

Factual summary of the feedback to the public consultation on the evaluation of the Block Exemption Regulation on Technology Transfer Agreements and the accompanying Guidelines

This document should be regarded solely as a summary of the contributions made by stakeholders on the evaluation of the Block Exemption Regulation and Guidelines. It cannot in any circumstances be regarded as the official position of the Commission or its services. Responses to the consultation activities cannot be considered as a representative sample of the views of the EU population.

This document summarises the views expressed by stakeholders in the public consultation – accessible through the European Commission’s (Commission’s) dedicated Better Regulation page (‘Have Your Say’) – conducted in the context of the evaluation of Commission Regulation (EU) 316/2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union (“Treaty”) to categories of technology transfer agreements (“TTBER”) and the accompanying guidelines (“Guidelines”). The public consultation ran from 17 April 2023 to 24 July 2023.

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 or 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.

The TTBER creates a safe harbour under EU competition law for certain categories of technology transfer agreements. The Guidelines provide guidance on the interpretation of the TTBER and on the application of EU competition law to technology transfer agreements that fall outside the safe harbour of the TTBER. The TTBER entered into force on 1 May 2014 and the evaluation is being undertaken in anticipation of its expiry on 30 April 2026.

The public consultation questionnaire was published in English, French and German. Participants were entitled to reply in any official language of the EU. The Commission publicised the consultation by means of a press release and a notice on DG Competition’s website.

In response to the public consultation, 20 contributions were received via the EU Survey online portal. In addition, 2 stakeholders submitted documents to the functional mailbox provided by DG Competition for the evaluation. The statistics shown in this summary reflect only the contributions that were submitted via EU Survey¹.

I. Profile of respondents to the online survey

The 20 respondents to the public consultation consist of 9 business associations, 5 companies/business organisations, 2 EU citizens, 1 non-governmental organisation, 1 public authority and 2 others (associations of lawyers).² The majority of contributions were submitted in English. *Figure 1* below breaks down the respondents by category.

¹ The graphs reported in the document do not take into consideration the number of respondents that did not answer the related question.

² 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.

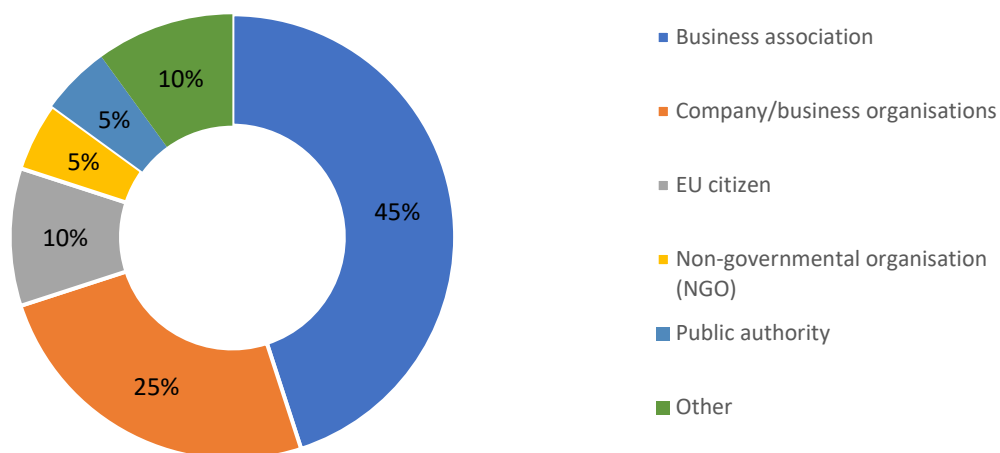


Figure 1. Respondent type

As regards the contributions from organisations (18 responses, from respondents other than EU citizens), the distribution of responses is slightly tilted towards larger organisations, though organisations of all sizes are represented (see Figure 2 below). 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).

