



## BUNDESRECHTSANWALTSKAMMER

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### **Contribution to the 2025 EU consultation on the revision of EU competition rules on technology transfer agreements**

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## Opinion

In addition to completing the online questionnaire (see below) as part of the Commission's current consultation process regarding the Reform of the EU Technology Transfer Block Exemption Regulation (TTBER) and its related Guidelines (TTGL) BRAK would like to highlight some particularly important issues. From BRAK's perspective, taking into account the experience of lawyers it represents, who advise companies from all types of industry sectors on licensing agreements on both, the licensee's and licensor's side, these issues should be considered in this Reform in view of the evaluation of the innovation and technology markets as well as practical experiences in applying the TTBER:

## **1. Including data licensing into the scope of the TTBER**

- (1) The scope of the TTBER should be expanded to also include the licensing of data or data packages including computer files. As data or data packages do not necessarily meet the requirements of know-how, or at least categorizing them in their entirety as know-how tends to be complicated or not feasible in practice, a separate listing of data as “technology” in the TTBER seems to be appropriate.
- (2) Even if data fall short of qualifying as or being protected by intellectual property rights, they regularly tend to also have a commercial value similar to trade secrets. Also, in the growing digital markets data, there is no innovation without data. Consequently, as data have the same potential as other “technology” within the meaning of the TTBER to foster competition, their licensing should equally be able to benefit from the TTBER.

## **2. Abolishing the TTBER’s market share threshold for technology markets**

- (3) The application of the TTBER should only depend on the market share threshold for the product markets and eliminate the second market share threshold for technology markets. The Commission’s current approach on calculating market shares on the technology markets calculation (cf. Art. 8(d), TTGL 86-90) is not at all practical and renders the assessment of whether the TTBER is applicable to a licensing agreement or not, burdensome and too complicated. The concern is that this approach aims at determining market shares on not yet identified market(s) based on unavailable product sales figures. More specifically, it is not clear for the licensor at the time of entering into the licensing agreement which types of products could and will be produced with his technology. In addition, numerous markets could be affected as the licensed IP rights could be used for the production of many different products which are produced by none of the contract parties but by other licensees of the licensor (TTGL 86).
- (4) To mitigate potential competition law concerns that the Commission may have with respect to the technology markets affected by a licensing agreement it could extend its withdrawal rights (Art. 6) to include a right to withdraw the TTBER in cases where less than a certain number of other independently controlled technologies exist, i.e. applying the “plus four test” (cf. TTGL 157-158), ideally in a slightly modified form, namely by abolishing the requirement of “comparable costs” as only one competitive parameter among many.

## **3. Including guidance on Licensing Negotiation Groups (LNG) in TTGL**

- (1) In view of the increasing relevance of LNGs in various sectors the new TTGL should include a chapter on the assessment of LNG under Article 101 TFEU as it has been included for technology pools during the last reform (2014), i.e. other multilateral agreements to which the TTBER does not directly apply. This would considerably increase legal certainty

and likely prevent the (perceived) need to first consult with the competition authorities (for example, the Automotive LNG between BMW, Mercedes-Benz, thyssenkrupp and VW regarding the licensing of certain standard essential patents was presented to the Bundeskartellamt for prior approval, see press release of 10 June 2024<sup>1</sup>

- (2) To increase legal certainty it would be helpful to obtain guidance on the assessment of LNG under Article 101(1) and Article 101(3) TFEU, taking into account all relevant existing rules and guidelines (e.g. the general rules for purchasing cooperations and information exchange between competitors on the purchasing markets and potentially also on the downstream markets as contained in the Horizontal Guidelines of 2023), as well as general considerations of the TTBER (within the context of statutory exemption of Article 101(3) TFEU). It is expected that LNG will often have pro-competitive effects, and in particular foster innovation due to more follow-on innovation by the LNG members (licensees) and more product choices, better quality and ideally lower prices for the downstream products. These aspects should mitigate any potential anticompetitive concerns as regards LNG members' cooperation in negotiating the commercial terms with the technology right holders (licensors).

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<sup>1</sup>[https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilung/2024/10\\_06\\_2024\\_ALNG.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilung/2024/10_06_2024_ALNG.html)

# Revision of the Technology Transfer Block Exemption Regulation and Technology Transfer Guidelines - public consultation questionnaire

## Introduction

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Article 101(1) of the Treaty on the Functioning of the European Union ("the Treaty") prohibits agreements between undertakings that are capable of affecting trade between EU Member States and that restrict competition. By way of exception, Article 101(3) of the Treaty provides that this prohibition may be declared inapplicable in respect of agreements which contribute to improving the production or distribution of goods or services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which only impose restrictions that are indispensable for the attainment of those objectives and do not eliminate competition in respect of a substantial part of the products concerned.

Technology transfer agreements are agreements by which one party authorizes another to use certain technology rights (including, amongst others, patents, design rights, software copyrights and know-how) for the production of goods or services. In many cases, such agreements either do not restrict competition, i.e. they fall outside the scope of Article 101(1) of the Treaty, or, where they fall within Article 101(1), they create objective efficiencies and meet the conditions of Article 101(3) of the Treaty. However, technology transfer agreements, or certain clauses within such agreements, can also have negative effects on competition. In particular, they may facilitate collusion, foreclose competitors or harm inter- or intra- technology competition, for example by reducing the incentives to innovate.

The Commission is empowered by Council Regulation 19/65/EEC ('Empowerment Regulation') to adopt block exemption regulations for certain technology transfer agreements for which it can be presumed with sufficient certainty that they fulfil the conditions of the exception provided by Article 101(3) of the Treaty. The Commission has made use of this empowerment to adopt the Technology Transfer Block Exemption Regulation ('TTBER'), which declares that Article 101(1) of the Treaty does not apply to certain categories of technology transfer agreements. The TTBER entered into force on 1 May 2014 and will expire on 30 April 2026. The TTBER is accompanied by Commission Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements ('Guidelines').

## Purpose of the revision

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This revision follows the evaluation of the TTBER and the Guidelines which was launched in November 2022 and was completed with the adoption on 22 November 2024 of a Staff Working Document ("SWD") setting out the results of the evaluation. The results of the various evaluation activities can be found [here](#), and the SWD – together with a summary in English, French and German – can be found [here](#).

The results of the evaluation of the TTBER and the Guidelines indicate that these instruments are valued by stakeholders, have overall met their objectives and remain largely relevant. In particular, they ensure that only agreements that meet the conditions of Article 101(3) of the Treaty are block-exempted, and that companies are able to self-assess the compliance of their technology transfer agreements with Article 101 with adequate legal certainty. That said, market and other developments that have occurred since 2014 have raised questions about the continued effectiveness and relevance of certain areas of the rules, as regards both their scope and content.

