

M e m o r a n d u m

To: EPLIT Working Group procedure Law.

Cc: EPLIT Board members

From: Dr. Michael Wallinger

Date: October 19, 2025

File:

Subject: **2025 EU consultation on the revision of EU competition rules on technology transfer agreements - TTBER**

Disclaimer: Over the last 20–30 years, I have dealt with the Block Exemption Regulation for Technology Transfer several times, either when drafting licence agreements for our clients or when preparing expert opinions to check licence agreements' compliance with the Regulation.

However, as I am not an expert in this legal field, I have often consulted experts such as Dr Stephanie Pautke, co-editor of the commentary Block Exemption Regulation for Vertical Agreements (BB Commentary). The following remarks therefore only summarise the assessments of various institutions that I found plausible.

Summary

It would be too time-consuming and beyond our legal competence to draft our own statement on the proposed block exemption regulation. I therefore recommend that we endorse the enclosed position paper No. 13/2025 of the German Bar Association. In my opinion Position Paper No. 13/2025 presents a proposal for improving the Draft Technology Transfer

Block Exemption Regulation (TTBER) and its accompanying Guidelines. Its three key recommendations address shortcomings of the current TTBER and should be supported.

1. Expanding the TTBER to cover data licensing

The paper rightly advocates for extending the TTBER's scope to include the licensing of data and data packages. In digital markets, data have become a critical input for innovation comparable to traditional know-how or intellectual property. The new draft of the commission now expressly address data licensing and explain when data (including databases) fall within the TT framework.

2. Simplifying market-share thresholds

The proposal to abolish the separate market-share threshold for technology markets is pragmatic and justified. While the new draft retains the separate technology-market threshold, there are two important improvements: (i) clearer calculation guidance and (ii) a longer grace period of three years where thresholds are later exceeded.

3. Providing guidance on Licensing Negotiation Groups (LNGs)

Finally, the Position Paper recommends that the revised TTGL include dedicated guidance on **Licensing Negotiation Groups (LNGs)**—collective arrangements of implementers who jointly negotiate licence terms. The new proposal of the EU commission introduces a 'soft safe harbour', which clarifies permissible collective negotiations by implementers subject to safeguards (openness, limited information exchange, no buyer-cartel behaviour). This significantly increases legal certainty, particularly for automotive, IoT and telecoms.

TTBER Comparison Current 2014 Regulation vs. Draft 2025 Regulation¹

Old (2014 TTBER)	New (Draft 2025 TTBER)	Comment on Change
Article 1 — Definitions. Defines 'technology transfer agreement', 'technology rights', 'contract products', 'relevant market', etc.	Article 1 — Definitions. Retains core definitions; aligns terminology with other BERs and clarifies 'active'/'passive' sales references via cross-links; strengthens definitions used later in Articles 3–4 (e.g., competitors/non-competitors; relevant markets).	Substantive scope remains bilateral licensing for production; clearer cross-references improve consistency with VBER and updated Guidelines.
Article 2 — Exemption. Art. 101(1) TFEU does not apply to covered technology transfer agreements, subject to this Regulation.	Article 2 — Exemption. Same structure: safe harbour applies subject to conditions in Articles 3–5 and other provisions.	No material change in the exemption mechanism.
Article 3 — Market-share thresholds.	Article 3 — Market-share thresholds. Thresholds retained: 20%	Core thresholds unchanged; calculation

¹ Sources: EUR-Lex (Regulation (EU) No 316/2014); European Commission Communication C/2025/5024: Draft TTBER as of 16 Sep 2025.

20% (competitors, combined); 30% (non-competitors, each).	(competitors, combined); 30% (non-competitors, each).	clarified in Article 8 and Guidelines.
Article 4 — Hardcore restrictions. Lists object restrictions for competitors and for non-competitors (e.g., price fixing to third parties; output limitations; certain territorial/customer restraints).	Article 4 — Hardcore restrictions. Structure maintained (competitors vs. non-competitors). Text refined and aligned with updated concepts (e.g., active/passive sales terminology).	Continuity with minor drafting clarifications.
Article 5 — Excluded restrictions. (a) Exclusive grant-backs; (b) No-challenge clauses (with limited termination carve-outs); (c) For non-competitors: R&D or own-IP exploitation limitations unless indispensable to protect know-how.	Article 5 — Excluded restrictions. Same three categories retained and explained in greater detail in the Draft Guidelines (e.g., treatment of exclusive grant-backs and termination rights in non-exclusive licences).	Policy unchanged; guidance expanded.
Article 6 — Withdrawal in individual cases. Commission and NCAs may withdraw safe harbour if effects are incompatible with Art. 101(3).	Article 6 — Withdrawal in individual cases. Same grounds (e.g., cumulative foreclosure effects) restated; mirrors 2014 text.	No substantive change.
Article 7 — Non-application (disapplication) of the Regulation. Commission may, by regulation, disapply TTBER where parallel networks with similar restraints cover >50% of a market; ≥6-month lead-time.	Article 7 — Disapplication of this Regulation. Same mechanism and thresholds; drafting modernised; ≥6-month lead-time maintained.	No substantive change.
Article 8 — Application of the market-share thresholds. Method for calculating market shares; look-back year (or 3-year average); technology market share based on combined sales of licensor and licensees; **2-year** grace period if thresholds are later exceeded.	Article 8 — Application of the market-share thresholds. Confirms calculation principles; clarifies that technologies with no prior sales are treated as **zero market share**; extends grace period to **3 years** after first exceedance.	Key change: grace period **2 → 3 years**; explicit 'zero share' rule improves clarity for new technologies.
Article 9 — Relationship with other block exemption regulations. Cross-refers to 2010 R&D (No 1217/2010) and Specialisation (No 1218/2010) BERs.	Article 9 — Relationship with other block exemption regulations. Cross-refers to updated 2023 R&D (EU 2023/1066) and Specialisation (EU 2023/1067) BERs.	Updated legal references only.
Article 10 — Transitional period. 1 May 2014 – 30 April 2015 for agreements compliant with 772/2004 but not with 316/2014.	Article 10 — Transitional period. 1 May 2026 – 30 April 2027 for agreements compliant with 316/2014 but not with the new Regulation.	New one-year transition aligned with 2026 entry into force.
Article 11 — Period of validity. In force 1 May 2014; expires 30 April 2026.	Article 11 — Period of validity. Entry into force 1 May 2026; expiry 30 April 2038.	New 12-year validity window.

