COMMISSION’S CONSULTATION ON THE REVIEW OF THE CURRENT REGIME FOR THE ASSESSMENT OF TECHNOLOGY TRANSFER AGREEMENTS

COMMENTS OF CLEARY GOTTLIEB ON THE DRAFT REGULATION AND GUIDELINES

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RESPONSE TO THE COMMISSION’S CONSULTATION ON THE REVIEW OF THE CURRENT REGIME FOR THE ASSESSMENT OF TECHNOLOGY TRANSFER AGREEMENTS

We welcome the Commission’s invitation to comment on the review of the current regime for the assessment of technology transfer agreements. We appreciate the Commission’s readiness to review these comments in spite of the delay in submission.

This paper summarizes Cleary Gottlieb Steen & Hamilton LLP’s response to the Commission’s public consultation on the revision of the current block exemption regulation for technology transfer agreements (the “TTBER” or the “Regulation”), and the Guidelines dealing with the application of the TTBER and the assessment of agreements falling outside the TTBER (the “Technology Transfer Guidelines”).

Our comments are in three parts:

- general comments on recent changes in technology and innovation practice (Part I), and a recommendation that the Guidelines include a discussion of “privateering” arrangements;
- specific detailed comments on the text of the Draft Regulation (Part II); and
- comments on the Draft Technology Transfer Guidelines (Part III).

I. GENERAL COMMENTS

1. Recent changes in technology licensing

1. There have been a number of developments in technology licensing since the Commission’s last consultation on the rules applicable to technology licensing agreements (which took place in 2004). Among these developments, we identify three principal trends:

   ▪ (i) the increasing complexity of products incorporating patented technology, the proliferation of patents, and greater distribution of patent ownership, leading to clearance difficulties and higher transaction and litigation costs, and greater importance of standards and pools;

   ▪ (ii) the emergence of “patent assertion entities” and the greater “strategic” use of patents by companies including by the use of “privateers” and the disaggregation of patent portfolios to raise royalty revenues and raise rivals’ costs; and

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2 These comments are not made on behalf of, and do not bind the firm or its clients. They are intended as a contribution to the policy debate in a situation where not all clients or all lawyers in the firm necessarily agree with all of the comments in this paper. These comments (including in particular those relating to Article 101 TFEU) are not all supported by judicial authority.
(iii) the proliferation of new business models such as advertising-funded or service-funded products, as well as cloud-based services, to support technology-intensive commercial activities.

2. *(i) Products incorporating patented technology are increasingly complex.* Products have become increasingly complex, incorporating multiple technologies covered by patents owned by many different companies. This trend gives rise to several consequences.

- First, it creates a risk that the cumulative amount of the royalties owed by the licensee to different patent holders may make the end product uneconomic (if patent owners ask for high royalties without consideration of other royalties due by the licensee).  

- Second, there is a greater risk of “hold-up”, *i.e.*, that a single patent owner can prevent the dissemination of a product by refusing to license (and perhaps enforcing this refusal through an injunction) or charging excessive royalties for their technology. At the same time, given the risks and costs of litigation, there is an increasing risk of “hold-out”, where companies use others’ IPRs without being properly licensed.

- Third, there is greater need for technology pools in order to resolve patent thickets, and therefore the legal issues associated with the creation and operation of such pools are now more important and more complex than previously.

- Fourth, both the products and their components are increasingly the subject of standardisation agreements, which raise legal issues similar in some respects to those raised by patent pools.

- Fifth, because of the increasing importance of multilateral licensing arrangements, the fact that the TTBER is limited to bilateral agreements makes it progressively less important and useful.

3. While important, none of these factors militate a change in the block exemption. Rules and self-assessment guidance concerning standard-setting and related agreements (which are mostly horizontal in nature) are already explicitly and implicitly covered by several different Commission documents, including

- (1) the Guidelines on Horizontal Cooperation Agreements ("Horizontal Agreements Guidelines")

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3 In addition to other efficiencies, patent pools generally help overcome the problem of excessive cumulative royalties (also referred to as “royalty stacking”) and should be encouraged.

4 Article 1(1) of the enabling regulation, Council Regulation 19/65/EEC of March 2, 1965 on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices, OJ 1965 36/533, empowers the Commission to apply Article 101(3) TFEU by regulation to technology transfer agreements involving two undertakings. The Commission therefore cannot legislate by block exemption in respect of multilateral technology transfer arrangements.

(2) the Block Exemption Regulation for Research & Development Agreements\(^6\); and

(3) the Block Exemption Regulation for Specialisation Agreements.\(^7\)

4. The Commission may withdraw the benefit of the TTBER if it finds that an exempted provision in a license, in the light of these factors, has effects that are incompatible with Article 101(3) TFEU.

5. (ii) Companies are increasingly making “strategic” use of patents. A second trend is that companies are increasingly acquiring and using patents for “strategic” ends. For example:

- Companies have sought to acquire substantial portfolios of patents for “offensive” and “defensive” purposes. The new owner can be a single manufacturer, or a group of companies set up to acquire the portfolio. In the former scenario, companies have acquired portfolios in order to build up an arsenal of patents to foreclose or tax rivals, which raises concerns where such acquisitions create or reinforce asymmetries in patent portfolio ownership. In the latter (“defensive”) scenario, patents are acquired to create balance, allowing the new owner, if sued for infringement of another manufacturer’s patents, a chance to counterclaim. Such creation of patent balance tends to be pro-competitive where it leads to royalty-free or low-running-royalty cross-licensing between producers, or a situation of mutual deterrence, which in turn allows freedom of innovation, design and production. Such acquisitions of patents will generally be an issue for merger control (and, in certain cases, for Article 102 TFEU), and while they are an important recent market trend, this development do not appear to call for changes in the TTBER or Guidelines. Where the acquisitions lead to new acquirer exceeding market share thresholds, the TTBER ceases to apply.

- Another strategy is for a company to spin off small portions of its patent portfolio to one or more entities that are not manufacturing (and that therefore cannot be sued for infringement, and do not need a cross-license, called “patent assertion entities” or PAEs). The threat of such a spin-off (and the creation of multiple licensors asking multiple royalties) is sometimes used to force prospective licensees into signing unfavourable cross-license agreement. When spin-offs to PAEs do in fact occur, the effect is likely to increase overall royalty stacks for the seller’s rivals. As explained above, such assignments are a matter of merger control and Article 102 TFEU (although they often escape scrutiny because the assignments do not reach the thresholds for merger control). Where there is, however, (a) a contractual arrangement or concerted practice requiring or encouraging the acquirer to target competitors of the transferor or (b) an agreement or concerted practice of sharing the proceeds,\(^8\) issues arise under Articles 101 and 102 TFEU, and it is appropriate to consider including guidance on such arrangements in the Guidelines. This is discussed in more detail in section 2 below.

