



## BUNDESRECHTSANWALTSKAMMER

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## Position Paper

With this position paper BRAK would like to comment on the Commission's first published draft of the Technology Transfer Block Exemption Regulation of 11 September 2025 ("**Draft TTBER**") and its accompanying Guidelines ("**Draft TTGL**") as part of the Commission's current Consultation. BRAK's comments are based on the practical experience of its members (lawyers) advising companies from all types of industry sectors on licensing agreements on both, the licensee and licensor side.

1. Harmonizing the definition of know-how in the TTBER with the notion of trade secrets under the EU Trade Secrets Directive 2016/943
  - (1) To ensure consistency of legal terms within the legal framework of the Union, their application and resulting legal consequences, the definition of know-how in Article 1(1)(i) Draft TTBER, as regards the requirement of “secrecy” of the respective information, must be harmonized with the definition of trade secrets as per the Trade Secrets Directive (EU) 2016/943. More specifically, for a trade secret to be “secret” it is required that “it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret”. By contrast, such measures are currently not required for certain information to be regarded as “secret” in order to qualify as know-how within the meaning of Article 1(1)(i) Draft TTBER.
2. Including certain types of data rights in the definition of technology rights
  - (2) In BRAK’s view the Commission misses an opportunity in not including into the Draft TTBER’s definition of “technology rights” in its Article 1(b) certain types of data rights. There is no reason why such data rights are only dealt with in the Draft TTGL, para. 62-66. Even if “*licencing of data is a fast-evolving practice*” (Draft TTGL, para. 65), provided that the types of data can be sufficiently defined today (see para. 5 below), they should equally be protected by the Draft TTBER (and their treatment can then be revisited with the Draft TTBER’s expiry date). In other “fast-evolving” areas, e.g. online distribution including sales via online platforms, the Commission has equally decided to include specific provisions in the relevant regulation, namely in Regulation (EU) 2022/720.
  - (3) It is not sufficient that the “*Commission will, however, generally apply the principles of the TTBER and these Guidelines (...)*” (cf. Draft TTGL, para. 63) as licensing agreements relating to such data rights will consequently not benefit from the same protection as those technology rights listed in Article 1(b). This different treatment would result in a lower degree of legal certainty in assessing such data related licensing agreements under EU competition law.
  - (4) Also, it has to be borne in mind that the Draft TTBER and the Draft TTGL are to be applied by all competition authorities and national courts within the Union. Even if the Draft TTGL, in so far as they comment on the Draft TTBER provisions directly and do not merely provide guidance on the application of Article 101(1) and (3) TFEU outside the scope of the Draft TTBER, should be binding also for competition authorities and courts in the Member States, the current treatment of the data rights in the Draft TTGL still leaves discretion to apply or not apply the principles of the Draft TTBER and the Draft TTGL. This is likely to result in an unwanted inconsistency in the application of EU law throughout the Union as regards such data related licensing agreements.

- (5) As regards the types of data that should be included in the definition of technology in the Draft TTBER, BRAK concurs with the Commission's approach (however, currently only addressed in the Draft TTGL, para. 63-65) to include the licensing of databases that are protected by copyright or by the *sui generis* right defined in Directive 96/9/EC (cf. Draft TTGL, para. 63). This type of data related licensing sufficiently clear and specified to be included in the definition of technology in the Draft TTBER.
3. Abolishing the market share threshold for technology markets
- (6) BRAK reiterates its position that the second market share threshold for technology markets should be abolished all together. The changes of the Commission in the Draft TTBER (Recital (13), Article 8(b), (d) and (c)) as well as in the Draft TTGL (para. 110-115) appear to be meant to address the concerns raised in the context of the technology market share threshold and the related market share calculation during the Consultation. However, in BRAK's view they are not sufficient to ensure a practical application of the TTBER by companies and thus run counter to the TTBER's goal to foster innovation in the technology sector.
- (7) When entering into a technology licensing agreement that relies on the safe harbour of the TTBER (and thus on not exceeding the technology market share threshold), the parties are not able to foresee for which products the licensed technology may be used over the next years by the licensor and its licensees. Consequently, there is a high risk that the agreement will fall outside the scope of the TTBER during its agreed term, regardless of the new provision providing for an average market share calculation based on the 3 preceding years for new (product) markets (Art. 8(b) Draft TTBER), and the newly extended exemption period from 2 to 3 years (Article 8(e) Draft TTBER). The former change is limited to preventing a non-application of the TTBER because a new technology or new product results in markets shares of up to 100% in a given technology or product market after its exploitation or launch for the very first time. The latter change is unlikely to make a noticeable change for technology licensing agreement with a longer duration as it is common practice.
- (8) In BRAK's view, the Commission does not take into account the practical problems for the parties to the technology licensing agreement to learn about and monitor over time where the licensed technology is used and, what is even more challenging in practice, to obtain market size and market share information for such product markets in which the parties to the technology licensing agreement are not active themselves (but merely other licensees of the licensed technology or other competing technologies). Consequently, due to these practical difficulties and burdens legal certainty in applying the TTBER is jeopardized and, instead of reducing costs the technology market share threshold is likely to increase costs for companies.

