

volve non-competing undertakings. In particular, they may allow the parties to bring together complementary inputs, reduce transaction costs (for instance by creating one-stop shopping for a technology package), clear blocking positions and avoid costly infringement litigation”.²⁷⁹ Having regard to such perceived efficiency enhancing factors, the question raised was whether, and to what extent, multiparty licensing should be covered by a revised block exemption.

The Commission’s Evaluation Report generated a public debate advocating the need of a reform and finally resulting in the repeal of the TTBER 1996. The consultation process that followed aimed at the adoption of a new Transfer of Technology Block Exemption Regulation, inviting all interested parties to provide their feedback on the basis of their practical experience under the TTBER 1996.²⁸⁰

Finally, quoting from the same Commission’s Review Report: “Most submissions that express an opinion on this issue plead for the coverage of multiparty licensing by a future block exemption regulation, though often only below a rather low market share threshold and/or limited to situations of complementary or blocking IPRs. [...] The increased importance of these types of agreements is mentioned as the most important reason”.²⁸¹ However, as the Review Report also duly revealed: “A number of the submissions speak out against coverage. Some because they consider that the issues will be too complicated to be handled in a block exemption regulation and are better addressed in guidelines, others because they would not like to see a new block exemption regulation being delayed [...]”. Eventually, time was finally ripe for a new regulation.

II. TTBER’s Review Process

On the basis of the evaluation report and in consideration of the submitted contributions, nearly two years later, on 1 October 2003, the Commission published a formal proposal for a new technology transfer block exemption (hereinafter Draft

279 For an interesting overview on the scenario of patent litigation in Europe, see: Straus J., “Patent Litigation in Europe - A Glimmer of Hope? Present Status and Future Perspectives”, Washington University Journal of Law and Policy, 2000, p. 403 *et seq.*

280 Finally the consultation resulted in the submission of 33 replies: 11 submissions have come from industry and trade associations, 7 from law and IPR societies, 5 from individual law firms, 5 from national competition authorities (UK, Italy, France, The Netherlands, Finland), 2 from individual companies and 3 from consultants and others. All submissions are available at: http://europa.eu.int/comm/competition/antitrust/technology_transfer

281 Annex 1, “Summary of Submissions on TTBE Review Report”, to the European Commission, “Evaluation Report on the Transfer of Technology Block Exemption Regulation No 240/96 of 20 December 2001”, COM(2001) 786 final, p. 2, available at: http://europa.eu.int/comm/competition/antitrust/technology_transfer

TTBER)²⁸² together with detailed draft guidelines (hereinafter Draft Guidelines),²⁸³ which explained how the new regulation is to be implemented and how Article 81 of the EC Treaty shall be applied to agreements that fall outside the field of application of the revised regulation.

Interestingly, although the TTBER was not due to expire until the 31 March 2006, this anticipated review process was designed to coincide not only with the accession date of ten new Member States in the European Union on 1 May 2004, but also with the entry into force of the Council Regulation 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty,²⁸⁴ also referred to as the Modernization Regulation.²⁸⁵ Indeed, within a wider context, the review of the TTBER of 1996 could be regarded as “part of a wider modernisation process”²⁸⁶ deemed to bring the latter in line with the “new generation” of Regulations and Guidelines on related fields, based on economic observation²⁸⁷ and aiming at providing a more flexible framework for the assessment of given business endeavours.²⁸⁸

As from its entry into force on 1 May 2004, the Modernization Regulation radically reformed the system of competition law enforcement in the EU²⁸⁹ by abandoning the Commission's long-standing monopoly (and at the same time heavy burden) in implementing the antitrust rules laid down in Art. 81 and 82 of the EC Treaty,

