
Market Share Thresholds and Legal Certainty in the Draft Revision of the EU Technology Transfer Block Exemption

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Abstract

In this paper, the authors analyze the proposed amendments contained in the draft new block exemption regulation on technology transfer agreements in comparison with the currently applicable Commission Regulation (EU) No 316/2014. Particular attention is devoted to the market share thresholds applicable to the contracting parties and to the extended transitional (“grace”) period.

The methodology is based on a critical analysis of the proposed normative solutions and a comparative assessment vis-à-vis the existing regulatory framework and the relevant doctrine in the field of technology transfer and EU competition law. The findings indicate that the retention of the nominal market share thresholds limits the practical scope of application of the block exemption and increases reliance on self-assessment under Article 101 TFEU. Conversely, the extension of the grace period enhances the stability of the exemption’s application in situations of temporary market fluctuations.

Keywords: TTBER 2025; technology transfer; market share thresholds; block exemption; grace period; Article 101(3) TFEU

Introduction

Commission Regulation (EU) No 316/2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements (Regulation 316/2014) constitutes a key instrument of European Union competition law in the field of licensing of intellectual property rights. By establishing a “safe harbour” system, the Regulation enables certain categories of technology transfer agreements, subject to the prescribed conditions, to benefit from an exemption from the prohibition of restrictive agreements laid down in Article 101(1) of the Treaty on the Functioning of the European Union (TFEU, 2012).

After more than ten years of application of Regulation 316/2014, the European Commission (2025) adopted Communication C/2025/6189 approving the draft Commission Regulation on the application of Article 101(3) TFEU to categories of technology transfer agreements (hereinafter: Draft TTBER 2025) and the draft Commission Guidelines on the application of Article 101 TFEU to technology transfer agreements (hereinafter: Draft Guidelines 2025).

The revision is motivated by the need to adapt the existing framework to developments in technology markets, which are characterized by rapid technological change, increased contractual complexity, and heightened economic interdependence, as well as by the need to ensure greater consistency with the case law of the Court of Justice of the European Union.

Although Draft TTBER 2025 does not introduce radical structural changes compared to Regulation 316/2014, certain amendments have significant practical implications. The nominal market share thresholds applicable to the contracting parties, as a key condition for the application of the block exemption, remain formally unchanged. However, more precise rules concerning their calculation are

introduced, together with an extension of the grace period from two to three years (European Commission, 2025). These amendments are intended to enhance the legal certainty of contracting parties, particularly in circumstances of temporary market fluctuations and technological volatility.

This paper examines selected proposed amendments contained in Draft TTBER 2025 in comparison with Regulation 316/2014, with particular emphasis on the role of market share thresholds as a condition for the application of the block exemption. The analysis focuses on issues relating to the determination of market shares, the distinction between horizontal and vertical licensing agreements, and the legal and economic implications of the extended grace period. The aim is to assess whether the proposed solutions contribute to achieving a more appropriate balance between legal certainty and flexibility in the application of Article 101(3) TFEU to technology transfer agreements. . In this context, the central question addressed in this paper is whether the market share thresholds retained in Draft TTBER 2025 adequately reflect the economic realities of technology markets and ensure an appropriate scope of application of the block exemption.

The analysis builds upon earlier research conducted in the field of licensing agreements in EU competition law, including the doctoral research of one of the authors, while focusing specifically on the proposed amendments introduced in Draft TTBER 2025.

Market Share Thresholds in the Draft Revision of the Technology Transfer Block Exemption

A market share may be defined as the proportion of a producer's supply or sales of a given product in relation to the total supply or sales of that product on the relevant market (Marković-Bajalović, 2000, p. 98). For that reason, market shares are typically expressed as percentages. The level of market shares held by the contracting parties constitutes one of the key instruments for assessing whether a concluded technology transfer agreement may produce appreciable restrictive effects on competition in the relevant market. Consequently, the availability of the block exemption from the prohibition laid down in Article 101(1) of the Treaty on the Functioning of the European Union (TFEU, 2012) is conditioned upon the market shares of the contracting parties on the relevant market. Draft TTBER 2025 retains this concept as the central criterion for the application of the "safe harbour," thereby confirming the continuity of the approach established under Regulation 316/2014.

