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Market Share Thresholds in Licensing Agreements – Punishing Success?

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Contents

Summary

The EU has, in the Lisbon strategy, set an objective to become the most competitive economy in the world by 2010. It will, in order to achieve this objective, be necessary to develop and rapidly spread new technologies on the common market. National IP laws provide the legislative framework for the existence and scope of an intellectual property right while EC competition law concerns the exercise of the same. Licensing is a way to distribute intellectual property rights and generally has effects that are pro-competitive and beneficial for consumer welfare.[1]

However, while they do have favourable effects, licensing agreements may also prove restrictive of competition. Competition legislation of the EC, which serves to protect effective competition on the common market, therefore provides certain limitations for what is allowed and the regulatory framework to which undertakings must comply.[2]

Both instruments share the same objectives of improving and protecting consumer welfare, but national IP laws often seem to take a more long-term approach as for what licensing can do for the market, while EC competition law rather regards the immediate effects on competition.

A new block exemption for technology transfer agreements (the TTBER) entered into force in May, 2004 and introduced a new system in which market share thresholds determines whether an agreement comes within the scope of the block exemption safe harbour that exempts it from application of Article 81(1).

Some welcome this system claiming it brings the EU approach closer to that of the US, which will result in facilitating global licensing. Many others are more unenthusiastic, especially so since the TTBER entered into force along with Regulation 1/2003, which decentralised the enforcement system of EC competition law.[3]

Critics say that the assessment of technology transfer agreements has been made more complex, perhaps too much so. They also claim the TTBER Guidelines that are to provide principles of interpretation, to be rather obscure and difficult to apply. The fact that fluctuations in market shares –a common feature on technology markets- are not regarded is one major point of criticism. Some claim that the system functions as a punishment for success.

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[1] TTBER Recital 5.
[2] *EC Competition Law, Text, Cases and Materials.* Alison Jones and Brenda Sufrin, p. 579.
[3] *The new EU Technology Transfer regime-out of the straitjacket into the safe harbour?* Marc Hansen and Omar Shah, p. 465-466.

Abbreviations

CFI	Court of First Instance
CMLR	Common Market Law Reports
EC	European Community
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECR	European Court Reports
EC Treaty	European Community Treaty
EEC	European Economic Community
EIPR	European Intellectual Property Review
ELR	European Law Review
EU	European Union
IPR	Intellectual property right
NCA	National Competition Authority
O.J.	Official Journal of the European Communities
Para.	Paragraph
R&D	Research and development
SSNIP	Small but significant and non-transitory increase in prices
TTBER	Technology Transfer Block Exemption Regulation

1 Introduction

1.1 Purpose

The reason for my choice of subject was a desire to look into an area of law that has not yet become well established and elaborated upon. Since the reform of 2004, there are many such areas within the competition law of the EC, but the importance of technology transfer within the common market, with its implications for companies as well as for consumers, captured my interest. The introduction of a system where market shares of the parties to a licensing agreement are decisive of whether the technology transfer block exemption applies to the agreement, combined with the new decentralised system of self-assessment has proved controversial and is questioned. It will be interesting to ensue the further development of the block exemption and to see whether it will function well as it stands or if it will prove necessary to re-evaluate this method of exemption.

The purpose of this thesis is to examine the new block exemption for technology transfer, with special emphasis on the market share element of the Regulation and the implications it may have on licensing in the EC.

1.2 Disposition

The first part of the thesis introduces the concept of licensing and what it entails. Subsequently, through an examination of relevant early case law on licensing and of the former block exemption regulations on technology transfer, the history of licensing within the common market is presented and provides a background to the modernised block exemption. The process that preceded the adoption of the block exemption is looked into in the following part, as to investigate the reasons for the modernisation. After a brief presentation of the new decentralised system that was introduced in Regulation 1/2003, the thesis then turns to deal with the 2004 Technology Transfer Block Exemption Regulation and the accompanying Guidelines and examines the functioning of these instruments. The final part of the thesis is devoted to a more thorough analysis of the reformation of EC competition law that was accomplished through the adoption of the TTBER and Regulation 1/2003. The negative aspects and the benefits of this reformation are examined along with suggestion that have been presented as alternatives to the market share thresholds of today.

Readers of this thesis should have at least basic knowledge of competition law within the EC.

1.3 Delimitation

As for delimitation, I have decided not to include a further assessment of the Lisbon strategy. As interesting as it may be, it would go well beyond the subject of this thesis. Also, a further analysis and comparison to other block exemptions in the EU has been left out, as well as a more thorough discussion and evaluation of provisions of the Technology Transfer Block Exemption concerning exclusive licenses. The policy towards such provisions contains the same potential effects of punishing successful licensors as the market share thresholds.

1.4 Method and material

A traditional legal method has been employed for this thesis. Commission regulations and notices as well as preparatory work, have been analysed for the purpose of clarifying what the legislative framework is. In order to dwell on the background and history of licensing, doctrine and case law has been the natural source of information. Jones and Sufrin's "*EC Competition Law, Text, Cases and Materials*" was a valuable source of general information on licensing issues.

As for the analysis of what implications the TTBER will have and what the future of it may be, only a limited range of literature has as yet been published. It has therefore proved necessary mainly to turn to various articles and publications for information. Frank Fine's article "*The EU's new antitrust rules for technology licensing - a turbulent harbour for licensors*" was useful when looking into the functioning of the technology transfer block exemption.

Many of the articles commentating on the block exemption have expressed criticism of the market share thresholds and the new self-assessment regime. The above-mentioned article by Frank Fine is one of these. I have made sure also to regard and employ publications of more positive commentators as sources of information in the presentation of the block exemption and as a base for the final analysis.

The more positive attitude towards the technology transfer block exemption is reflected in documents published by the Commission and representatives of this institution, but also other commentators, such as Dolmans and Piilola in their article "*The new technology transfer, a welcome reform after all*" share the overall optimistic approach.

2 Licensing

It is important to distinguish between the existence of an intellectual property right and the exercise of the same. National intellectual property rights legislation deal with the *existence* and the subject matter of intellectual property rights - the actual holding of the right, while EC competition law comes into play in the assessment of the *exercise* of the right.

National IP law creates an exclusive right for the innovator to decide on the usage and development of the intellectual property right and to exclude others from using the new technology or product. This exclusivity creates a limited monopoly power.[4] The monopoly thus created certifies efficient use and development of the right and provides incentives to innovate and to spread and develop innovative technology, as it prevents others from using the innovation. This in turn leads to economic growth and is of benefit for business and thus for the common market.[5]

According to the exhaustion of rights doctrine, there is no further possibility to prevent or restrict sales, through intellectual property rights or in any other way, of a product incorporating an intellectual property right when it has reached the common market, with the consent of the holder.[6]

Licensing provides a means for the holder of the right to, despite the principle of Community exhaustion, remain in control of the technology or product developed by him while it is being manufactured and distributed. Technology as distributed on the market results in the introduction of new competitors and, since licensing of an IPR allows a third party to exploit rights that he would otherwise have been denied access to, markets are opened up through the grant of a license. As a reward for innovation the licensor is provided an opportunity to regain the investments he has made in the development of the technology.[7]

Through the grant of a license, the licensor avoids the risks of producing the goods of its own accord and recovers the money spent on research and development. The licensee is at the same time given an opportunity to use a e.g. patent he would otherwise have been denied access to, as well as the opportunity to develop it further which place him one step ahead of the competitors on the market that have not been granted a license.[8]

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[4] *Draft Technology Transfer Block Exemption Regulation.* Robert C. Lind and Paul Muysert, p. 183. TTBER Guidelines paragraph 6.
[5] Ibid. TTBER Guidelines paragraph 6 & 7.
[6] TTBER Guidelines paragraph 6.
[7] Ibid. paragraph 17.
[8] *Konkurrensrätt, en handbok.* Carl Wetter m.fl. p. 501.

The Technology Transfer Block Exemption (the TTBER) states that technology transfer agreements generally *"improve economic efficiency and are pro-competitive"*. The reason for this is that they will provide incentive for innovation, help prevent research and development from being conducted twice and result in competition on the product market. The chance that the pro-competitive effects outweigh the restrictive ones is held to depend on the market power of the parties.[9]

Effective competition, being a primary objective and an important foundation for economic development and innovation within the EC, combined with the benefits of licensing, makes it important to strike a balance between the protection of competition and that of not restricting the rights of the IPR holder.[10]

It has been held that competition law is to certify that the monopoly created by the IP laws does not expand to distort competition, while allowing the holder of the right to distribute that right through licensing.[11]

The objective of IPR regulation is to promote technical progress for the benefit of the consumer, while competition law serves to increase innovation to maintain an efficient market, enhance economic efficiency and promote competition and consumer welfare. National IPR legislation and competition law therefore have the common objective of creating welfare for consumers.[12]

2.1 Different kinds of licenses

There are a number of categories of licensing agreements. They can involve transfer of know-how or patent rights to another company for purposes of production, marketing or usage. The licensee can thus obtain a mere right to sell certain products or technology while the licensor retains the right to produce them, while through other licensing agreements, the licensee is given the right to perform the actual production and manufacturing of the products.

A licensing agreement can guarantee more or less exclusivity for the licensee while the geographical area in which he can act often is limited. Provisions denying the licensee the right to sublicense are common as well as provisions through which the licensor retains the right to control the usage of the license. The licensor is normally granted a royalty based on the

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[9] TTBER Recital 5.

[10] *Commission adopts new safe harbour for licensing of patents, know-how and software copyright.* Luc Peeperkorn, Lars Kjolbye and Donncadh Woods, p. 14.

[11] *Draft Technology Transfer Block Exemption Regulation.* Robert C. Lind and Paul Muysert, p. 182.

[12] TTBER Guidelines paragraph 7.

sales of the licensee. Provisions on minimum sales or minimum royalty are therefore frequent.[13]

The view on whether to define licensing agreements as vertical – cooperation between different levels of trade, or horizontal - between parties on the same level of trade has shifted through history. The Commission used to consider them to be a kind of vertical agreements in the 1960's but increasingly turned to view them as horizontal once the licensee started to manufacture products similar to those of the licensor. The stricter and more interventionist approach towards horizontal agreements is one explanation to why the former block exemptions included black lists of absolutely prohibited provisions.[14]

The nature of the actual licensing agreement is what in the end determines if it is to be classified as horizontal or vertical.

The purpose to protect and promote integration of the common market explains the restrictive approach and attitude of the Commission and the ECJ towards agreements that result in absolute territorial protection of an area or that restricts trade between Member States. It has been held that it is obvious that the approach of the Commission towards vertical cooperation is much more flexible and allowing since the reform of 2004.[15]

2.2 Article 81

Article 81(1) prohibits agreements, which may affect trade between Member States and have as their object or effect the restriction of competition within the common market.

Licensing agreements may have effects that are restrictive of competition but the negative effects are in many cases mitigated by the fact that the agreement produces positive effects as well. Article 81(3) therefore offers the possibility of exemption from Article 81(1) for agreements where the positive effects of the agreement outweigh the negative ones. Exemption can be granted individually or through block exemptions, issued by the Commission.

Article 81(3) provides four conditions that must be fulfilled in order for an individual exemption from Article 81(1) to be granted. The agreement must first of all contribute to the improvement of production or distribution of goods, or promote technical or economic progress. Secondly, consumers must be allowed a fair share of the resulting benefit. The third condition is that the agreement must not impose indispensable restrictions on the

[13] *Konkurrensrätt, en handbok.* Carl Wetter m.fl. p. 502.
[14] *EC Competition Law, Text, Cases and Materials.* Alison Jones and Brenda Sufrin, p. 579-580.
[15] *Konkurrensrätt, en handbok.* Carl Wetter m.fl. p. 362-363, 371.

undertakings concerned and, lastly, the agreement must not give undertakings the possibility to eliminate competition in respect of a substantial part of the products in question.

There is also a possibility for a whole category of agreements to be automatically exempted under block exemptions, providing a safe harbour from application of Article 81(1). An agreement that does not come within the scope of a block exemption is not presumed to be restrictive of competition but must be assessed individually.

