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Josef Drexl, Beatriz Conde Gallego, Daria Kim

Position Statement of the Max Planck Institute for Innovation and Competition of 25 April 2025 in the framework of the revision of the Technology Transfer Block Exemption Regulation and the accompanying Guidelines

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Josef Drexl[*], *Beatriz Conde Gallego*[**] *and Daria Kim*[***]

Abstract: *In its Position statement on the Revision of the Technology Transfer Block Exemption Regulation (TTBER) and the accompanying guidelines, the Institute comments on the questions raised by the European Commission in its call for contributions of 31 January 2025. In light of recent technological developments, the statement addresses the relevance of the TTBER for the licensing of data for developing artificial intelligence (AI) and AI models. It advises against extending the TTBER to data-related rights, proposing instead separate guidelines to foster data sharing within the framework of Article 102 TFEU. Regarding AI models, the Institute calls for clarification of the TTBER's scope. While recognising the practical challenges of applying market share thresholds, the statement supports retaining the existing rules but shifting from a '4plus' to a '3plus' rule in the guidelines. It endorses the Commission's plan to incorporate case law on pay-for-delay settlements and recommends a specific hardcore restriction under Article 101(1) TFEU. The statement supports the current safe harbour framework for technology pools and calls for new guidelines on licensing negotiation groups (LNGs), including a defined safe harbour regime.*

Keywords: *Technology transfer; block exemption; data licensing; AI models; market share thresholds; pay-for-delay settlements; technology pools; licensing negotiation groups; post-expiry royalty payments*

[*] Professor Dr iur, LL.M (UC Berkeley), Director of the Institute, Honorary Professor of the University of Munich.

[**] Dr, LLM (Würzburg), Senior Research Fellow at the Max Planck Institute for Innovation and Competition.

[***] Dr, LLM (MIPLC), Senior Research Fellow at the Max Planck Institute for Innovation and Competition.

The Max Planck Institute for Innovation and Competition is a research institute within the Max Planck Society for the Advancement of Science. The Max Planck Institute is committed to fundamental legal and economic research on processes of innovation and competition and their regulation. The Institute informs and guides legal and economic discourse on an impartial basis. It hereby provides its comments on the upcoming revision of the Technology Transfer Block Exemption Regulation (TTBER) and the accompanying Guidelines with a particular focus on the issues raised by the European Commission in its Call for Evidence of 31 January 2025.

1 Need for modernisation of the scope of the TTBER?

(1) Against the backdrop of the ongoing digital transformation and increasing importance of the licensing of data in the digital economy, the Commission raises the question of whether the scope of the TTBER, based on the definition of technology rights, ought to be extended to also include certain categories of data and rights in data. Here, the Institute would like to note at the outset that the Commission may well have formulated the question too narrowly. In the context of developing artificial intelligence (AI) in particular, companies in the digital sector not only engage in data licensing but also in the sharing of AI models, including foundation models, that the licensees may then fine-tune for their particular purposes. Moreover, one has to take into account that the use of data, in the sense of 'digital representations of information',[1] may be restricted by various intellectual property (IP) rights, including copyright, related rights and database rights, as well as trade secrets protection. Hence, the licensing of data cannot be addressed in the framework of the current reform of the TT rules without clarifying the role of these additional IP rights and trade secrets protection. Therefore, the following analysis will distinguish between the licensing of AI models, additional IP rights, such as database rights in particular, and data in general.

1.1 Licensing of AI models

(2) AI models – particularly those based on artificial neural networks (ANNs) – have gained significance as essential building blocks of the data-driven economy in the years since the last version of the TTBER entered into force. The Commission explicitly refers to 'market developments linked to technical progress […] including […]

[1] Art 2(1) Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data (Data Act) [2023] OJ L 2023/2854 defines 'data' more precisely as the 'digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audio-visual recording'.

the recent emergence of artificial intelligence'[2] as rendering the evaluation of the TTBER and the accompanying Guidelines on technology transfer agreements (TT Guidelines) both timely and necessary – especially with regard to the continued relevance of these instruments in light of their objectives under the new techno-economic circumstances.[3] In this context, the question for the evaluation is essentially two-fold: Firstly, whether *de lege lata* the current TTBER is, in principle, already applicable to agreements on the sharing of AI models – though clarifications are required as to how and to what extent it applies (see 1.1.1 below); and secondly whether *de lege ferenda* the amended TTBER should treat licences for AI models as technology transfer agreements, and if so, under what conditions and how (see 1.1.2 below).

1.1.1 Applicability of the TTBER to AI models de lege lata

(3) Whether licences for AI models already fall within the scope of the TTBER essentially hinges on whether such agreements can be understood as technology transfer agreements within the meaning of the TTBER – that is, whether AI models are protected by relevant 'technology rights',[4] and whether those rights are contractually allocated 'for the purpose of the production of contract products by the licensee and/or its sub-contractor(s)'.[5] Despite the widespread one-to-many provision of models via model-as-a-service (MaaS) platforms, the requirement that a technology transfer agreement be concluded between two undertakings[6] can be fulfilled in certain cases.

(4) The 2024 Support Study cites stakeholder interviews and survey responses that generally assume that the TTBER does not apply to AI foundation models, particularly because they 'do not fall under software copyright'.[7] However, while AI models as such are unlikely to be protected by copyright law,[8] other technology rights – particularly patents and know-how – can come into question.

(5) Patent protection for models of both a general-purpose nature and those trained for task-specific applications cannot be excluded at the outset, as evidenced by recent updates to the relevant sections of

[2] Commission Staff Working Document, Evaluation of Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements (22 November 2024) SWD(2024) 268 final, 6.

[3] ibid.

[4] As listed in Art 1(1)(b) TTBER.

[5] Art 1(1)(c)(i) TTBER. Conditions under Art 1(1)(c)(ii) TTBER could be considered *mutatis mutandis*.

[6] Art 1(c) TTBER.

[7] LE Europe et al., Support Study for the Evaluation of the Technology Transfer Block Exemption Regulation, Final Report (European Union 2024) 34 and 194.

[8] Begoña González Otero, 'Machine Learning Models Under the Copyright Microscope: Is EU Copyright Fit for Purpose?' (2021) 70 GRUR International 1043.

patent examination guidelines[9] as well as by empirical findings.[10] Accordingly, at least some patents and patent applications may constitute TTBER-relevant technology rights in the context of AI models.

(6) Even less clear is whether AI models may constitute 'know-how' within the meaning of Article 1(1)(i) TTBER. First, this requires that ANNs constitute *practical information resulting from experience and testing*. In the conventional context of manufacturing, know-how typically refers to practical instructions, methods, or techniques – often not formally documented – that are essential for the production of a product and have been developed through trial and error. By contrast, an AI model can be best described as an aggregation of numerical values. While these values are derived through training – that is, mathematical optimisation based on trial and error[11] – and may, in this sense, be viewed as 'resulting from experience and testing', it remains subject to interpretation and clarification whether such subject-matter can be considered 'information' in the first place. The technical functions fulfilled by the resulting values and weights within AI systems may argue in favour of such interpretation.

(7) Secondly, ANN models need to fulfil the *secrecy* requirement of Article 1(i)(i) TTBER. This would typically be the case where models are not publicly shared, even if they are run on the back end of a service provided through an MaaS platform.

(8) Thirdly, Article 1(i)(ii) TTBER requires that the information be *substantial* in the sense of being 'significant and useful for the production of the contract products'. This requirement calls for a case-by-case assessment. In the case of applications where model performance is critical, such a model may be considered 'significant and useful for the production of the contract products'.[12]

(9) The last requirement, that the information be *identified*, is likewise in need of interpretation. More concretely, Article 1(i)(iii) TTBER requires that an ANN model – assuming it may be deemed as 'practical information' – can be described 'in a sufficiently

[9] See, eg, the EPO, Guidelines for Examination in the European Patent Office (April 2025) at 3.3.1, <https://www.epo.org/en/legal/guidelines-epc/2025/g_ii_3_3_1.html> accessed 25 April 2025; cf. also USPTO, 2024 Guidance Update on Patent Subject Matter Eligibility, Including on Artificial Intelligence (17 July 2024) <https://www.federalregister.gov/documents/2024/07/17/2024-15377/2024-guidance-update-on-patent-subject-matter-eligibility-including-on-artificial-intelligence> accessed 25 April 2025.

[10] WIPO, Generative Artificial Intelligence – Patent Landscape Report (2002) available at <https://www.wipo.int/web-publications/patent-landscape-report-generative-artificial-intelligence-genai/en/index.html> accessed 25 April 2025.

[11] The training of ANN models essentially comes down to minimising a given cost function.

