result in a significant loss to the licensee (for example where the licensee has already invested in specific machines or tools which cannot be used for producing with another technology) or where the licensor's technology is a necessary input for the licensee's production. For example, in the context of standard essential patents the licensee producing a standard compliant product will necessarily have to use all patents reading on the standard. In such a case, challenging the validity of the relevant patents may result in a significant loss if the technology transfer agreement is terminated. Where the licensor's technology is not standard essential, but has a very significant market position, the disincentive to challenge may also be high considering the difficulty for the licensee in finding a viable alternative technology to license-in. The question whether the licensee's loss of profit would be significant, and therefore act as a strong disincentive to challenge, would need to be assessed on a case by case basis.
137. In the scenarios described in point (136), the licensee may be deterred from challenging the validity of the intellectual property right if it would risk the termination of the licensing agreement and thus face significant risks which go far beyond its royalty obligations. However, it should also be noted that, outside the context of these scenarios a termination clause will often not provide a significant disincentive to challenge and therefore not produce the same effect as a non-challenge clause.

⁽⁶⁴⁾ See in this respect Case 65/86, *Bayer v Sillhofer*, [1988] ECR 5249.

⁽⁶⁵⁾ Cf. in respect of challenging the ownership of a trademark Commission Decision in *Mosched/Whitbread* (OJ L 100, 20.4.1990, p. 32).

138. The public interest of strengthening the incentive of the licensor to license out by not being forced to continue dealing with a licensee that challenges the very subject matter of the licence agreement has to be balanced against the public interest to eliminate any obstacle to economic activity which may arise where an intellectual property right was granted in error⁽⁶⁶⁾. In balancing those interests it should be taken into account whether the licensee fulfils all the obligations under the agreement at the time of the challenge, in particular the obligation to pay the agreed royalties.
139. In the case of exclusive licensing, termination clauses are usually less likely on balance to have anti-competitive effects. Once the licence is granted, the licensor may find itself in a particular situation of dependency, as the licensee will be its only source of income as regards the licensed technology rights if royalties are dependent on production with the licensed technology rights, as may often be an efficient way to structure royalty payments. In this scenario, the incentives for innovation and for licensing out could be undermined if, for example, the licensor were to be locked into an agreement with an exclusive licensee which no longer makes significant efforts to develop, produce and market the product (to be) produced with the licensed technology rights⁽⁶⁷⁾. This is why the TTBER block exempts termination clauses for exclusive licensing agreements as long as also the other conditions of the safe harbour, such as respecting the market share threshold, are fulfilled. Outside the safe harbour, a case by case assessment has to be carried out taking into account the different interests as described in point (138).
140. Moreover, the Commission takes a more favourable view of non-challenge and termination clauses relating to know-how where the recovery of the licensed know-how is likely to be impossible or very difficult once it is disclosed. In such cases, an obligation on the licensee not to challenge the licensed know-how promotes dissemination of new technology, in particular by allowing weaker licensors to license stronger licensees without fear of a challenge once the know-how has been absorbed by the licensee. Therefore, non-challenge and termination clauses solely concerning know-how are not excluded from the scope of the TTBER.

Limiting the licensee's use or development of its own technology (between non-competitors)

141. In the case of agreements between non-competitors, Article 5(2) excludes from the scope of the block exemption any direct or indirect obligation limiting the licensee's ability to exploit its own technology rights or limiting the ability of the parties to the agreement to carry

out research and development, unless that restriction is indispensable to prevent the disclosure of licensed know-how to third parties. The content of this condition is the same as that of Article 4(1)(d) of the hardcore list concerning agreements between competitors, which is dealt with in points (115) and (116) of these guidelines. However, in the case of agreements between non-competitors it cannot be considered that such restrictions generally have negative effects on competition, or that the conditions of Article 101(3) of the Treaty are generally not satisfied⁽⁶⁸⁾. Individual assessment is therefore required.

142. In the case of agreements between non-competitors, the licensee normally does not own a competing technology. However, there may be cases where for the purposes of the block exemption the parties are considered non-competitors despite the fact that the licensee does own a competing technology. This is the case where the licensee owns a technology but does not license it and the licensor is not an actual or potential supplier on the product market. For the purposes of the block exemption, in such circumstances, the parties are neither competitors on the technology market nor competitors on the downstream product market⁽⁶⁹⁾. In such cases it is important to ensure that the licensee is not restricted in its ability to exploit its own technology and further develop it. This technology constitutes a competitive constraint in the market, which should be preserved. In such a situation restrictions on the licensee's use of its own technology rights or on research and development are normally considered to be restrictive of competition and not to satisfy the conditions of Article 101(3) of the Treaty. For instance, an obligation on the licensee to pay royalties not only on the basis of products it produces with the licensed technology but also on the basis of products it produces only with its own technology will generally limit the ability of the licensee to exploit its own technology and thus be excluded from the scope of the block exemption.
143. In cases where the licensee does not own a competing technology or is not already developing such a technology, a restriction on the ability of the parties to carry out independent research and development may be restrictive of competition where only a few technologies are available. In that case the parties may be an important (potential) source of innovation in the market. This is particularly so where the parties possess the necessary assets and skills to carry out further research and development. In that case the conditions of Article 101(3) of the Treaty are unlikely to be fulfilled. In other cases where a number of technologies are available and where the parties do not possess special assets or skills, the restriction on research and development is likely either to fall outside Article 101(1) for lack of an appreciable restrictive effect or to satisfy the conditions of Article 101(3). The restraint may promote the dissemination of new technology by assuring the licensor that the licence does not create a new competitor and by inducing the licensee to focus on the exploitation and development of the licensed technology. Moreover, Article 101(1) only applies where the agreement reduces

⁽⁶⁶⁾ Case 193/83 *Windsurfing International* [1986] ECR 611, paragraph 92.

⁽⁶⁷⁾ In the context of an agreement which is technically not an exclusive agreement, and where a termination clause is thus not covered by the safe harbour of the TTBER, the licensor may, in a specific case, be in a similar situation of dependency in relation to a licensee with considerable buyer power. Such dependency will be taken into account in the individual assessment.

⁽⁶⁸⁾ See point (14) above.

⁽⁶⁹⁾ See point (36) above.

the licensee's incentive to improve and exploit its own technology. This is, for instance, not likely to be the case where the licensor is entitled to terminate the licence agreement once the licensee commences to produce on the basis of its own competing technology. Such a right does not reduce the licensee's incentive to innovate, since the agreement can only be terminated when a commercially viable technology has been developed and products produced on the basis thereof are ready to be put on the market.

3.6. Withdrawal and non-application of the Block Exemption Regulation

3.6.1. Withdrawal procedure

144. According to Article 6 of the TTBER, the Commission and the competition authorities of the Member States may withdraw the benefit of the block exemption in respect of individual agreements that are likely to have anticompetitive effects (account must be taken of both actual and potential effects) and do not fulfil the conditions of Article 101(3) of the Treaty. The power of the competition authorities of the Member States to withdraw the benefit of the block exemption is limited to cases where the relevant geographic market is no wider than the territory of the Member State in question.
145. The four conditions of Article 101(3) are cumulative and must all be fulfilled for the exception rule to be applicable⁽⁹⁾. The block exemption can therefore be withdrawn where a particular agreement fails to fulfil one or more of the four conditions.
146. Where the withdrawal procedure is applied, the withdrawing authority bears the burden of proving that the agreement falls within the scope of Article 101(1) and that the agreement does not satisfy all four conditions of Article 101(3). Given that withdrawal implies that the agreement in question restricts competition within the meaning of Article 101(1) and does not fulfil the conditions of Article 101(3), withdrawal is necessarily accompanied by a negative decision based on Articles 5, 7 or 9 of Regulation (EC) No 1/2003.
147. According to Article 6 of the TTBER, withdrawal may in particular be warranted in the following circumstances:
- (a) access of third parties' technologies to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements prohibiting licensees from using third parties' technologies;
- (b) access of potential licensees to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements preventing licensors from licensing to other licensees or because the only technology owner licensing out relevant technology rights concludes an exclusive license with a licensee who is already active on the product market on the basis of substitutable technology rights. In order to qualify as relevant, the technology rights need to be both technically and commercially substitutable in order for the licensee to be active on the relevant product market.
148. Articles 4 and 5 of the TTBER, containing the list of hardcore restrictions of competition and excluded restrictions, aim at ensuring that block exempted agreements do not reduce the incentive to innovate, do not delay the dissemination of technology, and do not unduly restrict competition between the licensor and licensee or between licensees. However, the list of hardcore restrictions and the list of excluded restrictions do not take into account all the possible impacts of licence agreements. In particular, the block exemption does not take account of any cumulative effect of similar restrictions contained in networks of licence agreements. Licence agreements may lead to foreclosure of third parties both at the level of the licensor and at the level of the licensee. Foreclosure of other licensors may stem from the cumulative effect of networks of licence agreements prohibiting the licensees from exploiting competing technologies, leading to the exclusion of other (potential) licensors. Foreclosure of licensors is likely to arise in cases where most of the undertakings on the market that could (efficiently) take a competing licence are prevented from doing so as a consequence of restrictive agreements and where potential licensees face relatively high barriers to entry. Foreclosure of other licensees may stem from the cumulative effect of licence agreements prohibiting licensors from licensing other licensees and thereby preventing potential licensees from gaining access to the necessary technology. The issue of foreclosure is examined in more detail in sections 4.2.2 and 4.2.7. In addition, the Commission is likely to withdraw the benefit of the block exemption where, in individual agreements,

⁽⁹⁾ See in this respect point 42 of the Guidelines on the application of Article 81(3) of the Treaty, cited in footnote 3.

a significant number of licensors of competing technologies impose on their licensees to extend to them more favourable conditions agreed with other licensors.

3.6.2. Non-application of the Block Exemption Regulation

149. Article 7 of the TTBER enables the Commission to exclude from the scope of the TTBER, by means of regulation, parallel networks of similar agreements where these cover more than 50 % of a relevant market. Such a measure is not addressed to individual undertakings but concerns all undertakings whose agreements are defined in the regulation declaring that the TTBER is not to apply.
150. Whereas withdrawal of the benefit of the TTBER by the Commission under Article 6 implies the adoption of a decision pursuant to Articles 7 or 9 of Regulation (EC) No 1/2003, the effect of a Commission regulation pursuant to Article 7 of the TTBER declaring that the TTBER is not to apply, is merely to remove the benefit of the TTBER and to restore the full application of Article 101(1) and (3) of the Treaty in respect of the restraints and the markets concerned. Following the adoption of a regulation declaring the TTBER not applicable for a particular market in respect of agreements containing certain restraints, the criteria developed by the relevant case law of the Union Courts and by notices and previous decisions adopted by the Commission will give guidance on the application of Article 101 to individual agreements. Where appropriate, the Commission will take a decision in an individual case, which can provide guidance to all the undertakings operating on the market concerned.
151. For the purpose of calculating the 50 % market coverage ratio, account must be taken of each individual network of licence agreements containing restraints, or combinations of restraints, producing similar effects on the market.
152. Article 7 TTBER does not entail an obligation on the part of the Commission to act where the 50 % market-coverage ratio is exceeded. In general, the adoption of a regulation pursuant to Article 7 is appropriate when it is likely that access to the relevant market or competition in that market is appreciably restricted. In assessing the need to apply Article 7, the Commission will consider whether individual withdrawal would be a more appropriate remedy. This may depend, in particular, on the number of competing undertakings contributing to a cumulative effect on a market or the number of affected geographic markets within the Union.
153. Any regulation adopted under Article 7 must clearly set out its scope. Therefore the Commission must first define the relevant product and geographic market(s) and, secondly, identify the type of licensing restraint in respect of which the TTBER will no longer apply. As regards the latter aspect, the Commission may modulate

the scope of the regulation according to the competition concern which it intends to address. For instance, while all parallel networks of non-compete arrangements will be taken into account for the purpose of establishing the 50 % market coverage ratio, the Commission may nevertheless restrict the scope of the regulation only to non-compete obligations exceeding a certain duration. Thus, agreements of a shorter duration or of a less restrictive nature might be left unaffected, due to the lesser degree of foreclosure attributable to such restraints. Where appropriate, the Commission may also provide guidance by specifying the market share level which, in the specific market context, may be regarded as insufficient to bring about a significant contribution by an individual undertaking to the cumulative effect. In general, when the market share of the products incorporating a technology licensed by an individual licensor does not exceed 5 %, the agreement or network of agreements covering that technology is not considered to contribute significantly to a cumulative foreclosure effect ⁽⁷¹⁾.

