



Technology Transfer Agreements in the EU

Sara Nesler, Mag. iur. (I), LL.M., Hanover

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Technical know-how plays a particularly important role for many companies. Often this expertise is not generated within an undertaking, but it is transferred from another undertaking or a research institute through a licence agreement. Particularly in research-intensive and capital-intensive industries, these are often exclusive licences, which at first glance violate the principle of free competition that applies in the EU. The aim of this article is to explain the basic outlines of competition law regarding the transfer of technology rights and in particular the so-called “Technology Transfer Block Exemption Regulation” (TTBER). This regulation generally exempts technology transfer agreements from the principle of free competition in Art. 101 (1) of the Treaty on the Functioning of the European Union (TFEU). Although the TTBER was last revised in 2014, it is very topical due to the continuing and increasing relevance of technology transfer agreements in today’s business world.

Art. 101 TFEU and the block exemption regulations

Art. 101 (1) TFEU prohibits in principle all agreements, decisions and concerted practices which are anti-competitive, and which distort the internal market. Admittedly, Art. 101 (3) TFEU provides for exceptions for agreements if they have positive effects on the

production or distribution of goods or contribute to the promotion of technical or economic progress. However, the determination of these conditions requires an individual examination of all agreements and acts and is associated with a high degree of legal uncertainty.

To counteract the problem, the European Commission issues block exemption regulations (BERs) pursuant to Art. 103 TFEU, thereby establishing conditions under which certain types of agreements in certain market sectors are in principle deemed to comply with competition law. For such agreements, a BER creates a kind of “safe harbour”.

In total, there are currently six block exemption regulations: among them the recently amended Vertical Block Exemption Regulation (see Alliuris Compact “*Restrictions of Competition in Distribution*”, August 2022) and the TTBER relevant here.

The Technology Transfer BER

The transfer of technical know-how is not only in the interest of individual companies but can have positive effects in general. On the one hand, technical progress increases the quality of life of consumers, on the other hand, it promotes the competitiveness of the European internal market. The EU Commission recognised this as early as 1996 with the introduction of the first



version of the TTBER and confirmed it with the amendments of 2004 and 2014.

This assessment is reflected in the structure of the revised regulation. The TTBER of 2014 does not contain a list of permitted technology transfer agreements, but in principle exempts the majority of technology transfer agreements from the prohibition of Art. 101 (1) TFEU.

This means that technology transfer agreements are in principle permitted (Art. 2 TTBER) as long as the joint market share threshold of 20 % for competing undertakings and the individual market share threshold of 30 % for non-competing undertakings is not exceeded (Art. 3 TTBER) and the agreement does not contain hardcore restrictions.

The TTBER covers the entire European Economic Area, but it also applies to agreements concluded for non-EU countries to the extent that they have an impact on the European Single Market (*impact principle*).

What does “technology transfer agreement” mean?

The question of what is meant by “technology rights” is of central importance for the application of the TTBER. This term covers know-how, but also patents, utility models, designs, topographies of semiconductor products, supplementary protection certificates for medicinal products or similar products, plant variety rights and software copyrights or a combination thereof. Technology rights must be distinguished from intellectual property rights and intellectual property. A technology transfer agreement is therefore a licence agreement in which one party allows one or more other parties to use its technology (patent, know-how, software licence) for the production of goods and services.

Hardcore restrictions (Art. 4 TTBER)

If the contract contains a hardcore restriction (or black clause), the entire contract is excluded from the block exemption and an individual assessment becomes necessary.

The TTBER provides for different hardcore restrictions for competing and non-competing undertakings in Art. 4.

A distinction is often made between “reciprocal” and “non-reciprocal” agreements. For the purposes of the TTBER, “reciprocal” means a technology transfer agreement whereby two undertakings grant each other, in the same or separate agreements, a technology right licence which concerns competing technologies or can be used to produce competing products. By contrast, “non-reciprocal” means an agreement whereby one undertaking grants a technology licence to another undertaking or whereby two undertakings grant such a licence to each other, which licences do not concern competing technologies and cannot be used for the production of competing products.

Competing companies

For competing undertakings, the exemption provided for in Art. 2 TTBER does not apply to agreements containing the following:

- The restriction of a party’s ability to set the price at which it sells its products to third parties.
- The output restriction. Output restrictions imposed on the licensee in a non-reciprocal agreement or imposed on only one licensee in a reciprocal agreement relating to the contract products are exceptionally permitted.
- The allocation of markets or customers, with several exceptions. For instance, an obligation on the licensee to produce the contract products only for its own use is permissible, provided that it is not subject to restrictions on active and passive sales as spare parts for its own products.
- The restriction of the licensee’s ability to use its own technology rights or the restriction of the ability of the parties to the agreement to carry out research and development unless such research and development is indispensable to prevent the disclosure of the licensed know-how to third parties.