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\(^8\) This strategy, sometimes called “privateering”, is discussed in more detail below.
6. **(iii) Proprietary technology licensing is no longer the only basis of innovation.** Software licensing may be replaced by service agreements (as in, for instance, Software as a Service agreements for the provision of cloud computing services). Since such service agreements do not raise issues, and are not strictly speaking “technology transfer” agreements. There is therefore no need to modify the Block Exemption Regulation or Guidelines.

7. Another growing trend is that technology may be licensed royalty-free, and remunerated by the display of advertising, by payment for add-on services provided by the technology providers (as in open source licenses), or by payment for upgrades. Free business models often involve two-sided or multi-sided markets, and the provision of free services generate significant consumer welfare. Since these agreements in many cases involve end-users, and in any event the provisions enabling viable open source licensing either need no exemption or are already covered by the block exemption, no new changes are needed to accommodate these developments.

2. **Privateering under Article 101 TFEU**

1. In principle, as explained, agreements for the assignment or transfer of intellectual property rights are not governed by Article 101, and therefore require no exemption under Article 101(3), even if the transfer has negative effects on competition.\(^9\) A bare assignment of patents will generally be an issue for merger control (and, in certain cases, for Article 102 TFEU). However, an ongoing agreement (or concerted practice) between the assignor and acquiring PAE that the assigned patents will be used offensively against the assignor’s rivals, or revenue sharing and milestone arrangements between the assignor and the acquiring PAE that have the effect of encouraging the PAE to target rivals, qualify as agreements that are part of a transfer of technology to which Article 101 TFEU may apply. Such “privateering” agreements are a relatively new phenomenon, but it is already clear that problems arise, which the Guidelines should address.\(^10\) The US Federal Trade Commission is considering a study of PAE activity,\(^11\) and the Commission should consider this too in the context of the Guidelines and/or a sector inquiry.

\(^9\) See, e.g., Technology Transfer Guidelines, para. 49. Note that an assignment and/or any privateering agreement (or concerted practice) will not benefit from the TTBER, which is limited to technology transfer agreements between a licensor and a licensee (recital 6).


2. Absent an existing license,\textsuperscript{12} patent owners often reach an informal understanding or refrain from seeking injunctions or royalties against each other, for fear that the other party will retaliate. The effect of such mutual restraint or deterrence is to keep marginal costs low and preserving design and production freedom for both parties. The spin-off of patents or disaggregation of such a portfolio, however, disrupts this equilibrium, even if each acquiring PAE seeks a allegedly-reasonable royalty. Especially where technically or commercially essential patents are distributed among several acquiring PAEs, each can and has the incentive to charge a monopoly rent (assuming the patents, or the sub-portfolios as a whole, are essential). The result is a royalty stack above the monopoly level. This is referred to in economics as the problem of “Cournot complements”, which recognizes that monopolist producers of complementary products (or, in the present context, holders of patents) may extract monopoly rents, thus reducing output below the level that a single monopolist (or the holder of an integrated patent portfolio) would have produced.\textsuperscript{13}

3. An assignor who uses this patent portfolio disaggregation strategy gets the best of both worlds, compared to a patentee using the patents offensively directly against its rivals: (i) the assignor can continue itself to produce royalty-free, so long as the threat of its retained patents (and the ability to sue on those) is enough to deter the target from countersuing the assignor, while (ii) the PAE agrees (or has the incentives) to use the assigned patents aggressively against the assignor’s competitors, excluding them from the market altogether, or (more likely) raising their costs and thus diminishing their competitiveness. Since the PAE is not a manufacturing entity, it is immune from countersuit for patent infringement.

4. Disintegration of patent portfolios in the context of a privateering strategy therefore harms consumers by raising costs, reducing output, potentially limiting consumer choice and hampering innovation. It is sometimes argued in response by PAE supporters that targets may step up innovation in order to design around the patents owned by the PAEs and the assignor, but (a) that type of defensive R&D to protect sunk investments distracts from new product development and may lead to less innovation than alternative forms of R&D, and (b) the strategy in any event does not work if the patents are technically or commercially

\textsuperscript{12} Under patent law, generally, if the owner grants a license and later sells the patent, the buyer takes the patent subject to the existing license. But often, no license exists, or patents are covered only by a FRAND obligation. If the owner is a party to an agreement to adopt a standard, and therefore is bound by a FRAND obligation, the buyer must take the patents subject to the obligation to grant licenses on FRAND terms. See Horizontal Agreements Guidelines, para. 285. The Horizontal Guidelines unfortunately said nothing about the effects, under competition law, if an owner fails to impose an appropriate obligation on the new owner, or if the new owner fails to comply with its obligation. The Guidelines do not say what the position is, under competition law, if the standard-setting agreement does not impose any such obligation on the original owners of the patents. The Commission is, no doubt, aware that few standard-setting agreements impose any such requirements. See ETSI Guide on Intellectual Property Rights in para. 4.2, as amended in November 2011, which includes a mere statement of intent (“it is desirable that, to the maximum extent possible in each legal jurisdiction, when ownership of an essential IPR is transferred, any applicable licensing undertaking should automatically transfer to the new owner. Some legal jurisdictions may already provide for achieving of this result.”). Enforcement under Article 102 TFEU is difficult. See European Commission, MEMO/09/549, “Antitrust: Commission Welcomes IPCom’s Public FRAND declaration”, December 10, 2009. Most importantly, enforcement does not, however, prevent the multiple monopoly rent problem, explained below, resulting from portfolio disaggregation.

essential, or the portfolios (equivalent to “patent thickets”) are so large as to be effectively unavoidable.

5. That appears to leave only countervailing strategy, which is for the target in turn to disaggregate its patent portfolio and arrange for PAEs to sue the firm that started the privateering, so as to create a royalty revenue stream to compensate at least in part for the royalties due. This results in wasteful litigation and compounds the Cournot problem. Since the PAEs retain part of the royalties, and running royalties are paid (constituting marginal costs for both parties), such a new equilibrium will be less efficient and raise consumer prices in comparison with the original situation of mutual deterrence.