[12] For uncertainties regarding the notion of 'contract products' in this context, see para 10 below.

comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality'. Here, the question arises whether limitations of the interpretability and explainability of AI models (often phrased as the 'black box') pose a challenge to the assessment of this requirement. With regard to the secrecy criterion, the 'black box' characterisation of ANNs appears rather irrelevant. With regard to the substantiality criterion, a model's functionalities can, in principle, be described in a manner that allows for assessing their 'significance' and 'usefulness' for the production of certain model-based goods and services – even when understanding of the model's inner workings is limited. In any case, it is worth emphasising that challenges of model interpretability should not be unduly generalised. The interpretability of a model must be assessed contextually and in relation to its intended purpose. Ongoing research in the field of AI explainability and interpretability argues against a blanket presumption that the requirement under Article 1(i)(iii) TTBER cannot be met in individual cases.

(10) It is far from straightforward how to interpret the requirement that technology rights be transferred 'for the purpose of the *production of contract products*'[13] in the context of AI models. The TTBER defines a product as a good or service, 'including both intermediary goods and services and final goods and services'.[14] Increasingly, AI models are embedded in the production and provision of goods and services, both intermediary and final, where they serve as core components of analytical, decision-making, and generative systems. Examples include medical diagnostic services using models trained to detect abnormalities, models essential to autonomous driving or aircraft safety systems, predictive maintenance applications that forecast system failures, and models enabling real-time translation services or voice assistants. Importantly in the context of AI models, 'further R&D is permitted'[15] for a good or service to qualify as a 'product' within the meaning of the TTBER. This would typically cover the fine-tuning of a model for the specific use case at hand.

(11) The last issue regarding the applicability of the TTBER *de lege lata* concerns the relationship with the recently revised R&D BER.[16] In the case of an overlap of the two BERs, Article 9 TTBER provides that only the R&D BER will apply. Such overlap may arise in particular when AI models and systems are shared under R&D agreements involving paid-for research and development of contract products or contract technologies in the sense of Article 1(1)(b)(i) R&D BER. This provision would apply in particular in a 'software-as-a-

[13] Art 1(1)(c)(i) TTBER. Conditions under Art 1(1)(c)(ii) TTBER could be considered *mutatis mutandis*.

[14] Art 1(f) TTBER.

[15] Rec 7 TTBER.

[16] Commission Regulation (EU) 2023/1066 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements [2023] OJ L 143/9.

service' (SaaS) scenario. Many companies and other entities are in need of AI-based applications for specific tasks. However, they often neither have the expertise nor the human resources to develop tailor-made AI systems. Therefore, it is quite common that the development will be outsourced to a specialised AI company. In such a case, pursuant to Article 3(2) R&D BER, the agreement must stipulate that both parties have access to the final results (ie, the fine-tuned AI systems) for the block exemption of Article 2 R&D BER to apply. The same applies where the result of the R&D is IP-protected or constitutes know-how pursuant to Article 3(3) R&D BER. Hence, in this latter case, the R&D BER would prevail over the TTBER. Furthermore, it is to be noted that pursuant to Article 2(3) TTBER, the exemption under the R&D BER extends to provisions on the licensing or transfer of IP or know-how contained in an R&D agreement where the licensing or transfer is directly related to and necessary for the implementation of the agreement and does not constitute the primary object of the agreement. This rule could also apply in a case where a customer who holds a pre-trained AI model enters into a paid-for R&D agreement with a SaaS provider for further fine-tuning the model and where the agreement includes provisions on the licensing of the model to the service provider for the purpose of its fine-tuning.

(12) In cases where ANNs are either protected by patent law or constitute know-how, the next question concerns the concrete application of the TTBER. In these cases, the regulation requires a definition of the relevant product market and the relevant technology market for the purpose of applying the market share thresholds. This assessment poses difficulties, since competition law practice has so far not yet gathered any experience for such market definition in markets for ANN models. In this regard, the Commission might reflect on providing further guidance in the TT Guidelines in light of the overarching objectives of ensuring effective protection of competition and fostering legal certainty.[17]

1.1.2 Applicability of the TTBER to AI models de lege ferenda

(13) Regardless of whether the TTBER is already applicable to certain agreements involving AI models – subject to the uncertainties outlined above – the following issue requires normative consideration: Should agreements for licensing AI models benefit from exemptions, and under what conditions? While this question requires an in-depth exploration that goes beyond the scope of this statement, the following points are worth considering.

(14) *The technical nature of the transferred subject-matter* – Historically, the Block Exemption Regulation for Patent and Know-how Licensing Agreements was introduced 'to encourage the dissemination of technical knowledge in the EU and to promote the

[17] SWD(2024) 269 final, 10.

manufacture of technically more sophisticated products'.[18] The definition of a 'technology transfer agreement' is centred on technology rights, and the technical nature of the subject-matter is reflected in the selection of technology rights covered by the TTBER, as well as in its definition of know-how. AI models are undoubtedly valuable economic assets. However, do they fall within the concept of 'technology' in a way that would justify expanding the TTBER's scope to include models not currently covered by 'technology rights'? On the one hand, references to machine learning (ML) 'techniques' are common – though such techniques should not be equated with models themselves. On the other hand, one could argue that the same principles should apply here as those underlying the delineation of patentable subject-matter as well as the definition of 'know-how' where the latter may cover unpatentable subject-matter but should still be limited to information in the form of production-related instructions. The Institute does not intend to take a definite position on this, but advises the Commission to further reflect on the issue.

(15) *The underlying principles and assumptions* – More uncertain and contentious is whether the general principle underlying the block exemption that 'the benefit of the block exemption established by the TTBER should be limited to those agreements which can be assumed with sufficient certainty to satisfy the conditions of Article 101(3) of the Treaty',[19] also applies to licences for AI models. Business practices concerning the allocation of access and use rights in AI models are still evolving, and the understanding of both the subject-matter and the terms and conditions of these contractual arrangements remains limited.[20] This reflects a key challenge and limitation of the current discussion: knowledge about the role that AI models play in competition, in the formation and functioning of markets, and in innovation activity – and the potential and actual efficiencies they generate – might be insufficient to assess whether the related contractual practices can be presumed, with sufficient certainty, to 'normally satisfy'[21] the conditions set out in Article 101(3) TFEU. Given these uncertainties, it would be prudent for the Commission to postpone the final decision to include AI model licensing in the TTBER to the next revision and use the time for additional studies on the emerging market structures as well as the terms and conditions of AI model licensing.

(16) Conversely, benefits generally associated with AI model sharing could argue for providing a safe harbour for AI model licensing

[18] SWD(2024) 269 final, 9.
[19] Rec 9 TTBER; SWD(2024) 269 final, 8.
[20] Federal Trade Commission, 'Partnerships Between Cloud Service Providers and AI Developers. The FTC Staff Report on AI Partnerships & Investments 6(b) Study' (2025) <https://www.ftc.gov/system/files/ftc_gov/pdf/p246201_aipartnerships6breport_redacted_0.pdf> accessed 25 April 2025.
[21] Rec 2 TTBER.

agreements. These benefits should be considered in relation to those the Commission attributes more broadly to technology transfer agreement, which it summarises as follows:

> [M]ost technology transfer agreements do not restrict competition. Indeed, technology transfer agreements often have positive effects, in that they *strengthen the incentives to innovate*, *reduce duplication in R&D* and promote innovation by allowing innovators to *earn returns* to cover their R&D costs. Technology transfer agreements also facilitate the *diffusion of innovation*, *reduce production costs*, result in *improved products* and *generate competition* in product markets. Licensing agreements are also capable of removing obstacles to the development and exploitation of the licensee's own technology, creating *design freedom* and removing the *risk of infringement* claims by the licensor. The efficiencies often stem from the combination of the *complementary assets* and *technologies* of the licensor and licensee. This type of cooperation can lead to *cost/output configurations that would otherwise not be possible*. For instance, the combination of the licensor's improved technology with the licensee's more efficient production or distribution assets may reduce production costs or lead to higher quality products.[22]

To assess whether the presumed benefits of technology transfer agreements are likely to materialise in the case of licences for AI models, the subsequent sections offer preliminary exploratory considerations as to how the mechanisms through which these benefits are expected to arise may play out in the case of AI model sharing – taking into account the specificities of AI model development and deployment, as well as the broader ecosystem.

(17) *Strengthening incentives to innovate* – Returns from licensing AI models could indeed increase the incentives for innovation and help the developers of the models to monetise their innovations. Yet it remains unclear whether monetisation is currently the primary motive behind AI model development; rather, other forms of competitive advantage appear to be the main drivers, such as benefitting from a common culture of collective innovation based on voluntary model sharing.

