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The New Technology Transfer Block Exemption

A Welcome Reform, After All

Maurits DOLMANS, Anu PIILOLA*

This article discusses the most important changes introduced at the final stage of the Commission's review of the technology transfer block exemption regulation ("TTBER"), and examines the benefits and the challenges of the new regulatory framework for technology licensing.

The new TTBER represents a significant improvement over the Commission's draft TTBER, published in October 2003. Most importantly, the Commission agreed to revise the list of hardcore restrictions between competitors, which was over-inclusive and had the potential to seriously hinder technology licensing in horizontal agreements. In addition, the list of hardcore restrictions between non-competitors and the interpretation of "know-how" (and thus the scope of the TTBER) were adjusted to reflect the comments submitted during the consultation period preceding the publication of the final TTBER. Significant changes were also made to the Guidelines, for instance, with respect to cross-licence agreements between competitors. Some difficulties remain in the final TTBER, mainly concerning the introduction of market share ceilings. However, on balance, the new TTBER can be considered to represent a desirable regulatory change. The final regulation promotes dynamic competition through innovation and contains a number of provisions that contribute towards a more liberal, flexible and economic oriented regulation of technology transfer agreements.

On 27 April 2004, the Commission published a new Technology Transfer Block Exemption Regulation ("New TTBER"),[1] along with Guidelines on the Application of Article 81 to Technology Transfer Agreements ("Guidelines").[2] The new Regulation and the Guidelines entered into force on 1 May 2004, on the same day as the accession of ten new Member States to the EU and the entry into force of Regulation 1/2003, modernising the procedures for implementation of Articles 81 and 82 EC.

The adoption of the New TTBER was the result of a thorough review during which the Commission comprehensively re-evaluated its policies towards technology licensing. In December 2001, the Commission adopted a mid-term review of the Old TTBER followed by a consultation process. This consultation process led to a publication of a new draft TTBER on 1 October 2003 ("Draft Revised TTBER"),

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* Cleary Gottlieb Steen & Hamilton, Brussels. The authors express their appreciation for the pleasant, open and constructive discussions with, and comments from, Luc Peeperkorn and Lars Kjoelbye of the European Commission.

[1] *Commission Regulation on the application of Article 81(3) of the Treaty to categories of technology transfer agreements*, OJ 2004 L 123/11. The idea behind the block exemption is to automatically exempt certain types of agreements from the scope of Article 81(1) of the EC Treaty, without the need to individually examine the anti- and pro-competitive effects of the restrictive agreement.

[2] OJ 2004 C 101/2. The Guidelines are intended to provide further guidance on the application of the TTBER and to outline principles for the assessment of technology licences under Article 81 EC in situations where the block exemption does not apply.

which was followed by another public consultation period. The Commission's Draft Revised TTBER was generally criticised as too restrictive.[3]

This article discusses the most important changes made at the final stage of the Commission's review process. The New TTBER represents a significant improvement over the Commission's Draft Revised TTBER and shows that the Commission took the comments presented during the consultation period to heart. The final version no longer protects static competition between licensees at the expense of dynamic competition through innovation. The New TTBER therefore represents a welcome regulatory change. Some difficulties remain, mainly related to the new market share ceilings, but they were probably unavoidable given the decision to broaden the block exemption to an unlimited category of provisions (excluding blacklisted and greylisted clauses). After a quick overview of the most important changes introduced by the new TTBER (Section I), this article discusses hardcore restrictions in horizontal and vertical licenses and certain other categories of clauses (Section II), followed by a review of remaining difficulties (Section III) and a conclusion (Section IV).

I. Overview of the New TTBER—Most Important Changes

The New TTBER is extended to cover software copyright licences in addition to (already previously covered) patent and know-how licences.[4] The TTBER applies to all licences and assignments for production purposes, excluding IP pooling and R&D arrangements.

The new Regulation no longer contains an exhaustive list of exempted and whitelisted clauses. It has a limited list of blacklisted ("hardcore") clauses[5] and greylisted ("excluded") clauses,[6] all others being exempted up to market share ceilings of 20 per cent (licences between competitors) and 30 per cent (licences between non-competitors).[7] Apart from imposing market share ceilings, the New TTBER also imposes greater restrictions on licences between competitors ("horizontal licences") than on licences between non-competitors ("vertical licences").

