Summary of the stakeholder workshop on the evaluation of the Technology Transfer Block Exemption Regulation and Guidelines

In the context of the Commission's evaluation of the Technology Transfer Block Exemption Regulation ('TTBER') and the accompanying guidelines on the application of Article 101 TFEU to technology transfer agreements ('Guidelines'), the Directorate General for Competition ('DG COMP') organised a one-afternoon interactive stakeholder workshop ('workshop') to gather additional information on the functioning of the TTBER and the Guidelines. The workshop took place on 6 December 2023 online.

Building on the outcome of previous consultations carried out in the context of this evaluation, in which stakeholders had generally expressed a positive view of the TTBER and Guidelines and confirmed their continuing relevance, the workshop focused on areas of the rules that had attracted more critical feedback. Participants discussed the following topics in two consecutive sessions. The discussion was based on an issues paper circulated in advance of the workshop by the DG COMP team in charge of the evaluation of the TTBER.

Session 1 – Key provisions of the TTBER

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

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

There were approximately 70 participants, including lawyers, in-house lawyers, academics, representatives of businesses in various sectors, such as the automotive, telecommunications, pharmaceutical, and chemical sectors, representatives of National Competition Authorities of Member States ('NCAs'), and representatives of business associations in the automotive, telecommunications and electronics sectors.

The discussions on each topic are summarised below. This summary of the workshop reflects the views expressed by participants and does not prejudge the findings of the ongoing evaluation. The positions reflected in this summary cannot be regarded as the official position of the Commission and its services and thus do not bind the Commission.

Session 1 - Key provisions of the TTBER

The concept of technology rights

With regard to the concept of technology rights, the following questions were discussed:

1. **In the light of recent technical and industrial developments, do you consider that the definition of technology rights in the TTBER is still relevant?**
2. **Are there other intellectual property rights or related rights that should be included in the definition?**
3. **Are any of the IP rights in the definition no longer relevant?**

As regards the concept of technology rights, participants generally stressed the need to include data and data sets, including raw data, in the scope of the block exemption, given the growing importance of data since the entry into force of the TTBER in 2014.

One of the participants who favoured adding raw data to the list of technology rights also called for the definition of know-how in the TTBER to be aligned with the definition of trade secret in the 2016 Trade Secrets Directive. They noted the challenges of defining raw data, referring to the difficulty of describing raw data comprehensively, due to its often heterogenous nature, and called for possible future changes in the TTBER to be done in a coherent manner with other instruments.

Market share thresholds in the TTBER and soft safe harbour in the Guidelines based on the existence of at least four other technologies

With regard to the market share thresholds in the TTBER and the soft safe harbour in the Guidelines, the following questions were discussed:

1. **Do you consider that the market share thresholds are effective in ensuring that the TTBER exempts only those agreements for which it can be assumed with sufficient certainty that they meet the conditions of Article 101(3) TFEU?**
2. **If not, is there a more effective alternative?**
3. **In view of the objectives of the TTBER, do you consider that the current market share thresholds are appropriate?**
4. **In particular, do you consider it effective to have different thresholds for agreements between competitors and non-competitors?**

As regards the relevance of market share thresholds, some participants pointed to practical difficulties in defining relevant product market(s) and in calculating market shares for products still under development, given the limited information available or its confidential nature at that stage.

In this respect, one of the participants suggested removing market share thresholds for technology markets as these are difficult to apply in technology markets, and only keeping market shares for product markets. Another participant suggested removing market share thresholds altogether, stating that the list of hardcore restrictions was sufficient to exclude anti-competitive agreements from the exemption. During the discussions, it was also suggested to look at the presence in the market of pools and alternative technologies, rather than focusing on the market shares of the parties when assessing the competitive situation on the market.

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

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

As regards the distinction between competitors and non-competitors, one participant considered that the definition of competitors was very broad, since it included both upstream (technology) and downstream (product) market competition, and that any type of remote competitive relationship would qualify. This, combined with low market share thresholds, does not make the use of the safe harbour realistic.

5. **What are the practical difficulties in calculating the market shares of the parties in the relevant technology market(s)?**
6. **Has the calculation method provided by Article 8 been effective in addressing such difficulties?**
7. **What are the advantages and disadvantages of that method?**

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

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

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

8. **Has the 4+ safe harbour in the Guidelines been effective in capturing technology transfer agreements that are unlikely to infringe Article 101 TFEU?**
9. **Does the 4+ safe harbour provide an adequate level of legal certainty to undertakings in their assessment of technology transfer agreements?**

Regarding the 4+ safe harbour, some participants referred to the practical difficulty of applying the 4+ safe harbour test. They stated that 4+ is a high threshold, and that there are rarely more than four credible alternative technologies on the market. They therefore suggested reducing the test to two or three independently controlled technologies as these would already be enough to exert competitive pressure on the parties. Participants also questioned the usefulness of such a test, pointing out that, when there are more than four alternative technologies on the market, the parties' market shares would likely be below the thresholds set by the TTBER.

One participant also remarked that, as technology markets are often not transparent, it is often not possible to have knowledge of the alternative technologies and apply the 4+ test.

Another participant considered that the 4+ test should include both existing and future technologies, i.e. technologies still in the pipeline but sufficiently developed to exert competitive pressure on the market in the short to medium term. However, some participants stressed the need to include practical examples in the Guidelines if the test was to include both existing and future technologies.

A few participants also raised concerns with the condition that the four alternative technologies should be available at 'comparable cost', as required by the Guidelines. They considered that, most of the time, these costs cannot be known or legally obtained by the licensor, due to their sensitive or confidential nature. Those participants therefore argued in favour of abolishing this requirement.

