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From: Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director

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To: Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union

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Subject: COMMISSION STAFF WORKING DOCUMENT EXECUTIVE SUMMARY OF THE EVALUATION Evaluation of Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements

Delegations will find attached document SWD(2024) 269 final.

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COMMISSION STAFF WORKING DOCUMENT
EXECUTIVE SUMMARY OF THE EVALUATION

Evaluation of Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements

{SWD(2024) 268 final}

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Introduction

The purpose of the Staff Working Document is to evaluate Commission Regulation 316/2014¹ on the application of Article 101(3) of the Treaty on the Functioning of the European Union ('the Treaty') to technology transfer agreements (the Technology Transfer Block Exemption Regulation, or TTBER), together with the accompanying guidelines on the application of Article 101 of the Treaty to technology transfer agreements (TTGL)².

Technology transfer agreements are agreements by which one party authorises another to use its technology rights to produce goods or services. Technology rights include patents, know-how, copyright in software and certain other intellectual property rights. Technology transfer agreements can improve economic efficiency by facilitating the diffusion of technology, incentivising research and development, promoting incremental innovation and generating product market competition. However, they can also have negative effects on competition, as they may facilitate collusion or harm inter- or intra-technology competition, for example by reducing the incentives to innovate.

Article 101(1) of the Treaty prohibits agreements between undertakings that restrict competition. As an exception to this rule, Article 101(3) of the Treaty provides that the prohibition may be declared inapplicable if such agreements contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, and do not impose restrictions which are not indispensable or eliminate competition in respect of a substantial part of the products concerned. With Regulation (EEC) 19/65³, the Council empowered the Commission to apply by regulation Article 101(3) of the Treaty to certain categories of technology transfer agreements. On this basis, the Commission adopted the TTBER, which came into force on 1 May 2014, replacing a previous version of that regulation dating from 2004.

The TTBER has the objective of exempting from the prohibition set out in Article 101(1) of the Treaty certain categories of technology transfer agreements for which it may be presumed with sufficient certainty that they satisfy the conditions laid down in Article 101(3) of the Treaty. In particular, the TTBER exempts technology transfer agreements if the following *cumulative* conditions are met:

- The market shares of the parties to the agreement do not exceed the following thresholds on the relevant technology and product markets: a combined market share

¹ Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, OJ L 93, 28.3.2014, p. 17.

² Communication from the Commission - Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, OJ 89, 28.3.2014, p. 3.

³ Regulation No 19/65/EEC of 2 March of the Council on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices, OJ 36, 6.3.1965, p. 35, as amended by Council Regulation (EC) No 1215/1999 of 10 June 1999, OJ L 148, 15.6.1999, p. 1.

of 20% for agreements between competitors, and individual market shares of 30% for agreements between non-competitors.

- The agreement does not include certain severe restrictions of competition (known as 'hardcore restrictions'), including price restrictions, limitations of output, or the allocation of markets or customers. Where a technology transfer agreement contains a hardcore restriction of competition, the whole agreement falls outside the block exemption.

The TTBER also contains a short list of excluded restrictions: these restrictions are not covered by the block exemption, but their inclusion in an agreement does not prevent the rest of the agreement from benefiting from the exemption, if the remainder is severable from the excluded restriction(s).

The TTGL provide guidance on the application of the TTBER and on the individual assessment under Article 101 of the Treaty of technology transfer agreements that fall outside the block exemption. The TTGL also (i) include a safe harbour for technology transfer agreements that fall outside the block exemption where the agreement does not contain hardcore restrictions and there are at least four other independently controlled technologies that are substitutable for the licensed technology ('the 4+ test')⁴; and (ii) set out conditions, which, if respected, will in general mean that the setting-up and operation of a technology pool will fall outside the scope of the prohibition in Article 101(1) of the Treaty.

The TTBER is due to expire on 30 April 2026. In line with the 'evaluate first' principle under the Commission's Better Regulation agenda, the TTBER should be evaluated before it expires, so that the Commission can decide whether to let it expire or extend it, with or without modifications.

Methodology

The evaluation is based on data from numerous sources. Evidence was gathered through the following consultation activities: a call for evidence, a public consultation, a specific consultation of national competition authorities, a stakeholder workshop and an external evaluation support study.

Evaluation findings

To what extent was the intervention successful and why?

Effectiveness: overall, the feedback gathered from the evaluation activities points to the TTBER having been effective in meeting its objectives, namely: (i) exempting technology transfer agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty; and (ii) providing legal certainty for undertakings. The same can be said for the TTGL.

⁴ TTGL, paragraph 157. The substitute technologies must be available to users at a comparable cost.