Blacklist in vertical licences. Under Article 4(2), blacklisted hardcore restrictions in agreements between non-competitors include (i) minimum resale price maintenance;

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[3] See, for instance, Maurits Dolmans and Anu Piilola, *The Proposed New Technology Transfer Block Exemption, Is Europe better off with the current regulation?*, 26W.Comp.4 (2003)

[4] The definition of patents includes utility models, design rights, semiconductor mask works, supplementary protection certificates for pharmaceuticals, and plant breeders rights.

[5] See Article 4(1) ("hard-core restrictions between competitors") and Article 4(2) ("hard-core restrictions between non-competitors").

[6] See Article 5 ("excluded restrictions"). Where a licence contains a clause listed in Article 5 as an "excluded restriction", there is no presumption for or against the illegality of such a clause. Such a restriction requires an individual assessment of its pro- and anti-competitive effects. If a greylisted restriction is found to violate Article 81, it does not prevent the application of the TTBER to the rest of the agreement. Only the clause in question—as opposed to other restrictions—is unenforceable. In other words, the rule of severability applies to the restrictions set out in Article 5 but not to the restrictions set out in Article 4. Article 5 clauses were called "conditions" in the Draft Revised TTBER. The term "excluded restrictions" is clearer.

[7] See Article 2 ("exemption") and Article 3 ("market share thresholds").

(ii) certain passive sales restrictions on licensees; (iii) restrictions on intra-channel sales in selective distribution; (iv) bans on spare parts sales by OEM ("captive use") licensees; and (v) restrictions of active and passive sales to end users by selective distributors operating at the retail level. Otherwise, the TTBER exempts all active sales bans on licensor and licensee, as well as all customer and territorial restrictions on the licensor without limitation. Passive sales restrictions on licensees are allowed only to protect territories or customers exclusively reserved to the licensor, or for a period of two years to protect territories or customers exclusively allocated to other licensees.[8]

Blacklist in horizontal licences. Under Article 4(1), blacklisted hardcore restrictions in agreements between competitors include resale price maintenance (maximum and minimum), reciprocal output limitations (unilateral limitations on licensees now being allowed),[9] certain market or customer allocations, and restrictions on licensees' ability to exploit their own technology or on the parties' ability to carry out research and development.

While market and customer allocations are generally black-listed in contracts between competitors, the New TTBER exempts (i) non-reciprocal technical field of use restrictions on licensors; (ii) all technical field of use restrictions on licensees; (iii) sole licences for specific territories;[10] (iv) non-reciprocal exclusive licences to produce in specific territories;[11] (v) non-reciprocal active and passive sales bans to protect customers or territories exclusively allocated to one of the parties; (vi) non-reciprocal active sales bans for territories allocated exclusively to another licensee; as well as (vii) OEM ("captive use") restrictions and non-reciprocal second-source licence restrictions.[12]

Excluded restrictions. Article 5 of the New TTBER contains a limited grey list of "excluded restrictions" which do not benefit from the block exemption, but which must be assessed on an *ad hoc* basis. Their inclusion does not prevent possible block exemption of the remainder of the agreement.[13] Clauses such as exclusive grant-back licence and assignment obligations on the licensee with respect to its severable improvements to, or new applications of, the licensed technology,[14] and IPR validity no-challenge clauses are

[8] See Article 4(2) and Guidelines, as note 2 above, at para. 96 and following.

[9] Reciprocal agreements refer to cross-licensing agreements where the parties license to each other competing technologies (or technologies which can be used for the production of competing products), whereas non-reciprocal agreements are agreements where only one of the parties licenses its technology to the other party or, in case of cross-licensing, the licensed technologies are not competing technologies (or cannot be used for the production of competing products). See Article 1(c) and (d).

[10] A licence is considered a "sole" licence when the licensor undertakes not to grant a licence to a third party to produce in the given territory, but reserves the right itself to produce within that territory. The licence is "exclusive" when the licensor not only agrees not to licence others, but also to refrain itself from producing within that territory. Guidelines, as note 2 above, at para. 88 and 162.

[11] It is important not to read Article 4(1)(c)(ii) *a contrario* as suggesting that a competing licensee could not be barred from using the licensed technology for production outside the licensed territory. A territorial limitation on the scope of the licence normally does not violate Article 81, and therefore does not need block exemption.

[12] See Article 4(1). See also Guidelines, as note 2 above, at para. 77 and following.

