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## **COMMISSION STAFF WORKING DOCUMENT**

### **EVALUATION**

**Evaluation of Commission Regulation (EU) N° 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) 269 final}

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## GLOSSARY

<i>Term or acronym</i>	<i>Meaning or definition</i>
Commission	European Commission
Council	Council of the European Union
DG Competition	Directorate-General for Competition of the European Commission
EEA	European Economic Area
EFTA	European Free Trade Association
EU	European Union
FTE	Full-time equivalent
LNG	Licensing Negotiation Group
NCA	A Member State's national competition authority
TFEU or the Treaty	Treaty on the Functioning of the European Union
TTBER or 'the Regulation'	Technology Transfer Block Exemption Regulation
TTGL or 'the guidelines'	Technology Transfer Guidelines
2004 TTBER	The previous version of the Technology Transfer Block Exemption Regulation which entered into force on 1 May 2004

## 1. INTRODUCTION

Article 101(1) of the Treaty on the Functioning of the European Union ('the Treaty' or TFEU) 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.

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. In most cases, technology transfer agreements take the form of licence agreements, whereby one party (the licensor) grants the right to use its technology to another party (the licensee) for the purpose of producing goods or services, while keeping the ownership of the technology<sup>1</sup>.

Technology transfer agreements can improve economic efficiency by facilitating the diffusion of technology, incentivising research and development ('R&D'), promoting incremental innovation and generating competition in product markets. 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 do fall within Article 101(1), they create objective efficiencies that are passed on to consumers and meet all of the four cumulative conditions of Article 101(3) of the Treaty. However, technology transfer agreements, or certain clauses in such agreements, can also have negative effects on competition. In particular, they may facilitate collusion, restrict the ability of competitors to enter or expand in the market, or harm inter- or intra-technology competition, for example by reducing the incentives to innovate.

In 1965, the Council adopted Regulation (EEC) 19/65<sup>2</sup>, which empowers the Commission to apply Article 101(3) of the Treaty, by regulation, to 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. On this basis, the Commission adopted Commission Regulation 316/2014<sup>3</sup>, on the application of Article 101(3) of the Treaty to technology transfer agreements (the Technology Transfer Block Exemption Regulation, or TTBER), which came into force on 1 May 2014, replacing a previous version of that regulation dating from 2004.

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<sup>1</sup> Alternatively, technology transfer agreements can take the form of assignments, whereby one party (assignor) assigns the ownership of its technology to another party (assignee). In order to benefit from the block exemption provided by Commission Regulation No 316/2014 (see footnote 3), the assignment agreement must establish that part of the risk associated with the exploitation of the technology remains with the assignor.

<sup>2</sup> 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.

<sup>3</sup> 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.

The TTBER exempts from the application of Article 101(1) of the Treaty technology transfer agreements by which one undertaking assigns or licenses to no more than one other undertaking certain intellectual property rights for the purpose of producing goods or services (referred to as 'contract products'). The IP rights covered include certain industrial property rights, including patents, utility models and design rights, as well as copyright in computer software. The TTBER also covers know-how that is secret, substantial and identified.

Technology transfer agreements can only benefit from an exemption under the TTBER if: (i) the market shares of the parties to the agreement do not exceed certain thresholds; and (ii) the agreement does not include hardcore restrictions<sup>4</sup>.

The TTBER is accompanied by guidelines on the application of Article 101 of the Treaty to technology transfer agreements ('the guidelines' or TTGL)<sup>5</sup>. The TTGL provide guidance on the assessment of technology transfer agreements under Article 101 of the Treaty and include 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 is unlikely if there are at least four other independently controlled technologies that are sufficiently substitutable for the licensed technology at a comparable cost to the user ('the 4+ test')<sup>6</sup>. The guidelines are without prejudice to the case law of the EU courts on the application of Article 101 of the Treaty<sup>7</sup>.

The current version of the TTBER will expire on 30 April 2026. In line with the 'evaluate first' principle of the Commission's Better Regulation agenda<sup>8</sup>, the TTBER has been evaluated to enable the Commission to decide whether to let it expire or to extend it, with or without amendments.

This evaluation coincides with the publication of the Draghi report<sup>9</sup>, and the Political Guidelines for the next European Commission 2024-2029<sup>10</sup> which emphasise the importance of innovation as a key driver of competitiveness in the EU and the need to foster technological progress and put research and innovation at the heart of the EU economy. Technology transfer agreements have an important role to play in fostering technological progress, as they facilitate the diffusion of technology and strengthen incentives to innovate<sup>11</sup>.

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<sup>4</sup> Hardcore restrictions are serious restrictions of competition that will, in general, cause harm to the market and consumers, such as price fixing or output restriction.

<sup>5</sup> 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.

<sup>6</sup> TTGL, paragraph 157.

<sup>7</sup> TTGL, paragraph 4.

<sup>8</sup> See Section II.3 of the European Commission 2019-2024 Working Methods; see also [Better Regulation Toolbox](#) dated July 2023, Tool #45 – What is an evaluation and when it is required.

<sup>9</sup> The future of European competitiveness – A competitiveness strategy for Europe: [https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead\\_en](https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en)

<sup>10</sup> [https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648\\_en?filename=Political%20Guidelines%202024-2029\\_EN.pdf](https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdf)

<sup>11</sup> See TTBER, recital 4.



This evaluation report, in the form of a Staff Working Document, reflects the findings and views of the Commission's staff and does not necessarily reflect the formal position of the Commission itself. The following sections set out the purpose of the evaluation (Section 1.1) and its substantive and geographic scope (Section 1.2).

## 1.1 Purpose of the evaluation

The purpose of this evaluation was to gather evidence on the functioning of the TTBER, to enable the Commission to decide – in view of the expiry of the TTBER on 30 April 2026 – whether to let the Regulation expire or to extend it, with or without amendments, taking account of developments that have occurred since its adoption in 2014. The TTGL were also included in the scope of this evaluation.

As required by the Better Regulation Guidelines<sup>12</sup>, the evaluation examined whether the objectives of the TTBER and TTGL have been met during the period of their application (effectiveness) and continue to be appropriate (relevance), and whether the TTBER and TTGL, taking into account the costs and benefits associated with their application, are efficient in achieving their objectives (efficiency). It also considers whether the TTBER and TTGL, as legislation at EU level, have provided added value (EU added value) and are consistent with other Commission instruments relating to the application of Article 101 of the Treaty, as well as other EU legislation affecting technology transfer agreements (coherence).

Since the TTBER entered into force in May 2014, there have been market developments linked to technical progress, in particular digitalisation, including the increased importance of data and the recent emergence of artificial intelligence. In addition, multiple sectors of the economy are affected by the green transition, partly driven by the European Green Deal<sup>13</sup>. In view of these developments, it is necessary to assess whether the TTBER and TTGL are still relevant, in particular whether they still achieve the objective of providing legal certainty to stakeholders when they assess technology transfer agreements under Article 101 of the Treaty.

To gather evidence for the evaluation, the following consultation activities were organised: a call for evidence, a public consultation, a specific consultation of national competition authorities (NCAs), a stakeholder workshop and an evaluation support study "Support study for the evaluation of the Technology Transfer Block Exemption Regulation" (2024) ('the study'), carried out by a consortium consisting of LE Europe, European University Institute, Spark Legal and Ramboll<sup>14</sup>.

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<sup>12</sup> Commission Staff Working Document, Better Regulation Guidelines, 3.11.2021, SWD (2021) 305 final.

<sup>13</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – The European Green Deal, 11.12.2019, COM(2019) 640 final.

<sup>14</sup> The study supported the evaluation by providing evidence on the functioning of the TTBER and TTGL, with a focus on four evaluation criteria: effectiveness, efficiency, relevance and coherence. The study contractor was tasked with gathering evidence on the functioning of the TTBER and TTGL since their entry into force in 2014, for all Member States. More information can be found in Annex I below. The study has been published by the Commission on its website, and can be found on the TTBER review webpage of DG Competition website ([here](#)).

## 1.2 Scope of the evaluation

The substantive scope of the evaluation includes the TTBER and the TTGL in their entirety. The evaluation covers the period between the TTBER's entry into force in May 2014 and the date of drafting of this document (June 2024).

The geographic scope of the evaluation extends to all EU Member States. Article 101(1) of the Treaty is directly applicable in all Member States by virtue of the case law of the Court of Justice of the European Union.

Regulation (EC) No 1/2003<sup>15</sup> created a system of parallel competences in which the competition authorities and the courts of the Member States, alongside the Commission, have the power to apply not only Article 101(1), but also Article 101(3) of the Treaty<sup>16</sup>. When assessing the compatibility of technology transfer agreements with Article 101 of the Treaty, NCAs and national courts are bound by the directly applicable provisions of the TTBER. The TTGL bind the Commission<sup>17</sup>, but do not bind NCAs or national courts, though NCAs and national courts typically take the TTGL into account when assessing the compatibility of technology transfer agreements with Article 101 of the Treaty.

## 2. WHAT WAS THE EXPECTED OUTCOME OF THE INTERVENTION?

This section provides a description of the TTBER and TTGL and their objectives, including the main changes made to these instruments in the last revision (Section 2.1) and the points of comparison against which the TTBER and TTGL have been evaluated (Section 2.2).

### 2.1. Description of the intervention and its objectives

#### 2.1.1. Block exemption regulations in EU antitrust law

Under Article 3 of the Treaty, the establishing of the competition rules necessary for the functioning of the internal market is an exclusive competence of the European Union.

The purpose of the competition rules enshrined in the Treaty (notably Articles 101 and 102 of the Treaty) and related secondary EU law (such as Commission regulations) and soft law (such as Commission notices and guidelines) is to prevent competition from being distorted to the detriment of consumers, thereby contributing to the achievement of an integrated single market<sup>18</sup>.

Article 101(1) of the Treaty prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between

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<sup>15</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1 ('Regulation (EC) No 1/2003').

<sup>16</sup> Regulation (EC) No 1/2003, recital 4.

<sup>17</sup> See, for example, judgment of 28 June 2005, Dansk Rørindustri A/S, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 211; judgment of 13 December 2012, Expedia Inc. v Autorité de la concurrence and Others, C-226/11, EU:C:2012:795, paragraph 28.

<sup>18</sup> See, for example, judgment of 17 February 2011, TeliaSonera Sverige, C-52/09, EU:C:2011:83, paragraph 22; judgment of 12 May 2024, Servizio Elettrico Nazionale and Others, C-377/20, EU:C:2022:379, paragraphs 41 and 44.



Member States and which have as their object or effect the prevention, restriction or distortion of competition.

By way of exception, Article 101(3) of the Treaty provides that the prohibition contained in Article 101(1) of the Treaty may be declared inapplicable to agreements that fulfil four cumulative conditions. They must: (i) contribute to improving the production or distribution of goods or to promoting technical or economic progress; (ii) while allowing consumers a fair share of the resulting benefits. Moreover: (iii) they must not impose restrictions that are not indispensable to the attainment of the aforementioned objectives; and (iv) must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products concerned<sup>19</sup>.

The assessment of agreements under Article 101 of the Treaty therefore involves a two-step analysis:

- i. The first step is the assessment under Article 101(1) of the Treaty, aimed at verifying whether an agreement between undertakings that is capable of affecting trade between Member States restricts competition. That is the case if the agreement reveals a sufficient degree of harm to competition, such that there is no need to examine its actual or potential effects ('restriction by object') or, in the absence of such obvious harm to competition, if the agreement results in actual or potential anti-competitive effects in the market ('restriction by effect')<sup>20</sup>.
- ii. The second step, which is only necessary where an agreement is found to restrict competition within the meaning of Article 101(1) of the Treaty, is the assessment under Article 101(3) of the Treaty to determine whether the agreement fulfils the four conditions of the exception. For this assessment, it is necessary to identify the pro-competitive benefits produced by the agreement and assess whether these benefits outweigh the anti-competitive effects resulting from the agreement<sup>21</sup>.

In 1965, the Council adopted the 'Empowerment Regulation' to facilitate the enforcement work of the Commission, empowering it to declare by way of regulation that Article 101(1) of the Treaty does not apply to certain categories of agreements, including certain technology transfer agreements<sup>22</sup>.

This type of Commission regulation is generally referred to as a 'block exemption regulation' and aims to exempt from the prohibition set out in Article 101(1) of the Treaty those categories of agreements for which it may be presumed with sufficient certainty that they satisfy the conditions laid down in Article 101(3).

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<sup>19</sup> See Commission Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97, paragraph 9. With effect from 1 December 2009, Article 81 of the EC Treaty became Article 101 of the Treaty on the Functioning of the European Union.

<sup>20</sup> See, for example, judgment of 21 December 2023, European Superleague Company SL, C-333/21, paragraphs 158-170.

<sup>21</sup> The Guidelines on the application of Article 81(3) of the Treaty (see footnote 19) set out the Commission's interpretation of the four conditions of the Article 101(3) exception. Those Guidelines provide an analytical framework for applying Article 101(3) in individual cases (see paragraphs 4-5).

<sup>22</sup> 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. 533.

The Commission has made use of this empowerment by adopting various block exemption regulations, including for technology transfer agreements.

Since the modernisation of the EU antitrust rules in 2003, companies may no longer notify restrictive agreements to the Commission to obtain a comfort letter or an individual exemption decision. They must self-assess the compliance of their agreements with Article 101 of the Treaty. Block exemption regulations provide a simplified set of rules for companies to conduct this self-assessment. They therefore reduce the compliance burden for agreements that meet the conditions of the block exemption. Neither Article 101 of the Treaty nor block exemption regulations impose reporting obligations on companies.

#### *2.1.2. The previous versions of the TTBER*

The first block exemption regulations for technology licensing agreements were adopted by the Commission in the 1980s. In particular, the Commission adopted a block exemption regulation for patent licensing agreements in 1984<sup>23</sup> and a block exemption regulation for know-how licensing agreements in 1989<sup>24</sup>.

Both these regulations were repealed in 1996, when the Commission adopted a single block exemption regulation for technology transfer agreements.<sup>25</sup> The goal of that regulation was to harmonise and simplify the rules on patent licensing agreements and know-how licensing agreements, to encourage the dissemination of technical knowledge in the EU and to promote the manufacture of technically more sophisticated products<sup>26</sup>.

In 2004, the Commission adopted a new block exemption regulation for technology transfer agreements (the '2004 TTBER'). The 2004 TTBER introduced some substantial changes, which have been maintained in the subsequent version of the regulation (i.e. the TTBER, which is currently being evaluated). First, in line with the more modern economic effects-based approach to the application of Article 101, the 2004 TTBER introduced general market share thresholds, which, if exceeded by the parties to the technology transfer agreement, cause the agreement to fall outside the block exemption. Second, the 2004 TTBER listed a limited number of severe restrictions of competition ('hardcore restrictions'), which, if included in the agreement, likewise cause the entire agreement to fall outside the block exemption. Third, in line with the modernisation of the rules implementing Articles 101 and 102<sup>27</sup>, the 2004 TTBER eliminated: (i) the 'black, grey and white' lists for licensing clauses, which previously classified restrictions of competition in technology transfer agreements as exempted or non-exempted; and (ii) the notification system, which required the parties to technology transfer agreements

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<sup>23</sup> Commission Regulation (EEC) No 2349/84 of 23 July 1984 on the application of Article 85 (3) of the Treaty to certain categories of patent licensing agreements.

<sup>24</sup> Commission Regulation (EEC) No 556/89 of 30 November 1988 on the application of Article 85 (3) of the Treaty to certain categories of know-how licensing agreements.

<sup>25</sup> Commission Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85 (3) of the Treaty to certain categories of technology transfer agreements.

<sup>26</sup> *Ibidem*, recital 3.

<sup>27</sup> See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25, which repealed Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 81 and 82(4) of the Treaty.



(who wished to obtain an exemption) to notify to the Commission those restrictions of competition that were not included in the above-mentioned lists.

In 2014, the Commission adopted the current TTBER, following a revision of the 2004 TTBER (see Section 2.1.4).

### 2.1.3. *The TTBER and the TTGL*

The current version of the TTBER entered into force on 1 May 2014.

As explained in the Introduction (Section 1, above), most technology transfer agreements do not restrict competition. Indeed, technology transfer agreements often have positive effects, in that they strengthen the incentives to innovate, reduce duplication in R&D and promote innovation by allowing innovators to earn returns to cover their R&D costs. Technology transfer agreements also facilitate the diffusion of innovation, reduce production costs, result in improved products and generate competition in product markets. Licensing agreements are also capable of removing obstacles to the development and exploitation of the licensee's own technology, creating design freedom and removing the risk of infringement claims by the licensor. The efficiencies often stem from the combination of the complementary assets and technologies of the licensor and licensee. This type of cooperation can lead to cost/output configurations that would otherwise not be possible. For instance, the combination of the licensor's improved technology with the licensee's more efficient production or distribution assets may reduce production costs or lead to higher quality products.

On the other hand, as also recognised by international agreements<sup>28</sup>, licensing agreements can also result in negative effects on competition in the market. In particular, technology transfer agreements may facilitate collusion; they may foreclose competitors from the market, by raising barriers to entry (e.g. by restricting their access to essential inputs or raising their costs), or they may reduce inter- or intra-technology competition. This creates obstacles to market integration and harms consumers through higher prices, lower output, less product variety, lower product quality and less innovation.

However, even those licensing agreements that restrict competition may give rise to efficiencies, and may therefore be exempted under Article 101(3) of the Treaty, provided that they create objective economic benefits for consumers and that their pro-competitive effects outweigh the restrictive effects of the agreement on competition.

In this context, the **objectives** of the TTBER are the following: (i) to ensure the effective protection of competition, in particular by exempting only those technology transfer agreements for which it can be presumed with sufficient certainty that they meet the conditions of Article 101(3) of the Treaty; and (ii) to provide adequate legal certainty to companies.

In light of the above, the TTBER block-exempts – by disapplying the prohibition set out in Article 101(1) of the Treaty – those technology transfer agreements that fulfil certain conditions (Article 2 of the TTBER). The block exemption is based on the presumption that this category of agreements, to the extent that they are caught by Article 101(1), fulfils the conditions of Article 101(3) of the Treaty.

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<sup>28</sup> See for example Article 40, paragraph 1, of the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS agreement).

The exemption is subject to a number of conditions, which vary depending on whether or not the parties to the agreement are competitors. This reflects the fact that, in general, agreements between competitors pose a higher risk of anti-competitive effects (for example, licensing between competitors can facilitate collusion; by increasing transparency in the market, reducing the incentives to compete, or creating a high degree of commonality of costs between the parties). Consequently, the TTBER contains stricter conditions for agreements between competitors, in particular where the agreement is reciprocal, whereas the TTBER applies a more lenient approach for agreements between non-competitors.

Against this background, the TTBER exempts technology transfer agreements if the following *cumulative* conditions are met:

- i) The **market shares** of the parties to the agreement do not exceed the **thresholds** set out in the TTBER on relevant technology and product markets, namely a combined market share of 20% for agreements between competitors and individual market shares of 30% for agreements between non-competitors (Article 3 of the TTBER). The TTBER clarifies in Article 8 how market shares in the relevant product and technology markets(s) are calculated; and
- ii) The agreement does not include certain severe restrictions of competition (**'hardcore restrictions'**), including price restrictions, limitations of output, or the allocation of markets or customers. These hardcore restrictions are listed in Article 4<sup>29</sup>, together with specific exceptions<sup>30</sup>. Where a technology transfer agreement contains a hardcore restriction of competition, the whole agreement falls outside the block exemption.

Article 5 of the TTBER sets out a short list of **excluded restrictions**: these restrictions are not covered by the block exemption, which means that their compatibility with Article 101 of the Treaty must be assessed individually, but their inclusion in an agreement does not prevent the rest of the agreement from benefiting from the exemption if it is severable from the excluded restriction(s). This list of excluded restrictions includes: (i) clauses that transfer rights in any improvements of the licensed technology made by the licensee exclusively to the licensor (exclusive grant-backs); and (ii) clauses forbidding the licensee from challenging the validity of the licensed technology (non-challenge and termination-on-challenge clauses)<sup>31</sup>.

Other provisions of the TTBER set out; (i) the conditions under which the Commission and the NCAs may withdraw the benefit of the block exemption in individual cases

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<sup>29</sup> The following are hardcore restrictions where the technology transfer agreement is made *between competitors*: (a) price fixing; (b) output limitation; (c) allocation of markets or customers; (d) restricting licensees from exploiting their own technology; and (e) restricting the parties from carrying out R&D. For technology transfer agreements *between non-competitors*, the hardcore list is shorter and only includes: (a) price fixing; (b) restrictions of passive sales by the licensee; and (c) restrictions of sales by the licensee to end-users when the licensee is a member of a selective distribution system.

<sup>30</sup> Agreements containing these excepted restrictions can benefit from the block exemption.

<sup>31</sup> In addition, Article 5(2) sets out a specific excluded restriction for technology transfer agreements between *non-competitors*, which mirrors the hardcore restrictions listed at points (d) and (e) in footnote 29 for agreements between competitors.



(Article 6 of the TTBER)<sup>32</sup>; (ii) the conditions under which the Commission may declare that the TTBER shall not apply to agreements containing specific restrictions in a particular market (Article 7 of the TTBER)<sup>33</sup>; and (iii) the relationship between the TTBER and other block exemption regulations in the field of R&D and specialisation (Article 9 of the TTBER)<sup>34</sup>.

To provide additional guidance on the application of Article 101 of the Treaty to technology transfer agreements, the Commission also published the TTGL in 2014. The TTGL explain that, where a technology transfer agreement falls outside the safe harbour provided by the block exemption, for example because the market shares of the parties exceed the thresholds set out in the TTBER, the agreement does not necessarily fall within the prohibition of Article 101(1) of the Treaty or fail to fulfil the conditions of the Article 101(3) exception. The consequence of an agreement falling outside the block exemption is simply that an individual assessment is required in order to determine whether the agreement complies with Article 101.