Recitals & Scope (selected highlights). Bilateral licensing only; not designed for technology pools; R&D/specialisation licensing covered by sector-specific BERs; distribution-type restraints subject to VBER.	Recitals & Scope (selected highlights). Maintains bilateral scope; explicitly excludes technology pools and Licensing Negotiation Groups (LNGs) from TTBER (they are handled under Guidelines); clarifies exclusion of mere software resale/distribution; aligns references to VBER 2022/720 and Vertical Guidelines.	Important clarifications in recitals rather than article text; operational impact for pools/LNGs (addressed via Guidelines).
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Position Statement of the Max Planck Institute for Innovation and Competition of 25 April 2025

The Max Planck Institute for Innovation and Competition (MPI) in Munich takes a more cautious and academically grounded stance than the German Bar Association (BRAK) regarding the modernization of the TTBER. Whereas the Bar Association urges the expansion and simplification of the TTBER to adapt it rapidly to data-driven markets, the MPI warns against overextending the Regulation's scope before key legal and economic issues are clarified.

1. Data and AI model licensing.

The Bar Association calls for an explicit inclusion of data as “technology” within the TTBER, arguing that data and data packages are essential innovation inputs comparable to know-how. In contrast, the MPI advises against integrating data licensing or AI models into the TTBER at this stage. It proposes developing separate competition-law guidance—potentially under Articles 101 and 102 TFEU—to govern data access, sharing, and refusals to license. The MPI emphasises the complexity of overlapping IP rights (copyright, database, trade-secret, and data-protection laws) and the risk of creating legal uncertainty by forcing data into the TTBER framework. It therefore recommends addressing AI model licensing and data-sharing in distinct instruments rather than amending the TTBER's definition of “technology rights.”

2. Market-share thresholds.

The Bar Association seeks to abolish the dual-market approach and base exemption solely on product-market shares, replacing the technology-market test with a “plus-four” rule or equivalent safeguard. The MPI, however, supports retaining the current dual-threshold structure, albeit with refinement. It suggests moderating the soft safe harbour rule from a “4 +” to a “3 +” benchmark in the Guidelines, not abolishing the concept of technology-market assessment altogether.

3. Licensing Negotiation Groups (LNGs).

Both institutions converge on the need for guidance and a safe harbour for LNGs. The MPI explicitly supports creating a defined safe-harbour regime for joint licence negotiations under Article 101 TFEU, similar to the BRAK's call for explicit TTGL provisions.

Overall evaluation.

The MPI's position is conceptually conservative and research-driven, seeking to preserve the TTBER's focus on classical technology transfer while developing parallel guidance for data, AI, and digital markets under broader competition-law instruments. The Bar Association's paper is pragmatic and industry-oriented, advocating a faster, practice-based adaptation of the TTBER to digital realities. In essence, the MPI calls for separation and caution; the Bar Association presses for integration and simplification.

ACEA² recommendations for Workstream Technological and Digital Innovation

ACEA frames its recommendations around industrial competitiveness and innovation capacity. It argues Europe has fallen behind in key digital building blocks (cloud, OS, chips, LLMs, imaging) and calls for lighter regulatory burdens, and a framework that speeds commercialization of connected/automated mobility. The paper's competition-law asks focus on standard-essential patent (SEP) licensing and concrete adjustments to TTBER that re-balance bargaining power between licensors and implementers.

Specific licensing practice.

ACEA urges that SEP holders be obliged to license at any level (component or vehicle), to restore incentives for EU suppliers and avoid injunction leverage against OEMs; this is framed as critical for fair competition in automotive IoT/connectivity.

ACEA asks to tighten conditions for patent pools run by SEP holders and, symmetrically, to enable Licensing Negotiation Groups (LNGs) for implementers "under similar conditions," i.e., a soft safe harbour for lawful collective negotiations (openness, limited info exchange, no buyer-cartel conduct).

ACEA requests rapid approval of an ACEA privacy code of conduct for automated driving and simplification of regulatory reporting (greater reliance on manufacturer certification).

Where BRAK pushes legal-framework simplification and scope expansion, ACEA presses implementation-side fixes that unlock SEP licensing and reduce regulatory friction (any-level licensing mandate; stricter pool rules; LNG safe harbour).

signed

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² ACEA stands for the European Automobile Manufacturers' Association (Association des Constructeurs Européens d'Automobiles) and is the main industry association representing Europe's car, van, truck, and bus manufacturers.