154. The transitional period of not less than six months that the Commission will have to set under Article 7(2) should allow the undertakings concerned to adapt their agreements to take account of the regulation declaring that the TTBER is not to apply.
155. A regulation declaring that the TTBER is not to apply will not affect the block exempted status of the agreements concerned for the period preceding its entry into force.

4. APPLICATION OF ARTICLE 101(1) AND 101(3) OF THE TREATY OUTSIDE THE SCOPE OF THE TTBER

4.1. The general framework for analysis

156. Agreements that fall outside the block exemption, for example because the market share thresholds are exceeded or the agreement involves more than two parties, are subject to individual assessment. Agreements that either do not restrict competition within the meaning of Article 101(1) of the Treaty or which fulfil the conditions of Article 101(3) are valid and enforceable. It is recalled that there is no presumption of illegality of agreements that fall outside the scope of the block exemption provided that they do not contain hardcore restrictions of competition. In particular, there is no presumption that Article 101(1) applies merely because the market share thresholds are exceeded. Individual assessment based on the principles described in these guidelines is always required.

Safe harbour if there are sufficient independently controlled technologies

157. In order to promote predictability beyond the application of the TTBER and to confine detailed analysis to cases that are likely to present real competition concerns, the Commission takes the view that outside the area

⁽⁷¹⁾ See in this respect point 8 of the Commission Notice on agreements of minor importance, cited in footnote 20.

- of hardcore restrictions Article 101 of the Treaty is unlikely to be infringed where there are four or more independently controlled technologies in addition to the technologies controlled by the parties to the agreement that may be substitutable for the licensed technology at a comparable cost to the user. In assessing whether the technologies are sufficiently substitutable the relative commercial strength of the technologies in question must be taken into account. The competitive constraint imposed by a technology is limited if it does not constitute a commercially viable alternative to the licensed technology. For instance, if due to network effects in the market consumers have a strong preference for products incorporating the licensed technology, other technologies already on the market or likely to come to the market within a reasonable period of time may not constitute a real alternative and may therefore impose only a limited competitive constraint.
158. The fact that an agreement falls outside the safe harbour described in point (157) does not imply that the agreement is caught by Article 101(1) of the Treaty and, if so, that the conditions of Article 101(3) are not satisfied. As for the market share safe harbour of the TTBER, this additional safe harbour merely creates a presumption that the agreement is not prohibited by Article 101. Outside the safe harbour individual assessment of the agreement based on the principles developed in these guidelines is required.
- 4.1.1. *The relevant factors*
159. In the application of Article 101 of the Treaty to individual cases it is necessary to take due account of the way in which competition operates on the market in question. The following factors are particularly relevant in this respect:
- (a) the nature of the agreement;
 - (b) the market position of the parties;
 - (c) the market position of competitors;
 - (d) the market position of buyers on the relevant markets;
 - (e) entry barriers and
 - (f) maturity of the market.
160. The importance of individual factors may vary from case to case and depends on all other factors. For instance, a high market share of the parties is usually a good indicator of market power, but in the case of low entry barriers it may not be indicative of market power. It is therefore not possible to provide firm rules on the importance of the individual factors.
161. Technology transfer agreements can take many shapes and forms. It is therefore important to analyse the nature of the agreement in terms of the competitive relationship between the parties and the restraints that it contains. In the latter regard it is necessary to go beyond the express terms of the agreement. The existence of implicit restraints may be derived from the way in which the agreement has been implemented by the parties and from the incentives that they face.
162. The market position of the parties, including any undertakings *de facto* or *de jure* controlled by the parties, provides an indication of the degree of market power, if any, possessed by the licensor, the licensee or both. The higher their market share the greater their market power is likely to be. This is particularly so where the market share reflects cost advantages or other competitive advantages vis-à-vis competitors. These competitive advantages may for instance result from being a first mover in the market, from holding essential patents or from having superior technology. However, market shares are always only one factor in assessing market positions. For instance, in particular in the case of technology markets, market shares may not always be a good indicator of the relative strength of the technology in question and the market share figures may differ considerably depending on the different calculation methods.
163. Market shares and possible competitive advantages and disadvantages are also used to assess the market position of competitors. The stronger the actual competitors and the greater their number the less risk there is that the parties will be able to exercise market power individually. However, if the number of competitors is rather small and their market position (size, costs, R&D potential, etc.) is rather similar, this market structure may increase the risk of collusion.
164. The market position of buyers provides an indication of whether or not one or more buyers possess buyer power. The first indicator of buyer power is the market share of the buyer on the purchase market. This share reflects the importance of its demand for possible suppliers. Other indicators focus on the position of the buyer on its resale market, including characteristics such as a wide geographic spread of its outlets, and its brand image amongst final consumers. In some circumstances buyer power may prevent the licensor and/or the licensee from exercising market power on the market and thereby solve a competition problem that would otherwise have existed. This is particularly so when strong buyers have the capacity and the incentive to bring new sources of supply on to the market in the case of a small but permanent increase in relative prices. Where the strong buyers merely extract favourable terms from the supplier or simply pass on any price increase to their customers, the position of the buyers is not such as to prevent the exercise of market power by the licensee on the product market and therefore not such as to solve the competition problem on that market ⁽⁷²⁾.
165. Entry barriers are measured by the extent to which incumbent companies can increase their price above the competitive level without attracting new entry. In the absence of entry barriers, easy and quick entry would

⁽⁷²⁾ See in this respect Case T-228/97, *Irish Sugar*, [1999] ECR II-2969, paragraph 101.

- render price increases unprofitable. When effective entry, preventing or eroding the exercise of market power, is likely to occur within one or two years, entry barriers can, as a general rule, be said to be low.
166. Entry barriers may result from a wide variety of factors such as economies of scale and scope, government regulations, especially where they establish exclusive rights, state aid, import tariffs, intellectual property rights, ownership of resources where the supply is limited due to for instance natural limitations, essential facilities, a first mover advantage or brand loyalty of consumers created by strong advertising over a period of time. Restrictive agreements entered into by undertakings may also work as an entry barrier by making access more difficult and foreclosing (potential) competitors. Entry barriers may be present at all stages of the research and development, production and distribution process. The question whether certain of these factors should be described as entry barriers depends particularly on whether they entail sunk costs. Sunk costs are those costs which have to be incurred to enter or be active on a market but which are lost when the market is exited. The more costs are sunk, the more potential entrants have to weigh the risks of entering the market and the more credibly incumbents can threaten that they will match new competition, as sunk costs make it costly for incumbents to leave the market. In general, entry requires sunk costs, sometimes minor and sometimes major. Therefore, actual competition is in general more effective and will weigh more heavily in the assessment of a case than potential competition.
167. In a mature market, that is to say a market that has existed for some time, where the technology used is well known and widespread and not changing very much and in which demand is relatively stable or declining, restrictions of competition are more likely to have negative effects than in more dynamic markets.
168. In the assessment of particular restraints other factors may have to be taken into account. Such factors include cumulative effects, that is to say, the coverage of the market by similar agreements, the duration of the agreements, the regulatory environment and behaviour that may indicate or facilitate collusion such as price leadership, pre-announced price changes and discussions on the 'right' price, price rigidity in response to excess capacity, price discrimination and past collusive behaviour.
- 4.1.2. *Negative effects of restrictive licence agreements*
169. The negative effects on competition on the market that may result from restrictive technology transfer agreements include the following:
- (a) reduction of inter-technology competition between the companies operating on a technology market or on a market for products incorporating the technologies in question, including facilitation of collusion, both explicit and tacit;
 - (b) foreclosure of competitors by raising their costs, restricting their access to essential inputs or otherwise raising barriers to entry; and
 - (c) reduction of intra-technology competition between undertakings that produce products on the basis of the same technology.
170. Technology transfer agreements may reduce inter-technology competition, that is to say, competition between undertakings that license or produce on the basis of substitutable technologies. This is particularly the case where reciprocal obligations are imposed. For instance, where competitors transfer competing technologies to each other and impose a reciprocal obligation to provide each other with future improvements of their respective technologies and where this agreement prevents either competitor from gaining a technological lead over the other, competition in innovation between the parties is restricted (see also point (241)).
171. Licensing between competitors may also facilitate collusion. The risk of collusion is particularly high in concentrated markets. Collusion requires that the undertakings concerned have similar views on what is in their common interest and on how the co-ordination mechanisms function. For collusion to work the undertakings must also be able to monitor each other's market behaviour and there must be adequate deterrents to ensure that there is an incentive not to depart from the common policy on the market, while entry barriers must be high enough to limit entry or expansion by outsiders. Agreements can facilitate collusion by increasing transparency in the market, by controlling certain behaviour and by raising barriers to entry. Collusion can also exceptionally be facilitated by licensing agreements that lead to a high degree of commonality of costs, because undertakings that have similar costs are more likely to have similar views on the terms of coordination⁽⁷³⁾.
172. Licence agreements may also affect inter-technology competition by creating barriers to entry for and expansion by competitors. Such foreclosure effects may stem from restraints that prevent licensees from licensing from third parties or create disincentives for them to do so. For instance, third parties may be

⁽⁷³⁾ See in this respect point 36 of the Guidelines on horizontal cooperation agreements, cited in footnote 27.

foreclosed where incumbent licensors impose non-compete obligations on licensees to such an extent that an insufficient number of licensees are available to third parties and where entry at the level of licensees is difficult. Suppliers of substitutable technologies may also be foreclosed where a licensor with a sufficient degree of market power ties together various parts of a technology and licenses them together as a package while only part of the package is essential to produce a certain product.

173. Licence agreements may also reduce intra-technology competition, that is to say, competition between undertakings that produce on the basis of the same technology. An agreement imposing territorial restraints on licensees, preventing them from selling into each other's territory reduces competition between them. Licence agreements may also reduce intra-technology competition by facilitating collusion between licensees. Moreover, licence agreements that reduce intra-technology competition may facilitate collusion between owners of competing technologies or reduce inter-technology competition by raising barriers to entry.

