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Position Paper in the EU Consultation 2023 regarding the Reform of the Block Exemption Regulation for Technology Transfer Agreements Nr. 316/2014 („TTBER“) and the EU Commission’s Guidelines 2014/C 89/03 („TTGL“)

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Opinion

BRAK considers the existence of a group exemption for certain types of technology transfer agreements as well as explanatory guidelines by the Commission as regards agreements covered by the group exemption but also outside of it as very important instruments to increase legal certainty and to foster a consistent assessment throughout the EU.

BRAK welcomes the opportunity to contribute to this Consultation on the current TTBER and TTGL given that in the course of the practical application of these legal instruments over the last 9 years it has transpired that there are areas in which the TTBER and the TTGL are not fit for purpose or at least can be improved to meet said goals. In the following, BRAK will address these areas. BRAK's perspective is that of legal advisors (inhouse and external counsels) specialized in EU competition law which get involved in assisting their clients in assessing all types of technology licensing arrangements and technology pools between competitors and non-competitors, be it on the licensor's or the licensee's side, in a wide range of different industries and business sectors.

1. Field of use restrictions generally outside the scope of Art. 101 (1) TFEU

- (1) Field of use restrictions in technology transfer agreements generally do not restrict competition. They tend to be necessary for the licensor to be willing to licence her technology to a third party. Consequently, they generally fall outside the scope of Art. 101 (1) TFEU. By contrast, the Commission currently considers field of use restrictions to require an exemption under the TTBER (TTGL 113-114, 209), apparently with the exception of symmetrical field of use restrictions in agreements between competitors (TTGL 213). This assessment should be altered in the new TTGL and it should be clarified that field of use restrictions are generally not restrictive to competition, regardless of whether the technology transfer agreement is between non-competitors or competitors, and whether the restrictions are asymmetrical or symmetrical in nature. This aspect is relevant for technology transfer agreements which do not fall within the scope of the TTBER because of the parties' market shares. A clarification to said end would increase legal certainty by making a self-assessment for such restrictions under Art. 101 (3) TFEU redundant.

- (2) In addition, the definition of field of use restrictions (currently in TTGL 208) should be amended in that not only licenses that are limited to one or more industrial sector(s) or product market(s) but also licenses that are limited to one or more field(s) of application, irrespective if this field is of a technical nature or not, should be covered. In practice, it is often questionable if a field of application is actually of a technical nature or not and at the same time it is questionable if such field of application, for example if it refers to functionalities, product sizes, price range and type of customers, could qualify as a separate product market within the meaning of competition law and in line with applicable case law. It is understood that a definition of field of use restrictions will not be included in the TTBER itself because such definition is not relevant for its application but an adjusted definition as described should be included in the TTGL.
- (3) In view of the European Court of Justice's decision in *Roche Novartis* (judgment of 23 January 2018, C-179/16), which related to the off-label use of over-the-counter (OTC) pharmaceuticals, a field of use restriction in this sector could also be the off-label use. This case law should be taken into account in the TTGL dealing with field of use restrictions and its definition.

2. Inclusion of data packages into list of technology rights, Art. 1 (1) (b)

- (4) In view of the scope of the TTBER the list of technology rights listed in Art. 1 (1) (b) should be expanded to also include the licensing of data or data packages including computer files. To the extent data packages consist of know-how (TTGL 45), they would be covered by the TTBER. However, in practice, the categorization of data packages in their entirety as know-how may be difficult. Data packages therefore require a separate listing in Art. 1 (1) (b) to be eligible for a group exemption under the TTBER.
- (5) In addition, the database manufacturer's rights, that are often relevant in the context of licensing data rights, should also be part of the technology rights covered by the TTBER.

3. Adjusting the distinction between competitors and non-competitors in view of ECJ case law

- (6) With respect to the distinction between competitors and non-competitors (TTGL 27 et seq., 29) the Commission's explanations must take into account the ECJ's recent decisional practice, more specifically its decision in *Lundbeck* (25 March 2021, C-591/16 P, para. 64), in which the ECJ concluded under the circumstances at hand that the parties were potential competitors irrespective of their blocking position.

4. Limiting market share threshold to product markets and abolishing the threshold for technology markets

- (7) BRAK takes the position that the application of the TTBER should only require a market share threshold for the relevant product market and eliminate a further market share test for the so-called technology market (Art. 1 (1) (k)). The Commission acknowledges that the calculation of the licensor's market share in the technology market is difficult and considers a fall back to the product level ("as its footprint") as the best approach (TTGL 87). However, this approach on market share calculation (Art. 8 (d), TTGL 86-90) is not at all practical and renders the assessment for the parties of whether the TTBER is applicable or not to their licensing agreement burdensome and too complicated. The practical concern is that this approach aims at determining market shares on not yet identified market(s) based on unavailable data. More specifically, it is not clear for the licensor at the time of entering into the licensing agreement which types of products could and will be produced with his technology. In addition, numerous

markets could be affected as the licensed IP rights could be used for the production of many different products which are produced by none of the contract parties but by other licensees of the licensor (TTGL 86). In practice, and as a consequence of this difficulty, a tendency among the parties to IP licensing agreements can be observed to limit their assessment of market shares to the relevant product market (and its geographic dimension).

