through improved "production or distribution of goods", as well as through "technical or economic progress", both ultimately benefiting society by generating collective welfare. It is within this interpretative framework and against the attainment of these goals that patent pools should be assessed when confronted with antitrust concerns.

B. The Way to the TTBER

I. TTBER 1996 and Commission Evaluation Report

In March 1965 the issuance of the Council Regulation No 19/65/EEC,[269] and in particular its Art. 1, empowered the Commission to apply Article 81(3) of the EC Treaty by regulation to certain categories of technology transfer agreements and corresponding concerted practices that would otherwise fall within the prohibition of Article 81(1) and to which only two undertakings were party, thereby excluding the exemption of multiparty licensing. Pursuant to such legislative mandate, the Commission had, in particular, adopted Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 81(3) of the Treaty to certain categories of technology transfer agreements (hereinafter TTBER 1996).[270] In fact, block exemption regulations in the field of technology licensing were adopted for the first time in the mid 1980s for both patent and know-how licenses,[271] the combination of which resulted in the TTBER of 1996.[272]

Basically, the ultimate scope of the Commission in adopting a "block exemption" regulation to the benefits of certain categories of technology transfer agreements was to facilitate the dissemination of knowledge, thereby maximizing the benefits of innovation, as fostered by licensing and technology exchange. The idea behind the block exemption is to automatically exclude certain types of agreements, i.e. as a "block", from the general prohibition of Art. 81(1) of the EC Treaty, thus eliminating the need for an "individual exemption", requiring the latter a laborious case-by-case assessment of the anti- and pro-competitive effects of the licensing agreement at issue, balancing, on the one hand, the restrictive effects caught by Art. 81(1) with,

269 Council Regulation (EEC) No 19/65, OJ 36, 6.3.1965, p. 533-65. 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, p. 1 *et seq*.

270 Commission Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85 (3) [now Art.81 (3)] of the Treaty to certain categories of technology transfer agreements, OJ L 31, 9.2.1996, p. 2-13, as amended by the 2003 Act of Accession, and available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31996R0240&model=guichett

271 Commissions Regulations (EEC) 2349/84 of 23 July 1984 and 556/89 of 30 November 1989.

272 For a more extensive legal analysis on the TTBER of 1996, see i.a.: Ullrich H. In: "EG Wettbewerbsrecht", Immenga U. & Mestmaecker E. eds, 1997, n. 33, p. 1241 *et seq*.

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on the other hand, the benefits for innovation and consumer welfare that give rise to legal exemption under Art. 81(3).

However, the TTBER of 1996, setting out the overall EU competition policies applicable to patent and know-how licensing agreements still did not encompass patent pools or other multiparty licensing agreements[273] and therefore has met with some criticism. Demonstratively, Alexander Schaub, former Director General of the European Commission's DG Competition, sarcastically described it as a "dinosaur awaiting extinction".[274] Specifically, as pointed out during a Symposium on European Competition Law, the TTBER was regarded as "the last of the mainstream EU block exemption regulations to apply a formalistic and rigid exemption approach according to which all restraints are presumed to be illegal unless expressly permitted by the block exemption or notified to the Commission for individual clearance".[275] Taking into account the voiced criticism, on 20 December 2001 the Commission issued an Evaluation Report on the TTBER 1996,[276] where it openly admitted the shortcomings of the Block Exemption Regulation under exam and promised a radical, more liberal, economics-based approach to technology transfer, in line with the recent revisions of other major block exemptions.[277]

In particular, regarding multiparty licenses,[278] the evaluation report critically recognized that: "As the TTBE only covers bilateral license agreements, a significant number of more complex arrangements, such as licensing programmes, multilateral pools and licence packages fall outside its scope […]. Such arrangements have become increasingly important for industry, given the growing complexity of new technologies. As a result, the Commission has frequently received notifications concerning these types of agreements. […] In this respect, it can be observed that multiparty licensing, including multilateral pools, may be pro-competitive when they in-

273 Expressly, Art. 5.1. of the old Technology Transfer Block Exemption Regulation provided that: "This regulation shall not apply to: (1) agreements between members of a patent or know-how pool which relate to the pooled technology".

274 Schaub A., "Remarks at the Fordham Corporate Law Institute's 28 th Annual Conference on International Antitrust Law and Policy", Report, Oct. 2001.

275 Carlin F. *et al.*, "The Last of Its Kind: The Review of The Technology Transfer Block Exemption Regulation", Symposium on European Competition Law, 24 Northwestern Journal of International Law and Business, Spring 2004, p. 601 *et seq*.

276 European Commission, "Evaluation Report on the Transfer of Technology Block Exemption Regulation No 240/96 of 20 December 2001", COM(2001) 786 final, available at: http://europa.eu.int/comm/competition/antitrust/technology_transfer/en.pdf

277 See Commission Regulation 2790/1999 on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices, 1999 O.J. (L 336) 21; Commission Regulation 2658/2000 on the Application of Article 81(3) of the Treaty to Categories of Specialization Agreements, 2000 O.J. (L 304) 3; Commission Regulation 2659/2000 on the Application of Article 81(3) of the Treaty to Categories of Research and Development Agreements, 2000 O.J. (L 304) p. 7.

278 Sect.5.1.4, p. 33, "Multiparty licenses" in European Commission, "Evaluation Report on the Transfer of Technology Block Exemption Regulation No 240/96 of 20 December 2001", COM(2001) 786 final, available at: http://europa.eu.int/comm/competition/antitrust/technology_transfer/en.pdf

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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

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