



25 April 2025

To: The European Commission, Directorate General for Competition

Sub: Response to Call for Evidence for an Impact Assessment - Revision of the Technology Transfer Block Exemption Regulation and Technology Transfer Guidelines

Dear Sir/Ma'am,

We have great pleasure in enclosing comments in response to the Call for Evidence for an Impact Assessment concerning the Revision of the Technology Transfer Block Exemption Regulation and Technology Transfer Guidelines on behalf of the Antitrust Committee of the International Bar Association ("IBA").

Yours sincerely,



INTERNATIONAL BAR ASSOCIATION

ANTITRUST COMMITTEE

**SUBMISSION TO THE EUROPEAN COMMISSION REGARDING THE CALL FOR
EVIDENCE FOR AN IMPACT ASSESSMENT CONCERNING THE REVISION OF THE
TECHNOLOGY TRANSFER BLOCK EXEMPTION REGULATION AND TECHNOLOGY
TRANSFER GUIDELINES**

25 April 2025

INTRODUCTION

1. The International Bar Association’s (“**IBA**”) Antitrust Committee (“**Committee**”) would like to thank the European Commission (“**Commission**” or “**EC**”) for the opportunity to provide comments on the call for evidence on the revision of the Technology Transfer Block Exemption Regulation and the Technology Transfer Guidelines (“**TTBER**” and “**TTGs**” respectively).
2. The Committee’s Unilateral Conduct and Behavioural Issues Working Group (“**Working Group**”) offers these submissions for the Commission’s consideration as it finalizes the Guidelines.

ABOUT THE IBA

3. The IBA is the world’s leading international organisation of legal practitioners, bar associations, and law societies. As the “global voice of the legal profession”, the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, and it has considerable expertise in assisting the global legal community.
4. The Committee includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience, including unilateral conduct. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy.
5. The Working Group is responsible for monitoring and commenting on a range of competition issues that arise, *inter alia*, from unilateral conduct and abuse of dominance or misuse of market power as well as cooperative/horizontal (non-cartel) and vertical agreements. It aims to encourage best practice in the ongoing development of international laws in these areas by commenting on consultations on proposed new and reformed legislation.

OVERVIEW

6. The Working Group is grateful for the opportunity to provide its views on the Commission’s call for evidence on the revision of the Technology Transfer Block Exemption Regulation and the Technology Transfer Guidelines.
7. As the Draghi Report noted, closing the innovation gap with the US and China, particularly in advanced technology, is key to ensure the competitiveness of the EU, as well as competition overall in a global context.¹ Against this background, as also noted by the Staff Working Document, technology transfer agreements have a key role to play in strengthening incentives to innovate and to facilitate the diffusion and commercial exploitation of innovative technologies.² If appropriately understood and deployed, block

¹ The future of European competitiveness, Part A – A competitiveness strategy for Europe, Part A – Foreword, page 8.

² Commission Staff Working Document, Executive Summary of the Evaluation {SWD(2024)268 final}, Section 2.1.3.

exemptions and guidelines for technology transfer agreements should strike a delicate balance between preserving incentives to innovate and facilitate the dissemination of technologies that would facilitate the entry and effective participation of smaller startups.

8. Against this background, it is essential that the competition rules relating to technology licensing are focused on protecting against anti-competitive effects such as foreclosure or collusion, while at the same time preserving incentives and avenues to innovate and to license IP right holders in the interests of ensuring that innovative technologies capable of propelling the development of new goods and services are brought to market without undue impediment. Additionally, guidelines can help providing clear guidance as to which behaviours comply with the relevant competition rules and which typically do not.
9. We are pleased to share our initial views below on the key issues flagged by the Commission.

I. LICENSING OF DATA RIGHTS

10. The Commission has identified two policy options concerning data-related provisions in technology transfer agreements:
 - (a) Option 1: no change to the TTBER, but the Commission could provide guidance on the factors that it will take into account in assessing data-related provisions in technology transfer agreements.
 - (b) Option 2: widen the scope of the TTBER by expanding the definition of technology rights to include certain categories of data or rights in data and provide further guidance in the Guidelines.
11. The Working Group agrees that the licensing of data or data rights are a key input in today's growing digital economy, and EU Regulations such as the Data Act and the Digital Markets Act now impose mandatory data sharing in certain instances. It is also true that access to data on fair and reasonable terms can facilitate innovation and market entry. However, data itself is perhaps more properly considered an input or resource rather than intellectual property in the true sense. It therefore is not clear that the licensing of data or data rights amount to traditional IP rights, necessarily related to access to technology. While regulation of access to data may be an important factor in facilitating market entry in both digital markets and traditional markets powered by digital technology, it is unclear that the narrower scope of the TTBER should be extended to cover data in and of itself (as opposed to licenced technology or IP rights that incorporate key and proprietary data rights). We also see the risk that provisions and/or definitions of certain categories of data in the TTBER may contradict existing rules / definitions such as in the Data Act and GPDR. "Data" is a term used for a wide range of information and it would seem challenging to categorise and define data to be included within the meaning of "technology rights".
12. Based on the above, the Working Group submits that Option 1 – no change to the TTBER with guidance on the factors that the Commission would take into account in assessing data-related provisions in technology transfer agreements – would be the most suitable option.