The introduction of market share thresholds into the block exemption regime marked a shift away from the earlier formalistic approach, which failed to sufficiently take into account economic realities and the actual market power of the contracting parties (Vasić, 2024, pp. 124–125).¹ Although the historical development of this solution is important for understanding the evolution of competition policy in the field of technology transfer, the present analysis focuses on the applicable rules and their reflection in Draft TTBER 2025.

Draft TTBER 2025 retains the concept of market share thresholds as the primary condition for the application of the block exemption. The prescribed threshold levels under Regulation 316/2014 are based on the assumption that licensing agreements concluded between undertakings holding high market

¹ Earlier technology transfer block exemption regulations were based on a predominantly formalistic approach, relying on predefined lists of permitted and prohibited clauses. Such an approach did not sufficiently take into account the economic realities of the market or the actual market power of the contracting parties (Bechtold, Bosch, & Brinker, 2014, pp. 571–572). The introduction of market share thresholds into the block exemption regime therefore marked a shift towards a more economically oriented assessment of licensing agreements.

shares have a greater potential to restrict competition on the relevant market (Lugard, 2014, p. 48). Pursuant to Article 3 of Regulation 316/2014 (2014), technology transfer agreements may benefit from the block exemption provided that the market shares of the contracting parties on the relevant market do not exceed the prescribed limits. In this respect, Draft TTBER 2025 (European Commission, 2025), following the structure of Regulation 316/2014, draws a clear distinction between agreements concluded between competitors and those concluded between undertakings that are not competitors on the market.

Where the contracting parties are competitors, the block exemption applies on condition that their combined market share does not exceed 20% on the relevant market or markets. This threshold applies in situations where the parties are actual or potential competitors on the product market and/or actual competitors on the technology market, whereas potential competition on the technology market is not taken into account (European Commission, 2025, para. 106). Draft TTBER 2025 retains the nominal value of this threshold and provides that the exemption continues to apply to agreements between competitors provided that their combined market share does not exceed 20% on the relevant market or markets (European Commission, 2025).

However, as under Regulation 316/2014, Draft TTBER 2025 leaves unresolved the interpretation of the wording “on the relevant market or markets.” The question arises whether the block exemption is excluded where the prescribed threshold is exceeded on any relevant market, or whether it may still apply on the market where the threshold has not been exceeded. The prevailing view in the literature holds that exceeding the combined market share threshold of 20% on any relevant market—whether the product market or the technology market—precludes the application of the block exemption (Pellmann, 2022, p. 150; Bechtold et al., 2014, p. 544; Busche & Röhling, 2016, p. 1275; Berg & Mäsch, 2018, p. 2125). This interpretation is confirmed in the Guidelines accompanying Regulation 316/2014, which clarify that the safe harbour applies only where the combined market share of the contracting parties does not exceed the prescribed threshold on any relevant market (European Commission, 2014, para. 82). Draft TTBER 2025 does not resolve this ambiguity at the normative level, and the same approach is reflected in the accompanying 2025 Guidelines. In particular, the 2025 Guidelines clarify that the exemption under Article 2 of Draft TTBER 2025 applies to technology transfer agreements between competing undertakings only where their combined market share does not exceed 20% on any relevant market (European Commission, 2025, para. 106). In our view, this solution in Draft TTBER 2025 does not contribute to legal certainty. The revision of Regulation 316/2014 presented an opportunity for the Commission to take account of doctrinal views on this issue and to formulate Article 3(1) of Draft TTBER 2025 in clearer terms, explicitly providing that where the contracting parties are competitors, the exemption applies only if their combined market share does not exceed 20% on any relevant market.

Where the contracting parties are not competitors, Draft TTBER 2025 provides that the block exemption applies on condition that the market share of each of the parties does not exceed 30% on the relevant market or markets (European Commission, 2025). Draft TTBER 2025 retains the same wording as Regulation 316/2014 and does not introduce substantive changes in this respect. It follows from this provision that there is no aggregation of market shares, unlike in situations where the contracting parties are competitors. The reason lies in the absence of a competitive relationship between the parties. For example, one party may hold a market share on the relevant technology market, while the other may hold a market share on the relevant product market, provided that the individual market shares of each party

do not exceed 30%. German doctrine emphasizes that, in agreements concluded between undertakings that are not competitors, the application of market share thresholds is based on an individual assessment of the position of each contracting party on the relevant market (Busche & Röhling, 2016, p. 1275; Bechtold et al., 2014, p. 544).