2.3 Block Exemptions

No block exemptions have been issued for other intellectual property rights than those covered by the Technology Transfer Block Exemption.[16] The block exemption for vertical agreements however, is applicable to transfer and licensing of intellectual property rights in vertical agreements in so far as they are only ancillary but directly related to the agreement and not restricting competition. Also, the block exemption for R&D[17] provides provisions on licensing of those intellectual property rights that are a result of the R&D covered by the R&D block exemption.[18]

Furthermore, the R&D block exemption and the block exemption for specialisation agreements[19] may both cover technology licenses, where the licensing is only secondary. Technology licenses are otherwise generally dealt with by the Technology Transfer Block Exemption Regulation.[20]

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[16] Regulation 2790/1999 contains a provision on intellectual property rights. Ancillary licenses of IPR's to vertical arrangements may be block exempted through this. The provision is particularly relevant to franchise agreements.
[17] Commission Regulation 2659/2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements.
[18] *Konkurrensrätt, en handbok*. Carl Wetter m.fl. p. 507.
[19] Commission Regulation 2658/2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements.
[20] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors*. Frank Fine, p. 770.

3 History of Licensing in the EC

The 1962 Notice on Patent Licensing Agreements, also known as *the Christmas Message*[21], presents the early, favourable attitude of the Commission towards licensing agreements. In this Notice licensing was, generally but with some exceptions, held to be permissible and not subject to the requirement of notification. Even exclusive patent licensing agreements were held not to fall under Article 81(1) as long as the obligations imposed on the licensee were covered by the patent.[22] Regulation 17/1962 shows the same permissive attitude, allowing agreements between two undertakings even where they imposed certain restrictions on the licensee.[23]

However, as the number of cases on intellectual property rights brought before the ECJ increased and the Commission became involved in the examination of an increasing number of notified agreements, a new attitude towards licensing gradually developed. This new approach held licensing generally to fall within the prohibition of Article 81(1), rather than being permitted.[24]

3.1 Consten and Grundig

The reasons for the increasing number of agreements being notified to the Commission were several. The exhaustion of rights doctrine was one, but the most important role in this development was played by the case of *Consten & Grundig*, in which a distinction was made between the existence and exercise of an intellectual property right. In this case an exclusive distribution agreement and registration of a trademark was used to create absolute territorial protection through prevention of parallel import. The existence of an intellectual property right was held to be a matter for national Member State law while competition law of the EC could limit the exercise of the intellectual property right where this was deemed necessary.[25]

The same approach as that in Article 81, towards the difference between the existence and the exercise of an intellectual property right is used for Article 82, as is shown by the *Parke Davis* case.[26]

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[21] *Commission Notice of 24 December 1962 on Patent Licensing Agreements*
[22] *EC Competition Law, Text, Cases and Materials.* Alison Jones and Brenda Sufrin, p. 580-581.
[23] Ibid. p. 581.
[24] Ibid.
[25] Cases 56 & 58/64, *Consten & Grundig v. Commission* [1966] ECR 229, [1966] CMLR 418.
[26] Case 24/67 *Parke Davis & Co v. Probel and Centrafarm* [1968] ECR 55.

The potential harmful effect of exclusive licensing that was demonstrated in Consten & Grunding led to a more restrictive attitude towards licensing. Not all parts of society were keen on this development; the industry drew attention to the need for protection of a licensed right where major investments had been made to develop it.[27]

3.2 The 1970's

The restrictive attitude towards exclusive licensing was retained throughout the 1970's, holding them to fall within the prohibition of Article 81unless they could pass the exemption procedure of Article 81(3). However, in 1971, the Commission issued a report where the need for making inventions worthwhile was emphasized. It was also stated that a competitive market with free movement of goods must be protected and promoted.[28]

In their Fourth Competition Policy Report, the Commission returned to the discussion of the need to separate between the existence and the exercise of intellectual property rights. The Commission declared that there was a need for further case law spreading light on how to differentiate between the two concepts. An agreement conferring patent licensing rights was held only to be prohibited by Article 81 if the agreement included terms not necessary for the protection of the industrial property right.[29]

3.2.1 Centrafarm

In this case[30], ECJ held that the right to place a product on the market through licensing was part of the subject matter of the right and not considered an infringement. The exercise of the right however, could potentially infringe Article 81, but it was declared that this had to be decided on an ad hoc basis.

3.2.2 Nungesser

The first block exemption for patent licenses was adopted in 1984. The adoption of a 1979 draft was delayed by negotiations with several related parties and by a pending case before the ECJ, concerning exclusive licenses for the first time since Consten & Grundig – the *Nungesser* case[31], which the Commission wanted to take into account.[32]

[27] *Competition Classics, Material & Cases on European Competition Law and Practices.* Hans-Henrik Lidgard, p. 247.
[28] *First Report on Competition Policy*, Commission 1971.
[29] *Fourth Competition Policy Report*, Commission 1974, paragraph 20.
[30] Case 15/74 *Centrafarm BV v. Sterling Drug Inc.* [1974] ECR 1147, [1974] 2 CMLR 480.
[31] Case 258/78 *Nungesser v EC Commission* [1982] ECR 2015, [1983] 1 CMLR 278.
[32] *EC Competition Law, Text, Cases and Materials.* Alison Jones and Brenda Sufrin, p. 583.

The ECJ considered whether or not an open exclusive license, not preventing parallel import or licensees for other territories, had the effect of distorting competition in the EC. The Court took into account the specific nature of the product in question and came to the conclusion that an open exclusive license was justified for the protection of the new technology and not in itself incompatible with Article 81. The reason for this conclusion was the novelty of the technology, the fact that it was unknown on the licensee's market when the agreement came into being and that the license might not have been possible unless exclusivity was granted, which in turn could have resulted in harmed distribution of the new technology and less inter-brand competition.[33]

The resulting absolute territorial protection however, was held to go beyond what was necessary for the improvement of production or distribution of the promotion of technical progress and therefore prohibited under Article 81(1) as well as being a reason not to grant an exemption under Article 81(3).[34]

The distinction made between open exclusive licenses and those resulting in absolute territorial protection is very important and signifies that open exclusive licenses giving the licensee exclusive rights without prejudicing a third party's right to act in the relevant territory, is not a distortion of competition.

Interesting to note is the difference of approach between the Commission and the Court in assessing the agreement here. The Commission condemned the provisions in the agreement as automatically infringing Article 81 while the ECJ used, at least to some extent, a rule of reason approach based on the economic context of the license. The exclusivity of the license was held not to constitute a restriction of competition, as it was necessary for the agreement to come into existence at all. When reasoning about the absolute territorial protection however, the ECJ turned away from the economic based approach and automatically condemned those provisions.

The Commission interpreted the Nungesser case quite narrowly even if open exclusive licenses falling within the prohibition in Article 81(1) was also exempted through Regulation 240/96, if the technology in question was new and to be introduced and protected in the licensed territory.[35]

Just as the Commission interpreted the Nungesser case narrowly, the concept "new technology" has suffered the same narrow interpretation. Only a few licenses therefore, have been held to fall outside Article 81(1) if they effect trade between Member States and have an appreciable effect on competition.

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[33] *Nungesser*, para. 56-58, *EC Competition Law, Text, Cases and Material.* Alison Jones and Brenda Sufrin, p. 588.
[34] *EC Competition Law, Text, Cases and Materials.* Alison Jones and Brenda Sufrin, p. 583-586.
[35] Ibid. p. 588. Recital 10 of Regulation 240/96 on Technology Transfer Agreements.

3.3 Windsurfing

The *Windsurfing* case, concerning territorial restraints in patent licenses, highlights the approach and attitude of the EC in the 1980's.[36] The Commission and the ECJ both found some of the provisions in the agreement going outside the protection of the patent and held those provisions as infringing Article 81(1). The ECJ did discuss the result of the restrictions in the agreement but took a very formalistic approach abandoning all economic reasoning. The scope of the patent was decided upon and some provisions were referred to as going beyond this scope and consequently restricting competition. The analysis made focused much more on details than on the actual result of the agreement.[37] A provision concerning the existence of the right would not be considered infringing Article 81 while a provision on the exercise of the right could do so, unless exempted through Article 81(3).[38]

In the period of time between the decision of the Commission and the ECJ judgement in the Windsurfing case, the first block exemption for intellectual property rights was adopted and displayed the same reasoning.[39]

3.4 The First Block Exemption Regulations

The *Patent Regulation* was primarily applicable to pure patent licensing agreements, while the *Know-how Regulation* was applied to pure know-how licenses. The regulations were similar in many ways, they both applied only to agreements between two parties and they shared the same structure. White lists of clearly exempted provisions and very strict black lists of prohibited provisions were provided in both.

Pure licensing agreements were exempted as long as they did not prevent parallel trade and the regulations included a limited right to restrict passive sales initially. Both regulations exempted exclusive licensing agreements.[40]

However similar the structures of the two regulations were, some material differences existed through which either the licensor or the licensee could draw benefit. Agreements, in which patent and know-how was licensed

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[36] Case 193/83, *Windsurfing International v. EC Commission* [1986] ECR 611, [1986] 3 CMLR 489.
[37] *Competition Classics, Material & Cases on European Competition Law and Practices.* Hans-Henrik Lidgard, p. 256.
[38] *EU Law, text, cases and materials.* Paul Craig and Graínne De Búrca, p. 1114.
[39] Commission Regulation 2349/84/EEC on the application of Article 85(3) of the Treaty to certain categories of patent licensing agreements, (replaced by Regulation 240/96/EC).
[40] *EC Competition Law, Text, Cases and Materials.* Alison Jones and Brenda Sufrin, p. 592. *Competition Classics, Material & Cases on European Competition Law and Practices.* Hans-Henrik Lidgard, p. 248.

together, were therefore drafted so as to have either patent or know-how as the predominant element, depending on which of the two regulations benefit wanted to be drawn from.[41]

These first two block exemptions on intellectual property rights are often referred to as "*straitjacket regulations*" because of their formalistic approach.

It is a fact that case law is limited from the period of time after the Windsurfing decision. It is difficult to give a clear explanation to why this was so. It is possible that the regulations did function well, but companies seem to rather have chosen other solutions than licensing to spread technology and this is probably the reason for the limited case law.[42]

3.4.1 Tetra Pak

The ruling in the *Tetra Pak* case[43] is very important as it determined the relationship between Articles 81 and 82 and the reach of the latter. The decision is controversial as the CFI held that Article 82 could be violated despite the fact that the agreement in question was within the scope of a block exemption.[44]

The effect on competition, in this case, had been created through the acquiring of a license and resulted in a monopolistic situation. The special responsibility of a dominant firm was emphasised as well as the fact that Article 82 can be applied and abused even where an agreement has been block exempted. Also, where the agreement is outwith the scope of a block exemption, it may immediately be caught by Article 82.[45]

3.4.2 Magill

In the *Magill* ruling[46], the CFI held that an exclusive right to reproduce a protected work would not amount to an abuse under Article 82 as the subject matter of the copyright was protected by EC law. However, if an exercise of the copyright contrary to Article 82 goes beyond what is necessary "*to fulfil the essential function of the right*" the owner of the right is not protected.[47]

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[41] *EC Competition Law, Text, Cases and Materials.* Alison Jones and Brenda Sufrin, p. 592. *Competition Classics, Material & Cases on European Competition Law and Practices.* Hans-Henrik Lidgard, p. 248.
[42] *Competition Classics, Material & Cases on European Competition Law and Practices.* Hans-Henrik Lidgard, p. 256.
[43] Case T-51/89, *Tetra Pak Rausing v Commission [*1990] ECR II-309.
[44] *EU Law, text, cases and materials.* Paul Craig and Graínne De Búrca, p. 1118.
[45] Ibid.
[46] Case T-69/89, *Radio Telefis Eireann v Commission* [1991] ECR II-485.
[47] *EU Law, text, cases and materials.* Paul Craig and Graínne De Burca, p. 1118.

The similar economic effects of the two block exemption regulations led the Commission to the decision of replacing them with one single block exemption covering all the areas of the former two block exemptions.[48]

3.5 Regulation 240/96

The aim of the new regulation[49] was to strike a balance between three objectives. The first objective was a simplification of the rules on licensing agreements to encourage technical knowledge being spread in the EC. The second aim was to guarantee effective competition in new or improved products and the third to create a favourable legal environment, through the provision of legal certainty for companies investing in the EC.[50]

The 1996 Regulation has been held to be the last piece of the formalistic school, although it was designated to ease technology transfer. The possibility for exemption was based on the clauses that were included in the license, which forced agreements to comply with formalistic rules on a clause by clause basis. Block exemptions only covered provisions that had already been individually exempted through Article 81(3) and this, combined with the notification system, provided legal certainty as the parties knew in advance whether their agreement was exempted for the duration of its term.[51]

The Commission suggested, in the drafting process, that the block exemption should simply cover undertakings with less than a certain, limited market share. The suggestion led to controversy and strong reactions and concerns were expressed that a market share threshold would result in individual notification for many agreements. A compromise was made, retaining the market share threshold element only in that the exemption could be withdrawn by the Commission where the market share of the licensee was over 40 %. Lack of effective competition was, according to the Commission, more likely to exist where the market share of the licensee exceeded 40 %.