For that reason, in addition to providing explanations on how to apply the TTBER<sup>35</sup>, the TTGL give guidance on the application of Article 101 to technology transfer agreements that fall outside the block exemption, thereby helping undertakings to carry out the individual assessment mentioned above<sup>36</sup>. In addition, the TTGL include specific sections on: (i) the assessment of settlement agreements, where guidance is provided on certain restrictions included in agreements to settle disputes about technology rights;<sup>37</sup> and (ii) the assessment of technology pools, namely arrangements whereby two or more parties assemble a package of technology rights and license them not only to contributors to the

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<sup>32</sup> Article 6 provides: '1. The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Regulation (EC) No 1/2003, where it finds in any particular case that a technology transfer agreement to which the exemption provided for in Article 2 of this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty, and in particular where: (a) access of third parties' technologies to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements prohibiting licensees from using third parties' technologies; (b) access of potential licensees to the market is restricted, for instance by the cumulative effect of parallel networks of similar restrictive agreements prohibiting licensors from licensing to other licensees or because the only technology owner licensing out relevant technology rights concludes an exclusive license with a licensee who is already active on the product market on the basis of substitutable technology rights. 2. Where, in any particular case, a technology transfer agreement to which the exemption provided for in Article 2 of this Regulation applies has effects which are incompatible with Article 101(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of this Regulation, pursuant to Article 29(2) of Regulation (EC) No 1/2003, in respect of that territory, under the same circumstances as those set out in paragraph 1 of this Article.'

<sup>33</sup> Article 7 provides: '1. Pursuant to Article 1a of Regulation (EC) No 19/65/EEC, the Commission may by regulation declare that, where parallel networks of similar technology transfer agreements cover more than 50 % of a relevant market, this Regulation is not to apply to technology transfer agreements containing specific restrictions relating to that market. 2. A regulation pursuant to paragraph 1 shall not become applicable earlier than six months following its adoption.'

<sup>34</sup> Article 9 provides: 'This Regulation shall not apply to licensing arrangements in research and development agreements which fall within the scope of Regulation (EU) No 1217/2010 or in specialisation agreements which fall within the scope of Regulation (EU) No 1218/2010.'

<sup>35</sup> See Section 3 of the TTGL.

<sup>36</sup> See Sections 4.1 and 4.2 of the TTGL.

<sup>37</sup> See Section 4.3 of the TTGL.

pool but also to third parties<sup>38</sup>. While such arrangements usually fall outside the scope of the TTBER, the TTGL 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<sup>39</sup>.

#### *2.1.4. The revision of the 2004 TTBER*

In December 2011, the Commission launched a revision of the 2004 TTBER<sup>40</sup>. Stakeholders and NCAs were invited to submit their experience and views on the functioning of the 2004 rules and to identify areas for possible improvements. To this end, the Commission carried out two public consultations, commissioned expert economic studies and met with NCAs.

The specific objective of the revision of the 2004 TTBER was to ensure that the Commission's competition policy on technology transfer agreements still struck the right balance between providing effective incentives for competitors and non-competitors to enter into innovation- and welfare-increasing technology transfer agreements, and ensuring that such agreements do not undermine economic welfare by unnecessarily distorting competition.

In general, the stakeholder consultations indicated that the 2004 TTBER and accompanying guidelines were performing well in the light of those objectives and that stakeholders were, in general, content with the structure of the 2004 regime. Therefore, the revision resulted in only incremental improvements.

The revision concluded in April 2014 with the adoption of the current TTBER and TTGL. The main changes introduced were the following:

**Excluded Restrictions – Exclusive grant-backs:** as explained in Section 2.1.3, an exclusive grant-back clause is a provision whereby the licensee is obliged to license back to the licensor on an exclusive basis its own improvements to the licensed technology. The 2004 TTBER distinguished between severable<sup>41</sup> and non-severable<sup>42</sup> improvements and excluded from the block exemption only exclusive grant-back obligations that concerned severable improvements. By contrast, the current TTBER excludes all exclusive grant-back obligations from the block exemption; these obligations therefore require an individual assessment to determine whether they comply with Article 101 of the Treaty. Non-exclusive grant-back obligations are still covered by the block exemption.

**Excluded Restrictions – Termination-on-challenge clauses:** these clauses allow the licensor to terminate the agreement if the licensee challenges the validity of the licensed technology. Under the 2004 regime, all termination-on-challenge clauses were covered by the block exemption. By contrast, under the current TTBER, only termination-on-challenge clauses in exclusive licence agreements are still block-exempted, whereas

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<sup>38</sup> See Section 4.4 of the TTGL.

<sup>39</sup> TTGL, paragraph 261.

<sup>40</sup> [ec.europa.eu/commission/presscorner/detail/en/memo\\_14\\_208](http://ec.europa.eu/commission/presscorner/detail/en/memo_14_208)

<sup>41</sup> Severable improvements are improvements that can be used without infringing the licensed technology rights.

<sup>42</sup> Non-severable improvements are improvements that cannot be used without infringing the licensed technology rights.

termination-on-challenge clauses in non-exclusive agreements are excluded from the block exemption.

**TTGL – technology pools:** the Commission introduced a safe harbour in the section of the TTGL on technology pools. The safe harbour covers both the setting-up and operation of the pool, including licensing out. By structuring the pool and the licensing agreements from the pool in accordance with the conditions of the safe harbour, the participants in the pool can be certain that the pool will generally fall outside the Article 101(1) prohibition, irrespective of their market position<sup>43</sup>.

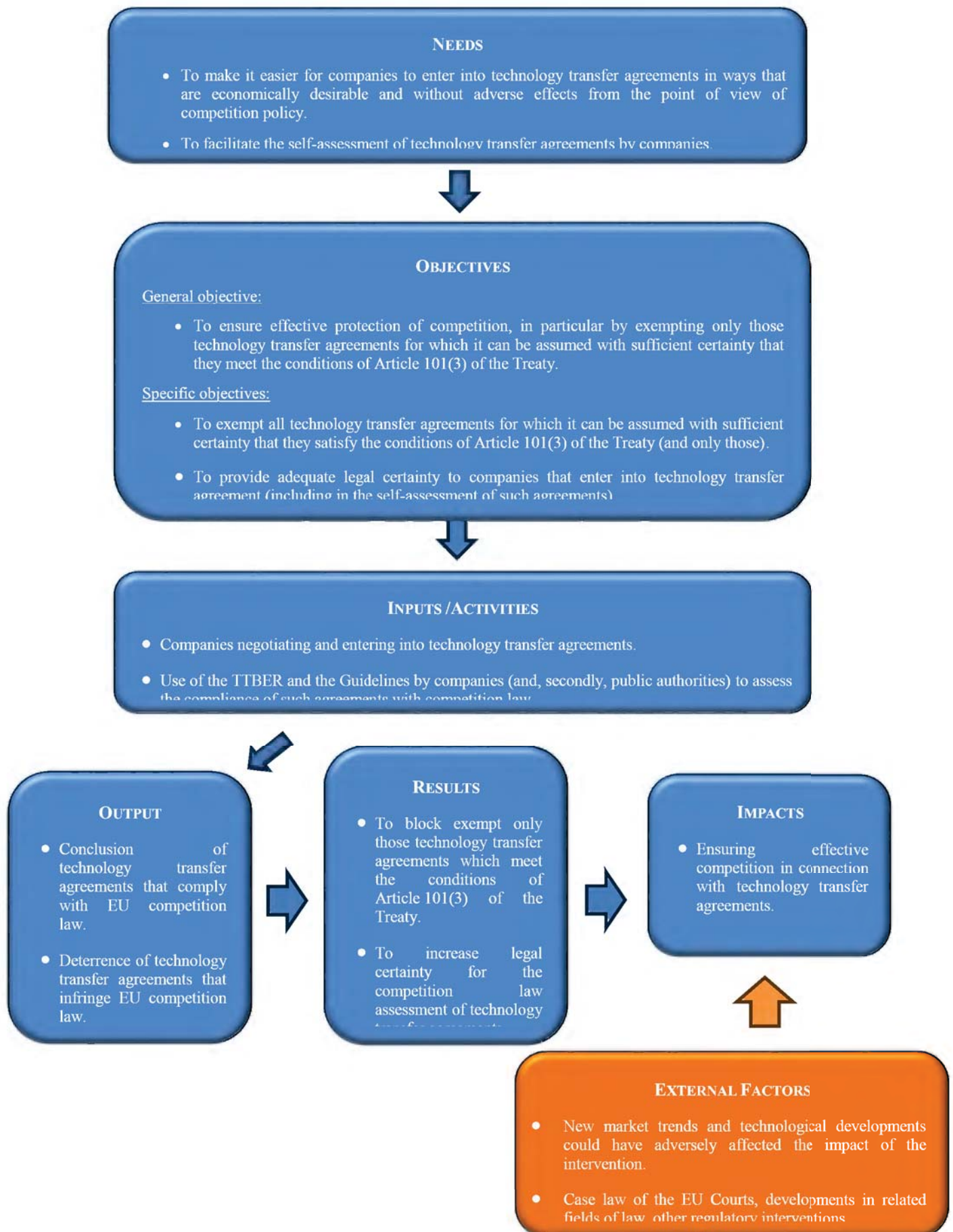
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The following graphic shows the **intervention logic of the last revision**:

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<sup>43</sup> The safe harbour is based on criteria that were already set out in the 2004 version of the TTGL as criteria to be used for the competition law assessment of patent pools.





## 2.2. Points of comparison

The main point of comparison for the evaluation is the hypothetical scenario of not having any TTBER or TTGL at all. The evaluation therefore analyses the performance of the TTBER, together with the TTGL, compared to a scenario in which the compliance of technology transfer agreements with Article 101 of the Treaty would have to be assessed using only other Commission guidance, relevant case law at EU and national level, and the decisional practice of the Commission and NCAs.

On the other hand, as explained above, the TTBER and the TTGL were preceded by several earlier block exemption regulations and guidelines covering technology transfer agreements, the last of which was the 2004 TTBER (together with the accompanying guidelines). Commission guidance on the assessment of technology transfer agreements has existed since the 1980s. Therefore, the evaluation also uses a second point of comparison, namely the 2004 TTBER and the accompanying guidelines. In particular, the evaluation assesses the performance of the changes introduced by the TTBER and the TTGL compared to a scenario in which such changes had not been implemented, and therefore the 2004 TTBER and the accompanying guidelines had remained in force.

Which of these points of comparison (baselines) are used will depend on the particular evaluation criterion and the related evaluation questions.

## 3. HOW HAS THE SITUATION EVOLVED DURING THE EVALUATION PERIOD?

The evaluation indicates that the main characteristics of technology transfer agreements have not changed in the period 2014-2024, as shown by the analysis of a sample of licence agreements undertaken for the study<sup>44</sup>. This is further confirmed by the interviews of experts carried out for the study, who confirmed that licences of intellectual property rights - which represent the bulk of technology transfer agreements - have not changed since 2014<sup>45</sup>.

The evaluation activities, including the study, were unable to determine whether there has been an evolution in the total number of technology transfer agreements that are concluded yearly or whether the use of such agreements has increased or decreased since 2014, mainly due to the absence of reliable sources of information<sup>46</sup>.

Nonetheless, the analysis carried out for the study on a sample of publicly available technology transfer agreements indicates that these agreements have some common characteristics:

- licensing agreements have a very broad territorial scope in general, and a substantial percentage of agreements are worldwide in scope;

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<sup>44</sup> See the study report, in particular Annex 4.

<sup>45</sup> See page 194 of the study report.

<sup>46</sup> See page 30 of the study report. Moreover, during the evaluation activities, stakeholders did not link possible increases or decreases in the number of technology transfer agreements concluded since 2014 with the TTBER. In any case, it seems doubtful that the TTBER by itself could have any effect on the number of technology transfer agreements concluded. Indeed, technology transfer agreements are often worldwide in scope, and are therefore subject to differing (and evolving) competition law regimes.



- a significant number of licensing agreements include some type of exclusivity clause, giving exclusive rights to the licensee in relation to the licensed technologies;
- cross-licensing between the parties seems to be limited to a minority of licensing agreements;
- a significant number of agreements allow the licensee to sub-license the licensed technologies in some form;
- a significant number of agreements include various types of grant-back obligations and/or terminate-on-challenge clauses<sup>47</sup>.

Against this apparent relative stability in the main characteristics of technology transfer agreements, the evaluation activities reveal that there have been a number of developments which have the potential to impact the TTBER and TTGL. The following sections describe developments affecting technology transfer agreements in various markets (Section 3.1) and other external trends (Section 3.2.) which, according to the study, have the potential to affect the current rules. The impact of these developments on the TTBER and TTGL is analysed in Section 4.

### 3.1. Developments relating to technology transfer agreements

#### *Pay-for-delay agreements in the pharmaceutical sector*

Antitrust enforcement cases in the pharmaceutical sector have focussed on certain practices that may hinder market entry and restrict competition. These include misuse of the regulatory framework and pay-for-delay agreements. In particular, the increasing number of antitrust cases relating to pay-for-delay agreements may have implications for both the relevance and effectiveness of the guidance provided in the TTGL on settlement agreements.

**Pay-for-delay** is a practice whereby manufacturers of branded drugs pay generic manufacturers to delay the marketing of cheaper generic drugs. Pay-for-delay agreements are typically concluded in the context of patent litigation in which the manufacturer of a branded drug sues a generic drug manufacturer for infringing its patent. While genuine settlements of patent disputes generally do not raise competition concerns, pay-for-delay agreements can prevent patients and governments from benefiting from cost savings resulting from the timely entry of generic drugs onto the market and harm competitive dynamics.

Competition authorities (most notably the Commission) and courts have scrutinised these agreements, focusing on whether generic drug manufacturers that entered into this type of agreement were excluded from the market by the strength of the patents or rather by the payment from the branded drug manufacturer (the latter being considered pay-for-delay agreements). Prominent antitrust cases relating to pay-for-delay agreements such as

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<sup>47</sup> The accuracy of this analysis is limited by the sample of technology transfer agreements used for the study. In particular, it could not be established that the publicly available agreements analysed by the study have the same characteristics as agreements that companies are not obliged to disclose and were therefore representative of technology transfer agreements in general.

Lundbeck (2013)<sup>48</sup>, Servier (2014)<sup>49</sup> and Teva-Cephalon (2021)<sup>50</sup> have led to the imposition of fines and private litigation against pharmaceutical manufacturers that entered into anti-competitive agreements to delay the market entry of generic drugs.

The TTGL provide guidance on settlement agreements in the context of technology disputes, also explaining when these agreements can be considered technology transfer agreements that fall within the scope of the TTBER. The TTGL also note that pay-for-delay agreements usually involve value transfers other than transfers of technology rights<sup>51</sup>, such as cash payments or commercial side deals. Indeed, a transfer of technology<sup>52</sup> is rarely the primary purpose of a pay-for-delay agreement. That said, the Court of Justice has recently confirmed in Servier<sup>53</sup> that a technology transfer agreement can be considered an inducement for an anti-competitive pay-for-delay agreement.

### *Standard essential patents*

Standards ensure that interoperable and safe technologies are widely disseminated among companies and consumers. Patent protection incentivises R&D and enables innovative companies to receive an adequate return on investments. Standards frequently make reference to technologies that are protected by patents. A patent that protects technology that is essential to a standard is called a standard essential patent (SEP). SEPs therefore protect technologies that are essential for complying with technical standards and for marketing products based on such standards<sup>54</sup>.

The study found that SEPs play a crucial role in various industries in terms of innovation and market integration, ensuring product interoperability, fostering market creation, and reducing market uncertainties<sup>55</sup>. Indeed, the Commission has previously found, in its communication Setting out the EU approach to Standard Essential Patents, that standards support innovation and growth in Europe, in particular providing for interoperability of

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<sup>48</sup> European Commission Decision C(2013) 3803 final of 19 June 2013 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.39226 – Lundbeck).

<sup>49</sup> European Commission Decision C(2014) 4955 final of 9 July 2014 relating to a proceeding under Article 101 and Article 102 [TFEU] (Case AT.39612 – Perindopril Servier).

<sup>50</sup> European Commission Decision C(2020) 8153 final of 26 November 2020 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39686-CEPHALON).

<sup>51</sup> Even if a technology transfer is rarely the primary purpose of a pay-for-delay agreement, the economic literature highlights that the reasons to sign these deals may be linked to licensing incentives. By licensing the patent to some entrants, the incumbent is able to reduce the cost of pay-for-delay agreements with other entrants (their payoff from challenging the incumbent is smaller when upon entry they also need to compete against the licensees, so they are willing to accept a smaller payment to stay out). See Palikot, Emil, and Matias Pietola. 'Pay-for-delay with Settlement Externalities'. The RAND Journal of Economics 54.3 (2023): 387-415.

<sup>52</sup> Turner, J.D., 'Intellectual Property and EU Competition Law', Oxford University Press, (2015) p 253-254; Schroder, V. 'Pay-for-Delay Settlements in the European Union – Did the Commission Go Too Far?' European Intellectual Property Review, Issue 12, 2016, & European Competition Law Review, Issue 12, (2016), p 2.

<sup>53</sup> Case C-176/19 P, Commission v Servier and Others, judgment of 27 June 2024, ECLI:EU:C:2024:549, paras 193 to 201, 211 and 226.

<sup>54</sup> See Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee Setting out the EU approach to Standard Essential Patents, available at <https://ec.europa.eu/docsroom/documents/26583>.

<sup>55</sup> See the study report, pages 40 et seq.



digital technologies that are the foundation of the Digital Single Market. Without the widespread use of such standardised technologies, such interconnectivity would not be possible<sup>56</sup>.

In this context, the study found that this crucial role of SEPs is especially evident in sectors like telecommunications and automotive, where standards for various connectivity technologies (such as 5G) are subject to SEPs, and in relation to Internet of Things (IoT) applications, for which the use of standards subject to thousands of SEPs is expected to continue to increase<sup>57</sup>.

The study also found a significant growth in the number of declared SEPs in the EU, along with a greater prevalence of enforcement and litigation involving SEPs, which has become a significant aspect of the SEP landscape<sup>58</sup>.

Litigation relating to SEPs often concerns the question of whether SEPs are licensed on fair, reasonable and non-discriminatory (FRAND) terms. Disagreements about whether a SEP holder is offering FRAND terms have given rise to significant case law both at EU and national level. In this context, the judgment of the Court of Justice in Huawei/ZTE<sup>59</sup> provides a framework enabling companies wishing to negotiate licences of their SEPs to ensure compliance with Article 102 of the Treaty. Given that sometimes national courts interpret the Huawei/ZTE framework differently, on 15 April 2024, the Commission submitted *amicus curiae* observations to the Oberlandesgericht München (Higher Regional Court of Munich, Germany) on how, in the Commission's view, the Court of Justice's judgment should be interpreted with the aim of ensuring the coherent application of EU competition law<sup>60</sup>.

Moreover, on 27 April 2023, the European Commission published its proposal for a regulation on SEPs<sup>61</sup>. The SEPs regulation proposal aims to provide a balanced framework, setting a global standard for SEP transparency with the following objectives: (i) to ensure that EU SEP owners and SEP implementers innovate in the EU, make and sell products in the EU and are competitive in non-EU markets; and (ii) to ensure that end users, including small and medium-sized enterprises (SMEs) and consumers, benefit from products based on the latest standardised technologies at reasonable prices. Among other things, the SEPs regulation proposal sets out a procedure for the determination of FRAND terms. At the time of publication of this document, the co-legislators had not yet approved the SEPs regulation proposal.

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<sup>56</sup> See Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee Setting out the EU approach to Standard Essential Patents, available at <https://ec.europa.eu/docsroom/documents/26583>.

<sup>57</sup> See the study report, page 35.

<sup>58</sup> See the study report, pages 40 and 314.

<sup>59</sup> Case C-170/13, Huawei v. ZTE, judgment of 16 July 2015, ECLI:EU:C:2015:477

<sup>60</sup> More information is available at [https://competition-policy.ec.europa.eu/antitrust-and-cartels/national-courts/amicus-curiae-observations\\_en](https://competition-policy.ec.europa.eu/antitrust-and-cartels/national-courts/amicus-curiae-observations_en)

<sup>61</sup> 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](https://single-market-economy.ec.europa.eu/publications/com2023232-proposal-regulation-standard-essential-patents_en)

While the evaluation has not shown significant changes in the interrelation between SEPs and technology transfer agreements (e.g. changes in licensing agreements relating to SEPs), the increase in the number of SEPs – and, possibly the new regulatory framework to be provided by the SEPs regulation proposal (if adopted) – may affect the relevance and the effectiveness of the TTBER and, in particular, of the TTGL. Indeed, the market share thresholds contained in the TTBER usually exclude the application of the block exemption to licensing agreements for SEPs, given that SEPs generally confer a high market share on the patent holder<sup>62</sup>.

#### *Main developments in multilateral licensing agreements*

**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<sup>63</sup>.

The study found that technology pools are economically significant in the EEA, that joint licensing has increased since the entry into force of the TTBER, and that pools have adopted innovative approaches, such as licensing platforms, aimed at streamlining the licensing of their technology<sup>64</sup>.

**Licensing Negotiation Groups (LNGs)** enable technology implementers to negotiate jointly with technology right holders. According to the proponents of LNGs, this reduces transaction costs and gives the implementers greater bargaining power. However, the TTBER only applies to bilateral agreements, and the TTGL do not provide guidance on LNGs.

The primary rationale behind LNGs is to simplify access to essential intellectual property rights and strengthen the bargaining power of dispersed licensees. However, LNGs may raise competition concerns, to the extent that they involve coordination between competitors. Although economic research shows that buyer groups can increase supplier innovation, under certain circumstances they can also reduce technology right holders' incentives to innovate<sup>65</sup>.

Moreover, the need for LNG members to agree on certain key parameters before they negotiate with technology right holders – such as the licensed product, the level in the value chain for licensing, or the maximum acceptable royalty – may involve the exchange of commercially sensitive information between competitors, which can in itself amount to an infringement of Article 101 of the Treaty.

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<sup>62</sup> See the study report, page 36: "[...] the TTBER will often not apply to a bilateral arrangement involving a SEP holder because the market share thresholds are exceeded. Although previous Commission's decision-making states that there is no presumption of dominance for SEP holders, in practice SEP holders with patents that are essential in respect of widely used standards will generally be found dominant [...]"

<sup>63</sup> See TTGL, paragraph 262.

<sup>64</sup> See the study report, pages 42 and 69-70.

<sup>65</sup> See Caprice, Stéphane, and Patrick Rey. "Buyer power from joint listing decision." *The Economic Journal* 125.589 (2015): 1677-1704.