6. A privateering agreement or concerted practice that targets rivals of the assignor cannot fulfill the requirements of Article 101(3) TFEU. The assignment of patents to the PAE is not aimed at improving the production or distribution of goods or to promoting technical or economic progress. Indeed, its objective or effect is precisely the reverse: assignment of the technology to a non-practising entity, which is invulnerable to countersuit, is likely to hamper the production of goods by the assignor’s rivals and/or raise those rivals’ costs, diminishing competition. There is no intention, or even possibility, for the PAE to use the assigned technology to produce goods. Nor does disaggregation of patent portfolios through sale to PAEs create efficiency in licensing – as opposed to patent aggregation, which may (but does not always) entail efficiencies by reducing multiple monopoly rents and reducing transaction costs by offering a one-stop-shop, privateering has the opposite effect.

7. We recommend that the Guidelines explain that

- (1) an assignee remains bound by any FRAND obligations of the assignor;
- (2) the sale of a portfolio of patents to several assignees is not permitted to lead to the aggregate royalty rate exceeding the FRAND rate for the entire portfolio;
- (3) any agreement intended to circumvent these requirements and any “privateering” arrangement in the context of the assignment of patents – arrangements to target the assignor’s rivals, or revenue sharing, shareholding or milestone arrangements between the assignor and the acquiring PAE that have the effect of encouraging the PAE to target rivals – may be contrary to Article 101 TFEU, void under Article 101(2) TFEU, and undeserving of exemption under Article 101(3) TFEU;14
- (4) unlawful privateering need not be effected through a formal agreement; it may also result from an unlawful concerted practice between the assignor and the PAE; and
- (5) it will be a matter for national law whether the invalidation of the “privateering” agreement under Article 101 TFEU also affects the agreement to assign the patents.

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14 Joined cases 56 and 58/64 Consten and Grundig v Commission [1966] ECR 299 is an example of a case in which Article 101 TFEU (as it now is) prevented industrial property rights being used to produce anticompetitive results.
8. If the Commission considers that there is insufficient experience with PAEs and privateering arrangements, we recommend that the Commission conduct a proper sector inquiry into these practices.

II. **DRAFT REGULATION ON TECHNOLOGY TRANSFER AGREEMENTS**

**Licenses of software copyrights for reproduction/distribution**

9. Recital (7) now says that the Regulation does not apply to licensing agreements for the purpose of “mere reproduction and distribution” of software copyright protected works. The Draft Technology Transfer Guidelines explain that “the production of copies for resale[] is not considered to be ‘production’ within the meaning of the TTBER,” which covers “only . . . licensing for the purposes of the production of contract products.” We do not agree with this clarification. Reproduction of a software copyright protected work is a restricted act under copyright. Moreover, the reproduction license in itself does not result in exhaustion (at least not until the first sale of a copy of the licensed software). We therefore believe that a software reproduction license should continue to be covered by the Technology Transfer Block Exemption.

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**Recitals:** The Regulation is not to apply to licences “in the context of” R&D agreements, or specialisation agreements, or agreements for distribution of software or to agreements to set up patent pools, or to licences by pools (recital 7, and Article 9). The Regulation will apply to provisions in agreements when the provisions are not the primary object of the agreement, but are directly related to the application of the technology being licensed (recital 9). If the applicable market share threshold is exceeded in one or more of several product or technology markets, the exemption will not apply to those markets, but apparently will apply to the others (recital 12). If a national competition authority withdraws the benefit of the Regulation, there is no longer an express requirement that the withdrawal must not prejudice the uniform of EU competition rules or the full effect of measures implementing them (recital 17: compare recital 17 in Reg. 772/2004).

**Articles:** There is a new definition of “technology” (Article 1(1)(b)). This leads to corresponding changes in later clauses. The definition of “technology transfer agreement” is slightly modified (Article 1(1)(c)). It has not been thought necessary to define “patents.” In the definition of “competing undertakings” the previous comment that relevant markets are for substitutable or interchangeable products has been omitted. The definition of “selective distribution system” applies when the licensor undertakes to licence “directly or indirectly” only to selected licensees and the licensees undertake not to sell to unauthorised distributors “within the territory reserved by the licensor to operate that system.” (Article 1(o)). “Exclusive licence” is defined as one under which only the-licensee is permitted to produce on the basis of the licensed technology, in general or for a particular use or in a particular territory (Article 1(p)). There is no longer a definition of “severable” technology ((previously Article 1(n)). The exemption is narrowed from agreements “permitting” production of contract products to exempt only agreements “for the purpose of the production of contract products” (Article 2(1)). A new provision says that where the parties are not competing undertakings but the licensee owns a technology that is used only for in-house production and which is substitutable for the licensed technology, the exemption applies only if the market share threshold is not exceeded in any relevant market (Article 3(2)). The definition of market share (previously in Article 3(3)) has been moved to Article 8(d) and slightly modified. The provision that treats undertakings as non-competing even if they become competitors after the agreement is signed (Article 4(3)) says that a “material amendment” (which ends the concession) includes a new agreement concerning competing technologies that can be used to produce products competing with the original contract products. Restrictions now no longer exempted will include obligations to assign rights (as well as exclusive licences) (Article 5(1)(a)). These changes do not seem to be significant. If the Commission considers them to be significant, the reasons should be explained in the Communication.

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15 Draft Technology Transfer Guidelines, para. 52
Other intellectual property rights

10. As noted in the 2003 Comments, the Regulation should apply to as many kinds of intellectual property rights as possible, including *sui generis* database rights, merchandise agreements (and copyright and trademark licenses for production purposes), and non-software copyright, as well as any related intellectual property rights used in the production of goods or services. Such licenses have less effect on competition than patent licenses where, even when they are exclusive, competitors can still sell products with the same functions. Additionally, the rationale for including them (*i.e.*, such licenses enable licensees to provide service or products to consumers) is the same as for other technology transfer agreements. In practice, the Regulation is often used as a guideline for assessing licenses of a broad array of intellectual property rights, including those not covered by it.\(^{17}\) Also, licenses are often mixed and it is difficult, if not impossible, to determine which intellectual property rights are the main subject of the agreement and which are merely ancillary. We recommend that the Regulation should apply to all licenses for production of goods or services, with the exception of online content distribution licenses and broadcasting licenses, which raise entirely different issues and need to be treated separately. Article 1(1)(b) of the Draft Regulation should be modified accordingly.

11. It would be useful to confirm that the Regulation applies to licenses granted for the purposes of franchising arrangements.