- (8) In support of this suggested limitation of the market share test, it should be taken into account that the Commission itself specifies an additional safe harbour from Art. 101 (1) TFEU – i.e. in addition to the block exemption under the TTBER – where there are four or more independently controlled technologies (so-called “four plus test”, TTGL 157-158). Thus, to mitigate potential competition law concerns that the Commission may have with respect to the technology markets affected by a licensing agreement, the Commission could extend its withdrawal rights (Art. 6) to include a right to withdraw the TTBER if the number of available technologies falls below a certain level (i.e. application of the current “four plus test” or, as detailed in [point 9](#) below, a modification of this test).
5. Extending the grace period after exceeding market share threshold, Art. 8 (2)
- (9) BRAK takes the view that the extension of the group exemption by two years after the market share threshold is exceeded (Art. 8(e)) is not long enough to recoup investments in R&D intensive technology markets, and therefore suggests a longer grace period of four to five years.
- 6. Clarifying the scope of the exemption for ancillary provisions, Art. 2 (3)**
- (10) The scope of the exemption of ancillary provisions under Art. 2 (3) should be extended (comparable to the already covered licensing of other IP rights or know-how to the licensee) to R&D services that the licensor may provide to the licensee in the context of licensing and which are directly related to the production of the contract products. The primary object of the agreement still lies on the technology transfer and related R&D services would be merely ancillary. In this scenario, the R&DBER should not trump the TTBER (Art. 9). Conversely, if R&D is the primary object of the agreement and not the licensing of IP rights, the R&DBER applies (Art. 2 (3) R&DBER).
- 7. Limiting the scope of non-exempted exclusive grant backs, Art. 5 (1) (a)**
- (11) The scope of Art. 5 (1) (a) not exempting exclusive grant back obligations regarding the licensee’s own improvements (or own applications) of the licensed technology should be limited to “severable” improvements. This approach would comply with the previous TTBER 772/2004 which also differentiated between severable and non-severable improvements (and provided a definition for these terms). The underlying competition and innovation concern is that such a wide provision could reduce the licensor’s incentive to license its technology if even minor adjustments or enhancements made by the licensee based on his technology are not exclusively granted back or, more specifically, such grant back obligations would not be covered by the TTBER. The Commission appears to be solely concerned with the likelihood of the licensee’s incentive to innovate (TTGL 129) being reduced by an exclusive grant back obligation, without considering the effect on licensors’ licensing behaviour.
- (12) BRAK therefore submits that absent a clear definition of “improvements” and an appropriately threshold for when an improvement can be claimed by the licensee, the non-exemption of exclusive grant back obligations should be limited to severable improvements whereas, as

before 2014, exclusive grant backs for non-severable improvements should be exempted under the TTBER.

8. Limiting the scope of non-exempted non-challenge clauses, Art. 5 (1) (b)

- (13) As a general remark, the non-exemption of non-challenge clauses under the TTBER does not sufficiently take into account the innovation concern that a limited protection, within the safe harbour of the TTBER, against IP challenges in the practically very relevant situations where the licensee gets a closer look into the licensor's IP portfolio can constitute a strong disincentive to license and thus hinder innovation.
- (14) Also, the Commission's different treatment between know-how (TTGL 140) and IP rights (non-exemption, Art. 5 (1) (b)) can give rise to differentiation issues in cases where an IP portfolio consisting of different IP rights and know-how is licensed and there is no clear separating line between the different rights included. BRAK submits that the Commission should clarify in the TTGL that in such situations, in the interest of protecting the included know-how and promoting the dissemination of new technology, a non-challenge clause relating to the entire IP portfolio licensed to the licensee is also exempted under the TTBER.
- (15) Lastly, it is acceptable that the licensor's right to terminate the agreement in the event that the licensee challenges the IP rights' validity is not exempt under the TTBER in the case of a non-exclusive licence (as opposed to an exclusive licence). However, the Commission should specify that, safe for the specific scenarios described in the TTGL (136), a termination clause generally does not raise competition law concerns, i.e. falls outside the scope of Art. 101 (1) TFEU. The balancing of interests described in TTGL 138 is understood to be conducted in the context of Art. 101 (1) TFEU and not in the context of the exemption of Art. 101 (3) TFEU as the statutory test would be a different one. The same assessment (in the context of Art. 101 (1) TFEU) is understood to apply for a termination right in the context of an exclusive license (TTGL 139 at the end).