4.1.3. *Positive effects of restrictive licence agreements and the framework for analysing such effects*

174. Even restrictive licence agreements often also produce pro-competitive effects in the form of efficiencies, which may outweigh their anti-competitive effects. The assessment of the possible pro-competitive effects takes place within the framework of Article 101(3), which contains an exception from the prohibition rule of Article 101(1) of the Treaty. For that exception to be applicable the licence agreement must produce objective economic benefits, the restrictions on competition must be indispensable to attain the efficiencies, consumers must receive a fair share of the efficiency gains, and the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products concerned. An undertaking that relies on Article 101(3) must demonstrate, by means of convincing arguments and evidence, that the conditions for obtaining an exemption are satisfied⁽⁷⁴⁾.

175. The assessment of restrictive agreements under Article 101(3) of the Treaty is made within the actual context in which they occur⁽⁷⁵⁾ and on the basis of the

facts existing at any given point in time. The assessment is therefore sensitive to material changes in the facts. The exception rule of Article 101(3) applies as long as the four conditions are fulfilled and ceases to apply when that is no longer the case⁽⁷⁶⁾. However, when applying Article 101(3) it is necessary to take into account the initial sunk investments made by any of the parties and the time needed and the restraints required to commit and recoup an efficiency enhancing investment. Article 101 cannot be applied without considering the *ex ante* investment and the risks relating thereto. The risk facing the parties and the sunk investment that must be committed to implement the agreement can thus lead to the agreement falling outside Article 101(1) or fulfilling the conditions of Article 101(3), as the case may be, for the period of time required to recoup the investment.

176. The first condition of Article 101(3) of the Treaty requires an assessment of the objective benefits in terms of efficiencies produced by the agreement. In this respect, licence agreements have the potential of bringing together complementary technologies and other assets allowing new or improved products to be put on the market or existing products to be produced at lower cost. Outside the context of hardcore cartels, licensing often occurs because it is more efficient for the licensor to licence the technology than to exploit it itself. This may particularly be the case where the licensee already has access to the necessary production assets. The agreement then allows the licensee to gain access to a technology that can be combined with those assets, allowing it to exploit new or improved technologies. Another example of potentially efficiency enhancing licensing is where the licensee already has a technology and the combination of this technology and the licensor's technology gives rise to synergies. When the two technologies are combined the licensee may be able to attain a cost/output configuration that would not otherwise be possible. Licence agreements may also give rise to efficiencies at the distribution stage in the same way as vertical distribution agreements. Such efficiencies can take the form of cost savings or the provision of valuable services to consumers. The positive effects of vertical agreements are described in the Guidelines on Vertical Restraints⁽⁷⁷⁾. A further example of possible efficiency gains is to be found in agreements whereby technology owners assemble a technology package for licensing to third parties. Such pooling arrangements may in particular reduce transaction costs, as licensees do not have to conclude separate licence agreements with each licensor. Pro-competitive licensing

⁽⁷⁴⁾ Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291, paragraph 82.

⁽⁷⁵⁾ See Joined Cases 25/84 and 26/84, *Ford*, [1985] ECR 2725; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *Glaxo-SmithKline Services and Others v Commission and Others* [2009] ECR I-9291, paragraph 103.

⁽⁷⁶⁾ See in this respect for example Commission Decision of 3 March 1999, *TPS* (Of L 90, 2.4.1999, p. 6). Similarly, the prohibition of Article 101(1) also only applies as long as the agreement has a restrictive object or restrictive effects.

⁽⁷⁷⁾ Cited in footnote 52. See in particular paragraphs 106 *et seq.*

- may also occur to ensure design freedom. In sectors where large numbers of intellectual property rights exist and where individual products may infringe upon a number of existing and future property rights, licence agreements whereby the parties agree not to assert their property rights against each other are often pro-competitive because they allow the parties to develop their respective technologies without the risk of subsequent infringement claims.
177. In the application of the indispensability test contained in Article 101(3) of the Treaty the Commission will in particular examine whether individual restrictions make it possible to perform the activity in question more efficiently than would have been the case in the absence of the restriction concerned. In making this assessment the market conditions and the realities facing the parties must be taken into account. Undertakings invoking the benefit of Article 101(3) are not required to consider hypothetical and theoretical alternatives. They must, however, explain and demonstrate why seemingly realistic and significantly less restrictive alternatives would be significantly less efficient. If the application of what appears to be a commercially realistic and less restrictive alternative would lead to a significant loss of efficiencies, the restriction in question is treated as indispensable. In some cases, it may also be necessary to examine whether the agreement as such is indispensable to achieve the efficiencies. This may for example be so in the case of technology pools that include complementary but non-essential technologies⁽⁷⁸⁾, in which case it must be examined to what extent the inclusion of those technologies gives rise to particular efficiencies or whether, without a significant loss of efficiencies, the pool could be limited to technologies for which there are no substitutes. In the case of simple licensing between two parties it is generally not necessary to go beyond an examination of whether individual restraints are indispensable. Normally there is no less restrictive alternative to the licence agreement as such.
178. The condition that consumers must receive a fair share of the benefits implies that consumers of the products produced under the licence must at least be compensated for the negative effects of the agreement⁽⁷⁹⁾. This means that the efficiency gains must fully off-set the likely negative impact on prices, output and other relevant factors caused by the agreement. They may do so by changing the cost structure of the undertakings concerned, giving them an incentive to reduce price, or by allowing consumers to gain access to new or improved products, compensating for any likely price increase⁽⁸⁰⁾.
179. The last condition of Article 101(3) of the Treaty, according to which the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products concerned, presupposes an analysis of remaining competitive pressures on the market and the impact of the agreement on such sources of competition. In the application of the last condition of Article 101(3) the relationship between Article 101(3) and Article 102 must be taken into account. According to settled case law, the application of Article 101(3) cannot prevent the application of Article 102 of the Treaty⁽⁸¹⁾. Moreover, since Articles 101 and 102 both pursue the aim of maintaining effective competition on the market, consistency requires that Article 101(3) be interpreted as precluding any application of the exception rule to restrictive agreements that constitute an abuse of a dominant position⁽⁸²⁾.
180. The fact that the agreement substantially reduces one dimension of competition does not necessarily mean that competition is eliminated within the meaning of Article 101(3). A technology pool, for instance, can result in an industry standard, leading to a situation in which there is little competition in terms of the technological format. Once the main players in the market adopt a certain format, network effects may make it very difficult for alternative formats to survive. This does not imply, however, that the creation of a de facto industry standard always eliminates competition within the meaning of the last condition of Article 101(3). Within the standard, suppliers may compete on price, quality and product features. However, in order for the agreement to comply with Article 101(3), it must be ensured that the agreement does not unduly restrict competition and does not unduly restrict future innovation.
- ⁽⁷⁸⁾ *Idem*, paragraphs 98 and 102.
- ⁽⁷⁹⁾ See by analogy paragraph 130 of Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge*, cited in footnote 3. Similarly, the application of Article 101(3) does not prevent the application of the Treaty rules on the free movement of goods, services, persons and capital. These provisions are in certain circumstances applicable to agreements, decisions and concerted practices within the meaning of Article 101, see to that effect Case C-309/99, *Wouters*, [2002] ECR I-1577, paragraph 120.
- ⁽⁸²⁾ See in this respect Case T-51/89, *Tetra Pak II*, [1990] ECR II-309. See also point 106 of the Guidelines on the application of Article 81(3) of the Treaty cited in footnote 3 above.

4.2. Application of Article 101 to various types of licensing restraints

181. This section deals with various types of restraints that are commonly included in licence agreements. Given their prevalence it is useful to provide guidance as to how they are assessed outside the safe harbour of the TTBER. Restraints that have already been dealt with in the other sections of these guidelines, in particular sections 3.4 and 3.5, are only dealt with briefly in this section.

182. This section covers both agreements between non-competitors and agreements between competitors. In respect of the latter a distinction is made — where appropriate — between reciprocal and non-reciprocal agreements. No such distinction is required in the case of agreements between non-competitors. Indeed, when undertakings are neither actual nor potential competitors on a relevant technology market or on a market for products incorporating the licensed technology, a reciprocal licence is for all practical purposes no different from two separate licences. The situation is different for arrangements whereby the parties assemble a technology package, which is then licensed to third parties. Such arrangements are technology pools, which are dealt with in section 4.

183. This section does not deal with obligations in licence agreements that are generally not restrictive of competition within the meaning of Article 101(1) of the Treaty. These obligations include but are not limited to:

- (a) confidentiality obligations;
- (b) obligations on licensees not to sub-license;
- (c) obligations not to use the licensed technology rights after the expiry of the agreement, provided that the licensed technology rights remain valid and in force;
- (d) obligations to assist the licensor in enforcing the licensed intellectual property rights;
- (e) obligations to pay minimum royalties or to produce a minimum quantity of products incorporating the licensed technology; and
- (f) obligations to use the licensor's trade mark or indicate the name of the licensor on the product.

4.2.1. Royalty obligations

184. The parties to a licence agreement are normally free to determine the royalty payable by the licensee and its mode of payment without being caught by Article 101(1)

of the Treaty. This principle applies both to agreements between competitors and agreements between non-competitors. Royalty obligations may for instance take the form of lump sum payments, a percentage of the selling price or a fixed amount for each product incorporating the licensed technology. In cases where the licensed technology relates to an input which is incorporated into a final product it is as a general rule not restrictive of competition that royalties are calculated on the basis of the price of the final product, provided that it incorporates the licensed technology⁽⁸³⁾. In the case of software licensing royalties based on the number of users and royalties calculated on a per machine basis are generally compatible with Article 101(1).

185. In the case of licence agreements between competitors it should be borne in mind (see points (100) to (101) and (116) above) that in a limited number of circumstances royalty obligations may amount to price fixing, which is considered a hardcore restriction (see Article 4(1)(a)). It is a hardcore restriction under Article 4(1)(a) if competitors provide for reciprocal running royalties in circumstances where the licence is a sham, in that its purpose is not to allow an integration of complementary technologies or to achieve another pro-competitive aim. It is also a hardcore restriction under Article 4(1)(a) and 4(1)(d) if royalties extend to products produced solely with the licensee's own technology rights.

186. Other types of royalty arrangements between competitors are block exempted up to the market share threshold of 20 % even if they restrict competition. Outside the safe harbour of the block exemption Article 101(1) of the Treaty may be applicable where competitors cross license and impose running royalties that are clearly disproportionate compared to the market value of the licence and where such royalties have a significant impact on market prices. In assessing whether the royalties are disproportionate it is necessary to examine the royalties paid by other licensees on the product market for the same or substitute technologies. In such cases it is unlikely that the conditions of Article 101(3) are satisfied.

187. Notwithstanding the fact that the block exemption only applies as long as the technology rights are valid and in force, the parties can normally agree to extend royalty obligations beyond the period of validity of the licensed intellectual property rights without falling foul of Article 101(1) of the Treaty. Once these rights expire, third parties can legally exploit the technology in question and compete with the parties to the agreement. Such actual and potential competition will normally be sufficient to ensure that the obligation in question does not have appreciable anti-competitive effects.

⁽⁸³⁾ This is without prejudice to the possible application of Article 102 TFEU to the setting of royalties (see Case 27/76, United Brands, paragraph 250, see also Case C-385/07 P, Der Grüne Punkt — Duales System Deutschland GmbH [2009] ECR I-6155, paragraph 142).