According to the study, research is currently under way on the competitive impact of LNGs, in particular on whether they may restrict competition, either by object or by effect<sup>66</sup>. Recent literature suggests that permitting LNGs, i.e. allowing competitors to negotiate jointly with technology right holders, could harm competition in various sectors and undermine licensing-based monetisation models in general, but also that LNGs could be designed to significantly reduce transaction costs and the threat of patent hold-out while at the same time minimising antitrust risks<sup>67</sup>.

According to the study, there is an increasing interest in LNGs in various sectors, though participants in the stakeholder workshop noted that there were few real-life examples of LNGs<sup>68</sup>.

In June 2024, the German Competition Authority (Bundeskartellamt) announced that it had informed the Automotive Licensing Negotiation Group, an LNG consisting of several car manufacturers and a steel manufacturer, that it would tolerate the LNG's activities subject to certain conditions<sup>69</sup>. The Bundeskartellamt considered that the LNG is unlikely to lead to restrictive effects on competition on downstream vehicle markets through the coordination of upstream purchases, given that patent licensing costs for general mobile telecommunications SEPs represent only a very small proportion of the total costs of the vehicle.

### **3.2. External trends**

#### *Digital transformation*

Digitalisation has had an impact on all areas of the economy. It has, among other things, increased the importance of data. As a consequence, data ownership and data sharing are increasingly important in the context of technology transfer agreements, particularly in fields like the Internet of Things (IoT) and artificial intelligence (AI).

IoT involves everyday objects being connected to the internet and sending and receiving data for various uses. In 2021, 29% of EU businesses used the IoT, with variations in the rate of adoption across Member States.

As regards AI, statistics from Eurostat for 2021 indicate the levels of adoption of AI by businesses in the EU.

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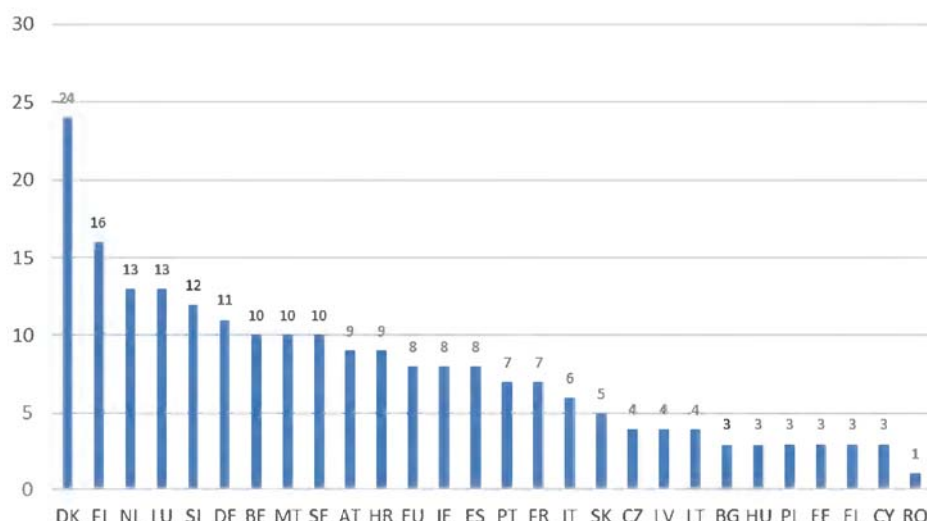
<sup>66</sup> See for example (i) Barnett, J. M. (2022). The economic case against licensing negotiation groups in the Internet of Things. *Journal of Antitrust Enforcement*, 10(3), 518-546; (ii) Nikolic, I. (2021). Licensing Negotiation Groups for SEPS. *Collusive Technology Buyers Arrangements: Pitfalls and Reasonable Alternatives*. (iii) Peters, Ruud and Nikolic, Igor and Heiden, Bowman (2022), *Designing SEP Licensing Negotiation Groups to Reduce Patent Holdout in 5G/IoT Markets*.

<sup>67</sup> See Barnett, J. M. (2022), which states that LNGs pose 'serious risks of collusion among implementers to depress SEP royalties below reasonable levels', on one side of the debate, and Peters and Nikolic (2022) on the other.

<sup>68</sup> See Annex V for a summary of the stakeholder workshop.

<sup>69</sup> [Bundeskartellamt - Homepage - BMW, Mercedes, Thyssenkrupp and VW can negotiate jointly for the acquisition of certain technology licences.](#)

### Percentage of EU enterprises using AI technologies in 2021



Source: Eurostat, 'Enterprises using AI technologies' (2021) from the study

According to the study, a growing number of technology transfer agreements include clauses referring to access to and sharing of data, particularly data generated in the development of the transferred technologies and during the life of the agreements<sup>70</sup>.

#### 4. EVALUATION FINDINGS

This section answers the evaluation questions relating to the criteria of effectiveness, efficiency, coherence (Section **Error! Reference source not found.**), EU added value (Section **Error! Reference source not found.**) and relevance (Section **Error! Reference source not found.**).

At the outset, it is important to note that – compared to other block exemption regulations such as the one for vertical agreements (VBER)<sup>71</sup>, or those for R&D agreements<sup>72</sup> and specialisation agreements<sup>73</sup> (together, HBERs) – the TTBER and the TTGL have been used or mentioned in fewer enforcement cases of the Commission and the NCAs and have been the subject of fewer judgments by EU and national courts. This was confirmed by the results of a questionnaire sent to NCAs in December 2022. The NCAs generally stated that they had very little experience of enforcing the TTBER, and that they were unable to identify relevant cases in their national courts.

<sup>70</sup> See the study report, page 34.

<sup>71</sup> 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.

<sup>72</sup> 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.

<sup>73</sup> 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, C/2023/3448, OJ L 143, 2.6.2023, p. 20.



More in detail:

- Since 2014, the few judgments of the EU courts that mentioned the TTBER and TTGL<sup>74</sup>, or addressed matters that are directly relevant for those instruments, are limited to those relating to pay-for-delay agreements (for which see above Section 3.1 above).
- As regards Commission decisions, other than those concerning pay-for-delay agreements which led to the EU court judgments referred to in the preceding subparagraph, the evaluation found a limited number of relevant cases, which mainly concerned restrictions of active and passive sales in licensing agreements<sup>75</sup>. In those cases, however, the application of the TTBER was usually questioned by the Commission, given that the licensing agreements being investigated concerned intellectual property rights that did not squarely fall within the list of technology rights covered by the TTBER<sup>76</sup>, such as copyrights (other than software copyright) or trademarks.
- In relation to national cases, only three NCAs mentioned TTBER-related cases in their reply to the NCA questionnaire, and two of the three cases mentioned<sup>77</sup> had been closed without a decision<sup>78</sup>.

Given the nature of the TTBER and TTGL, which mainly aim to give businesses the tools to self-assess the compliance of their technology transfer agreements with Article 101, the low number of relevant cases or judgments is not in itself evidence of a lack of relevance or effectiveness of these instruments. However, it reduced the sources of evidence available for the evaluation, as compared to evaluations of other Commission block exemption regulations. As a consequence, the evaluation findings are based mostly on the results of stakeholder feedback, including in the public consultation<sup>79</sup>, the stakeholder workshop and the study.

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<sup>74</sup> Including earlier versions of the TTBER and TTGL, such as the 2004 TTBER.

<sup>75</sup> The decisions in question are those in Cases AT.40413, 40414, 40420, 40422, 40424 – Video Games, AT.40436 – Ancillary sports merchandise, AT.40433 - Film Merchandising, AT.40432 - Character merchandise.

<sup>76</sup> See Article 1 (1) (b) of the TTBER.

<sup>77</sup> The only case in which a decision was adopted is *Carpa Dorada*, a decision by the Spanish NCA in 2013 (Expte. S/0312/10, CARPA DORADA Y CLUB DE VARIEDADES VEGETALES PROTEGIDAS), which was later appealed before the national court.

<sup>78</sup> The study's findings are overall in line with the results of the questionnaire to NCAs. In Annex 3, the study also reports an additional decision by the German NCA and other judgments from national courts. However, these judgments mostly focus on intellectual property disputes between SEP holders and implementers, which have limited relevance to this evaluation.

<sup>79</sup> 20 responses were received to the public consultation through the Commission's *Have Your Say* portal. The respondents consisted of 9 business associations, 5 companies/business organisations, 2 EU citizens, 1 non-governmental organisation, 1 public authority and 2 others (associations of lawyers). Two additional respondents answered outside the *Have Your Say* portal: one of these two respondents did not respond to the questionnaire but only provided a paper with its views on the TTBER, while the other respondent answered the questionnaire only partially and after the deadline for submission had expired. While the feedback included in these two additional responses is considered in this evaluation, these responses have not been included in the statistical analysis of the responses to the public consultation.



#### 4.1. To what extent was the intervention successful and why?

**Effectiveness – have the TTBER and the TTGL met their objective of: (i) exempting 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?**

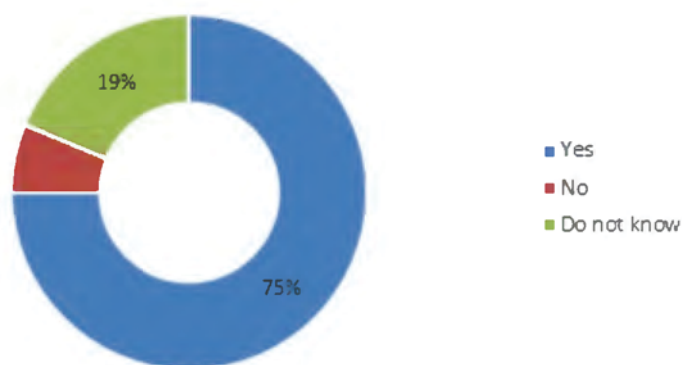
As explained above, the primary objective of the TTBER is to exempt from the prohibition in Article 101(1) of the Treaty those technology transfer agreements which can be assumed to satisfy the conditions of Article 101(3) of the Treaty. The TTGL provide guidance on: (i) the application of the TTBER; and (ii) the application of Article 101 of the Treaty to technology transfer agreements that fall outside the scope of the TTBER, thereby helping businesses to carry out individual assessments. The TTGL also include specific guidance on settlements in the context of technology disputes and on technology pools. The other main objective of the TTBER and TTGL is to provide legal certainty for businesses.

Therefore, the question of the success of the TTBER and TTGL requires an assessment of whether they have been effective in: (i) exempting all 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 only those); and (ii) providing legal certainty.

##### *A) Exempting technology transfer agreements that satisfy the conditions of Article 101(3) of the Treaty*

In the **public consultation**, stakeholders were asked whether the TTBER has achieved its objective of exempting only those technology transfer agreements for which it can be assumed with sufficient certainty that they satisfy the conditions for an exemption under Article 101(3) of the Treaty. Most respondents (12) answered 'Yes' to this question, only 1 respondent (a citizen) answered in the negative, without providing an explanation, while 3 replied 'Do not know'<sup>80</sup>.

*In your view, has the TTBER been effective in exempting only those technology transfer agreements for which it can be assumed with sufficient certainty that they satisfy the conditions for an exemption under Article 101(3) of the Treaty?*



Stakeholders were also asked whether, conversely, there are licence agreements of intellectual property rights or other technology rights that satisfy the conditions of

<sup>80</sup> See Annex V for a breakdown of the respondents by category of stakeholder.

Article 101(3) of the Treaty, but are not covered by the TTBER. A small majority of respondents (9) answered 'Yes', whereas 4 respondents answered 'No' and 4 replied 'Don't know'.

Among the technology transfer agreements that are not covered by the TTBER but which respondents considered to satisfy the conditions of Article 101(3) of the Treaty, 3 business associations mentioned agreements on the transfer of intellectual property rights other than those covered by the TTBER (such as IP rights in databases or in raw data). One business organisation and one business association mentioned agreements between parties that have market shares higher than the thresholds currently set out in the TTBER,<sup>81</sup> and 2 business associations mentioned licensing negotiation groups.

Similarly, the **study** did not identify any types of technology transfer agreements that are currently covered by the block exemption, but for which it is *not* possible to assume with sufficient certainty that they meet the conditions of Article 101(3) of the Treaty.

On the other hand, in line with the results of the public consultation, the study identified technology transfer agreements which may meet the conditions of Article 101(3) of the Treaty, but which are not covered by the TTBER. In particular, although the analysis of the case law performed for the study did not provide any indications on the existence of such agreements, some stakeholders interviewed for the study identified the licensing of data and/or intellectual property rights relating to data as technology transfer agreements that might meet the conditions of Article 101(3) of the Treaty<sup>82</sup>.

The issue of data was also extensively discussed during the **stakeholder workshop**<sup>83</sup>. Several participants criticised the fact that the TTBER does not cover transfers of data or data sets, given the growth in the importance of data since the entry into force of the TTBER in 2014.

Overall, all the sources of evidence indicated that the TTBER does not block-exempt technology transfer agreements that would likely not meet the conditions of Article 101(3) of the Treaty. This means, in practice, that the evaluation did not indicate any "false positives", namely agreements that benefit from the legal safe harbour provided by the TTBER without meriting it.

On the other hand, the evaluation provided indications that the TTBER currently does not cover certain types of technology transfer agreements that may deserve to be block-exempted, in particular licences of at least certain types of data or data rights (these

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<sup>81</sup> See Articles 3 and 8 of the TTBER.

<sup>82</sup> See the study report, page 90. Other types of agreements identified by the study that may meet the conditions of Article 101(3) are (i) licence agreements that require significant additional R&D efforts before the licensed technology can be translated into a marketable product and (ii) licence agreements for technology that is co-owned by multiple undertakings. In relation to agreements under (i) above, the TTBER states that a licence agreement can still be covered by the TTBER even if the licensee is expected to carry out further R&D activities, provided however that the licence of the technology is linked to the production of a contract product or service (recital 7). In relation to agreements under (ii) above, the issue relates to the possibility that a licence of a technology which is owned by more than one party would involve an agreement between more than two parties, which would not be covered by the TTBER (the TTBER only covers technology transfer agreements between two parties).

<sup>83</sup> See Annex V for a summary of the stakeholder workshop.

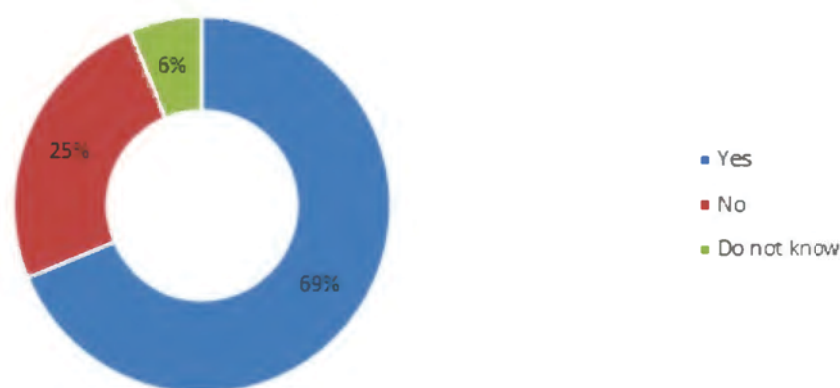
would therefore be “false negatives”). However, the evidence did not indicate any consensus among stakeholders about the types of data or data rights concerned.

### *B) Providing legal certainty*

In the **public consultation**, stakeholders were asked whether the TTBER and TTGL have achieved their objective of providing legal certainty to undertakings when they assess technology transfer agreements and/or certain clauses included in such agreements under Article 101 of the Treaty. The aim of these questions was ultimately to understand whether the rules are clear and comprehensible.

As regards the TTBER, most respondents (11) answered ‘Yes’, indicating that they considered that the TTBER has been effective in providing legal certainty, while 4 respondents answered in the negative and 1 answered ‘Don’t know’.

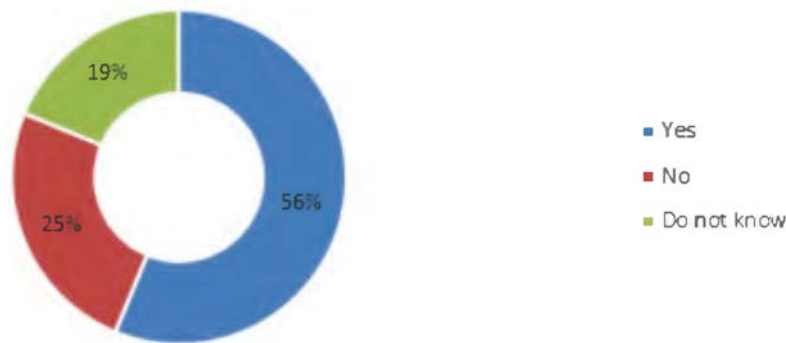
*In your view, has the TTBER been effective in providing legal certainty when assessing technology transfer agreements and/or certain clauses included in such agreements under Article 101 of the Treaty; in other words: are the rules clear and comprehensible, allowing you to understand and predict the legal consequences?*



Similarly, as regards the TTGL, 9 respondents answered ‘Yes’, indicating that they considered that the TTGL have been effective in providing legal certainty, while 4 respondents answered in the negative and 3 answered ‘Don’t know’.

*In your view, have the TTGL been effective in providing legal certainty when assessing technology transfer agreements and/or certain clauses included in such agreements under Article 101 of the Treaty; in other words: are the rules clear and comprehensible, allowing you to understand and predict the legal consequences?*





*Source: Factual summary of the contributions received during the public consultation*

The respondents who replied that the TTBER and/or the TTGL have been effective in providing legal certainty highlighted that both instruments work well and have been generally helpful (or even indispensable) in providing clarity to stakeholders on the legal consequences of entering into technology transfer agreements. For example, one business association highlighted that the TTBER and TTGL ensure a uniform and reliable approach for the assessment of licensing agreements under competition law.

The results of the **study** generally confirm that the TTBER and the TTGL are effective in providing legal certainty and are broadly viewed by stakeholders as providing an adequate level of legal certainty<sup>84</sup>. This has the significant benefit of allowing businesses to design their technology transfer agreements in a way that there is a low risk of infringing the competition rules<sup>85</sup>. Indeed, the study found that, by giving businesses the confidence to enter into agreements that they otherwise might not have done, the TTBER has the positive effect of increasing the overall number of technology licensing agreements, thereby leading to a greater dissemination of innovation<sup>86</sup>. Moreover, the study found that the TTBER has substantial benefits for most technology transfer agreements, which involve SMEs with small market shares, and are thus easy cases to assess as meeting the block exemption<sup>87</sup>.

On the other hand, both the study and the respondents to the public consultation considered that certain areas of the current rules do not provide sufficient legal certainty. These areas of the rules are analysed in sub-section (C) below.

In addition, some stakeholders interviewed for the study considered that some of the wording used in the TTBER and TTGL is complex and that they contain an insufficient number of practical examples of the competition law assessment of technology transfer agreements<sup>88</sup>.

Overall, the evidence gathered from the public consultation and the study shows that TTBER and TTGL are helpful to companies, both in providing a legal safe harbour -

<sup>84</sup> See the study report, page 68.

<sup>85</sup> See the study report, pages 91-93.

<sup>86</sup> See the study report, page 93.

<sup>87</sup> See the study report, pages 197.

<sup>88</sup> See the study report, page 197.

which is particularly important for smaller undertakings entering into licensing agreements, given that their agreements are often not caught by the prohibition in Article 101(1) of the Treaty - and in providing clear guidance to both smaller and larger undertakings on how to assess their technology transfer agreements under competition law<sup>89</sup>.

Even those respondents to the public consultation who answered negatively to the questions relating to legal certainty reported above generally limited their criticisms to only certain areas of the rules (for which see sub-section (C) below). This is exemplified by the response of one business association, which, although it answered “No” to the question about whether the TTGL provided legal certainty, commented that “*we believe that TTGL provide a useful framework for licensing agreements, and should be maintained*”.

On the other hand, the evaluation indicates that the wording of some parts of the instruments is complex, and a lack of sufficient practical examples in the TTGL may reduce the level of legal certainty that they provide. In part, however, the complexity of the wording used in the two instruments results from the nature of technology transfer agreements, which are usually highly specialised and complex contracts dealing with very technical subjects.

### *C) Critical feedback on specific areas of the rules*

While the evidence gathered generally confirmed that the TTBER and TTGL have met their objectives, it also highlighted a number of issues in relation to certain areas of the rules that may affect their effectiveness. The critical feedback on these areas of the rules is presented below.

#### *Market share thresholds*

In the **public consultation**, stakeholders were asked about the level of legal certainty provided by the market share thresholds contained in the TTBER and the guidance on how to apply those thresholds contained in the TTGL. The majority of respondents (8) confirmed that the rules on market share thresholds provided an “appropriate level of legal certainty”, while 1 respondent said that the level of legal certainty was “slightly low” and 3 respondents stated that the rules provided only “very low legal certainty”.

The respondents who considered that the legal certainty provided by the rules on market share thresholds was low mainly focused their feedback on the market share threshold for technology markets. According to these stakeholders, calculating the licensor’s market share in the technology market is difficult in practice. This is because market shares need to be calculated for markets that are not easily identifiable, given the development status of the technology, or because the data needed to carry out the calculations is unavailable. In this context, the guidance provided in the TTBER and TTGL is seen as insufficient to overcome these practical problems, with one business organisation reporting that, in practice, undertakings limit their assessment under the TTBER to the relevant *product* market(s) only.

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<sup>89</sup> It is recalled that neither the TTBER nor Article 101 of the Treaty impose notification or reporting obligations on companies - see Section 2.1.1 above.



Similar concerns were expressed by some stakeholders interviewed for the **study**, who considered that the effectiveness of the market share thresholds is impaired by the practical difficulties of applying them. These were stated to include:

- Limited visibility on the relevant technology market(s), due to the technologies in question being very young or of a disruptive nature.
- Insufficient data to undertake the calculation of the market share of the licensed technology, including the calculation of the overall size of the market, due to uncertainty about the degree of substitutability (also in terms of prices) between the various technologies<sup>90</sup>.
- Long product development timelines in some sectors (up to 10 years), resulting in uncertainty in identifying the relevant timeline for the market share assessment.
- Occasional uncertainty over the qualification of the parties to the agreement as competitors or non-competitors, given the size of the patent portfolios of larger companies<sup>91</sup>. This results in uncertainty on whether the 20% or the 30% market share threshold is applicable.