In particular, the evaluation identified the following issues:

The increased importance of data resulting from digitalisation of the economy has made the licensing of data and/or rights in data more common. Moreover, technology transfer agreements increasingly contain provisions relating to data. However, the TTBER does not cover data licensing and the TTBER and Guidelines do not provide rules or guidance on provisions in technology transfer agreements relating to data. Some companies encounter practical difficulties when they apply the TTBER's market share thresholds for technology markets, resulting in uncertainty about whether their agreements are covered by the block exemption. These difficulties result notably from a lack of available information about the applications for which the licensed technology will be used, or about the substitutability or the market shares of third-party technologies. This problem appears to arise in particular in dynamic markets characterised by a high degree of innovation. It appears that similar difficulties affect the soft safe harbor provided in point 157 of the Guidelines, which is based on the existence of at least four independently- controlled technologies that are substitutable for the licensed technology. The conditions of the soft safe harbour provided in point 261 of the Guidelines for the establishment and operation of technology pools may not be fully effective in ensuring that only technology pools that fall outside the scope of Article 101(1) of the Treaty benefit from the safe harbour. Licensing negotiation groups ('LNGs') bring together technology implementers that wish to negotiate technology licences jointly. The evaluation indicates that, under certain conditions, LNGs can create efficiencies, notably by reducing transaction costs, but can also raise competition concerns, for example they may lead to downstream collusion between the participating implementers. However, the rules do not currently provide guidance on the competition law assessment of LNGs.

In the areas for which the evaluation indicated that a revision of the TTBER and Guidelines may be warranted, the impact assessment phase will explore policy options for a possible revision of those instruments, while ensuring the compliance of technology transfer agreements with Article 101 of the Treaty. The policy options must respect the limits imposed by the Empowerment Regulation, which defines the powers of the Commission to adopt block exemption regulations for technology transfer agreements, defined by that Regulation as agreements to which only two undertakings are party

relating to the acquisition or use of industrial property rights or rights to use methods of manufacture or knowledge relating to the application of industrial processes.

The Commission aims to ensure that all relevant stakeholders have the opportunity to express their views on the proposed policy options. The Commission will also collect feedback on other areas of the TTBER and the Guidelines for which the results of the evaluation identified room for improvements or clarifications.

This questionnaire is one of the key instruments to collect stakeholders' views and the replies to the questionnaire will inform the drafting of the revised rules.

More information on the current revision, including on the planned consultation activities, can be found in the Call for Evidence, published on the "Have Your Say" platform available [here](#).

## How to answer this consultation

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You are invited to reply to this public consultation by filling out the EUSurvey questionnaire online.

The questionnaire is structured as follows:

The first part of the questionnaire (Sections 3 and 4) concerns general information on the respondent. The second part focuses on policy options for a possible revision of the TTBER (Section 5). It aims to gather information and views from stakeholders to assess the impact of the policy changes that the Commission is exploring. The third part of the questionnaire (Section 6) addresses other issues and elements (for example, improvements, clarifications) to be considered during the impact assessment phase.

## Languages

The questionnaire is available in English, French and German. You may respond to the questionnaire in the EUSurvey tool in any official EU language.

**Next steps**

The Commission will summarise the results of this consultation in a report, which will be published on the Commission's "Have Your Say" platform.

**Practical remarks**

The consultation is open for 12 weeks, and replies can be provided in all 24 official EU languages. To facilitate the analysis of your reply, we would kindly ask you to keep your answers concise and to the point. Please explain your replies and, where possible, illustrate them with concrete examples. At the end of the questionnaire, we also invite you to upload any documents and/or data that you consider useful to accompany your replies. You may include documents and URLs for relevant online content in your replies. You are not required to answer every question. You may respond 'no opinion/no' to questions on topics where you do not have particular knowledge, experience or opinion. Where applicable, this is strongly encouraged in order to ensure that the evidence gathered by the Commission is solid. You have the option of saving your replies as a "draft" and finalizing them later. In order to do this, click on 'Save as Draft' and save the new link that you will receive from the EUSurvey tool on your computer. Please note that without this new link you will not be able to access your draft replies again and continue your reply to the questionnaire. Once you have completed your replies and submitted them, you will be able to download a copy. Whenever there is a text field for a short description, the maximum number of characters will be indicated. Questions marked with an asterisk (\*) are mandatory. To avoid any confusion about the numbering of the questions, please note that you will be asked some questions only if you choose a certain reply to the previous one(s). No statements, definitions, or questions in this public consultation may be interpreted as an official position of the Commission. All definitions provided in this document are strictly for the purposes of this public consultation and are without prejudice to definitions that the Commission may use in current or future EU law or decisions. You are invited to read the privacy statement attached to this consultation for information on how your personal data and contribution will be dealt with.

If you encounter problems with completing this questionnaire or if you have questions, you can contact us via the following functional mailbox: [COMP-TTBER-REVIEW@ec.europa.eu](mailto:COMP-TTBER-REVIEW@ec.europa.eu)

## 1. Information about you and the TTBER

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Please note that this questionnaire uses the following defined terms, which have the same meaning as in the TTBER:

**Technology rights** mean know-how and the following rights, or a combination thereof, including applications for or applications for registration of those rights: (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.

**Technology transfer agreements** mean agreements by which one party authorises another to use certain technology rights (see previous definition) for the production of goods or services.

**Intellectual property rights** include industrial property rights, in particular patents and trademarks, copyright and neighbouring rights.

In view of these definitions, please answer the questions set out below, if applicable

1.1. Please indicate whether you have been party to a technology transfer agreement in the last ten years or whether you have experience with such agreements.

☒ Yes

☐ No

1.2. Please specify the technology right(s) to which your knowledge of and/or experience with the TTBER or the Guidelines primarily relates (multiple answers possible):

☒ Patents

☒ Utility models

☒ Design rights

☒ Topographies of semiconductor products

☒ Supplementary protection certificates for medicinal products or other products

☐ Plant breeder's certificates

- ☒ Software copyrights
- ☒ Know-how
- ☒ Other

1.3. Please specify the goods or services to which your knowledge of or experience with the TTBER or the Guidelines primarily relates.

All type of products and services, e.g. pharmaceuticals, IT/software, IOT, telecoms, engineering

1.4. Please specify whether you are primarily a licensor or a licensee of technology rights / whether your organisation primarily represents licensor(s) or licensees.

- ☐ Licensor(s)/organisation representing primarily licensors
- ☐ Licensee(s)/organisation representing primarily licensees
- ☒ Active as a licensor and a licensee to an equal extent/organisation representing both licensors and licensees to an equal extent
- ☐ None of the above

1.5. If you are a licensor or represent licensors, please specify the means by which the technology rights are typically licensed (multiple answers possible).