- 282 For a critical insight on the Draft TTBER, see i.a.: Drexl J., Hilty R., et al., “Comments on the Draft Technology Transfer Block Exemption Regulation”, In: IIC, 2004, Volume 35, p. 187 *et seq.*
- 283 Draft Commission Regulation on the application of Art.81(3) of the Treaty to categories of technology transfer agreements; Draft Guidelines on the application of Art.81(3) of the Treaty to technology transfer agreements, OJ 2003 C 235/10, also available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/c_235/c_23520031001en00100054.pdf
- 284 Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, OJ L 1, 4 January 2003, as amended by Regulation (EC) No 411/2004, OJ L 68, 6 March 2004.
- 285 For a critical outlook, see i.a.: Anderman S., “The New EC Competition Law Framework for Technology Transfer and IP Licensing”, In: Drexl J. ed.: Research Handbook on Intellectual Property and Competition Law, Cheltenham, UK, Northampton, MA, USA, Edward Elgar, 2008, p. 107 *et seq.*
- 286 Dolmans M., Piilola A., “The Proposed New Technology Transfer Block Exemption: Is Europe really better off than with the current regulation?”, World Competition 26(4), 2003, p. 546 *et seq.*
- 287 On the point, for an analysis on the legal implications of the reform in a wider perspective, see i.a.: Anderman S., “The New EC Competition Law Framework for Technology Transfer and IP Licensing”, In: Drexl J. ed.: Research Handbook on Intellectual Property and Competition Law, Cheltenham, UK, Northampton, MA, USA, Edward Elgar, 2008, p. 107 *et seq.*
- 288 In particular referring to: Commission Regulation 2790/1999 for vertical agreements; Guidelines on the applicability of Art.81 EC to horizontal cooperation agreements; Commission Regulation 2659/2000 for research and development agreements; Commission Regulation 2658/2000 for specialization agreements.
- 289 Gauer C., *et al.*, “Regulation 1/2003 and the Modernization Package Fully Applicable Since 1 May 2004”, Competition Policy Newsletter, Summer 2004, no. 2, p. 1 *et seq.*, also available at: http://ec.europa.eu/comm/competition/publications/cpn/cpn2004_2.pdf

thereby extending the competences of the competition authorities of the EU member states (hereinafter also referred to as national competition authorities or NCAs) by establishing parallel responsibilities between EU and member states according to flexible rules of allocation, each time favouring the best placed authority for intervening. Consequently, the old system of notification was abolished and companies could no longer rely on an up to then centrally administered notification procedure. Therefore, a judicial decision on the merit may be finally reached only in the event of a challenge under Art. 81 EC before a national court or other competent antitrust authority. Otherwise the compatibility of the agreement at issue with the criteria set out by Art. 81 (3) EC would be left to the individual self-assessment of the undertakings themselves.

In order to better operate in such a modernized enforcement system, a “European Competition Network” (ECN)²⁹⁰ was specifically inaugurated as a vehicle to ensure coherent and effective application of Community competition rules within a collaborative framework²⁹¹ for an optimized allocation of antitrust cases among the different NCAs and the European Commission,²⁹² as well as for the establishment of a record of best practices.²⁹³

Consequently, as from May 2004 a wide network of national competition authorities and courts - particularly important in an extended European Union of 25 member states - was actively encouraged to apply EC competition rules by a direct route,²⁹⁴ eventually sanctioning the compatibility of a licensing agreement with EU

- 290 The basis for the functioning of the ECN are laid down in the “Commission Notice on Cooperation within the Network of Competition Authorities” (OJ C 101, 27 April 2004, p. 3.) and in the “Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities” (available at: http://ec.europa.eu/comm/competition/ecn/joint_statement_en.pdf) to which all competition authorities in the network have adhered by special statement.
- 291 The ECN is the framework for the close cooperation mechanisms of Council Regulation 1/2003, as well as a discussion forum dealing with a variety of topical issues of interest to its member authorities. However, the ECN as such does not have any autonomous powers or competences, since it is not an institution and it does not have any legal personality. It is the competition authorities of the Member States and the European Commission that have powers and competences to apply, in particular, the Community competition rules laid down in Articles 81 and 82 EC. Thus, companies and individuals do not enter in contacts with the ECN but always with one or more of the competition authorities.
- 292 Gauer C., Jaspers M., “The European Commission Network, Achievements and Challenges - A case in Point: Leniency”, Competition Policy Newsletter, Spring 2006, no. 1, p. 8 *et seq.*, also available at: http://ec.europa.eu/comm/competition/publications/cpn/cpn2006_1.pdf
- 293 The agreements and practices that are “ECN-relevant”, thus coming under the close cooperation rules and mechanisms thereby put in place, are those capable of having an “appreciable” effect on trade between EU Member States. In addition, the authorities meeting within the ECN can exchange their experience and views regarding particular sectors of the economy, representing this the common competition culture enhancement role of the ECN. For more details, see: <http://ec.europa.eu/comm/competition/ecn/faq.html>
- 294 In fact, the European Competition Network (ECN) presented an impressive result of antitrust enforcement actions during the first two years from its establishment: actually, more than 560

antitrust law, and thereby its enforceability, without the need for intervention by a central administrative clearance “ad hoc”.²⁹⁵