[13] Guidelines, as note 2 above, at para. 107 and following.

[14] A grant back obligation refers to a requirement to assign to the licensor or grant him an exclusive licence to (severable or non-severable) improvements of the licensed technology.

greylisted in all agreements.[15] In addition, limitations on the licensee's ability to exploit its own technology or limitations on the ability of any of the parties to the agreement to carry out research and development (which are blacklisted in agreements between competitors) are greylisted in agreements between non-competitors.[16]

II. The Commission's More Permissive Approach

The most important changes introduced after the publication of the Draft Revised TTBER in October include (i) the revision of the hardcore restrictions between competitors; (ii) the revision of the hardcore restrictions between non-competitors; and (iii) the interpretation of "know-how" and thus the scope of the TTBER. Significant changes were also made to the Guidelines, for instance, with respect to cross-licence agreements between competitors. For a review of changes to the old regime that were already incorporated into the Draft Revised TTBER, and which were not substantially amended at the final stage of the review, we refer to the more detailed discussion in 26 W.Comp. 4 (2003).

A. Hard-core restrictions in horizontal licences

The submissions that the Commission received in response to its invitation to comment on the Draft Revised TTBER were generally critical towards the proposed over-inclusive hardcore list for restrictions between competitors. As a result, Article 4(1) of the TTBER was substantially rewritten.

1. *Territorial and customer restrictions*

In contrast with the Draft Revised TTBER, the final TTBER generally allows territorial and customer restrictions in (i) *non-reciprocal* exclusive licences between competitors, and (ii) *reciprocal and non-reciprocal* sole licences between competitors. Moreover, technical field of use restrictions are treated more leniently.[17]

These changes represent a notable improvement to the Commission's first proposal. In its October draft, the Commission proposed to blacklist territorial and customer restrictions between competitors as well as most field of use restrictions. Both passive and active sales bans would have been deemed hardcore restrictions, even when the agreement was non-reciprocal, and even where the licensee remained perfectly free to continue to use its own technology without restrictions. The objective was to promote intra-community trade, facilitate market integration, and protect the competitive interests of licensees. The general ban on all territorial and customer

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15 However, validity non-challenge clauses are exempted in know-how licences, if the know-how, once disclosed, cannot be recovered. See Guidelines, as note 2 above, at para. 112.

16 See Article 5.

17 On field of use restrictions, see Guidelines, as note 2 above, at para. 179.

restrictions would, however, likely have acted as a disincentive to enter into licensing agreements in the first place.

Non-reciprocal horizontal licenses. The New TTBER distinguishes between reciprocal and non-reciprocal horizontal licences, treating the latter more leniently. Thus, the final TTBER exempts unilateral bans on active and passive sales to protect customers or territories exclusively allocated to the other licensing party, as well as absolute customer restrictions in second-source licences (to provide an alternative source of supply for a specific customer). Passive sales bans to protect other licensees are still prohibited, even in non-reciprocal agreements, whereas active sales bans to protect territories or customer groups exclusively allocated to other licensees are exempted in non-reciprocal agreements.

Reciprocal horizontal licenses. In theory, reciprocal licences between competitors can be used to cloak a cartel or a market allocation arrangement (although there is little evidence that this often happens in practice). The stricter treatment of such licences seems therefore justified. In practice, however, most reciprocal horizontal licences are benign, serving, for instance, to allow design freedom to both parties. The New TTBER recognises this by exempting sole licences (restrictions on a licensor not to grant other licences), as well as field of use restrictions and OEM restrictions on competing licensees irrespective of whether the licence is reciprocal or not.[18]

The Commission can be commended for its openness and its willingness to revise its earlier position. Drawing the distinction between reciprocal and non-reciprocal agreements seems justifiable. It is, however, regrettable that restrictions in reciprocal agreements between competitors remain blacklisted even in a situation where the licensee remains free to use his own technology. The Commission argues that once a licensee is tooled up to practice the licensed new technology, the licensee will no longer have the ability or incentive to practice its own, old technology. This is undoubtedly a relevant consideration, but deserves *ad hoc* scrutiny rather than a categorised ban. Restrictions in horizontal licences explicitly preserving the licensee's right to use and improve its own technology could have been greylisted, allowing examination on a case-by-case basis.