(18) *Reducing the duplication of R&D efforts* – The licensing and sharing of pre-trained models can help avoid unnecessary duplication of computationally intensive training processes, especially in the case of foundation models, as access to existing models enables others to build on prior work. Yet the usability and value of both general-purpose and case-specific models may be limited due to design decisions or constraints introduced during their development, as well as barriers to

[22] ibid. (Emphasis added.)

fine-tuning – such as limited access to suitable data, essential documentation, or meta-data.

(19) *Promoting incremental innovation* – Licensing AI models can offer design freedom, enabling developers to build upon existing models without risk of infringement. Yet achieving this objective depends on factors such as the clarity of licensing terms, the quality of model documentation, and access to the necessary data and meta-information.

(20) *Promoting diffusion of innovation and follow-on innovation* – Model sharing facilitates adaptation, fine-tuning, and the development of AI systems and applications for a wide variety of tasks and in new fields, thereby promoting the diffusion of innovation across sectors. However, if agreements are overly restrictive – for example, if they limit fields of application or withhold key information or data necessary for modifying the model – the potential for follow-on innovation may be considerably restricted.

(21) *Cost efficiencies* – Pairing a high-performing AI model (from the licensor) with the licensee's distribution network or customer base can generate cost efficiencies and lead to improved products or services.

(22) *Fostering competition in product markets* – Access to AI models can, at least theoretically, lower entry barriers for new firms, thereby fostering competition in downstream applications.

(23) *Efficiencies from combining complementary assets* – AI model development typically requires a combination of diverse expertise, capabilities, and resources – as clearly evidenced from strategic partnership agreements between AI developers and major digital firms. In particular, licensing is key to enable fine-tuning of foundation models, since the developer of the foundation model and the holder of the data that are needed to further train the model for concrete industrial application are typically different parties. Thus, it seems quite clear that AI model licensing can also generate said efficiencies.

(24) In sum, the foregoing considerations suggest a credible case for exploring the inclusion of AI (ANN) models among the 'technology rights' in the next revision of the TTBER. However, one should also note that the business models for the licensing of AI models are rapidly evolving, with a tendency to move from open access to more proprietary approaches. This may also lead to the emergence of new anti-competitive contractual restrictions that are currently not yet foreseeable, but might justify a revision of the catalogue of hard-core restrictions and excluded restrictions in Articles 4 and 5 TTBER. Therefore, to safeguard effective competition oversight, it might be wiser to postpone the extension of the exemption system of the TTBER to AI model licensing for the time being.

1.2 Licensing of other IP rights, including database rights

(25) Especially where data are used for the purpose of developing AI, the data may oftentimes be protected by copyright or related rights. Copyright is especially relevant for the development of generative AI, which requires the use of large volumes of copyright-protected texts, musical and audiovisual works. In addition, related rights granted under the national law of the Member States also play a huge role. For instance, radiological images are enormously important for the development of AI in medical research and diagnostics. The same applies to the images generated by the sensors of a car for the development of AI to enable automated and autonomous driving. EU copyright law explicitly preserves the power of the Member States to provide for related rights protection of images that do not fulfil the originality requirement of EU copyright protection.[23] For the TTBER to apply to such a case, it would not suffice to extend the scope of application of the licensing to 'data', since the licence agreement would need to include explicit provisions on the use of the copyright or the related right. At the least, the TTBER would need to include copyright and related rights in the list of technology rights to the extent that these rights protect data (as potentially to be defined as in Article 2(1) Data Act[24]).

(26) Moreover, database protection under EU legislation plays an additional and important role for access to and licensing of data, since data as digital representations of information are typically included in and licensed as part of larger datasets. EU legislation provides for two different forms of protection that follow their own specific rules and principles, namely copyright protection and *sui generis* protection.[25] Still, databases as the subject-matter of protection are defined uniformly as 'collections of independent works, data or other materials arranged in a systematic or methodological way and individually accessible by electronic or other means'.[26] Already this definition shows that the two concepts, a database and data, need to be distinguished. Copyright protection depends on whether the originality requirements of copyright law are fulfilled with regard to the selection or the arrangement of the database's contents.[27] *Sui generis* database protection depends on 'qualitatively and/or quantitatively substantial investment in either the obtaining, verification or presentation of the contents'. There are databases that enjoy only one of these forms of protection. But there are also databases that are protected cumulatively by both regimes, and there are others that do not enjoy any IP protection. Hence, as regards

[23] See Art 6, sentence 3, Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), [2006] OJ 372/12.

[24] See n 1 above.

[25] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L 77/20.

[26] Art 1(2) Database Directive.

[27] Art 3(1) Database Directive.

larger datasets, the first question is whether they constitute a database. This depends on the concrete case. Datasets that only contain unstructured raw data will typically fail to fulfil the requirement of a systematic or methodological arrangement. Even where the dataset is structured, in most cases, neither the selection nor the arrangement will fulfil the requirement of originality of copyright law. In such cases, the *sui generis* database right based on the key requirement of a substantial investment amounts to the most likely candidate for providing IP protection.

(27) Moreover, one needs to distinguish between the IP protection of the individual contents and the IP protection of the database. A database may contain very different kinds of contents, which may individually be protected by copyright, related rights, as trade secrets, or may not be protected at all. Where IP rights in the individual contents and database protection come together, the rightholders may oftentimes be different persons. The holder of the copyright-protected photograph is attributed to the photographer as the author while the rightholder of the *sui generis* database right will be the maker of the database.

(28) The argument of making the TTBER applicable to those rights rests on the general assumption that licensing would create considerable economic and societal benefits that should be supported by legal certainty to the parties of the licensing agreement provided under the block exemption. Licensing of copyright-protected works enhances access of the public to the work. In the context of the development of generative AI, even the licensing of copyright-protected cultural content enhances technological innovation. Hence, the economic and societal benefits associated with the recognition of the respective rights system as such finds an extension as regards the licensing of such rights.

(29) However, this positive characterisation does not provide the entire picture. It is also to be noted that these rights are also the cause of problems for the working of the data economy. There are several layers to the problem. First, the *de facto* holder of the data may not be the person who holds said IP rights in the data or the relevant database. Even where the data holder is also the rightholder in the database, it may not hold the copyright and the related rights that protect elements contained in the database. Second, especially copyright protection and even more so *sui generis* database protection are intrinsically uncertain. Whether the requirements for protection are fulfilled in the individual case can often only be clarified after lengthy court proceedings. Moreover, no registration is required for the recognition of any of these rights. Even where it may be clear that certain contents are protected, it may still be unclear who the rightholder is. Third, these features invite the strategic use of these rights, that is, the claiming of infringement of rights in order to extract monetary benefits from those who actually bring value to the data. The most dangerous right in this regard is the *sui generis* database right. For this right, both the criteria for protection

(*substantial* investment) and for infringement (extraction or re-utilisaton of a *substantial* part of the contents[28]) are particularly vague. Because of all of this, potential protection via copyright, related rights and *sui generis* database rights, particularly when they are held by third parties, has to be considered a major obstacle for voluntary licensing of data in the digital economy. The problem has even been confirmed by the EU legislature, who decided to enact Article 43 Data Act, which excludes the application of the *sui generis* database right where the data were obtained from or generated by a connected product or related service to safeguard the exercise of the IoT data access and use right under Articles 4 and 5 Data Act. The problem of this 'cut-back' of the *sui generis* right is that it does not go far enough, since it does not apply in other circumstances of the data economy, including the use of data for the purpose of developing AI.

(30) To be sure, the latter concerns do not argue against extending the scope of application of the TTBER to said rights. Quite to the contrary, one could reasonably argue that, while it would not be able to solve the fundamental problem, especially regarding the *sui generis* database right, the block-exemption regime of the TTBER could at least mitigate it by facilitating licensing to some extent. Still, the Institute is of the opinion that the fundamental challenge of coordinating IP protection and the interest in promoting access to data should be addressed more holistically. From a competition policy perspective, the exercise should also include the application of Article 102 TFEU to refusals to grant access to data. Here, one would have to take into account that EU courts traditionally set a higher benchmark for intervention in cases of a refusal to licence IP, additionally requiring the prevention of a new product, as compared to regular refusal-to-deal cases.[29] Where the refusal relates to large datasets that include a large variety of different data, the existing case-law on refusals to license would invite data holders to argue that at least some of the data included in the set are IP-protected to ultimately escape a duty to license. The subsequent analysis of licensing data in general (at paras 33-39 below) will further strengthen the arguments for a more holistic approach.

1.3 Licensing of trade secrets

(31) Where data are not protected by any IP rights, the digitally represented data may still benefit from trade secrets protection pursuant to the Trade Secrets Directive.[30] An argument for extending the scope of application of the TTBER to trade secrets more broadly could be that

[28] Art 7(1) and (2) Database Directive.

[29] See in particular Case 418/01 *IMS Health* ECLI:EU:C:257, para 48 (explaining the 'new product rule' with the need of balancing the fundamental right in intellectual property with the interest in safeguarding free competition).