Ancillary provisions

12. Currently, provisions in technology transfer agreements relating to the purchase of products by the licensee and/or relating to the licensing of other types of intellectual property (such as trademarks) are only covered by Regulation 772/2004 to the extent that such provisions do not “constitute the primary object of the agreements, but are directly related to the production of the contract products” (Regulation 772/2004, Recital 9 and Article 1(b)). In practice the Commission has interpreted this test as meaning that the clauses at issue could not benefit from the protection of Regulation 772/2004 where the value of those other activities exceeded the value of the licensed technology.\(^{18}\) The availability of the block exemption might therefore differ *vis-à-vis* two (otherwise identical) licensing agreements that differ only in relation to the value of the distributed products to which the licensed technology relates. We agree this seems unsatisfactory.

13. Paragraph 1(c) of the Draft Regulation provides that the TTBER may apply to these ancillary provisions to the extent that such provisions “are directly and exclusively related to the production of the contract products”. This applies even if the provisions relating to the purchase of products or the licensing of other types of intellectual property are of primary importance. The Commission has explained that this “directly and exclusively related” test is different from the monetary value test. The new test has the potential to better reflect the commercial reality of the licensing arrangements concerned, and does not depend on factors as to which inadequate information is available, or that

\(^{17}\) See Draft Technology Transfer Guidelines, para. 52: “Although the TTBER does not cover copyright other than software copyright, the Commission will as a general rule apply the principles set out in the TTBER and these guidelines when assessing such licensing of copyright under Article 101.”

\(^{18}\) Technology Transfer Guidelines, para. 49.
may change over time. We recommend that the Commission provide additional illustrative examples in paragraph 50 of the Draft Technology Transfer Guidelines in order to facilitate self-assessment by businesses.

**Maximum resale prices**

14. Article 4(1)(a) of the Draft Regulation bans fixed resale prices between competitors, including not only minimum resale price and maximum rebate arrangements, but also maximum resale price clauses. The latter does not seem justified. The licensor may have an interest in ensuring that the licensee does not by overcharging deprive the licensor of some of the benefit of the license. This may be particularly important for a licensor, for instance, in connection with the introduction of a new product that may benefit from reputational or network effects, or where the licensee’s incentives are misaligned with those of the licensor (e.g., where the licensee wants to use the licensed technology for high-priced low-volume products, while using its own or some other technology for high-volume low-priced products, while the licensor wants to maximize output of the licensed products). Blacklisting maximum resale clauses is therefore not appropriate.

15. There could be a concern that maximum resale prices could in some cases restrict the licensee’s incentive to invest in adding value to the product (important in the case of complex, multi-function products where the licensee cannot charge separately for the added value) or restrict investment in related services. This should not be dealt with under Article 4 by blacklisting maximum resale price provisions, but by “grey-listing” maximum retail price maintenance and thus requiring a specific analysis under Article 101(3) TFEU and the guidelines.

**Territorial restrictions – “reservation of rights” clauses**

16. Articles 4(1)(c) (ii), (iv) and (v) of the Draft Regulation combine territorial restrictions with other kinds of restrictions (customer groups). This is confusing because it suggests that a license for a limited territory needs an exemption under Article 101(3) TFEU, and that the block exemption is limited to “exclusive” licenses. But a licensee never has the right to exploit the licensed technology outside the territory for which the patent or copyright license is granted. A license that is given for the area to which the patent or copyright applies (usually a Member State) does not involve a restriction of competition. Even for convenience in drafting, the Commission should not appear to be making this mistake. A corresponding point arises in Article 4(2)(b)(i) of the Draft Regulation.

17. The Guidelines (and ideally the block exemption) should therefore clarify that Article 101(1) TFEU does not prohibit a clause limiting the scope of the license to one or more Member States, and reserving the licensor’s rights to invoke its intellectual property rights outside the licensed territory to the fullest extent allowed by the law.\(^{19}\)

**Restrictions on passive sales by the licensee**

18. The Commission proposes to remove the safe harbor for passive sales restrictions protecting a licensee from passive sales from other licensees (that do not compete with

\(^{19}\) Such a clause would require the licensor to rely on and invoke its IPRs, and would not allow the licensor to rely on potentially more easily enforced contract law.
the licensor) into its territory during the first two years of an agreement. We consider this change unnecessary and are concerned that it might act as a disincentive to the dissemination of new technologies. It is also inconsistent with the principle (discussed above) that a patent or copyright licensee has no right to engage in exploitation outside the licensed territory. The following considerations bear mention:

- The dissemination of technology requires a certain protection of the licensee’s investments that are often considerable and sunk costs. Moreover, a license in itself does not result in exhaustion (at least not until the first sale of the licensed product). In these regards, technology transfers may differ from the distribution of goods and thus an analogy with the Vertical Agreements Block Exemption – where passive sales restrictions are treated as hardcore restraints under any circumstances – is not pertinent.

- The Commission itself appears to recognize that such clauses – that would now be treated as hardcore restraints – typically carry only limited risks of competitive harm. For example, the Commission clarifies that, “where substantial investments by the licensee to start up and develop a new market are necessary,” such agreements “generally fall outside Article 101(1) for a period of up to two years.”

- The practical value of block exemptions lies in the legal certainty they create, and such goal is undermined by a change from safe harbour to an assessment under Article 101(3) TFEU.

Against this backdrop, the proposed change should be abandoned and Article 4(2)(b)(ii) TTBER left unchanged.

**Allocation of markets and field of use clauses where licensee continues use of its pre-existing technology**

20. Article 4(1)(c)(ii) of the Draft Regulation allows bans between competitors on use of the licensed technology in specified fields of use, product markets, or territories, but only in non-reciprocal agreements. But the licensee is free to continue to use its own technology to compete with the licensor, and might well do so. If it does, the net effect of the license is procompetitive even if the scope of the licence is limited. A licence, even if limited in scope, is often better than no license at all. Accordingly, bans between competitors on use of the licensed technology in specified fields of use, product markets, or territories should not be blacklisted as a “hard core restriction” in reciprocal agreements pursuant to which the licensee can continue to use its own technology (especially if the licensee in fact does continue to use its own technology). As noted in our comments to the 2003 consultation (the “2003 Comments”), a better approach would be to “greylist” such restraints in accordance with Article 5 TTBER. Under this approach, the restrictive

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20 Article 4(2)(b)(ii) TTBER.