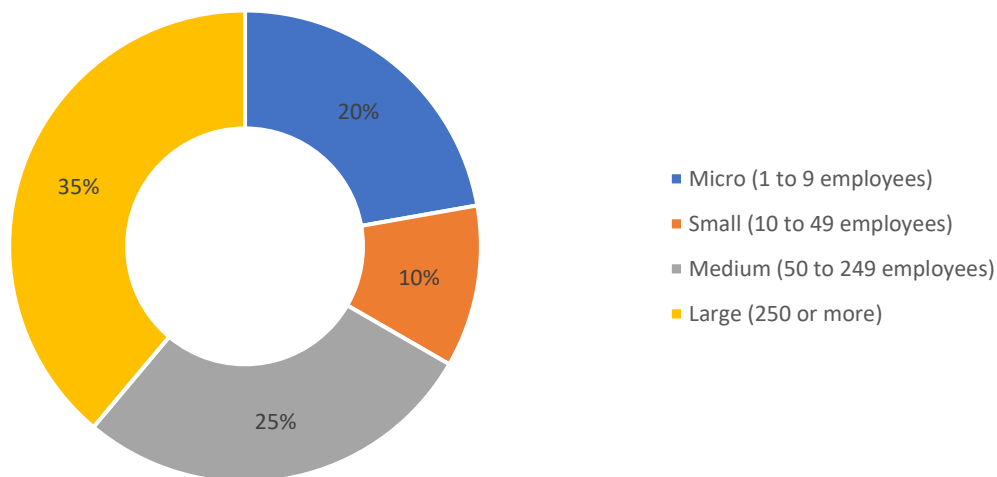


Figure 2. Size of organisations

The respondent business associations are either national or Union-wide, and represent the interests of their members in relation to specific industry sectors or specific economic activities (such as licensing). The respondent companies are active mainly in the information and communications technology

industry and in car manufacturing³. The non-governmental organisation focuses on the protection of the environment and nature; the public authority is a ministry of 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.

Moreover, the majority of respondents (11) are active both as licensors (or associations that represent licensors) and licensees (or associations that represent licensee), while only 2 respondents are active only as licensors and 1 only as a licensee (see *Figure 3*). The remaining stakeholders answered they were neither licensors nor licensees nor associations representing them (4).⁴

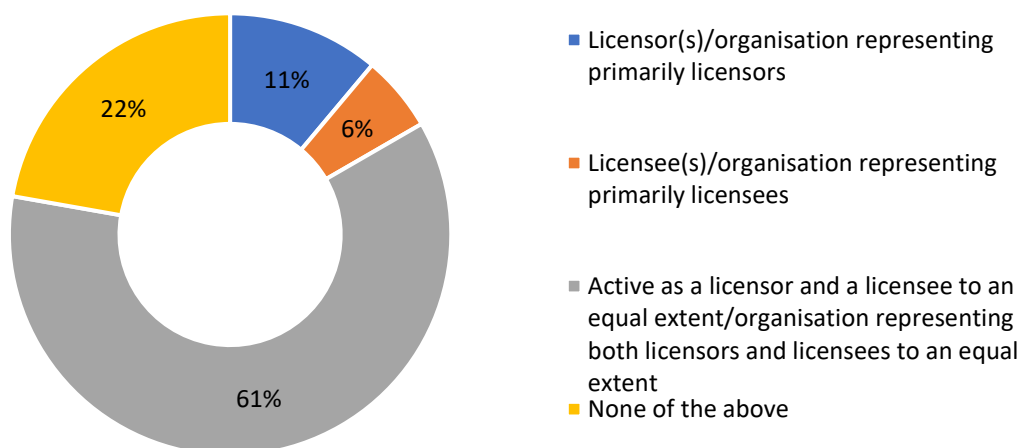


Figure 3. Role of respondents in licensing activities

II. EU Survey results

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.

1. 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.

³ All companies/business organisations that responded are large in size (i.e. more than 250 employees) except for one, which is medium-sized (i.e. between 50 to 249 employees).

⁴ Moreover, 2 respondents did not answer the question.