[30] Directive (EU) 2016/943 Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L 157/1.

with know-how the Regulation already covers a particular sub-category, although it is to be noted that the definition of know-how in the TTBER[31] departs to quite some extent from the definition of trade secrets in the Trade Secrets Directive.[32]

(32) Yet any kind of information can be recognised as a trade secret as long as it has commercial value due to being kept secret.[33] This is hardly compatible with the overall focus of the TTBER on the licensing of 'technology'. Hence, one should at best consider an extension to the extent that the use of trade secrets serves the purpose of technological development, such as the use of trade secrets for the purpose of developing AI. Yet one could also argue that mentioning trade secrets may well become dispensable if one extends the scope of the TTBER to data in general, though with a restriction to cases where the use of the data serves the purpose of promoting technological development as in the field of licensing of data for the purpose of developing AI.

1.4 Licensing of data as such

(33) The 2024 Support Study has produced evidence that a growing number of technology transfer agreements nowadays include provisions on access to and sharing of data particularly generated in the course of the development of the transferred technology or in the course of the application of the agreement. The Institute supports a cautious approach to extending the scope of the exemption under Article 2(2) TTBER to such ancillary data. This approach would in particular avoid the risk of blurring the fundamental purpose of the TTBER of creating a competition law framework for the licensing of technologies, while simultaneously responding to the needs of modern licensing. This extension can easily be implemented in Article 2(3) TTBER by adding provisions on the sharing of data to the extent that those provisions are directly related to the production or sale of the contract products.

(34) It is a completely different issue of whether the TTBER should also be used to address the licensing of data more broadly. In fact, the Institute is of the opinion that the European Union should do much more to enhance data sharing for the purpose of promoting innovation and social well-being especially in the context of developing AI. Competition law has to play a major role in this context. However, the TTBER is not the right place for doing what would be needed. Nor are the TT Guidelines fit for purpose. Their drawback is that competition policy should address data licensing by adopting a comprehensive approach that includes the perspective of both Articles 101 and 102 TFEU. Thus, the Institute would like to advise the Commission to consider the adoption of competition law guidelines on

[31] Art 1(1)(i) TTBER. As to these requirements see in more detail paras 6-9 above.
[32] Art 2(1) Trade Secrets Directive.
[33] Art 2(1)(b) Trade Secrets Directive.

the refusal to share data and data sharing agreements with a particular focus on data used for the purpose of developing AI.

(35) Still, the Institute is equally convinced that the logic of promoting voluntary technology transfer by creating safe harbours for licensing agreements, while taking care of the particular anti-competitive risks, could in principle also apply to the sharing of data. Even if the major problem lies in the unwillingness of data holders to share data, to ease voluntary data sharing would be an important endeavour that the Commission should also address without unnecessary delay. In addition, a more lenient competition law approach by providing a block exemption for the sharing of data in general could quickly facilitate data sharing especially where third party rights based on IP law, trade secrets protection and, not to forget, data protection law would not stand in the way of voluntary data sharing. However, there are several reasons why the proposed comprehensive approach should be preferred to addressing data sharing more generally in the framework of the current revision of TTBER.

(36) First, to address data sharing from the perspective of providing for a block exemption or any other safe harbour would address the competition law implications of data sharing from the wrong angle. Extending the block-exemption based on market shares in the framework would not only produce the immediate problem of how to define data markets and assess market shares. This would more importantly ignore that in many instances the major problem in the digital market is data dependence where one party depends on access to the data held by another party for doing business in an upstream or downstream market. For this purpose, the German legislature has reformed the essential facility doctrine to include data[34] and extended the application of the rule on the control of relative market power to cases of data dependence[35] in 2021.[36]

(37) Data dependence is also a problem where the data are neither protected by IP nor trade secrets law. Based on the application of digital protection measures, *de facto* data holders can exclude other parties from access to and use of the data with economic effects on the market that are similar to those of exclusive property rights. This *de facto* position may even provide more economic freedom to the data holder than it would be the case if IP law applied. In its *Ryanair* judgment, the CJEU has confirmed that the exception and limitations to the copyright or the sui generis right in databases as provided by the Database Directive do not apply where the database is neither capable of copyright nor *sui generis* protection,[37] allowing the *de facto* data holder

[34] Section 19(2) No 4 Act against Restraints of Competition.
[35] Section 20(1) and (1a) Act against Restraints of Competition.
[36] 10th Amendment of the Act against Restraints of Competition, Law of 14 January 2021.
[37] Case C-30/14 *Ryanair* ECLI:EU:C:2015:10.

to impose practically any use restriction in a data licensing agreement. On the EU level, the legislature has so far only addressed such cases in form of sectoral regulations, as in the form of the IoT data access and use right, while the only generally applicable competition law tool available for that purpose remains Article 102 TFEU. Here, the CJEU has meanwhile moved to lower the benchmark for intervention in refusal-of-access cases, as most recently demonstrated in the *Android Auto* judgment establishing a duty of the dominant undertaking to take positive actions to enable interoperability.[38] This however should not dispense the Commission from adopting a more proactive role in the data sharing field.

(38) Secondly, the issue of data dependence is placed at the interface of competition law and contract law. It relates to a situation of unequal distribution of bargaining power. While having so far refrained from addressing the issue with generally applicable competition law rules, the EU legislature has however adopted rules on the control of the contract law terms in B2B data sharing agreements in Article 13 Data Act. In addition, Article 41 Data Act mandated the Commission with the task of developing model contract terms for data access and use. On 2 April 2025, this has resulted in the publication of such model contract terms by the Commission's Expert Group on B2B Data Sharing and Cloud Computing Contracts.[39] These developments demonstrate the need for more coordinated action. The Commission should not move forward to integrating data sharing in the framework of its TT rules without taking account of the different kinsd of rules that are currently considered to be fair or unfair from a contract law perspective. Yet from a competition law perspective, the task consists in identifying hard-core anticompetitive contract clauses in data sharing agreements. This should not remain a purely theoretical task. Rather, the Institute advises the Commission to envisage a sector inquiry designed to gather information on the practice of data sharing contracts in the EU.

(39) Thirdly, the Institute is of the opinion that the topic has not yet sufficiently matured to provide a sufficiently informed basis for presenting rules or guidance on data sharing contracts from a competition law perspective by 30 April 2026, the date when the current TT rules are to expire.

2 Reform of the market share thresholds and the soft safe harbour rule

(40) The Commission equally seeks feedback on the question of whether the market share thresholds for technology markets in the TTBER as well as the soft safe harbour rule in para 157 TT Guidelines

[38] Case C-233/23 *Alphabet et al v AGCM* (Android Auto) ECLI:EU:C:2025:110.
[39] European Commission, 'Final Report of the Export Group on B2B data sharing and cloud computing contracts' (2025).

should be amended. The Institute does not have a very strong view on this issue. Still, the Institute would advise to refrain from amending the rules in the TTBER, but would in principle support to move from a 4+ to a 3+ rule in para 157 TT Guidelines.

(41) The debate on the reform of the rules on technology markets in the TTBER is largely inspired by a conflict between the soundness of the theoretical approach and practical difficulties in applying the rules. Since the block exemption is one on technology licensing agreements, the market shares should primarily be assessed with regard to technology markets. Still, the TTBER also requires an assessment of the market shares on the product level to guarantee that competition be protected in both types of markets. Hence, if the applicable market share benchmarks contained in Article 3 TTBER are exceeded for one or more relevant product or technology markets, the exemption will not be considered to apply to these markets.[40]

(42) Against this backdrop, different options need to be discussed to solve or mitigate the practical problem that undertakings often encounter considerable obstacles to gathering reliable information on the structure of technology markets. Those information problems have the effect of reducing legal certainty for undertakings that are required to self-assess whether their agreements are bloc-exempted.

(43) A first option[41] would indeed be to give up the assessment of market shares for technology markets. This idea, however, has to be rejected since it would considerably weaken the effectiveness of EU competition law and lead to false negatives in many instances. It would also change the function of the current reliance on the market-share assessment for the product market. While under the current regime, it only serves as a basis for protecting competition in the product market, under this first option, the market shares for the product market would also be used as a proxy for assessing the competitive situation on the technology market level. However, market shares on the product market level cannot work as reliable indicators of the concentration on the technology market level. A product market can be highly competitive, while the competitors in that product market can only choose among very few technologies. Thus, a separate assessment of the competitive situation on the technology level is indispensable.

(44) This leads to the second option, which would consist of a modification of the exemption criteria for the relevant technology markets. Here, the Commission considers replacing the market-share approach by the 4+ rule so far applied in the context of para 157 TT Guidelines. This option would still mark a considerable change in the

[40] Rec 12 TTBER.