21 See para. 116 of the Draft Technology Transfer Guidelines. It also should be noted that, as compared to its predecessor, the TTBER already reduced the duration of passive sales bans between non-competitors from five to two years.

clause would be subject to individual examination, while the rest of the license would continue to benefit from the TTBER.

21. Similarly, it is not clear what the justification would be for limiting Article 4(1)(c) (iv), (v), and (vii) of the Draft Regulation to non-reciprocal agreements, especially where the licensee can continue to use its own technology (and certainly if the licensee in fact does continue to use its own technology). These provisions should not be so limited.

22. It should also be made clear in the Guidelines that a license limited to production at one particular site is a legitimate field of use restriction, at least with respect to sensitive know-how, where the licensor’s market share in the downstream market for the product based on the IPR is below the 30% threshold.

Non-challenge and termination clauses23

23. One of the most important changes proposed in the Draft Regulation concerns the exclusion of direct and indirect non-challenge and termination clauses regarding EU intellectual property rights (except those relating solely to know-how) from the scope of the block exemption. The Draft Technology Transfer Guidelines explain: “The reason for excluding non-challenge [and termination] clauses . . . is the fact that licensees are normally in the best position to determine whether or not an intellectual property right is invalid. . . . [I]nvalid intellectual property rights should be eliminated” because they “stifle[] innovation rather than promoting it.”24 Under the proposed revisions, the exemption would be unavailable for any right for the licensor to terminate the agreement if the licensee challenges the validity of any of the rights which the licensor holds in the EU (Article 5(1)(b) of the Draft Regulation).

24. It is reasonable to say that a licence should not be terminated on the ground that the licensee challenges the validity of patents of the licensor that are not being licensed to it. But the proposed revised provision would not exempt a clause allowing a licensor to terminate the licence even if the licensee were to challenge the validity of the rights being licensed. This result would be unreasonable, even though it would still permit the licensor to show that the clause complies with Article 101(3) TFEU (because, for example, the licensor was a patent pool which verified, for its own purposes, the validity and essential nature of the patents in the pool). Permitting licensees to retain their licenses while simultaneously challenging the validity of the licensed patents would encourage costly, protracted, and ultimately inefficient patent litigation (a) when the licensor in good faith believes its IPRs to be valid, (b) when there are no objective indications that the IPRs are invalid, (c) when the validity was litigated and a settlement was reached, and especially (d) if their validity was litigated and the challenge failed entirely. It would hamper settlement of claims. The Guidelines appropriately explain that no-challenge clauses are inherent (reasonably necessary and directly related) to the settlement of good faith litigation (where the IPR owner reasonably believed its IPR to be valid) and that no-challenge clauses in settlement agreements therefore need no block exemption and no ad hoc analysis under Article 101(3) TFEU. This should not apply

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23 See supra on non-challenge clauses, para. 56 and infra, paras. 109-111 and 126.
24 Draft Technology Transfer Guidelines, paras. 123 and 125.
only in agreements to terminate litigation, but also in agreements where parties agree to settle to avoid litigation, i.e., agree to give up claims for infringement of the IPRs.

25. Moreover, the Commission’s proposal would inhibit licensing agreements that are fundamentally procompetitive because they enable the dissemination of technology. This is because IPR owners (especially SMEs) (a) often do not license, and (b) can neither be reasonably expected nor be forced to license, users with whom they are in litigation.

26. Prohibiting termination options in case of a challenge of licensed IPRs invites gaming by the user (especially large users facing smaller IPR owners), who would take a license simply to reduce the risk and downside of losing a challenge. This may be appropriate in case of IPRs covering essential or unavoidable technology (to which the block exemption in any event does not apply), but not in case of IPRs for which there are commercially viable substitutes. Moreover, denying block exemption for no-challenge clauses while recognizing their validity in settlement agreements could invite an IPR owner to seek a declaratory judgment against a user, which the parties can then settle pursuant to an agreement including a valid no-challenge clause. This is a waste of resources.

27. For these reasons, Article 5(1)(b) of the Draft Regulation should be revised to maintain the exemption for non-challenge and termination clauses in cases where a licensee challenges the validity of the IPRs licensed to it and where the IPR owner does not, and has no reason to know, that the IPR is invalid.

**Market share limits – technology centres**

28. In our experience, the market share ceilings provided for in the Regulation are difficult to apply, not least because in new markets precise market definition is often elusive and shares are often difficult to estimate. This concern seems to be widely held. More than three-quarters of the published replies to the first round of the present consultation identified practical difficulties in applying the market share thresholds (and agreed that these difficulties went beyond those inherent in a market share calculation).

29. Because the relevant market(s) may be difficult to define with confidence, or statistics may be unavailable, market share limits are often not useful. Indeed, they may be particularly meaningless if the technology is new, or rapidly changing. It would therefore be useful, as an alternative, to provide in the Regulation that a license agreement would be exempted if there are a sufficient number of (i) independently controlled substitutable technologies, or (ii) independent research centres carrying on similar research. This idea is already in the Technology Transfer Guidelines, but it could be incorporated into the Regulation as well, as an alternative to market share limits. (There is a similar provision in the US Guidelines on Licensing of Intellectual Property, paragraph 4.3). (There is a similar provision in the US Guidelines on Licensing of Intellectual Property, paragraph 4.3).

30. The research centre approach has several important advantages. First, the approach is forward-looking, unlike the market share approach, which reflects past market positions and may not accurately represent the market power held or likely to be held by the parties.

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25 Para. 219 and following of the draft guidelines appear to be limited to this situation.
26 See Technology Transfer Guidelines, paras. 25 and 144.
to the license. The number of firms that currently sell products is less important than the number of firms that can in the future challenge the licensor’s position. Second, it is usually easier to identify competing research centres than to try to define relevant markets and estimate market shares when no real market may yet exist, where the application of the relevant technology is uncertain, and/or when present or past market share data is unavailable or unreliable. Market share limits have little meaning in the case of a genuinely new kind of product, but that is precisely the kind of situation in which the aim should be to encourage innovation, in particular as the parties are unlikely to be actual competitors in any real sense. Third, the technology centre approach would encourage parties to enter into non-exclusive licenses in order to benefit from the block exemption, thereby promoting the dissemination of technology. Fourth, the technology centre approach could spur market integration by providing an incentive for established technology companies to identify and invest in potentially competing technologies (because these competing technologies would be taken into account in the competitive assessment).