All is not lost, however, where competitors enter into a reciprocal licence believing that, for instance, active sales restrictions outside the licensed territories or customer group are reasonably necessary and a condition for the licence to be granted in the first place: Each licensor can reserve its rights under its intellectual property rights outside the licensed territory to prevent the unauthorised use of its technology there. Such a "reservation of rights" clause is not caught by Article 81 EC to begin with, and does not need the safe harbour of the TTBER.[19] Moreover, the Guidelines confirm

[18] Unlike the Draft Revised TTBER, the final TTBER exempts both reciprocal and non-reciprocal field of use restriction, irrespective of whether the restrictions are symmetrical or asymmetrical. See para. 91 of the Guidelines, and para. 179. However, field of use restrictions on licensors must be non-reciprocal to benefit from the TTBER.

[19] See, for instance, Article 2(1)(14) of the Old TTBER.

that hardcore restrictions may in exceptional circumstances still fulfil the conditions of Article 81(3) EC.[20] Evidence that the parties continue to practice and develop their own technology outside the licensed territories would be relevant for that assessment, but not sufficient. Proof of significant free riding concerns or other efficiencies would be needed.

2. *Running royalties no longer treated as price-fixing*

Licences containing clauses fixing maximum or minimum prices of the products produced with the licensed technology continue to be blacklisted in the New TTBER. The Commission has, however, revised its approach to what it considers illegal "price-fixing" between competitors. The Draft Revised TTBER provided that when competitors cross-licence technologies and calculate royalties on the basis of individual product sales, such arrangements are considered price fixing agreements.[21] This was, according to the Commission, due to the fact that the amount of royalty can be considered to have a direct impact on the marginal cost of the product and thus a direct impact on prices.

This approach was widely criticised. It is a common practice to calculate royalties based on sales figures and there is no reason to suspect collusion every time this method of calculating "running royalties" is used. It was suggested that the Commission should apply Article 81 only where (a) the patents are substitutes or non-essential complements; and (b) the parties agree to use the unnecessary complements or agree to pay running royalties even if they do not use the substitute or non-essential component, especially if (c) the royalties are a significant share of the total costs.

In the final TTBER and Guidelines, reciprocal running royalties are regarded as price fixing only when the licence is a sham to cloak horizontal price fixing.[22] This acknowledges the consistent practice of calculating royalties and no longer artificially hinders pro-competitive cross-licensing. However, one can still question why the Commission also bans maximum resale price maintenance between competitors (as opposed to limiting the hard core restriction only to the setting of minimum resale prices). A price ceiling may be appropriate to ensure that a rival licensee does not deprive the licensor of the benefit of the contract. Maximum price fixing can, of course, have anticompetitive effects between competitors, for instance where it deprives them from adding value to the licensed product or investing in pre- or post-sales services. Nevertheless, these potential negative effects might have been properly addressed by including maximum price fixing in the greylist.

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[20] Guidelines, as note 2 above, at paras 18 and 75.

[21] See Draft Guidelines, para. 77. For royalty obligations, see Guidelines, as note 2 above, at para. 156 and following

[22] See Guidelines, as note 2 above, at para. 80.

3. *Definition of "competitor"*

Evidentiary burden on the "blocking position". The definition of "competitor" in Article 1(1)(j)(i) excludes parties whose products infringe the other party's intellectual property because their patents are in a one-way or two-way blocking position.[23] The Draft Revised TTBER imposed a heavy burden of evidence, requiring "convincing evidence" such as final court judgments. The revised Guidelines allow other kinds of evidence as well.[24] This change is welcome. The unnecessarily heavy burden required by the Draft Guidelines would have discouraged settlements and could have lead to wasteful litigation, and thus to undesirable delay in the grant of licences.

Competitors in evolving markets. During the consultation period several questions were raised as to how to treat licensing parties who, at the time of concluding the licence, are non-competitors, but who later become competitors. The Commission has helpfully added a new Article 4(3), which provides that if parties are not rivals when the agreement is concluded, the rules on non-competitors continue to apply even if parties later enter into competition with each other, unless the agreement is materially amended.[25] This is an important addition to the TTBER as it increases legal certainty in a situation which may commonly arise after the agreement has been concluded.

B. HARD-CORE RESTRICTIONS IN VERTICAL LICENCES

The hard-core restrictions between non-competitors received considerably less criticism than the blacklist of hard-core restrictions between competitors. Consequently, the changes introduced in Article 4(2) are less significant than those discussed above.