- ☒ Via bilateral licensing agreements with individual licensees
- ☒ Via technology pools
- ☒ Via licensing agreements with licensees that have negotiated the licence through a licensing negotiation group
- ☐ Other

1.5.1. Please explain your answer, including the context in which the licensing takes place and estimating how often you use the respective means.

Regularly as organization (BRAK) representing legal advisors of licensees and licensors.

1.6. If you are a licensee or represent licensees, please specify the means by which the technology rights are typically licensed (multiple answers possible).

- ☒ Via bilateral licensing agreements with individual licensors
- ☒ Via licensing agreements with licensors that belong to a technology pool
- ☐ Via licensing agreements that are negotiated by a licensing negotiation group
- ☐ Other

1.6.1. Please explain your answer, including the context in which the licensing takes place and estimating how often you use the respective means.

See 1.5.1 above.

1.7. Please describe the impact of the TTBER and the Guidelines on your activities (e.g. whether you use the instruments to self-assess your technology transfer agreements under competition law).

Regular application as organization (BRAK) representing legal advisors.

## 2. Policy options for the revision of the TTBER

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The Commission is exploring **policy options** for revising the TTBER. The baseline scenario against which the proposed options will be assessed is the maintenance of the TTBER and the Guidelines as they stand today.

**Policy options relating to the absence of rules or guidance on data licensing and on data-related provisions in technology transfer agreements**

The Commission is exploring options to provide rules or guidance on the licensing of data and/or on data-related provisions in technology transfer agreements. Currently, the TTBER and Guidelines do not provide rules or guidance on data-related provisions in technology licensing agreements. However, the evaluation has shown that data is increasingly important in the digital economy; and that technology transfer agreements increasingly include clauses governing the transfer of data.

Against this background, the policy options currently identified include:

- Option 1: no change to the TTBER. Under this option, guidance could nonetheless be provided in the Guidelines on the factors that the Commission will take into account when it assesses data-related provisions in technology transfer agreements.
- Option 2: widen the scope of the TTBER, by expanding the definition of technology rights to include certain categories of data or rights in data, and provide further guidance in the Guidelines.

#### Data Licensing

2.1. Have you entered into agreements which included a transfer or licence of data in the last five years?

☒ Yes

☐ No

2.2. Please indicate in which sectors of the economy, in your experience, data licensing agreements are most common.

IT, IoT, telecoms, engineering (e.g. automotive).

2.3. In your experience, which type of data is usually transferred or licensed in the context of data licensing (multiple replies possible):

☒ Raw data or any other type of data that has not yet been significantly processed, coded, formatted, or analysed;

☒ Datasets, meaning any organised collections of data for the purpose of analysis;

☒ Databases, meaning a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible;

☐ Synthetic data, meaning data that has been generated artificially rather than generated by real world events;

☐ Other types of data.

2.4. In your experience, data licensing agreements are usually agreed by:

- ☒ Two parties
- ☒ More than two parties

2.5. Considering your experience with data licensing agreements, which of the following options is correct in your opinion.

- ☐ All or most of all data licensing agreements are entered into with the exclusive purpose of allowing the parties to carry out research and development activities, with no links to the production of contract products or services by the licensee.
- ☐ All or most of all data licensing agreements are entered into mainly to allow the licensee to produce contract products or services, with limited or no research and development activity involved.
- ☒ The number of data licensing agreements entered into with the exclusive purpose of allowing the parties to carry out research and development activities and of those that are entered into mainly to allow the licensee to produce contract products or services (with limited or no research and development activities involved) are about the same.

2.5.1. Please explain your answer with evidence where available.

Experience as legal advisor represented by BRAK.

2.6. In your experience, which types of restrictions are commonly included in data licensing agreements (multiple replies possible)?

- ☒ Exclusivity clauses
- ☒ Sales restrictions (for example, restrictions on active and passive sales of the goods or services produced using the licensed data)
- ☒ Output restrictions (for example, limitations on the number or volume of the goods or services produced using the licensed data that can be sold by the licensee)
- ☒ Market and customer allocation between licensor and licensee (for example, the agreement prevents the licensee from selling in certain territories or to certain customers)

- ☒ Field of use restrictions (for example, use of the licensed data is limited only to one or more technical fields or sectors)
- ☐ Captive use restrictions (meaning obligations on the licensee to limit its production of the contract products to the quantities required for itself)
- ☒ Tying and bundling (for example, licensing of the data is conditional on the licensing of other data or technology, or vice versa)
- ☒ Non-compete obligations
- ☒ Exclusive grant-backs of improvements of the licensed data, meaning obligations on the licensee to grant an exclusive licence to the licensor in respect of its own improvements to, or its own new applications of, the licensed data
- ☒ Obligations not to challenge the licensor's intellectual property rights in the licensed data
- ☐ Other

**Data and intellectual property rights**

2.7. Do you consider that at least certain types of data listed in question 2.3 can be protected by intellectual property rights? Examples of intellectual property rights that can cover certain types of data are copyright and sui generis protection for databases.

- ☒ Yes
- ☐ No
- ☐ Do not know

2.8. In your opinion, can certain types of data be qualified as know-how, namely a package of practical information, resulting from experience and testing, which is: (i) secret, (ii) substantial, and (iii) identified?

- ☒ Yes
- ☐ No
- ☐ Do not know

2.9. In your opinion, can certain types of data be qualified as trade secrets<sup>[1]</sup>, defined as "information" which is secret; has commercial value because it is secret; has been subject to reasonable steps to keep it secret?

[1] The full definition of trade secrets provided in Article 2 of Directive 2016/943 of the European Parliament and of the Council of 8 June 2016.

- ☒ Yes
- ☐ No
- ☐ Do not know

2.10. Please explain whether, in your experience, data licensing agreements usually indicate that the data subject to the transfer is protected by intellectual property rights. In your answer, please identify the relevant type of data and the corresponding intellectual property right(s).

Preliminary know-how; the data concerned is relevant for the forming of data packages including and complementary to software copyrights and other (undisputed) know-how; the data are hardly separable from the other (undisputed) technology rights within the meaning of the TTBER.

2.10.1. If you answered positively to the last question, please explain how in your experience the licensing agreements deal with possible additional data that is gathered by the licensee during the licence agreement.

#### Data licensing and competition

2.11. Based on your experience or knowledge, do you think that data licensing generates overall:

- ☐ Only pro-competitive effects (for example, lower prices, more innovation, etc.)
- ☐ Only anti-competitive effects (for example, foreclosure, less innovation, less variety of products, etc.)
- ☒ More pro-competitive effects than anti- competitive effect
- ☐ More anti-competitive effects than pro- competitive effects
- ☐ Similar level of pro-competitive and anti- competitive effects

2.11.1. Please explain your answer providing concrete example where possible.

Data that is inseparable from undisputed technology within the meaning of the TTBER; if not covered by the TTBER as well, the data package risk to fall, at least to a certain extent outside the scope of the TTBER, to the detriment of the undisputed technology.