188. In the case of agreements between non-competitors the block exemption covers agreements whereby royalties are calculated on the basis of both products produced with the licensed technology and products produced with technologies licensed from third parties. Such arrangements may facilitate the metering of royalties. However, they may also lead to foreclosure by increasing the cost of using third party inputs and may thus have effects similar to those of a non-compete obligation. If royalties are paid not just on products produced with the licensed technology but also on products produced with third party technology, then the royalties will increase the cost of the latter products and reduce demand for third party technology. Outside the scope of the block exemption the question whether the restriction has foreclosure effects must therefore be considered. For that purpose it is appropriate to use the analytical framework set out in section 4.2.7 below. In the case of appreciable foreclosure effects such agreements are caught by Article 101(1) of the Treaty and unlikely to fulfil the conditions of Article 101(3), unless there is no other practical way of calculating and monitoring royalty payments.

4.2.2. Exclusive licensing and sales restrictions

189. For the purpose of these guidelines, it is useful to distinguish between restrictions as to production within a given territory (exclusive or sole licences) and restrictions on the sale of products incorporating the licensed technology into a given territory and to a given customer group (sales restrictions).

4.2.2.1. Exclusive and sole licences

190. An 'exclusive licence' means that the licensor itself is not permitted to produce on the basis of the licensed technology rights, nor is it permitted to license the licensed technology rights to third parties, in general or for a particular use or in a particular territory. This means that, in general or for that particular use or in that particular territory, the licensee is the only one allowed to produce on the basis of the licensed technology rights.

191. Where the licensor undertakes not to produce itself or license others to produce within a given territory, this territory may cover the whole world or any part of it. Where the licensor undertakes only not to license third parties to produce within a given territory, the licence is a sole licence. Exclusive or sole licensing is often accompanied by sales restrictions that limit the parties as to where they may sell products incorporating the licensed technology.

192. Reciprocal exclusive licensing between competitors falls under Article 4(1)(c) TTBER, which identifies market and customer sharing between competitors as a hardcore restriction. Reciprocal sole licensing between competitors is, however, block exempted up to the market share threshold of 20%. Under such an agreement the parties mutually commit not to license their competing technologies to third parties. In cases where the parties have a significant degree of market power such agreements may facilitate collusion by ensuring that the parties are the only sources of output in the market based on the licensed technologies.

193. Non-reciprocal exclusive licensing between competitors is block exempted up to the market share threshold of 20%. Above the market share threshold it is necessary to analyse the likely anti-competitive effects of such exclusive licensing. Where the exclusive licence is worldwide it implies that the licensor leaves the market. In cases where exclusivity is limited to a particular territory such as a Member State the agreement implies that the licensor abstains from producing goods and services inside the territory in question. In the context of Article 101(1) of the Treaty, the competitive significance of the licensor must, in particular, be assessed. If the licensor has a limited market position on the product market or lacks the capacity to effectively exploit the technology in the licensee's territory, the agreement is unlikely to be caught by Article 101(1). A special case exists where the licensor and the licensee only compete on the technology market and the licensor, for instance being a research institute or a small research based undertaking, lacks the production and distribution assets to effectively bring to market products incorporating the licensed technology. In such cases Article 101(1) is unlikely to be infringed.

194. Exclusive licensing between non-competitors — to the extent that it is caught by Article 101(1) of the Treaty⁽⁸⁴⁾ — is likely to fulfil the conditions of Article 101(3). The right to grant an exclusive licence is generally necessary in order to induce the licensee to invest in the licensed technology and to bring the products to market in a timely manner. This is in particular the case where the licensee must make large investments in further developing the licensed technology. To intervene against the exclusivity once the licensee has made a commercial success of the licensed technology would deprive the licensee of the fruits of its success and would be detrimental to competition, the dissemination of technology and innovation. The Commission will therefore only exceptionally intervene against exclusive licensing in agreements between non-competitors, irrespective of the territorial scope of the licence.

⁽⁸⁴⁾ See the judgment in *Nungesser* cited in footnote 13.

195. However, if the licensee already owns a substitutable technology used for in-house production, the exclusive license might not be necessary in order to give incentives to the licensee to bring a product to the market. In such a scenario, the exclusive licensing may instead be caught by Article 101(1) of the Treaty, in particular where the licensee has market power on the product market. The main situation in which intervention may be warranted is where a dominant licensee obtains an exclusive licence to one or more competing technologies. Such agreements are likely to be caught by Article 101(1) and unlikely to fulfil the conditions of Article 101(3). However, for Article 101(1) to apply entry into the technology market must be difficult and the licensed technology must constitute a real source of competition on the market. In such circumstances an exclusive licence may foreclose third party licensees, raise the barriers to entry and allow the licensee to preserve its market power.
196. Arrangements whereby two or more parties cross licence each other and undertake not to licence third parties give rise to particular concerns when the package of technologies resulting from the cross licences creates a de facto industry standard to which third parties must have access in order to compete effectively on the market. In such cases the agreement creates a closed standard reserved for the parties. The Commission will assess such arrangements according to the same principles as those applied to technology pools (see section 4.4). There will normally be a requirement that the technologies which support such a standard be licensed to third parties on fair, reasonable and non-discriminatory terms⁽⁸⁵⁾. Where the parties to the arrangement compete with third parties on an existing product market and the arrangement relates to that product market, a closed standard is likely to have substantial exclusionary effects. This negative impact on competition can only be avoided by licensing also to third parties.

4.2.2.2. Sales restrictions

197. Also as regards sales restrictions there is an important distinction to be made between licensing between competitors and between non-competitors.
198. Restrictions on active and passive sales by one or both parties in a reciprocal agreement between competitors are hardcore restrictions of competition under Article 4(1)(c) TTBER. Such sales restrictions are caught by Article 101(1)

and are unlikely to fulfil the conditions of Article 101(3). Such restrictions are generally considered market sharing, since they prevent the affected party from selling actively and passively into territories and to customer groups which it actually served or could realistically have served in the absence of the agreement.

199. In the case of non-reciprocal agreements between competitors the block exemption applies to restrictions on active and/or passive sales by the licensee or the licensor into the exclusive territory or to the exclusive customer group reserved for the other party (see Article 4(1)(c)(i) TTBER). Above the market share threshold of 20 % sales restrictions between licensor and licensee are caught by Article 101(1) of the Treaty when one or both of the parties have a significant degree of market power. Such restrictions may, however, be indispensable for the dissemination of valuable technologies and may therefore fulfil the conditions of Article 101(3). This may be the case where the licensor has a relatively weak market position in the territory where it exploits the technology itself. In such circumstances restrictions on active sales in particular may be indispensable to induce the licensor to grant the licence. In the absence of such restrictions the licensor would risk facing active competition in its main area of activity. Similarly, restrictions on active sales by the licensor may be indispensable, in particular, where the licensee has a relatively weak market position in the territory allocated to it and has to make significant investments in order to efficiently exploit the licensed technology.
200. The block exemption also covers restrictions on active sales into the territory or to the customer group allocated to another licensee, which was not a competitor of the licensor at the time when it concluded the licence agreement with the licensor. This is, however, only the case when the agreement between the parties in question is non-reciprocal (see Article 4(1)(ii) TTBER). Above the market share threshold such active sales restrictions are likely to be caught by Article 101(1) of the Treaty when the parties have a significant degree of market power. The restraint is nevertheless likely to be indispensable within the meaning of Article 101(3) for the period of time required for the protected licensee to penetrate a new market and establish a market presence in the allocated territory or vis-à-vis the allocated customer group. This protection against active sales allows the licensee to overcome the asymmetry, which it faces due to the fact that some of the licensees are competing undertakings of the licensor and thus already established on the market. Restrictions on passive sales by licensees into a territory or to a customer group allocated to another licensee are hardcore restrictions under Article 4(1)(c) of the TTBER.

⁽⁸⁵⁾ See in this respect the Commission's Notice in the Canon/Kodak Case (OJ C 330, 1.11.1997, p. 10) and the IGR Stereo Television Case mentioned in the XI Report on Competition Policy, paragraph 94.

201. In the case of agreements between non-competitors sales restrictions between the licensor and a licensee are block exempted up to the market share threshold of 30 %. Above the market share threshold restrictions on active and passive sales by licensees to territories or customer groups reserved exclusively for the licensor may be indispensable for the dissemination of valuable technologies and therefore fall outside Article 101(1) or fulfil the conditions of Article 101(3) of the Treaty. This may be the case where the licensor has a relatively weak market position in the territory where it exploits itself the technology. In such circumstances restrictions on active sales in particular may be indispensable to induce the licensor to grant the licence. In the absence of such restrictions the licensor would risk facing active competition in its main area of activity. In other cases sales restrictions on the licensee may be caught by Article 101(1) and may not fulfil the conditions of Article 101(3). This is likely to be the case where the licensor individually has a significant degree of market power and also where a series of similar agreements concluded by licensors which together hold a strong position on the market have a cumulative effect.
202. Sales restrictions on the licensor, when caught by Article 101(1) of the Treaty, are likely to fulfil the conditions of Article 101(3) unless there are no real alternatives to the licensor's technology on the market or such alternatives are licensed by the licensee from third parties. Such restrictions and in particular restrictions on active sales are likely to be indispensable within the meaning of Article 101(3) in order to induce the licensee to invest in the production, marketing and sale of the products incorporating the licensed technology. It is likely that the licensee's incentive to invest would be significantly reduced if it faced direct competition from the licensor whose production costs are not burdened by royalty payments, possibly leading to sub-optimal levels of investment.
203. As regards sales restrictions between licensees in agreements between non-competitors, the TTBER block exempts restrictions on active selling between territories or customer groups. Above the market share threshold of 30% restrictions on active sales between licensees' territories and customer groups limit intra-technology competition and are likely to be caught by Article 101(1) of the Treaty when the individual licensee has a significant degree of market power. However, such restrictions may fulfil the conditions of Article 101(3) where they are necessary to prevent free riding and to induce the licensee to make the investment necessary for efficient exploitation of the licensed technology inside its territory and to promote sales of the licensed product.
- Restrictions on passive sales are covered by the hardcore list of Article 4(2)(b) of the TTBER (see points (119) to (127) above).
- 4.2.3. *Output restrictions*
204. Reciprocal output restrictions in licence agreements between competitors constitute a hardcore restriction as set out in Article 4(1)(b) of the TTBER (see point (103) above). Article 4(1)(b) does not cover output restrictions on the licensor's technology imposed on the licensee in a non-reciprocal agreement or on one of the licensees in a reciprocal agreement. Such restrictions are block exempted up to the market share threshold of 20 %. Above the market share threshold, output restrictions on the licensee may restrict competition where the parties have a significant degree of market power. However, Article 101(3) is likely to apply in cases where the licensor's technology is substantially better than the licensee's technology and the output limitation substantially exceeds the output of the licensee prior to the conclusion of the agreement. In that case the effect of the output limitation is limited even in markets where demand is growing. In the application of Article 101(3) of the Treaty it must also be taken into account that such restrictions may be necessary in order to induce the licensor to disseminate its technology as widely as possible. For instance, a licensor may be reluctant to license its competitors if it cannot limit the licence to a particular production site with a specific capacity (a site licence). Where the licence agreement leads to a real integration of complementary assets, output restrictions on the licensee may therefore fulfil the conditions of Article 101(3). However, this is unlikely to be the case where the parties have substantial market power.
205. Output restrictions in licence agreements between non-competitors are block exempted up to the market share threshold of 30 %. The main anti-competitive risk flowing from output restrictions on licensees in agreements between non-competitors is reduced intra-technology competition between licensees. The significance of such anti-competitive effects depends on the market position of the licensor and the licensees and the extent to which the output limitation prevents the licensee from satisfying demand for the products incorporating the licensed technology.
206. When output restrictions are combined with exclusive territories or exclusive customer groups, the restrictive effects are increased. The combination of the two types of restraints makes it more likely that the agreement serves to partition markets.