In the Draft Revised TTBER, the Commission proposed to prohibit restrictions on both active and passive sales, unless territories or customer groups were exclusively reserved to the licensor or exclusively allocated to other licensees. This deviated from the Old TTBER, which allowed such restrictions also if the licensee had, for instance, been granted semi-exclusivity or co-marketing agreements in the protected territory.

The final TTBER was revised to allow restrictions on active sales between non-competitors, irrespective of whether the protected territory or customer group is exclusively allocated. Passive sales bans, however, are exempted only if they serve to protect exclusively allocated territories.

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[23] A one-way blocking position refers to a situation where a technology cannot be exploited without infringing upon another technology, whereas a two-way blocking position refers to a situation where the holders of blocking IPRs both need to obtain a licence from one another, as neither technology can be exploited without infringing upon the other technology.

[24] See para. 32 of the Guidelines, as note 2 above ("Relevant evidence includes court decisions including injunctions and opinions of independent experts [. . .] However, also other convincing evidence, including expert evidence from the parties that they have or had good and valid reasons to believe that a blocking position exists or existed, can be relevant to substantiate the existence of a blocking position.").

[25] See also Guidelines, as note 2 above, at paras 31 and 68.

The Regulation confirms that a licensor may for a period of two years prohibit passive sales by the licensee into territories exclusively allocated to other licensees (a restriction that normally needs no exemption since it is not caught by Article 81 EC in the first place). This clarification is welcome, even though one could question whether it was necessary to reduce the duration of passive sales bans between non-competitors from five to two years. An additional change is that second-source licence restrictions are also allowed in the final TTBER.

C. Scope of the TTBER

The Draft Revised TTBER proposed changes to the definition of "know-how". For the purpose of the application of the TTBER, "know-how" means a body of technical information that is *secret, substantial,* and *identified* in any appropriate form. Under the old Regulation, to be substantial, the know-how had to include information that is "useful", i.e. capable of improving the competitive position of the licensee.[26] The Draft Revised TTBER, however, defined substantial as "indispensable" for the manufacture or provision of the contract product.[27] This would have had an effect of significantly narrowing the scope of the TTBER, and creating scope for dispute (as to the "indispensability" of the know-how), without any apparent justification. The final TTBER therefore reverts to the old definition and no longer requires that know-how be "indispensable". Instead, it is sufficient for know-how to be "significant and useful".[28]

D. Other changes

The New TTBER features the following additional changes compared to the Draft Revised TTBER:

- ***Non-reciprocal output restrictions between competitors.*** Non-reciprocal output restrictions between competitors are generally exempted and no longer greylisted under Article 5.[29] This change is justified considering that a non-reciprocal quantity limitation would normally not reduce the total output in the market and there is no reason to assume that such a one-way restriction would not reflect a bona fide licensing agreement. Output restrictions may, however, restrict passive sales, and therefore should not be included in horizontal licences without some internal assessment of their competitive impact.[30]

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[26] See Article 10(3) in the Old TTBER.
[27] See Article 1(g) of the Draft Revised TTBER.
[28] See Article 1(i) and para. 47 of the Guidelines, as note 2 above.
[29] See Art 4(1)(b) and Guidelines, as note 2 above, at para. 83.
[30] See Guidelines, as note 2 above, at para. 98 and 175. For an example of an output limitation that could be regarded as a passive sales restriction even under the New TTBER, see Maurits Dolmans and Miguel Odriozola, *Site License, Right License?, Site Licenses under EC Competition Law*, 1998 European Competition Law Review, 19:8.