Article 3(2) of Draft TTBER 2025 employs the wording “on the relevant technology and product markets” (European Commission, 2025). In our view, this indicates that, as in the case of horizontal technology transfer agreements, the exemption under Article 2 of Draft TTBER 2025 cannot apply where the market share of any contracting party in a vertical technology transfer agreement exceeds the 30% threshold, whether on the relevant product market or on the relevant technology market. Accordingly, the exemption under Article 2 of Draft TTBER 2025 cannot be applied even on a market where the relevant market share threshold has not been exceeded (Bechtold et al., 2014, p. 544).

The Adequacy of Market Share Threshold Levels

Draft TTBER 2025 retains the nominal market share thresholds of 20% for competitors and 30% for non-competitors, thereby maintaining continuity with the approach established under the previous regulation. However, substantial criticism persists regarding the relevance and practical operability of these thresholds. Academic literature predominantly argues that the currently proposed thresholds are relatively low and may easily be exceeded in practice, particularly in the case of horizontal licensing agreements where the parties’ market shares are cumulative (Dolmans & Piilola, 2003, pp. 551–552; Marquis, 2007, pp. 271-272). Such a situation considerably limits the practical scope of the block exemption. Where the parties’ market shares exceed the thresholds set out in Article 3 Draft TTBER 2025, they are required to conduct a self-assessment of the agreement pursuant to Article 101(3) TFEU and in accordance with the analytical framework provided in the 2025 Guidelines.

Relatively low market share thresholds under the block exemption regime for technology transfer agreements significantly narrow its practical scope when viewed in light of the *de minimis* rule. According to the Commission Notice on agreements of minor importance, Article 101(1) TFEU does not apply to horizontal agreements where the parties’ combined market share does not exceed 10%, nor to vertical agreements where the market share of each party does not exceed 15%. Viewed in this context, the practical relevance of the block exemption under Draft TTBER 2025 is confined to a relatively narrow category of agreements (Bishop, 2007, p. 35; Pellmann, 2022, p. 138). In practice, only technology transfer agreements concluded between competitors whose combined market share lies between 10% and 20% may derive tangible benefit from the block exemption, given that agreements below the 10% threshold are already considered agreements of minor importance and fall outside the scope of Article 101(1) TFEU. Consequently, undertakings with market shares exceeding 20% (or 30% in the case of non-competitors) are required to conduct an individual self-assessment pursuant to Article 101(3) TFEU, applying the analytical framework set out in the 2025 Guidelines.

Empirical analyses that would allow a reliable assessment of how many technology transfer agreements are capable of meeting such restrictive market share thresholds remain scarce (Bishop, 2007, p. 35). As a result, a considerable number of these agreements are likely, in practice, to fall outside the scope of the block exemption. This issue is particularly pronounced in the context of high-technology transfer agreements, where licensors may hold market shares of up to 100%, thereby automatically

excluding the possibility of benefiting from the block exemption (Bishop, 2007, p. 35). For instance, licensors may enjoy a full market share where the licensed subject matter constitutes a new technology that effectively creates a new market (Bechtold, Bosch, & Brinker, 2014, p. 573).

In our view, relatively low market share thresholds contribute to an increasing reliance on self-assessment in the context of technology transfer agreements. As a consequence, a progressively smaller number of licensing agreements may effectively benefit from the block exemption under Draft TTBER 2025. In such circumstances, the parties would be required to assess their agreements individually under Article 101(3) TFEU, guided by the principles set out in the TTBER Guidelines (Marquis, 2007, pp. 272-273).