Non-competing undertakings

For non-competing undertakings, the exemption provided for in Art. 2 TTBER does not apply to agreements containing the following:

- The restriction of a party's ability to set the price at which it sells its products to third parties, without prejudice to the ability to set maximum selling prices or to set recommended prices.
- The restriction of the territory or customer group into which or to which the licensee may passively sell contract products, with several exceptions. Permitted exceptions include agreements reserving to the licensor passive sales into an exclusive territory or to an exclusive customer group and agreements prohibiting members of a selective distribution system from selling to unauthorised distributors.
- The restriction of passive or active sales to end users, provided that such restriction is imposed on a licensee belonging to a selective distribution system and operating at the retail level, without prejudice to the possibility of prohibiting members of the system from conducting business from unauthorised establishments.

Non-exempted restrictions (Art. 5 TTBER)

In addition, Art. 5 TTBER contains a list of non-exempted restrictions, so-called "grey clauses", which must be examined in an individual assessment. The exclusion from the block exemption does not apply to the entire contract, but only to the individual clause.

Clauses in which the licensee undertakes directly or indirectly to grant the licensor, or a third party designated by the licensor, an exclusive licence or full or partial rights for its own improvements to the licensed technology shall not be exempted.

Clauses that directly or indirectly prevent one party from challenging the intellectual property rights held by the other party in the EU are also subject to individual assessment. However, in the case of an exclusive licence, it remains possible to terminate the

technology transfer agreement if the licensee challenges one or more of the licensed technology rights. Where the parties to the agreement are not competing undertakings, the exemption provided for in Art. 2 shall not apply to clauses limiting the ability of one of the parties to the agreement to carry out research and development. Unless such a restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.

Withdrawal in individual cases

Art. 6 TTBER contains a fall-back exception for individual cases in which an agreement exempted by Art. 2 nevertheless has negative effects that are incompatible with Art. 101 (3) TFEU. The EU Commission may withdraw the legal advantage granted by the BER in individual cases.

Relationship to other block exemption regulations

The relationship between the TTBER and other BERs must be carefully considered, as they determine different levels of requirements for a possible exemption. The hardcore restrictions, in particular, vary in strength depending on the BER.

According to Art. 9 TTBER, the Research and Development (R&D) BER and the Specialisation BER take precedence over the TTBER. The Vertical BER, on the other hand, is subsidiary to all other BERs.

The classification of borderline cases is particularly problematic. For example, the applicability of the TTBER is affirmed for contracts in which the contracting parties conclude a licence agreement with third parties in addition to an R&D cooperation or a joint venture established for this purpose does so. If technologies are contributed to the joint venture, it is questionable which BER prevails.

In the case of specialisation agreements, a distinction must be made according to the type of agreement. Unilateral and reciprocal specialisation between two competing undertakings is assessed under the Specialisation BER. However, to the extent that the technology transfer element dominates, the TTBER applies.



Pure distribution licences fall under the Vertical BER due to the lack of technology transfer. For pure manufacturing licences, on the other hand, the TTBER is applicable. For mixed manufacturing and distribution agreements the classification is not so clear. It depends on whether the agreement focuses on the manufacture or the distribution of the product.

Outlook

The TTBER will initially apply until 30 April 2026. Early amendments are not considered necessary and are not expected.

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<i>Contact</i>	Alisha Daley-Stehr Alliuris Communication
<i>Web</i>	www.alliuris.law
<i>Mail</i>	info@alliuris.org
<i>Fon</i>	+49-511-307 56-20
<i>Fax</i>	+49-511-307 56-21

Alliuris in Germany

<i>Firm</i>	Herfurth & Partner Luisentraße 5, D-30159 Hanover
-------------	--

<i>Web</i>	www.herfurth.de
<i>Fon</i>	+49-511-307 56-0
<i>Fax</i>	+49-511-307 56-10
<i>Mob</i>	

<i>Contact</i>	Ulrich Herfurth, Partner
<i>Languages</i>	German, English, French, Spanish, Portuguese, Russian, Mandarin, Czech, Polish
<i>Mail</i>	info@herfurth.de

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EDITORS: ALLIURIS A.S.B.L. ALLIANCE OF INTERNATIONAL BUSINESS LAWYERS | BRUSSELS

MANAGEMENT: Luisenstr. 5, D-30159 Hannover
Fon +49-511-307 56-20, Fax +49-511-307 56-21

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