2.12. In your opinion, in which markets would data licensing generate anti-competitive effects (multiple replies possible):

- ☐ Markets concerning the generation of data and creation of datasets, databases or other organised sets of data.
- ☐ Markets concerning the licensing or sale of data from data owners to licensee or data buyers.
- ☐ Markets concerning the exploitation of such data for the production of products or services.
- ☐ Markets for the sale of the products or services produced using the licensed technology (downstream markets).
- ☐ Other

2.13. In your opinion, in which markets would data licensing generate pro-competitive effects (multiple replies possible):

- ☒ Markets concerning the generation of data and creation of datasets, databases or other organised sets of data.
- ☒ Markets concerning the licensing or sale of data from data owners to licensee or data buyers.
- ☒ Markets concerning the exploitation of such data for the creation of products or services.
- ☒ Downstream markets for the sale of those product or services to consumers.
- ☐ Other

2.14. In your experience or knowledge, do data licensing agreements have effects on competition similar to those of technology transfer agreements currently covered by the TTBER? Please explain your answer, making reference to the relevant provisions of the TTBER and Guidelines.

Yes, as the licensing of data also fosters competition and innovation and at the same time, within the limits foreseen by the TTBER (market share thresholds, and no hardcore-restrictions), does not have anti-competitive effects on the market; cf. Art. 2 (1); Art. 3; Art. 4 (1) (c) (i-iv); 4 (1) (d); Art. 5 (2).

2.14.1. In your opinion, which types of intellectual property licensing are more similar to data licensing, taking into account their respective effects on competition? (multiple replies possible)

- ☐ Patent licensing
- ☒ Know-how licensing
- ☒ Software copyright licensing
- ☐ Copyright licensing
- ☐ Trademark licensing
- ☐ Other
- ☐ None of the above

2.14.1.1. Please explain your answer.

See 2.10 above.

2.15. In your opinion, are there any restrictions of competition that can be found in data licensing agreements but not in technology transfer agreements currently covered by the TTBER and Guidelines? Please explain your answer, providing concrete examples where possible.

No

2.16. In your opinion, are there any restrictions of competition in technology transfer agreements that are referred to in the TTBER or the Guidelines but which do not have the same effects when included in data licensing agreements? Please explain your answer, providing concrete examples where possible.

No

**Assessing the policy options**

The objectives of the TTBER and the Guidelines are to block-exempt only those technology transfer agreements for which it can be assumed with sufficient certainty that they meet the conditions of Article 101 (3) of the Treaty and to enable companies to self-assess the compliance of their technology transfer agreements with Article 101 with adequate legal certainty.

2.17. In your opinion, would the extension of the block exemption provided by the TTBER to the licensing of certain types of data contribute to achieving such objectives?

- ☒ Yes
- ☐ No
- ☐ Do not know

2.17.1. Please explain your reply.

See 2.14 above.

2.18. Based on your experience or knowledge, what would be the impact on the following parameters of extending the block exemption to the licensing of certain types of data?

| Impact on:                                                                  | Negative or very negative | Neutral                             | Positive or very positive           | No opinion               |
|-----------------------------------------------------------------------------|---------------------------|-------------------------------------|-------------------------------------|--------------------------|
| Competition on the market                                                   | <input type="checkbox"/>  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Prices of data                                                              | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| Prices of products produced using licensed data                             | <input type="checkbox"/>  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Quality of products produced using licensed data                            | <input type="checkbox"/>  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Variety of products produced using licensed data                            | <input type="checkbox"/>  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Innovation                                                                  | <input type="checkbox"/>  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Self-assessment by companies of data licensing agreements                   | <input type="checkbox"/>  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Administrative burden for companies entering into data licensing agreements | <input type="checkbox"/>  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> |

|                                                                                            |                          |                                     |                                     |                          |
|--------------------------------------------------------------------------------------------|--------------------------|-------------------------------------|-------------------------------------|--------------------------|
| Flexibility for companies in drafting data licensing agreements compliant with Article 101 | <input type="checkbox"/> | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Involvement of SMEs in innovation                                                          | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| Costs for your organization                                                                | <input type="checkbox"/> | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Legal certainty for your organization                                                      | <input type="checkbox"/> | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Harmonised application of competition rules by national competition authorities            | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |

2.18.1. Please explain your replies to the previous question and, if possible, provide concrete examples of the impacts you indicated.

2.19. Based on your experience, please consider the potential conditions other than the prohibition of hard-core restrictions under which data licensing agreements could be exempted under the TTBER, namely the potential conditions that would be needed to ensure that only agreements that meet the conditions of Article 101 (3) are exempted:

- ☐ Market share thresholds as provided currently in the TTBER.
- ☒ Market share thresholds as provided currently in the TTBER, but only for the product markets.
- ☐ Other types of conditions

2.19.1. Please explain your replies to the previous question and, if possible, provide concrete examples of the impacts you indicated.

The market share threshold for technology markets does not work in practice as there are too many potential product markets, many yet unknown at the relevant time, in which the technology (here: the data) may be used.

2.20. Based on your experience, is the current list of hardcore restrictions included in Article 4 of the TTBER appropriate and sufficient (in addition to market share thresholds) to exclude from the block exemption data licensing agreements that do not meet with sufficient certainty the exemption provided in Article 101(3)?

- ☒ Yes
- ☐ No
- ☐ Do not know

2.20.1. Please explain your answer.

See 2.14 above.

2.21. In your opinion, should the current list of excluded restrictions included in Article 5 of the TTBER be applied to data licensing to avoid that clauses that are not likely to fulfil the conditions of Article 101(3) of the Treaty are covered by the block exemption?

- ☒ Yes
- ☐ No
- ☐ Do not know

2.21.1. Please explain your answer

But: Data licensing should be treated as know-how licensing to which Art. 5 is also only applicable to a certain extent.

2.22. In your opinion, if the block exemption will not be expanded to cover the licensing of certain type of data, would the provision of guidance on data licensing in the Guidelines increase legal certainty?

- ☒ Yes
- ☐ No
- ☐ Do not know

2.22.1. Please explain your answer.

But: Provisions in the TTBER itself are preferable.