9. Modifying the safe harbour of "four or more independently controlled technologies" ("4 plus text") from the application of Art. 101 (1), (3) TFEU

- (16) The TTGL (157-158) provide for a separate safe harbour from Art. 101 TFEU for any (non-hardcore) restrictions where there are four or more independently controlled technologies that may be substitutable for the licensed technology at a comparable cost. As a practical observation, the reference to at least four competing R&D poles is almost never fulfilled, especially in innovative, R&D intensive markets. In addition, there is the practical difficulty for the parties to be aware of these competing R&D poles or find out about them within the boundaries foreseen by competition law. BRAK therefore submits that the number of competing R&D poles for this safe harbour should be reduced to a maximum of two. It should be stressed that in the context of technology and R&D intensive markets the competitive pressure resulting from one or two competing technologies should have a sufficient effect on the parties to the technology agreement in the innovation race towards the market launch.
- (17) In addition, BRAK submits that the requirement for competing R&D poles to operate at comparable costs should be abolished. Costs are only one competitive parameter among many, such as time-to-market, quality, performance, safety, on which competitive R&D poles could equally be measured from the customer's perspective. In particular in innovative technology driven markets (as opposed to commoditized markets), costs are not necessarily the decisive parameter.

10. **Assessment of settlement agreements and related clauses outside the scope of the TTBER**

- (18) In the context of settlement agreements, the Commission appears to take a stricter approach towards cross-licensing, more specifically that cross-licensing should be limited to unblock the disputing parties' IPR positions (TTGL 240), than in the context of other technology transfer agreements. In the context of the TTBER itself, only reciprocal agreements (as defined, Art. 1 (1) (d)) are treated stricter but not cross-licensing between the parties in general. In assessing cross-licenses under Art. 101(1) and Art. 101(3) TFEU there is no obvious reason why potential procompetitive effects resulting from cross-licensing could not equally arise in the context of a settlement. BRAK therefore submits that, in its revision of the chapter on settlement agreements in the TTGL, the Commission should be mindful of this aspect.

11. **Adjustments in view of consistency with new jurisprudence and legislation**

- (19) There are a number of areas in which the TTBER and TTGL should be adjusted in view of the latest changes or provisions of the more recent BERs, in particular the VBER and the R&DBER including the Vertical GL and Horizontal GL but also in view of relevant jurisprudence of the EU courts (with respect to the latter aspects see [point 3](#) above). In the following the most relevant necessary alignments to the other BERs are listed.

11.1 VBER: notion of exclusivity

- (20) The definition of "exclusive customer group" (Art. 1 (1) (r)) should be aligned with the new definition of exclusivity as per the definition of exclusive distribution system in Art. 1 (1) (h) VBER, meaning that a customer group can still be exclusive if, in addition to the licensor or the licensee, 4 other licensees are allowed to actively sell the contract products. This change would be relevant for the exemptions to the hard-core restriction in Art. 4 (c).

11.2 Verticals BER: notion of active and passive sales

- (21) The definition of passive and active sales of Art. 1 (1) (l), (m) Vertical BER should in principle also apply in the context of the TTBER, but, in view of the different focus of the agreements covered by the respective BERs, with the exception that sales of contract products on RFQ markets should not qualify as passive sales.

11.3 Potential competition test

- (22) The assessment of potential competition referencing a "small and permanent increase in relative prices" as set out in Art. 1 (1) (n) (ii) should be aligned to the definition of potential competition in Art. 1 (1) (c) VBER and, therefore, eliminate the reference to the hypothetical price increase, a test which has failed in its practical application.
- (23) Also, in view of their common goal to promote and disseminate innovation there is no obvious reason why the time periods relevant for determining potential competition for IP licensing agreements (TTGL 34: 1-2 years) should deviate from the assessment for R&D agreements (Horizontal GL 16, 87: up to 3 years). Thus, setting the relevant time period for the assessment of potential competition to (a maximum of) 3 years seems adequate.

11.4 Ancillary information exchange

- (24)** In line with the approach taken in the latest reform regarding horizontal agreements (Horizontal GL 34, 152 etc.) any exchange or disclosure of (competitively sensitive) information that is objectively necessary for the negotiation, conclusion and implementation of an IP licensing agreement should either not fall under Art. 101 (1) TFEU (as ancillary restraint to the otherwise non-restrictive technology transfer agreement) or, alternatively, be automatically exempted under the TTBER together with the technology transfer agreement (which requires an exemption from Art. 101 (1) TFEU). The “white list” in TTGL 183 should be amended accordingly.