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,⁵ 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”⁶ (see *Figure 4* below).⁷

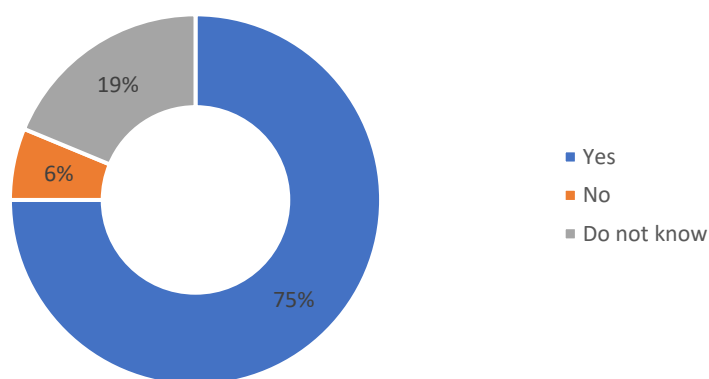


Figure 4. In your view, has the TTBER been effective in exempting only those technology transfer agreements for which it can be assumed with sufficient certainty that they satisfy the conditions for an exemption under Article 101(3) of the Treaty?

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”,⁸ whereas 4 respondents answered “No”⁹ and 4 replied “Do not know” (see *Figure 5* below).

⁵ 7 business associations and 5 companies/business organisations.

⁶ 2 non-governmental organisations and 1 EU citizen.

⁷ Moreover, 4 respondents did not reply to the question.

⁸ 7 business associations and 2 companies/business organisations.

⁹ 1 business association, 1 company/business organisation, 1 EU citizen and 1 non-governmental organisation.

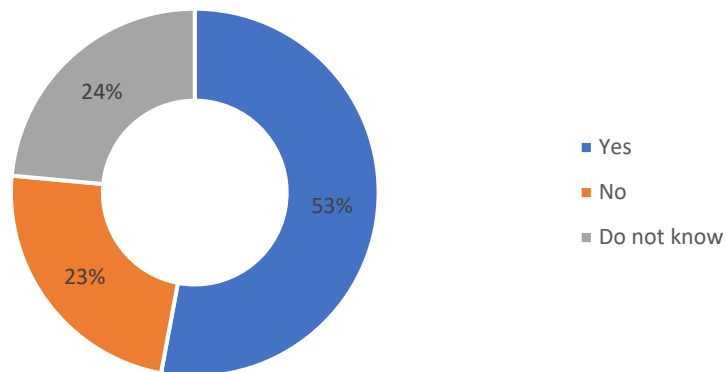


Figure 5. Are there licence agreements of intellectual property rights or other technology rights which are not covered by the TTBER but that in your view satisfy the conditions for exemption under Article 101(3) of the Treaty?

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 agreements between parties that have market shares higher than the thresholds currently set out in the TTBER,¹⁰ 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,¹¹ while 4 respondents answered in the negative¹² and 1 answered “Do not know” (see *Figure 6* below).¹³

¹⁰ See Articles 3 and 8 of the TTBER.

¹¹ 5 companies/business organisations, 4 business associations, 1 non-governmental organisation and 1 association of lawyers.

¹² 3 business associations and 1 citizen.

¹³ Moreover, 4 respondents did not answer the question.

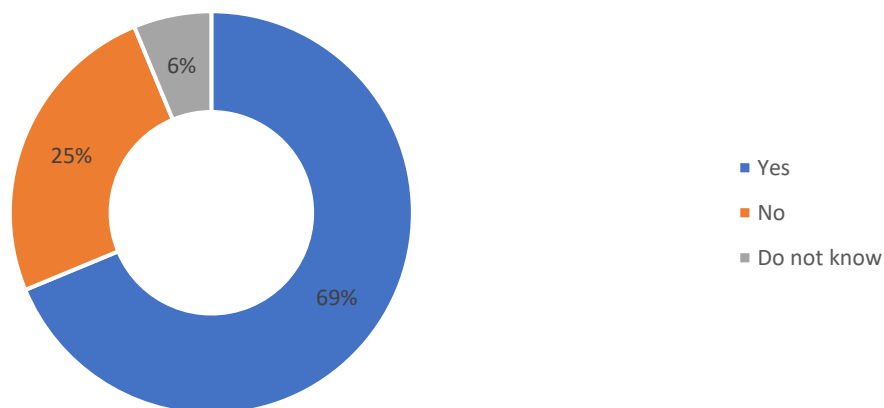


Figure 6 . In your view, has the TTBER been effective in providing legal certainty when assessing technology transfer agreements and/or certain clauses included in such agreements under Article 101 of the Treaty; in other words: are the rules clear and comprehensible, allowing you to understand and predict 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,¹⁴ while 4 respondents answered in the negative¹⁵ and 3 answered “Do not know” (see Figure 7 below)¹⁶.