2.23. Based on your experience or knowledge, what would be the impact on the following parameters of providing guidance in the Guidelines on the licensing of data?

| Impact on:                                                                                 | Negative or very negative | Neutral                             | Positive or Very positive           | No opinion                          |
|--------------------------------------------------------------------------------------------|---------------------------|-------------------------------------|-------------------------------------|-------------------------------------|
| Competition on the market                                                                  | <input type="checkbox"/>  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| Prices of data                                                                             | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/>            |
| Prices of products produced using licensed data                                            | <input type="checkbox"/>  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| Quality of products produced using licensed data                                           | <input type="checkbox"/>  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| Variety of products produced using licensed data                                           | <input type="checkbox"/>  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| Innovation                                                                                 | <input type="checkbox"/>  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| Self-assessment by companies of data licensing agreements                                  | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/>            |
| Administrative burden for companies entering into data licensing agreements                | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/>            |
| Flexibility for companies in drafting data licensing agreements compliant with Article 101 | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/>            |
| Involvement of SMEs in innovation                                                          | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/>            |
| Costs for your organization                                                                | <input type="checkbox"/>  | <input type="checkbox"/>            | <input type="checkbox"/>            | <input checked="" type="checkbox"/> |
| Legal certainty for your organization                                                      | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/>            |
| Harmonised application of competition rules by national competition authorities            | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/>            |

2.23.1. Please explain your replies to the previous question and, if possible, provide concrete examples of the impacts you indicated.

See 2.22.1 above.

2.24. Based on your experience, when providing guidance on the competition law analysis of data licensing, on what types of agreement (for example, bilateral agreements or multilateral agreements, such as data pools) and restrictions should the Commission focus?

Parallel approach as with know-how licensing.

2.25. Do you have experience or knowledge of instances where data licensing agreements are likely to create horizontal competition concerns?

No

2.26. Do you have experience or knowledge of instances where data licensing agreements are likely to create vertical competition concerns?

No

2.27. Based on your experience, are there specific sections of the Guidelines that would need to be adapted to cover data licensing agreements? Please explain your answer by providing concrete examples where possible.

See 2.24 above.

2.28. Licensing agreements that concern technology rights not related to data, such as patent licences, may still include provisions regulating the use of data that are created by one or both parties during the licence. Have you ever encountered such data-related provisions? If yes, please provide describe the rights and obligations created by such provisions.

No

2.28.1. In your opinion, what are the effects on competition of these data-related provisions?

n.a.

2.29. Article 2(3) of the TTBER states that the block exemption also applies to provisions in technology transfer agreements relating 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. Based on your knowledge, do you think that the data-related provisions that you identified in response to the question above are covered by Article 2(3)?

- ☐ Yes
- ☒ No
- ☐ Do not know

2.29.1. Please explain your answer.

Because data generally do not relate “to the purchase of products by the licensee” nor do they qualify as “IP rights” or “know-how” (cf. Art. 2 (3) TTBER).

#### **Policy options relating to the TTBER market share thresholds for technology markets**

The Commission is exploring options to address difficulties reported by stakeholders in applying the TTBER’s market share thresholds for technology markets. Currently, the TTBER exempts technology transfer agreements between competitors where the parties’ combined market share does not exceed 20%, and agreements between non-competitors where the market share of each party does not exceed 30%. These thresholds apply to both relevant product markets and relevant technology markets (Article 3 of the TTBER). The licensor’s market share on relevant technology markets is calculated on the basis of sales by the licensor and all its licensees of products incorporating the licensed technology (Article 8 of the TTBER). In addition, point 157 of the Guidelines provides a soft safe harbour for technology transfer agreements that fall outside the block exemption because the market share thresholds are exceeded. For these agreements, the Guidelines state that, in the absence of hardcore restrictions, an infringement of Article 101 TFEU is unlikely if, in addition to the technologies controlled by the parties, there are at least four other independently controlled technologies that are substitutable for the licensed technology and available to users at a comparable cost.

Against this background, the policy options currently identified include:

- Option 1: No change to the TTBER. Under this option, changes to the conditions of the soft safe harbour in point 157 of the Guidelines could still be considered.
- Option 2: amend the TTBER by either (a) removing the market share threshold for relevant technology markets, leaving only the threshold for relevant product markets, or (b) replacing the current market share threshold for technology markets, for example with a condition based on the existence of a certain number of other independently controlled technologies that are substitutable for the licensed technology, similar to the soft safe harbour currently provided in point 157 of the Guidelines. Related guidance would be provided in the Guidelines.

2.30. Do you have experience or knowledge of applying the market share thresholds in the TTBER?

☒ Yes

☐ No

2.31. Do you have experience or knowledge of applying the soft safe harbour set out in point 157 of the Guidelines?

☒ Yes

☐ No

**Assessing the policy options**

The objectives of the TTBER and the Guidelines are to block-exempt only those technology transfer agreements for which it can be assumed with sufficient certainty that they meet the conditions of Article 101 (3) of the Treaty and to enable companies to self-assess the compliance of their technology transfer agreements with Article 101 with adequate legal certainty.

2.32. In your opinion, would removing the TTBER's market share thresholds for technology markets, leaving only the market share thresholds for product markets (Option 2(a)) achieve these objectives?

☒ Yes

☐ No

☐ Do not know

2.32.1. Please explain your reply.

2.33. In your opinion, would replacing the TTBER's market share thresholds for technology markets with a condition in the TTBER based on the existence of a certain number of independently-controlled substitute technologies (Option 2(b)) achieve these objectives?

☒ Yes

☐ No

☐ Do not know

2.33.1. Please explain your reply.

Viable alternative to 2.32 above. Most important is the abolishment of the technology market threshold due to its inpractability.

2.34. Based on your experience or knowledge, what would be the impact on the following parameters of removing the TTBER's market share thresholds for technology markets (Option 2(a))?

| Impact on:                                                                       | Negative or very negative | Neutral                             | Positive or very positive           | No opinion               |
|----------------------------------------------------------------------------------|---------------------------|-------------------------------------|-------------------------------------|--------------------------|
| Competition on the market                                                        | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| Prices of products produced using licensed technology                            | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| Quality of products produced using licensed technology                           | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| Variety of products produced using licensed technology                           | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| Innovation                                                                       | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| Self-assessment by companies of technology transfer agreements                   | <input type="checkbox"/>  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Administrative burden for companies entering into technology transfer agreements | <input type="checkbox"/>  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Involvement of SMEs in innovation                                                | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| Costs for your organization                                                      | <input type="checkbox"/>  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Legal certainty for your organization                                            | <input type="checkbox"/>  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Harmonised application of competition rules by national competition authorities  | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |

2.34.1. Please explain your replies to the previous question and, if possible, provide concrete examples of the impacts you indicated.

See 2.19.1, 2.33.1 above.