III. DRAFT COMMUNICATION ON TECHNOLOGY TRANSFER AGREEMENTS

Relationship with other block exemptions and guidance

31. Because technology can also be an element of other types of agreements, the Draft Technology Transfer Guidelines clarifies when each set of rules will apply in areas of potential overlap. Specifically:

- Where undertakings establish a production joint venture and license the joint venture to exploit technology for use in producing contract products, this license is subject to the Specialisation Agreements BER, rather than the TTBER. The Draft Technology Transfer Guidelines’ rules on technology pools will apply if the joint venture then licenses the technology to third parties because although the arrangement brings together the parties’ technologies, the licensing activity is not linked to production by the joint venture.

- Licensing between the parties and by the parties to a joint entity in the context of an R&D agreement is subject only to the R&D BER, not the TTBER. However, if technology developed under the R&D agreement is then licensed to third parties, this falls within the scope of the TTBER because third parties are not party to the R&D agreement.

32. However, the relationship between the Technology Transfer Guidelines and the Horizontal Agreements Guidelines are not fully explained and should be clarified because the two documents are not entirely consistent with one another. Presumably the Technology Transfer Guidelines, being most current, prevails over the Horizontal Agreement Guidelines, but that should be stated explicitly.

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28 We refer to it in the text as the Draft Technology Transfer Guidelines.
29 Draft Technology Transfer Guidelines, paras. 57-66.
30 Draft Technology Transfer Guidelines, para. 60.
31 Draft Technology Transfer Guidelines, para. 62.
Market definition

33. Paragraphs 19-26 of the Draft Technology Transfer Guidelines modify paragraphs 19-25 of the Technology Transfer Guidelines. Paragraph 25 omits a useful explanation in the former paragraph 23. This explanation begins after the reference to paragraph 70. It should be reinstated.

The distinction between competitors and non-competitors

34. The Guidelines acknowledge that in some cases involving “drastic” innovation, it may be possible to conclude that parties are non-competitors. However, if it is not obvious at the time of the conclusion of the agreement that the licensed technology has the effect of replacing the licensee’s technology (and other existing technologies) by making it obsolete or uncompetitive, the parties are to be regarded as competitors.

35. As noted in our 2003 Comments, the requirement to show that the breakthrough nature of the innovation is “obvious” ex ante is a very high burden of proof. It may discourage licensing. It is still our view, therefore, that as long as, at the time of signing the relevant licensing agreement, the parties have reasonable grounds to think that the technology is a “sweeping breakthrough”, a three-year grace period should apply, after which the final determination will be made. If, after this initial “commercial launch period”, it becomes clear that the new product is not capable of displacing the old technology, the rules on agreements between competitors would apply.

36. At the very least, if the parties are not certain and nevertheless include clauses that are block exempted only between non-competitors, and the parties’ view that the innovation is a breakthrough is later proved to have been correct, the block exemption provisions on clauses between non-competitors should be applied with retroactive effect to avoid any claims for damages during the period before the nature of the technology became clear.

The “safe harbour”

37. Paragraphs 67-82 modify and add substantially to paragraphs 65-72 of the Technology Transfer Guidelines.

Excluded restrictions – exclusive grant-backs

38. Paragraph 122 of the draft repeats inaccurate statements made in the existing paragraph 109. It reads in part: “A non-reciprocal grant back obligation may promote the dissemination of new technology by permitting the licensor to freely determine whether and to what extent to pass on its own improvements to its licensees. A feed-on clause may also promote the dissemination of technology because each licensee knows at the time of contracting that it will be on an equal footing with other licensees in terms of the technology on the basis of which it is producing”.

39. A non-reciprocal grant-back obligation may place the licensor in a privileged position, as it is the only company involved that has access to all the technologies, and it is in a position (subject to Article 102 TFEU) to withhold or to feed-on technology on a discriminatory basis, and in return for further payments. “Patent clearance”, by which

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32 Draft Technology Transfer Guidelines, para. 34.
one company gathers related patent rights, can give rise to or strengthen a dominant position. It may be appropriate to add a footnote stating that grant-back arrangements should not be used to distort competition downstream, in favour of the licensor’s downstream business or in favour of those companies that the licensor chooses to privilege, or from which it can extract extra payment, and that in such a case, the benefit from the block exemption may be withdrawn.

40. The second sentence is not fully accurate. Licensees do not know whether they will be on equal terms with other licensees unless the licensor has undertaken to licence all the technology that its licensees have granted back to it, and to do so on non-discriminatory terms. This is unusual, and certainly cannot be taken for granted.

Excluded restrictions – non-challenge clauses and defensive termination

41. As discussed, the proposed Article 5 of the Regulation would make an important change from Reg. 772/2004. The proposal would exclude from the block exemption clauses giving a right to terminate the agreement if the other party challenges the validity of any of the intellectual property rights (except knowhow) of the licensor in the EU, even the rights being licensed. Such a clause (“defensive termination”) would therefore need to be justified under Article 101(3) TFEU in every case.

42. As explained above, we do not recommend to implement the proposed change. We recognise, as do the Draft Technology Transfer Guidelines, that the interests of the licensor in not being forced to continue dealing with a licensee that challenges the very subject matter of the licence agreement must be balanced against the public interest in allowing patents to be challenged (Draft Technology Transfer Guidelines, paragraph 125). However, defensive termination clauses are a common feature of licensing arrangements, and may encourage settlement of disputes. We are not aware of any developments since 2004 that would justify altering this position. The current approach, whereby the Commission may withdraw the protection of the block exemption in respect of defensive termination clauses that produce effects incompatible with Article 101(3) TFEU (Article 6, TTBER) therefore seems preferable to the scenario envisaged under the Draft Technology Transfer Guidelines, in which the licensor would need to justify a defensive termination clause in every case.

43. We recommend that the Commission modify Article 5 of the TTBER to allow termination if a licensee challenges the validity of the patents licensed to it by the agreement in question and paragraph 125 of the Draft Technology Transfer Guidelines should be changed accordingly. (The same issue arises in paragraph 255, on patent pools, discussed below).

33 See supra, on non-challenge clauses, paras. 56, 80-82 and infra, para. 126.

34 Defensive termination clauses are a feature of several open source software licences (e.g., Apache Software Foundation; Mozilla Public Licence; Common Public License; Eclipse Public License).