On the other hand, several interviewees stated that the TTBER's reliance on market share thresholds is still relevant, also to ensure consistency with other Commission block exemption regulations<sup>92</sup>.

The **stakeholder workshop** confirmed the feedback presented above<sup>93</sup>. Some participants pointed to the practical difficulties of defining relevant market(s) and calculating market shares for technologies or products that are still under development, given the limited information available or its confidential nature at that stage. Moreover, some participants said that: (i) market shares are an inappropriate indicator of market power in technology markets, as they do not provide an appropriate reflection of competitive dynamics in fast-paced, R&D-intensive markets, and that (ii) it is difficult to calculate market shares in technology market(s) on the basis of sales of products incorporating the licensed technology (which is the methodology currently endorsed by the TTBER) because parties do not necessarily know what type of product the technology will be used for when they enter into a licensing agreement.

Overall, the various sources of evidence provide a coherent assessment of the effectiveness of the market share thresholds. Both the public consultation and the study indicate that the market share thresholds remain useful and necessary to exclude from the safe harbour agreements that may not meet the conditions of Article 101(3) of the Treaty. The majority of stakeholders consider this holds true for the product market thresholds and the technology market thresholds.

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<sup>90</sup> See the study report, pages 83-85. In this sense, patents can have multiple implementations and so can be complements or substitutes depending on the actual implementation. Also, patents can be substitutes or complements depending on their price. Finally, the complementarity/substitutability of patents may also change during the term of the agreement depending on the evolution of the technology.

<sup>91</sup> See the study report, pages 83-85. See also case study n.1 in Annex 7 of the study report.

<sup>92</sup> See the study report, page 86.

<sup>93</sup> See Annex V for a summary of the stakeholder workshop.

However, in relation to the market share thresholds for technology markets, the evaluation identified challenges to their effectiveness. In particular, the evidence points to a number of practical difficulties in calculating the market shares of the parties to technology transfer agreements, which reduce the legal certainty provided by the thresholds. In this context, the calculation method provided by the TTBER in Article 8 and the guidance provided in the TTGL to help companies in their calculations appear to be insufficient to address the difficulties highlighted by stakeholders.

The effectiveness of the 4+ test set out in the TTGL in addressing these challenges is examined separately in the following paragraphs.

#### 4+ test

As explained in Section 1 above, the TTGL state that, in the absence of hardcore restrictions, an infringement of Article 101 of the Treaty is unlikely if there are at least four other independently controlled technologies that are sufficiently substitutable for the licensed technology at a comparable cost to the user<sup>94</sup>. This is usually referred to as the 4+ test and helps to provide legal certainty to parties that are unable to calculate their market shares in relevant technology markets.

In the **public consultation**, in response to a question on the level of legal certainty provided by the 4+ test, 4 respondents stated that the 4+ test provided an “appropriate level of legal certainty”, while 5 respondents noted that the level of legal certainty was “slightly low”. Only 2 respondents stated that the rules provided only “very low legal certainty”. When asked to elaborate on their replies, stakeholders pointed out the practical difficulties in obtaining evidence on the existence of competing technologies, particularly in relation to innovative technologies. Some of them also criticised the requirement that these technologies need to be licensed at a comparable cost, as they felt that this was very hard to ascertain in practice and that it might not be relevant for the assessment of competition between technologies in more innovative markets. Other stakeholders however felt that the 4+ test is an effective tool to assess the degree of competition in relevant technology markets and, therefore, is indeed of help to address the practical challenges in the calculation of the market share thresholds in technology markets (for which see sub-section (C) above).

The **study**’s insights on this issue are mainly based on the interviews of relevant stakeholders. The study found that the interviewees had mixed views on the effectiveness of the 4+ test<sup>95</sup>. Some stakeholders considered that the safe harbour provided by the 4+ test is effective in providing adequate legal certainty to parties to agreements that exceed the market share thresholds in Article 3 of the TTBER. However, one stakeholder argued that there are rarely four competing technologies, especially in R&D-intensive markets, and that one or two competing technologies would provide sufficient competitive pressure on the parties to the technology agreement to avoid anti-competitive effects in the market. Moreover, another stakeholder noted that it remains unclear what would be the Commission’s assessment if there were only 2 or 3 additional technologies, rather than 4<sup>96</sup>.

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<sup>94</sup> Paragraph 157 of the TTGL.

<sup>95</sup> See the study report, page 88.

<sup>96</sup> See the study report, page 88.



During the **stakeholder workshop**, the 4+ test was deemed by some participants insufficient to increase legal certainty, as market participants are often unaware of substitute technologies and/or it is rare to have four substitutes in the market<sup>97</sup>.

Overall, the evidence collected during the evaluation provides a mixed picture. The 4+ test seems to provide a sufficient level of legal certainty and seems to be a valid alternative to obtain certainty concerning the competition law assessment of agreements between parties that are unable to calculate their market shares in the relevant technology market(s). On the other hand, the 4+ test seems to suffer from practical difficulties similar to those that companies encounter when trying to calculate their market shares in technology market(s), notably the absence of information on competing technologies and their licensing conditions. This seems particularly true in relation to certain types of markets characterised by more disruptive or innovative technologies.

#### *Excluded restrictions – Exclusive grant-backs*

One of the main changes introduced in the 2014 revision of the TTBER was the exclusion of all exclusive grant-back obligations from the block exemption, including those for non-severable improvements (see Section 2.1.4 above) which were previously block-exempted.

This change was deemed effective by the majority of respondents to the **public consultation**. 8 respondents expressed the view that this change had achieved its objectives, while 4 respondents answered negatively, and 4 respondents answered 'Do not know'. The respondents who answered negatively considered that the change introduced in the 2014 revision of the TTBER decreased the level of legal certainty compared with the regime provided by the 2004 TTBER. According to some of these stakeholders, the change limits licensors' incentive to license.

The analysis of the economic literature performed for the **study** produced mixed results. While some authors suggest that exclusive grant-backs are justified because without them licensors would be discouraged from licensing in the first place, other authors argue that exclusive grant-back clauses harm downstream innovation incentives. Moreover, the economic literature suggests that exclusive grant-backs allow a patent holder to concentrate all improvements on itself and thus obtain or sustain market power<sup>98</sup>.

Stakeholders interviewed for the study took opposing positions on the change introduced in the 2014 revision of the TTBER. Some interviewees considered that the previous distinction between severable and non-severable improvements added complexity (possibly stifling innovation) and its removal from the TTBER has not had any negative effects. Other stakeholders argued that the prior distinction was adequate because it was less punitive for licensors and provided more balanced incentives for both parties.

Similar positions were taken during the **stakeholder workshop**<sup>99</sup>.

Overall, the evidence indicates that the new rules on exclusive grant-backs included in the current TTBER are effective. The majority of stakeholders confirmed the validity of the choice made during the last revision of the TTBER.

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<sup>97</sup> See Annex V for a summary of the stakeholder workshop.

<sup>98</sup> See the study report, page 77 and the literature cited there.

<sup>99</sup> See Annex V for a summary of the stakeholder workshop.

Some stakeholders and academics claimed that excluding exclusive grant-backs for non-severable improvements from the block exemption is wrong, mainly on the ground that it hampers the incentives of licensors to license out their technology and/or innovate in the first place. However, they did not advance new facts or arguments going beyond those that were already considered during the revision of the 2004 TTBER.

During that revision, the Commission's services examined this issue in detail and found *inter alia* that: (i) block-exempting exclusive grant-back obligations for non-severable improvements disincentivises licensees from engaging in this type of incremental innovation, as it completely prevents the innovator from using its own innovation; (ii) non-severable improvements cannot in any case be exploited by the licensee without also using the licensor's original technology, which will generally benefit the licensor by leading to increased sales of products incorporating its technology (licence fees are often based on the value/volume of product sales), and (iii) the exclusion of exclusive grant-back obligations from the block exemption does not mean that these obligations necessarily infringe Article 101 of the Treaty, but simply that they require an individual assessment.

Given that a majority of stakeholders confirmed the effectiveness of the current rules on exclusive grant-backs, and that the critical voices did not advance new facts or arguments that were not considered prior to the adoption of the TTBER, the evaluation indicates that the current rules remain effective in meeting the objectives of the TTBER, namely to block-exempt only those agreements that meet the conditions of Article 101(3) of the Treaty and to provide legal certainty.

#### *Excluded restrictions – Termination-on-challenge clauses*

Another change introduced in the 2014 revision of the TTBER was the exclusion from the block exemption of certain termination-on-challenge clauses. Under the 2004 regime, all termination-on-challenge clauses were covered by the block exemption. By contrast, under the current TTBER, only termination-on-challenge clauses in exclusive licence agreements are still block-exempted, whereas termination-on-challenge clauses in non-exclusive agreements are excluded from the block exemption (see Section 2 above for more details).

On the exclusion from the block exemption of termination-on-challenge clauses in non-exclusive technology transfer agreements, the majority of respondents to the **public consultation** confirmed the effectiveness of the current rules. 10 respondents expressed the view that this change had achieved its objectives, while 2 respondents answered negatively and 3 respondents answered 'Do not know'. One business organisation which answered negatively stated that the current regime is too restrictive and damages licensors, while the 2004 version of the TTBER had struck a better balance between allowing parties to challenge invalid patents and protecting good faith in licensing negotiations. The other respondent which answered negatively to the public consultation, a licensor, claimed that one of the objectives of the current rule, namely enabling licensees to challenge invalid IP rights without the risk of the licensor retaliating by terminating the licence, is extraneous to antitrust law and should not be protected as such.

Similar feedback was provided by some participants to the **stakeholder workshop**.

The analysis of relevant economic literature carried out for the **study** shows that, while termination-on-challenge clauses may have pro-competitive justifications, such as



incentivising licensing, they may foster an environment in which potentially invalid or weak IP rights endure without being exposed to scrutiny. Indeed, the capacity to challenge IP rights through legal channels is a fundamental element in upholding a robust IP ecosystem<sup>100</sup>. However, the evidence on whether the absence of termination-on-challenges clauses from licensing agreements actually leads to an increased invalidation of invalid patents is mixed<sup>101</sup>.

As regards the coverage by the current TTBER of termination-on-challenge clauses in exclusive licences, the study concludes that this helps to re-balance the position of licensors when they are significantly smaller than licensees, and therefore cannot afford to defend their technology in court if challenged. This seems to be the case, for example, for certain licensors in the biotechnology sector<sup>102</sup>.

Based on the above, it appears that, despite some criticisms, the current rules on termination-on-challenge clauses – and therefore the change made in the last revision of the TTBER – have met their objectives. Moreover, given the apparently mixed effects on competition of termination-on-challenge clauses, the choice to exclude them from the block exemption when they are used in non-exclusive licences (but not to treat them as hardcore restrictions) appears to strike the right balance, in light of the TTBER's objective to block-exempt only those agreements for which it can be assumed with sufficient certainty that they meet the conditions of Article 101(3) of the Treaty.

### *Technology pools*

The last revision of the TTBER and TTGL introduced a soft safe harbour in the TTGL for arrangements relating to the creation and operation of technology pools, subject to the fulfilment of certain conditions (see Section 2.1.4 above).

Most respondents to the **public consultation** confirmed the effectiveness of the soft safe harbour for technology pools. 12 respondents considered that this change had achieved its objectives, while 4 respondents answered negatively and 2 respondents answered 'Do not know'.

Some respondents, mainly representing technology implementers, questioned the legal certainty provided by the conditions of the safe harbour, claiming that the effectiveness of the safe harbour is hampered by the alleged absence of conditions dealing effectively with how pools set their royalties, how they ensure transparency and whether the technologies included in the pool fulfil the condition of essentiality.

As regards the **study**, several of the information sources consulted noted the positive aspects of the guidance on technology pools, including the conditions of the soft safe harbour, which have helped technology pools and other entities to assess the compliance of agreements and therefore have helped promote the formation of pools<sup>103</sup>.

However, several stakeholders interviewed for the study stated that the guidance on technology pools provides a low level of legal certainty and that there is insufficient

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<sup>100</sup> See the study report, page 78 and the literature cited.

<sup>101</sup> See the study report, page 79 and the literature cited.

<sup>102</sup> See the study report, page xiii.

<sup>103</sup> See the study report, page xiii.



monitoring of compliance with the conditions of the soft safe harbour for technology pools. In particular, it was claimed that pooled patents are often not ‘essential’ (complements) but are instead substitutes (a fact that would not allow a pool to meet the criteria of the soft safe harbour); that pools do not license on FRAND terms, or that they do not license to all potential licensees, and that pools are insufficiently transparent on several aspects of how they are run, including on how they carry out checks on essentiality, their royalty policies and their governance rules<sup>104</sup>. Moreover, some stakeholders complained that the safe harbour does not provide for checks to avoid the “double-dipping” or “double-collection” of royalties, namely situations where implementers are required to pay double licensing fees for certain overlapping patents (for example because they have obtained a licence both through bilateral agreements and through a pool)<sup>105</sup>.

During the **stakeholder workshop**<sup>106</sup>, participants observed that the guidance in the TTGL works well and helps to create legal certainty, by providing that patent holders can only join the technology pool if the patent is essential, including for third parties. However, other participants pointed out that the enforcement of the TTGL is at times ineffective as regards a number of conditions of the soft safe harbour. Some technology pools were said to lack transparency, also in relation to the use of FRAND terms. A few participants pointed out that, in practice, licences are not offered to all potential licensees, and some licensors select where to license in the production chain.

Overall, the evaluation indicates that the introduction of a safe harbour for technology pools has been a success. It has facilitated the creation of technology pools and increased legal certainty regarding the competition law assessment of technology pools.

Some stakeholders however expressed concerns about the effectiveness of the conditions of the safe harbour, mainly stating that pools often include a significant share of substitute or non-essential patents. They also said that the guidance is not clear enough on the concepts of open participation, the determination of FRAND licensing terms and on the governance of technology pools. Moreover, stakeholders said that the ownership of pools should be transparent and there should be safeguards on the sharing of information by the pool with its members.

Throughout the evaluation activities, these concerns were mostly expressed by a specific group of stakeholders, namely licensees and implementers of technologies. These stakeholders consider that the conditions of the current safe harbour are not strict enough to deter possible anti-competitive practices.

In conclusion, the evaluation indicates that the guidance in the TTGL 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.

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<sup>104</sup> See the study report, pages xiii-xiv, 70-74 and 195.

<sup>105</sup> See the study report, pages 215 and 230.

<sup>106</sup> See Annex V for a summary of the stakeholder workshop.

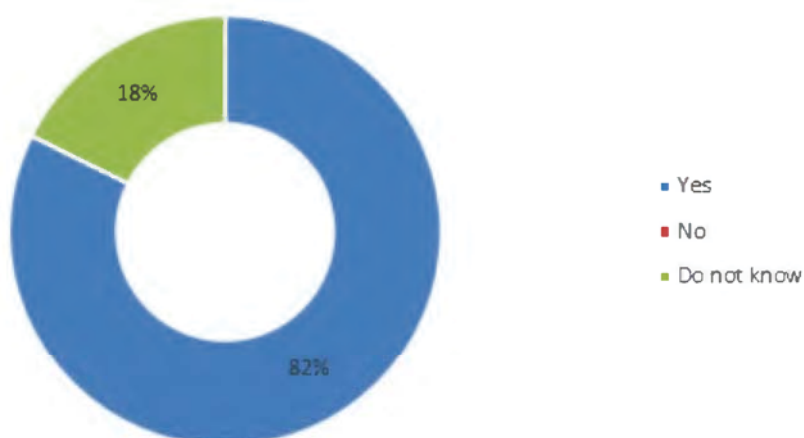
**Efficiency – are the costs created by the TTBER and TTGL for undertakings wishing to assess their agreements under Article 101 of the Treaty proportionate, in view of the benefits that the TTBER and TTGL create for that assessment?**

With respect to efficiency, the objective of the evaluation was to verify whether the TTBER and TTGL have contributed to reducing the costs to businesses of ensuring compliance with the prohibition set out in Article 101(1) of the Treaty.

In order to do so, the **public consultation** focused on the costs and benefits incurred by companies when they apply the TTBER and TTGL.

As regards benefits, most respondents (14) indicated that they consider that the TTBER and TTGL have produced benefits for the assessment of technology transfer agreements under Article 101 of the Treaty, while no respondents answered in the negative and 3 respondents answered that they did not know<sup>107</sup>. 4 of the respondents that answered positively explained that these instruments provide a helpful framework for businesses to assess the compliance of technology transfer agreements with Article 101.

*Do you consider that the TTBER and the TTGL have created benefits for the assessment of technology transfer agreements under Article 101 of the Treaty, as compared to a situation in which such agreements would need to be assessed without the TTBER and TTGL?*



As regards costs, 8 respondents indicated that they do not consider that the TTBER and TTGL have created costs for the assessment of technology transfer agreements under Article 101, 5 respondents considered that these instruments have created costs, and 2 respondents answered 'Do not know'. 3 of the respondents that considered that the TTBER and TTGL have created costs nonetheless considered that those costs are proportionate to the benefits created. Of these 3 respondents, 2 explained that these costs consist mainly of fees paid to consultants to assess the compatibility of technology transfer agreements with the TTBER and TTGL. In this respect, it is recalled that neither Article 101 of the Treaty nor the TTBER impose reporting obligations on companies<sup>108</sup>.

<sup>107</sup> See Annex V for a breakdown of the respondents by category of stakeholder.

<sup>108</sup> See Section 2.1.1 above for a general explanation of the application of Article 101 of the Treaty and the self-assessment regime.



8 respondents indicated that the costs of ensuring that their technology transfer agreements comply with Article 101 would increase if the TTBER and TTGL were not to be prolonged<sup>109</sup>. However, no respondent was able to quantify the benefits created or the costs generated by the TTBER and TTGL.

The **study** generally confirmed the results of the public consultation. Interview and survey respondents generally considered that the TTBER and TTGL create substantial efficiency gains, although these can be difficult to quantify<sup>110</sup>. According to the study, stakeholders reported needing between 0.25 and 6 full-time legal expert days to assess technology licence agreements against the TTBER. However, when asked to compare these costs with the costs that they would incur in the absence of the TTBER and TTGL, some stakeholders considered that these instruments lead to very large cost reductions, namely between 10 and 1000 times lower costs. The study also found that stakeholders were able to reduce their compliance costs by using TTBER-aligned template agreements, and that, where both parties to a technology transfer agreement wish to benefit from the TTBER safe harbour, this limits the range of clauses that need to be negotiated, thereby leading to more straightforward negotiations<sup>111</sup>.

The study included a case study on the cost savings generated by the TTBER and TTGL. This identified the costs typically associated with technology transfer agreements as: legal fees; the time required for negotiations and intellectual property due diligence; royalty payments, and litigation costs. The case study identified direct cost savings resulting from the TTBER and TTGL, notably the elimination of the need for a complex individual assessment of agreements under Article 101 of the Treaty<sup>112</sup>, as well as indirect cost savings, for example, in the form of a reduction in the range of contractual clauses that need to be negotiated.

Lastly, the study found that stakeholders generally considered that the **2014 revision** of the TTBER and TTGL had not led to any significant change in compliance costs and that, for those respondents who considered that compliance costs had somewhat increased after 2014, this perception appeared to be attributable to market and technological developments, rather than to the changes introduced in that revision<sup>113</sup>.

Overall, the evaluation indicates that the TTBER and TTGL have been efficient in reducing compliance costs for companies wishing to enter into technology transfer agreements, compared with a scenario in which these instruments did not exist. Furthermore, the 2014 revision of the TTBER and TTGL has not led to any significant change in the efficiency of these instruments. However, the evaluation has not produced evidence that makes it possible to quantify these cost reductions.

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<sup>109</sup> The remaining respondents said that they did not know (7 responses) or that their compliance costs would not increase (1 response).

<sup>110</sup> See study report, pages 91 and 93. The study found that stakeholders did not hold data on the costs or cost savings resulting from the TTBER.

<sup>111</sup> See the study report, page 92. In this respect, the study did not produce evidence that the desire by companies to benefit from the TTBER safe harbour leads to distortionary effects on the content of their licence agreements.

<sup>112</sup> One stakeholder stated that the TTBER makes it possible for an in-house counsel to assess the compliance of an agreement without having to resort to external counsel – see study report, page 307.

<sup>113</sup> Respondents notably referred to the increasing complexity of defining relevant markets and calculating market shares.



***Coherence – are the TTBER and TTGL coherent with other EU legislation and policies, notably in the fields of intellectual property and competition?***

The evaluation assessed whether the TTBER and TTGL are consistent with developments in the Commission's overall policy and practice, notably in the fields of antitrust and intellectual property.

*A) Legislation and policies on competition*

In the **public consultation**, stakeholders were asked whether the TTBER and TTGL are coherent with other EU Commission instruments that provide guidance on the interpretation of Article 101 of the Treaty: 8 respondents answered 'Yes', 5 answered 'No' and 4 answered that they did not know.<sup>114</sup> Some of the respondents that answered 'No' mentioned limited inconsistencies with the recently revised HBERs and VBER.

In particular, the TTBER shares certain definitions and hardcore restrictions with the HBERs and/or VBER, which were amended in the recent revisions of those block exemption regulations<sup>115</sup>. Given that the revisions of the VBER and HBER, together with the accompanying guidelines, occurred after the adoption of the TTBER and TTGL, the latter do not reflect the changes made during those revisions.

This is, for example, the case for the definition of "exclusive territory" in the TTBER, where it means "*a given territory within which only one undertaking is allowed to produce the contract products [...]*"<sup>116</sup>. This definition was in line with the version of the VBER that was adopted in 2010, while it is no longer in line with the definition in the recently revised VBER, which now allows up "*to a maximum of five distributors per exclusive territory*"<sup>117</sup>.

*B) Proposed SEPs regulation*

In the **public consultation**, stakeholders were also asked whether the TTBER and TTGL are coherent with other existing or forthcoming EU legislation and policies on intellectual property and competition law. Most respondents answered 'No' (10), no respondents answered 'Yes', and 9 respondents answered 'Do not know'.