Pursuant to the publication of those drafts, there was a second round of consultations where the Commission, under the lead of Mario Monti, at that time in charge as European Commissioner for Competition Policy, once more invited all interested parties to send their comments on these texts²⁹⁶. Finally, despite several critical voices on the proposed approach,²⁹⁷ the new TTBER²⁹⁸ didn’t change the basic structure presented in the Draft Regulation and Guidelines. In particular, the block exemption, disregarding some proposals in this direction, still does not include multiparty licensing agreements, such as patent pools, in which more than two parties are involved. Hence, said arrangements would have to be individually exempted under Art. 81(3) of the EC Treaty, therefore leaving this important part of licensing practices merely covered by the TTBER Guidelines,²⁹⁹ in which one entire section is dedicated to patent pools,³⁰⁰ basically applying the principles set out in the TTBER by analogy.

In fact, as regards the extension of the TTBER of 1996, regulating only bilateral technology transfer agreements, to multiparty licensing such as patent pools, the Commission had initially really taken this strongly supported option into considera-

cases were reported in the common ECN case-management system, as reported in: Gauer C., Jaspers M., *supra*, fn. 292, p. 8.

295 In this sense, see: Gauer C., *et al.*, *supra*, fn. 289, p. 1.

296 As a result, beyond 70 contributions from industry, trade associations, intellectual property organizations, as well as national authorities, law firms and universities, were submitted and can be found at:

http://europa.eu.int/comm/competition/antitrust/technology_transfer_2/en.pdf

297 Among the critics, see Lind, *et al.*, “The European Commission’s Draft Technology Transfer Block Exemption Regulation and Guidelines: A Significant Departure from Accepted Competition Policy Principles”, *European Commission Law Review*, 2004, vol. 25, p. 168: “The TTBER and Guidelines as they stand are not only bad competition policy, but are also unworkable”; Intellectual Property Lawyers Association, “Reform to the Technology Transfer Regulation”, IPLA, p.4, available at:

http://europa.eu.int/comm/competition/antitrust/technology_transfer_2/14_17_ipla_en.pdf

298 Commission regulation (EC) No. 772/2004 of 27 April 2004 on the application of Art.81(3) of the Treaty to categories of technology transfer agreements, OJ 2004 L 123/11 (hereinafter TTBER), available at:

http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&m=guicheti&numdoc=32004R0772

299 Commission Notice - Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, O.J. C 101, 27/04/2004 P. 2 - 42 (hereinafter Guidelines), available at:

<http://europa.eu.int/eur-lex/lex/Notice.do?val=358871:cs&lang=en&list=343592:cs,343498:cs,358871:cs,287758:cs,282404:cs,256769:cs,224308:cs,222857:cs,215479:cs,215452:cs,&pos=3&page=1&nb=50&pgs=10&checktext=checkbox&visu=#text>

300 Guidelines, *supra*, fn. 299, section 4, “Technology pools”, par. 210 *et seq.*

tion.³⁰¹ However, as the latter is explicitly merely empowered – by virtue of the above-mentioned Council Regulation of 1965,³⁰² as currently amended by Regulation (EC) No 1/2003 – to regulate bilateral technology transfer agreements, the extension of the block exemption over multiparty arrangements would have required a longer procedure, passing through the authorization of the Council. Consequently, the idea of bringing patent pools within the scope of the block exemption was finally discarded, as it was already clear from the draft TTBER in 2003.

As for the specific reasons explaining the maintained exclusion of multiparty licenses from the TTBER, the following should be in summary accounted:

- Since the cooperation of both Council and Parliament would be required for a Council regulation extending the powers of the Commission beyond bilateral technology transfer agreements, that procedure would ultimately delay the adoption of the TTBER;
- Multiparty licensing rules in the TTBER would be of limited added value, as typically patent pools involve high market shares making the licensing agreements fall outside the scope of the block exemption anyway;
- Patent pools meeting the conditions established by the current case law, i.e. if limited to essential and complementary technologies, open, non-exclusive, as well as licensed on fair, reasonable and non-discriminatory (so-called “FRAND”) terms, are not caught by Art. 81 (1).³⁰³ Therefore, the jurisprudence at hand already supplies a certain degree of legal predictability, while, in comparison with a traditional legislative source, also offering the additional benefit of a more versatile approach;
- Pooling agreements not meeting the above-mentioned criteria may lead to market foreclosure, and consequently an individual analysis is strongly recommended anyway;³⁰⁴
- Finally, it has been brought up that an inclusion of multiparty licenses would complicate the linear structure of the TTBER where, on the other hand, the