The right of withdrawal could be exercised when an agreement did fall under the exemption but resulted in effects that were incompatible with Article 81(3). A licensed product not being subject to effective competition, provisions leading to territorial restrictions and prevention of parallel imports are examples of that kind.[52]

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[48] *EC Competition Law, Text, Cases and Materials.* Alison Jones and Brenda Sufrin, p. 591.
[49] Commission Regulation 240/96 on technology transfer agreements.
[50] Commission Evaluation Report on Regulation 240/96, [COM (2001) final 786].
[51] *The new EU technology transfer regime-out of the straitjacket into the safe harbour?* Marc Hansen and Omar Shah, p. 466.
[52] Commission Regulation 240/96 on technology transfer agreements, Article 7 (1).

Regulation 240/96 dealt with all agreements between two undertakings where licensing of patents or know-how was dominant - technology transfer agreements. The regulation also covered ancillary provisions to such agreements concerning other intellectual property rights such as trademarks and copyright.[53] The exemption mainly covered open exclusive licenses and there was only a limited possibility to prevent passive sales.[54]

The block exemption did not differ all that much from previous legislation. A grey list of potentially authorised provisions was introduced and the blacklist of prohibited provisions was shortened, though still covering hardcore restrictions as well as other not so severe provisions. The white list was made more extensive, making the number of exempted agreements greater.[55] The regulation was much detailed and it functioned in a straitjacket type of way - as its predecessors - without reference to economic factors or the competitive relationship between the parties.[56]

It has been declared that Regulation 240/96 was not of much relevance for technology licensing companies, it simply required them to conform to the prohibitions of the regulation, which was not very difficult.[57]

[53] Commission Regulation 240/96 on technology transfer agreements, Articles 1 (1), 10 (15), 8 and 5 (1).
[54] *Competition Classics, Material & Cases on European Competition Law and Practices.* Hans-Henrik Lidgard, p. 257.
[55] *EC Competition Law, Text, Cases and Materials.* Alison Jones and Brenda Sufrin, p. 592.
[56] *Competition Classics, Material & Cases on European Competition Law and Practices.* Hans-Henrik Lidgard, p. 257.
[57] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors,* Frank Fine, p. 769.

4 Overview and Reform

An increasing number of technology transfer licenses were granted in order to spread innovations, and Regulation 240/96 became subject of an evaluation. The reason for the proposed overview was to clarify the application of the competition rules so that their importance in an ever-changing economy would be maintained. The new rules governing technology licensing were adopted in May 2004 after a long consultative process.[58]

The Commission issued a report in 2001 in which it was held that a renewal had occurred in EC competition law through the new block exemption regulations for horizontal and vertical agreements that were adopted in 2000. A stronger focus was now put on inter-brand competition issues and analysis of possible positive effects of restrictions, through the use of market share thresholds, removal of white and grey lists and through the creation of guidelines. This renewal provided a switch from a legalistic and form-based approach - assessing an agreement based on its form rather than on its effect on the market - which functioned as a straitjacket hindering the distribution of new technology, and towards a more economics based assessment.[59]

Furthermore, the Commission declared that new regulations had altered the Commission’s approach on IPR issues, that technology transfer had evolved considerably during recent years and that it was necessary to assess whether these changes had resulted in any inconsistency towards the TTBER of 1996. More complex licensing and a higher level of complexity of new technologies had made a reform necessary. It was established that the TTBER had to be adapted to be consistent with these changes and that it was necessary to turn to a more economics based approach.[60]

Also, the proposed decentralisation of enforcement through a reform of Regulation 17[61], giving national competition courts and authorities power to apply Article 81(3), made it necessary to have clear and reasoned rules so as to certify that application of the rules was predictable.[62]

The aim of the Commission was for the evaluation report to analyse the legal and factual situation so that a simpler and possibly wider block exemption for technology licensing agreements could be designed in the

[58] *Allmän Rapport om Europeiska Unionens Verksamhet 2003,* Europeiska Kommissionen, p. 107-108.
[59] Commission Evaluation Report on Regulation 240/96, [COM (2001) final 786].
[60] Ibid.
[61] Commission Regulation 17 (1956-1962) O.J. Spec. Ed. 87.
[62] Commission Evaluation Report on Regulation 240/96, [COM (2001) final 786].

future in consistency with recent developments in the competition law of the Community.[63]

4.1 Draft proposal and evaluation reports

The Commission drafted a proposal block exemption and various organisations and companies affected by the regulation, industry- and trade associations, law- and IPR societies, law firms and national competition authorities submitted evaluations in response to the draft. The general attitude reflected in the reports was that a review and reform of the competition policy on technology transfer agreements in the EC was considered necessary. The regulation in force at the time was described as a legal straitjacket because of the distinction between black, grey and white clauses of licensing agreements – a formal distinction that was not very logical from an economic point of view. The regulation was moreover held to be too formalistic and narrow in scope and doing nothing to encourage innovation and spreading of new technology. The parties generally agreed that a more economic based approach was required.[64]

As for comments on the market share thresholds that had been presented in the draft, three groups of opinions could be defined. The first group stated that as licensing often is used in situations with new technology or products for which it may be difficult to define the relevant markets, market shares can be high while the actual market power does not equal those market shares. Using thresholds in licensing issues was considered constituting a risk of hindering licensing and innovation.[65]

The second group considered market share thresholds necessary in order to provide a proper competition policy but considered it necessary for the Commission to clarify market definition issues and specify the different types of markets. The third group unreservedly supported the idea of market share thresholds.[66]

One report especially[67] emphasised the importance of harmonisation and market flexibility, as IP licenses are increasingly granted in a global perspective.[68] The relationship between the EU and the US was also taken into account, considering the reform of moving towards a more economic based approach necessary and desired, as it would lead to a more coherent EU competition policy and an approach more in line with the US regulation on IP issues. It was stated that there is no presumption for intellectual property rights resulting in market power in the US and that licensing is

[63] Commission Evaluation Report on Regulation 240/96, [COM (2001) final 786].
[64] Ibid.
[65] Ibid.
[66] Ibid.
[67] The American Intellectual Property Law Association.
[68] Comments of the American Intellectual Property Law Association in the Commission Evaluation Report on Regulation 240/96, April 25, 2002.

generally considered to be pro-competitive. Not only is the existence of a monopoly recognised in the US but IP laws also respects the rights of the IPR holder to exploit his right fully by imposing all restrictions that are necessary to obtain the full benefit of the IPR, in a licensing agreement.[69]

4.2 The Economic and Social Committee

The Economic and Social Committee, in their opinion on the draft TTBER, considered the difficulty of defining a product market where also potential competition must be regarded and stated that a definition of the technology market, which must be performed when licensing an IPR, is even more difficult to make. It was held that no licensing agreements would benefit from the block exemption and that the distribution of technology would be put at risk.[70]

The Committee actually recommended that the system of market share thresholds should be abandoned completely. They considered that the Commission failed to recognise that in situations with new products incorporating intellectual property rights, market shares can be so high as to create a monopoly, causing the license to fall outwith the scope of the exemption, while market power is really not that strong.[71]

The Commission took the comments they received on their draft block exemption seriously and re-drafted the rules and guidelines for licensing agreements and presented a new package of legislation in April 2004 consisting of the new Technology Transfer Block Exemption Regulation 772/2004 (the TTBER) and Guidelines for Technology Transfer Agreements.

The market share thresholds remained.

[69] *Comments of the American Intellectual Property Law Association* in the Commission Evaluation Report on Regulation 240/96, April 25, 2002.
[70] Opinion of the Economic and Social Committee on the Draft Commission Regulation on the application of Article 81(3) of the Treaty to categories of technology transfer agreements.
[71] Ibid.

5 The 2004 Reform

The recent adoption of several new block exemptions in combination with the fundamental changes of enforcement of Community competition law through Regulation 1/2003, were cornerstones in the process that led to the adoption of the new TTBER. It has been held that all the reforms together "*constituted a revolution in the application of Article 81 to technology transfer agreements*".[72]

On May 1, 2004, the new Technology Transfer Block Exemption Regulation entered into force and provided an opportunity for automatic clearance of licenses under Article 81(3) of the EC Treaty. Regulation 1/2003[73] entered into force at the same time and provided decentralisation of enforcement and abolished the former Commission system of notification and individual exemption.

5.1 Decentralisation through Regulation 1/2003

Regulation 1 creates a new decentralised system of enforcement within EC competition law, making national competition authorities and national courts the main actors in EC competition law along with the Commission. The new model is based *on ex post* enforcement, with the self-assessment regime, while the old system of negative clearance and notification for exemption under Article 81(3) can be described as *ex ante* enforcement. The exemption provision of Article 81(3) has now become directly applicable and national courts and competition authorities have thus received authority to fully apply Article 81.[74]

The Commission has issued guidelines on the interpretation and application of Article 81(3).[75]

It is for the companies themselves to assess, through a balancing of positive and negative effects of their agreement and using the principles of the TTBER Guidelines, whether it can be granted exemption and covered by the safe harbour of the TTBER. Application of the guidelines will be in focus and of major importance in this assessment as the companies will need much more support and guidance on the applicability of the rules of the TTBER, when they have to apply them themselves. It will no longer be

[72] *The new EU technology transfer regime-out of the straitjacket into the safe harbour?* Marc Hansen and Omar Shah, p. 465.
[73] Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.
[74] *Konkurrensrätt, en handbok*. Carl Wetter m.fl. p. 5.
[75] Commission Guidelines on the application of Article 81(3) of the Treaty.

possible to draft a model agreement that is certain to come within the scope of the TTBER.[76]

5.1.1 Rationale for the reform

The reasons for the reform were several, the new system was supposed to involve companies and national courts in the application of EC competition law and the former centralised order was held not to comply with the needs of balancing effective surveillance and simplified administrative control. Another reason was that the Commission did not consider it proper for them to have the exclusive right to apply EC competition rules at a time when the national authorities and courts were ready to apply them too. Furthermore, the duty for undertakings to notify agreements to the Commission was held to impose large expenses for the undertakings without advantages to make them just. [77] The new major focus for the Commission would instead be to deal with abuses of dominant position and large-scale cartels.[78]

The Commission may, after the adoption of Regulation 1, no longer impose notification as a condition for exemption under Article 81(3). However, NCA's and national courts may express their opinion that there is no reason for action on their part, thus confirming that the conditions for prohibition of the agreement are not met.[79]

5.1.2 Results

It has been argued that the abolishing of the notification system has resulted in a lack of legal security for the undertakings. The former possibility to notify the agreement and be granted an exemption provided certainty that the agreement was not considered restrictive of competition and that it would not be held in breach of Article 81(1).[80]

Some however, consider the above reasoning a misconception as there was only a restricted number of agreements that became subject to Commission decisions of exemptions, leaving all other undertakings to the insecurity of not knowing whether their agreement could be exempted or not. The same commentator argues that it, in other areas of law, usually is for companies themselves to decide if they act according to the legal framework. Legal security in those areas depends on the standard of the foundation for the

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[76] *The new EU technology transfer regime-out of the straitjacket into the safe harbour?* Marc Hansen and Omar Shah, p. 466.
[77] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors.* Frank Fine, p. 766.
[78] Ibid. p. 767.
[79] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors.* Frank Fine, p. 787. Article 5 of Regulation 1/2003.
[80] *The new EU technology transfer regime-out of the straitjacket into the safe harbour?* Marc Hansen and Omar Shah, p. 469.

assessment and to what extent guidance is provided by the law, interpretations of the law or by legal practice.[81]

5.2 The 2004 Technology Transfer Block Exemption

The 2004 TTBER was the last block exemption to be modernized and was intended to be developed into an instrument more like the other reformed Commission block exemptions on R&D, horizontal cooperation and specialisation agreements, along with the Vertical Regulation. All these block exemptions share the same economic foundation, through which all restrictions that are not expressly prohibited, are exempted if the parties keep below certain market share thresholds. The economic foundation it entails is consistent with the development in the US.[82]

The TTBER will be of much importance for how licensing agreements will be fashioned in the future. The reason for this is that licensing agreements that do not comply with the block exemption may be declared illegal and invalid, which give them an uncertain legal status, while agreements within the TTBER safe harbour are walking a safe (or at least a safer) path.[83]

The aim of the modernisation was to move away from the legalistic approach, lessening the formalism and moving towards an economic-based analysis, placing greater emphasis on the market powers of companies and their potential competition restrictions and focusing more on hardcore restrictions. The new system was also generally to improve the spreading of technology within the Community.[84]