13. That said, given that control of and access to big data is gaining significant economic importance in the digital economy, it would be helpful for the Commission to

- (a) codify in the TTGs the criteria for assessing the competitive significance of data, notably the “four Vs” of big data set out in the Apple/Shazam decision (variety, velocity, volume, and value), as well as the potential for foreclosure;
- (b) ensure that any guidance provided in connection with data rights takes into account the principle of fair and reasonable access on the one hand as well as fair compensation on the other hand, as also set out in other instruments such as the Data Act, which requires FRAND compensation from data recipients.

II. MARKET-SHARE BASED SAFE-HARBOURS FOR THE TTGS, PARTICULARLY FOR TECHNOLOGY MARKETS

14. The EC has acknowledged the practical difficulties in the implementation of the TTBER market share thresholds for technology markets, and has identified two policy options to address this issue:

- (a) Option 1: no change to the TTBER safe harbours in Article 3 (market share thresholds) and Article 8 (application of market share thresholds), but potential changes to the conditions of the soft safe harbour in point 157 of the Guidelines.
- (b) Option 2: amend the TTBER safe harbour and the related TTG guidance by either removing the market share threshold for the relevant technology markets, leaving only the threshold for relevant product markets or replace the current market share threshold for technology markets with a condition based on the existence of a number of other independent technologies.

15. The Working Group submits that Option 2 is the more appropriate one, given that the calculation of market shares in emerging technology markets will often be very difficult, if not impossible where commercialisation has not yet taken root. In fact, even in markets where there are actual product sales it is often difficult to calculate actual shares to determine whether the 20% threshold (for agreements between competitors) or the 30% threshold (for agreements between non-competitors) are met. Furthermore, the question whether companies are actual or potential competitors often involves very difficult judgement calls. Compounding the challenge is that in many nascent technology settings, markets are dynamic and demand and supply-side substitution trends not well understood or established. This may make the determination of market shares speculative and subject to fluctuation. This is not to say that for some markets, market shares may be easier to calculate, or where the market shares are less unstable.

16. Against this background the Working Group submits that:

- (a) The Commission should provide guidance in the TTGs on the calculation of market shares and potentially also on the market definition as well as on the question of (actual or potential) competitors; all this guidance should be consistent with the guidance that the Commission already provided in the revised Market Definition Notice and in its other publications. Such guidance should ideally also cover the relevant factors for assessing market "power" and

"foreclosure risk" in the context of technology markets where market definitions and calculation of market shares is not reasonably possible.

- (b) The Commission should maintain the 4+ rule in para. 157 of the TTGs according to which Article 101 TFEU is unlikely to be infringed where there are four or more independently controlled technologies. The Commission should consider making some allowance to account for likely potential competition through rapid entry or supply-side substitution where this can be shown or reasonably inferred.
- (c) In line with (b) above, the Commission should provide more clarity on the concept of “commercially viable alternative” to the licensed technology, as well as the concept of “reasonable period of time” that would determine whether technologies that are likely to come into the market in the near term will be taken into account. In that connection a clear benchmark, such as a 1-2 year period would be particularly helpful and provide more legal certainty for the assessment of technology transfer agreements.
- (d) The Working Group also believes that it could be worthwhile considering a two-fold approach, i.e. combining Option 1 and Option 2 in the sense that two alternative safe harbours could be established.

III. THE SAFE HARBOUR FOR TECHNOLOGY POOLS

- 17. The Working Group takes note of the concerns on the effectiveness of the conditions of the safe harbour contained in para. 261 of the TTGs, and in particular (i) the inclusion of a significant share of substitute or non-essential patents; (ii) effective participation; (iii) determination of FRAND licensing terms; (iv) lack of transparency of ownership and governance; and (v) the existence of safeguards on sharing of competitively sensitive information.³
- 18. The Working Group submits that the conditions of the safe harbour are adequate and that the issues raised by the stakeholders – mostly licensees and implementers – are essentially issues of effective compliance with the conditions of the safe harbour that can be resolved through individual enforcement. In any case, we would expect the Commission to take into consideration the practice of national competition authorities (such as the recent 2024 decision of the Federal Cartel Office⁴) and to evaluate how this approach can be reconciled with the Commission’s view of the legal questions at stake here.
- 19. One particular area where additional guidance might be beneficial is in regard to technology pools that are limited to SEPs, which are already subject to FRAND commitments. The Commission might consider formulating an additional safe harbour focused specifically on SEP technology pools.