207. Output limitations imposed on the licensee in agreements between non-competitors may also have pro-competitive effects by promoting the dissemination of technology. As a supplier of technology, the licensor should normally be free to determine the output produced with the licensed technology by the licensee. If the licensor were not free to determine the output of the licensee, a number of licence agreements might not come into existence in the first place, which would have a negative impact on the dissemination of new technology. This is particularly likely to be the case where the licensor is also a producer, since the licensee's output may find its way back into the licensor's main area of operation and thus have a direct impact on those activities. On the other hand, it is less likely that output restrictions are necessary in order to ensure dissemination of the licensor's technology when they are combined with sales restrictions on the licensee prohibiting it from selling into a territory or customer group reserved for the licensor.

4.2.4. Field of use restrictions

208. Under a field of use restriction the licence is either limited to one or more technical fields of application or one or more product markets or industrial sectors. An industrial sector may encompass several product markets but not part of a product market. There are many cases in which the same technology can be used to make different products or can be incorporated into products belonging to different product markets. A new moulding technology may for instance be used to make plastic bottles and plastic glasses, each product belonging to a separate product market. However, a single product market may encompass several technical fields of use. For instance a new engine technology may be employed in four cylinder engines and six cylinder engines. Similarly, a technology to make chipsets may be used to produce chipsets with up to four CPUs and more than four CPUs. A licence limiting the use of the licensed technology to produce say four cylinder engines and chipsets with up to four CPUs constitutes a technical field of use restriction.

209. Given that field of use restrictions are covered by the block exemption and that certain customer restrictions are hardcore restrictions under Articles 4(1)(c) and 4(2)(b) of the TTBER, it is important to distinguish the two categories of restrictions. A customer restriction presupposes that specific customer groups are identified and that the parties are restricted in selling to such identified groups. The fact that a technical field of use

restriction may correspond to certain groups of customers within a product market does not imply that the restraint is to be classified as a customer restriction. For instance, the fact that certain customers buy predominantly or exclusively chipsets with more than four CPUs does not imply that a licence which is limited to chipsets with up to four CPUs constitutes a customer restriction. However, the field of use must be defined objectively by reference to identified and meaningful technical characteristics of the contract product.

210. Because certain output restrictions are hardcore restrictions under Article 4(1)(b) of the TTBER, it is important to note that field of use restrictions are not considered to be output restrictions because a field of use restriction does not limit the output the licensee may produce within the licensed field of use.

211. A field of use restriction limits the exploitation of the licensed technology by the licensee to one or more particular fields of use without limiting the licensor's ability to exploit the licensed technology. In addition, as with territories, these fields of use can be allocated to the licensee under an exclusive or sole licence. Field of use restrictions combined with an exclusive or sole licence also restrict the licensor's ability to exploit its own technology, by preventing it from exploiting it itself, including by way of licensing to others. In the case of a sole licence only licensing to third parties is restricted. Field of use restrictions combined with exclusive and sole licences are treated in the same way as the exclusive and sole licences dealt with in section 4.2.2 above. In particular, for licensing between competitors, this means that reciprocal exclusive licensing is hardcore under Article 4(1)(c).

212. Field of use restrictions may have pro-competitive effects by encouraging the licensor to license its technology for applications that fall outside its main area of focus. If the licensor could not prevent licensees from operating in fields where it exploits the technology itself or in fields where the value of the technology is not yet well established, it would be likely to create a disincentive for the licensor to license or would lead it to charge a higher royalty. The fact that in certain sectors licensing often occurs to ensure design freedom by preventing infringement claims must also be taken into account. Within the scope of the licence the licensee is able to develop its own technology without fearing infringement claims by the licensor.

213. Field of use restrictions on licensees in agreements between actual or potential competitors are block exempted up to the market share threshold of 20 %. The main competitive concern in the case of such restrictions is the risk that the licensee ceases to be a competitive force outside the licensed field of use. This risk is greater in the case of cross licensing between competitors where the agreement provides for asymmetrical field of use restrictions. A field of use restriction is asymmetrical where one party is permitted to use the licensed technology within one industrial sector, product market or technical field of use and the other party is permitted to use the other licensed technology within another industrial sector, product market or technical field of use. Competition concerns may in particular arise where the licensee's production facility, which is tooled up to use the licensed technology, is also used to produce products outside the licensed field of use with its own technology. If the agreement is likely to lead the licensee to reduce output outside the licensed field of use, the agreement is likely to be caught by Article 101(1). Symmetrical field of use restrictions, that is to say, agreements whereby the parties are licensed to use each other's technologies within the same field(s) of use, are unlikely to be caught by Article 101(1) of the Treaty. Such agreements are unlikely to restrict competition that existed in the absence of the agreement. Article 101(1) is also unlikely to apply in the case of agreements that merely enable the licensee to develop and exploit its own technology within the scope of the licence without fearing infringement claims by the licensor. In such circumstances field of use restrictions do not in themselves restrict competition that existed in the absence of the agreement. In the absence of the agreement the licensee also risked infringement claims outside the scope of the licensed field of use. However, if the licensee terminates or scales back its activities in the area outside the licensed field of use without business justification, this may be an indication of an underlying market sharing arrangement amounting to a hardcore restriction under Article 4(1)(c) of the TTBER.
214. Field of use restrictions on licensee and licensor in agreements between non-competitors are block exempted up to the market share threshold of 30 %. Field of use restrictions in agreements between non-competitors whereby the licensor reserves one or more product markets or technical fields of use for itself are generally either non-restrictive of competition or efficiency enhancing. They promote dissemination of new technology by giving the licensor an incentive to license for exploitation in fields in which it does not want to exploit the technology itself. If the licensor could not prevent licensees from operating in fields where the licensor exploits the technology itself, it would be likely to create a disincentive for the licensor to licence.
215. In agreements between non-competitors the licensor is normally also entitled to grant sole or exclusive licences to different licensees limited to one or more fields of use. Such restrictions limit intra-technology competition between licensees in the same way as exclusive licensing and are analysed in the same way (see section 4.2.2.1 above).
- 4.2.5. *Captive use restrictions*
216. A captive use restriction can be defined as an obligation on the licensee to limit its production of the licensed product to the quantities required for the production of its own products and for the maintenance and repair of its own products. In other words, this type of use restriction takes the form of an obligation on the licensee to use the products incorporating the licensed technology only as an input for incorporation into its own production; it does not cover the sale of the licensed product for incorporation into the products of other producers. Captive use restrictions are block exempted up to the respective market share thresholds of 20 % and 30 %. Outside the scope of the block exemption it is necessary to examine the pro-competitive and anti-competitive effects of the restraint. In this respect it is necessary to distinguish agreements between competitors from agreements between non-competitors.
217. In the case of licence agreements between competitors a restriction that imposes on the licensee to produce under the licence only for incorporation into its own products prevents it from supplying components to third party producers. If prior to the conclusion of the agreement, the licensee was not an actual or likely potential supplier of components to other producers, the captive use restriction does not change anything compared to the pre-existing situation. In those circumstances the restriction is assessed in the same way as in the case of agreements between non-competitors. If, on the other hand, the licensee is an actual or likely supplier of components, it is necessary to examine what is the impact of the agreement on that activity. If by tooling up to use the licensor's technology the licensee ceases to use its own technology on a stand alone basis and thus to be a component supplier, the agreement restricts competition that existed prior to the agreement. It may result in serious negative market effects when the licensor has a significant degree of market power on the component market.

218. In the case of licence agreements between non-competitors there are two main competitive risks stemming from captive use restrictions: a restriction of intra-technology competition on the market for the supply of inputs and an exclusion of arbitrage between licensees enhancing the possibility for the licensor to impose discriminatory royalties on licensees.
219. Captive use restrictions, however, may also promote pro-competitive licensing. If the licensor is a supplier of components, the restraint may be necessary in order for the dissemination of technology between non-competitors to occur. In the absence of the restraint the licensor may not grant the licence or may do so only against higher royalties, because otherwise it would create direct competition with itself on the component market. In such cases a captive use restriction is normally either not restrictive of competition or covered by Article 101(3) of the Treaty. However, the licensee must not be restricted in selling the licensed product as replacement parts for its own products. The licensee must be able to serve the after-market for its own products, including independent service organisations that service and repair the products produced by him.
220. Where the licensor is not a component supplier on the relevant product market, the above reason for imposing captive use restrictions does not apply. In such cases a captive use restriction may in principle promote the dissemination of technology by ensuring that licensees do not sell to producers that compete with the licensor on other product markets. However, a restriction on the licensee not to sell into certain customer groups reserved for the licensor normally constitutes a less restrictive alternative. Consequently, in such cases a captive use restriction is normally not necessary for the dissemination of technology to take place.
- 4.2.6. *Tying and bundling*
221. In the context of technology licensing tying occurs when the licensor makes the licensing of one technology (the tying product) conditional upon the licensee taking a licence for another technology or purchasing a product from the licensor or someone designated by it (the tied product). Bundling occurs where two technologies or a technology and a product are only sold together as a bundle. In both cases, however, it is a condition that the products and technologies involved are distinct in the sense that there is distinct demand for each of the products and technologies forming part of the tie or the bundle. This is normally not the case where the technologies or products are by necessity linked in such a way that the licensed technology cannot be exploited without the tied product or both parts of the bundle cannot be exploited without the other. In the following the term 'tying' refers to both tying and bundling.
222. Article 3 of the TTBER, which limits the application of the block exemption by market share thresholds, ensures that tying and bundling are not block exempted above the market share thresholds of 20 % in the case of agreements between competitors and 30 % in the case of agreements between non-competitors. The market share thresholds apply to any relevant technology or product market affected by the licence agreement, including the market for the tied product. Above the market share thresholds it is necessary to balance the anti-competitive and pro-competitive effects of tying.
223. The main restrictive effect of tying is foreclosure of competing suppliers of the tied product. Tying may also allow the licensor to maintain market power in the market for the tying product by raising barriers to entry since it may force new entrants to enter several markets at the same time. Moreover, tying may allow the licensor to increase royalties, in particular when the tying product and the tied product are partly substitutable and the two products are not used in fixed proportion. Tying prevents the licensee from switching to substitute inputs in the face of increased royalties for the tying product. These competition concerns are independent of whether the parties to the agreement are competitors or not. For tying to produce likely anti-competitive effects the licensor must have a significant degree of market power in the tying product so as to restrict competition in the tied product. In the absence of market power in the tying product the licensor cannot use its technology for the anti-competitive purpose of foreclosing suppliers of the tied product. Furthermore, as in the case of non-compete obligations, the tie must cover a certain proportion of the market for the tied product for appreciable foreclosure effects to occur. In cases where the licensor has market power on the market for the tied product rather than on the market for the tying product, the restraint is analysed as a non-compete clause or quantity forcing, reflecting the fact that any competition problem has its origin on the market for the 'tied' product and not on the market for the 'tying' product⁽⁸⁶⁾.
224. Tying can also give rise to efficiency gains. This is for instance the case where the tied product is necessary for a technically satisfactory exploitation of the licensed technology or for ensuring that production under the licence conforms to quality standards respected by the licensor and other licensees. In such cases tying is normally either not restrictive of competition or covered by Article 101(3) of the Treaty. Where the licensees use the licensor's trademark or brand name or where it is otherwise obvious to consumers that there is a link between the product incorporating the licensed technology and the licensor, the licensor has a legitimate interest in ensuring that the quality of the products is such that it does not undermine the value of its technology or its reputation as an economic operator. Moreover, where

⁽⁸⁶⁾ For the applicable analytical framework see section 4.2.7 and points 129 *et seq.* of the Guidelines on Vertical Restraints cited in footnote 52.