[41] The Commission distinguishes three different solutions to the problem of legal certainty, which are also taken as guideposts here. However, the order has been changed. See European Commission, Call for Evidence for an Impact Assessment (31 January 2025) 3.

system, since the soft safe harbour rule in para 157 is only devised to apply in cases where the requirements for the block-exemptions are not met. This also means that this option would not only have the effect of providing more legal certainty for the parties to the agreement. It would also have the effect of lowering the benchmark for the block-exemption.

(45) The third option considered by the Commission would consist of leaving the block-exemption criteria as they are, but changes to the soft safe harbour could be considered. The Institute can identify some logic of this proposal. Where the legal certainty as regards the block-exemption is reduced, undertakings will automatically undertake an additional assessment in the light of Article 101(3) TFEU based on the assumption that the block exemption is not available. Similarly, the Commission Staff Working Document argues that already now the soft safe harbour helps to provide legal certainty to parties that encounter problem calculating their market shares.[42]

(46) However, the soft safe harbour rule has its own shortcomings. It is not without legal certainties either. Still, to identify how many competing technologies are present in the relevant market is less burdensome and less fraught with the potential lack of evidence than assessing the market shares of all competitors in the market, also requiring access to data that allows for assessing the volume of licensing for each of the competing technologies. The other problem is that the requirement of four additional technologies in the market that can be considered substitutes for the licensed technology may well prevent the exemption in most of the cases.[43] Yet the actual number of substitutable technologies may be higher, since also evidence on existing technologies may be incomplete, especially if they only consist ofknow-how.

(47) In the light of these arguments, the Institute would in principle not be opposed to replacing the 4+ rule by a 3+ rule. It is of course true that the 4+ rule mathematically can be taken as a proxy to the 20% market share provided as a benchmark for the exemption of an agreement among competitors. However, the Institute sees room for flexibility since market shares can anyhow not be considered a very reliable proxy for market power in technology markets that are oftentimes highly dynamic. Because of this, the balance goes more in the direction of providing more legal certainty for the parties, even though this would lead to a lowering of the benchmark for the exemption.

[42] SWD(2024) 269 final, 30.

[43] See LE Europe et al., Support Study (n 7) 88 (reporting of such experience of licensing parties).

3 Integration the case-law on pay-for-delay settlements

(48) The Commission also announces an update of the TTBER and the Guidelines in the light of the case-law of the CJEU[44] on pay-for-delay settlements between originator pharmaceutical companies and generics producers.[45] Such settlements are characterised by the fact that the generics producer agrees to enter the market typically until shortly before the regular expiry of the originator company's patent in return for a value transfer from the originator company. In the US, where pay-for-delay settlement led to extensive court proceedings before the European Commission and national authorities, especially the British one, discovered such cases in the EU, such agreements involved huge payments from the patent-holding company to the generics company. In contrast, in cases in the EU, the value transfer often involved a licensing agreement making the generics company the exclusive supplier in the certain Member States. Due to this particular feature of the European cases, there is a link between the reform of the TTBER and this case-law. Pay-for-delay settlements involving licences are already addressed in paras 238-239 TT Guidelines. This is to be explained by the fact that the Commission had already commenced proceedings on such settlements before the last revision in 2014.

(49) Because of this nexus, the Institute supports the Commission's plan. Integrating settled case law in the Commission's competition law guidelines would contribute to legal certainty. However, the question is also how such implementation should take place.

(50) In general, the TT Guidelines provide most flexibility to comprehensively inform the public about how the law is to be applied to pay-for-delay settlements. The focus of the judgments was not so much on Article 101(3) TFEU but, with the categorisation of pay-for-delay settlements as restrictions by object, on Article 101(1) TFEU.

(51) As regards the TTBER, this case-law should therefore be considered in the context of Articles 4 and 5 on hard-core and excluded restrictions, respectively. In para 239 of the current TT Guidelines, the Commission already argues that pay-for-delay settlements ought to be analysed in the light of the rules of Article 4(1)(c) and (d) TTBER. Current Article 5(1)(b) TTBER on non-challenge clauses is equally relevant for the assessment of these settlements.

(52) The Institute is of the opinion that para 239 TT Guidelines is failing to provide sufficient information on how the TTBER should be applied to pay-for-delay settlements. There, the reference to Article

[44] See Case C-307/18 *Generics (UK)* ECLI:EU:C:2020:52; Case C-591/16 P *Lundbeck v Commission* ECLI:EU:C:2021:243; Case C-201/19 P *Servier v Commission* ECLI:EU:C:2022:577.

[45] European Commission, Call for Evidence for an Impact Assessment (31 January 2025) 3.

4(1)(c) and (d) TTBER remains rather opaque. It is only accompanied with the hint that such licensing agreements may also include hard-core restrictions in the form of market sharing provisions. Indeed, the agreements that the Commission and the EU courts had to deal with included the exclusive allocation of the geographic market for some Member States to the licensee. However, the core concern of the arrangement should remain the exclusion of potential price competition under the commitment of the licensee to refrain from entering the market with generic products. It is true that this arrangement is largely implemented in the form of a licensing agreement that builds on a geographical market allocation in the sense of Article 4(c)(i) and (ii) TTBER and a non-challenge clause in the sense of Article 5(1)(b) TTBER. However, the Institute recommends formulating a provision regarding an additional hard-core restriction that explicitly mirrors the conditions for the categorisation of pay-for-delay settlements as restrictions by object in the sense of Article 101(1) TFEU in line with the case-law of the CJEU. Such a rule would contribute to legal certainty and protect against circumvention by implementation of pay-for-delay settlements in the form of licensing agreements that avoid current hard-core restrictions in form of clauses on market allocations.

(53) The current TTBER also reflects the pay-for-delay case-law to some extent in Article 5(1)(b) on non-challenge clauses. Pursuant to this rule the block exemption regulation does not apply to a contractual prohibition of the licensee from challenging the validity of a licensed technology right. In contrast, a clause that allows the licensor to terminate the TT agreement in the instance that an exclusive licensee challenges the validity of the payment will nevertheless benefit from the safe harbour. Prior to the last revision in 2014, such terminate-on-challenge clauses were also exempted in the case of non-exclusive licences. The current regime marks a shift in perception. In the past, non-challenge clauses were classified as pro-competitive since they were considered having the potential of stabilising licensing agreements and, at the outset, enhancing the willingness of rightholders to enter into licensing agreements. In the light of the case-law, one may wonder whether the exemption for the right to terminate the licensing agreement can still be maintained at least in the case where the licensing agreement is part of a pay-for-delay settlement. Yet it is also true that even if this right would no longer be exempted, licensees would anyhow have little incentives to terminate the arrangement since they strongly benefit from the exclusive licence. Hence, such an amendment would hardly have the effect of improving the situation.

(54) Another standard clause in pay-for-delay licensing agreements allows the licensee to terminate the agreement if another undertaking enters the market with generics. One could consider making such a clause an additional excluded restriction in Article 5 TTBER. However, such an amendment could collide with the holding

of the CJEU in *Genentech*.[46] In this judgment, the CJEU held that an obligation of a licensee to pay royalty rates after the revocation of the patent can not be considered as anticompetitive in the sense of Article 101(1) TFEU as long as the licensee retains the right to terminate the licensing agreement. Indeed, third parties will only be able to enter the market after either the patent has been revoked or they win against the patent holder in patent infringement proceedings, where the generics producers successfully rely on the invalidity claim as a defence. In sum, the Institute does not see any strong reason for amending Article 5(1)(b) TTBER.

4 Need to Adapt the Safe Harbour for Technology Pools

(55) In the Call for Evidence,[47] the Commission states its intention to explore whether the conditions laid down in para 261 TT Guidelines should be adapted to ensure that only technology pools that fall outside the scope of Article 101(1) TFEU benefit from a safe harbour. In general, the Institute considers the safe harbour criteria established in the TT Guidelines to be fit for purpose.

(56) The Institute recognises that concerns expressed in the Commission's evaluation that technology pools may often include substitute and non-essential patents[48] are to a certain extent justified. However, the Institute notes that this problem does not stem from overly lenient safe harbour conditions and cannot be remedied by tightening them. Moreover, the Institute observes that the competitive assessment of technology pools is not restricted to the prerequisites laid down for the safe harbour. Rather, the TT Guidelines elaborate extensively on the assessment of technology pools which include to a significant extent substitute technologies[49] and complementary but non-essential patents.[50] In both cases, the compatibility of technology pools with Article 101 TFEU is already subject to a detailed assessment in which different aspects are factored in. Additionally, in the context of technology pools, particularly if the pool follows a top-down approach for setting the SEP royalties, pool members have an incentive to reduce the negative effects of an over-disclosure of SEPs and thus ensure the standard essentiality of the patents contributed, as otherwise a fair distribution of the royalties among the pool members would be distorted.