- (9) As proposed by BRAK before, in order to mitigate potential competition law concerns that the Commission may have with respect to the technology markets affected by a licensing agreement absent a technology market threshold for the application the TTBER, the withdrawal rights in Article 6 Draft TTBER could be extended to include a right to withdraw the TTBER in cases where less than a certain number of other independently controlled technologies exist, i.e. applying the “plus four test” (cf. Draft TTGL, para. 181), ideally in a slightly modified form, namely by abolishing the requirement of “comparable costs” as only one competitive parameter among many which is still contained in the Draft TTGL.
4. Limiting the scope of excluded restrictions to severable exclusive grant backs
- (10) BRAK notes that, unfortunately, the Commission has neither made any changes to the provisions in Article 5 on excluded restrictions in the Draft TTBER nor included any further guidance in the Draft TTGL.
- (11) As previously submitted by BRAK in this Consultation, the scope of Article 5(1)(a) Draft TTBER according to which exclusive grant back obligations regarding the licensee’s own improvements (or own applications) of the licensed technology are not exempted under the TTBER should be limited to “severable” improvements. This approach would comply with the previous TTBER 772/2004 which also differentiated between severable and non-severable improvements (and provided a definition for these terms). From BRAK’s perspective, the underlying competition and innovation concern is that such a wide provision could reduce the licensor’s incentive to license its technology if even minor adjustments or enhancements made by the licensee to the licensed technology cannot be not exclusively granted back or, more specifically, such exclusive grant back obligations would not be covered by the TTBER.
5. Field of use restrictions: generally outside the scope of Article 101(1) TFEU and definition in Draft TTGL
- (12) Field of use restrictions in technology transfer agreements generally do not restrict competition. They tend to be necessary for the licensor to be willing to license its technology to a third party. Consequently, they should generally fall outside the scope of Article 101(1) TFEU. By contrast, the Commission considers field of use restrictions to generally require an exemption under the TTBER (Draft TTGL, para. 229 et seq.), and only under exceptional circumstances not to fall or be unlikely to fall within the scope of Article 101(1) TFEU (TTGL, para. 234). This assessment should be altered and it should be clarified that field of use restrictions are generally not restrictive of competition, regardless of whether the technology transfer agreement is between non-competitors or competitors, or whether the restrictions are asymmetrical or symmetrical in nature. This aspect is relevant for technology transfer agreements which do not fall within the scope of the TTBER because of the

parties' market shares. A clarification to said end would increase legal certainty by making a self-assessment under Article 101(3) TFEU redundant.

- (13) In addition, even if not relevant for the application of the TTBER as such but merely for differentiation purposes to certain hardcore restrictions of the TTBER (cf. Draft TTGL, para. 230-232), the "definition" of field of use restrictions in the Draft TTGL (para. 229) should be amended in that not only licenses that are limited to one or more industrial sector or product market but also licenses that are limited to one or more field of application, irrespective of whether this field is of a technical nature or not, should be covered. In practice, it is often questionable if a field of application is actually of a technical nature or not and at the same time it is questionable if such field of application, for example if it depends on the functionalities, product sizes, price range and type of customers, could qualify as a separate product market within the meaning of competition law and in line with applicable case law.
  - (14) In view of the European Court of Justice's decision in *Roche Novartis* (judgment of 23 January 2018, C-179/16) which related to the off-label use of over-the-counter (OTC) pharmaceuticals a field of use restriction in this sector could also be the off-label use. This case law should be reflected in the definition of field of use restrictions in the Draft TTGL.
6. Deleting the maximum cost ratio for safe harbour for Licensing Negotiation Groups in Draft TTGL
- (15) First, BRAK very much supports the Commission's decision to now have included a new chapter with guidance on Licensing Negotiation Groups (LNGs) in the Draft TTGL (para. 297 et seq.)
  - (16) However, as regards the requirements for the application of the safe harbour for LNGs (Draft TTGL, para. 326), BRAK is concerned that the requirement that the licensing fees payable under the technology transfer agreement negotiated through the LNG must not exceed 10% of the sale price of the products incorporating the licensing technology does not sufficiently take into account that LNG will regularly consist of licensees that are not only active on different product markets but also on different levels of the value chain. For example, the LNG in the automotive sector for the licensing of standard essential patents (SEP), such as 4G and 5G mobile communications standards, which was assessed by the Commission (and before that by the German Federal Cartel Office) prior to the publication of the Draft TTGL would not provide a good example for setting this cost ratio given that in this case, with the exception of one member, the LNG members were all automotive OEMs and thus operating on the same market level on which the cost of licensing SEPs represented a very small proportion of a vehicle's total production costs (namely less than 1 %). This cost ration may often be much higher and even regularly exceed 10 % in other cases where at least certain members of the LNG only provide a small added value to the licensed SEP in the production chain.

- (17) Against this background, BRAK submits that the applicability of the safe harbour for LNGs should not depend on a certain specified cost ratio between the licensing fees and the product costs for as long as this percentage figure is not supported by reliable empirical evidence, e.g. from past decision practice. The respective requirement for the safe harbour in para. 326(g) should therefore be deleted from the Draft TTGL.

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