35 The Statements of Objections against Samsung and Motorola in connection with standard essential patents concern analysis based on Article 102 TFEU, to which the block exemption does not apply.
Settlement Agreements

44. Paragraphs 219-27 of the Draft Technology Transfer Guidelines modify paragraphs 204-09 of the Technology Transfer Guidelines. We agree with the Commission’s statement that settlement agreements in the context of technology disputes are in principle a legitimate way to find a mutually acceptable compromise to a bona fide legal disagreement. As a preliminary remark, it is important to bear in mind that the patchwork of national litigation systems in the EEA significantly increases the complexity, costs, and uncertainty of patent litigation, which encourages the use of settlement agreements.36

45. There are two new paragraphs 223 and 227, both apparently prompted by the current Commission investigations of pharmaceutical settlement agreements as well as the AstraZeneca case.37 The Commission’s main concern appears to be that settlement agreements in the context of technology disputes (which often include a licensing arrangement) may maintain invalid patents. In particular, so-called “reverse payments” and “non-challenge” clauses in settlement agreements should, according to the Commission, attract antitrust scrutiny. We respectfully submit that there is no indication that reverse payments and/or non-challenge clauses would necessarily render an otherwise lawful settlement agreement unlawfully restrictive of competition:

- First, as long as the settlement agreement falls within the scope of the licensor’s patent and a genuine dispute exists about either the validity or the infringement of the patent, there is no reason for the settlement agreement to attract antitrust scrutiny at all. Indeed, a patent settlement agreement that is within the scope of the patent is simply a means to enforce the underlying patent rights. In addition, settlements to end a dispute are generally procompetitive because they end costly and uncertain patent litigation, allowing companies to focus their resources on innovating to the benefit of customers.

- Second, it should be recalled that patents, once granted, are in principle presumed to be valid.38 It remains unclear why the Commission suggests to use competition law “in the general public interest to remove invalid intellectual property rights as an unmerited barrier to innovation and economic activity.” There is no reason why a competition authority should second-guess the validity or assess the

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37 Case C-457-10 P, AstraZeneca AB and AstraZeneca plc v Commission, not yet published.

“merits” of a granted patent, since the European Patent Office (“EPO”) examines patent applications for patentability and provides for an opposition procedure, allowing third parties to challenge the patent. To the extent that the Commission suggests that antitrust scrutiny of settlement agreements is a means to assess the validity or the “merits” of the patent, it ignores the distinction between patent law and antitrust law.

- Third, any suggestion in paragraph 223 that “reverse payments” should particularly attract scrutiny from a competition law perspective lacks legal basis. In fact, the parties’ financial and/or commercial incentives to enter into a settlement agreement should not be relevant when assessing whether or not the agreement potentially unlawfully restricts competition. Indeed, the CJEU underlined that “as far as the existence of the infringement is concerned, it would not matter whether or not the conclusion of the agreement was in the commercial interests of [one of the parties].” The very nature of an agreement is the exchange of value between two or more parties, and the exact amount thereof reflects solely the parties’ respective bargaining positions.

- In addition, it may very well make economic sense for a patentee to engage in a reverse payment settlement, because litigation often presents significantly greater risks to the patentee than to the (future) licensee. This is because typically the investments undertaken by a (future) licensee in e.g., R&D are much lower than the investments undertaken by the patentee with respect to the disputed technology. Therefore, in litigation, there is significantly more at stake for the patentee than for the (future) licensee; the patentee might lose its IP protection and not be able to recoup its investments, whereas the (future) licensee might just lose an opportunity to start using or selling the disputed technology. This asymmetry of risk appears even when a patentee is confident in the validity and strength of its patent, as “[n]o one can be certain that he will prevail in a patent suit.” Thus, due to the asymmetries of risk, engaging in reserve payment settlements may make economic sense even if the patentee believes that it has a strong chance of prevailing in litigation.

- Fourth, the ambiguous language in paragraphs 223 and 227 suggests that settlement agreements including a reverse payment and/or a non-challenge clause would necessarily need to be litigated. Paragraph 223 states, in relevant part, that “[s]crutiny is necessary in particular if the licensor provides an inducement, financially or otherwise for the licensee to accept more restrictive settlement

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40 Joined cases C-403/04 P and C-405/04 P Sumitomo Metal Industries Ltd and Nippon Steel Corp. v Commission [2007] E.C.R. I-729, para. 44. Furthermore “not every agreement between undertakings ... which restricts the freedom of action of the parties or of one of them necessarily falls within the ambit of the prohibition laid down in Article [101(1) TFEU],” Case T-99/04 AC-Treuhand AG v Commission [2008] E.C.R. II-1501, para. 126.
42 See e.g., Valley Drug Co. v. Geneva Pharmaceuticals, Inc., 344 F.3d 1294, 1310 (11th Cir. 2003): “Given the asymmetries of risk and large profits at stake, even a patentee confident in the validity of its patent might pay a potential infringer a substantial sum in settlement.”
terms than would otherwise have been accepted based on the merits of the licensor’s technology.” Paragraph 227 says that a settlement may be restrictive “where the licensor knows or could reasonably be expected to know that the licensed technology does not meet the respective (sic) legal criteria to receive intellectual property protection.” (emphasis added). To the extent that this is the case, this suggestion is unworkable. Both paragraphs’ wording suggests that an unknown third party (a (patent) court, or maybe the Commission itself?) would have to determine how another court (or party) would have determined certain questions had they not been settled. In addition, there is no legal reason why the existence of court litigation should be a prerequisite for the legality of a settlement agreement. Indeed, the CJEU has held that settlement agreements are in principle “lawful and useful,” and that they can attract antitrust scrutiny only if the underlying dispute is a “sham.”

Fifth, paragraph 227 is appropriate only in cases of crystal clear and intentional provision of incorrect or misleading information. The language in this paragraph suggesting that settlements may be restrictive “where the licensor knows or could reasonably be expected to know that the licensed technology does not meet the respective (sic) legal criteria to receive intellectual property protection.” appears to seek to extrapolate the Commission’s experience in one isolated case to a broad statement of policy vis-à-vis all future cases. Such an approach can present significant legal risks and, indeed, prove altogether unwarranted and unworkable. Non-challenge clauses are usually necessary in settlement agreements. Without them, there may be no settlements at all, which would result in a continuous stream of costly and time- and resource-consuming litigation, and less incentives for licensors to continue innovating. We therefore respectfully submit that paragraph 209 of the existing Technology Transfer Guidelines are an appropriate and accurate reflection of practical realities, and the proposed revisions are unjustified.