- it is known to consumers that the licensees (and the licensor) produce on the basis of the same technology it is unlikely that licensees would be willing to take a licence unless the technology is exploited by all in a technically satisfactory way.
225. Tying is also likely to be pro-competitive where the tied product allows the licensee to exploit the licensed technology significantly more efficiently. For instance, where the licensor licenses a particular process technology the parties can also agree that the licensee buys a catalyst from the licensor which is developed for use with the licensed technology and which allows the technology to be exploited more efficiently than in the case of other catalysts. Where in such cases the restriction is caught by Article 101(1), the conditions of Article 101(3) are likely to be fulfilled even above the market share thresholds.
- 4.2.7. *Non-compete obligations*
226. Non-compete obligations in the context of technology licensing take the form of an obligation on the licensee not to use third party technologies which compete with the licensed technology. To the extent that a non-compete obligation covers a product or an additional technology supplied by the licensor the obligation is dealt with in section 4.2.6 on tying.
227. The TTBER exempts non-compete obligations both in the case of agreements between competitors and in the case of agreements between non-competitors up to the market share thresholds of 20 % and 30 % respectively.
228. The main competitive risk presented by non-compete obligations is foreclosure of third party technologies. Non-compete obligations may also facilitate collusion between licensors when several licensors use it in separate agreements (that is in the case of cumulative use). Foreclosure of competing technologies reduces competitive pressure on royalties charged by the licensor and reduces competition between the incumbent technologies by limiting the possibilities for licensees to substitute between competing technologies. As in both cases the main problem is foreclosure, the analysis can in general be the same in the case of agreements between competitors and agreements between non-competitors. However, in the case of cross licensing between competitors where both agree not to use third party technologies the agreement may facilitate collusion between them on the product market, thereby justifying the lower market share threshold of 20 %.
229. Foreclosure may arise where a substantial proportion of potential licensees are already tied to one or, in the case of cumulative effects, more sources of technology and are prevented from exploiting competing technologies. Foreclosure effects may result from agreements concluded by a single licensor with a significant degree of market power or from the cumulative effect of agreements concluded by several licensors, even where each individual agreement or network of agreements is covered by the TTBER. In the latter case, however, a serious cumulative effect is unlikely to arise as long as less than 50 % of the market is tied. Above that threshold significant foreclosure is likely to occur when there are relatively high barriers to entry for new licensees. If barriers to entry are low, new licensees are able to enter the market and exploit commercially attractive technologies held by third parties and thus represent a real alternative to incumbent licensees. In order to determine the real possibility for entry and expansion by third parties it is also necessary to take account of the extent to which distributors are tied to licensees by non-compete obligations. Third party technologies only have a real possibility of entry if they have access to the necessary production and distribution assets. In other words, the ease of entry depends not only on the availability of licensees but also the extent to which they have access to distribution. In assessing foreclosure effects at the distribution level the Commission will apply the analytical framework set out in section VI.2.1 of the Guidelines on Vertical Restraints⁽⁸⁷⁾.
230. When the licensor has a significant degree of market power, obligations on licensees to obtain the technology only from the licensor can lead to significant foreclosure effects. The stronger the market position of the licensor the higher the risk of foreclosing competing technologies. For appreciable foreclosure effects to occur the non-compete obligations do not necessarily have to cover a substantial part of the market. Even in the absence thereof, appreciable foreclosure effects may occur where non-compete obligations are targeted at undertakings that are the most likely to license competing technologies. The risk of foreclosure is particularly high where there is only a limited number of potential licensees and the licence agreement concerns a technology which is used by the licensees to make an input for their own use. In such cases the entry barriers for a new licensor are likely to be high. Foreclosure may be less likely in cases where the technology is used to make a product that is sold to third parties. Although in this case the restriction also ties production capacity for the input in question, it does not tie demand downstream of the licensees. To enter the market in the latter case licensors only need access

⁽⁸⁷⁾ See footnote 52.

to one or more licensee(s) that have suitable production capacity. Unless only few undertakings possess or are able to obtain the assets required to take a licence, it is unlikely that by imposing non-compete obligations on its licensees the licensor is able to deny competitors access to efficient licensees.

231. Non-compete obligations may also produce pro-competitive effects. First, such obligations may promote dissemination of technology by reducing the risk of misappropriation of the licensed technology, in particular know-how. If a licensee is entitled to license competing technologies from third parties, there is a risk that particularly licensed know-how would be used in the exploitation of competing technologies and thus benefit competitors. When a licensee also exploits competing technologies, it normally also makes monitoring of royalty payments more difficult, which may act as a disincentive to licensing.
232. Second, non-compete obligations possibly in combination with an exclusive territory may be necessary to ensure that the licensee has an incentive to invest in and exploit the licensed technology effectively. In cases where the agreement is caught by Article 101(1) of the Treaty because of an appreciable foreclosure effect, it may be necessary in order to benefit from Article 101(3) to choose a less restrictive alternative, for instance to impose minimum output or royalty obligations, which normally have less potential to foreclose competing technologies.
233. Third, in cases where the licensor undertakes to make significant client specific investments for instance in training and tailoring of the licensed technology to the licensee's needs, non-compete obligations or alternatively minimum output or minimum royalty obligations may be necessary to induce the licensor to make the investment and to avoid hold-up problems. However, normally the licensor will be able to charge directly for such investments by way of a lump sum payment, implying that less restrictive alternatives are available.

4.3. Settlement agreements

234. Licensing of technology rights in settlement agreements may serve as a means of settling disputes or avoiding that one party exercises its intellectual property rights to prevent the other party from exploiting its own technology rights⁽⁸⁸⁾.
235. Settlement agreements in the context of technology disputes are, as in many other areas of commercial disputes, in principle a legitimate way to find a mutually acceptable compromise to a bona fide legal disagreement. The parties may prefer to discontinue the

dispute or litigation because it proves to be too costly, time-consuming and/or uncertain as regards its outcome. Settlements can also save courts and/or competent administrative bodies effort in deciding on the matter and can therefore give rise to welfare enhancing benefits. On the other hand, it is in the general public interest to remove invalid intellectual property rights as an unmerited barrier to innovation and economic activity⁽⁸⁹⁾.

236. Licensing, including cross licensing, in the context of settlement agreements is generally not as such restrictive of competition since it allows the parties to exploit their technologies after the agreement is concluded. In cases where, in the absence of the licence, it is possible that the licensee could be excluded from the market, access to the technology at issue for the licensee by means of a settlement agreement is generally not caught by Article 101(1).
237. However, the individual terms and conditions of settlement agreements may be caught by Article 101(1). Licensing in the context of settlement agreements is treated in the same way as other licence agreements⁽⁹⁰⁾. In these cases, it is particularly necessary to assess whether the parties are potential or actual competitors.

Pay-for-restriction in settlement agreements

238. 'Pay-for-restriction' or 'pay-for-delay' type settlement agreements often do not involve the transfer of technology rights, but are based on a value transfer from one party in return for a limitation on the entry and/or expansion on the market of the other party and may be caught by Article 101(1)⁽⁹¹⁾.
239. If, however, such a settlement agreement also includes a licensing of the technology rights concerned by the underlying dispute, and that agreement leads to a delayed or otherwise limited ability for the licensee to launch the product on any of the markets concerned, the agreement may be caught by Article 101(1) and would then need to be assessed in particular in the light of Articles 4(1)(c) and 4(1)(d) of the TTBER (see section 3.4.2 above). If the parties to such a settlement agreement

⁽⁸⁹⁾ Case 193/83 *Windsurfing v Commission* [1986] ECR 611, paragraph 92.

⁽⁹⁰⁾ Cf. Case 65/86 *Bayer v. Sulhofer* [1988], ECR 5259, paragraph 15.

⁽⁹¹⁾ See, for instance, the Commission Decision in *Lundbeck*, not yet published.

⁽⁸⁸⁾ The TTBER and its Guidelines are without prejudice to the application of Article 101 to settlement agreements which do not contain a licensing agreement.

are actual or potential competitors and there was a significant value transfer from the licensor to the licensee, the Commission will be particularly attentive to the risk of market allocation/market sharing.

Cross licensing in settlement agreements

240. Settlement agreements whereby the parties cross license each other and impose restrictions on the use of their technologies, including restrictions on the licensing to third parties, may be caught by Article 101(1) of the Treaty. Where the parties have a significant degree of market power and the agreement imposes restrictions that clearly go beyond what is required in order to unblock, the agreement is likely to be caught by Article 101(1) even if it is likely that a mutual blocking position exists. Article 101(1) is particularly likely to apply where the parties share markets or fix reciprocal running royalties that have a significant impact on market prices.

241. Where under the settlement agreement the parties are entitled to use each other's technology and the agreement extends to future developments, it is necessary to assess what is the impact of the agreement on the parties' incentive to innovate. In cases where the parties have a significant degree of market power the agreement is likely to be caught by Article 101(1) of the Treaty where the agreement prevents the parties from gaining a competitive lead over each other. Agreements that eliminate or substantially reduce the possibilities of one party to gain a competitive lead over the other reduce the incentive to innovate and thus adversely affect an essential part of the competitive process. Such agreements are also unlikely to satisfy the conditions of Article 101(3). It is particularly unlikely that the restriction can be considered indispensable within the meaning of the third condition of Article 101(3). The achievement of the objective of the agreement, namely to ensure that the parties can continue to exploit their own technology without being blocked by the other party, does not require that the parties agree to share future innovations. However, the parties are unlikely to be prevented from gaining a competitive lead over each other where the purpose of the licence is to allow the parties to develop their respective technologies and where the licence does not lead them to use the same technological solutions. Such agreements merely create design freedom by preventing future infringement claims by the other party.

Non-challenge clauses in settlement agreements

242. In the context of a settlement agreement, non-challenge clauses are generally considered to fall outside Article 101(1) of the Treaty. It is inherent in such agreements that the parties agree not to challenge *ex post* the intellectual property rights which were the

centre of the dispute. Indeed, the very purpose of the agreement is to settle existing disputes and/or to avoid future disputes.

243. However, non-challenge clauses in settlement agreements can under specific circumstances be anti-competitive and may be caught by Article 101(1) of the Treaty. The restriction of the freedom to challenge an intellectual property right is not part of the specific subject-matter of an intellectual property right and may restrict competition. For instance, a non-challenge clause may infringe Article 101(1) where an intellectual property right was granted following the provision of incorrect or misleading information⁽²⁾. Scrutiny of such clauses may also be necessary if the licensor, besides licensing the technology rights, induces, financially or otherwise, the licensee to agree not to challenge the validity of the technology rights or if the technology rights are a necessary input for the licensee's production (see also point (136)).