301 Dolmans M., Piilola A., “The Proposed New Technology Transfer Block Exemption: Is Europe really better off than with the current regulation?”, *World Competition* 26(4), 2003, p. 561 *et seq.*

302 OJ 36, 6.3.1965, p. 533/65. Regulation as last amended by: Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, OJ L 1, 4 January 2003.

303 For a legal outline of the “FRAND Exception”, in the context of antitrust assessment of patent pools, see i.a.: Nack R. and Von Meibom W., “Patents Without Injunctions? – Trolls, Hold-Ups, Ambushes and Other Patent Warfare”, In: *MPI Studies on Intellectual Property, Competition and Tax Law – Patents and Technological Progress in a Globalized World – Liber Amicorum Joseph Straus*, 2008, vol. 6, Springer ed., p. 495 *et seq.*; More in general on the application of FRAND for standard-related technology licensing, see: Ullrich H., “Patente, Wettbewerb und Technische Normung”, GRUR, 2007, p. 826 *et seq.*

304 For a legal analysis on the point, see i.a.: Van Bael I., “Clauses Which May Require An Individual Exemption Under Art. 81 (3): Agreements Between Members of a Technology Pool”, In: *Competition Law of the European Community*, Kluwer Law International, 2005, p. 651 *et seq.*

Guidelines, taking a more flexible approach and applying the TTBER's principles by analogy, may be a more appropriate reference for assessment.³⁰⁵

C. *Current TTBER and Accompanying Guidelines*

I. **New TTBER's Operative Principles**

On 1 May 2004 the new Technology Transfer Block Exemption Regulation³⁰⁶ became finally effective and therefore directly binding and enforceable in all Member States of the European Union.

However, pursuant to the transitional provision of Art.10,³⁰⁷ the full harmonization effect of the TTBER was postponed until 1 April 2006. As for its final term of validity, the current TTBER is due to expire on 30 April 2014, after 10 years from its coming into force.³⁰⁸

In the premises,³⁰⁹ it is stated that the new regulation shall meet the two requirements of ensuring effective competition and providing adequate legal security for undertakings, based on the simplification of the applicable regulatory framework and on the adoption of an economic-based approach,³¹⁰ with regard to the concrete impact of the agreements under consideration on the relevant market.

305 For a comparison with the former TTBER on the point of exclusion of patent pools from its coverage, see: Van Bael I., "Agreements Specifically Excluded from the Former TTBER", In: "Competition Law of the European Community", Kluwer Law International, 2005, p. 628 *et seq.*

306 Commission Regulation (EC) No. 772/2004 of 27 April 2004 on the application of Art.81(3) of the Treaty to categories of technology transfer agreements, (TTBER), OJ 2004 L 123/11, available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&m odel=guicheti&numdoc=32004R0772

307 *Id.*, Art.10 "Transitional period", stating that: "The prohibition laid down in Article 81(1) of the Treaty shall not apply during the period from 1 May 2004 to 31 March 2006 in respect of agreements already in force on 30 April 2004 which do not satisfy the conditions for exemption provided for in this Regulation but which, on 30 April 2004, satisfied the conditions for exemption provided for in Regulation (EC) No 240/96".

308 *Id.*, Art.11 "Period of validity".

309 *Id.*, Premise no. 4.

310 For a critical assessment on the economic approach promoted by the new TTBER, see i.a.: Bishop S., "From Black and White to Enlightenment? An Economic View of the Reform of EC Competition Rules on Technology Transfer", In: "EU Policy Issues: A Critical Examination of the Block Exemption Regulation and the Corresponding Guidelines", European University Institute - Robert Schuman Centre for Advanced Studies, The Annual EU Competition Law and Policy Workshops, 2005 Session, available at: <http://www.eui.eu/RSCAS/Research/Competition/2005/200510-CompBishop.pdf>
A Critical Examination of the Block Exemption Regulation and the Corresponding Guidelines