Respondents that answered in the negative and provided an explanation for their answers all indicated that the TTBER and TTGL are not coherent with the Commission's recently adopted proposal for a regulation on SEPs (COM(2023)232) ('proposed SEPs regulation'. However, these respondents were generally unable to identify specific provisions that were inconsistent between the two sets of instruments. Instead, they gave their opinions on the appropriateness of certain provisions of the proposed SEPs regulation, which they generally regarded as promoting the interests of technology implementers. To the extent that these remarks merely expressed the stakeholder's views on the proposed SEPs regulation, they were not taken into account for this evaluation.

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<sup>114</sup> See Annex V for a breakdown of respondents by category of stakeholder.

<sup>115</sup> The VBER was revised in 2022 and the HBERs were revised in 2023.

<sup>116</sup> See TTBER, Article 1 (1) (q).

<sup>117</sup> See VBER, Article 4. See also paragraph 120 of the Vertical Guidelines (Communication from the Commission, Guidelines on vertical restraints, 2022/C 248/01, OJ C 248, 30.6.2022)

The **study** also considered the proposed SEPs regulation. According to the study, if enacted, the proposed SEPs regulation could complement the TTBER in promoting innovation in the EU<sup>118</sup>. While there are some overlaps between the provisions of the TTBER regime and the proposed SEPs regulation, in general these do not lead to any redundancies or inconsistencies.

Taking all the above evidence into account, the approach of the TTBER and TTGL, on the one hand, and that of the proposed SEPs regulation, on the other, do not appear to be incompatible, but rather complementary, as the two instruments pursue different objectives. On the one hand, the TTBER and TTGL aim to provide a safe harbour from EU competition rules for technology transfer agreements that meet certain conditions and provide guidance on the assessment of technology transfer agreements under competition law, thereby providing legal certainty for companies while protecting competition. On the other hand, the proposed SEPs regulation seeks to facilitate the licensing of SEPs, by increasing transparency, reducing information asymmetries between SEP holders and implementers (notably by imposing checks on the essentiality of patents), and ensuring that licence agreements are made under fair, reasonable, and non-discriminatory (FRAND) terms.

Moreover, the public consultation and the study did not find any clear inconsistencies between the TTBER and TTGL, on the one hand, and the proposed SEPs regulation, on the other.

### *C) Other Commission policies*

The **study** also assessed the coherence of the TTBER and TTGL with recent EU policy developments affecting intellectual property (other than the proposed SEPs regulation), R&D, industrial policy and sustainability.

The study found that the TTBER and TTGL are generally coherent with EU legislation relating to intellectual property adopted since their entry into force in 2014. However, the study report highlights certain differences between the TTBER and the Trade Secrets Directive<sup>119</sup>, notably as regards the concept of know-how. Indeed, the TTBER defines know-how as practical information that is secret, substantial and identified, while – according to the study – the Trade Secrets Directive refers to know-how as a broader concept, capturing all technical or commercial information that is valuable to an entity and not widely known (see recitals 1-2 of the Trade Secrets Directive)<sup>120</sup>.

Regarding R&D policies, the study found that the TTBER regime's facilitation of technology diffusion complements the European open science approach to research dissemination. However, the study report points to some uncertainties about whether licence agreements entered into by joint owners of technology are covered by the TTBER, given that the block exemption is limited to two-party agreements<sup>121</sup>.

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<sup>118</sup> See the study report, page xv.

<sup>119</sup> Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, OJ (2016) L 157/1.

<sup>120</sup> See the study report, page xiv.

<sup>121</sup> See the study report, page 95.



The study also found that the TTBER and TTGL do not mention the issues of supply chain resilience or sustainability directly. However, the study report notes that the TTBER and TTGL promote innovation by increasing legal certainty for agreements that lead to the diffusion of technology and, therefore, at least indirectly, contribute to resilient supply chains, diversification of technology sources and the accelerated adoption of green innovation<sup>122</sup>.

#### **4.2. How did the EU intervention make a difference and to whom?**

***EU added value – have the TTBER and the TTGL added value compared to what could have been achieved by regulations or guidelines at national level?***

As regards EU added value, stakeholders were asked in the **public consultation** whether the TTBER and TTGL have added value compared to what could have been achieved by regulations or guidelines at national level. 11 respondents answered this question positively, while one respondent answered 'No' and 6 answered 'Do not know'.

Stakeholders confirmed that the TTBER and TTGL have added value compared to what could have been achieved by regulations or guidelines at national level. They pointed out that national rules and guidelines would only bind national antitrust authorities and courts. If each Member State were to issue its own rules and guidelines, there would be a patchwork of different regulations in Europe, which would be unmanageable for businesses operating across borders. Regulation at EU level has instead created a level playing field across Member States, which also facilitates market integration.

#### **4.3. Is the intervention still relevant?**

***Are the TTBER and TTGL still relevant in light of their objective, which is to exempt from the prohibition of Article 101(1) of the Treaty those technology transfer agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty, taking into account market developments that have occurred since 2014?***

As regards relevance, the evaluation aimed to verify whether market developments have had an impact on the primary objective of the TTBER and TTGL, namely to exempt from the prohibition of Article 101(1) of the Treaty those technology transfer agreements which satisfy the conditions of Article 101(3) of the Treaty.

For this purpose, the **public consultation** asked whether the TTBER and TTGL are still relevant for the assessment of technology transfer agreements under Article 101 of the Treaty. Respondents confirmed the continuing relevance of the TTBER and TTGL: 13 respondents answered 'Yes'; 1 respondent answered 'No', and 3 respondents answered 'Do not know'<sup>123</sup>.

The **study** also indicated that the TTBER and TTGL remain relevant. In particular, it found that these instruments are commonly used by a range of entities in a wide range of sectors, namely during licensing negotiations, in designing contract templates, and that, in some cases, these instruments influence company strategy in relation to licensing choices<sup>124</sup>. The study also found that the TTBER regime is relevant to SMEs for

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<sup>122</sup> See the study report, page 96.

<sup>123</sup> See Annex V for a breakdown of respondents by stakeholder category.

<sup>124</sup> See the study report, page 28.



defensive purposes, as it empowers them in negotiations with bigger companies, and the TTBER's list of hardcore restrictions is useful for narrowing down negotiations around licensing clauses<sup>125</sup>. The relevance of the instruments was also confirmed by the study's analysis of a sample of licensing agreements, which generally revealed an absence of clauses that correspond to excluded or hardcore restrictions (for example, exclusive grant-back obligations)<sup>126</sup>. This is not evidence of, but is consistent with, companies taking the TTBER's conditions into account when drafting their licence agreements.

As more extensively explained at the beginning of Section 4, the study found that there is relatively little case law or decisional practice by competition authorities relating to the TTBER. However, the study report notes that, since these instruments are primarily a self-assessment tool for companies, these findings do not imply that the instruments lack relevance. On the contrary, the study finds that companies and their advisers commonly rely on these instruments<sup>127</sup>.

On the other hand, the study found that a minority of stakeholders, in particular some law firms, are critical of the TTBER regime and question its relevance. This group considers that the scope of the block exemption is narrow and the TTBER is complex to apply, requiring several assessments<sup>128</sup>. For this small group, there are significant challenges in verifying the conditions for exemption, which may lead some companies to effectively disregard the TTBER and the TTGL, on the assumption that these instruments leave sufficient legal uncertainty for companies to successfully challenge future claims of non-compliance<sup>129</sup>.

Furthermore, the study considered the impact on the relevance of the TTBER and TTGL of recent trends in licensing practices and in the market in general, which have been described above in Section 3. In this respect, it identified a range of potential challenges to the relevance of the TTBER and TTGL:

- Data - the study report notes the growing importance of data in technology markets, citing as examples the use of data generated by devices connected to the internet of things, and the use of online material to develop AI<sup>130</sup>. The study also found that technology transfer agreements increasingly include clauses governing the transfer of data, in particular data generated in the development of the transferred technologies and during the life of the agreement, however the study report notes that rights in data are not included in the list of technology rights covered by the TTBER or TTGL<sup>131</sup>;
- SEPs - the study found indications that the number of declared SEPs has increased in recent years<sup>132</sup> and that the applicability of the TTBER regime to bilateral arrangements involving SEP holders may be limited, due to the market share thresholds not being met and/or because the TTGL discuss SEPs mostly in

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<sup>125</sup> See the study report, page 29.

<sup>126</sup> See the study report, pages 164-172.

<sup>127</sup> See the study report, page 30.

<sup>128</sup> See the study report, page 29.

<sup>129</sup> See the study report, page 193.

<sup>130</sup> See Section 3.2 above for more details.

<sup>131</sup> See the study report, pages 34 and 44-45.

<sup>132</sup> See Section 3.1 above for more details.

the context of licensing by pools<sup>133</sup>. In this context, it should be noted that the TTGL *do* provide guidance that is applicable to the licensing of SEPs. However, the study highlighted that the TTGL mention SEPs (or more generally technology essential to a standard) only sporadically<sup>134</sup>. In a context where the number of SEPs has been increasing, the relevance and effectiveness of the TTGL may be affected by their limited references to SEPs, which may have created some uncertainty regarding the application of the guidance provided by TTGL to SEP licence agreements. That said, it is important to note that the guidance provided in the TTGL on technology transfer agreements that fall outside the block exemption is general, and therefore also covers the licensing of SEPs.

- New jurisprudence on settlement and pay-for-delay agreements – the study reviewed a number of recent judgments of the EU courts on these types of agreements in the pharmaceutical sector, and found that the guidance provided in the TTGL on settlement agreements was no longer up to date<sup>135</sup>.
- Licensing Negotiation Groups – the study report notes proposals by implementers in some sectors to enter into LNGs<sup>136</sup>, and finds that LNGs may efficiently reduce transaction costs for both implementers and technology right holders, but that LNGs can also raise competition concerns, for example, they may lead to downstream collusion between the participating implementers. In that context, the study report notes that the TTGL provide guidance on technology pools, but do not provide guidance on LNGs<sup>137</sup>.

The relevance of the TTBER and TTGL was also largely confirmed by the **stakeholder workshop**<sup>138</sup>. However, participants generally considered that the absence of data or data rights from the list of technology rights covered by the block exemption did not reflect the growth in the importance of data in the years since the adoption of the TTBER. Moreover, some participants (mainly representing licensees) commented on the absence of guidance on Licensing Negotiation Groups, which, in their view, can create efficiencies, by enabling licensees to pool their knowledge about the portfolios of licensors, and result in more balanced licence negotiations, in particular vis-à-vis technology pools. Participants representing technology right holders, on the other hand, argued against the need for specific guidance on LNGs, pointing to the lack of real-life examples of LNGs and the lack of enforcement experience, as well as possible competition concerns, including the risk that LNGs could engage in collective hold-outs or lead to collusion in downstream product markets.

<sup>133</sup> See the study report, page 36: “[...] the TTBER will often not apply to a bilateral arrangement involving a SEP holder because the market share thresholds are exceeded. Although previous Commission’s decision-making states that there is no presumption of dominance for SEP holders, in practice SEP holders with patents that are essential in respect of widely used standards will generally be found dominant [...]”.

<sup>134</sup> This is the case, for example, for the section of the TTGL on technology pools and the section relating to termination-on-challenge clauses, where the TTGL state that, in the context of SEPs, such termination clauses are likely to have the same anti-competitive effects as no-challenge clauses (see TTGL, paragraph 136).

<sup>135</sup> See the study report, pages 40 and 156.

<sup>136</sup> The study found only one example of an existing LNG – see the study report, page 48.

<sup>137</sup> See the study report, pages 43 and 50.

<sup>138</sup> See Annex V for a summary of the stakeholder workshop.



Overall, the evaluation indicates that the TTBER and TTGL remain relevant, but that certain market developments, in particular in the digital economy and in technology markets, raise questions about the scope of the block exemption and the scope and content of the TTGL, in particular in relation to technology pools and LNGs.

## **5. WHAT ARE THE CONCLUSIONS AND LESSONS LEARNED?**

### **5.1. Conclusions**

The evaluation confirms that the TTBER and TTGL have overall met their objectives. 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.

Moreover, the main changes introduced by the 2014 revision of the TTBER and TTGL, namely the amendments to the list of excluded restrictions and the introduction in the TTGL of a safe harbour for technology pools, have proved to be effective and have been well received by the majority of stakeholders.

The evaluation also showed that these objectives were achieved in an efficient way. Compared to a scenario in which there would be no block exemption or guidance for the assessment of technology transfer agreements, the costs of using the TTBER and the TTGL to assess those agreements – although these are difficult to quantify – are generally regarded by stakeholders as low and proportionate to the benefits provided by these instruments. Accordingly, stakeholders anticipate increased costs in the absence of the TTBER and TTGL.

That said, certain market and other developments since the TTBER and TTGL were adopted in 2014 call into question the continued effectiveness and relevance of certain areas of the rules, as regards both their scope and content. First, the evaluation confirmed that data is increasingly important in the digital economy. In that context, the transfer of data and/or rights in data has become more frequent, yet data and data rights are not expressly covered by the TTBER or TTGL.

Second, the evaluation found that market participants encounter practical difficulties when applying the TTBER's market share thresholds for technology markets. This is often due to a lack of available information on competing technologies, especially in innovative markets, where market conditions are often dynamic. Similar problems arise when market participants apply the 4+ test included in the TTGL.

Third, in a context where multilateral licensing appears to be increasing, the conditions of the safe harbour provided in the TTGL may not be entirely effective in only capturing technology pools that fall outside the Article 101(1) prohibition.

Fourth, the evaluation showed that the relevance of the current rules may be affected by the emergence of LNGs, for which the TTGL currently provide no guidance.

Fifth, the current guidance in the TTGL relating to settlement agreements does not reflect the most recent case law of the EU courts.

Finally, the evaluation indicates that the TTBER and TTGL are generally coherent with other relevant EU legislation and policies, and that they enable a uniform application of



Article 101 of the Treaty to technology transfer agreements throughout the Union. However, certain definitions and provisions of the TTBER are not aligned with the equivalent provisions in the recently revised HBERs and VBER.

## **5.2. Lessons learned**

The evaluation has provided valuable insights on the functioning of the TTBER and TTGL, and confirmed 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 companies' ability to assess the compliance of their technology transfer agreements with Article 101 of the Treaty.

## **Annex I: Procedural Information**

### **1. Lead DG**

The Directorate-General for Competition ('DG Competition') is the lead Directorate-General ('DG') for this evaluation.

### **2. Decide reference**

The Decide reference of this evaluation is PLAN/2022/2296.

### **3. Derogations granted and justification**

Not applicable: no derogations were requested during this evaluation.

### **4. Organisation and timing**

The evaluation of the Technology Transfer Block Exemption Regulation (TTBER)<sup>139</sup> and the Technology Transfer Guidelines (TTGL)<sup>140</sup> was launched in November 2022. Its purpose was to assess whether the TTBER should be allowed to expire, prolonged, or revised in order to take account of market developments that have occurred since its entry into force in 2014.

The call for evidence, which set out the background of the evaluation as well as its purpose and scope, was published on the Commission's *Have Your Say* portal on 25 November 2022 and was open for comments until 23 December 2022. The call for evidence also presented the consultation activities that would take place during the evaluation, in particular a public consultation, a stakeholder workshop, an independent support study and a consultation of the national competition authorities (NCAs).

The evaluation was carried out in close cooperation with the NCAs and the Interservice Steering Group (ISSG).

NCAs were consulted to gather evidence on their experience in applying the TTBER and TTGL and to find out whether and how courts in their jurisdictions have applied these instruments.

The ISSG was set up in November 2022 and met for the first time on 21 November 2022 with representatives from the Commission's Secretariat General, Legal Service and the following Directorate-Generals: Climate Action (CLIMA), Communications Networks, Content and Technology (CNECT), Defence Industry and Space (DEFIS), Energy (ENER), Environment (ENV), Financial Stability, Financial Services and Capital Markets

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<sup>139</sup> 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.

<sup>140</sup> 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.



Union (FISMA), Internal Market, Industry, Entrepreneurship and SMEs (GROW) and Research and Innovation (RTD). Further meetings of the ISSG were held on 17 March 2023, 26 September 2023 and 19 September 2024.

The table below presents the timing of the activities undertaken in the course of the evaluation, and other relevant milestones:

Timing	Step
11 November 2022	Launch of the evaluation in Decide Planning
21 November 2022	<u>1<sup>st</sup> ISSG Meeting with the following agenda items:</u> <ul style="list-style-type: none"> <li>- presentation of the planned evaluation of TTBER and TTGL</li> <li>- discussion on the draft consultation strategy, draft call for evidence and proposed timeline of the initiative</li> </ul>
25 November 2022	Publication of the call for evidence - <i>open for comments until 23 December 2022</i>
5 December 2022	Questionnaire sent to NCAs to take stock of their experience
17 March 2023	<u>2<sup>nd</sup> ISSG Meeting with the following agenda items:</u> <ul style="list-style-type: none"> <li>- presentation of the feedback received in the call for evidence</li> <li>- discussion on the draft online evaluation questionnaire for the public consultation</li> </ul>
17 April 2023	Publication of the online public evaluation questionnaire - <i>open for comments until 24 July 2023</i>
26 September 2023	<u>3<sup>rd</sup> ISSG Meeting with the following agenda items:</u> <ul style="list-style-type: none"> <li>- presentation of the replies received to the online evaluation questionnaire</li> <li>- update on the next steps in the evaluation, including the study and the stakeholder workshop</li> </ul>
4 October 2023	Publication of the summary report on the public consultation
6 December 2023	Stakeholder workshop
19 December 2023	Signature of the contract for the evaluation support study
27 August 2024	Submission of the final report of the evaluation study
19 September 2024	<u>4<sup>th</sup> ISSG Meeting with the following agenda item:</u> consultation on the draft Staff Working Document
22 November 2024	Publication of the evaluation support study  Publication of the summary report on the stakeholder workshop

## 5. Consultation of the Regulatory Scrutiny Board

Not applicable. This evaluation was not selected for scrutiny by the Regulatory Scrutiny Board.

## 6. Evidence, sources and quality issues

For the purposes of the evaluation of the TTBER and TTGL, the main source of evidence used to inform the assessment of each evaluation criterion was the data and information gathered from businesses and other market players that use the TTBER and TTGL in their economic activities, for example by entering into technology transfer agreements.

Other sources of evidence were the enforcement experience of NCAs, the case law and the literature that discuss the TTBER regime or other connected topics, and the evidence presented by the contractor in the study report. The NCAs' enforcement experience proved to be limited.

The evidence was gathered via the following consultation activities: the call for evidence, the questionnaire sent to NCAs, the public consultation, the stakeholder workshop and the evaluation study (see more details on the study in the section below). DG Competition also held a number of meetings with various stakeholders to learn about their experience in applying the TTBER and TTGL.

## 7. Use of external expertise

The evaluation was supported by an external support study ('the study'), the purpose of which was to gather information about the functioning of the TTBER and TTGL, with a focus on four out of the five evaluation criteria (effectiveness, efficiency, relevance, and coherence).

The study was tendered on the basis of a framework service contract for the provision of services and support for policy studies in the area of competition policy. The framework contract provides for offers for specific contracts to be made to all contractors that signed the framework contract, who then decide whether to submit a specific tender in reply to the offer. DG Competition evaluates all the submitted tenders and selects the one that has the best price-quality ratio on the basis of the specified award criteria.

The call for tender for the study was sent to the contractors that signed the framework contract on 10 October 2023.

Following the evaluation of the submitted tenders, the specific contract for the study was signed with a consortium led by LE Europe<sup>141</sup> on 19 December 2023 for a period of 22 weeks. The deadline to submit the final report was 21 May 2024. Due to special circumstances, the deadline to submit the final report was extended.

The contractor submitted the interim report of the study in complete form on 19 April 2024, the updated interim report on 30 April 2024, the draft final report on

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<sup>141</sup> LE Europe is a European economics and policy consultancy company. The other members of the consortium are Ramboll (engineering, architecture and consultancy company), Spark Legal (consultancy providing research, analysis and advisory services related to law and policy) and EUI – European University Institute (institute dedicated to social sciences and humanities).



17 May 2024, and the final report on 27 August 2024. The final report was approved on 4 September 2024.

## Annex II. Methodology and Analytical models used

This Annex describes the methods and sources used to evaluate the Technology Transfer Block Exemption Regulation (TTBER)<sup>142</sup> and the Technology Transfer Guidelines (TTGL)<sup>143</sup>, including the changes from the original plan and the limitations encountered.

### 1. CHANGES FROM THE ORIGINAL PLAN

#### 1.1. Change of adoption date

The adoption date for the Staff Working Document indicated in the call of evidence has been moved from the third quarter of 2024 to the fourth quarter of 2024. This change was necessary for the completion of the evaluation process.

#### 1.2. Change of focus

There was no change in the focus of the evaluation.

### 2. DATA SOURCES

#### 2.1. Consultation activities

##### a) *Launch of the evaluation process*

The evaluation of the TTBER was initiated and its planning published on the Commission's *Have your say* webpage in November 2023<sup>144</sup>.

##### b) *Call for evidence*

The call for evidence on the evaluation of the TTBER was open for feedback between 25 November and 23 December 2022. Its objective was to obtain the views of individuals, businesses, public authorities and other relevant stakeholders on the effectiveness, efficiency, coherence, relevance and EU added value of the TTBER. Participants were able to reply in any of the EU's official languages. The call for evidence was also promoted through a press release and DG Competition's website on competition policy<sup>145</sup>. 12 stakeholders gave feedback.

##### c) *Public consultation*

Between 17 April and 24 July 2023, a public consultation was carried out to gather stakeholder views on the functioning of the TTBER and TTGL. The public consultation

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<sup>142</sup> 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.

<sup>143</sup> 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.

<sup>144</sup> [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13636-EU-competition-rules-on-technology-transfer-agreements-evaluation\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13636-EU-competition-rules-on-technology-transfer-agreements-evaluation_en)

<sup>145</sup> [https://ec.europa.eu/commission/presscorner/detail/en/mex\\_22\\_7180](https://ec.europa.eu/commission/presscorner/detail/en/mex_22_7180)



aimed to gather qualitative and quantitative evidence on the five evaluation criteria (effectiveness, efficiency, relevance, coherence and EU added value).

22 contributions were received, 20 via the *Have Your Say* portal and 2 via direct submissions to DG Competition outside the *Have Your Say* portal. The contributions came from a variety of stakeholders, with a particularly strong participation from business associations and large companies active in Europe. On 4 October 2023, a factual summary of the contributions to the public consultation was published on the *Have Your Say* portal<sup>146</sup> and on DG Competition's website<sup>147</sup>.