(57) By contrast, the Institute recommends providing more guidance on the condition laid down in para 261 lit (e) TT Guidelines according to which the pooled technologies must be licensed out to all potential licensees on FRAND terms. On the one hand, in the Institute's

[46] Case C-567/14 *Genentech* ECLI:EU:C:2016:526.
[47] European Commission, Call for Evidence for an Impact Assessment (31 January 2025) 3.
[48] SWD(2024) 269 final, 34.
[49] TT Guidelines, para. 255.
[50] ibid., paras 262-265.

view, the obligation to license on FRAND terms should solely apply if a technology pool licenses SEPs encumbered by a FRAND commitment. In all other cases – as the Commission assumes in para 268 TT Guidelines – the patent owners should be free to negotiate and fix the royalties for the technology package.

(58) On the other hand, the Institute draws attention to recent jurisprudential developments – albeit outside the EU – which question the obligation by a technology pool to license SEPs on FRAND terms.[51] Concretely, the Court of Appeal of England and Wales largely endorsed the arguments alleged by the licensing platform Avanci that the terms offered by the Avanci 5G Platform are not required to be FRAND because Avanci does not owe any FRAND obligation, and the FRAND obligations owed by the platform members are irrelevant as they can only be enforced bilaterally against each SEP owner.[52]

(59) The Institute disagrees with this line of reasoning. Rather, the Institute contends that a commitment to license on FRAND terms by the SEP holders does not only extend to subsequent owners but also to those entities that license the FRAND-encumbered SEPs on their behalf. In any case, the Institute advises the Commission to make clear that the technology pool's obligation to license on FRAND terms arises from competition law, and Article 101 TFEU in particular. Additionally, the Commission could condition the benefit of the safe harbour on the members' explicitly committing the licensing entity to abide by their FRAND undertakings.

(60) Finally, as regards the requirement in para 261 lit (e) that the pooled technologies be licensed out to *all potential licensees*, the Institute observes that there is much uncertainty as to its interpretation. Both the extent to which the FRAND commitment can be interpreted as limiting the freedom of the SEP holder to decide to whom it licenses its right as well as whether a refusal to license at a certain level in the value chain violates competition law are highly controversial questions. As has been explained elsewhere, the Institute indeed holds SEP licensing at the component level to be more conducive to a predictable and efficient licensing framework – at least for many of the industry sectors where SEPs are increasingly being implemented – and more supportive of the innovation dimension of standardisation.[53] Still, against the current legal situation, and until a clarification – if any – is provided by the CJEU, the Institute recommends abstaining from any further clarification on the part of the Commission.

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[51] *Tesla v InterDigital and Avanci* [2025] EWCA Civ 193.

[52] ibid., paras 24, 231ff and 249ff.

[53] Josef Drexl, Dietmar Harhoff, Beatriz Conde Gallego andPeter Slowinski, 'Position Statement of the Max Planck Institute for Innovation and Competition of 6 February 2024 on the Commission's Proposal for a Regulation of the European Parliament and of the Council on Standard Essential Patents' (2024) *GRUR International* 662.

5 Licensing Negotiation Groups

(61) In the Call for Evidence, the Commission states its intention to explore whether guidance on the competitive assessment of licensing negotiation groups (LNGs) should be provided in the TT Guidelines.[54] The Institute considers that such guidance is necessary and that the TT Guidelines are the appropriate legal instrument to include it. Concretely, the Institute advises the Commission to provide specific guidance – including the delineation of a safe harbour – on the assessment of agreements to jointly negotiate SEP licences under Article 101 TFEU.

5.1 Need for Guidance

(62) The Institute acknowledges that LNGs, in which multiple licensees jointly negotiate with technology rightholders, are still a relatively new phenomenon of which there are scant examples.[55] However, technological and market developments point to the growing relevance of multiparty licensing solutions. Above all, the importance of compatibility and connectivity standards as integral elements of a digitalised economy has led to the formation of pools and platforms for the joint licensing of SEPs in IoT-enabling technologies.

(63) Like technology pools, LNGs have been advanced as a suitable instrument to facilitate technology licensing. Especially in those scenarios in which a high number of companies implement standardised technologies, LNGs can significantly simplify licensing. However, their legal feasibility has always come with the caveat of whether they are compatible with competition law. Indeed, while bringing about substantial pro-competitive benefits, in particular by reducing transaction costs in licensing negotiations, LNGs also pose significant anti-competitive risks.

(64) The guidance provided in the Commission's Horizontal Guidelines[56] for the assessment of joint purchasing agreements only provides limited help to reduce legal uncertainty as to the compatibility

[54] European Commission, Call for Evidence for an Impact Assessment (31 January 2025) 3.

[55] In June 2024, the German Bundeskartellamt decided to tolerate the launch of an Automotive Licensing Negotiation Group planned by the companies BMW, Mercedes, ThyssenGroup and VW with the aim of jointly negotiating conditions for the acquisition of licenses for SEPs on general mobile communication technologies. This is the only known example to date. See Bundeskartellamt, 'Letter of the Chairman – Proposed creation of a framework for negotiating licence agreements for standard essential patents (SEPs) through an "Automotive Licensing Negotiation Group" (ALNG)', 10 June 2024, <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2024/10_06_2024_ALNG.html?nn=55030> accessed 25 April 2025.

[56] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, [2023] OJ C 259/1 (in the following 'Horizontal Guidelines').

of LNGs with Article 101 TFEU. Though the Institute agrees with the Bundeskartellamt that joint licensing negotiation shares some elements with joint purchasing agreements,[57] it notes that there are major differences between the joint purchase of goods and the licensing of IPRs.

(65) From an economic perspective, technologies, as non-rival products, differ from physical goods. Because of their non-rival nature, technology licensing is not affected by the problem of scarcity. In a competitive market for tangible goods, a seller will prefer to sell to the purchaser who is willing to pay a higher price. This directly reduces the volume of available goods to other purchasers and forces them, in turn, to agree on a higher price. In technology markets, by contrast, due to the absence of scarcity, the pricing mechanism differs. Thus, the fact that one licensee is willing to pay a relatively high royalty does not reduce the availability of the technology for others. A buyer cartel will only have a negative impact on price without the immediate effect of lowering the volume of licensing. In other words, if one licensee is willing to pay a relatively high price, this will not produce a direct effect on the willingness of other licensees to also pay a higher price. Still, joint licensing negotiations bear the risk of harming dynamic competition. If implementers were allowed to collude on lower prices, this could reduce the incentives of the technology owners to invest in developing the technology.

(66) Yet, as will be explained below, the singular competition law regime applicable to the licensing of SEPs alters the competition law assessment, since it largely mitigates the competitive risks that joint licensing agreements otherwise pose. This, in turn, argues for more liberal rules on LNGs active in that field.

5.2 Competition Law Assessment of SEP LNGs

(67) Like any other buyer collaboration, LNGs may lead to restrictions of competition both on the upstream licensing market and on the downstream markets for products that implement the standard.

(68) As regards the licensing market, a recurrent concern is that, by collectively agreeing on the licensing royalties and other relevant licensing terms, LNGs would amount to a buyer cartel and as such to a restriction of competition by object within the meaning of Article 101(1) TFEU.

(69) Unlike their predecessor, the recently revised Horizontal Guidelines expand considerably on the concept of a buyer cartel and the factors that may be taken into consideration for determining its existence. Accordingly, buyer cartels are described as ‘agreements or concerted practices between two or more purchasers which, *without*

[57] Bundeskartellamt (n 55) 2.

engaging in joint negotiations vis-à-vis the supplier: a) coordinate those purchasers' individual competitive behaviour on the purchasing market […] or b) influence those purchasers' individual negotiations with suppliers'.[58] Moreover, a 'buyer cartel may also exist where purchasers agree to exchange commercially sensitive information between themselves about their individual purchasing intentions or their negotiations with suppliers, *outside any genuine joint purchasing arrangement that interacts with suppliers collectively, on behalf of its members*'.[59] The fact that 'the joint purchasing arrangement makes it clear to suppliers that the negotiations are conducted on behalf of its members and that the members will be bound by the agreed terms and conditions for their individual purchases' as well as the fact that 'the members […] have defined the form, scope and functioning of their cooperation in a written agreement […] make it less likely that a purchasing arrangement entered into between buyers will amount to a buyer cartel'.[60]

(70) Since removing uncertainty for individual purchasing decisions constitutes the essence of a buyer cartel, a blanket equation of LNGs with a buyer cartel seems misguided. Thus, it is precisely the standard implementers' intention to replace individual licensing negotiations by collectively engaging with the SEP owner(s) through a more or less formally structured LNG. At the same time, the Institute advises the Commission to put emphasis on this particular aspect in its future guidance, ideally by reflecting it in the conditions laid down for a safe harbour.