Conversely, some authors consider the nominal thresholds proposed in Draft TTBER 2025 to be acceptable. They argue that there is no need to amend the market share thresholds laid down in Regulation 316/2014 and suggest that the European Commission should refrain from modifying them in the 2025 revision (Drexel, Conde Gallego, & Kim, 2025, p. 743). Exceeding these thresholds does not result in the automatic prohibition of the agreement; rather, it triggers the obligation to conduct a self-assessment. In such cases, the possibility remains that the agreement may satisfy the conditions for individual exemption under Article 101(3) TFEU, provided that it contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits and avoiding unnecessary restrictions of competition.

The “4+” Test as an Alternative Indicator

An argument supporting the view that the market share thresholds in Draft TTBER 2025 are set at an unduly restrictive level may be derived from the position expressed by the European Commission in the 2025 Guidelines in situations involving multiple independent technologies. The Commission takes the view that an agreement which does not contain hardcore restrictions is unlikely to fall within the scope of Article 101(1) TFEU where there are four or more independently controlled technologies, in addition to those controlled by the parties to the agreement, that may be substitutable for the licensed technology at a comparable cost to the user (European Commission, 2025, para. 181). In the literature, this approach is commonly referred to as the “4+ test” (Meier, 2021, p. 163). The existence of several independently controlled alternative technologies capable of substituting the licensed technology significantly reduces the likelihood of anti-competitive effects. Where, in addition to the technologies controlled by the contracting parties, at least four comparable technologies are present on the relevant market, the licensed technology may be considered to face sufficient competitive pressure. In such circumstances, the conclusion of a technology transfer agreement will, as a rule, not result in an appreciable distortion of the competitive market structure (Klawitter, 2015, p. 35).

Moreover, certain working drafts of Draft TTBER 2025 contemplated the possibility of replacing the “4+” rule with a “3+” rule. Although the 4+ rule may be regarded as an indirect mathematical indicator of a 20% market share threshold (in the case of agreements between competitors), the European Commission considered the option of relaxing this approach by introducing a “3+” test. In the literature, this proposal was assessed positively. Some commentators emphasized that there is room for greater flexibility in relation to the 4+ rule, given that market shares cannot always be regarded as particularly reliable indicators of market power in technology markets, which are often highly dynamic (Drexel, Conde Gallego, & Kim, 2025, p. 743). This concern is particularly relevant in relation to decentralized and

blockchain-based technologies, where traditional indicators of market power and regulatory control may prove less reliable, raising broader questions of legal certainty in innovation markets (Bjelajac & Bajac, 2022). Conversely, commentators have pointed out that the 4+ rule is not without its shortcomings. First, the requirement that at least four additional technologies be present on the market and capable of substituting the licensed technology may, in many instances, render the application of the block exemption practically unattainable. Moreover, the actual number of substitutable technologies may be difficult to determine in practice, as evidence of their existence is often incomplete, particularly where technologies are based primarily on know-how (Drexl, Conde Gallego, & Kim, 2025, p. 743).

In the literature, the 4+ rule has been described as a form of “second safe harbour” (Jones & Sufirin, 2016, p. 868). Some authors consider this solution to reflect the Commission’s awareness that the market share thresholds laid down in the TTBER are relatively restrictive in nature (Klawitter, 2015, pp. 35–36). The Commission has thus demonstrated a certain degree of flexibility, particularly in the context of dynamic markets such as technology markets, by accepting the number of alternative competing technologies as a supplementary indicator of market power. However, given that this approach is formulated in the Guidelines rather than in the block exemption regulation itself, its contribution to legal certainty may be questioned. The positions expressed in the Guidelines do not limit the power of the Court of Justice of the European Union to interpret Article 101 TFEU and the block exemption regulation independently, nor are they binding on national competition authorities (Vasić, 2024, p. 226).

Methodology for Determining Market Shares

The application of the block exemption under Article 3 Draft TTBER 2025 depends on the correct determination of the market shares of the contracting parties. Article 8 Draft TTBER 2025 lays down the rules for calculating market shares, both on the technology market and on the product market (European Commission, 2025, Art. 8).

The primary criterion for determining the market shares of the contracting parties is the value of sales on the relevant market. In technology transfer agreements, market shares are calculated on the basis of sales value data. Where such data are not available, estimates based on other reliable information, including sales volumes, may be used. Market shares are determined on the basis of data relating to the preceding calendar year, unless that year is not representative, in which case the market share is calculated as an average over the three preceding calendar years (European Commission, 2025, Art. 8(1)).