#### **d) Consultation of national competition authorities**

EU national competition authorities were consulted via a specific questionnaire, which generated 17 contributions. The NCAs also provided information and feedback through the study and at dedicated meetings of the European Competition Network.

#### **e) Stakeholder workshop**

On 6 December 2023, an online stakeholder workshop was held to gather additional evidence about the functioning of the TTBER and TTGL. Building on the outcome of the previous consultations carried out during the evaluation, the workshop focused on those issues where earlier feedback had been more critical. Participants discussed the following topics in two consecutive sessions:

##### Session 1 – Key provisions of the TTBER

- The concept of technology rights
- Market share thresholds in the TTBER and soft safe harbour in the TTGL based on the existence of at least four other technologies
- Exclusive grant-back obligations
- Non-challenge and termination clauses

##### Session 2 – Technology pools and licensing negotiation groups ('LNGs')

The discussion was structured around an issues paper circulated in advance of the workshop. There were approximately 70 participants, including lawyers, in-house lawyers, academics, representatives of businesses in various sectors (such as the automotive, telecommunications, pharmaceutical and chemical sectors), representatives of the NCAs and representatives of business associations in the automotive, telecommunications and electronics sectors. The information resulting from these discussions contributed to the assessment of the five evaluation criteria. A summary report of the stakeholder workshop ('workshop summary') is published on DG Competition's [website](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13636-EU-competition-rules-on-technology-transfer-agreements-evaluation/public-consultation_en)<sup>148</sup>.

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<sup>146</sup> [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13636-EU-competition-rules-on-technology-transfer-agreements-evaluation/public-consultation\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13636-EU-competition-rules-on-technology-transfer-agreements-evaluation/public-consultation_en)

<sup>147</sup> [https://competition-policy.ec.europa.eu/public-consultations/2023-technology-transfer\\_en](https://competition-policy.ec.europa.eu/public-consultations/2023-technology-transfer_en)

<sup>148</sup> [2023 technology transfer - European Commission \(europa.eu\)](https://2023-technology-transfer-european-commission.europa.eu)

## *f) Support study*

The Commission commissioned a support study ('the study') to carry out an independent evaluation of the functioning of the TTBER and TTGL, with a focus on four evaluation criteria (effectiveness, efficiency, relevance and coherence). The purpose of the study was to provide qualitative and quantitative information in response to evaluation questions.

The study used a wide range of research methods to gather information and analyse the evaluation questions:

- desk-based research, including a review of legal and economic literature, an analysis of data on licensing agreements, and a review of contributions to the Commission's public consultation and call for evidence;
- a review of cases handled by NCAs, national courts, the Commission and the courts of the European Union;
- interviews with a wide range of stakeholders;
- an online survey of stakeholders;
- two case studies;
- a validation workshop.

In addition to this wide-ranging exercise to collect information, the study assessed all the information gathered for consistency and aimed to cross-check and reconcile differing perspectives to produce a coherent set of responses to the evaluation questions.

The final study report was submitted on 27 August 2024 and accepted on 4 September 2024. The study, together with this Staff Working Document, is available on the webpage of DG Competition's [website](#) dedicated to the evaluation of the TTBER and the TTGL<sup>149</sup>.

## **3. ANALYSIS AND SYNTHESIS**

### **3.1. Steps taken to ensure the quality of the analytical results**

For the purposes of the evaluation of the TTBER and TTGL, evidence from the various sources was analysed and triangulated.

The assessment started with the results of the **public consultation**. An in-depth analysis of the feedback resulted in a preliminary but comprehensive understanding of the main issues faced by stakeholders regarding the functioning of the current rules. It made it possible to identify the issues on which stakeholders held common positions, as well as the issues on which their positions diverged. The assessment of the specific issues raised was based on: (i) the examples and the level of detail provided by stakeholders to support their concerns with concrete evidence; (ii) the variety of different positions; and (iii) the extent to which different types or groups of stakeholders shared the same view.

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<sup>149</sup> [https://competition-policy.ec.europa.eu/public-consultations/2023-technology-transfer\\_en](https://competition-policy.ec.europa.eu/public-consultations/2023-technology-transfer_en)



The **targeted consultation of the NCAs** aimed to gather their perspectives on the five evaluation criteria and, in general, on the application of the TTBER and TTGL. However, this consultation did not provide significant evidence, as in general the NCAs have very limited experience of applying the TTBER and the TTGL.

The **study** was designed to collect evidence and views on the TTBER and TTGL through: (i) 60 stakeholder interviews; (ii) 18 survey replies; (iii) a desk-based review of relevant economic and legal literature (88 studies); (iv) a review of legal cases (42 decisions and judgments); (v) an analysis of IP licensing data (about 800 agreements); (vi) an analysis of market trends; (vii) a workshop; and (viii) two case studies.

The **stakeholder workshop** provided additional input, which helped, first, to deepen the understanding of the issues raised in response to the public consultation and, second, to evaluate on a preliminary basis their impact on stakeholders. During the workshop, stakeholders were able to elaborate on their views on a series of specific topics by, for instance, providing examples of specific issues and explaining how those issues impacted stakeholders.

### **3.2. Critical assessment of the work carried out by the external contractor**

The study included an online survey that was characterised by a lack of engagement among all the types of stakeholders covered by this evaluation. The consumer organisations and patent offices that were identified declined to participate, due to their lack of exposure to the TTBER and TTGL. A sample of the most representative (in terms of patents awarded) university technology transfer offices was selected to replace consumer organisations and patent offices.

The study also included a series of interviews and encountered limited engagement from consumer organisations, licensors, licensees, standard-setting organisations, technology pools and LNGs. Following repeated invitations to new stakeholders, the success rate improved for all stakeholder categories, except consumer organisations, which were eventually replaced with university technology transfer offices.

Across all the research activities carried out for the study only limited quantitative information was collected in relation to the following parameters: (i) the number and size of LNGs operating in the European Economic Area (EEA) (for the purpose of assessing the economic significance of LNGs); (ii) the number and size of technology pools operating in the EEA (to assess the economic importance of technology pools); and (iii) the cost savings (or cost increases) resulting from the TTBER and TTGL (to assess the efficiency of these instruments).

### **3.3. Uncertainty and the robustness of the results**

Triangulation of sources played a critical role in ensuring that the findings were robust. Where primary data were not available (e.g. on the exact number or characteristics of technology transfer agreements), other sources of information supplemented the missing data. These sources included the sample analysis of licensing agreements conducted for the study and the feedback provided by participants (e.g. in the public consultation, the workshop or the interviews carried out for the study).



## **4. LIMITATIONS OF THE ANALYSIS**

### **4.1. Level of participation**

Overall, there was a satisfactory level of stakeholder participation and representativeness in the consultation activities, taking into account the limited number of potential targets of the TTBER and TTGL. The Commission received 12 submissions in response to the call for evidence and 22 responses to the public consultation. Additional stakeholders were contacted during the study, via interviews and online surveys. The feedback received from stakeholders gives a fair representation of the opinions of lawyers, academics, representatives of businesses in various sectors and representatives of business associations. However, NCAs did not provide relevant information for the evaluation, considering their limited experience of using the TTBER and TTGL. Similarly, there was very limited participation by SMEs and consumers/consumer associations. This can be explained by the fact that these stakeholders may not have had the resources to participate in the public consultation or the stakeholder workshop. In addition, the TTBER and the TTGL are technical pieces of legislation mainly aimed at a specialist audience, and other categories of stakeholders have limited exposure to them.

### **4.2. Low level of stakeholder engagement in the study**

Both the online survey and the interviews conducted during the study encountered a lack of engagement from all the different types of stakeholder covered by this evaluation. Although it was finally possible to reach a representative sample of stakeholders for both these consultation activities, certain categories of respondents did not provide the requested feedback, due to lack of interest in the issues under discussion. Moreover, considering the reminders sent and the necessity to extend the deadline for the responses, the level of effective engagement in some replies could be questionable. That being said, the results of the study are consistent overall with feedback collected through other evaluation activities, which gives confidence as to the robustness of the feedback.

### **4.3. Poor quantitative data availability on certain aspects of the intervention**

It proved to be extremely difficult to gather reliable evidence to quantify the benefits and costs of the intervention. Participants in the various evaluation activities were not able to quantify the costs and/or benefits of the introduction of the TTBER and TTGL. Similarly, the evidence gathered in the survey conducted for the study was characterised by the lack of availability of robust quantitative evidence. A lack of consistent and comparable cost and benefit data during the evaluation period meant that it was not possible to make a quantitative assessment of whether the regulatory costs (i.e. compliance costs, enforcement/implementation costs and administrative costs) of the TTBER are proportionate to the benefits achieved.

### Annex III. Evaluation matrix

Evaluation criteria	Evaluation questions	Data sources	Points of comparison	Indicators
<b>Relevance</b>	Are the TTBER and the TTGL still relevant for the assessment of technology transfer agreements under EU competition law?	<ul style="list-style-type: none"> <li>- Call for evidence</li> <li>- Public consultation</li> <li>- Stakeholder workshop</li> <li>- Study</li> </ul>	Assessment of relevance looks at whether the original objectives behind the TTBER and TTGL are still appropriate, taking into account developments since 2014, such as digitalisation of the economy.	<p><u>Quantitative:</u></p> <ul style="list-style-type: none"> <li>- Public consultation – figures on the relevance questions</li> </ul> <p><u>Qualitative:</u></p> <ul style="list-style-type: none"> <li>- Feedback from the call for evidence</li> <li>- Feedback from the public consultation,</li> <li>- Feedback from the study interviewees</li> <li>- Feedback from the stakeholder workshop</li> </ul>
<b>Effectiveness</b>	To what extent the provisions of the TTBER, notably the hardcore and excluded restrictions, and the TTGL have proven effective in identifying those technology transfer agreements	<ul style="list-style-type: none"> <li>- Call for evidence</li> <li>- Public consultation</li> <li>- Stakeholder workshop</li> <li>- Study</li> </ul>	Assessment of the effectiveness looks at the extent to which the TTBER and the TTGL have fulfilled their	<p><u>Quantitative:</u></p> <ul style="list-style-type: none"> <li>- Public consultation – figures on the effectiveness questions</li> </ul>

	for which it cannot be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty?		objective of identifying those technology transfer agreements for which it cannot be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty	<u>Qualitative:</u> <ul style="list-style-type: none"> <li>- Feedback from the call for evidence</li> <li>- Feedback from the public consultation,</li> <li>- Feedback from the Study interviewees</li> <li>- Feedback from the stakeholder workshop</li> </ul>
<b>Efficiency</b>	<p>To what extent the TTBER and the TTGL have resulted in cost savings for businesses, NCAs and other stakeholders when they assess the compliance of technology transfer agreements with Article 101 of the Treaty, as compared to a counterfactual situation without the TTBER and TTGL?</p> <p>Are the costs proportionate to the benefits provided by the TTBER and TTGL?</p>	<ul style="list-style-type: none"> <li>- Call for evidence</li> <li>- Public consultation</li> <li>- Stakeholder workshop</li> <li>- Study</li> </ul>	Assessment of the efficiency of the TTBER and the TTGL looks at whether the net outcomes for business, NCAs and stakeholders associated with them have been positive.	<u>Quantitative:</u> <ul style="list-style-type: none"> <li>- Public consultation – figures on the efficiency questions</li> </ul> <u>Qualitative:</u> <ul style="list-style-type: none"> <li>- Feedback from the call for evidence</li> <li>- Feedback from the public consultation,</li> <li>- Feedback from the study interviewees</li> <li>- Feedback from the stakeholder workshop</li> <li>- EU case law</li> </ul>
<b>Coherence</b>	Are the TTBER and the TTGL in line with developments in the Commission's overall policy and practice in the field of EU	<ul style="list-style-type: none"> <li>- Call for evidence</li> <li>- Public consultation</li> <li>- Stakeholder workshop</li> <li>- Study</li> </ul>	Assessment of coherence consists in looks at how the different components	<u>Quantitative:</u> <ul style="list-style-type: none"> <li>- Public consultation – figures on the coherence</li> </ul>



	(competition) law?		set out in the the TTBER and the TTGL operate together, and whether they are consistent with other EU legislation, EU case law and other EU policies.	<u>Qualitative:</u> <ul style="list-style-type: none"> <li>- Feedback from the call for evidence</li> <li>- Feedback from the public consultation,</li> <li>- Feedback from the study interviewees</li> <li>- Feedback from the stakeholder workshop</li> </ul>
<b>EU added value</b>	To what extent have the TTBER and the TTGL contributed to ensuring a consistent application of Article 101(1) of the Treaty to technology transfer agreements by the competition authorities and the courts of the EU Member States?	<ul style="list-style-type: none"> <li>- Call for evidence</li> <li>- Public consultation</li> </ul>	Assessment of the EU added value consists in looking at whether the objectives of the TTBER and the TTGL could have been achieved by Member States acting alone.	<u>Quantitative:</u> <ul style="list-style-type: none"> <li>- Public consultation – figures on the EU added value questions</li> </ul> <u>Qualitative:</u> <ul style="list-style-type: none"> <li>- Feedback from the call for evidence</li> <li>- Feedback from the public consultation</li> </ul>

## Annex IV. Overview of costs and benefits

<i>Table 1. Overview of costs and benefits identified in the evaluation</i>							
	Citizens/Consumers		Businesses		Administrations		
	Quantitative	Comment	Quantitative	Comment	Quantitative	Comment	
<b>Block exemption for technology transfer agreements and guidance on how to apply it</b>							
<b>Direct compliance costs</b> (adjustment costs, administrative costs, regulatory charges)	<b>Type: recurrent</b>	N/A	Individuals do not have to comply with competition law in their capacity as citizens, so they do not incur any cost.	N/A	Businesses do not have to comply with the block exemption for their technology transfer agreements to be in compliance with competition law. To the extent that they wish their technology transfer agreements to be within the scope of the block exemption, the compliance costs would be linked to the (internal or external) competition law analysis of technology transfer agreements. However, that cost is hard to isolate and, therefore, to quantify. No stakeholder was able to give	N/A	N/A

					<p>us a precise figure for the cost of the competition law analysis of technology transfer agreements. In the public consultation, most respondents replied that the TTBER did not create costs. The respondents who mentioned that they incurred costs were not able to quantify them precisely. The study reached similar conclusions, with interviewees unable to provide specific quantifications of the costs (some of them only indicating some ranges of FTE<sup>150</sup>) and most of them confirming that the block exemption reduced the costs of a competition law analysis of technology transfer agreements.</p>		
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On this issue, the evaluation support study says (page 91): 'Respondents, from universities to large companies (500+ employees) report the need for 0.25, to 2 to even 6 FTE lawyer days to assess a single agreement.'



<b>Enforcement costs</b>  (costs associated with activities linked to the implementation of an initiative such as monitoring, inspection and adjudication/litigation)	<b>Type: recurrent</b>	N/A	N/A	N/A	N/A	N/A	The block exemption regulation has the primary goal of allowing a company to self-assess whether their technology transfer agreement complies with Article 101 of the Treaty. In that sense, the Commission and other competition authorities do not incur costs in the enforcement of the TTBER. When the Commission (and NCAs) quotes/uses/interprets the TTBER, it is usually to verify whether the agreement under scrutiny can be exempted from the prohibition of Article 101(1) thanks to the TTBER.
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<p><b>Direct benefits</b> (such as improved well-being; changes in pollution levels, safety, health, employment; market efficiency)</p>	<p><b>Type:</b> <b>recurrent</b></p>	<p>N/A</p>	<p>The TTBER strikes a balance between giving incentives to companies to enter into welfare-enhancing licensing agreements and the protection of competition in the market. This creates benefits for innovation, the market and therefore consumers' welfare. However, it is not possible to precisely quantify these benefits, as they are diluted in the overall benefits of competition law and of an</p>	<p>N/A</p>	<p>Businesses enjoyed significant benefits from the TTBER and the block exemption. They could self-assess their technology transfer agreements (without asking for the Commission's prior assessment and approval) and they could be sure that, if the agreement meets the criteria of the block exemption, it is exempted from the prohibition of Article 101(1). The quantification of such benefits, which entail a reduction in work for the legal assessment of technology transfer agreements is, however, very difficult. Most respondents to the public consultation confirmed the existence of such benefits but were not able to quantify them when asked to do so<sup>151</sup>. The study</p>	<p>N/A</p>	<p>The competition law analysis of technology transfer agreements by the Commission and NCAs is facilitated by the TTBER and the guidance on how to apply the block exemption, as they can find in those documents principles on when a technology transfer agreement meets the Article 101(3) exemption. However, such benefits are very hard to quantify, as it is impossible to quantify how much time officials spend analysing technology transfer agreements as part of their enforcement work.</p>
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One business association said that 'In the absence of the TTBER and TTGL there would be uncertainty on the compliance with Arts 101 and 102 and this would have cost implications', while a business said 'While there may be a cost in terms of engaging lawyers or economists to review the potential competition law implications of technology transfer agreements, we believe that the added clarity and guidance provided by the TTBER and TTGL helps to streamline the assessment of potential competition law implications.'

			efficient licensing system.		similarly found that the TTBER created benefits, with stakeholders pointing to large cost reductions which, however, are only very broadly identified (anywhere from 10 to as much as 1000 times lower cost than a situation without the TTBER) <sup>152</sup> .		
<b>Indirect benefits</b> (such as wider economic benefits, macroeconomic benefits, social impacts, environmental impacts)	<b>Type: recurrent</b>	N/A	See answer in the column above	N/A	The study supports the view that the TTBER (and the TTGL) created a legal framework where the limited risk of competition infringement by agreements designed to benefit from the block exemption gives parties the confidence to enter into agreements that they might not otherwise have done. This is a significant positive effect, as the TTBER leads to more licensing agreements than in its absence, and therefore greater dissemination of innovation		

<sup>152</sup>

See the study report, page 91.



					and stronger incentives to innovate <sup>153</sup> . However, it is not possible to quantify these benefits.		
<b>Guidance on how to apply Article 101 to technology transfer agreements (and technology pools) that do not fall within the block exemption</b>							
<b>Direct compliance costs</b> (adjustment costs, administrative costs, regulatory charges)	<b>Type: recurrent</b>	N/A	Individuals do not have to comply with competition law in their capacity as citizens, so they do not incur any cost.	N/A	The TTGL do not impose any obligations on companies. They simply provide guidance on how to apply Article 101 of the Treaty to technology transfer agreements. As such, any compliance cost should be treated as deriving directly from the need to comply with Article 101, rather than with the TTGL. In any case, the respondents to the public consultation who said that the TTGL (together with	N/A	N/A

<sup>153</sup> See the study report, page 92.

					the TTBER) created costs were not able to identify them.		
<b>Direct benefits</b> (such as improved well-being; changes in pollution levels, safety, health, employment; market efficiency)	<b>Type: recurrent</b>	N/A	The TTGL provides clarity on when a technology transfer agreement is compliant with Article 101. This allowed companies to draft technology transfer agreements that are pro-competitive or at least neutral in terms of its effects on competition. However, it is not possible to estimate the exact amount of these benefits, as they are diluted in the	N/A	Businesses gained significant benefits from the guidance on how to apply Article 101 to technology transfer agreements that do not enjoy the benefit of the block exemption. They could self-assess their technology transfer agreements faster and with more legal certainty. The quantification of these benefits, which entails a reduction in the work to make a legal assessment of technology transfer agreements, is however very difficult. Most respondents to the public consultations confirmed the existence of such benefits (from both the TTBER and the TTGL together). However, when they were asked to quantify these	N/A	The competition law analysis of technology transfer agreements by the Commission and NCAs is facilitated by the guidance on how to apply Article 101 to technology transfer agreements that do not enjoy the benefit of the block exemption. Those responsible for enforcement can more easily assess the effects on competition of such agreements on the basis of the already established principles included in the TTGL. However, such benefits are very hard to estimate, as it is impossible to quantify how much time officials spent on

			overall benefits of a competitive market.		benefits they were not able to do so <sup>154</sup> . The study similarly found that the TTGL have created benefits, in particular in relation to the guidance on technology pools <sup>155</sup> .		analysing technology transfer agreements as part of their enforcement work.
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<sup>154</sup> One business association said that *'In the absence of the TTBER and TTGL there would be uncertainty on the compliance with Arts 101 and 102 and this would have cost implications'*, while a business said *'While there may be a cost in terms of engaging lawyers or economists to review the potential competition law implications of technology transfer agreements, we believe that the added clarity and guidance provided by the TTBER and TTGL helps to streamline the assessment of potential competition law implications.'*

<sup>155</sup> See the study report, page 75.



## **Annex V. Stakeholder consultation - Synopsis report**

### **1. INTRODUCTION**

This annex presents the results of the consultation activities performed in the context of the evaluation of the Technology Transfer Block Exemption Regulation (TTBER) and the Technology Transfer Guidelines (TTGL).

The aim of the evaluation was to gather input from various stakeholders on their experience with the performance of the TTBER and the TTGL in order to inform the decision on whether the Commission should allow the TTBER to expire, prolong its duration or revise it in order to take account of developments that have occurred since its adoption in 2014. The evaluation was primarily of interest to companies with business operations in the EU, active in various sectors of the economy, and which hold industrial property rights and/or enter into technology transfer agreements with other independent companies. It was also likely to interest law firms and economic consultancy firms that advise such companies on related competition issues. The experience gathered by the competition authorities (NCAs) and the courts of the EU Member States in applying the TTBER was also relevant for this evaluation. Other stakeholders with a possible interest in the evaluation included academics specialising in EU competition law and industrial property rights.

The various consultation activities consisted of:

- a call for evidence;
- an open public consultation based on an online questionnaire;
- a consultation of NCAs;
- a stakeholder workshop.

As a general observation, the limited number of responses to the call for evidence and the public consultation indicates that the TTBER and the TTGL are niche instruments, which are known and applied by specific categories of stakeholders, in particular companies that are active in sectors where intellectual property rights are essential and that enter into technology transfer agreements with other companies. Similarly, it appears that, like the Commission, NCAs have little experience in applying the TTBER and TTGL in their casework, which reduces the sources of evidence.