(71) While LNGs do not amount to a restriction of competition by object, they may nevertheless have restrictive effects on competition in the licensing market. In this context, two main sources of concern have been identified. Firstly, members of an LNG may be able to exercise joint market power vis-à-vis SEP holders. Secondly, an LNG may be used by its members to implement delaying strategies, either collectively or individually.

(72) In analogy with the risks posed by joint purchasing agreements,[61] significant market power by the members of a joint licensing agreement may harm competition in the upstream market in two ways. On the one hand, SEP holders' incentives to invest and innovate may be reduced if LNGs are able to depress licensing royalties based on LNG-determined rates. On the other hand, the exercise of aggregated market power may lead to foreclosure effects in the licensing market. It is in this context that the singular legal framework

58 Horizontal Guidelines, para 279 (emphasis added).
59 ibid, para 281 (emphasis added).
60 ibid, para 282.
61 ibid, paras 294-296 and 303.

worked out for SDO-based standardisation and SEP licensing in particular operates to mitigate these two harmful effects.

(73) As a condition for standardisation agreements to fall outside the prohibition of Article 101(1) TFEU, SDOs' rules have to ensure effective access to the standard. Where patent-protected technologies are included in the standard, effective access is guaranteed by the rightsholders' irrevocable commitment to license their SEPs to all third parties on FRAND terms.[62] The resulting implications are far-reaching. It renders the legal exclusivity offered by the patent right no longer absolute and unconditional, but subject to substantial limitations. Yet far from only imposing limitations on the technology's exclusive use, the FRAND commitment also assures that in exchange SEP holders receive a fair and reasonable compensation for their innovative efforts.

(74) The dual assurance of the FRAND commitment – for implementers, that they will not be forced to accept non-FRAND rates and conditions for the use of the standardised technologies, and for SEP holders, that they will receive a fair and reasonable compensation for precisely this use – remains at the centre of the procedural framework for licensing negotiations developed by the CJEU in *Huawei*.[63] It builds the basis for the reciprocal duties of the negotiating parties to submit a FRAND offer and a FRAND counteroffer. As negotiating parties, LNGs would be bound by this legal framework. Consequently, in the same manner as the FRAND commitment and the *Huawei* negotiation framework impose limits on the ability of SEP holders to exercise their – certainly existing – market power, both elements likewise act as a constraint against LNGs' intent to exert aggregated power to negotiate non-FRAND licensing conditions.

(75) With regard to potential foreclosure effects, the risk of a total foreclosure of the licensing market resulting from the exercise of market power by LNGs can be disregarded. As noted above (para 65), licensees do not compete on the demand side for the availability of licences. This is even more so in the context of SEPs, as SEP holders' FRAND commitment guarantees all of them access to the standardised technologies. Rather, SEP implementers compete on the markets for standard-compliant products, for which the SEP royalties are an additional cost. In this context, too, the non-discrimination element of the FRAND commitment further limits market power by creating a level playing field between similarly situated licensees. Hence, competing implementers can be confident that none of them will gain a competitive advantage on the product market through preferential or particularly favourable access to the standardised technology.

(76) However, foreclosure effects could still arise if members of an LNG bar competitors from participating in the LNG, thereby

[62] ibid, paras 451 and 456.
[63] Case C-170/13 *Huawei* ECLI:EU:C:2015:477, paras 59-69.

excluding them from the advantages of a joint negotiation. Whether the LNG's members would always have an interest in exerting their collective power to achieve this outcome is arguable. Thus, it has been rightly observed that SEP implementers – at least where their number is large, as is the case for IoT-enabling standards – face a collective action problem.[64] Accordingly, an implementer is not incentivised to take an individual licence as long as it is not assured that all other competitors will also take a licence on comparable terms. LNGs help to solve this problem. In the same line of reasoning, the broader their membership, the fewer unlicensed implementers will be able to leverage this factor in competition. Yet, although it is not in the rational interest of the members to restrict the LNG's membership, the Institute considers that the compatibility of LNGs with Article 101 TFEU should explicitly be made dependent on participation in them being open to all interested SEP implementers active in a specific industry sector.

(77) From all these considerations it follows that the anti-competitive effects associated with the exercise of potential market power by the LNGs are, on the one hand, substantially lessened by the fact the LNGs – and their individual members – would be bound by the competition law framework and the obligations developed by the CJEU. On the other hand, a broad LNG's membership would be in the interest of both SEP licensors and licensees. Therefore, the Institute advises the Commission against putting too much weight on the members' combined market shares in a – more or less broadly defined – licensing market when delineating the competitive assessment of LNGs.

(78) In the Institute's view, the Commission should rather put emphasis and mandate particular safeguards to prevent the implementation of both delaying tactics and collusion strategies.

(79) Whereas LNGs may help to reduce the collective action problem faced by SEP implementers and disincentivise hold-out from a systemic perspective, a situation where members of an LNG collectively or individually sought to delay licensing negotiations cannot be completely ruled out. As to the attempt to collectively delay negotiations by the LNG, the Institute observes that an LNG negotiating on behalf of its members would be obliged by the *Huawei* jurisprudence to negotiate in good faith. Even if adjustments would need to be made due to increased internal coordination efforts, the duty to conduct licensing negotiations diligently and without any delaying tactics would equally apply. In the Institute's view, this point should be stressed by the Commission. In addition, the Institute notes that, unlike in the framework of bilateral negotiations, if an LNG does not obey its

[64] Ruud Peters, Igor Nikolic and Bowman Heiden, 'Designing SEP Licensing Negotiation Groups to Reduce Patent Holdout in 5G/IoT Markets', in: Jonathan M Barnett/SeanM. O'Connor (Eds), *5G and Beyond – Intellectual Property and Competition Policy in the Internet of Things* (CUP, Cambridge, 2024) 156ff.

negotiating duties, the SEP holder(s) would, besides the possibility of seeking injunctions against the individual members of the LNG, also have the option of filing a complaint with the Commission on the basis of a violation of Article 101 TFEU.

(80) A greater potential for individual delaying strategies arises if the members of the LNG retain the possibility to continuing bilateral negotiations with the aim of adapting the jointly negotiated outcome to the particular licensee's circumstances once joint negotiations have concluded. Unlike the Bundeskartellamt, the Institute regards this as a major risk. The Institute therefore advises the Commission to specify that the outcome of the joint negotiations must be binding for the participating members – a requirement that mirrors one of the conditions for ruling out the existence of a buyer cartel in the context of joint purchasing agreements. Additionally, the Institute endorses the proposal made in the literature to require that the LNG commits its members to enter into a licence with the SEP holder within a predetermined period after conclusion of the joint negotiations.[65]

(81) The Institute acknowledges that by requiring the result of the collective negotiations be binding on members of the LNG a tension arises with their legitimate interest in more tailor-made licensing outcomes. However, in the Institute's view, the competitive assessment of joint licensing agreements – in particular when designing the framework under which LNGs could lawfully operate – should not be affected by this fact. Rather, this problem underlines the importance of establishing governance rules that not only ensure an efficient internal communication but also allow to accommodate the various interests of the members (e.g. rules that while allowing an open participation ensure a relative homogenous membership of similarly situated implementers, voting rules and procedures, right to timely opt out of collective negotiations, possibility to agree on various LNG negotiation mandates).

(82) In line with the assessment of the Bundeskartellamt, the Institute considers that negotiations with LNGs must be voluntary for SEP licensors and encourages the Commission to introduce a corresponding condition in its assessment. In this context, concerns have been expressed that coordination for the purpose of joint negotiations could be used to influence parallel bilateral negotiations with SEP holders that have chosen not to adhere to negotiations with the LNG. The Institute observes that, as a matter of principle, the fact that a negotiating party tries to influence negotiations by pointing out how parallel negotiations with other parties proceed is nothing unusual. It would also occur under the current *status quo* where SEP implementers negotiate all or most of their licences on an individual basis. Moreover, a similar scenario would be present if members of a

[65] ibid, 171.

technology pool enter into bilateral negotiations with specific implementers.

(83) That said, the Commission should condition the compatibility of LNGs with Article 101 TFEU on the existence of effective mechanisms to prevent the exchange of sensitive information among their members that is not objectively necessary for the attainment of the LNGs' objectives, much the same as it provides for other forms of competitors' collaboration, and in particular for joint purchasing agreements and technology pools.

(84) Concretely, information regarding the essentiality and validity of particular SEPs could be shared among the members of the LNG. Moreover, the LNG should also be allowed to seek outside expertise on these matters on behalf of its members.[66] The Institute holds the view that LNGs could efficiently contribute to reducing the lack of transparency present in SEP negotiations – which negatively affect both SEP holders and implementers – and which the aborted SEP Regulation aimed to reduce.