**Technology pools**

46. Paragraphs 228-56 of the Draft Technology Transfer Guidelines are designed to replace paragraphs 210-35 of the Technology Transfer Guidelines. This is useful and important, because the Draft Regulation does not apply to pools, so the Draft Technology Transfer Guidelines provide the only guidance that is available. However, further guidance would be welcome.

47. Paragraph 229 usefully refers to standards as well as to pools. Paragraph 251 is important in this context.

48. Paragraph 230 says that pools composed “solely or predominantly of substitute technologies” amount to a price fixing cartel. However, the paragraph should also recognise that when, as is normal, a pool is composed primarily of technically essential

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and therefore non-substitutable technologies, the presence of a few non-SEPs, especially if they are “commercially essential”, does not prevent the pool from being procompetitive. Gilbert (2009) goes further and argues that the presence of at least one valid essential patent in a pool that contains substitute technologies can prevent it from being anticompetitive, and that this risk of over-inclusion is less than “the risk to competition from inadvertently excluding an essential patent”. Furthermore, Gilbert states that “it is important to keep this tradeoff in mind given that it can be difficult to determine ex ante whether an individual patent is a substitute or a complement for other patents in the pool.”

45. Richard Gilbert, The Essentiality Test for Patent Pools, Competition Policy Center, UC Berkeley (September 2009), pp. 16-20. Gilbert illustrates the theory with the following example: there is a patent X that is technically necessary to practice a technology (say, speech recognition). Patents Y1 and Y2 read on a desirable feature of the technology that is included in the standard, such as a music recognition function. Y1 and Y2 are perfect substitutes, and should therefore be excluded from the pool. However, if we take the premise that patent pools only cause harm if they include patents that can be used to make or sell products or processes that are substitutes for each other, it follows that Y1 and Y2 do not need to be excluded from a pool that also includes patent X. Although Y1 and Y2 are substitutes, they cannot be used to make or sell substitute products because any speech recognition product, whether or not it has music recognition capacity, must have a license to use patent X. Taking this further, suppose the price V1 is what consumers are willing to pay for a product that offers speech recognition, and V2>V1 for a product with music recognition as well. A pool with X, Y1 and Y2 can charge a royalty V2 for a license for speech and music recognition. However, a pool with X and Y1 that offers the same license for speech and music recognition can charge the same royalty V2. In both pools, the cost to consumers is the same, regardless of whether Y2 is in the pool or not.

46. Ibid., pp. 15.

47. Draft Technology Transfer Guidelines, para, 233.
52. Paragraph 244 lists seven conditions that, if they are all met, would cause the pool to fall outside Article 101(1) TFEU. It would be useful to say that it is not necessary to meet all seven conditions in order to fall outside Article 101(1) TFEU.

53. Paragraph 244(e) refers to the pooled technologies being licensed “on FRAND terms”, but this important point is not explained. It is referred to, again without explanation, in paragraph 251. This much too important a question to be passed over so quickly. A reference to the Horizontal Guidelines would appropriate.

54. Paragraphs 245-48 consider the assessment of agreements outside the “safe harbour” under paragraph 244. These paragraphs underestimate the benefits in various circumstances of including technologies that are not, or may not be, technically essential. Bekkers (2008) gives the simple example of the predictive text function in GSM phones, which facilitates the composition of short text messages. This is a feature that a substantial part of mobile phone buyers will want when choosing to purchase a phone. A manufacturer may therefore feel that they need to license this commercially essential or important patent, even though it is not part of the standard and therefore the patent in question is “non-essential”.

55. Paragraph 245-48 also disregard the practical difficulties of excluding from the pool technologies that have become non-essential, and the heavy consequences if patent-holders fail to do so. As the United States Court for the Federal Circuit stated in U.S. Philips Corp. v. ITC, “in a fast-developing field such as the one at issue in this case, it seems quite likely that questions will arise over time, such as what constitutes an 'essential' patent... To hold that a licensing agreement that satisfied the rule of reason when executed became unreasonable at some later point because of technological development would introduce substantial uncertainty into the market and displace settled commercial arrangements in favor of uncertainty that could only be resolved through expensive litigation." Paragraph 247(d) says that if the pool technology supports a de facto industry standard, the pool may foreclose new substitute technologies. In theory that might be so, but it seems more likely that either the standard would be modified to accept the new technology or that the parties would consider that the advantages of a single standard outweighed the possible advantage of offering alternative ways of complying with it.

56. Paragraph 251 of the Draft Technology Transfer Guidelines usefully recognises that agreements setting up standards, as well as agreements setting up pools, may involve agreements on the royalties to be charged. This is an important point that could usefully be discussed in a separate section on standards. At present the existing Technology Transfer Guidelines are not fully consistent with the Horizontal Agreements Guidelines, in the treatment of pools and standards.

57. Again, paragraph 251 mentions FRAND terms without discussing them. FRAND terms are mentioned in the Horizontal Agreements Guidelines.


49 U.S. Philips Corp. v. ITC, 424 F.3d 1179, 1196-98 (Fed. Cir. 2005).
58. Paragraph 255 modifies paragraph 229 of the existing Technology Transfer Guidelines, in connection with non-challenge clauses. The last sentence of the Draft Technology Transfer Guidelines read “....non-challenge clauses, including termination clauses, in a technology transfer agreement between the pool and third parties are likely to fall within Article 101(1)”. As discussed above, this is not so for licenses in settlement agreements. The Draft Technology Transfer Guidelines should add that in the case of a patent pool that is otherwise procompetitive, as most pools are, the procompetitive effects of the pool are likely to outweigh the possible objections to a non-challenge or defensive termination clause, in particular where (a) the parties to the pool have satisfied themselves, for their own purposes (including the sharing of royalties), that the patents in the pool are valid and essential, and (b) the possible invalidity of a subset of the pooled patents makes no difference in the royalty because other patents are still needed (and where recalculating the aggregate rate would in practice be burdensome and lead to arbitrary results). It certainly should be recognised clearly that non-challenge and defensive termination clauses are much more likely to be lawful under Article 101(3) TFEU in the context of an agreement involving a pool or a standard than they may be in other circumstances. The sentence gives the entirely incorrect impression that a non-challenge clause is more likely to be unlawful in the context of a pool than in other circumstances. 50 There could be no grounds for such a view, and the sentence would very seriously discourage participation in patent pools, which in general are undoubtedly procompetitive for well-known reasons which the Commission should not appear to question.

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50 See supra, on non-challenge clauses, paras. 56, 80-82 and 109-111.