2.35. Based on your experience or knowledge, what would be the impact on the following parameters of replacing the TTBER's market share thresholds for technology markets with a condition in the TTBER based on the existence of a certain number of independently-controlled substitute technologies (Option 2(b))?

| Impact on:                                                                       | Negative or very negative | Neutral                             | Positive or very positive           | No opinion               |
|----------------------------------------------------------------------------------|---------------------------|-------------------------------------|-------------------------------------|--------------------------|
| Competition on the market                                                        | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| Prices of products produced using licensed technology                            | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| Quality of products produced using licensed technology                           | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| Variety of products produced using licensed technology                           | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| Innovation                                                                       | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| Self-assessment by companies of technology transfer agreements                   | <input type="checkbox"/>  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Administrative burden for companies entering into technology transfer agreements | <input type="checkbox"/>  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Involvement of SMEs in innovation                                                | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| Costs for your organization                                                      | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| Legal certainty for your organization                                            | <input type="checkbox"/>  | <input type="checkbox"/>            | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Harmonised application of competition rules by national competition authorities  | <input type="checkbox"/>  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |

2.35.1. Please explain your replies to the previous question and, if possible, provide concrete examples of the impacts you indicated.

BUT: Legal certainty would be higher compared to the status-quo, but lower compared to option 2 (a) (see 2.34 above).

2.36. In your opinion, could the application of the TTBER's market share thresholds for technology markets be improved by providing for one or more alternative methodologies or metrics for companies to calculate market shares in relevant technology markets, in addition to the methodology currently set out in Article 8(d) of the TTBER (calculation of the licensor's market share based on the combined sales of the licensor and its licensees of products incorporating the licensed technology as a share of all other products in the same relevant product market)?

- ☐ Yes
- ☒ No
- ☐ Do not know

2.37. In your opinion, could the guidance in the Guidelines be improved as regards the application of the TTBER's market share thresholds for technology markets and /or the application of the soft safe harbour in point 157 of the Guidelines based on the existence of at least four other independently-controlled substitutable technologies?

- ☒ Yes
- ☐ No
- ☐ Do not know

### 3. Other areas for revision

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The evaluation identified other areas in which the TTBER and the Guidelines could be improved. The following questions relate to such possible improvements.

#### **Technology pools**

**Technology pools** allow multiple technology right holders to license their patents jointly. These pools can increase efficiency, reduce litigation and transaction costs, and streamline licensing. On the other hand, they can also restrict competition between technology right holders (collusion) if substitute technologies are included in the pool, or exclude competing technologies from the market, in particular if licensees are obliged to take a licence of a whole package of pooled technologies.

The Guidelines include a chapter on technology pools (section 4.4), including a soft safe harbour for arrangements relating to the creation and operation of technology pools, subject to the fulfilment of certain conditions (point 261).

The evaluation indicated that the guidance on technology pools, and in particular the soft safe harbour, has worked well and has increased legal certainty. Nonetheless, changes that have occurred in the last 10 years in how technology pools operate, and in how they deal with issues such as transparency, suggest that the conditions of the soft safe harbour may not be fully effective in ensuring

that the benefit of the safe harbour is reserved for technology pools that fall outside the scope of the prohibition in Article 101 of the Treaty.

General questions on technology pools

3.1. Have you or your organization been involved in any way with technology pools (for example, as a licensor, licensee, or administrator/manager)?

☒ Yes

☐ No

3.2. Have you or your organization ever concluded any technology transfer agreements involving a technology pool, whether as

☒ A licensee, i.e. licensing technology from the pool

☒ A licensor, i.e. participating in the agreement as part of the technology pool

☐ A manager or administrator of the pool

3.3. Do you have any experience of the creation and operation of technology pools? Please share any specific experiences or examples that illustrate your interactions.

BRAC consists of lawyer regularly advising licensees and licensors of technology pools.

3.4. Have you used the Guidelines to assess or guide your involvement with technology pools?

☒ Yes

☐ No

Soft safe harbour for technology pools - Essentiality

One of the conditions of the soft safe harbour for technology pools provided in the Guidelines is that sufficient safeguards are adopted to ensure that only essential technologies are pooled (point 261(b) of the Guidelines). Essentiality means that the technology is necessary to produce a particular product or perform a particular process (there are no viable technical or commercial substitutes) or the technology is necessary to produce such a product or perform such a process in accordance with a standard that includes the pooled technologies (point 252 of the Guidelines). This condition is intended to address the risk of foreclosure of third party technologies and to ensure that licensees are not forced to pay for technology that they may not need (point 262 of the Guidelines).

3.5. Is this condition effective in addressing the risks to competition identified in point 262 of the Guidelines?

- ☒ Yes
- ☐ No
- ☐ Do not know

3.6. Are there any specific improvements needed for this condition to ensure that only essential patents are included in technology pools?

- ☐ Yes
- ☒ No

Soft safe harbour for technology pools - FRAND licensing

Another condition of the soft safe harbour for technology pools is that the pooled technologies must be licensed out to all potential licensees on Fair, Reasonable and Non-Discriminatory (FRAND) terms (point 261(e) of the Guidelines).

3.7. Have you faced challenges or issues in relation to this condition when negotiating licenses with technology pools as a licensee?

- ☒ Yes
- ☐ No

3.8. Have you faced challenges or issues in respecting this condition as a member of a technology pool or as an administrator/manager of a technology pool?

- ☒ Yes
- ☐ No

3.9. Is the condition that the pooled technologies are licensed out to all potential licensees necessary to ensure that the operation of the pool falls outside the prohibition of Article 101(1)?

- ☒ Yes
- ☐ No
- ☐ Do not know

Soft safe harbour for technology pools - Information exchange

Another condition of the soft safe harbour for technology pools provided in the Guidelines is that sufficient safeguards must be adopted to ensure that the exchange of sensitive information (such as pricing and output data) is restricted to what is necessary for the creation and operation of the pool (point 261 (c) of the Guidelines).

3.10. Based on your experience and knowledge, do you consider that there is too much transparency between technology pools and their members/founders? For example, as regards information exchange about the level of the royalty fees applied by the technology pool and the royalty fees applied by the members of the pool individually?

- ☐ Yes
- ☒ No
- ☐ Do not know

3.11. Based on your experience or your knowledge, what additional guidance, including on specific measures, could be included in the Guidelines to prevent exchanges of information that go beyond what is strictly necessary for the creation and operation of technology pools?

Soft safe harbour for technology pools - Non-exclusive licensing

Another condition of the soft safe harbour for technology pools provided in the Guidelines is that the pooled technologies must be licensed into the pool on a non-exclusive basis (point 261(d) of the Guidelines).

3.12. As a member of a pool, based on your experience and knowledge, do you think that this condition of the soft safe harbour is sufficiently clear?

- ☒ Yes
- ☐ No
- ☐ Do not know

3.13. As a licensee, based on your experience and knowledge, do you think that this condition of the safe harbour is sufficiently clear?

- ☒ Yes
- ☐ No
- ☐ Do not know

3.14. Are there any specific monitoring mechanisms that could ensure that the benefit of the soft safe harbour is reserved for technology pools that fall outside the scope of the prohibition of restrictive agreements contained in Article 101(1) of the Treaty?