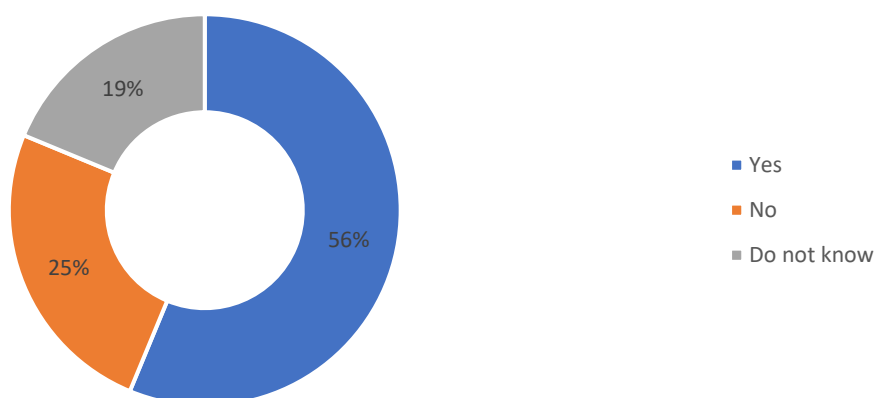


Figure 7. In your view, have the Guidelines been effective in providing legal certainty when assessing technology transfer agreements and/or certain clauses included in such agreements under Article 101

¹⁴ 5 companies/business organisations, 3 business associations and 1 association of lawyers.

¹⁵ 3 business associations and 1 EU citizen.

¹⁶ Moreover, 4 respondents did not answer the question.

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 respondents¹⁷ 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 certainty¹⁸ 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.¹⁹

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;²⁰ (ii) the exclusion from the block exemption of exclusive grant-back clauses (Art. 5(1)(a) of the TTBER),²¹ and (iii) the exclusion from the block exemption of termination clauses in non-exclusive technology transfer agreements (Art. 5(1)(b) of the TTBER).²²

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).

¹⁷ 4 business companies/organisations and 4 business associations.

¹⁸ 3 business associations.

¹⁹ 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).

²⁰ See Section 4.4 of the Guidelines (paras 261-265).

²¹ 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).

²² 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).