- ***Grant-back obligation and the assignment of non-severable improvements.*** While exempting obligations to grant an exclusive licence to non-severable improvements, the Draft Revised TTBER suggested that the assignment of non-severable improvements ought to be greylisted. It was unclear why the assignment of non-severable improvements should be treated differently from exclusive grant-back licences. The New Guidelines clarify that the assignment of non-severable improvements generally falls outside of Article 81(1) and thus does not even require an exemption provided by TTBER, because non-severable improvements could not be exploited without the licensor's permission anyway.[31] The greylist now refers only to grant-back licences and assignments of severable improvements.
- ***Validity non-challenge clauses***. Validity non-challenge clauses in know-how agreements will be exempted (and no longer only greylisted) when know-how, once disclosed, is difficult to recover.[32] This makes sense, since a challenge could result in a loss of confidentiality, and no-challenge clauses are likely to be anti-competitive only when the licensee is prevented from challenging the validity of confidentiality obligations for know-how that is insubstantial or not really secret.
- ***Non-assertion and settlement agreements.*** References to non-assertion and settlement agreements being outside of the scope of the TTBER have been deleted. In the Draft Guidelines the Commission took the view that the purpose of such agreements is not the "manufacture or provision of contact products", and that they therefore should be left outside of the TTBER.[33] There is no economic basis for excluding agreements that have been entered into to avoid or settle IPR litigation and the Commission should be commended for having revised its view in this respect.
- ***Subcontracting.*** The Draft Guidelines limited the notion of subcontracting to cases where the contractor licenses technology to the sub-contractor, proposing at the same time to replace the 1979 Notice concerning the assessment of certain subcontracting agreements in relation to Article 81(1).[34] The scope of this Notice is wider as it comprises all the cases where the contractor entrusts the sub-contractor with the manufacture of goods, the provision of services or the performance of work under the contractor's instructions to be provided to the contractor or performed on his behalf. The Guidelines now confirm the 1979 Notice.[35]
- ***Application of market share ceilings***. Even if the market share of the parties exceeds the 20 per cent or 30 per cent ceilings after the conclusion of the

[31] See Guidelines, as note 2 above, at para. 109.
[32] See Guidelines, as note 2 above, at para. 112.
[33] See Draft Guidelines, para. 35. See also Guidelines, as note 2 above, at para. 204 and following.
[34] OJ 1979 C 1, p. 2.
[35] See Guidelines, as note 2 above, at para. 44.

agreement, the agreement remains within the safe harbour for a period of two calendar years.[36] The Draft Revised TTBER contained an absolute maximum of 25 per cent and 35 per cent, respectively. These "ultimate ceilings" have been deleted, in view of the difficulties in calculating the exact market share of the licensing parties at any given moment on any given market within the two year time period.

- ***Transitional provisions***. Under the New TTBER, existing licensing agreements can benefit from the exemption under the Old TTBER until 31 March 2006, when the Old TTBER was meant to expire.[37] This protects legitimate expectations that agreements reflecting the Old TTBER are in conformity with EC law at least until the expiry of the old Regulation.
- ***Pools and cross-licences***. While plans were abandoned to expand the TTBER to cover multilateral licences, the Guidelines contain a useful discussion of the application of Article 81 EC to technology pools.[38]

III. Remaining Difficulties

A. Market share ceilings

As explained above, the TTBER block exempts agreements between competitors only if the parties' combined market share remains below 20 per cent. Agreements between non-competitors are exempted up to the 30 per cent market share ceiling.

The introduction of the market share ceilings in the Draft Revised TTBER was widely criticised. The market share ceilings are low, and the ceiling will be quickly reached. This is true especially between the competitors, whose market shares have to be cumulated. The Draft Revised TTBER provided in addition that the competitors' market shares must not exceed the ceiling *either* on a relevant technology market, *or* on a relevant product market. The final TTBER withholds the block exemption only if the ceiling is exceeded on both markets.[39]

The main criticism concerned the question whether market share ceilings are needed at all, considering the difficulties associated with gathering reliable market data, meeting the burden of proof (normally to the person wishing to invoke the block exemption), and taking into account the resulting legal uncertainty. It is already clear that Article 82 EC prevails over any block exemption regulation, and that firms in a dominant position would therefore be unable to benefit from the Regulation.[40]

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[36] See Article 8.

[37] See Article 10.

[38] See Guidelines, as note 2 above, at para. 210 and following.

[39] See Article 3(1) of the New TTBER, which is now consistent with Article 3(2) of the New TTBER. For calculation of technology market share, see Article 3(3) and Guidelines, as note 2 above, at para 70-72.

[40] See Case T-51/89, *Tetra Pak v. Commission*, 1990 ECR II 390, where the Court held Article 82 EC prevails over a block exemption regulation.

