



Legal Update  
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## European Commission seeks views on the Technology Transfer Block Exemption

The European Commission is inviting comments on the application of EU competition rules for the assessment of technology transfer agreements due to the upcoming expiry of the current Technology Transfer Block Exemption Regulation (“TTBE”).

The review is being undertaken by the European Commission in order to evaluate whether the TTBE should lapse, be modified or replaced upon its expiry on 30 April 2014.

As a key element of this review, the European Commission has invited stakeholders to present their views on their practical experiences in applying the TTBE and the accompanying guidelines via a questionnaire.

The TTBE is relevant to businesses engaged in technology transfer by, e.g., licensing of intellectual property such as patents, know-how and copyrights. The review will be of particular interest to companies in sectors such as pharmaceuticals, life sciences, manufacturing, electronics, telecommunication and other technology driven industries.

### The current rules

The European Commission has produced a number of so-called block exemptions which provide for certain “safe harbours” available to companies. It has also provided guidelines on the application of the block exemptions as well as on the assessment of agreements which fall outside the block exemptions.

Article 101 of the Treaty on the Functioning of the European Union sets out the EU competition rules for, *inter alia*, licensing agreements. The provision prohibits agreements between companies which lead to an appreciable restriction of competition. The TTBE and accompanying guidelines complement the enforcement of this primary rule.

The current TTBE came into force in May 2004. It covers, among others, licensing agreements concerning patents, know-how, software copyrights and combinations of these, creating a safe harbour for certain provisions of such technology transfer agreements.

The TTBE deals with competition concerns associated with licensing, including recognising that licensing can also be pro-competitive and exempting licences where the combined market share of the licensor and licensee falls below certain thresholds. The TTBE also lists various licensing restrictions, referred to as hardcore restrictions and excluded restrictions, which if imposed on the activities of a licensor or licensee raise the risk of anti-competitive conduct.

The TTBE is aimed at strengthening the incentives for initial R&D, facilitating diffusion of intellectual property and generating market competition.

### Public consultation

As the TTBE will expire in 2014, the Commission seeks to obtain stakeholders’ submissions to make a proposal on how to assess technology transfer agreements after the expiry.

The Commission is interested in finding out whether businesses are facing practical problems when applying the current TTBE rules and whether the current rules need to be updated or replaced to keep up with industry development. The published questionnaire, which focuses on the practical application of the TTBE, will therefore help ensure that the regime to be applied after the expiry both reflects current market realities and provides for the possibility of market participants to enter into technology transfer agreements where it contributes to economic welfare without posing a risk for competition.

Specific areas on which comment is sought include whether there is a need for the TTBE, revisions to the lists of hardcore and excluded restrictions and the practical difficulties in calculating relevant market shares for the purposes of qualifying for the block exemption.

The Commission therefore welcomes comments from the business community and their representatives as well as other stakeholders including industry associations and consumer interest associations who have had direct experience of the application of the current regime for the assessment of technology transfer agreements.

The period of consultation is set from 6 December 2011 to 3 February 2012. Completed questionnaires must therefore be submitted to the Commission before 3 February 2012. The Commission points out that all input is welcome and that neither an obligation to answer all questions nor to follow the format provided by the questionnaire exists. The Questionnaire for stakeholders can be downloaded [here](#).

## Context

An accompanying research paper drafted for the Commission by a pair of independent economists has examined the economic literature behind the interplay of competition policy and intellectual property protection (available [here](#)). It found that the relevant literature is in places 'highly incomplete' and its conclusions were somewhat hesitant as a result. However, the research paper is designed to aid discussion of the TTBE and looks closely, *inter alia*, at cross-licensing, patent thickets, patent pools, grant backs, and 'pass through'. The Commission's inclusion of this research paper shows how important a role economic analysis and the issues raised by the economists will play in this area of competition policy and the need for stakeholders to respond in similar terms.

For example, internet-based industries may wish to shape the debate regarding the revised TTBE, following the precedent of the Commission's 2010 revision of the Vertical Agreements Block Exemption, in which a substantial discussion of internet sales was newly introduced.

Technology transfer was also a major issue in the Commission's 2009 report into its pharmaceutical sector inquiry, which has led to ongoing monitoring of patent settlement agreements amongst pharmaceutical companies. Such companies and others engaged in sectors where R&D is key, may also wish to consider revisions to the TTBE that will improve their ability to conduct and compete in the market place. Such stakeholders may particularly wish to comment on the TTBE consultation.

## Response

With regards to sending comments in the framework of this consultation, we would be happy to discuss any concerns and suggestions you may have on the existing text or contemplated future versions of the TTBE.

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