4.4. Technology pools

244. Technology pools are defined as arrangements whereby two or more parties assemble a package of technology which is licensed not only to contributors to the pool but also to third parties. In terms of their structure technology pools can take the form of simple arrangements between a limited number of parties or of elaborate organisational arrangements whereby the organisation of the licensing of the pooled technologies is entrusted to a separate entity. In both cases the pool may allow licensees to operate on the market on the basis of a single licence.
245. There is no inherent link between technology pools and standards, but the technologies in the pool often support, in whole or in part, a *de facto* or *de jure* industry standard⁽³⁾. Different technology pools may support competing standards⁽⁴⁾. Technology pools can produce pro-competitive effects, in particular by reducing transaction costs and by setting a limit on cumulative royalties to avoid double marginalisation. The creation of a pool allows for one-stop licensing of the technologies covered by the pool. This is particularly important in sectors where intellectual property rights are prevalent and licences need to be obtained from a significant number of licensors in order to operate on the market. In cases where licensees receive on-going services

⁽²⁾ Cf. Case C-457/10 P, *AstraZeneca v. Commission*, [2012] ECR not yet published.

⁽³⁾ See concerning the treatment of standards and the treatment of standardisation agreements the Horizontal Guidelines, point 257 ff., cited in footnote 27.

⁽⁴⁾ See in this respect the Commission's press release IP/02/1651 concerning the licensing of patents for third generation (3G) mobile services. This case involved five technology pools creating five different technologies, each of which could be used to produce 3G equipment.

concerning the application of the licensed technology, joint licensing and servicing can lead to further cost reductions. Patent pools can also play a beneficial role in the implementation of pro-competitive standards.

246. Technology pools may also be restrictive of competition. The creation of a technology pool necessarily implies joint selling of the pooled technologies, which in the case of pools composed solely or predominantly of substitute technologies amounts to a price fixing cartel. Moreover, in addition to reducing competition between the parties, technology pools may also, in particular when they support an industry standard or establish a *de facto* industry standard, result in a reduction of innovation by foreclosing alternative technologies. The existence of the standard and a related technology pool may make it more difficult for new and improved technologies to enter the market.
247. Agreements establishing technology pools and setting out the terms and conditions for their operation are not — irrespective of the number of parties — covered by the block exemption, as the agreement to establish the pool does not permit a particular licensee to produce contract products (see section 3.2.4). Such agreements are addressed only by these guidelines. Pooling arrangements give rise to a number of particular issues regarding the selection of the included technologies and the operation of the pool, which do not arise in the context of other types of licensing. Licensing out from the pool is generally a multiparty agreement, taking into account that the contributors commonly determine the conditions for such licensing out, and is therefore also not covered by the block exemption. Licensing out from the pool is dealt with in point (261) and in section 4.4.2.

4.4.1. *The assessment of the formation and operation of technology pools*

248. The way in which a technology pool is formed, organised and operated can reduce the risk of it having the object or effect of restricting competition and provide assurances to the effect that the arrangement is pro-competitive. In assessing the possible competitive risks and efficiencies, the Commission will, inter alia, take account of the transparency of the pool creation process; the selection and nature of the pooled technologies, including the extent to which independent experts are involved in the creation and operation of the pool and whether safeguards against exchange of sensitive information and independent dispute resolution mechanisms have been put in place.

Open participation

249. When participation in a standard and pool creation process is open to all interested parties it is more likely that technologies for inclusion into the pool are selected

on the basis of price/quality considerations than when the pool is set up by a limited group of technology owners.

Selection and nature of the pooled technologies

250. The competitive risks and the efficiency enhancing potential of technology pools depend to a large extent on the relationship between the pooled technologies and their relationship with technologies outside the pool. Two basic distinctions must be made, namely (a) between technological complements and technological substitutes and (b) between essential and non-essential technologies.
251. Two technologies are complements as opposed to substitutes when they are both required to produce the product or carry out the process to which the technologies relate. Conversely, two technologies are substitutes when either technology allows the holder to produce the product or carry out the process to which the technologies relate.
252. A technology can be essential either (a) to produce a particular product or carry out a particular process to which the pooled technologies relate or (b) to produce such product or carry out such a process in accordance with a standard which includes the pooled technologies. In the first case, a technology is essential (as opposed to non-essential) if there are no viable substitutes (both from a commercial and technical point of view) for that technology inside or outside the pool and the technology in question constitutes a necessary part of the package of technologies for the purposes of producing the product(s) or carrying out the process(es) to which the pool relates. In the second case, a technology is essential if it constitutes a necessary part (that is to say, there are no viable substitutes) of the pooled technologies needed to comply with the standard supported by the pool (standard essential technologies). Technologies that are essential are by necessity also complements. The fact that a technology holder merely declares that a technology is essential does not imply that such a technology is essential according to the criteria described in this point.
253. When technologies in a pool are substitutes, royalties are likely to be higher than they would otherwise be, because licensees do not benefit from rivalry between the technologies in question. When the technologies in the pool are complements the technology pool reduces transaction costs and may lead to lower overall royalties because the parties are in a position to fix a common royalty for the package as opposed to each party fixing a royalty for

- its own technology while not taking into account that a higher royalty for one technology will usually decrease the demand for complementary technologies. If royalties for complementary technologies are set individually, the total of these royalties may often exceed what would be collectively set by a pool for the package of the same complementary technologies. The assessment of the role of substitutes outside the pool is set out in point (262).
254. The distinction between complementary and substitute technologies is not clear-cut in all cases, since technologies may be substitutes in part and complements in part. When due to efficiencies stemming from the integration of two technologies licensees are likely to demand both technologies, the technologies are treated as complements, even if they are partly substitutable. In such cases it is likely that in the absence of the pool licensees would want to licence both technologies due to the additional economic benefit of using both technologies as opposed to using only one of them. Absent such demand based evidence on the complementarity of the pooled technologies, it is an indication that these technologies are complements if (i) the parties contributing technology to a pool remain free to license their technology individually and (ii) the pool is willing, besides licensing the package of technologies of all parties, to license the technology of each party also separately and (iii) the total royalties charged when taking separate licences to all pooled technologies do not exceed the royalties charged by the pool for the whole package of technologies.
255. The inclusion of substitute technologies in the pool generally restricts inter-technology competition since it can amount to collective bundling and lead to price fixing between competitors. As a general rule the Commission considers that the inclusion of significant substitute technologies in the pool constitutes a violation of Article 101(1) of the Treaty. The Commission also considers that it is unlikely that the conditions of Article 101(3) will be fulfilled in the case of pools comprising to a significant extent substitute technologies. Given that the technologies in question are alternatives, no transaction cost savings accrue from including both technologies in the pool. In the absence of the pool licensees would not have demanded both technologies. To alleviate the competition concerns it is not sufficient that the parties remain free to license independently. This is because the parties are likely to have little incentive to license independently in order not to undermine the pool's licensing activity, which allows them to jointly exercise market power.
- Selection and function of independent experts
256. Another relevant factor in assessing the competitive risks and the efficiencies of technology pools is the extent to which independent experts are involved in the creation and operation of the pool. For instance, the assessment of whether or not a technology is essential to a standard supported by a pool is often a complex matter that requires special expertise. The involvement in the selection process of independent experts can go a long way in ensuring that a commitment to include only essential technologies is implemented in practice. Where the selection of technologies to be included in the pool is carried out by an independent expert this may also further competition between available technological solutions.
257. The Commission will take into account how experts are selected and the functions that they are to perform. Experts should be independent from the undertakings that have formed the pool. If experts are connected to the licensors (or the licensing activity of the pool) or otherwise depend on them, the involvement of the expert will be given less weight. Experts must also have the necessary technical expertise to perform the various functions with which they have been entrusted. The functions of independent experts may include, in particular, an assessment of whether or not technologies put forward for inclusion into the pool are valid and whether or not they are essential.
258. Finally, any dispute resolution mechanisms foreseen in the instruments setting up the pool are relevant and should be taken into account. The more dispute resolution is entrusted to bodies or persons that are independent of the pool and its members, the more likely it is that the dispute resolution will operate in a neutral way.
- Safeguards against exchange of sensitive information
259. It is also relevant to consider the arrangements for exchanging sensitive information between the parties⁽⁹⁵⁾. In oligopolistic markets exchanges of sensitive information such as pricing and output data may facilitate collusion⁽⁹⁶⁾. In such cases the Commission will take into account to what extent safeguards have been put in place, which ensure that sensitive information is not exchanged. An independent expert or licensing body may play an important role in this respect by ensuring that output and sales data, which may be necessary for the purposes of calculating and verifying royalties is not disclosed to undertakings that compete on affected markets.

⁽⁹⁵⁾ For details on information sharing, see Horizontal Guidelines, point 55 pp., cited in footnote 27.

⁽⁹⁶⁾ See in this respect the judgment in *John Deere* cited in footnote 11.

260. Special care should be taken to put in place such safeguards when interested parties participate simultaneously in efforts to form pools of competing standards where this may lead to exchange of sensitive information between competing pools.

Safe harbour

261. The creation and operation of the pool, including the licensing out, generally falls outside Article 101(1) of the Treaty, irrespective of the market position of the parties, if all the following conditions are fulfilled:

- (a) participation in the pool creation process is open to all interested technology rights owners;
- (b) sufficient safeguards are adopted to ensure that only essential technologies (which therefore necessarily are also complements) are pooled;
- (c) sufficient safeguards are adopted to ensure that exchange of sensitive information (such as pricing and output data) is restricted to what is necessary for the creation and operation of the pool;
- (d) the pooled technologies are licensed into the pool on a non-exclusive basis;
- (e) the pooled technologies are licensed out to all potential licensees on FRAND^(?) terms;
- (f) the parties contributing technology to the pool and the licensees are free to challenge the validity and the essentiality of the pooled technologies, and;
- (g) the parties contributing technology to the pool and the licensee remain free to develop competing products and technology.

Outside the safe harbour

262. Where significant complementary but non-essential patents are included in the pool there is a risk of foreclosure of third party technologies. Once a technology is included in the pool and is licensed as part of the package, licensees are likely to have little incentive to license a competing technology when the royalty paid for the package already covers a substitute technology. Moreover, the inclusion of technologies which are not necessary for the purposes of producing the product(s) or carrying out the process(es) to which the technology pool relates or to comply with the standard which includes the pooled technology also forces licensees to pay for technology that they may not need. The inclusion of such complementary technology thus amounts to collective bundling. Where a pool encompasses non-essential technologies, the agreement is likely to be caught by Article 101(1) where the pool has a significant position on any relevant market.

263. Given that substitute and complementary technologies may be developed after the creation of the pool, the

^(?) For details on FRAND see Horizontal Guidelines, point 287 pp., cited in footnote 27.

need to assess essentiality does not necessarily end with the creation of the pool. A technology may become non-essential after the creation of the pool due to the emergence of new third party technologies. Where it is brought to the attention of the pool that such a new third party technology is offered to and demanded by licensees, foreclosure concerns may be avoided by offering to new and existing licensees a licence without the no-longer essential technology at a correspondingly reduced royalty rate. However, there may be other ways to ensure that third party technologies are not foreclosed.