Exclusive grant-back obligations

With regard the exclusive grant-back obligations, the following question was discussed:

1. **Do you consider that the current exclusion from the block exemption of all exclusive grant-back obligations (irrespective of whether they relate to severable or non-severable improvements) strikes the right balance between, on the one hand, preserving the incentive of licensees to innovate and, on the other hand, preserving the incentive of licensors to license their technology?**

Some participants advocated a return to the 2004 regime, which distinguished between severable and non-severable improvements, and to exclude from the block exemption only those exclusive grant-back obligations that relate to severable improvements. They considered that the current exclusion creates disincentives to licensing for licensors, as they cannot ensure that licensees who make a non-severable improvement to the licensed technology will grant back such improvements.

One participant suggested specifying what would happen in the case of co-ownership of an improvement, wondering if this would be considered an exclusive grant-back obligation under the TTBER.

No-challenge and termination-on-challenge clauses

With regard to no-challenge and termination-on-challenge clauses, the following questions were discussed:

1. **Do you consider that the exclusion from the block exemption of no-challenge clauses and termination-on-challenge clauses in non-exclusive licences strikes the right balance between, on the one hand, ensuring that invalid IP rights are not protected and, on the other hand, preserving the incentive of licensors to license their technology?**
2. **Alternatively, do you consider that the treatment of no-challenge clauses and termination-on-challenge clauses under Article 5 of the TTBER should be aligned?**

Some participants indicated that the licensor should have the option of terminating the agreement when the licensee challenges the licensed intellectual property rights in the case of a non-exclusive licence agreement covering patents and know-how.

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

Other participants called for the section of the Guidelines on settlement agreements to be revised in line with recent case law to provide more legal certainty, especially considering that settlement agreements are generally no-challenge agreements. One of the issues raised was that there is currently uncertainty on when to engage in settlement discussions and what kind of agreement would be required to be compliant with antitrust rules.

Additional comments

Some participants expressed opinions on additional topics. Although these opinions went beyond the scope of the previous questions, this summary reports on these comments for the sake of completeness.

- Resale price maintenance ('RPM'): One participant stressed the need to add to the TTBER a section on RPM, similar to the guidance provided for vertical agreements, in order to clarify that, in certain situations, RPM can be pro-competitive.
- Field-of-use clauses: Some participants considered that it should be left to the parties to define or comment on the list of fields of use restrictions, which are defined too narrowly in the TTBER. One of the participants suggested to delete the reference to technical use, as it may make the application of the rules unclear.
- Data: One participant commented on the increasing number of obligations imposed by regulators on undertakings to share data and suggested adding more guidance for undertakings on how to do so without infringing competition law rules.

Session 2 - Technology pools and Licensing Negotiation Groups

Technology pools

With regard to technology pools, the following questions were discussed:

1. **Do you consider that the guidance on technology pools is effective in distinguishing between technology pools that are neutral or pro-competitive and technology pools that may raise competition concerns?**
2. **Are there any aspects that should be changed?**
3. **Do you consider that the soft safe harbour in paragraph 261 of the Guidelines has reduced compliance costs for the creation and operation of technology pools?**
4. **Does the guidance provide sufficient legal certainty? Are there any aspects that require clarification?**

Most participants considered the guidance on technology pools in the Guidelines to be effective. One of the participants mentioned that the Guidelines could be extended beyond technology pools to other forms of aggregations.

One participant indicated that technology pools were generally working well, as evidenced by the number of technology pools formed and the uptake of licences from these pools (equivalent to a 'one stop shop'). Participants also indicated that technology pools generate pro-competitive effects for all stakeholders (licensors, licensees and ultimately consumers), notably by reducing transaction costs. Some participants also considered that the Guidelines help to create legal certainty, by providing that patent holders can only join the technology pool if the patent proves essential, also for third parties.

However, other participants considered that the enforcement of the Guidelines is at times insufficient as regards a number of conditions of the soft safe harbour. Participants indicated that some technology pools lack transparency, including on whether patents included in the pool are essential or not. Participants also considered that it was unclear whether licences concluded by technology pools were bound by FRAND commitments or whether these only applied to licences concluded by individual technology pool members on a bilateral basis. They also said it was unclear how licence fees are calculated and whether they are FRAND or not. This is apparently difficult to establish, given the confidentiality agreements in place, and licensees have no possibility to compare what is offered in the licence. One participant suggested to incentivise pool administrators to monitor compliance with the Guidelines, such as the rules on the royalty allocation formula.

A few participants considered that, in practice, licences are not offered to all potential licensees, and some licensors choose where to license in a production chain. This is particularly the case in the automotive industry, where licences for wireless communications are generally only offered to producers of end products i.e. car manufacturers, rather than to their suppliers.

One participant suggested specifying in the Guidelines, in line with recent national case law, that licence agreements that cover (some) technologies also licensed through another pool are not FRAND if the licence leads to the payment of duplicative royalties, without any specific mechanism for reimbursement.

Licensing negotiation groups ('LNGs')

With regard to LNGs, the following questions were discussed:

1. **Do you consider that specific guidance on LNGs should be added to the Guidelines, similarly to technology pools?**
2. **Can LNGs create efficiencies (e.g., reduction of the number of licensing negotiations and of transaction costs; counterbalancing SEP holders' market power)?**
3. **If guidance on LNGs were to be added to the Guidelines, what conditions and safeguards should be included in order to address possible antitrust concerns?**

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

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

If guidance were to be provided on LNGs, a few participants considered that there should be no obligation to join an LNG and to accept the outcome of the negotiation between an LNG and a technology pool. It was also suggested that any guidance on LNGs should reflect the guidance already provided for technology pools, and that the guidance should also stress the anti-competitive aspects of LNGs, such as the risk of a buyer cartel and collective hold-out.