11.5 Sustainability arguments in Art. 101 (3) TFEU

- (25)** Once again in line with the new approach under the Horizontal GL, sustainability arguments should be taken into account in assessing technology transfer agreements under Art. 101 (3) TFEU. The TTGL need to be adjusted to this end.

TTBER Consultation questionnaire

Fields marked with * are mandatory.

Introduction

Article 101(1) of the Treaty on the functioning of the European Union ('the Treaty') prohibits agreements between undertakings that restrict competition, unless they contribute to improving the production or distribution of goods or services or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefits, in accordance with Article 101(3) of the Treaty.

Technology transfer agreements are agreements by which one party authorises another to use certain technology rights (for example, patents, design rights, software copyrights and know-how) for the production of goods or services. In many cases, such agreements either do not restrict competition, that is, they fall outside the scope of Article 101(1) of the Treaty, or, where they fall within Article 101(1), they create objective efficiencies that are passed on to consumers and meet the 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 the market or to expand, or harm inter- or intra-technology competition, for example by reducing the incentives to innovate.

Regulation No 19/65/EEC empowers the Commission to apply Article 101(3) of the Treaty, by means of a regulation, to certain categories of technology transfer agreements. The Commission used this empowerment to adopt [Commission Regulation \(EU\) No 316/2014 on the application of Article 101\(3\) of the Treaty to technology transfer agreements](#) ("TTBER").

The Commission also provided guidance on the assessment of technology transfer agreements in the related [Commission Communication - Guidelines on the application of Article 101 of the Treaty to technology transfer agreements](#) ("TTGL").

Purpose of the evaluation

The purpose of this evaluation is to gather evidence on the functioning of the TTBER to enable the Commission to take an informed decision on whether to allow that Regulation to expire, prolong its duration or revise it to take account of market developments that have occurred since its adoption in 2014. The Commission will also evaluate the TTGL.

More information on the evaluation can be found in the Call for Evidence, published on the "Have Your Say" platform on 25 November 2022 and available [here](#).

Structure of the public consultation and how to respond to it

As part of the evaluation, the Commission will seek the views of all interested parties on the effectiveness, efficiency, relevance, coherence and EU added value of the TTBER and TTGL on the basis of this online questionnaire. The results of this consultation will serve as input for the evaluation.

The consultation is open for 12 weeks, and replies can be provided in all 24 official EU languages. This questionnaire contains both high-level and detailed technical questions. The questions are available in English, French and German and are grouped under the following evaluation criteria:

- **Effectiveness:** The Commission will evaluate whether the TTBER and TTGL have been effective in (i) exempting agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty; (ii) providing legal certainty, and (iii) providing a common framework for national competition authorities and national courts to ensure consistency in the application of Article 101 of the Treaty.
- **Efficiency:** The Commission will evaluate whether any costs created by the TTBER and TTGL for undertakings wishing to assess their agreements under Article 101 of the Treaty are proportionate in view of the benefits that the TTBER and TTGL have created for that assessment;
- **Relevance:** The Commission will evaluate whether the TTBER and TTGL are still relevant, taking into account market developments that have occurred since the adoption of the TTBER and TTGL in 2014;
- **Coherence:** The Commission will evaluate whether the TTBER and TTGL are coherent with other Union legislation, notably in the fields of intellectual property and competition; and
- **EU added value:** The Commission will evaluate whether the TTBER and TTGL, being an intervention at EU level, add value for the assessment of technology transfer agreements under Article 101 of the Treaty.

The information collected will provide part of the evidence that the Commission will use in order to decide whether to allow the TTBER, together with the TTGL, to expire, prolong its duration or revise it to take account of market developments that have occurred since 2014.

Nothing in this questionnaire may be interpreted as stating an official position of the Commission.

You are invited to provide your feedback through this online questionnaire. Please explain your replies and, where possible, illustrate them with concrete examples. At the end of the questionnaire, we also invite you to upload any documents and/or data that you consider useful to accompany your replies.

If you encounter problems with completing this questionnaire or if you require assistance, please contact COMP-TTBER-REVIEW@ec.europa.eu.

About you

* Language of my contribution

- Bulgarian
- Croatian
- Czech
- Danish
- Dutch
- English
- Estonian
- Finnish
- French
- German
- Greek
- Hungarian
- Irish
- Italian
- Latvian
- Lithuanian
- Maltese
- Polish
- Portuguese
- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

* I am giving my contribution as

- Academic/research institution
- Business association
- Company/business
- Consumer organisation
- EU citizen
- Environmental organisation
- Non-EU citizen
- Non-governmental organisation (NGO)
- Public authority

Trade union

Other

* First name

Bundesrechtsanwaltskammer

* Surname

Brüssel

* Email (this won't be published)

brak.bxl@brak.eu

* Organisation name

255 character(s) maximum

Bundesrechtsanwaltskammer

* Organisation size

Micro (1 to 9 employees)

Small (10 to 49 employees)

Medium (50 to 249 employees)

Large (250 or more)

Transparency register number

255 character(s) maximum

Check if your organisation is on the [transparency register](#). It's a voluntary database for organisations seeking to influence EU decision-making.