(85) As to other more sensitive commercial information, such as royalty rates or the characteristics of existing or even future implementing products or services, a direct exchange between members of an LNG should be avoided.

(86) The risk that a joint licensing negotiation will result in collusive outcomes in the downstream markets increases if members of the LNG possess high market shares in those product markets. Among the factors considered in the competitive assessment of purchasing agreements, the Commission refers to the fact that the agreement may allow members to achieve a high degree of commonality in their costs.[67] In this context, the Bundeskartellamt in its assessment of the Automotive Licensing Negotiation Group concluded that in spite of the fact that the market shares of the members exceeded the thresholds established for a joint purchasing agreement, the cooperation was unlikely to restrict competition in the downstream vehicle markets, since the cost for licensing SEPs on general communication technologies only accounts for a very small portion of the overall costs of manufacturing a car.[68]

(87) While not disputing this fact, the Institute notes that this may not be the case for all products implementing standardised technologies and that this circumstance may change over time. Moreover, the Institute observes that the fact that SEP royalties may not constitute a decisive factor in pricing decisions in the downstream markets indeed indicates that competing implementers have to differentiate themselves

66 For these two proposals, ibid, 168.
67 ibid, para 300.
68 Bundeskartellamt (n 55), p 2.

along other technical and/or commercial factors. The likelihood that competing members of an LNG will use the framework of collective licensing negotiations to coordinate on these other factors is certainly not to be neglected.

(88) The Institute thus recommends excluding from the benefit of a safe harbour LNGs whose participating members have a high combined market share on the relevant downstream markets. The threshold of a combined market share of 15% established in the Horizontal Guidelines for joint purchasing agreements[69] certainly serves as a valuable reference. Still, in view of the efficiencies that LNGs may bring, which are especially associated with their broad membership, the Commission could consider establishing a higher threshold.

6 Post-Expiry Royalty Payments

(89) A topic that the Commission does not plan to address in the framework of the current reform are the existing principles contained in the TT Guidelines on post-expiry royalty payments. The topic is exclusively addressed in para 187 TT Guidelines. The Institute is of the opinion that the Guidelines do not sufficiently capture the competitive challenges of post-expiry royalty payments. This assessment is supported by the judgment of the U.S. Supreme Court in *Kimble v Marble* handed down after the last revision of the EU TT rules in 2014.[70]

(90) Before entering into the competition law analysis, it is important to bring precision to the concept of post expiry royalty payments. The mere fact that a licensee is required to pay royalties after the expiry of a patent does not suffice to qualify the obligation as one on making post expiry royalty payments. From a competition law perspective, only royalty payments that relate to the use of the patent after the expiry of patent raise concerns. The Institute agrees that deferred payments to the period after the expiry of the patent are in principle to be considered as non-restrictive of competition in the sense of Article 101(1) TFEU. Such deferrals serve the interest of the licensee and are equivalent to a loan which can have the effect of helping the licensee when the initial investment in the manufacturing and the marketing of the product will not allow for reaching the level of profitability at the early stage of the implementation of the licensing agreement.

(91) In the EU, the case law on post expiry royalty payments is relatively limited. The CJEU has addressed the topic so far in two cases, namely *Ottung*[71] and *Genentech*.[72] In both cases, the Court was capable

[69] Horizontal Guidelines, para 291.
[70] *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446 (2015).
[71] Case C-320/87 *Ottung* ECLI:EU:C:1989:195.
[72] Case C-567/14 *Genentech* ECLI:EU:C:2016:526.

of denying a competition law violation with the argument that the contractual right to terminate would exclude any restrictive effect of the agreement at hand.

(92) In contrast, in *Kimble*, the US Supreme Court confirmed the 50 years older judgment in *Brulotte*,[73] according to which obligations to make post-expiry royalty payments are to be considered as illegal under the patent misuse doctrine. Both cases were characterised by the fact that the licensing agreements did not set any endpoint to the payment obligations. Hence, in both cases, it was clear that the payment obligation did not relate to a mere deferral of payments for the use of the patent until the patent's expiry. Before *Kimble*, many lower U.S. Federal Courts expressed criticism on the soundness of Brulotte. This occurred at a time when the patent misuse doctrine encountered growing pressure. The classical patent misuse rationale that parties to a licensing agreement should not be allowed to extend the scope of the patent beyond what the patent law provides for, was criticised from the perspective of antitrust policy. Hence, the Supreme Court's decision to confirm *Brulotte* in 2015 was not necessarily expected. In *Kimble*, the Court clearly distinguished the patent misuse doctrine as a patent law remedy from antitrust law to explain that the post-expiry royalty rates clearly collide with the patent law legislature's intent to limit the patent holder's capability of monetizing the invention to the term of the protection.

(93) The lenient position the Commission has adopted in para 187 TT Guidelines starkly contrasts with the legal situation in the US. If courts followed para 187 TT Guidelines, obligations to make post expiry royalty payments would practically never be considered a violation of competition law, while such an obligation would be considered illegal in the US. To explain this by the fact that EU law has no counterpart to the US patent misuse doctrine is hardly satisfactory.

(94) Still, in para 187 TT Guidelines, the Commission makes a very straight-forward argument against any anticompetitive effect. The Commission argues that, once the patent has expired, the market will be open to competition, and hence, the fact that the licensee is still under an obligation to pay royalties will not cause any harm to competition. This argument is flawed for several reasons.

(95) First, it is purely theoretical and does not take into account the concrete market circumstances. IPRs are not the only market entry barriers that can exist. Especially in pharmaceutical markets, the EU has seen a series of cases where despite the expiry of the patent even several decades ago generic drugs did not enter the market. This can occur in particular where drug markets comprising a relatively small number of patients do not appear profitable enough for generics producers to make the investment in getting the market authorization

[73] *Brulotte v Thys C*o, 379 U.S. 29 (1964).

and marketing the product. The Commission addressed such a case in *Aspen* as one on unfair pricing pursuant to Article 102(a) TFEU.[74]

(96) Secondly, the Commission seems to follow a theory according to which competition law only protects competition, and not competitors. This is usually a position that is attributed to US antitrust law. Apart from this, it unduly penalises the licensee who will be exposed to a competitive disadvantage in relation to other companies who waited for the expiry of the patent before they entered the market.

(97) Thirdly, and most importantly, the competition law argument only looks at static price competition. It does not take into account the dynamic aspects of the case that should matter in IP-related cases in particular. More specifically, the Commission seems to ignore that licensees are often innovators. For instance, in the pharmaceutical industry, the major investment for bringing the product to the market is to be made after the grant of the patent, since the patented drug still needs to prove its efficacy and its safety in the course of very expensive clinical trials before the drug has a chance to get the market authorisation. In the pharmaceutical industry it is not uncommon that the patent will be licensed to a company that is scientifically and technologically better placed than the patent holder to develop the drug to the stage it can enter the market. If, as is typically the case, the royalty payments are calculated as a percentage of the turnover generated by the sale of the drug, the licensing agreement will provide the patent holder with income only after many years. This is all legitimate since the patent holder, if it had made the effort to develop the drug itself, would not have been able to generate any income either. Even the fact that, in such a scenario, the licensee would benefit from data exclusivity under EU medicinal law, preventing generics producers from relying on the first market authorisation to get an abbreviated authorisation based on a showing of biosimilarity is not counterargument. While it is true that the licensee could still benefit from exclusive use of the originally patented technology as long as the data exclusivity period has not expired, the obligation to make post expiry royalty payments would still misallocate income by obliging licensee to make payments to the former patent holder although the very purpose of the data exclusivity regime is to remunerate the licensee for the investment it has made for bringing the product to the market. The analysis of this example shows that the US approach to solving the case is more appropriate from both an the innovation and competition policy perspective.

(98) At best, one can argue that para 187 does not exclude such an analysis as its wording indicates that the market entry of new competitors will *normally* exclude any anticompetitive effect of post-expiry royalty payments. Yet para 187 fails to explain potential *exceptional* circumstances that can justify competition law intervention.

[74] Commission decision of 10 February 2021, Case AT.4394 – *Aspen* (commitment decision).

Therefore, the Institute advises the Commission to revise para 187. The text should clearly state that obligations to make post-expiry royalty payments need to be assessed in the light of both price and innovation competition. It should also be clarified that for rewarding market participants for their investment in innovation the term of protection of IP regimes should serve as the legal guidepost. Indeed, the CJEU has followed the same approach in the context of applying Article 102 TFEU to the *AstraZeneca* case where *AstraZeneca* attempted to artificially extend its market dominance beyond the expiry of its patents.[75]

[75] Case C-457/10 P AstraZeneca v Commission ECLI:EU:C:2012:770.