The evidence collected shows that the first objective has generally been achieved. In particular, the evaluation indicates that the TTBER does not block-exempt technology transfer agreements that would likely not meet the conditions of Article 101(3) of the Treaty. On the other hand, the evaluation provided indications that the TTBER currently does not cover agreements that may deserve to fall within the block exemption, in particular licences of at least certain types of data or data rights.

The evidence collected also confirms that the rules remain generally clear and comprehensible and that, therefore, the second objective of providing legal certainty has generally been achieved. The TTBER and the TTGL are helpful to undertakings both in providing a legal safe harbour, which is particularly important for smaller companies entering into licensing agreements, given that their agreements will often not fall under the prohibition of Article 101 of the Treaty, and in providing clear guidance to both smaller and larger undertakings on how to self-assess their technology transfer agreements under competition law. This also concerns specifically the changes made to the TTBER and TTGL in 2014. The instruments continue to ensure a uniform and reliable approach to the assessment of technology licensing agreements under competition law.

Nonetheless, some stakeholders considered that certain areas of the TTBER and TTGL provide insufficient legal certainty. Notably, the evaluation indicates that: (i) a significant number of stakeholders face practical difficulties when applying the TTBER's market share thresholds for technology markets; (ii) while the safe harbour provided by the 4+ test in the TTGL remains useful for stakeholders, a lack of available information on competing technologies may create practical difficulties for stakeholders when they apply it; and (iii) although the safe harbour provided in the TTGL for the creation and operation of technology pools has generally worked well, its conditions might not be fully effective in ensuring that the protection offered by the safe harbour is reserved for technology pools that fall outside the prohibition in Article 101(1) of the Treaty. This appears to be partly due to changes that have occurred in the last 10 years in how technology pools operate and in how they deal with issues like transparency.

Efficiency: overall, the evaluation indicated that the TTBER and the TTGL are efficient in reducing compliance costs for companies wishing to enter into technology transfer agreements. The evidence showed that, without these instruments, undertakings would most likely face an increase in the cost of assessing the compliance of their technology transfer agreements with Article 101 of the Treaty.

Coherence: the evaluation indicates that the TTBER and TTGL are generally consistent with other EU competition instruments, with only limited inconsistencies with the revised version of the horizontal⁵ and vertical⁶ block exemption regulations highlighted.

⁵ 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, C/2023/3443, OJ L 143, 2.6.2023, p. 9; and Commission Regulation (EU) 2023/1067 of 1 June 2023 on the

Moreover, the evidence collected indicates that the approaches of the TTBER and TTGL, on the one hand, and the proposed SEPs regulation⁷, on the other, are not incompatible, but rather complementary, as the two sets of instruments have different objectives.

How did the EU intervention make a difference and to whom?

EU added value: The evidence gathered suggests that the TTBER and TTGL have added value compared to what could have been achieved by regulations or guidelines at national level. The feedback showed that the TTBER has created a level playing field across EU Member States for the competition law assessment of technology transfer agreements, which also facilitates market integration.

Is the intervention still relevant?

Relevance: the evaluation indicates that the objectives of the TTBER and the TTGL remain relevant, and that the provisions included in the two instruments remain generally appropriate to meet their objectives. That said, the feedback also highlighted certain market developments, in particular in the digital economy and in technology markets, that may have an impact on the continued relevance of the TTBER and TTGL in meeting their objectives. These trends raise questions about the scope of the block exemption, in particular in relation to the absence of licensing of data or data rights, and the scope and content of the TTGL, in particular in relation to technology pools and LNGs.

Conclusions

The evaluation indicates that the TTBER and TTGL have met their objectives during the period of their application and that they are efficient in doing so. In particular, they ensure that only agreements that meet the conditions of Article 101(3) of the Treaty are block-exempted, and that undertakings are able to self-assess the compliance of their technology transfer agreements with Article 101 of the Treaty with adequate legal certainty.

Furthermore, these objectives remain relevant, as the evaluation confirms the need for a block exemption regulation and guidance for applying Article 101 of the Treaty to technology transfer agreements.

However, the evaluation also points to some aspects of the current rules that may not provide sufficient legal certainty. This may impact undertakings' ability to assess the compliance of their technology transfer agreements with Article 101 of the Treaty.

application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, C/2023/3448, OJ L 143, 2.6.2023, p. 20.

⁶ Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, C/2022/3015, OJ L 134, 11.5.2022, p. 4.

⁷ COM(2023)232 - Proposal for a regulation of the European Parliament and of the Council on standard essential patents and amending Regulation (EU) 2017/1001. The text of the Proposed Draft Regulation is available here: https://single-market-economy.ec.europa.eu/publications/com2023232-proposal-regulation-standard-essential-patents_en