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* Country of origin

Please add your country of origin, or that of your organisation.

This list does not represent the official position of the European institutions with regard to the legal status or policy of the entities mentioned. It is a harmonisation of often divergent lists and practices.

Afghanistan

Djibouti

Libya

Saint Martin

Åland Islands

Dominica

Liechtenstein

Saint Pierre and
Miquelon

- Albania
- Algeria
- American Samoa
- Andorra
- Angola
- Anguilla
- Antarctica
- Antigua and Barbuda
- Argentina
- Armenia
- Aruba
- Australia
- Austria
- Azerbaijan
- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Belarus
- Belgium
- Belize
- Benin
- Bermuda
- Bhutan
- Bolivia
- Dominican Republic
- Ecuador
- Egypt
- El Salvador
- Equatorial Guinea
- Eritrea
- Estonia
- Eswatini
- Ethiopia
- Falkland Islands
- Faroe Islands
- Fiji
- Finland
- France
- French Guiana
- French Polynesia
- French Southern and Antarctic Lands
- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland
- Grenada
- Lithuania
- Luxembourg
- Macau
- Madagascar
- Malawi
- Malaysia
- Maldives
- Mali
- Malta
- Marshall Islands
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- Moldova
- Monaco
- Mongolia
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar/Burma
- Namibia
- Saint Vincent and the Grenadines
- Samoa
- San Marino
- São Tomé and Príncipe
- Saudi Arabia
- Senegal
- Serbia
- Seychelles
- Sierra Leone
- Singapore
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden

- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria
- Burkina Faso
- Burundi
- Cambodia
- Cameroon
- Canada
- Cape Verde
- Cayman Islands
- Central African Republic
- Chad
- Chile
- China
- Christmas Island
- Clipperton
- Guadeloupe
- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Hungary
- Iceland
- India
- Indonesia
- Iran
- Iraq
- Ireland
- Isle of Man
- Israel
- Italy
- Jamaica
- Nauru
- Nepal
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
- Niger
- Nigeria
- Niue
- Norfolk Island
- Northern Mariana Islands
- North Korea
- North Macedonia
- Norway
- Oman
- Pakistan
- Palau
- Palestine
- Panama
- Papua New Guinea
- Paraguay
- Peru
- Switzerland
- Syria
- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia
- Timor-Leste
- Togo
- Tokelau
- Tonga
- Trinidad and Tobago
- Tunisia
- Türkiye
- Turkmenistan
- Turks and Caicos Islands
- Tuvalu
- Uganda
- Ukraine
- United Arab Emirates
- United Kingdom
- United States

- Cocos (Keeling) Islands
- Colombia
- Comoros
- Congo
- Cook Islands
- Costa Rica
- Côte d'Ivoire
- Croatia
- Cuba
- Curaçao
- Cyprus
- Czechia
- Democratic Republic of the Congo
- Denmark
- Japan
- Jersey
- Jordan
- Kazakhstan
- Kenya
- Kiribati
- Kosovo
- Kuwait
- Kyrgyzstan
- Laos
- Latvia
- Lebanon
- Lesotho
- Liberia
- Philippines
- Pitcairn Islands
- Poland
- Portugal
- Puerto Rico
- Qatar
- Réunion
- Romania
- Russia
- Rwanda
- Saint Barthélemy
- Saint Helena
Ascension and
Tristan da Cunha
- Saint Kitts and
Nevis
- Saint Lucia
- United States
Minor Outlying
Islands
- Uruguay
- US Virgin Islands
- Uzbekistan
- Vanuatu
- Vatican City
- Venezuela
- Vietnam
- Wallis and
Futuna
- Western Sahara
- Yemen
- Zambia
- Zimbabwe

The Commission will publish all contributions to this public consultation. You can choose whether you would prefer to have your details published or to remain anonymous when your contribution is published. **For the purpose of transparency, the type of respondent (for example, 'business association', 'consumer association', 'EU citizen') country of origin, organisation name and size, and its transparency register number, are always published. Your e-mail address will never be published.** Opt in to select the privacy option that best suits you. Privacy options default based on the type of respondent selected

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Only organisation details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published as received. Your name will not be published. Please do not include any personal data in the contribution itself if you want to remain anonymous.