- ☐ Yes
- ☐ No
- ☒ Do not know

#### Transparency

The Guidelines state that pooling arrangements give rise to a number of 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 (point 247 of the Guidelines). Furthermore, point 248 of the Guidelines states that the way in which a technology pool is formed, organised and operated can reduce the risk that it will restrict competition and provide assurances 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 the exchange of sensitive information and independent dispute resolution mechanisms have been put in place.

3.15. Based on your experience or knowledge, do you believe that the Guidelines adequately address the need for transparency in relation to the following issues?

|                                                      | Yes                      | No                                  | Do not know              |
|------------------------------------------------------|--------------------------|-------------------------------------|--------------------------|
| Governance of technology pools                       | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Essentiality of the patents included in the pool     | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Calculation of royalties in the technology pool      | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| Information on the technologies included in the pool | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |

|                                                    |                          |                                     |                          |
|----------------------------------------------------|--------------------------|-------------------------------------|--------------------------|
| Information on contributors to the technology pool | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| information on licensees of the technology pool    | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |

3.15.1. If you consider that one or more of the areas are not adequately addressed in the Guidelines, please explain the reasons for your reply and provide concrete examples.

See 3.15.2 below.

3.15.2. If you consider that one or more of the areas are not adequately addressed in the Guidelines, what are the improvements needed to increase legal certainty?

Provide more practical guidance for pools that do not meet these soft safe-harbour-requirements (TT GL para. 261), e.g. because the technology (i) is not essential, or (ii) the pool contains technical substitutes (cf. TT GL para. 250-255).

3.16. Is there any additional guidance or rules that would help improve transparency in how technology pools are created and operated? Please explain your answer.

See 3.15.2 above.

#### Double dipping

Double dipping refers to situations where licensees pay overlapping royalties for the same technology rights, for example because the technology right is covered by a licence that they have obtained from a pool and by a licence that they have negotiated bilaterally with the right holder.

3.17. Have you experienced issues with double dipping or overlapping patents when dealing with technology pools?

- ☐ Yes
- ☒ No
- ☐ Do not know

3.18. In your opinion, what effects on competition can be caused by the double dipping?

3.19. Based on your experience or knowledge, what measures could be implemented in the Guidelines to prevent double dipping and ensure that licensees are not charged multiple times for the same patents when they deal with technology pools?

Final remarks

3.20. Are there any other concerns or suggestions you have regarding the guidance provided in the Guidelines on technology pools that have not been addressed by the previous questions?

The definition of (standard) essential technology should take into account the definitions in the context of SEP foreseen in the draft Regulation COM (2023) 232 of 27 April 2023 (even if it has been discarded by now) given that it reflects the developments around SEP up to date.

**Licensing negotiation groups (LNG)**

**Licensing Negotiation Groups (LNG)** are arrangements under which technology implementers agree to negotiate jointly the terms of technology licences.

The evaluation indicates that, under certain conditions, LNGs can create efficiencies, notably by reducing transaction costs, but that they can also raise competition concerns, for example they may restrict competition between the participating implementers in downstream markets. The rules do not currently provide guidance on the competition law assessment of LNGs.

The questions in this section concern such LNGs, and their possible pro-competitive and anti-competitive effects.

3.21. Do you have experience of technology licensing negotiations in which two or more potential licensees negotiated jointly/adopted a joint negotiating position?

- ☒ Yes, as an owner of a technology right
- ☒ Yes, as a potential licensee
- ☐ No

3.22. In your view, should the Commission provide guidance for the assessment of LNGs under Article 101 of the Treaty?

- ☒ Yes
- ☐ No
- ☐ Do not know

3.23. Based on your experience or knowledge, which of the following possible anti-competitive effects would LNGs generate in the markets where they operate? (multiple replies possible)

- ☐ Higher prices for the downstream products
- ☐ Lower quality or less choice for the downstream products
- ☐ Lower innovation in the market, due to less R&D investment by the technology right holders
- ☐ Lower innovation in the market, due to less innovation by licensees (including follow-on innovation)
- ☐ Other

3.24. Based on your experience or knowledge, which of the following possible pro-competitive effects would LNG generate in the markets where they operate? (multiple replies possible)

- ☒ Lower prices for the downstream products
- ☒ Higher quality or more choice for the downstream products
- ☐ Higher innovation in the market, due to more R&D investment by the technology right holders
- ☒ Higher innovation in the market, due to more innovation by licensees (including follow-on innovation)
- ☐ Other

3.25. In your opinion, are licence negotiations involving a LNG likely to result in higher, lower or the same level of royalties, compared to a negotiation where the licensees negotiate individually?

Lower royalties due to LNG's combined bargaining power.

3.25.1. If you replied that negotiations with LNG result in higher or lower royalty, in your opinion would this lead to pro-competitive or anti-competitive effects in the market involved? Why?

Potentially pro-competitive as potential impact on downstream product prices, but this needs to be assessed depending on the relevance of the licensed technology to the downstream product (% of production costs, etc.).

3.26. Based on your experience or knowledge, which of the following factors are relevant for assessing whether a LNG complies with Article 101 of the Treaty? (multiple replies possible)

|                                                                                                                                                      | Relevant for the Assessment under Article 101(1) | Relevant for the Assessment under Article 101(3) | Do not know                         |
|------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------|--------------------------------------------------|-------------------------------------|
| Potential licensees are actual or potential competitors on downstream product markets                                                                | <input checked="" type="checkbox"/>              | <input type="checkbox"/>                         | <input type="checkbox"/>            |
| Aggregate share of the potential licensees of total demand for the licensed technology and its substitutes                                           | <input checked="" type="checkbox"/>              | <input type="checkbox"/>                         | <input type="checkbox"/>            |
| Aggregate market share of the potential licensees in downstream product markets                                                                      | <input checked="" type="checkbox"/>              | <input type="checkbox"/>                         | <input type="checkbox"/>            |
| The cooperation between potential licensees is secret towards the potential licensor(s)                                                              | <input type="checkbox"/>                         | <input type="checkbox"/>                         | <input checked="" type="checkbox"/> |
| Licensees are free to continue to negotiate bilaterally with the technology right holder                                                             | <input type="checkbox"/>                         | <input checked="" type="checkbox"/>              | <input type="checkbox"/>            |
| Licensees are bound to accept the conditions agreed between the LNG and the technology right holder                                                  | <input type="checkbox"/>                         | <input checked="" type="checkbox"/>              | <input type="checkbox"/>            |
| Licensees agree not to enter into licensing agreements with the technology right holder during the negotiations between the LNG and the right holder | <input type="checkbox"/>                         | <input checked="" type="checkbox"/>              | <input type="checkbox"/>            |
| Individual licensees can veto the licensing terms negotiated by the LNG with the technology right holder                                             | <input type="checkbox"/>                         | <input type="checkbox"/>                         | <input type="checkbox"/>            |
| Other factors                                                                                                                                        | <input type="checkbox"/>                         | <input type="checkbox"/>                         | <input type="checkbox"/>            |

3.26.1 If you answered "other factors", please specify your answer.

3.26.2. Please explain your choices, also indicating whether in your opinion some of the factors above are relevant for assessing whether any restriction of competition is “by object” or “by effect”.