264. In the assessment of technology pools comprising non-essential but complementary technologies, the Commission will in its overall assessment, *inter alia*, take account of the following factors:

- (a) whether there are any pro-competitive reasons for including the non-essential technologies in the pool, for example due to the costs of assessing whether all the technologies are essential in view of the high number of technologies;
- (b) whether the licensors remain free to license their respective technologies independently; where the pool is composed of a limited number of technologies and there are substitute technologies outside the pool, licensees may want to put together their own technological package composed partly of technology forming part of the pool and partly of technology owned by third parties;
- (c) whether, in cases where the pooled technologies have different applications some of which do not require use of all of the pooled technologies, the pool offers the technologies only as a single package or whether it offers separate packages for distinct applications, each comprising only those technologies relevant to the application in question; in the latter case technologies which are not essential to a particular product or process are not tied to essential technologies;
- (d) whether the pooled technologies are available only as a single package or whether licensees have the possibility of obtaining a licence for only part of the package with a corresponding reduction of royalties. The possibility to obtain a licence for only part of the package may reduce the risk of foreclosure of third party technologies outside the pool, in particular where the licensee obtains a corresponding reduction in royalties. This requires that a share of the overall royalty has been assigned to each technology in the pool. Where the licence agreements concluded between the pool and individual licensees are of relatively long duration and the pooled technology

supports a de facto industry standard, the fact that the pool may foreclose access to the market of new substitute technologies must also be taken into account. In assessing the risk of foreclosure in such cases it is relevant to take into account whether or not licensees can terminate at reasonable notice part of the licence and obtain a corresponding reduction of royalties.

265. Even technology pool arrangements that restrict competition may give rise to pro-competitive efficiencies (see point (245)) which must be considered under Article 101(3) and balanced against the negative effects on competition. For example, if the technology pool includes non-essential patents but fulfils all the other criteria of the safe harbour listed in point (261), where there are pro-competitive reasons for including non-essential patents in the pool (see point (264)) and where licensees have the possibility of obtaining a licence for only part of the package with a corresponding reduction of royalties (see point (264)), the conditions of Article 101(3) are likely to be fulfilled.

4.4.2. Assessment of individual restraints in agreements between the pool and its licensees

266. Where the agreement to set up a technology pool does not infringe Article 101 of the Treaty, the next step is to assess the competitive impact of the licences agreed by the pool with its licensees. The conditions under which these licences are granted may be caught by Article 101(1). The purpose of this section is to address a certain number of restraints that in one form or another are commonly found in licensing agreements from technology pools and which need to be assessed in the overall context of the pool. Generally the TTBER does not apply to licence agreements concluded between the pool and third party licensees (see point (247)). This section therefore deals with the individual assessment of licensing issues that are particular to licensing in the context of technology pools.

267. In making its assessment of technology transfer agreements between the pool and its licensees the Commission will be guided by the following main principles:

(a) the stronger the market position of the pool the greater the risk of anti-competitive effects;

(b) the stronger the market position of the pool, the more likely that agreeing not to license to all potential licensees or to license on discriminatory terms will infringe Article 101;

(c) pools should not unduly foreclose third party technologies or limit the creation of alternative pools;

(d) the technology transfer agreements should not contain any of the hardcore restrictions listed in Article 4 of the TTBER (see section 3.4).

268. Undertakings setting up a technology pool that is compatible with Article 101 of the Treaty, are normally free to negotiate and fix royalties for the technology package (subject to any commitment given to license on fair, reasonable and non-discriminatory terms, FRAND) and each technology's share of the royalties either before or after the standard is set. Such agreement is inherent in the establishment of the pool and cannot in itself be considered restrictive of competition. In certain circumstances it may be more efficient if the royalties of the pool are agreed before the standard is chosen, to avoid that the choice of the standard increases the royalty rate by conferring a significant degree of market power on one or more essential technologies. However, licensees must remain free to determine the price of products produced under the licence.

269. Where the pool has a dominant position on the market, royalties and other licensing terms should be non-excessive and non-discriminatory and licences should be non-exclusive⁽⁹⁸⁾. These requirements are necessary to ensure that the pool is open and does not lead to foreclosure and other anti-competitive effects on down-stream markets. These requirements, however, do not preclude different royalty rates for different uses. It is in general not considered restrictive of competition to apply different royalty rates to different product markets, whereas there should be no discrimination within product markets. In particular, the treatment of licensees of the pool should not depend on whether or not they are also licensors. The Commission will therefore take into account whether licensors and licensees are subject to the same royalty obligations.

⁽⁹⁸⁾ However, if a technology pool has no market power, licensing out from the pool will normally not infringe Article 101(1) even if those conditions are not fulfilled.

270. Licensors and licensees should be free to develop competing products and standards. They should also be free to grant and obtain licences outside the pool. These requirements are necessary in order to limit the risk of foreclosure of third party technologies and ensure that the pool does not limit innovation and does not preclude the creation of competing technological solutions. Where pooled technology is included in a (*de facto*) industry standard and where the parties are subject to non-compete obligations, the pool creates a particular risk of preventing the development of new and improved technologies and standards.
271. Grant back obligations should be non-exclusive and limited to developments that are essential or important to the use of the pooled technology. This allows the pool to feed on and benefit from improvements to the pooled technology. It is legitimate for the parties to ensure by grant back obligations that the exploitation of the pooled technology cannot be held up by licensees, including subcontractors working under the licence of the licensee, that hold or obtain essential patents.
272. One of the problems identified with regard to technology pools is the risk that they may shield invalid patents. Pooling may raise the costs/risks for a successful challenge, because the challenge might fail if only one patent in the pool is valid. The shielding of invalid patents in the pool may oblige licensees to pay higher royalties and may also prevent innovation in the field covered by an invalid patent. In this context, non-challenge clauses, including termination clauses⁽⁹⁹⁾, in a technology transfer agreement between the pool and third parties are likely to fall within Article 101(1) of the Treaty.
273. Pools often include both patents and patent applications. If patent applicants who submit their patent applications to pools, where available, use the patent application procedures that allow for a faster granting, this will achieve faster certainty on the validity and scope of these patents.
-

⁽⁹⁹⁾ See section 3.5.

Index

A	active sales	46, 48-49
	actual competition	6, 32-37, 66
	affect(ing) trade / competition	9-10, 30, 40, 59
	alternative	
	- independent technologies	60-61, 63
	- pool(s)	80
	- sources of supply	48
	anti-competitive	8, 28, 39, 53, 56, 80
	appreciable (effect on trade)	6-9
	article 101(1) TFEU	5-7, 10, 16, 29-30, 43, 50, 53, 57, 59, 65, 57-69, 73-76, 80
	article 101(2) TFEU	43, 50-51
	article 101(3) TFEU	4, 7, 10, 12, 29, 43, 50, 53, 57, 59, 68, 73, 76, 78
	assignment	16, 53
B	block / blocking position	33-34, 65, 67-68
C	captive use (restriction)	47
	collective bundling	77
	competing	27, 31-35, 44-45, 75, 80
	competitor(s)	28, 31-35, 37, 39-40, 44, 46-48, 65-66
	- actual	6, 8, 32-35, 37, 66
	- potential	6, 8, 32-35, 37, 44, 66
	complementary IPR	75-76
	contract product(s)	11, 14, 16-18, 20, 23, 37, 48
	copyright	
	- other than software related	11, 14, 21
	- software copyright	11
	cross-licensing	37, 67
D	<i>de minimis</i> Notice	39-40
	declaration of inapplicability	15, 59
	defensive termination	53
	division (of markets or customers)	46, 67

	downstream	28, 37, 80
E	effect on trade	9, 30
	efficiency	10, 43, 76
	essential technologies	74-78
	excluded restriction(s)	26, 53-55
	exclusive	
	- customer group	48-49
	- licence / licensing	28, 53
	- territory	48
	existing agreements	25
G	geographical market	31, 33, 37, 39-40, 57
	grant-back	53, 80
H	<i>hardcore</i> restriction(s)	7, 26, 35, 39, 40, 43-52, 53-54, 56, 60, 65, 80
I	improvements	
	- in efficiency	10
	- in production	27
	- to the licensed technology	53
	in-house	28
	individual assessment	52, 53-54, 60-63
	infringement	53, 58, 64, 66
	innovation	2, 4, 8, 28, 53, 57, 68, 75
	inter-technology competition	6, 8
	intra-technology competition	6, 8
J	joint venture(s)	19
K	know-how	16, 53
L	legal certainty	30, 49, 53
	licence / licensing	
	- cross-licensing	37, 67
	- exclusive licence	28, 53
	- refusing to license	2
	- sole licence	46
	- sub-licence	18, 22

M	market share	26-42, 43, 53, 56, 60-61, 72
	- calculating market share	36-38
	- thresholds	27-30, 39-41
	Member States	9, 57
	multi-party technology transfer agreements	72
N	national	9-11
	new applications	53
	no-challenge clause(s)	53, 69, 80
	non-compete obligation	80
	non-competitors	27-28, 35, 39, 44, 49, 53
	non-essential	76
	non-reciprocal	45, 48
	non-severable	53
	notion of transfer	22
	null / nullity	51
O	output limitations	48
P	parallel networks	53, 59
	passive sales	46, 48-49
	patent	11, 14, 66, 69, 75-76, 78
	pay-for-restriction / pay-for-delay	66
	potential competition	6, 8, 32-35, 37, 44, 66
	price fixing	46
	pro-competitive	53, 65, 72, 78
	product market	28, 31, 33-34, 36-40, 47
	purchase	16, 22-23, 38
R	RDBER	19
	reciprocal agreements	45, 47, 53
	reclassification	35
	relevant market(s)	8, 27, 30-40, 59
	rental and public performance rights	11, 21
	repeal (of the TTBER)	15
	research and development / R&D	19
	restriction	
	- excluded restriction(s)	26, 53-55
	- of production	46, 48
	- of the exploitation of own technology	46

	- of research and development	46
	reverse payment patent settlement	66
	royalty / royalties	22-23, 37, 67, 75-76, 78, 80
S	SABER	19
	safe harbour	3, 10-11, 14-15, 25, 29, 43, 53, 60, 63, 72, 78, 80
	selective distribution	46, 49
	settlement(s)	63-69
	severable	51, 53
	SME	30, 53
	software (related copyright)	11
	sole licence(s)	47
	specialisation (agreement)	19
	stakeholders	4, 24, 28, 53
	sub-contractor / subcontracting	17
	sub-licence / sublicensing	18, 22
	subject-matter	14, 17-18, 21
	substitutable	28, 37-38, 60-61
	substitute technologies	73
T	technical field	47
	technology market	31, 32, 34, 36-37, 44, 53
	technology pool(s)	11, 20, 63, 70-80
	- formation	74
	- arrangements between participants	75
	- agreements between pool and its licensees	79-80
	termination clause	53, 80
	trade between Member States	6, 9, 30
	trade mark	11, 14, 21
	transitional regime / period	10, 59
	turnover	22
U	upstream	28, 37
V	VABER	11, 21, 23, 49
	void	10, 43, 50-51
W	withdrawal (of benefit of the TTBER)	53, 56-58

As a leading firm, Loyens & Loeff is the natural choice for a legal and tax partner if you do business in or from the Netherlands, Belgium and Luxembourg, our home markets. You can count on personal advice from any of our 900 advisers based in one of our offices in the Benelux or in key financial centres around the world. Thanks to our full-service practice, specific sector experience and thorough understanding of the market, our advisers comprehend exactly what you need.

We centralise our expertise in litigation and commercial law under the practice group: "Litigation and Risk Management". This way we streamline our services and we combine Litigation, IP/IT and commercial law related issues.