5.2.1 Novelties

Categories of technology transfer agreements which, based on their economic effects on the relevant market, fall within the safe harbour of the block exemption are exempted. The new effects based approach has resulted in several differences from the earlier block exemption. The first and foremost is the introduction of *market share thresholds* on which the application of the TTBER rests and secondly, the *wider scope of application*

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[81] *Moderniseringsreformen beträffande EU:s antitrustpolitik i hamn.* Sven Norberg, p. 127.
[82] *Commission adopts new safe harbour for licensing of patents, know-how and software copyright.* Luc Peeperkorn, Lars Kjolbye and Donncadh Woods, p. 15. *Competition Classics, Material & Cases on European Competition Law and Practices.* Hans-Henrik Lidgard, p. 258.
[83] *Svårtillämpat nytt EG-gruppundantag för licensavtal*. Martin Månsson och Fredrik Persson, p. 741.
[84] *Commission adopts new safe harbour for licensing of patents, know-how and software copyright.* Luc Peeperkorn, Lars Kjolbye and Donncadh Woods, p. 14. *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors.* Frank Fine, p. 768.

of the Regulation, covering all types of technology transfer agreements including software copyright licensing. The introduction of market share thresholds has been criticized but has been held as unavoidable with the new approach of including all different kinds of provisions.[85]

Another important difference is the *introduction of a black list* while abolishing white and grey lists. This abolishing of the straitjacket effect leaves the choice on how to design the agreements to the parties and has the effect that all provisions that are not excluded from the scope of the block exemption are covered by it.[86]

Other differences are the *partitioning of agreements between competitors* (horizontal agreements) and those *between non-competitors* (vertical agreements) and the assessment of competing technologies. The reason for differentiating between competitors and non-competitors are that restrictions of competition are more likely to occur based on agreements between competitors.[87]

The design of the block exemption has otherwise been described as similar to that of previous block exemptions and is in fact reminiscent of the Christmas Message of the 1960's, the difference being that the TTBER emphasizes the concepts of market power and hardcore prohibition.[88]

5.2.1.1 Extended scope

The scope of the block exemption has been extended to cover also copyright in software, as well as patent and know-how licensing. This makes the new TTBER wider than its 1996 version. The Commission has, through guideline 51, decided that it will also apply the principles of the Regulation and the guidelines on designs. This statement goes further than the Regulation itself and even exceeds the powers of the Commission, which makes it controversial, especially since it will be the NCA's and national courts that will apply Article 81 and the guidelines, perhaps without considering the wording of the actual block exemption.[89]

The exemption can be applied on technology transfer agreements between two undertakings concerning the production of contract products, through Article 2. The definition of the stipulation "*contract products*" establishes that they are those which are produced with the licensed technology. This

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[85] *The new EC Technology Transfer Block Exemption Regulation*. Pat Treacy and Thomas Heide, p. 414 & 416. *The new Technology Transfer Block Exemption, a welcome reform after all*. Maurits Dolman and Anu Piilola, p. 352.
[86] *The new EC Technology Transfer Block Exemption Regulation*. Pat Treacy and Thomas Heide, p. 414.
[87] *The new EU technology transfer regime-out of the straitjacket into the safe harbour?* Marc Hansen and Omar Shah, p. 467.
[88] *Competition Classics, Material & Cases on European Competition Law and Practices.* Hans-Henrik Lidgard, p. 259.
[89] *An introductory guide to EC competition law and practice*. Valentine Korah, p. 323.

includes situations where the technology is incorporated into a product as well as where the technology is used in the manufacturing process.[90]

The fact that the agreement must be between two parties, excludes multiparty licensing from the scope of the block exemption. The same goes for agreements without effects on the common market. However, the principles of the TTBER may be applicable by analogy where a license has more than two parties.[91]

5.2.1.2 Market share thresholds

Article 3 provides the market share caps companies may not exceed for the safe harbour of the block exemption to apply. Different market share caps are applicable depending on whether the parties to the agreement are competitors or non-competitors. The reason for this distinction is that there is a general conception that cooperation between competitors is more restrictive of competition and should be treated in a stricter way.

That cooperation between competitors is more likely to restrict competition holds true also for licensing agreements. The object, purpose and effect of the agreement is what determines whether or not it restricts competition. Market shares of the parties and the possibly resulting market power combined with the existence of barriers to entry are of particular interest in the assessment of potential restrictive effects.

In cases where the parties are *competitors*, they may not have a combined market share exceeding *20%* of the affected relevant technology or product markets, while *non-competing* companies will be exempted where they each hold a maximum market share of *30%* on the affected relevant technology and product market. The definition of "*competitor*" and "*affected market*" is provided by the Technology Transfer Guidelines.

There is no presumption that an agreement which exceeds the market share thresholds is restrictive of competition or that Article 81(1) is applicable, unless it included hard core restrictions. However, the agreement does in those cases fall outside of the safe harbour of the block exemption and an individual assessment and market analysis must be made.[92]

5.2.1.3 Hard core provisions

Those provisions which are not exempted by the TTBER can be divided into two groups; hardcore provisions (of Article 4) are considered restrictive by their very nature and are always prohibited, as well as making the whole agreement illegal. The objective for this prohibition is to make sure that agreements falling under the TTBER do not restrict competition, that the incentives to innovate remain as it was and that distribution of technology is

[90] TTBER Article 1(1)(f).
[91] TTBER Guidelines paragraph 40.
[92] Ibid. paragraph 65.

not hindered.[93] Parties to all licensing agreements, including those within the safe harbour of the TTBER, must analyse their agreement with reference to Article 4 in the same way as to Article 3.[94]

There is a difference in approach towards hardcore restrictions, depending on whether they are in force between competitors or non-competitors. What restrictions amount to hardcore restrictions may in itself pose a problem of definition - 42 paragraphs of the guidelines are devoted to this issue.

The other group of non-exempted provisions is dealt with by Article 5. These so called "*conditions*" or "*excluded restrictions*" can leave the rest of the agreement legal if it is possible to separate them from the rest of the agreement. They are not protected by the block exemption but must be assessed individually.

All provisions not challenging Article 4 or 5 are allowed and exempted. There is thus no list of white clauses in the TTBER as in the Vertical Regulation and the other reformed block exemptions.

Territorial restrictions will be treated more restrictively since the introduction of the new TTBER. One reason that has been given for this is that the new enlarged EU causes concern relating to market integration, which is an important objective of the common market.[95]

5.2.2 Exempted agreements

Agreements which do not exceed the market share thresholds and which do not contain any hardcore restrictions are exempted from application of Article 81. Where the agreement does not come within the scope of the safe harbour, an individual assessment must be made to decide whether it can be exempted individually through Article 81(3), (see below).

5.3 The 2004 Technology Transfer Guidelines

Guidelines are policy documents declaring the current opinion of the Commission in certain competition related areas, and are based on judgements from the European courts and decisions from the Commission itself. They provide guidance on how to carry out an analysis for competition law problems, by clarifying what principles and methods are to be used, and serves as an influence on legal practice. Guidelines may also

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[93] TTBER Guidelines paragraph 121.
[94] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors.* Frank Fine, p. 786.
[95] *The new EU technology transfer regime-out of the straitjacket into the safe harbour?* Marc Hansen and Omar Shah, p. 467.

function as a practical influence on competition policy in a way so as to serve the interests of the market and industry.[96]

Guidelines are not binding as documents but they have become of increasing importance as the European courts have cited and applied some of them in their judgements. Furthermore, it is most likely that the Commission will act according to the principles and rules they have established themselves.[97]

There was no need for interpretative guidelines with the form-based TTBER of 1996 as only former individually exempted provisions were covered by that block exemption.[98]

The Technology Transfer Guidelines supplement the block exemption and provides principles for interpretation and application of the block exemption as well as principles for self-assessment for agreements falling outside the TTBER safe harbour.[99] They are also used for assessment of possible restrictive provisions in an exempted agreement, as well as used by analogy in certain cases.[100]

Fulfilling the task of clarifying provisions of block exemptions, the 235 paragraphs of the Technology Transfer Guidelines provide guidance on how to assess market power and on how to define the relevant markets. Moreover, the guidelines present a definition of a "*competitor*" as well as a distinction between a competitor and a non-competitor and an explanation of "*affected markets*".[101]

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[96] *Innovation Markets and Competition Analysis – EU competition law and US antitrust law.* Markus Glader, p. 73.
[97] Ibid. p. 74.
[98] *The new EU technology transfer regime-out of the straitjacket into the safe harbour?* Marc Hansen and Omar Shah, p. 466.
[99] *Commission adopts new safe harbour for licensing of patents, know-how and software copyright.* Luc Peeperkorn, Lars Kjolbye and Donncadh Woods, p. 16.
[100] TTBER Guidelines paragraph 2 & 40.
[101] *Competition Classics, Material & Cases on European Competition Law and Practices.* Hans-Henrik Lidgard, p. 258.

6 Functioning of the Technology Transfer Block Exemption

In order to be covered by the Technology Transfer Block Exemption it is necessary for parties to a licensing agreement to go through a complex test. The TTBER will be used as a starting point, if not directly so by analogy, in the assessment.[102] The first step in the safe harbour analysis is the *definition of the relevant technology and product markets.* Second is the assessment of whether the parties are *competitors* on the relevant market and third is the *calculation of market shares* held by the parties, on the markets that are affected by the license.

These tests originate from the US Antitrust Guidelines for the Licensing of Intellectual Property.[103]

6.1 Definition of relevant market

The importance of market delimitation and definition, which forms the base for further market analysis, of the different markets has attracted attention in recent times.[104]

Guideline 19 declares that the "*Commission Notice on definition of the relevant market*" is primarily to be used when defining the relevant market.[105] The Technology Transfer Guidelines only deal with market definition issues of specific importance for technology licensing agreements. This has been taken to mean that the Markets Notice is to be applied when defining the relevant product and technology markets while the Technology Transfer Guidelines consider the possibility of interchangeability on these types of market.[106]

Technology is integrated into a process in which products are manufactured or into the actual products and can therefore be described as an input. Consequently, companies have the potential to restrict competition on both product and technology markets because of just one licensed technology. It

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[102] *Competition law limitations for the distribution of pharmaceuticals- rough guide to the brave new world.* Dr Stephanie Pautke and Keith Jones, p. 26.
[103] *The new EU technology transfer regime-out of the straitjacket into the safe harbour?* Marc Hansen and Omar Shah, p. 467.
[104] *Innovation Markets and Competition Analysis – EU competition law and US antitrust law.* Markus Glader, p. 74-75.
[105] Commission 1997 Notice on definition of the relevant market.
[106] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors*. Frank Fine, p. 773-774.

is for that reason necessary to delineate technology and product, as well as innovation markets, which may all be affected by licensing agreements.[107]

The assessment and calculation of the parties' market share is performed on the "*affected relevant technology and product market*".[108] The guidelines seem to suggest that affected markets consist of those relevant technology or product markets on which the parties, or at least one of them, existed before the conclusion of the licensing agreement.[109]

The relevant product and technology market, as defined, provides a base for the assessment and the scope of area on which the parties market shares, indicating the parties' strength on that market, can be calculated. The definition of the relevant market is based on a number of circumstances and facts.[110]

6.1.1 Relevant product market

Effects on both product markets for final products and markets for intermediate products are considered in the TTBER and the guidelines. The relevant product market includes products which consumers consider interchangeable with or substitutable for the licensed products.[111]

6.1.1.1 Demand substitutability

The primary factor to take into account when defining the relevant product market is demand substitutability, which is the most effective and immediate limitation on a company. It has to be established if consumers have a possibility to choose another product in case of an increase in price.[112]

The SSNIP[113]-test helps to identify the relevant product market and provides the base for assessing demand substitutability on that market, which can be subject to market influence. It can also provide information on other important factors in the assessment of the relevant market.