IV. NON-PRACTISING ENTITIES

³ SWD(2024)269 final, page 34.

⁴ See

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2024/10_06_2024_ALNG.html

20. There has been a debate on whether non-practicing entities (NPEs - that is, entities that have not developed the IP themselves, but which acquired the IP with the sole purpose of extracting royalties through litigation) might have more incentives to charge higher prices compared to vertically integrated licensors, so it would be useful for the Commission to consider whether NPEs should be treated differently compared to other patent holders.

V. THE EXTENSION OF THE GUIDANCE FOR LICENSING NEGOTIATION GROUPS (LNGS)

21. The Working Group acknowledges that patent holders and patent implementers have diametrically opposed views on the need to provide guidance for Licensing Negotiation Groups. IP implementers consider that LNGs would improve access to technology, while IP holders consider that any guidance on LNGs would legitimize their existence and lead to patent hold-out issues and potentially lead to similar concerns such as a buyer cartel.
22. Against this background, on balance the Working Group believes that the inclusion of guidance on LNGs would be helpful in clarifying the situations where LNGs and conduct by LNGs could legitimately be considered as compliant with competition law. Indeed, given that the Horizontal Cooperation Guidelines already contain guidance on joint purchasing arrangements, it would make sense to provide similar guidance in the TTGs on LNGs. The Working Group also considers that in providing guidance it would be important for the Commission to include adequate safeguards to ensure that LNGs are not abused as platforms for collusion in downstream or adjacent markets and on the contrary promote LNGs that are not exclusionary and allow for a wide scope of exploitation to facilitate market entry, encourage commercialisation and drive access to technology.
23. If the Commission decides to introduce a safe harbour for LNGs, the Commission should ensure that the conditions for such a safe harbour are not more lenient than those contained for technology pools, to ensure a balanced treatment between patent holders and patent implementers.
24. This would also constitute an additional safeguard and a natural enforcement mechanism against the concerns identified by some stakeholders that there is insufficient monitoring of compliance with the conditions of the soft safe harbour for technology pools, in particular (i) the inclusion of non-essential patents in the pool; (ii) the inclusion of substitute patents as opposed to complements; and (iii) the fact that some technology pools do not license on FRAND terms.

VI. ADDITIONAL GUIDANCE TO ENSURE FURTHER CLARITY ON ESTABLISHED CONCEPTS INCLUDING PATENT SETTLEMENT/PAY-FOR DELAY AGREEMENTS, FIELD OF USE RESTRICTIONS AND DEFINITION OF KNOW-HOW

25. Patent settlement/pay-for-delay. The Working Group considers that the current guidance in the TTGs on pay-for-restriction in settlement agreements is useful and should be expanded to cover the key pay-for-delay cases that were tested before the EU courts since 2014. In that connection, it would be also helpful if the Commission, in line with the case law of the EU courts, could provide guidance on the criteria that the Commission will rely upon to consider that a pay-for-delay arrangement would be viewed as an “object” restriction.

26. Field of use restrictions. The current guidance concerning field of use restrictions is useful, but it would be helpful if some additional guidance – based on practical examples – were added to clarify further the factors that would distinguish a legitimate field-of-use restriction from a hardcore market or customer allocation restriction.
27. In that connection, the current TTGs specify that the fact that a field of use restriction might correspond to certain groups of customers within a product market does not automatically mean that the restraint will qualify as a customer restriction. However, the TTGs clarify that the field of use must be defined “*objectively, by reference to identified and meaningful technical characteristics of the contract product.*”⁵ The TTGs provide as an example that the fact that some customers buy exclusively chipsets with more than 4 CPUs does not mean that a license that is limited to chipsets limited to up to 4 CPUs is a hardcore customer restriction.⁶
28. Even though this example is useful, it would be helpful if the TTGs could provide more guidance on the criteria that could be used for field of use restrictions to ensure that such restrictions are not viewed as hardcore market allocation restrictions. In practice it might be difficult to set up field of use restrictions solely on the basis of technical characteristics, and it would be useful to clarify if and to what extent field of use restrictions based on end-use applications could be acceptable.
29. Scope of application/Scope of other regulations. As already mentioned above, the scope of the TTBER is an important issue. It would be helpful if its scope could be clarified in more detail, also regarding the scope, relevance and interplay with other regulations like the VBER, the R&D BER or trademark licensing agreements.

⁵ TTGs, para. 209.

⁶ TTGs, para. 209.