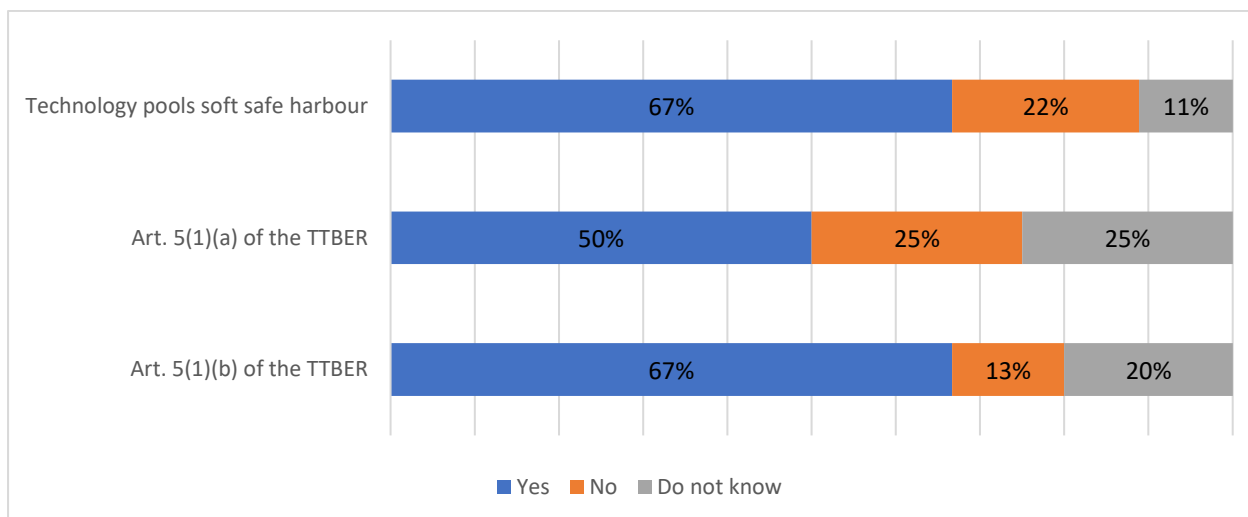


Figure 8. The TTBER and Guidelines were last revised in 2014. In your view, which of the following changes made to the TTBER and Guidelines compared to the previous version of the block exemption regulation and guidelines have been effective in (i) exempting agreements for which it can be assumed with 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,²³ while 4 respondents answered negatively²⁴ and 2 respondents answered “Do not know”.²⁵ The majority of those that answered negatively²⁶ 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,²⁷ while 4 respondents answered negatively²⁸ and 4 respondents answered “Do not know”.²⁹ All the respondents who answered negatively advocated returning to the regime provided by the 2004 version of the TTBER,³⁰ 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,³¹ while 2 respondents answered negatively³² and 3 respondents answered “Do not know”.³³ 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

²³ 5 business companies/organisations, 5 business associations and 2 associations of lawyers.

²⁴ 3 business associations and 1 EU citizen.

²⁵ Moreover, 2 respondents did not answer.

²⁶ 3 business associations.

²⁷ 5 business companies/organisations, 1 business association, 1 association of lawyers and 1 EU citizen.

²⁸ 3 business associations and 1 association of lawyers.

²⁹ Moreover, 4 respondents did not answer.

³⁰ 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.

³¹ 4 companies/business organisations, 4 business associations and 2 associations of lawyers.

³² 1 business association and 1 business organisation.

³³ Moreover, 5 respondents did not answer.

a better balance between allowing parties to challenge invalid patents and protecting good faith in licensing negotiations.

2. 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)³⁴ 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).³⁵ 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.

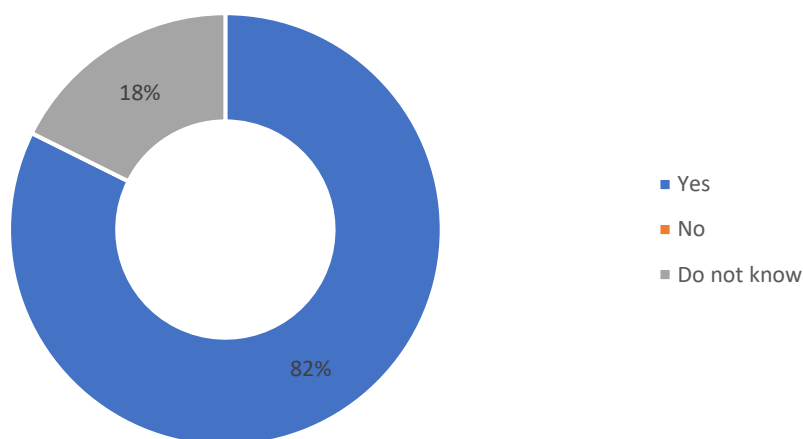


Figure 9. Do you consider that the TTBER and Guidelines have created benefits for the assessment of technology transfer agreements under Article 101 of the Treaty, as compared to a situation in which such agreements would need to be assessed without the TTBER and Guidelines?

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 Treaty³⁶, while 5 respondents considered that these instruments have created costs³⁷, and 2 respondents answered “Do not know” (see *Figure 10* below).³⁸ 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.

³⁴ 7 business associations, 5 companies/business organisations, 1 association of lawyers and one EU citizen.

³⁵ Moreover, 3 respondents did not answer.

³⁶ 4 business associations and 4 companies/business organisations.

³⁷ 1 business association, 1 company/business organisation, 1 EU citizen, 1 NGO, 1 other.

³⁸ Moreover, 5 respondents did not answer.