This solution constitutes one of the most significant innovations in Draft TTBER 2025. Regulation 316/2014 provides that market shares are determined exclusively on the basis of data relating to the preceding calendar year. This provision has been subject to criticism in the literature, as the calendar year often does not coincide with the financial year, potentially leading to inaccurate data being used for the calculation of market shares (Schröter et al., 2014, p. 742; Bechtold et al., 2014, p. 571). Determining market shares solely on the basis of a single year may fail to accurately reflect the actual market position of the parties, particularly in dynamic technology markets (Dolmans & Piilola, 2003, p. 552; Busche & Röhling, 2016, p. 1273). This concern is especially pronounced in cases involving newly introduced products (Busche & Röhling, 2016, p. 1263).

In our view, the proposed solution—by introducing temporal flexibility—enhances the representativeness of the data and reduces the risk of inaccurate results, particularly when determining

market shares in dynamic technology markets. Some commentators have emphasized that this approach constitutes a qualitative improvement over the one-year criterion of the previous regulation, as it allows for adaptation to sector-specific characteristics and enhances legal certainty for contracting parties (Drexel et al., 2025, p. 743).

The Extended Grace Period and Legal Certainty

The concept of a transitional period, known as a “grace period,” represents one of the key instruments of legal certainty within the block exemption regime for technology transfer agreements. Regulation 316/2014 provides that where the market share of the contracting parties under Article 3(1) or Article 3(2) of Regulation 316/2014 is initially not higher than 20% or 30%, respectively, but subsequently increases above those thresholds, the exemption under Article 2 of Regulation 316/2014 continues to apply for a period of two consecutive calendar years following the year in which the 20% or 30% threshold was first exceeded (Regulation 316/2014, Art. 8(1)(e)). This concerns situations in which the market shares of the contracting parties in the initial phase remain below the thresholds laid down in Article 3 of Regulation 316/2014, but over time, as a consequence of changes on the relevant market, those thresholds are exceeded. Such a solution was motivated by the need to provide legal certainty to contracting parties and to enable the continued use of the benefits of the block exemption in circumstances of short-term market fluctuations (Rab, 2014, p. 445).

The aforementioned grace period may be regarded as a compromise solution that allows technology transfer agreements which temporarily exceed the prescribed market share thresholds to retain their exempted status for a defined period of time. According to competition law theory, this constitutes a practical mechanism that protects contracting parties from the unexpected loss of the benefits of the block exemption as a result of temporary market fluctuations, particularly in dynamic and innovation-driven markets (Busche & Röhling, 2016, p. 1263-1264). The importance of this instrument is even greater in view of the fact that market shares in such markets may be subject to significant changes within short time intervals due to seasonal movements, technological cycles, or temporary fluctuations in demand.

Draft TTBER 2025 introduces a significant modification with regard to the grace period by extending the duration of the exemption from two to three consecutive calendar years following the year in which the market share was first exceeded (European Commission, 2025, Art. 8(1)(e)). This amendment represents one of the few material expansions of the scope of the block exemption in the proposal for the new regulation and aims to enhance the legal certainty of contracting parties. The extended period allows contracting parties to continue benefiting from Draft TTBER 2025 for a longer time even in cases where they temporarily exceed the prescribed thresholds, without the need to immediately resort to the self-assessment procedure under Article 101(3) TFEU.

In our view, *ratio* of the extended grace period lies in allowing contracting parties time to adapt to a new market situation and to avoid losing the exemption due to temporary and short-term deviations. Through this approach, the Commission acknowledges the dynamic nature of technology markets and the need for greater flexibility in the application of the regulatory framework, while preserving the basic structure of the block exemption. Although the extended period does not alter the fundamental logical framework of Draft TTBER 2025, we consider that this solution has a significant effect on the stability and

predictability of the application of the exemption, particularly in situations where market shares are subject to seasonal or short-term fluctuations.