### **2. THE CALL FOR EVIDENCE**

The call for evidence on the evaluation of the TTBER was open for feedback between 25 November and 23 December 2022. Its objective was to obtain the views of individuals, businesses, public authorities and other relevant stakeholders on the effectiveness, efficiency, consistency, relevance and the EU added value of the TTBER. Participants were able to reply in any of the EU's official languages. A total of 12 stakeholders gave feedback, mainly businesses or association of businesses active in sectors where IP rights play a role.

In general, stakeholders supported the extension and the revision of the TTBER and the TTGL, underlining that technology transfer agreements contribute to the diffusion of

technology and incentivise innovation, while generally raising only limited competition concerns. In particular, the two instruments should be amended to take recent developments into account and, where possible, to simplify the legal framework.

A series of amendments were suggested to certain provisions of the TTBER and the TTGL, in particular with respect to the scope of the block exemption, the market share thresholds, the treatment of grant-backs and non-challenge and termination clauses, the assessment of technology pools, and the inclusion of licensing negotiations groups (LNGs). The observations were sometimes contradictory between different categories of stakeholders, reflecting various perspectives and positions in the value chain. In any case, the same observations were further explained in the replies to the public consultation and during the workshop.

### 3. THE PUBLIC CONSULTATION

Between 17 April 2023 and 24 July 2023, a public consultation was carried out to gather the views of stakeholders on the functioning of the TTBER and the TTGL. The consultation aimed to gather qualitative and quantitative evidence on all five evaluation criteria (i.e. effectiveness, efficiency, relevance, coherence and EU added value).

#### a. Profile of respondents to the public consultation

The public consultation led to 22 contributions received, 20 via the *Have Your Say* portal and 2 which were sent directly to DG Competition outside the *Have Your Say* portal. The 20 respondents to the public consultation that replied on the portal consisted of 9 business associations, 5 companies/business organisations, 2 EU citizens, 1 non-governmental organisation, 1 public authority and 2 others (associations of lawyers)<sup>156</sup>. Most contributions were submitted in English.

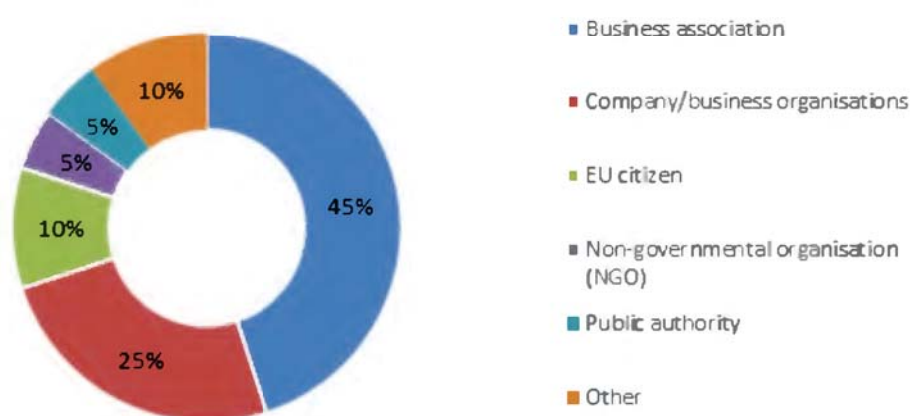
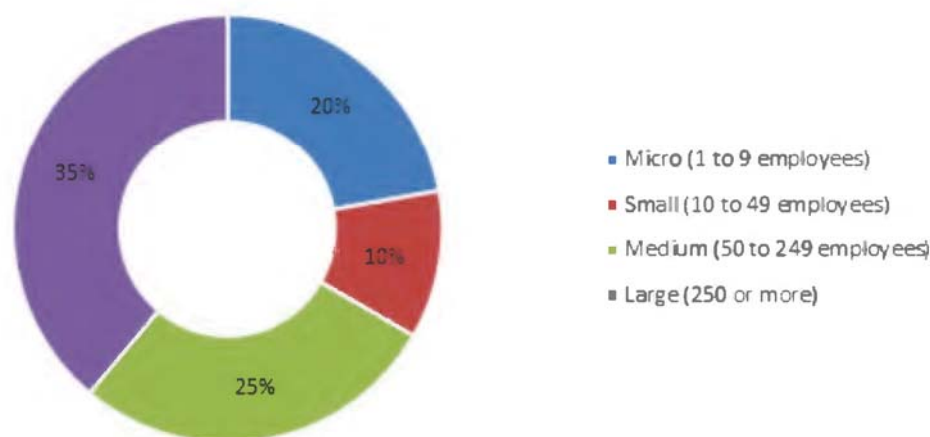


Figure 1: Respondent type

<sup>156</sup> One respondent (an association of lawyers) categorised itself incorrectly as a non-governmental organisation. This has been corrected to 'others' in the statistics contained in this summary.

As regards the contributions from organisations (18 responses, from respondents other than EU citizens), the distribution of responses is slightly skewed towards larger organisations, though organisations of all sizes are represented (see Figure 2). In particular, contributions were received from 7 large organisations (250 or more employees), 5 medium-sized organisations (50 to 249 employees), 2 small organisations (10 to 49 employees) and 4 micro-organisations (1 to 9 employees).



*Figure 2: Size of organisations*

The business associations that replied are either national or EU-wide, and represent the interests of their members in specific industrial sectors or specific economic activities (such as licensing). The respondent companies were active mainly in the information and communications technology industry and in car manufacturing. The non-governmental organisation focuses on the protection of the environment and nature; the public authority is a ministry in a Member State, and the two associations of lawyers (categorised as ‘others’ in Figure 1) represent the interests of specialised national lawyers in two Member States.

Most respondents (11) are active both as licensors (or associations that represent licensors) and licensees (or associations that represent licensees), while only 2 respondents are active only as licensors and only 1 as a licensee. The remaining stakeholders (4) stated that they were neither licensors nor licensees, nor associations representing them.



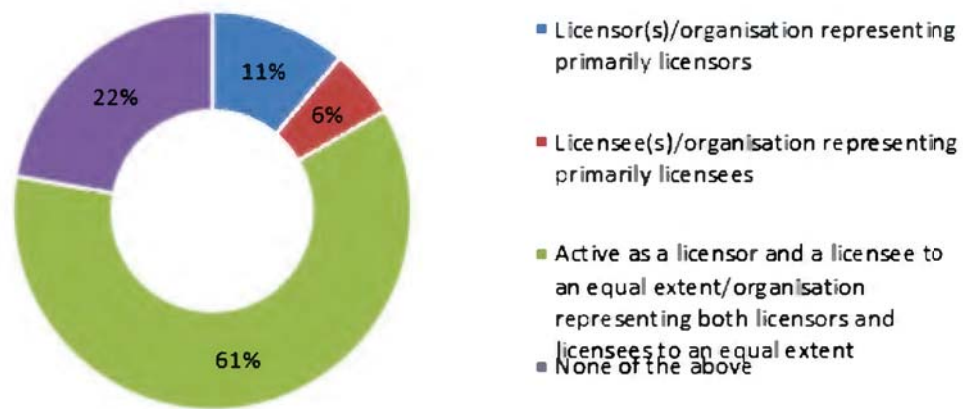


Figure 3: Role of respondents in licensing activities

## b. Results of the public consultation

The aim of the public consultation was to gather the views of stakeholders on the five evaluation criteria set out in the Better Regulation Guidelines, namely effectiveness, efficiency, relevance, coherence and EU added value. The questionnaire covered all of these criteria, however some stakeholders did not reply to every question and/or referred to comments made in response to other questions or to separate submissions. The following summary and statistics are therefore structured around the five evaluation criteria, whereas the qualitative comments are based on a more holistic review of the responses to the public consultation.

### Effectiveness (Have the objectives been met?)

In order to evaluate whether the TTBER and the Guidelines have met their objectives, stakeholders were asked to answer a number of questions related to effectiveness.

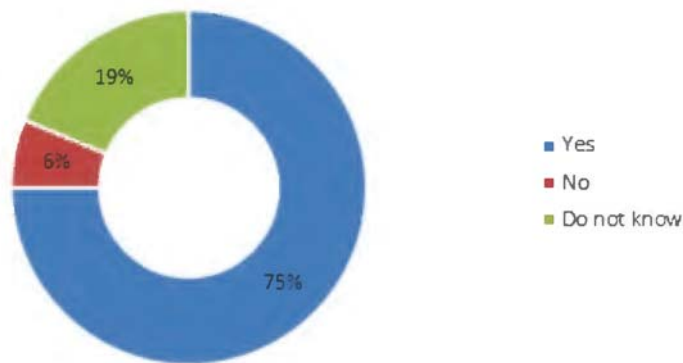
The first question enquired whether the TTBER has achieved its objective of exempting only those technology transfer agreements for which it can be assumed with sufficient certainty that they satisfy the conditions for an exemption under Article 101(3) of the Treaty.

The vast majority of respondents (12) answered “Yes” to this question,<sup>157</sup> while only 1 respondent (a citizen) answered the question in the negative, without providing an explanation. A minority of respondents (3) replied “Do not know”<sup>158</sup> (see Figure 4 below).<sup>159</sup>

<sup>157</sup> 7 business associations and 5 companies/business organisations.

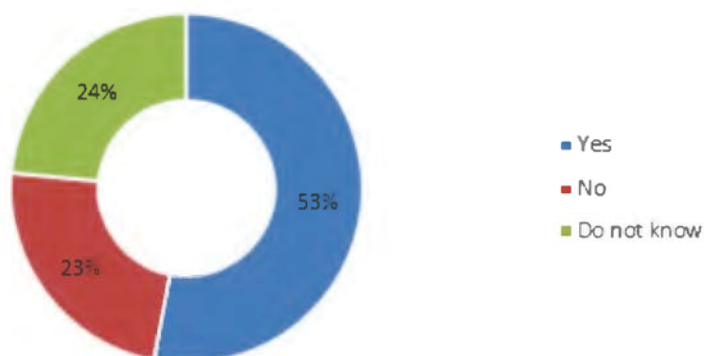
<sup>158</sup> 2 non-governmental organisations and 1 EU citizen.

<sup>159</sup> Moreover, 4 respondents did not reply to the question.



**Figure 4. In your view, has the TTBER been effective in exempting only those technology transfer agreements for which it can be assumed with sufficient certainty that they satisfy the conditions for an exemption under Article 101(3) of the Treaty?**

The second question enquired whether, conversely, there are licence agreements of intellectual property rights or other technology rights that satisfy the conditions for exemption under Article 101(3) of the Treaty, but which are not covered by the TTBER. A majority of respondents (9) answered “Yes”,<sup>160</sup> whereas 4 respondents answered “No”<sup>161</sup> and 4 replied “Do not know” (see *Figure 5 below*).



**Figure 5. Are there licence agreements of intellectual property rights or other technology rights which are not covered by the TTBER but that in your view satisfy the conditions for exemption under Article 101(3) of the Treaty?**

Among the technology transfer agreements which are not covered by the TTBER but which respondents considered to satisfy the conditions of Article 101(3) of the Treaty, three business associations respondents mentioned agreements relating to the transfer of IP rights other than those covered by the TTBER (such as IP rights in databases or in raw data), while one business organisation and one business association mentioned

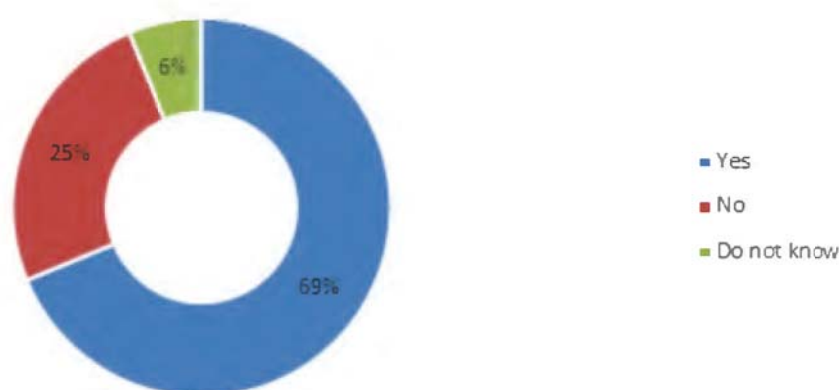
<sup>160</sup> 7 business associations and 2 companies/business organisations.

<sup>161</sup> 1 business association, 1 company/business organisation, 1 EU individual and 1 non-governmental organisation.

agreements between parties that have market shares higher than the thresholds currently set out in the TTBER,<sup>162</sup> and two business associations mentioned so-called Licensing Negotiation Groups (“LNGs”).

The third and fourth questions focused on whether the TTBER and Guidelines have achieved their objective of providing legal certainty to stakeholders when they assess technology transfer agreements and/or certain clauses included in such agreements under Article 101 of the Treaty. The aim of the questions was ultimately to understand whether the rules are clear and comprehensible.

As regards the TTBER, the majority of respondents (11) answered “Yes”, indicating that they considered that TTBER has been effective in providing legal certainty to stakeholders,<sup>163</sup> while 4 respondents answered in the negative<sup>164</sup> and 1 answered “Do not know” (see *Figure 6* below).<sup>165</sup>



*Figure 6 . In your view, has the TTBER been effective in providing legal certainty when assessing technology transfer agreements and/or certain clauses included in such agreements under Article 101 of the Treaty; in other words: are the rules clear and comprehensible, allowing you to understand and predict the legal consequences?*

Similarly, as regards the Guidelines, 9 respondents answered “Yes”, indicating that they considered that the Guidelines have been effective in providing legal certainty to stakeholders,<sup>166</sup> while 4 respondents answered in the negative<sup>167</sup> and 3 answered “Do not know” (see *Figure 7* below).<sup>168</sup>

<sup>162</sup> See Articles 3 and 8 of the TTBER.

<sup>163</sup> 5 companies/business organisations, 4 business associations, 1 non-governmental organisation and 1 association of lawyers.

<sup>164</sup> 3 business associations and 1 EU citizen.

<sup>165</sup> Moreover, 4 respondents did not answer the question.

<sup>166</sup> 5 companies/business organisations, 3 business associations and 1 association of lawyers.

<sup>167</sup> 3 business associations and 1 EU citizen.

<sup>168</sup> Moreover, 4 respondents did not answer the question.



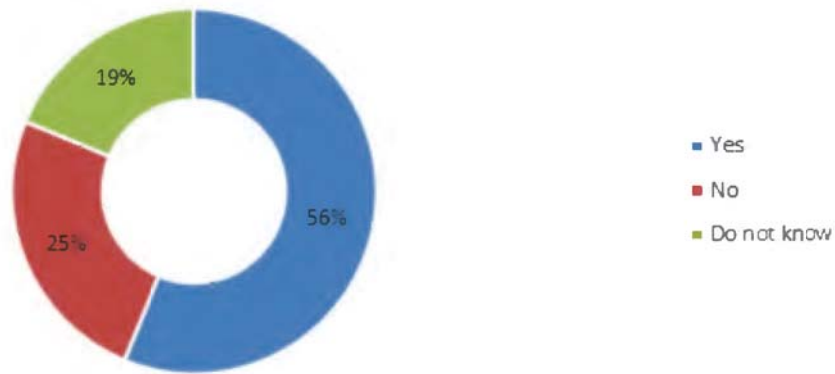


Figure 7. In your view, have the Guidelines been effective in providing legal certainty when assessing technology transfer agreements and/or certain clauses included in such agreements under Article 101 of the Treaty; in other words: are the rules clear and comprehensible, allowing you to understand and predict the legal consequences?

The respondents that answered that the TTBER and/or the Guidelines have been effective in providing legal certainty highlighted that both instruments work well and have been generally helpful (or even indispensable) in providing clarity on the legal consequences to stakeholders. For example, one business association highlighted that the TTBER and Guidelines ensure a uniform and reliable approach for the assessment of licensing agreements under competition law. At the same time, a majority of these respondents<sup>169</sup> considered that certain areas or provisions of the current rules do not provide sufficient legal certainty (and suggested specific updates of the rules in this respect).

A majority of those who answered that the TTBER and/or Guidelines have not been effective in providing legal certainty<sup>170</sup> focused their replies on the lack of legal certainty provided by the section of the Guidelines dealing with technology pools and licensing of Standard Essential Patents.<sup>171</sup>

The fifth question asked whether some of the main changes that were made during the last revision of the TTBER and Guidelines (compared to the previous version of the rules) have been effective in exempting agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty and/or in providing legal certainty. The changes concerned were: (i) the creation of a soft law safe harbour for technology pools;<sup>172</sup> (ii) the exclusion from the block exemption of exclusive grant-back clauses (Art. 5(1)(a) of the TTBER),<sup>173</sup> and (iii) the exclusion from

<sup>169</sup> 4 business companies/organisations and 4 business associations.

<sup>170</sup> 3 business associations.

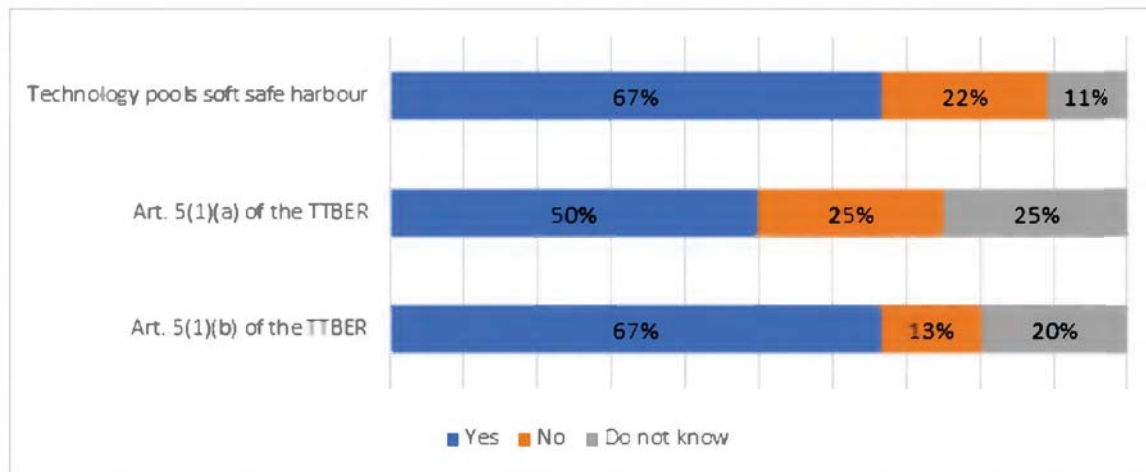
<sup>171</sup> In an additional question, respondents were asked to rate the level of legal certainty achieved by the TTBER and the Guidelines with respect to each specific area/provision of the rules (see Q 2.5 of the questionnaire).

<sup>172</sup> See Section 4.4 of the Guidelines (paras 261-265).

<sup>173</sup> In particular, the exclusion from the block exemption covers obligations on the licensee to assign to the licensor or to grant to the licensor an exclusive licence of the licensee's own improvements to the licensed technology (Art. 5(1)(a) of the TTBER).

the block exemption of termination clauses in non-exclusive technology transfer agreements (Art. 5(1)(b) of the TTBER).<sup>174</sup>

In relation to all these changes, the majority of respondents answered positively, indicating that they considered that the changes had achieved their objectives (see *Figure 8* below).



*Figure 8. The TTBER and Guidelines were last revised in 2014. In your view, which of the following changes made to the TTBER and Guidelines compared to the previous version of the block exemption regulation and guidelines have been effective in (i) exempting agreements for which it can be assumed with sufficient certainty that they satisfy the conditions for an exemption under Article 101(3) of the Treaty and/or (ii) providing legal certainty?*

Regarding the creation of a soft law safe harbour for technology pools, 12 respondents expressed the view that that change had achieved its objectives,<sup>175</sup> while 4 respondents answered negatively<sup>176</sup> and 2 respondents answered “Do not know”.<sup>177</sup> The majority of those that answered negatively<sup>178</sup> supported maintaining the soft safe harbour and called for increased legal certainty by introducing specific changes, for example in relation to requirements on royalties, transparency and essentiality.

Regarding the exclusion from the block exemption of exclusive grant-back clauses (Art. 5(1)(a) of the TTBER), 8 respondents expressed the view that that change had achieved its objectives,<sup>179</sup> while 4 respondents answered negatively<sup>180</sup> and 4 respondents answered “Do not know”.<sup>181</sup> All the respondents who answered negatively advocated returning to

<sup>174</sup> In particular, the exclusion from the block exemption covers clauses which give the licensor the right to terminate a non-exclusive technology transfer agreement in the event that the licensee challenges the licensor’s IP rights (Art. 5(1)(b) of the TTBER).

<sup>175</sup> 5 business companies/organisations, 5 business associations and 2 associations of lawyers.

<sup>176</sup> 3 business associations and 1 EU citizen.

<sup>177</sup> Moreover, 2 respondents did not answer.

<sup>178</sup> 3 business associations.

<sup>179</sup> 5 business companies/organisations, 1 business association, 1 association of lawyers and 1 EU citizen.

<sup>180</sup> 3 business associations and 1 association of lawyers.

<sup>181</sup> Moreover, 4 respondents did not answer.

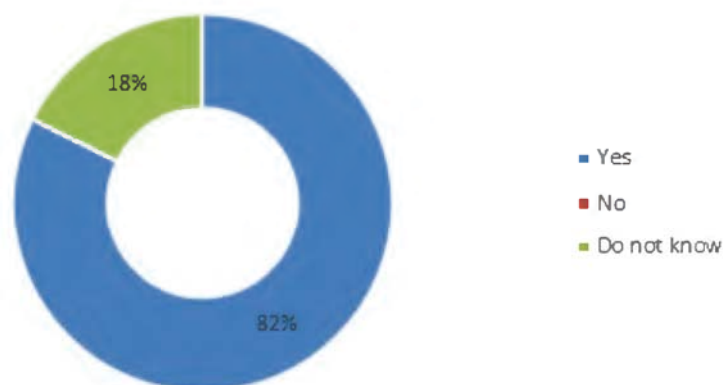
the regime provided by the 2004 version of the TTBER,<sup>182</sup> where different rules were provided for grant-backs of severable improvements and non-severable improvements.