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Organisation details and respondent details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published. Your name will also be published.

I agree with the [personal data protection provisions](#)

1. Information about you and the TTBER

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

Technology rights mean know-how and the following rights, or a combination thereof, including applications for or applications for registration of those rights: (i) patents, (ii) utility models, (iii) design rights, (iv) topographies of semiconductor products, (v) supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained, (vi) plant breeder's certificates, and (vii) software copyrights.

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

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

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

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

- Patents
- Utility models
- Design rights
- Topographies of semiconductor products
- Supplementary protection certificates for medicinal products or other products for which such protection certificates may be granted

- Plant breeder's certificates
- Software copyrights
- Know-how
- Other

1.1.1. If you chose "Other", please specify.

Note: The information under 1.1. refers to the knowledge and experience of the rapporteur, not of BRAK. BRAK has expertise in all of the technology rights mentioned.

1.2. Please identify the sector(s) to which your knowledge of and/or experience with the TTBER primarily relates by specifying the 2 digit NACE code referring to the level of "division" that applies to your business (see for reference pages 61 – 90 of [Eurostat's statistical classification of economic activities in the European Community](#)).

All sectors, no limitation possible.

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

All types of manufactural foods, no limitation possible.

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

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

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

- Bilateral licensing agreements with licensees
- Via technology pools
- Via licensing agreements with licensees that belong to a licensing negotiation group
- Other

1.5.1. Please explain your answer, notably by reference to the context in which the licensing takes place and how often you use the respective means.

1.6 If you are a licensee, please indicate the average level of royalties that you pay for licences of technology rights as a share of the overall production costs of the goods and/or services that you produce under technology transfer agreements.

at most 1 choice(s)

- More than 25%
- Between 10% - 25%
- Between 5% - 9%
- Less than 5%

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

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

1.7.1. Please explain your answer, notably by reference to the context in which the licensing takes place and how often you use the respective means.

1.8. Please provide a general description of the impact of the TTBER and/or the TTGL on your/your organisation's business activities.

Relevance for providing legal advice.

2. Effectiveness

2.1. In your view, has the TTBER been effective in exempting **only** those **technology transfer agreements** (see definitions under 1 above) for which it can be assumed with sufficient certainty that they satisfy the conditions for an exemption under Article 101(3) of the Treaty?

at most 1 choice(s)

- Yes

- No
- Do not know

2.2. Are there **licence agreements of intellectual property rights** or other technology rights (see definitions under 1 above), which are **not** covered by TTBER but that in your view satisfy the conditions for exemption under Article 101 (3) of the Treaty?

at most 1 choice(s)

- Yes
- No
- Do not know

2.2.1. Please explain your answer.

Data packages (computer files).

2.3. 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?

at most 1 choice(s)

- Yes
- No
- Do not know

2.3.1. Please explain your answer, noting that the table under question 2.5. gives you the opportunity to give feedback on particular provisions of the TTBER.

See 2.5 below.

2.4. 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?

at most 1 choice(s)

- Yes
- No
- Do not know

2.4.1. Please explain your answer, noting that the table under question 2.5. gives you the opportunity to give feedback on particular sections of the TTGL.

See 2.5 below.

2.5. Please indicate the level of legal certainty provided by the TTBER and the TTGL for each of the following areas using the following number coding: 1 (very low legal certainty), 2 (slightly low legal certainty), 3 (appropriate level of legal certainty). If you do not know or if the question is not applicable to your organisation, please select “DK/NA”.

No.	Areas/Provisions	Relevant provisions of the TTBER	Relevant paragraphs of the TTGL	Respondent's estimate of level of legal certainty
1	Definitions	Art. 1(1)	<i>various</i>	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA
2	The list of intellectual property rights covered by the block exemption (scope)	Art. 1(1)(b)	44-45	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA
3	Application of the TTBER (or its principles) to licensing of other types of IP rights	Art. 2(3)	47-50	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA

4	Concept of transfer	Art. 1(1)(c)	51-53	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input type="checkbox"/> 2 <input checked="" type="checkbox"/> 3 <input type="checkbox"/> DK/NA
5	Production of contract products	Art. 1(1)(g)	58-66	<i>at most 1 choice(s)</i> <input checked="" type="checkbox"/> 1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA
6	Market definition	Art. 1(1)(j-m)	19-26	<i>at most 1 choice(s)</i> <input checked="" type="checkbox"/> 1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA
7	Distinction between competitors and non-competitors			