It is important to emphasize that, as under the previous regulation, the extended period does not affect situations in which the contracting parties permanently exceed the prescribed thresholds. In such cases, it is necessary to conduct a self-assessment of the agreement in accordance with Article 101(3) TFEU, which means that the grace period operates exclusively as a temporary safeguard in situations of transitory exceedance of the threshold. Accordingly, the extended period serves as a mechanism that reduces legal uncertainty for technology transfer agreements that initially satisfied the conditions for exemption under the criteria proposed in Draft TTBER 2025 but where the contracting parties exceeded the prescribed market share thresholds within a short period of time. In our view, the extended transitional period of three years ensures greater legal certainty and a more stable application of the block exemption. It enables contracting parties to ensure that a temporary exceedance of market share thresholds does not result in undesirable consequences for their competitiveness and business strategies. This mechanism demonstrates how legal instruments may be adapted to dynamic markets. It also illustrates the evolution of the European Commission's approach to the application of Article 101(3) TFEU to technology transfer in conditions of rapid technological development.

Conclusion

The analysis of the proposed amendments in the draft revision of the Technology Transfer Block Exemption demonstrates that the European Commission seeks to strike a balance between legal certainty and flexibility in the application of the block exemption to technology transfer agreements. The draft revision retains the nominal market share thresholds (20% for competitors and 30% for non-competitors), thereby confirming continuity with the approach established under Regulation 316/2014. Although the nominal threshold levels remain unchanged, the introduction of more precise rules for their calculation, together with the extended grace period, constitutes significant practical innovations that enhance the predictability of the application of the block exemption in dynamic market conditions.

While the retention of these thresholds contributes to regulatory continuity and predictability, it is rightly observed in the literature that their relatively low level may considerably limit the practical scope of the block exemption, particularly in the case of horizontal technology transfer agreements. In this respect, the importance of self-assessment under Article 101(3) TFEU increases, as a substantial number of agreements will not be able to rely on the “safe harbour” of the block exemption.

The “4+” rule represents an attempt to mitigate the rigidity of the market share threshold system by introducing an alternative indicator of market power based on the number of independently controlled substitutable technologies. Although this approach reflects a degree of flexibility in the interpretation of Article 101(1) TFEU in the context of technology transfer, the fact that it is formulated in the Guidelines rather than in the regulation itself limits its contribution to legal certainty.

A particularly significant innovation concerns the methodology for determining market shares, allowing the use of average data over the preceding three calendar years where data for a single year are not representative. This solution contributes to greater accuracy and a more realistic assessment of the market position of the contracting parties, especially in dynamic technology markets.

The extension of the grace period from two to three years represents one of the few material expansions of the scope of the block exemption in the proposed revision. This amendment strengthens legal certainty for contracting parties in situations of temporary exceedance of the thresholds, while not altering the fundamental logic of the system, given that permanent exceedance of the thresholds still requires an individual self-assessment.

Overall, the proposed revision does not constitute a radical shift in competition policy in the field of technology transfer, but rather an evolutionary adjustment of the existing framework to the conditions of dynamic markets. The central challenge remains the search for an appropriate balance between legal certainty and flexibility, as well as between structural rules and economic market realities. In this context, the role of self-assessment under Article 101(3) TFEU remains of fundamental importance.

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Pragovi tržišnih udela i pravna sigurnost u nacrtu revizije Uredbe EU o grupnom izuzeću sporazuma o transferu tehnologije

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Sažetak

U radu se analiziraju predložene izmene u nacrtu nove uredbe o grupnom izuzeću sporazuma o transferu tehnologije u poređenju sa važećom TTBER 316/2014, sa posebnim osvrtom na pragove tržišnih udela ugovornih strana i produženi prelazni period („grace period“). Metodologija obuhvata kritičku analizu predloženih normativnih rešenja i poređenje sa važećom uredbom i doktrinom u oblasti transfera tehnologije i prava konkurencije EU. Rezultati pokazuju da zadržavanje nominalnih pragova tržišnih udela ograničava mogućnosti praktične primene grupnog izuzeća i povećava zavisnost od postupka samoprocene. Produženi grace period, s druge strane, doprinosi većoj stabilnosti primene izuzeća u uslovima privremenih tržišnih kolebanja.

Ključne reči: TTBER 2025, transfer tehnologije, tržišni udeli, grupno izuzeće, „grace“ period, član 101(3) UFEU