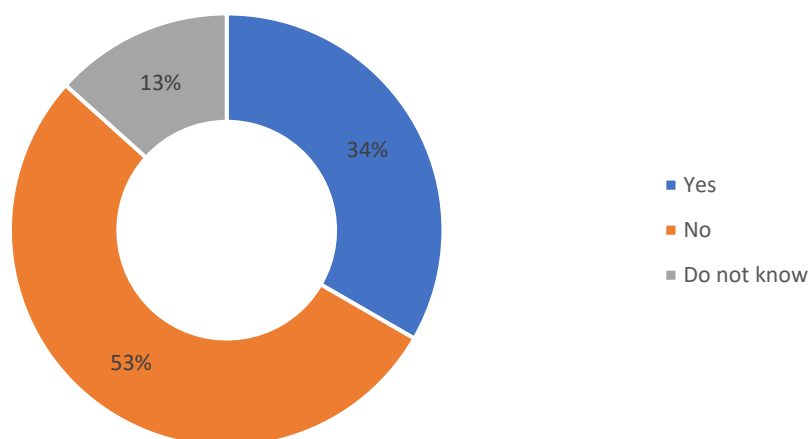


Figure 10. Do you consider that the TTBER and Guidelines have created costs for the assessment of technology transfer agreements under Article 101 of the Treaty (for example, fees paid to external consultants (lawyers and economists) and/or the cost of internal legal advice and time spent by commercial 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 if the TTBER and Guidelines were not to be prolonged.³⁹ However, no respondent was able to quantify the benefits created or the costs generated by the TTBER and Guidelines.

3. 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”,⁴⁰ 1 respondent answered “No”,⁴¹ and 3 respondents answered “Do not know” (see Figure 11 below).⁴²

³⁹ 5 business associations and 3 companies/business organisations.

⁴⁰ 8 business associations and 5 companies/business organisations.

⁴¹ EU citizen.

⁴² Moreover, 3 respondents did not answer.

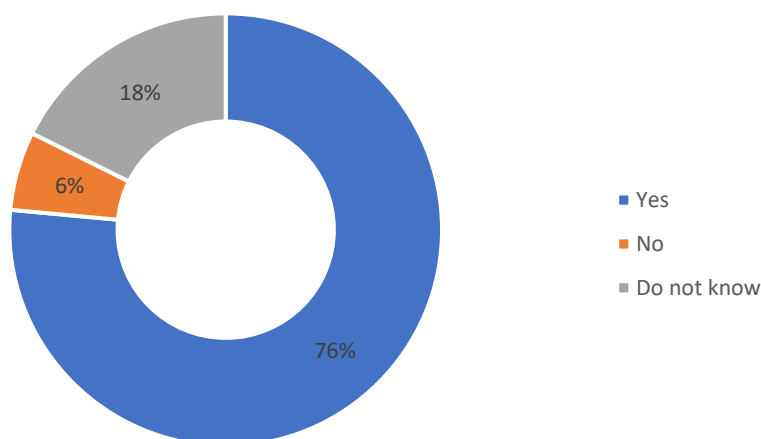


Figure 11. In your view, are the TTBER and Guidelines still relevant for the assessment of technology transfer agreements under Article 101 of the Treaty, taking into account notably any market developments that have occurred since these instruments were adopted in 2014, either generally or in a particular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

4. 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”,⁴³ while 5 respondents answered “No”⁴⁴ and 4 respondents answered that they did not know.⁴⁵ 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.

⁴³ 5 business organisations and 3 companies/business associations.

⁴⁴ 4 business associations and 1 EU citizen.

⁴⁵ Moreover, 3 respondents did not answer.