7.1	Definition of blocking position	-	29	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input checked="" type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA
7.2	Actual and potential competition in the product market	Art. 1(1)(n)(ii)	30-34	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input checked="" type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA
7.3	Actual and potential competition in the technology market	Art. 1(1)(n)(i)	35-36	<i>at most 1 choice(s)</i> <input checked="" type="checkbox"/> 1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA
7.4	Guidance on drastic innovations and competition after the agreement	Art. 4(3)	37-39	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input type="checkbox"/> 2 <input checked="" type="checkbox"/> 3 <input type="checkbox"/> DK/NA

8	Relationship with other Block Exemption Regulations	Art. 9	69-78	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input checked="" type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA
9	Market share thresholds	Art. 3, Art. 8	79-92	<i>at most 1 choice(s)</i> <input checked="" type="checkbox"/> 1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA
10	Hardcore restrictions			
10.1	General Principles	Art. 4(1)	94-96	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input type="checkbox"/> 2 <input checked="" type="checkbox"/> 3 <input type="checkbox"/> DK/NA

10.2	Price restrictions between competitors	Art. 4(1)(a)	99-102	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input type="checkbox"/> 2 <input checked="" type="checkbox"/> 3 <input type="checkbox"/> DK/NA
10.3	Output limitations between competitors	Art. 4(1)(b)	103-104	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input type="checkbox"/> 2 <input checked="" type="checkbox"/> 3 <input type="checkbox"/> DK/NA
10.4	Market and customer allocation between competitors	Art. 4(1)(c)	105-114	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input checked="" type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA
10.5	Restrictions on the ability to carry out R&D and use of licensed technology between competitors	Art. 4(1)(d)	115-116	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input checked="" type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA

10.6	Price restrictions between non-competitors	Art. 4(2)(a)	118	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input type="checkbox"/> 2 <input checked="" type="checkbox"/> 3 <input type="checkbox"/> DK/NA
10.7	Restrictions on passive sales between non-competitors	Art. 4(2)(b-c)	119-127	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input type="checkbox"/> 2 <input checked="" type="checkbox"/> 3 <input type="checkbox"/> DK/NA
11	Excluded restrictions			
11.1	Exclusive grant backs	Art. 5(1)(a)	129-132	<i>at most 1 choice(s)</i> <input checked="" type="checkbox"/> 1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA

11.2	Non-challenge and termination clauses	Art. 5(1)b)	133-140	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input checked="" type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA
11.3	Limitation on licensee's use or development of own technology (for non-competitors)	Art. 5(2)	141-143	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input checked="" type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA
12	Conditions for the withdrawal and disapplication of the block exemption	Art. 6, Art. 7	144-155	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input type="checkbox"/> 2 <input checked="" type="checkbox"/> 3 <input type="checkbox"/> DK/NA
13	Application of Article 101(1) and 101(3) outside the scope of the TTBER			

13.1	Safe harbour if there are sufficient independently controlled technologies	-	157-158	<i>at most 1 choice(s)</i> <input checked="" type="checkbox"/> 1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA
13.2	Relevant factors	-	159-168	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input checked="" type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA
13.3	Negative and positive effects of restrictive licence agreements	-	169-180	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input checked="" type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA
14	Obligations in licence agreements that generally do not restrict competition	-	183	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input checked="" type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA

14.1	Royalty obligations	-	184-188	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input checked="" type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA
14.2	Exclusive and sole licences	-	190-196	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input type="checkbox"/> 2 <input checked="" type="checkbox"/> 3 <input type="checkbox"/> DK/NA
14.3	Sales restrictions	-	197-203	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input type="checkbox"/> 2 <input checked="" type="checkbox"/> 3 <input type="checkbox"/> DK/NA
14.4	Output restrictions	-	204-207	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input type="checkbox"/> 2 <input checked="" type="checkbox"/> 3 <input type="checkbox"/> DK/NA

14.5	Field of use restrictions	-	208-215	<i>at most 1 choice(s)</i> <input checked="" type="checkbox"/> 1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA
14.6	Captive use restrictions	-	216-220	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input type="checkbox"/> 2 <input checked="" type="checkbox"/> 3 <input type="checkbox"/> DK/NA
14.7	Tying and bundling	-	221-225	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input type="checkbox"/> 2 <input checked="" type="checkbox"/> 3 <input type="checkbox"/> DK/NA
14.8	Non-compete obligations	-	226-233	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input checked="" type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA

14.9	Settlement agreements	-	234-243	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input checked="" type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA
14.10	Technology pools	-	244-273	<i>at most 1 choice(s)</i> <input type="checkbox"/> 1 <input checked="" type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> DK/NA

2.5.1. If you have rated legal certainty as “very low” (1) or “slightly low” (2) for one or more areas/provisions, please explain the reasons for your rating. Please also explain whether the lack of legal certainty results from (i) specific provisions in the TTBER or specific guidance in the TTGL or (ii) the overall structure of the TTBER and/or TTGL.