Customers' likely response to a small but lasting hypothetical increase in price is determined. Where they would switch to another product, that product is included in the relevant market. The possibility for substitution is based on the intended use, price and characteristics of the product and evidence of substitution in the recent past. The test is performed until a set

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[107] TTBER Guidelines paragraph 20 & 25.
[108] TTBER Article 3.
[109] TTBER Guidelines paragraph 66-67.
[110] *Konkurrensrätt, en handbok*, Carl Wetter m.fl. p. 99-101.
[111] TTBER Guidelines paragraph 21.
[112] Commission 1997 Notice on definition of the relevant market.
[113] ”small but significant and non-transitory increase in prices”

of products has been found for which an increase in price would not be profitable and until the market does not get larger.[114]

6.1.1.2 Supply substitutability

It is only the consumers' view on the interchangeability of products or technology that is regarded in this phase of assessment. The method of only regarding the demand side in the definition of the relevant market is also used in the Markets Notice. The supply side substitutability does however come into play at a later stage when potential competition is regarded in the calculation of market shares on the relevant product market.[115]

6.1.2 Relevant geographic market

The relevant geographic market is that on which conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciable different in those areas. The relevant geographic market can include just parts of one Member State or the whole world and the reason for defining it is to determine if companies within different areas are potential alternative suppliers for customers. Demand-side substitutability and basic demand characteristics, trade flows and barriers and switching costs associated to divert orders to companies in other areas, are all relevant factors for the assessment.[116]

6.1.3 Relevant technology market

Technology markets are often global, while product markets are more limited in scope. The relevant technology market includes those technologies which are considered by the licensees as interchangeable with or substitutable for the licensed technology.[117]

The starting point when defining the relevant technology market is therefore the technology marketed by the licensor and the definition then procures in the same way as the definition of the relevant product market. The intended use of the technology, its characteristics and the relevant royalty are considered and possible substitutes, which are interchangeable with the licensed technology or the products incorporating the licensed technology, are eventually identified.[118]

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[114] *Konkurrensrätt, en handbok*, Carl Wetter m.fl. p. 104-107.
[115] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors.* Frank Fine, p. 774.
[116] Commission 1997 Notice on definition of the relevant market.
[117] TTBER Guidelines paragraph 22.
[118] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors.* Frank Fine, p. 774.

The licensor and the licensee are competing on the same relevant technology market if third party licensees would turn to the licensee's technology in case of a small but permanent increase in royalties for the licensed technology. It is also possible to consider the market on which products are incorporating the relevant technology.[119]

The task of defining the limits for the relevant market is more difficult when the product or technology is far from being introduced onto the market than if the launch is closer. The parties must asses on what market the products incorporating the technology will exist or whether the products may be creating their own, new market. This is most difficult when it is uncertain what function the technology or product will have, and consequently with what it will compete, for a long time after the licensing takes place.[120]

It may also be that the intended use of the licensed technology changes after the granting of the license.[121]

6.1.4 Innovation markets

The guidelines establish that innovation markets can be affected by licenses but that it only is effects on existing product and technology markets that will be considered in the analysis of the effect. Delays in production of new products, caused by the license, may have effects on competition on the product and technology markets. Thus, innovation can amount to potential competition.[122]

6.2 Distinction competitor/non-competitor

In the old TTBER, an *ex post* approach was used when defining "*competing undertakings*". The relationship of the parties, with this method, was regarded with respect to the situation after the closing of the agreement and most licenses were regarded as horizontal.

In line with the aim of moving towards a more economic based analysis of a possible competition restricting agreement, the TTBER differentiates between competitors and non-competitors in the calculation of market shares on the relevant technology and product market, as well as in the examination of hardcore restrictions. When the relevant market has been defined, the next step is therefore a rather complex assessment of whether

[119] Ibid.
[120] *Draft Block Exemption for Technology Transfer.* Valentine Korah, p. 254.
[121] Ibid.
[122] TTBER Guidelines paragraph 25.

the parties would have been actual or potential competitors in the absence of the agreement.[123]

That the definition of the competitive relationship of the parties is performed in the absence of the license instead of what the situation becomes as a result of the agreement is very important as it holds most licensing agreements as concluded between non-competitors. They can through this benefit from the higher ceiling of market shares and the less rigorous hardcore prohibitions in Article 4(1)(2).

The fact that both actual and potential competition is regarded when calculating market shares on the relevant product market, while on the relevant technology market only actual competition is taken into account, makes it necessary to make a distinction between actual and potential competitors.

6.2.1 Actual competition

Actual competitors *on the relevant technology market* are those undertakings that are active on that market and who "*license out competing technologies without infringing each other's intellectual property rights*".[124] If the licensee, before the entering into the license, licenses out his own technology and the licensor subsequently enters that market as he grants a license for a competing technology to the licensee, the parties are considered actual competitors on the technology market.[125] Actual competitors on the relevant technology market therefore do not even have to have licenses that are functioning in the same geographic area.

On the relevant product market, actual competitors are those undertakings who, *"in the absence of the technology transfer agreement",* acts on the relevant product and geographic market where products of the license are distributed, without infringing each others' intellectual property rights.[126]

6.2.2 Potential competition

Guideline 29 gives the definition of potential competition: the parties are considered to be potential competitors on the product market if, in the absence of the agreement and without infringing the intellectual property rights of the other party, it is likely that they would have undertaken the necessary additional investment to enter the relevant market in response to a small but permanent increase in product prices. In order to constitute a

[123] *Competition law limitations for the distribution of pharmaceuticals- rough guide to the brave new world.* Dr Stephanie Pautke and Keith Jones, p. 28.
[124] TTBER Article 1(1)(j)(i).
[125] TTBER Guidelines paragraph 28.
[126] TTBER Article 1(1)(j)(ii).

realistic competitive constraint entry has to be likely to occur within a short period.

The Commission has established that potential competition is only to be regarded for the purposes of the relevant product market and is consequently not to be included in the parties' assessment of the relevant technology market. The reason for this is that it would be extremely difficult for a licensor to assess the ability of the licensee to switch to production of new technology. The licensor would be forced to determine if the licensee holds patents that may make it possible for him to develop the same products or technology as the ones of the licensor and entering the same relevant market as the licensor within a near future.[127]

Potential competitors on the relevant product market are thus, as seen above, those undertakings that would make the necessary investments in order to enter the relevant product and geographic market, without infringing each others' intellectual property rights, if relative prices were to be slightly but permanently increased, in the absence of the technology transfer agreement.[128]

Entry on the market must be likely to happen within a short period of time. An example, from the guidelines, of potential competition on the product market is where the licensee base production on its own technology in one geographic market and starts production based on a competing technology in another geographic market. The licensee is deemed a potential competitor as it is likely that it could have entered the other market based on its own technology.[129]

Potential competitors on the technology market are those who hold substitutable technologies where the licensee is not licensing its own technology but would do so in case of a small but permanent increase in technology prices.

Even if potential competition on the technology market is not taken into account when calculating market shares or examining the existence of hardcore restrictions in the TTBER, it may be so when the license has been deemed to fall outside the safe harbour of the TTBER and an individual assessment must be made.[130]

6.2.3 Reciprocal and non-reciprocal agreements

Yet another distinction must be made in the context of a competitive (horizontal) relationship. Article 1(1) of the TTBER separates between the

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[127] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors.* Frank Fine, p. 778.
[128] TTBER Article 1(1)(j)(ii).
[129] TTBER Guidelines paragraph 29.
[130] Ibid. paragraphs 30 and 66.

two concepts of reciprocal and non-reciprocal agreements. In a reciprocal agreement two undertakings grant each other licenses of competing technologies (or technologies which can be used in the production of competing products), thus creating a system of cross-licensing. Non-reciprocal agreement includes the situation where parties grant each other licenses which are not competing or where just one undertaking grants a license to another.

The distinction between these types of agreements must be made, as the black list for horizontal reciprocal agreements is more severe than that for non-reciprocal agreements. The reason for this is that reciprocal agreements in theory can be used to hide cartels and other similar restricting activities, while in practice they can be of benefit for competition.[131]

6.2.4 Alterations in the competitive relationship

The period of time before or at the actual closing of the agreement is when the assessment of whether the parties are competitors and the calculation of market shares is performed.[132]

There is a possibility that the competitive relationship changes during the term of the agreement. Parties to a licensing agreement may not have been competing when the agreement was entered into but eventually become so, perhaps even as a result of the license.[133] The licensee can develop a competing technology after the license is entered into. It is also possible that the licensee was acting on the product market before the license and that the licensor enter that market because of the licensed technology. The Commission has stated that their focus in these cases will be on "*the impact of the agreement on the licensee's ability to exploit his own technology*".[134]

The hardcore list for non-competitors continues to apply for the rest of the term of the license unless the agreement is altered in any material respect.[135]

The above provision creates a safety measure for undertakings affected, but some issues remain to be solved. For example, the meaning of the expression *"the rest of the term"* is uncertain. Does it include only the initial term of the contract or may it extend to an automatically prolonged contract term?

[131] *The new Technology Transfer Block Exemption, a welcome reform after all.* Maurits Dolman and Anu Piilola, p. 355.
[132] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors.* Frank Fine, p. 778-779.
[133] *Svårtillämpat nytt EG-gruppundantag för licensavtal*, Martin Månsson och Fredrik Persson, p. 749.
[134] TTBER Guidelines paragraph 31.
[135] TTBER Article 4 (3) and TTBER Guidelines paragraphs 31 & 68.

Another issue is how to interpret the expression *"in a material way"*. No guidance is given by the Technology Transfer Guidelines.

Furthermore, even if the parties in this situation can apply the provisions for hardcore prohibitions of non-competitors for the rest of the term of the agreement, the market share thresholds for competitors become applicable directly and the parties may only hold 20% of the market. They do not fall outwith the scope of the TTBER however, until after two years.[136]

The opposite situation, where parties are competing before the license but eventually switch from being competitors to non-competitors on the relevant technology and product market, may occur. It is possible that the licensing agreement presents a new technology that replaces the technology of the licensee. The new technology may also create a new market and the relationship of the parties becomes non-competitive.[137]

The guidelines establish that the relationship of the parties will remain that of competitors unless it is obvious that the licensee's technology will become obsolete, at the time of entering into the agreement. The reason for this is that it often is necessary for the technology or the products incorporating the technology to be on the market for some time before it is possible to establish that it has substituted all former products. However, as the licensee's technology does become obsolete, the relationship between the parties will be held non-competitive. The reason for this is that Article 81 must be applied with the reality of the market in mind. An example given for when a new technology have replaced an old is that of CD's replacing LP's.[138]

It has been argued that Article 4(3) of the TTBER should be used so as to protect also parties who become non-competitors, so that their agreement can benefit from the hardcore provisions for non-competitors.[139]

6.3 Market share calculation

The third step in the analysis of the TTBER is the determination of market shares of the undertakings on the relevant market, which discloses the relative strength of the parties. The TTBER system of market share thresholds is also employed in all other block exemptions in the EU for

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[136] *Svårtillämpat nytt EG-gruppundantag för licensavtal*, Martin Månsson och Fredrik Persson, p. 749.
[137] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors*. Frank Fine, p. 778.
[138] TTBER Guidelines paragraph 33.
[139] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors.* Frank Fine, p. 779.

determining whether parties to an agreement can benefit from a block exemption.[140]

Several methods can be used in order to calculate market shares on technology markets. The method employed in the TTBER, basing market shares on market sales, is the one that has been established as the favourable method in order to obtain a good indication of the market power of the licensor and the strength of the technology.[141]

6.3.1 Technology and product markets

6.3.1.1 Technology market

The relevant market for the TTBER is the technology market, but as market shares for the relevant technology market are based on sales on the downstream product market of products incorporating the licensed technology, it is strength on the relevant product market that determines the market shares for parties in a technology licensing agreement.[142] As stated in the TTBER: "*the market share of a party on the relevant technology market is defined in terms of the presence of the licensed technology on the relevant product markets*".[143]

Thus, both the technology markets and the product markets for products in which the technology is incorporated are regarded when market shares are calculated.