Moreover, market shares are backward looking, whereas analysis on technology and innovative markets should be forward-looking. Yesterday's high market share may not reflect tomorrow's market power, and may be out of date by the time the market share data are available. What matters is not how many firms currently sell products, but how many firms can challenge the licensor's position.[41]

Despite of the criticism concerning the market share ceilings, the Commission retained the ceilings in the final TTBER, on the ground that it would not be reasonable to introduce an unlimited block exemption for licence restrictions without some safeguard that restrictions in agreements between parties with a strong market position would be subject to at least *ad hoc* review. The Commission did, however, in the Guidelines refer to an alternative "technology centre" test, whereby an agreement could benefit from favourable individual analysis under Article 81(3) as long as there was a sufficient number (4 or more) of independent poles of research available on the market.[42]

B. Intellectual property rights excluded from the TTBER

In the Evaluation Report the Commission considered the possibility of extending the coverage of the block exemption to IPRs other than patents, know-how and software copyright, but these plans were abandoned before the publication of the Draft Revised TTBER. The exclusion of other IPR licences, such as *sui generis* database rights, merchandise agreements (copyright and trademark licences for production purposes), and agreements for the use of non-software copyright and related rights, is a missed opportunity. Further, it is ironic to exclude the block exemption for trademark and merchandise licences and require *ad hoc* analysis, which imposes greater burdens and risks in case of litigation, considering that such licences tend to have less impact on competition, since even if they are exclusive, competitors can still market products with identical functionality. The Guidelines, however, contain a welcome clarification, when stating that the principles of the TTBER and the Guidelines provide guidance also for other types of production licences.[43]

IV. Conclusion

The following chart summarises the changes introduced by the New TTBER:

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[41] See also Evans and Schmalensee, *Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries*, NBER Working Paper 8268, May 2001, p. 20, who argue that market shares provide no indication of the value of intellectual capital, the quality or popularity of tomorrow's products, or the changing nature of markets where the competition takes place. Incumbents holding significant market shares are more constrained by dynamic competition (as opposed to static competition by actual competitors on the market): what is crucial is the threat that another firm will come up with a drastic innovation challenging the incumbent and causing the demand for the incumbent's product to collapse.

[42] See Guidelines, as note 2 above, at paras 24 and 131. This alternative test is also recognised in the *US Guidelines for the Licensing of Intellectual Property*. See Section 4.3 of the *US Guidelines*.

[43] See Guidelines, as note 2 above, at paras 50-51.

	THE BALANCE	
MORE RESTRICTIVE THAN OLD TTBER	**NEUTRAL**	**MORE LIBERAL THAN OLD TTBER**
Market share ceilings	White list moved to Guidelines (although that reduces clarity in some cases)	Extension to copyright and neighbouring rights for software (but not other IPRs)
Passive sales ban into an exclusive territory allocated to another licensee exempted only for 2 years	Elimination of opposition procedure for the grey list	Unlimited (non-exhaustive) exemption of non-hardcore and non-excluded clauses, including all non-compete and tying clauses
Possibility to withdraw block exemption with general effect in case of parallel networks with more than 50% share	No coverage for multiparty agreements and pools	Exemption of active sales restrictions without time limits between non-competitors
	Validity no-challenge clauses continue to require an individual exemption (but exempted in case of know-how that cannot be recovered)	Exemption of customer, output and all field of use (even exclusive) restrictions between non-competitors
		Exemption of field of use restrictions (even when reciprocal) between competitors (when exclusive, only allowed when non-reciprocal)
		Exemption of non-reciprocal output restrictions between competitors
		Exemption of grant-back licence obligations (except exclusive grantbacks of severable improvements), even when non-reciprocal
		Exemption of no-challenge clauses in know-how agreements (if know-how, once disclosed, cannot be recovered)

As indicated in this chart, the New TTBER represents a significant improvement to the current regulatory framework in many respects. Most importantly, the New TTBER brings desirable flexibility to the assessment of the competitive effects of technology licensing agreements by abolishing the exhaustive lists of exempted and whitelisted clauses. Broadening the scope of the Regulation to cover software copyright licences and exempting some previously blacklisted clauses (such as non-compete and tying clauses between competitors and non-competitors) also constitute positive adjustments to the Old TTBER.

Despite of the various benefits brought about by the New TTBER, the new Regulation also contributes to an increasingly complex regulatory framework, by imposing market share ceilings. This represents the greatest practical challenge of the new Regulation to market players and the national courts.

On balance, however, the New TTBER can be considered to represent a desirable regulatory change. In comparison to both the Old TTBER and to the Draft Revised TTBER, the final TTBER rests on a more solid and sophisticated economic foundation and is a step towards more liberal, economic oriented regulation of technology transfer agreements.