See written opinion (cf. above)

2.6. Are there other areas for which you consider that the TTBER and/or the TTGL do not provide sufficient legal certainty? Please explain the reasons for your reply.

2.7. The TTBER and TTGL were last revised in 2014. In your view, which of the following changes made in the TTBER and the TTGL 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?

Please answer by completing the last column of the table below, answering with (Y) if you think the change was effective, (N) if you think the change was not effective, and (DK) if you do not know.

Changes made in the TTBER and TTGL	Answer
Creation of a soft law safe harbour for technology pools in Section 4.4 of the TTGL (paras 261-265)	<i>at most 1 choice(s)</i> <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Do not know
The exclusion from the block exemption of 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)	<i>at most 1 choice(s)</i> <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Do not know
The exclusion from the block exemption of 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).	<i>at most 1 choice(s)</i> <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Do not know

2.7.1. If you considered that one or more of the mentioned changes was not effective, please explain the reasons for your reply.

See written opinion (cf. above)

2.8. In your view, have the TTBER and TTGL achieved their objective of providing a common framework for national competition authorities and national courts to ensure consistency in the application of Article 101 of the Treaty?

at most 1 choice(s)

- Yes
- No
- Do not know

2.8.1. Please explain your answer.

Complexity of TTBER framework and rules make it difficult for NCAs and national courts to apply. Also, TTGL are not binding and thus likely disregarded by NCAs and national courts, in particular in the field of licensing.

3. Efficiency

3.1. Do you consider that the TTBER and 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?

at most 1 choice(s)

- Yes
- No
- Do not know

3.1.1. Please explain your answer

For clearly covered TT agreements better to have a safe harbour (TTBER) than none.

3.1.2. If you answered “yes”, please indicate the benefits generated and, where possible, quantify them, both in terms of value (in EUR) and as a percentage of your annual turnover (based on best estimates) and briefly explain the methodology of calculation. If it is not possible to quantify the benefits in this way, please use another proxy to (broadly) estimate the benefits and explain your methodology.

3.2. Do you consider that the TTBER and the TTGL 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 TTGL?

at most 1 choice(s)

- Yes
- No
- Do not know

3.2.1. Please explain your answer

The costs for the assessment are not higher with TTBER and TTGL and without (and merely applying Art. 101 (3) TFEU).

3.2.3.1. Please explain your answer

3.3. Would the costs of ensuring compliance of your technology transfer agreements with Article 101 of the Treaty increase if the TTBER and the TTGL were not to be prolonged?

at most 1 choice(s)

- Yes
- No
- Do not know

3.3.1. Please explain your answer. If relevant, please estimate such cost increase, both in terms of value (in EUR) and as a percentage of your annual turnover (based on your best estimates) and briefly explain the methodology of calculation.

Self assessment is more expensive than assessment of block exemption (TTBER), as least in clearly covered TT agreements.

4. Relevance

4.1. In your view, are the TTBER and TTGL 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?

at most 1 choice(s)

- Yes
- No
- Do not know

4.1.1. Please explain your answer.

5. Coherence

5.1. Are the TTBER and TTGL 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?

at most 1 choice(s)

- Yes
- No
- Do not know

5.1.1. If you answered “no”, please explain your answer.

5.2. Are the TTBER and TTGL 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?

at most 1 choice(s)

- Yes
- No
- Do not know

5.2.1. Please explain your answer.

5.3. Are the TTBER and TTGL coherent with other instruments (for example multilateral agreements and soft law) adopted at international level (other than in the EU) relating to the fields of intellectual property and competition law, such as the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)?

at most 1 choice(s)

- Yes
- No
- Do not know

5.3.1. Please explain your answer.

5.4. Do you consider that the provisions of the TTBER and the guidance provided by the TTGL are coherent in themselves and/or with each other?

at most 1 choice(s)

- Yes
- No
- Do not know

5.4.1. Please explain your answer.

6. EU added value

6.1. Have the adoption of the TTBER and TTGL at EU level added value compared with what could have been achieved by national regulations and/or guidelines?

at most 1 choice(s)

- Yes
- No
- Do not know

6.1.1. Please explain your answer

7. Other

7.1. Do you wish to make any additional comments regarding the evaluation of the TTBER and TTGL?

See written opinion (cf. above)

7.2. If you wish to submit documents (e.g. data, research paper, position paper) that you consider to be relevant for the evaluation of the TTBER and TTGL, please upload them below. Please make sure that you upload only non-confidential versions. If the uploaded documents support your replies to any of the previous questions, please indicate the numbers of those questions.

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

[e4c9cebd-7baa-4fcd-b8aa-42d334c12d81/stellungnahme-der-brak-2023-42.pdf](#)

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