The calculation of the licensor's market shares on the technology market is based on the sales of the licensor and his licensees of products incorporating the licensed technology on the downstream product market. Therefore, the success of the licensees and the products incorporating the technology will be of importance as these sales add on to the licensors technology market share. Those products incorporating the licensee's own technology must be included in the calculation when the parties are competitors on the technology market.[144]

The use of this method includes all sales on the relevant product market – including products that do no incorporate the licensed technology and has been described as a good indicator of the strength of the technology and the licensors market power. One reason for this is that potential competition is taken into account. Also, where a licensor do have a high share of the income of licensing on the market, this does not necessarily imply that he

[140] *Innovation Markets and Competition Analysis – EU competition law and US antitrust law.* Markus Glader, p. 83.
[141] TTBER Guidelines paragraph 23.
[142] *Competition law limitations for the distribution of pharmaceuticals- rough guide to the brave new world.* Dr Stephanie Pautke and Keith Jones, p. 29.
[143] TTBER Article 3(3)
[144] TTBER Guidelines paragraph 70.

has market power on the technology market as competition on a downstream product market may constitute a restraint.[145]

The licensing profit of each technology is the base for that technology's market share, which is calculated on the basis of market sales value data relating to the previous year.[146] Therefore, where the licensed technology is in pipeline or on innovation markets and has not yet generated any sales, it holds a zero percent market share. The method for the calculation of market shares relates exclusively to the sales figures of the licensed technology, not on royalties collected.[147]

6.3.1.2 Product market

As for product markets, the licensee's market share calculation must include all its sales on that market, including products incorporating the licensed technology and its sales of competing products. Where a licensee is regarded as a potential competitor to the licensor on the product market, their agreement is considered under the less forgiving Article 3(1), allowing the parties to hold only a combined market share of 20%. This can be the result even where parties are not actual competitors at all on the product market or the technology market. For parties that are competitors on the relevant product market but use different technologies that are not competitive per se, the result is the same.[148]

6.3.2 Alterations in market power

Market power of an undertaking may in some cases initially keep below the threshold but, as the licensed technology develops, eventually exceed it. According to the guidelines, the block exemption does not apply for the agreement on that market when this occurs.[149] Critics argue that this is a questionable system, functioning as a sort of punishment of successful companies.[150] When, after years of research and development, a licensee is appointed and eventually becomes successful to the point of not facing hard competition, the critics consider it too unforgiving to withdraw the exemption so that the license in question might be considered infringing Article 81.[151]

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[145] Ibid. paragraph 23.
[146] TTBER Article 8(1)
[147] TTBER Guidelines paragraph 70.
[148] Ibid. paragraph 71.
[149] Ibid. paragraph 69.
[150] *Svårtillämpat nytt EG-gruppundantag för licensavtal*, Martin Månsson och Fredrik Persson, p. 749.
[151] *Technology Transfer Agreements and the EC Competition Rules.* Valentine Korah, p. 242.

The Commission seems to agree and has included a mitigating provision in the TTBER that offers protection by the block exemption for a period of two years after the exceeding of the thresholds.[152]

6.3.3 Alternative methods to assess market power

It is possible to base the calculation of market shares on the technology market on the technology's share of the total royalty income, instead of basing it on the market sales. This alternative method is considered less practical because of the difficulty to obtain information about relevant royalties.[153]

However, in order to assess the true market strength of the undertaking, it may be necessary to use this method as a complement in an individual assessment of an agreement that has fallen outwith the block exemption. The reason for this is that competition in product (downstream) markets may affect competition for technology licensors (on the upstream market).[154]

This method has been describes as a second safe harbour within the guidelines, created in order to concentrate the heavy machinery of the competition rules only on agreements that actually are likely to cause restrictions of competition.[155]

The guidelines provides that the market share a company holds is not always a good indicator of what the strength of the technology is, in cases where agreements have fallen outwith the safe harbour of the TTBER. A third method was presented in the guidelines, where the Commission declared that agreements are not likely to infringe Article 81 where there are *"four or more independently controlled technologies in addition to the technologies controlled by the parties to the agreement that may be substitutable for the licensed technology".*[156]

The Commission, therefore, will not consider a licensing agreement restrictive of competition where at least four independent undertakings on the market are substitutes for the licensed technology, assuming of course that no hardcore restrictions are included in the agreement.[157]

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[152] *The new EC Technology Transfer Block Exemption Regulation*. Pat Treacy and Thomas Heide, p.416.
[153] TTBER Guidelines paragraph 23.
[154] *Innovation Markets and Competition Analysis – EU competition law and US antitrust law.* Markus Glader, p. 91.
[155] *Commission adopts new safe harbour for licensing of patents, know-how and software copyright.* Luc Peeperkorn, Lars Kjolbye and Donncadh Woods, p. 16.
[156] TTBER Guidelines paragraph 24 & 131.
[157] Ibid. paragraph 131.

The fact that the guidelines do not have binding effect makes it uncertain what effect, if any, this alternative test of market power will have.[158]

6.4 Individual assessment

The fact that an agreement turns out to be outwith the scope of the block exemption is a disadvantage for the parties as it leads to a greater degree of insecurity as to whether the agreement is considered a restriction of competition and thus illegal, but the legal consequences are not immediate, as will be shown below.[159]

There is no presumption of illegality for an agreement that fall outside the safe harbour of the TTBER, and there is no presumption for Article 81(1) to apply to agreements exceeding the market share thresholds, unless the agreement includes hardcore restrictions. Instead, in situations where the licensing agreement cannot be exempted by the safe harbour of the TTBER, the parties must perform an individual assessment and a market analysis according to Articles 81(1) and (3), in order to investigate whether any prohibited provisions are included.[160]

In the assessment of an agreement to examine if it includes prohibited provisions, the companies must go through a twofold test. The first filter is the Guidelines on the application of Article 81(3), which is to be the first and foremost instrument for all agreements with respect to Article 81(3).[161]

6.4.1 The Guidelines on the application of Article 81(3)

The Guidelines on the application of Article 81(3) have been held to be generic and not taking account of specific types of agreements. The companies must determine if the positive effects of the license outweigh its negative effects and the four cumulative criteria of Article 81(3) must be fulfilled. The license must produce objective, economic effects to be exempted, restrictions on competition must be indispensable, consumers must receive a fair share of the efficiencies and there may be no possibility to eliminate competition.[162] This assessment is part of the more economics based approach to licensing and has been described as a process *"far too complex for the parties' self-assessment"*.[163]

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[158] *Competition law limitations for the distribution of pharmaceuticals- rough guide to the brave new world.* Dr Stephanie Pautke and Keith Jones, p. 30.
[159] *Svårtillämpat nytt EG-gruppundantag för licensavtal,* Martin Månsson och Fredrik Persson, p. 759.
[160] TTBER Guidelines paragraph 65 & 130.
[161] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors.* Frank Fine, p. 771.
[162] TTBER Guidelines paragraph 146.
[163] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors.* Frank Fine, p. 771.

The Commission has made clear that initial sunk investments must be considered in this assessment, as well as the time and restraints needed to recover the investment. It has also been stated that these considerations may result in an agreement being exempted from Article 81(3) for as long as the companies need to recover their sunk costs.[164]

6.4.2 The Technology Transfer Guidelines

The second part of the test is the Technology Transfer Guidelines. The guidelines go through all kinds of restrictions determining whether or not they fall under Articles 81(1) and 81(3), and is therefore of much help when particular provisions of an agreement are to be evaluated.[165]

The guidelines give that it is important and necessary to, in the individual assessment, take into account how the competition functions on the market. The nature of the agreement, the competitive advantages of the parties, the number of independent technologies that are available on the market, which may be substitutable to the licensed technology, entry barriers and the maturity of the market are all to be taken into account, as well as the market positions of the parties and of other actors on the market, as this indicates market power.[166] The same considerations will be made in cases where the products have not yet reached the market but are on their way, licensed and in pipelines.[167]

It is also possible to take potential competition on the technology market into account as well as the actual competition, in the individual assessment.[168]

Examples of negative effects that may be produced with a licensing agreement are; reduction of inter-technology as well as intra-technology competition and foreclosure of competitors.[169] These effects must be weighed against positive effects such as efficiencies.

The general assessment of the benefits and drawbacks of the agreement that must be made is a task containing a large element of insecurity as large amounts of information about the agreement, the position of the parties and maturity of the market must be collected and analysed. The actual drafting of the agreement will be of less importance than the market on which the

[164] TTBER Guidelines paragraph 147.
[165] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors.* Frank Fine, p. 771.
[166] TTBER Guidelines paragraph 132.
[167] *Innovation Markets and Competition Analysis – EU competition law and US antitrust law*. Markus Glader, p. 90-91. TTBER Guidelines paragraph 8.
[168] TTBER Guidelines paragraph 66.
[169] Ibid. paragraph 141.

agreement is in play. Parties must be well aware of what implications it may have for them to acquire another company etc.[170]

6.5 Duration of exemption

In cases where the safe harbour does apply to the licensing agreement, the duration of the protection lasts until the licensed right expires or becomes invalid. However, it only lasts for as long as the market shares of the parties do not exceed the market share thresholds. A safety measure is offered by Article 8(2), which provides that the exemption for the agreement continues to apply for a certain period of time after the market share threshold was first exceeded. If market shares rise above the limits in year one, the TTBER offers protection to the license until the end of year three. Providing that the agreement continues to exceed the thresholds after these two years, the license falls outside the block exemption.[171]

Where the block exemption is not applicable on an affected relevant market because market shares exceed the thresholds, it is only on that market the exemption is inapplicable. It remains valid on all other product-or geographic markets. The licensor should therefore define the different geographical markets on which his technology exists and keep them separated.[172]

Not much time remain for those agreements that were granted exemption under the old block exemption. They lose their protection on March 31, 2006 unless they are granted exemption also under the new TTBER.

6.6 Withdrawal

The Commission may also withdraw the protection of the TTBER if it considers the licensing having effects that are restrictive of competition and incompatible with Article 81(3).[173] Withdrawal may take place where third parties' technologies are subject to restricted access, or where the licensing technology is not exploited without any valid reason.[174]

Also, in line with the decentralisation reform of the executive powers of EC competition law, it is now possible for national competition authorities,

[170] *The new EU technology transfer regime-out of the straitjacket into the safe harbour?* Marc Hansen and Omar Shah, p. 469.
[171] TTBER Article 8(2).
[172] *Svårtillämpat nytt EG-gruppundantag för licensavtal*, Martin Månsson och Fredrik Persson, p. 747.
[173] TTBER Article 6(1).
[174] TTBER Guidelines paragraph 120.

where an exempted technology transfer agreement has negative effects on its territory, to withdraw the safe harbour for that agreement in respect of that territory.[175]

6.7 The De Minimis Notice

The Commission de Minimis Notice[176] is a non-binding legal document but can nevertheless be of some importance. It exempts licensing agreements from the application of Article 81(1) where competing parties have market shares below 10% and non-competing parties have market shares below 15%. The license may not include certain hardcore restrictions if the Notice is to apply and the list of prohibited provisions is of wider scope than that of the TTBER.[177]

Finding that the agreement is exempted from the competition rules through this Notice relieves their parties from having to turn to the TTBER for exemption.[178]

Yet, the problem of calculating and assessing market shares when the products in question are new makes the de Minimis Notice difficult to apply on licensing of technology.[179]

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[175] TTBER Article 6(2).
[176] Commission 2001 Notice on agreements of minor importance.
[177] *EU Law, text, cases and materials.* Paul Craig and Gráinne De Búrca, p. 963-964. *Svårtillämpat nytt EG-gruppundantag för licensavtal*, Martin Månsson och Fredrik Persson, p. 747.
[178] Ibid.
[179] *EC Competition Law, Text, Cases and Materials.* Alison Jones and Brenda Sufrin, p. 589.

7 Further analysis

7.1 Why reforming competition law of the EC?

The European Union strives to create more jobs, improve innovation and the economy and stimulate growth of the market. The high expectations for the future of the EU naturally constituted an impetus and reason for the Commission to alter competition rules in a way as to make them more flexible and apt for the continuing quest to reach these expectations.[180]

One of the objectives of the Lisbon strategy is for the EU to achieve the position of the most competitive economy in the world by 2010. To attain this objective it is necessary to promote a favourable environment for business and create incentives and rewards for innovation, which is the base for effective competition.[181]

The economic development of the EU and its ability to keep up with competitors in the rest of the world depend on the ability to create new technology and to distribute it. Licensing creates new markets as well as new products on already existing markets, but may also restrict competition.

As announced by representatives from DG Competition: *"As the main driving force for innovation is competition it is important to find a balance between protection of competition and protection of intellectual property rights"*.[182]

The Technology Transfer Guidelines declare that innovation is an essential part of a competitive market economy and that intellectual property rights promote dynamic competition by encouraging investment and innovation. It also states that both IP and competition legislation reach for the same goal of improving consumer welfare and efficiency.[183]

The EC and the Commission must promote licensing and prove that they do consider licensing being generally pro-competitive. Limiting the scope of permissible market shares has made many people fear that companies will perform their R&D and production and distribute innovative technology in other places than Europe, because the legislative framework of the EC is too restrictive. The consequence may be the loss of many job opportunities.[184]

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[180] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors.* Frank Fine, p. 766.
[181] Opinion of the Economic and Social Committee on the Draft Commission Regulation on the application of Article 81(3) of the Treaty to categories of technology transfer agreements. TTBER Guidelines paragraph 7.
[182] *Commission adopts new safe harbour for licensing of patents, know-how and software copyright.* Luc Peeperkorn, Lars Kjolbye and Donncadh Woods, p.14.
[183] TTBER Guidelines paragraph 7.
[184] *An introductory guide to EC competition law and practice.* Valentine Korah, p. 324

The TTBER was created to replace the formalistic, straitjacket type of approach of the former block exemption, moving towards a more economic-based analysis. The parts of the TTBER that do reveal a more favourable approach towards licensing, may function as an encouragement of licensing

An important step has been taken on the way to a more liberal, reality-based legal solution for technology transfer in the EC. The straitjacket-effect of Regulation 240/96, where companies simply could design their agreements in line with the white lists of allowed provisions in order to be exempted, has been taken away and replaced with a safe harbour limited by market share thresholds. The new regulation provides a wider scope of application and it does grant a certain freedom to design licenses according to practice. Yet, the new system does not satisfy everybody. Some claim that the hazard of going through the self-assessment of the regulation will hinder the distribution of some technologies on the common market and that it most definitely will make companies think twice before taking the risk of investing a large sum of money just to be held constituting a restriction of competition as the license starts to become successful.