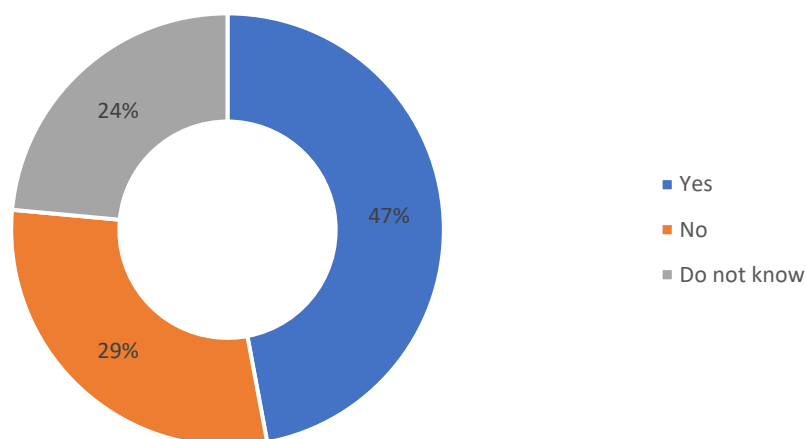


Figure 12. Are the TTBER and Guidelines coherent with other Commission instruments that provide guidance on the interpretation of Article 101 of the Treaty, for example, the Research and Development Block Exemption Regulation (Regulation (EU) No 1217/2010), the Specialisation Block Exemption Regulation (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),⁴⁶ no respondent (0) answered “Yes”, and 9 respondents answered “Do not know”.⁴⁷ 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).

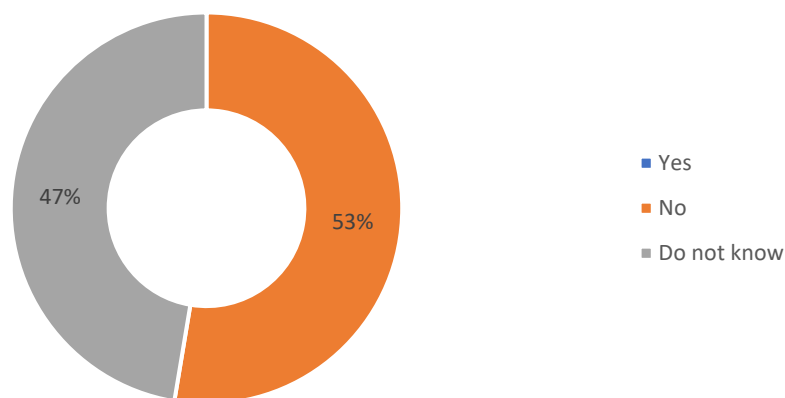


Figure 13. Are the TTBER and Guidelines coherent with other existing or upcoming EU legislation and policies relating to the fields of intellectual property and competition law, for example the Commission’s proposed initiative relating to Standard Essential Patents?

⁴⁶ 6 business associations, 3 companies/business organisations, 1 EU citizen.

⁴⁷ Moreover, 1 respondent did not answer.

5. **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,⁴⁸ while one respondent answered “No”.⁴⁹ 6 respondents answered “Do not know”.⁵⁰

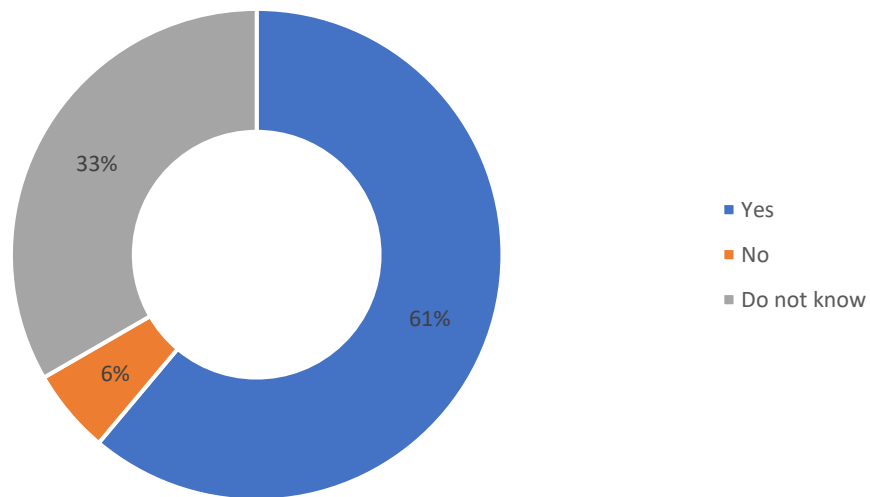


Figure 14. Has the adoption of the TTBER and Guidelines at EU level added value compared with what could have been achieved by national regulations and/or guidelines?

⁴⁸ 7 business associations, 2 companies/business organisations, 1 non-governmental organisation and 1 association of lawyers.

⁴⁹ EU citizen.

⁵⁰ Moreover, 2 respondents did not answer.