Regarding the exclusion from the block exemption of termination clauses in non-exclusive technology transfer agreements (Art. 5(1)(b) of the TTBER), 10 respondents expressed the view that that change had achieved its objectives,<sup>183</sup> while 2 respondents answered negatively<sup>184</sup> and 3 respondents answered “Do not know”.<sup>185</sup> One business organisation which answered negatively further explained that the current regime is too restrictive and damages licensors, while the 2004 version of the TTBER had struck a better balance between allowing parties to challenge invalid patents and protecting good faith in licensing negotiations.

### **Efficiency (Were the costs involved proportionate to the benefits?)**

In this section, the questions focused on the costs and benefits created for the assessment of technology transfer agreements under Article 101 of the Treaty.

As regards the benefits, the majority of respondents (14)<sup>186</sup> indicated in reply to the first question, that they consider that the TTBER and Guidelines have created benefits for the assessment of technology transfer agreements under Article 101 of the Treaty, while no respondent (0) answered in the negative and 3 respondents answered that they did not know (see *Figure 9* below).<sup>187</sup> 4 respondents that answered in the positive further explained that these instruments provide a helpful framework for businesses to assess compliance of technology transfer agreements with Article 101 of the Treaty.



*Figure 9. Do you consider that the TTBER and Guidelines have created benefits for the assessment of technology transfer agreements under Article 101 of the Treaty, as compared to a situation in which such agreements would need to be assessed without the TTBER and Guidelines?*

<sup>182</sup> Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L 123, 27.4.2004, p. 11–17.

<sup>183</sup> 4 companies/business organisations, 4 business associations and 2 associations of lawyers.

<sup>184</sup> 1 business association and 1 business organisation.

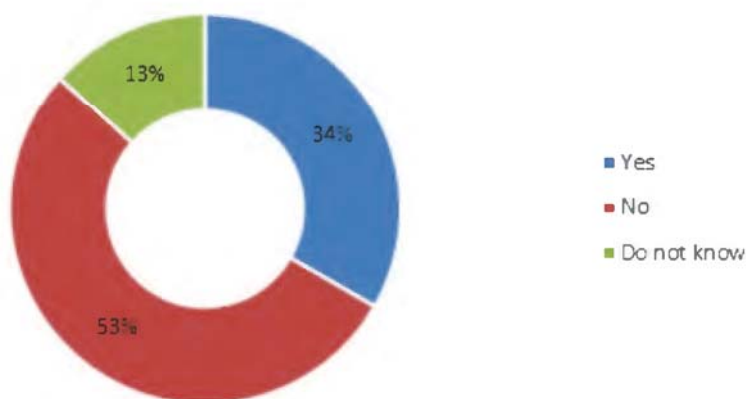
<sup>185</sup> Moreover, 5 respondents did not answer.

<sup>186</sup> 7 business associations, 5 companies/business organisations, 1 association of lawyers and 1 EU citizen.

<sup>187</sup> Moreover, 3 respondents did not answer.



As regards costs, 8 respondents indicated in reply to the second question that they do not consider that the TTBER and Guidelines have created costs for the assessment of technology transfer agreements under Article 101 of the Treaty<sup>188</sup>, while 5 respondents considered that these instruments have created costs<sup>189</sup>, and 2 respondents answered “Do not know” (see *Figure 10* below).<sup>190</sup> 3 of the respondents that considered that these instruments have created costs also considered that those costs are proportionate to the benefits created. Out of these 3, 2 respondents explained that these costs are generated mainly by fees to be paid to consultants assessing compliance of technology transfer agreements with the TTBER and the Guidelines.



*Figure 10. Do you consider that the TTBER and Guidelines have created costs for the assessment of technology transfer agreements under Article 101 of the Treaty (for example, fees paid to external consultants (lawyers and economists) and/or the cost of internal legal advice and time spent by commercial teams to negotiate and review contractual documents), as compared to a situation in which such agreements would need to be assessed without the TTBER and Guidelines?*

8 respondents also indicated that the costs of ensuring compliance of their technology transfer agreements with Article 101 of the Treaty would increase in the absence of the TTBER and Guidelines.<sup>191</sup> However, no respondent was able to quantify the benefits created or the costs generated by the TTBER and Guidelines.

### **Relevance (Is EU action necessary?)**

The questionnaire enquired whether the TTBER and Guidelines remain relevant for the assessment of technology transfer agreements under Article 101 of the Treaty. Respondents overwhelmingly confirmed the continuing relevance of the TTBER and Guidelines: 13 respondents answered “Yes”;<sup>192</sup> 1 respondent answered “No”,<sup>193</sup> and 3 respondents answered “Do not know” (see *Figure 11* below).<sup>194</sup>

<sup>188</sup> 4 business associations and 4 companies/business organisations.

<sup>189</sup> 1 business association, 1 company/business organisation, 1 EU citizen, 1 NGO, 1 other.

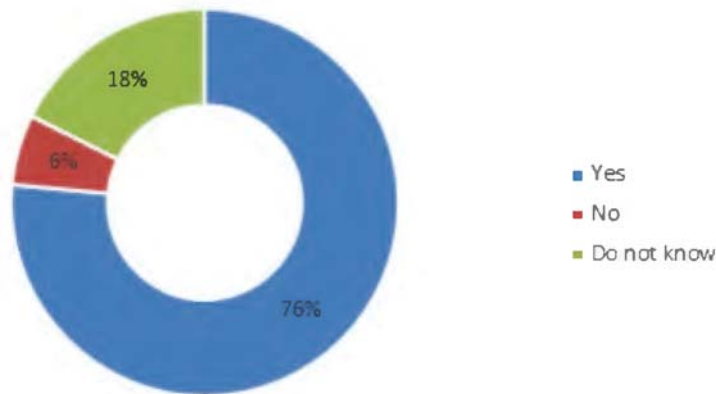
<sup>190</sup> Moreover, 5 respondents did not answer.

<sup>191</sup> 5 business associations and 3 companies/business organisations.

<sup>192</sup> 8 business associations and 5 companies/business organisations.

<sup>193</sup> EU individual.

<sup>194</sup> Moreover, 3 respondents did not answer.



*Figure 11. In your view, are the TTBER and Guidelines still relevant for the assessment of technology transfer agreements under Article 101 of the Treaty, taking into account notably any market developments that have occurred since these instruments were adopted in 2014, either generally or in a particular industry?*

### **Coherence (Does the policy complement other actions or are there contradictions?)**

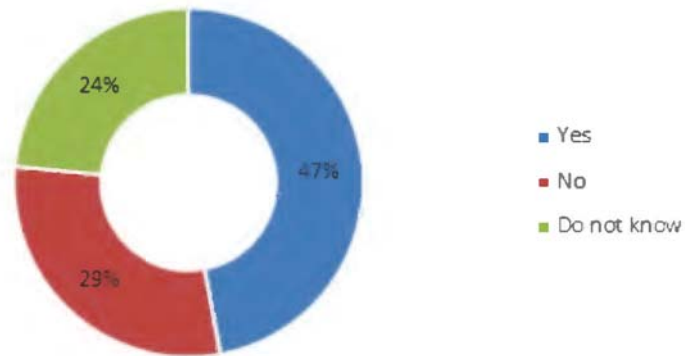
The questionnaire also asked whether the TTBER and Guidelines are coherent with other legal instruments and policies.

The first question in this section asked whether the TTBER and Guidelines are coherent with other existing EU Commission instruments that provide guidance on the interpretation of Article 101 of the Treaty (see *Figure 12* below). 8 respondents answered “Yes”,<sup>195</sup> while 5 respondents answered “No”,<sup>196</sup> and 4 respondents answered that they did not know.<sup>197</sup> While not all the respondents that answered in the negative provided further explanations, those that did mentioned certain limited incoherencies with the Horizontal Block Exemption Regulations and the Vertical Block Exemption Regulation.

<sup>195</sup> 5 business organisations and 3 companies/business associations.

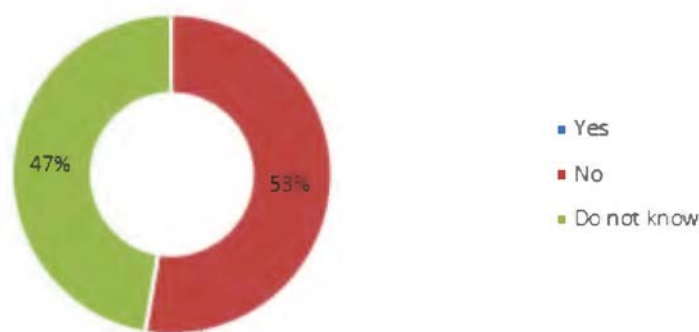
<sup>196</sup> 4 business associations and 1 EU citizen.

<sup>197</sup> Moreover, 3 respondents did not answer.



*Figure 12. Are the TTBER and Guidelines coherent with other Commission instruments that provide guidance on the interpretation of Article 101 of the Treaty, for example, the Research and Development Block Exemption Regulation (Regulation (EU) No 1217/2010), the Specialisation Block Exemption Regulation (Regulation (EU) No 1218/2010), the Commission Guidelines on Horizontal Agreements, the Vertical Agreements Block Exemption Regulation (Regulation (EU) No 2022/720) and the Commission Guidelines on Vertical Agreements?*

The second question in this section asked whether the TTBER and Guidelines are coherent with other existing or upcoming EU legislation and policies relating to the fields of intellectual property and competition law (see *Figure 13* below). A majority of respondents answered “No” (10),<sup>198</sup> no respondent (0) answered “Yes”, and 9 respondents answered “Do not know”.<sup>199</sup> All respondents that answered in the negative indicated that the TTBER and Guidelines are not coherent with the Commission’s recently adopted proposal for a Regulation on Standard Essential Patents (COM(2023)232).



*Figure 13. Are the TTBER and Guidelines coherent with other existing or upcoming EU legislation and policies relating to the fields of intellectual property and competition law, for example the Commission’s proposed initiative relating to Standard Essential Patents?*

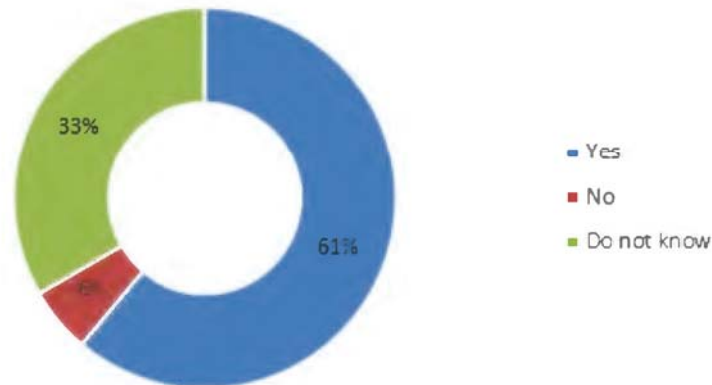
<sup>198</sup> 6 business associations, 3 companies/business organisations, 1 EU citizen.

<sup>199</sup> Moreover, 1 respondent did not answer.



### **EU Added Value (Did EU action provide clear added value?)**

Finally, the questionnaire asked whether the TTBER and Guidelines have added value compared to what could have been achieved by regulations or guidelines at national level (see *Figure 14* below). 11 respondents answered this question positively,<sup>200</sup> while one respondent answered “No”.<sup>201</sup> 6 respondents answered “Do not know”.<sup>202</sup>



*Figure 14. Has the adoption of the TTBER and Guidelines at EU level added value compared with what could have been achieved by national regulations and/or guidelines?*

## **4. CONSULTATION OF THE NCAS**

In December 2022, the Commission surveyed the NCAs from Member States about their experience of applying the TTBER and TTGL.

In total, 17 NCAs replied to the consultation. In general, they stated that they had no or little experience in applying the TTBER or the TTGL. One NCA observed that the legal framework is still adequate to address competition issues in the relevant sectors, even considering the market developments that have taken place at national and/or European level, but that certain parts of the TTBER and the TTGL could be simplified.

## **5. STAKEHOLDER WORKSHOP**

On 6 December 2023, an online stakeholder workshop took place to gather additional information about the functioning of the TTBER and the TTGL. Building on the outcome of previous consultations carried out during the evaluation exercise, the workshop

<sup>200</sup> 7 business associations, 2 companies/business organisations, 1 non-governmental organisation and 1 association of lawyers.

<sup>201</sup> EU individual.

<sup>202</sup> Moreover, 2 respondents did not answer.

focused on those issues where earlier feedback had been more critical. Participants discussed the following topics in two consecutive sessions:

#### Session 1 – Key provisions of the TTBER

- The concept of technology rights
- Market share thresholds in the TTBER and soft safe harbour in the TTGL based on the existence of at least four other technologies
- Exclusive grant-back obligations
- Non-challenge and termination clauses

#### Session 2 – Technology pools and licensing negotiation groups (LNGs)

The discussion was structured around an issues paper which the Commission shared with participants in advance. There were approximately 70 participants, including lawyers, in-house lawyers, academics, representatives of businesses in various sectors, such as the automotive, telecommunications, pharmaceutical, and chemical sectors, representatives of NCAs and representatives of business associations in the automotive, telecommunications and electronics sectors.

On the concept of technology rights, participants generally stressed the need to include data and data sets, including raw data, in the scope of the block exemption, given the growing importance of data since the entry into force of the TTBER in 2014. One of the participants that favoured adding raw data to the list of technology rights also called for the definition of know-how in the TTBER to be aligned with the definition of trade secret in the 2016 Trade Secrets Directive. They noted the challenges of defining raw data, referring to the difficulty of describing raw data comprehensively due to its often heterogeneous nature, and called for future possible changes in the TTBER to be done in a coherent manner with other instruments

As regards the relevance of market share thresholds, some participants pointed out the difficulty in defining relevant product markets and in determining market shares for products still under development, given the limited information available or its confidential nature at that stage. One of the participants suggested removing the TTBER's market share thresholds for technology markets, on the basis that market shares are difficult to calculate in technology markets and keeping only market share thresholds for product markets. Another participant suggested removing market share thresholds altogether, stating that the list of hardcore restrictions was sufficient to exclude anti-competitive agreements from the exemption. During the discussions, it was also suggested to look at the presence in the market of pools and alternative technologies, rather than focusing on the market shares of the parties when assessing the competitive situation on the market.

A few participants also suggested that potential competition under the TTBER should be treated the same way as is the case with the R&D block exemption regulation (under which the market share threshold applies to potential competitors in relevant markets for existing products that are capable of being improved or replaced by the joint R&D). Another participant suggested that, in the absence of sales data to calculate market



shares, solutions similar to those adopted in the R&D block exemption regulation should be used (e.g. R&D expenditure or R&D capabilities).

Some participants considered that the current market share thresholds were too low. One participant suggested raising the market share threshold for agreements between competitors from 20% to 30%. Another participant called for the removal of the market share thresholds for agreements between non-competitors, or for the current threshold to be raised.

As regards the distinction between competitors and non-competitors, one participant pointed out that the definition of competitors was very broad, since it included both upstream (technology) and downstream (product) market competition, and that any type of remote competitive relationship would qualify. This, combined with low market share thresholds, makes it unrealistic to use the safe harbour.

Some participants pointed out the difficulty in calculating the market shares of the parties in the relevant technology market(s) on the basis of the sales of the products incorporating the licensed technology. This is because the parties do not necessarily know for what type of product the technology might be used when they enter into a licensing agreement. It is therefore difficult to calculate the market shares of the parties for each potential new product for which the licensed technology could be used.

One participant pointed out that technology markets are generally considered to be global, unlike product markets, so the geographic market dimension is a challenge in those cases. The participant also noted that some parties may have market power in technology markets, but not in product markets, and that the same technology could be used in different product markets.

Another participant stressed the need to include provisions in the market definition notice on the possibility to address data as a standalone market if data (independently, or by being included in the definition of know-how) were included in the scope of the TTBER.

As regards the 4+ safe harbour, some participants stressed the difficulty in practice in applying the 4+ safe harbour test. They pointed out that 4+ is a high threshold and that there are rarely more than four credible alternative technologies on the market. They therefore suggested reducing the test to two or three independently controlled technologies as these would already be enough to exert competitive pressure on the parties. Participants also questioned the usefulness of such a test, pointing out that, when more than four alternative technologies are on the market, the parties' market shares would likely turn out to be below the thresholds set by the TTBER. One participant also remarked that, as technology markets are often not transparent, it is often not possible to have knowledge of those other technologies and apply the 4+ test. Another participant advocated that the 4+ test should include both existing and future technologies, i.e. technologies still in the pipeline but sufficiently developed to exert competitive pressure on the market in the short to medium term. However, some participants stressed the need to include practical examples in the TTGL if the test was to include both existing and future technologies.

A few participants also raised concerns about the TTGL's requirement that the four alternative technologies should be available at 'comparable cost'. They pointed out that, most of the time, these costs cannot be known or legally obtained by the licensor, due to



their sensitive or confidential nature. Those participants therefore argued in favour of abolishing this requirement.

On the exclusive grant-back obligations, some participants stressed the need to return to the 2004 regime, which distinguished between severable and non-severable improvements, and to exclude from the block exemption only those exclusive grant-back obligations that relate to severable improvements. They considered that the current exclusion creates disincentives to licensing for licensors, as they cannot ensure that licensees who make a non-severable improvement to the licensed technology will grant back such improvements. One participant suggested specifying what would happen in the case of co-ownership of an improvement, wondering if this would be considered an exclusive grant-back obligation under the TTBER.

On non-challenge and termination clauses, some participants indicated that the licensor should have the option to terminate the agreement when the licensee challenges the intellectual property rights in the case of a non-exclusive licence agreement covering patents and know-how. A few participants also indicated that in the case of exclusive licence agreements, the licensor should have the option (in addition to terminating the agreement), of revoking the exclusivity if the licensee challenges the intellectual property rights covered by the licence agreement (and still remaining within the scope of the block exemption). This would give the licensor the possibility to decide to continue the business relationship not on an exclusive, but on a non-exclusive basis. In this case, as exclusive licences are more expensive than non-exclusive ones, one participant stressed the need for the TTGL to set out how to deal with the economic consequences of such a change in the commercial relationship.

Other participants called for the section of the TTGL on settlement agreements to be revised in line with recent case law to provide more legal certainty, especially considering that settlement agreements are generally non-challenge agreements. One of the issues raised was that there is currently uncertainty about when to engage in settlement discussions and what kind of agreement would be required to be compliant with antitrust rules.

With regard to technology pools, most participants consider the guidance on technology pools in the TTGL to be effective. One of the participants mentioned that the TTGL could be extended beyond technology pools to other forms of aggregations. One participant indicated that technology pools were generally working well, as evidenced by the number of technology pools formed and the uptake of licences from these pools equivalent to a 'one-stop shop'. Participants also indicated that technology pools generate pro-competitive effects for all stakeholders (licensors, licensees and, ultimately, consumers), notably by reducing transaction costs. Some participants also pointed out that the TTGL help to create legal certainty, by providing that patent holders can only join the technology pool if the patent proves essential, including for third parties.

However, other participants pointed out that the enforcement of the TTGL is at times insufficient as regards a number of conditions of the soft safe harbour. Participants indicated that some technology pools lack transparency, including on whether patents included in the pool are essential or not. Participants also considered that it was unclear whether licences concluded by technology pools were bound by FRAND commitments or whether these only applied to licences concluded by individual technology pool members on a bilateral basis. They also said it was unclear how licence fees are

calculated and whether they are FRAND or not. This is apparently difficult to establish, given the confidentiality agreements in place, and licensees have no possibility to compare what is offered in the licence. One participant suggested to incentivise pool administrators to monitor compliance with the TTGL, such as the rules on the royalty allocation formula.

A few participants pointed out that, in practice, licences are not offered to all potential licensees, and some licensors choose where to license in a production chain. This is particularly the case in the automotive industry, where licences for wireless communications are generally only offered to producers of end products i.e. car manufacturers, rather than to their suppliers. One participant suggested specifying in the TTGL, in line with recent national case law, that license agreements, which cover (some) technologies also licenced through another pool, are not FRAND if the licence leads to the payment of duplicative royalties, without any specific mechanism for reimbursement.

With regard to LNGs, some participants (mainly representing licensees) stressed the need to include a section on LNGs in the TTGL. They pointed out that licensees had no leverage in their negotiations with licensors. For them, these are ‘take it or leave it’ licences. LNGs would therefore enable licensees to pool their knowledge and have a better discussion about the portfolios of licensors, in order to ensure balanced negotiations, reduce information asymmetry and respond more quickly and diligently to the offers they receive. In particular, participants stressed the need to align the TTGL with the proposed regulation on standard essential patents (SEPs), under which licensors are required to make more information available to licensees. Another participant said that LNGs would make it easier for licensees to obtain licences, particularly for SMEs with limited means. Participants also stressed that LNGs do not encourage holdout, as SEP holders can decide not to negotiate with LNGs, while if implementers do not want to negotiate with SEP holders, those SEP holders can still go to court.

On the other hand, some participants (mainly representing licensors) were against including a section on LNGs in the TTGL and advocated for a case-by-case assessment. They pointed out that there was no or little experience of formally instituted LNGs and that the TTGL should only be based on real-life examples. However, one participant noted that, although there have been no formal LNGs in practice, there have already been similar contractual mechanisms of patent acquisition consortia (patent aggregators such as RPX, AST, SIMPAT) to collectively purchase patents or obtain a licence for a certain patent portfolio. Another participant, while acknowledging that cooperation could bring efficiencies, for instance, by reducing the amount of royalties and solving multiple disputes at once, stressed that there is no need to rebalance the bargaining power of implementers (licensees) through LNGs. This is because they are already using the technologies for free and the only way for licensors to enforce their intellectual property rights is to go to court, which is costly and burdensome. The participant also pointed out that licensors are already bound by FRAND commitments, which is a safeguard for implementers. Some participants took the view that LNGs would encourage holdout, for instance if implementers decide to negotiate only through an LNG and then, if they do not like the outcome, they decide to negotiate bilaterally. This would increase the time it takes to conclude licences. Another participant stressed that LNGs would disadvantage the licensees not included in the LNGs, especially SMEs.

If guidelines on LNGs were to be established, a few participants pointed out that there should be no obligation to join an LNG and to accept the outcome of the negotiation



between an LNG and a technology pool. It was also suggested that any guidance on LNGs should reflect the guidance already provided for technology pools, and that the guidance should also stress the anti-competitive aspects of LNGs, such as the risk of a buyer cartel and collective holdout.