Another part of the revolution of the competition law of the EC is Regulation 1/2003, which came into force along with the TTBER and modernised the enforcement system of the EC.[185]

7.2 Decentralisation

Since May 2004, there is no longer any possibility for licensing parties to be granted exemption through pre-notification. The purpose of the new technology transfer block exemption and guidelines was to provide an instrument to resolve all issues arising from technology licensing agreements, so that the Commission could focus on more large-scale infringements of Community competition law. Problems in the application of the TTBER have been delegated to the national competition authorities and courts of the Member States and the companies themselves.[186]

The new decentralised system forces companies to perform their own assessment of their licensing agreement in order to determine if they fall within the safe harbour of the TTBER and are exempted from Article 81(1). The safe harbour of the modern TTBER is defined through market shares,

[185] Opinion of the Economic and Social Committee on the Draft Commission Regulation on the application of Article 81(3) of the Treaty to categories of technology transfer agreements.

[186] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors*, Frank Fine, p. 786-787. *The new EU technology transfer regime-out of the straitjacket into the safe harbour?* Marc Hansen and Omar Shah, p. 467.

while to be covered by Regulation 240/96, companies only had to avoid certain black or grey listed restrictions.[187]

7.2.1 Problems

Reduced legal certainty and incoherent application of community law are two issues that have been identified by critics as consequences of Regulation 1/2003.

7.2.1.1 Divergence of enforcement

Since the decentralisation scheme through Regulation 1/2003 that coincided with the adoption of the TTBER, national competition authorities and courts of 25 Member States can examine competition issues as well as the Commission.[188]

The risk of divergence of enforcement and interpretation of the block exemption has been acknowledged as something that possibly will have practical implications in the future. However, Katarina Pijetlovic argues that uniform application and legal certainty will be ascertained through centralised policy-making and a network of cooperation and information between the national competition authorities and courts.[189]

Divergence of enforcement, when 25 Member States will be applying the competition rules, may be a result of the new decentralised system. Companies must be aware of the commercial risks that are involved with their licensing and be prepared to defend their assessment of the agreement before national courts and competition authorities.[190]

Other issues are the lack of predictability and legal certainty.

7.2.1.2 Lack of predictability and legal certainty...

When the Commission abolished the pre-notification system, they handed over the problem of assessing market power to the parties to the agreement themselves. The predictability factor - of parties knowing whether or not their agreement was considered restrictive of competition - was removed. The parties need to assess the legality of their agreement and decide if it is pro-competitive through the application of the principles of interpretation of the guidelines. Also, a self-assessment must be performed for agreements falling outside of the TTBER or where they are within the block exemption but include certain types of restrictions. In doing so they should take account of the TTBER and the guidelines as well as the Commission Notice

[187] *The new EU technology transfer regime-out of the straitjacket into the safe harbour?* Marc Hansen and Omar Shah, p. 467.
[188] *Competition law limitations for the distribution of pharmaceuticals- rough guide to the brave new world.* Dr Stephanie Pautke and Keith Jones, p. 24.
[189] *Reform of EC antitrust enforcement.* Katarina Pijetlovic, p. 369.
[190] *Competition law limitations for the distribution of pharmaceuticals- rough guide to the brave new world.* Dr Stephanie Pautke and Keith Jones, p. 26.

on the application of Article 81(3). Is it too much to ask of companies to perform this self-assessment? Some say that potential licensing parties may even decide that they are not prepared to perform the assessment, leaving technology unlicensed.[191]

Lack of legal security is a real and great problem for companies involved in licensing, as the exhaustion of rights doctrine gives that an IPR cannot be taken back and protected by the holder, once it has been put on the market.[192]

It has been held that block exemptions are at present the only legal certainty offered by the Commission. The same critic claims that the TTBER and its guidelines are in fact too complex to ascertain any legal certainty and that they make it difficult for parties to know if they fall under its scope, but *"yet provide the false impression of being easy to apply"*, leading companies to believe that they are covered by the block exemption when they are in fact not.[193]

The degree of uncertainty as to whether an agreement is held to be restrictive of competition did increase as the system of *ex ante* exemption of the old TTBER, providing knowledge to the parties about how the Commission regarded their agreement, was replaced by a complex system where categories of agreements are exempted if the parties have market shares below certain levels.

On top of this, both the Commission and the competition authorities of the Member States have the power to withdraw an exemption where it considers this necessary for the protection of competition.

7.2.1.3 …while not adjusting the penalties

As for penalties facing companies that are found in breach of Article 81(1), no adjustment has been made since the Commission left it for the parties to perform the task of assessing potentially competition-restricting agreements.[194]

A licensing agreement that is found in breach of the rules is still considered automatically illegal and void and the parties may be fined up to 10% of their turnover.

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[191] *The new EC Technology Transfer Block Exemption Regulation.* Pat Treacy and Thomas Heide. p.414 & 420.

[192] Opinion of the Economic and Social Committee on the Draft Commission Regulation on the application of Article 81(3) of the Treaty to categories of technology transfer agreements.

[193] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors.* Frank Fine, p. 767.

[194] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors.* Frank Fine, p. 768.

The complex and difficult process licensors must go through, lack of legal certainty that face potential licensors, combined with the penalty that awaits them if they make a mistake, may have serious results. Companies may choose another mean to distribute their technology, they may license it in another part of the world where the legislation is less harsh or even choose not to distribute it at all, contrary to the objective of the TTBER.[195]

7.3 The assessment of the Technology Transfer Block Exemption

The self-assessment that must be performed by the parties includes a definition of the relevant market, a consideration of whether the parties are competitors on those markets as well as a calculation of market shares on the relevant markets. The system of basing the possibility of exemption on market share thresholds has been questioned.

7.3.1 Criticism of market share thresholds (to be or not to be)

The importance of economic analysis in the application of competition law has been emphasised lately – competition law often rests on complex economic considerations.[196]

Economic analysis is indeed taken into account in the assessment under the new block exemption. Is too much so? The difficulty for parties to an agreement to perform the complex market considerations that are a part of the TTBER is continuously repeated in the comments on the block exemption.

A first step for companies when they are to assess if their license restricts competition is the determination of the relevant market, including a legal as well as a detailed economic analysis of the competition on the market. They may have to take three different markets, product-, technology-, and innovation markets, into account in their assessment. These markets may be close to impossible to define, especially where the licensed product is an innovation, making it difficult to assess even on which market the technology or product will exist and what substitutes, if any, it will have.

The base for estimating market shares is, naturally, market share information. Reliable information of that kind is difficult to obtain and often simply consists of estimates. This makes the procedure to calculate market shares time-consuming, extremely difficult and expensive.[197]

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[195] TTBER recital 4.
[196] *Konkurrensrätt, en handbok,* Carl Wetter m.fl. p. 7.
[197] *The new EC Technology Transfer Block Exemption Regulation.* Pat Treacy and Thomas Heide, p.419.

Another issue is the divergence from the general principle that competition law provisions should be applied based on the factual circumstances at the time of the assessment.[198]

7.3.2 The licensing parties need help

A set of clear-cut rules, taking companies through the process of the TTBER, along with guidelines explaining in even more detail how to apply the rules, definitely seems to be desired and considered necessary. It is unfortunately not generally the opinion that the provisions of the two instruments provided, serve their purpose. On the contrary, they are obscure and difficult to interpret, not to mention apply.[199]

The assessment of the agreement will have to be performed considering the enlarged EU. This makes the task of the licensing parties even more difficult. A small business licensor may not regard the process of going through the exemption assessment worthwhile and may decide to rather avoid licensing. Again, the risk is that dissemination of technology is hindered.[200]

7.3.3 Levels of market shares

The ceilings of the market share thresholds have proved controversial. Some consider the market share threshold for non-competitors of 30 % of the affected relevant product- and technology markets as being rather high and indicating the positive approach of the Commission towards such licensing agreements.[201]

Many others however, claim that the level of permissible market share thresholds provided by the technology transfer block exemption is set too low. Also, it has been held that market shares do not reflect reality of the market and that the only important factor when assessing market power should be the number of companies that may challenge the position of the licensor. The same critics argue that the use of market shares is backward-looking, which is something that an analysis on technology markets should not be.[202]

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[198] *Svårtillämpat nytt EG-gruppundantag för licensavtal.* Martin Månsson och Fredrik Persson, p. 749.
[199] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors.* Frank Fine, p. 787.
[200] Opinion of the Economic and Social Committee on the Draft Commission Regulation on the application of Article 81(3) of the Treaty to categories of technology transfer agreements.
[201] *Competition Classics, Material & Cases on European Competition Law and Practices.* Hans-Henrik Lidgard, p. 258.
[202] *The new Technology Transfer Block Exemption, a welcome reform after all.* Maurits Dolman and Anu Piilola, p. 360-361.

7.3.3.1 Easy to reach

When a brand new technology is being licensed there may be no possible substitutes, which lead to the situation in which the first distributing licensor faces no competition at all.

As for a situation in which competition is weak in the particular area of business, a licensor easily reaches the market share thresholds. Part of the solution is provided by the criteria in the block exemption providing that the market share cap is calculated on the total market share on both the relevant technology market and the relevant product market of the licensor and its licensees. In the draft, market shares could not be exceeded on either the relevant technology market or on the relevant product market.[203]

7.3.4 Consequences of an error

There is, as stated above, a possibility that the parties to the agreement reach the wrong conclusion believing that they are within the safe harbour when they are in fact not. The complexity of the block exemption and the fact that information on market shares and the competitive environment often is difficult to access are all reasons for this.

Wrong conclusions in this respect have double consequences as the same assessment is made for the purposes of both Articles 3 and 4. Parties believing that they are non-competitors may close an agreement including provisions that are considered hardcore and prohibited for competitors. The result will be an invalid agreement, falling outwith the block exemption, and heavy fines.[204]

Critics argue that the benefits gained by the undertakings covered by the TTBER safe harbour do not protect the licensing agreement and its parties in a sufficient and effective way.[205]

7.3.5 Does the block exemption punish success?

The national IP laws and competition law of the EC do have the same objective of promoting consumer welfare. The conflict that still exists comes from the fact that while IP legislation aims to create welfare in the long run, competition law often only sees the immediate consequences of e.g. a granted license giving rise to a monopoly situation with increased prices. In order to encourage companies to innovate and distribute technology despite the risks and costs it involves it seems to be necessary to

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[203] Ibid. p. 360.
[204] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors.* Frank Fine, p. 778.
[205] Ibid. p. 782-783.

give them the right to protect and to make money out of their new technology.[206]

The *ex post* approach, which is often that of the Commission, may involve the prohibition of e.g. exclusivity restrictions as they restrict competition in the short run. While it may be true that competition can benefit from free-riders using the result of R&D that has been developed, there is a need to provide incentives to potential licensing parties so that they choose to distribute their technology and grant licenses in the future. This will certify a competitive environment in the long run.[207]

The other, *ex ante* approach, involves efforts to try and keep incentives for innovation instead of looking at how competition will be effected immediately.[208] A prohibition of provisions that encourage companies to innovate and license their technologies and withdrawal of exemption when a licensee reaches a certain level of market power certainly reduces or entirely removes these incentives.[209]

The technology transfer block exemption will be applied to agreements on high-technology markets, which are characterised by fast fluctuations in the market shares of the companies. This makes it likely that the parties' market shares will change during the term of the agreement as the technology proves successful. Not much account is taken, by the TTBER, to fluctuations in the market shares of parties on the technology market.[210]

The result of market shares rising above the thresholds is that the protection of the block exemption is taken away just as the license and technology proves successful and consequently acquires large market shares. Removing the safe harbour of the TTBER at that instance can be regarded as a punishment for being successful.