All are “by effect” restrictions of competition, if any; as regards the first three factors they could form the basis to create a soft safe harbour under the TT GL.

3.27. In your opinion, does the guidance on joint purchasing agreements provided in Chapter 4 of the Horizontal Guidelines<sup>[1]</sup> provide an appropriate analytical framework for assessing LNG?

[1] Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, (2023/C 259/01), paragraphs 273 onwards.

- ☐ Yes
- ☒ No
- ☐ Do not know

#### **Potential competition**

According to the Guidelines, parties to a technology transfer 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 another valid technology right; a two-way blocking position exists where neither technology right can be exploited without infringing the other valid technology right.

3.28. In your opinion, is the guidance on actual and potential competition provided in the Guidelines sufficiently clear?

- ☒ Yes
- ☐ No
- ☐ Do not know

3.29. In your opinion, is the guidance on blocking positions included in paragraphs 29-33 of the Guidelines sufficiently clear in explaining what is a blocking position and what consequences a blocking position has on competition between the parties?

- ☒ Yes
- ☐ No
- ☐ Do not know

#### Know-how

3.30. In your opinion, which types of information fall within the definition of “trade secret” provided by the Trade Secrets Directive (2016/943) but do not fall in the definition of know-how included in the TTBER?

Information that does not result from experience and testing (Article 1 (i) TTBER)

3.31. Based on your experience or knowledge, is the information you identified in the question above usually licensed in a similar way to know-how? Please explain your answer by providing real-life examples.

#### Guidance on licensing agreements for the purpose of further R&D activity

Recital 7 and Article 9 of the TTBER clarify that licensing in the context of research and development agreements or specialisation agreements that are covered by the Horizontal Block Exemption Regulations [1][2] (“HBERs”) does not fall within the scope of the TTBER. If the licensing is outside the scope of the HBERs, then the TTBER applies as long as the licence permits the licensee to exploit the licensed technology rights, possibly after further research and development, for the purpose of producing goods or services. Paragraph 61 of the Guidelines specifies that where the purpose of the licensing agreement is not to enable the production of a contract product, the analytical framework of the TTBER and the Guidelines may not be appropriate.

[1] Commission Regulation (EU) 2023/1066 of 1 June 2023 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. [2] Commission Regulation (EU) 2023/1067 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements.

3.32. In the last ten years, have you been a party to a licensing agreement (i) whose purpose is limited to the carrying out of further research and development activities by the licensee and not the production of contract products and (ii) that is not covered by either the HBERs or the TTBER?

☒ Yes

☐ No

3.33. Based on your experience/in your opinion, what effects on competition has the licensing of technology rights for the purpose of research and development activities which are not covered by the HBERs?

Pro-competitive, fostering innovation.

3.33.1. Are these effects similar to or different from the effects of the licensing for the purpose of producing contract products? Please explain your answer using concrete examples.

Likely to cause even less restraints of competition because not directly related to the exploitation of the licensed technology, and to foster more innovation.

#### Consideration for exclusive grant backs

Exclusive grant backs are obligations on the licensee to grant to the licensor an exclusive licence of any improvements or new applications of the licensed technology made by the licensee. Exclusive grant backs are excluded from the block exemption of the TTBER, regardless of whether the original licensor pays a consideration to the original licensee for the exclusive licence. The Guidelines specify however at paragraph 130 that the payment of consideration may be a relevant factor when individually assessing an exclusive grant-back under Article 101. In particular, the Guidelines explain that: "When grant backs are made against consideration it is less likely that the obligation creates a disincentive for the licensee to innovate".

3.34. In your opinion, is the explanation provided in the Guidelines on the role of consideration in an individual assessment under Article 101 sufficiently clear?

☒ Yes

☐ No

☐ Do not know

3.35. In your opinion, which of the following elements of the payment of consideration is relevant for the assessment under Article 101 (multiple replies possible):

- ☒ The overall amount of the consideration.
- ☒ The structure of the consideration (lump sum, fixed royalties, etc.)
- ☒ Whether the consideration is calculated on the basis of the value of the improvement.
- ☐ Other

3.35.1. Please explain your reply, including by providing concrete examples where appropriate.

All aspects can affect the licensee's willingness to innovate (the extent of it as well as the timing).

#### Field of use restrictions

The Guidelines explain at paragraph 208 that, 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. The Guidelines then explain when a restriction can be considered a field of use restriction and when, instead, a restriction is to be considered a customer restriction.

3.36. In your opinion, is the definition of field of use restriction provided in the Guidelines sufficiently clear? Does it appropriately cover all types of field of use restrictions?

- ☐ Yes
- ☒ No
- ☐ Do not know

3.37. In your opinion, is the explanation of the differences between field of use restrictions and customer restrictions sufficiently clear?

- ☐ Yes
- ☒ No
- ☐ Do not know

**Settlement Agreements**

Section 4.3 of the Guidelines provides guidance on the assessment of restrictions of competition included in settlement agreements in technology disputes. The guidance concerns inter alia pay-for-delay restrictions, i.e. clauses that 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 cross-licensing clauses in settlement agreements. Since the adoption of the Guidelines in 2014, the Court of Justice of the European Union has delivered a number of judgments that are relevant for this part of the guidance. These judgments include Lundbeck, Generics (UK), Teva and Servier.

3.38. In your opinion, on the basis of the judgments of the Union Courts since the adoption of the TTBER in 2014, are there parts of the guidance on settlement agreements that are not in line with that case law?

- ☐ Yes
- ☒ No
- ☐ Do not know

3.38.1. Please explain your answer. If you answered yes, please clearly indicate which parts of the guidance are not in line with the case law and why.

See 4.1 below.

**4. Additional remarks**

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4.1. Do you have any further comments on this initiative on aspects not covered by the previous questions?

Regarding the issue of “potential competition” (see 3.28 – 3.29 above) it must be aligned with the ECJ decision in Lundbeck (C-591/16 P, para 64).

4.2. If you wish to submit documents (for example, data, research paper, position paper) that you consider to be relevant for a possible revision of the TTBER and the Guidelines, please upload them here. Please make sure that you upload only non-confidential versions. If the uploaded documents support your replies to any of the previous questions, please indicate the numbers of those questions.

Please upload your file(s)

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

4.3. Please indicate whether the Commission services may contact you for further details on the information submitted.

☒ Yes

☐ No

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