Nevertheless, the block exemption does offer some mitigating provisions in this respect, giving that the protection of the safe harbour applies for another two years after the time when market shares exceeded the thresholds. This solution is only temporary and provides only a short period of protection after the exceeding of the thresholds. Therefore, the system of market share thresholds makes it sensible to regularly check on, and control what market shares the parties to the agreement hold. It has even been suggested that parties to the license should grant an obligation to inform each other of their

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[206] *Draft Technology Transfer Block Exemption Regulation.* Robert C Lind and Paul Muysert, p. 183.
[207] *Draft Block Exemption for technology transfer.* Valentine Korah, p. 261.
[208] *Innovation Markets and Competition Analysis – EU competition law and US antitrust law.* Markus Glader, p. 92.
[209] *Technology Transfer Agreements and the EC Competition Rules.* Valentine Korah, p. 242.
[210] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors.* Frank Fine, p. 779-780.

market shares in order to guarantee an instant discovery of a potential exceeding of the block exemption.[211]

The notification system of the prior regulation may have provided more legal certainty but it is also a fact that the procedure was slow and caused delays for the parties to the licensing agreement. This element is now taken away.

Also, the new self-assessment regime may be more complex and it may be more difficult to decide whether a licensing agreement comes within the block exemption, but there are also benefits to be drawn.

7.4 Benefits

7.4.1 Better economic foundation

It has been argued that the modernisation reform will reduce legal certainty but that the TTBER, the guidelines and enforcement within the EC has become better founded in economic theory.[212]

This fact, that the TTBER in its new form has a more solid economic base, has been repeated by others, as well as the fact that the block exemption favours the approach that most licenses are pro-competitive and allows the undertakings themselves to choose how they want to distribute their technology or product.[213]

7.4.2 Flexibility

The new structure of the block exemption is also held to represent the significant improvement of providing a more flexible approach to licensing agreements than the former, more straitjacket type of exemption.[214]

The flexibility element of the TTBER seems to give the possibility to companies on the market to design their licensing agreements as they wish and consider appropriate. The result may be better protection of competition law and innovation within the Community as the EC regulation is approaching that of the US.[215]

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[211] *Svårtillämpat nytt EG-gruppundantag för licensavtal*, Martin Månsson och Fredrik Persson, p. 750.
[212] *The new EU technology transfer regime-out of the straitjacket into the safe harbour?* Marc Hansen and Omar Shah, p. 469.
[213] *Svårtillämpat nytt EG-gruppundantag för licensavtal*. Martin Månsson och Fredrik Persson, p. 761.
[214] Ibid.
[215] *Commission adopts new safe harbour for licensing of patents, know-how and software copyright.* Luc Peeperkorn, Lars Kjolbye and Donncadh Woods, p. 16.

7.4.3 Moving closer the US

Making the EC assessment of licensing agreements more similar to the approach of the US competition law rules facilitates global licensing agreements – a development that will most probably be of growing interest in the future. Regulation in the US on this area comprises only guidelines – no block exemption – including a similar hardcore list to that of the TTBER, a safe harbour limited by a market share threshold and a rule of reason approach to licenses outside this safe harbour.

Differences will remain, especially relating to licensing which may restrict intra-technology competition between non-competitors and to sales restrictions. These important remaining differences relate to the more sever EC attitude towards territorial restrictions by reason of the objective of market integration, the fact that intra-brand and intra-technology competition is regarded as very important within the EC and that sales restrictions may harm consumer welfare.

Another important difference is that the *ex ante* approach that is only sometimes visible in the approach of the Commission, is used more consistently in the US. The relationship between the parties and their market shares are assessed when they enter into the license and not re-evaluated later and a rule of reason assessment is employed for restrictions.[216]

In the US, it is the existence of other companies likely to perform R&D on the market that is regarded rather than the market shares of the parties. Through the use of this method, it is possible to avoid problems of uncertainty where an exemption does apply for a new product, and the parties must place restraints as the product incorporating the technology (or is produced with it) becomes successful, in order to prevent free-riders.[217]

7.5 Solutions for the future

The guidelines that are supposed to co-exist with the Technology Transfer Block Exemption do both contradict and go further than the actual block exemption. The result may become differing and conflicting solutions to similar issues in the future as national courts and competition authorities of 25 Member States as well as the ECJ shall interpret the provisions of the block exemption.[218]

The difficulty of performing a self-assessment along with the fact that many consider the regulatory framework of the TTBER of today as providing a system far too complex to be employed by parties to licenses, as well as the

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[216] *Draft Block Exemption for Technology Transfer.* Valentine Korah, p. 261.
[217] Ibid.
[218] *An introductory guide to EC competition law and practice.* Valentine Korah, p. 322.

above factor, have led to suggestions and ideas on how to resolve the problematic issues that most likely will be the result.

7.5.1 Guidance letters

Some claim that only a limited number of cases will cause problems and insecurity as for how to interpret and apply Article 81, and that the Commission will discuss individual cases with undertakings concerned and provide statements.[219]

The Commission has established that "*parties may obtain informal guidance to novel questions as far as this is compatible with the Commission's enforcement priorities*".[220]

Specific and detailed issues relating to technology licenses may thus, where parties to a license so request, be evaluated by the Commission through so called "Guidance Letters". Certain criteria must be fulfilled- it must be an issue of economic importance from the consumer's point of view and the issue must concern "*widespread economic usage in the market place"*.[221]

Guidance letters are provided as a possible means of aid to the parties but what their implications will be is uncertain. A guidance letter will be published but only have a *de facto* effect and does not bind the national competition authorities or courts in the application of Articles 81 and 82.[222] Critics say that it would be difficult for licensing agreements to fulfil the criteria for the issuing of a guidance letter. They are not likely to be used as *"formal case resolution".* The reason for this is that it would give rise to notifications to the Commission, which is precisely what was intended to be done away with.[223]

It is difficult to assess whether these guidance letters will be of any importance at all. What does the Commission really suggest here? They cannot have intended the guidance letters to become an instrument offering assistance to all companies that will run into difficulties in their self-assessment, as the result would be to return to something like the abolished notification system. The *"enforcement priorities"* and the new focus of the Commission have been held to be cartels and other large-scale restrictions of competition. The complex criteria that have been posed indicate that only a very limited number of guidance letters will be issued and that it will be

[219] *Moderniseringsreformen beträffande EU:s antitrustpolitik i hamn.* Sven Norberg, p. 127.
[220] Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty.
[221] Ibid.
[222] *Moderniseringsreformen beträffande EU:s antitrustpolitik i hamn.* Sven Norberg, p. 127.
[223] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors.* Frank Fine, p. 767.

very difficult for licenses to fulfil the criteria. As they do not have binding effect, it would be possible to regard guidance letters simply as an extension and development of the TTBER Guidelines.

7.5.2 Clearance on national level

Another possible solution, of including the national competition authorities of the Member States, has been presented. Article 5 of Regulation 1/2003, announce that national competition authorities may apply Article 81 and declare that they are not to act "*where the conditions for prohibition are not met*". A clearance system on national level, resembling the former system of the Commission, could thus be a possible solution to the lack of legal certainty that some say we have at present.[224]

With the new and enlarged EU, the tendency in some areas seems to be that of decentralisation based on common policies and objectives. This also seems to be the only way forward with 25 Member States that all have different values and traditions. However, within the area of competition law, one main objective continues to be that of market integration.

There is a risk that 25 diverging systems of enforcement of EC competition law will be the result of a national clearance system. In which situation are *"the conditions for prohibition not met"*? The competition authorities of some Member States will most certainly be more likely than others to consider that there is no ground for action on their part. The EU, striving to create a fully integrated market, risks the result of a very incoherent system of enforcement in this respect, even if there is centralised policymaking.

7.5.3 Removing market share thresholds

The option of raising market share thresholds has been suggested by some as a way to grant more legal security.[225]

It is possible to suggest an even more drastic solution- to declare the market share thresholds unnecessary and remove them entirely. The difficulty for companies to define markets and collecting information of the level of market shares, and the legal insecurity that will be the result, have led to the question of whether market share thresholds actually are necessary.[226]

Consequently, the possibility for the Commission to simply rely on the powers of Article 82, that does prevail over block exemptions, to prevent

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[224] *The EU's new antitrust rules for technology licensing –a turbulent harbour for licensors.* Frank Fine, p. 786-787.

[225] Opinion of the European Economic and Social Committee on the "Draft Commission Regulation on the application of Article 81(3) of the Treaty to categories of technology transfer agreements".

[226] Ibid.

companies to take advantage of the block exemption and from abusing their market power to restrict competition on the common market, has been presented.[227]

The possibility to withdraw the protection of the block exemption for an agreement that is restrictive will remain. National competition authorities as well as the Commission have the power to withdraw an exemption where the negative aspects of the agreement outweigh the positive ones.

The Commission decided to introduce market shares despite the critic towards them because they did not consider it defendable to have a block exemption without limits and possibilities for a review on an ad hoc basis in cases with dominant parties.[228]

However, would it not suffice to declare the limits being Article 82? Protection of competition would remain through the possibility to prevent licensing agreements between companies with dominance that restrict competition, while nothing would remove incentives for companies to innovate and distribute technology. The punishment of successful companies, that may be a result of the market share thresholds of today, would consequently be removed.

[227] *Draft Block Exemption for Technology Transfer.* Valentine Korah, p. 255.
[228] *The new Technology Transfer Block Exemption, a welcome reform after all.* Maurits Dolmans and Anu Piilola, p. 361. TTBER Guidelines paragraphs 24 and 131.

8 Final remarks

Everyone seems to agree that licensing is of benefit for all. Licensors can retain control of their innovation and recover sunk investments while licensees gain access to an intellectual property right from which they can profit and which they can develop further. Incentives to innovate are provided and the consumer will in the long run have more products to choose from, at a better price.

The limited monopoly rights that national legislation grant IP holders may not have immediate positive effects for competition and this is why competition laws limit the scope of what is permissible for companies with a certain level of market shares. Nevertheless, it is important to encourage innovators to develop technology and distribute it onto the market. Potential licensors may choose not to distribute their technology at all, or at least not to distribute it on the common market, if EC competition law does not provide enough incentives for innovators to grant licenses.

Licensing must be promoted but competition must be retained. Is it possible to satisfy both the Commission and potential licensors?

With a flexible and reality based legal framework, it is. A step on the way has certainly been taken with the new TTBER, which represents a significant improvement. The fact that the reform has made the competition rules of the EC more similar to those of the US does make it easier for companies to perform licensing on an increasingly global market and companies have received a greater freedom to design their agreement as they think best.

The fact that the TTBER applies on the condition that market shares does not exceed certain levels may lead to difficulties. This is especially so as the block exemption does not take enough account of one of the most fundamental aspects – the fluctuating market shares - of the technology market, the market on which the TTBER is to function. Legal security is put at risk when companies must define the relevant markets they are active on and determine their level of market shares, as available data often only is estimates. Also, the assessment takes time and is expensive.

What alternatives to market share thresholds do we have?

In my opinion there are two solutions that seem to make more sense than the others. To raise the levels of permissible market shares is one option. The Commission states in the TTBER that licensing generally is pro-competitive and that it is the market power of the parties that decide whether the positive effects of a license outweigh the negative. This does not appear to be how the block exemption functions in reality. Many commentators seem to agree that the market share thresholds are set too low and that they are easily reached also by companies that do not really have the corresponding market power. If the thresholds are raised to a level where only parties with actual market power exceed them, incentives to innovate and distribute technology might remain on an acceptable level so that potential licensors would not hesitate to grant licenses on the European market.

Another, more controversial option is to simply remove the market share thresholds completely. The Commission has already introduced an alternative test of market power, through which Article 81 is unlikely to be infringed where there are at least four independent technologies, substitutable to the licensed, on the market. Relying on this test, along with the possibility of withdrawal of the block exemption and the limits of Article 82 where competition is restricted is a possibility. All technology licenses would be protected by the TTBER if the market share thresholds would be removed, but the rest of the block exemption could remain as it is with the hardcore restrictions as well as excluded restrictions and the possibility of removal of protection where competition really is restricted and consumer welfare is threatened, in more than just the short term.

A system designed like that would certainly open up the market and stimulate economic growth. If innovative technology business is not sufficiently stimulated by the 2004 reforms of EC competition law, further modernisation might prove necessary and the TTBER will most certainly be elaborated upon.

It does not seem realistic to expect competition law within the EC to be reformed within the nearest future but perhaps removal of market share thresholds will be the solution for the future.

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