1. Intellectual property licensing and competition law

Andreas Heinemann and Giulia Mara Meier

Licensing agreements regularly contain clauses with an effect on competition, for example, provisions on territorial exclusivity, customer allocation, output limitation, field-of-use restrictions, grant-back of improvements, no-challenge clauses, tying, and bundling as well as certain details regarding royalty obligations. If, for example, an exclusive license is granted for a certain territory, no other licensees may be assigned to that territory so that competition will be affected. Similar considerations could be made with regard to the other types of clauses mentioned. The question, therefore, arises as to what influence competition law has on the shaping of these contract terms.

Textbooks on competition law contain separate chapters on the competition law of licensing agreements.[1] The number of specialized books, reports, and articles on the competition law aspects of licensing is immense.[2] The relevant issues are highly complex. This is also due to the fact that the topic is part of the more general question of the relationship between intellectual property law and competition law. Questions at the interface of the two fields have arisen ever since these two areas of law existed.[3] Whereas initially the idea used to be widespread that there was a fundamental conflict between IP law and competition law, today the complementarity between both fields is emphasized. It is true that IP rights exclude the imitation of the protected subject matter and, in this sense, restrict competition. But that only concerns the short term. In the long run, competition is intensified since incentives are strengthened to replace the protected object with something new. This leads to better products and to innovation. Hence, losses in static competition may be compensated by an increase in dynamic competition.

How these general principles can be translated into specific rules is the subject of the following remarks. The focus is on the law of the European Union, but perspectives on US law and international developments are included. In the first step, the competition law principles

[1] For the US, see Herbert Hovenkamp, *Federal Antitrust Policy – The Law of Competition and its Practice* (5th edn, West Publishing 2016) § 5.5; for the EU, see Jones and Sufrin, *EU Competition Law – Text, Cases, and Materials* (7th edn, Oxford University Press 2019) ch 12; Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press 2015) ch 19.

[2] For a representative example, see OECD, *Licensing of IP Rights and Competition Law – Background Note by the Secretariat* (DAF/COMP(2019)3, 29 April 2019) <https://one.oecd.org/document/DAF/COMP(2019)3/en/pdf> (last accessed 7 May 20251 August 2024); in the German language, there is the term "Lizenzkartellrecht". See, for example the homonymous book by Reto M. Hilty and Alfred Früh, *Lizenzkartellrecht* (Stämpfli 2017).

[3] Whereas intellectual property protection in the modern sense occurred at the end of the 18th century as a result of the revolutions in North America and France, modern competition law was given the decisive impetus by the US Sherman Act in 1890.

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

applied to licensing agreements are explained, and the legal sources are presented (1). The EU Technology Transfer Block Exemption Regulation (TTBER) contains the most detailed rules on the subject, which is why it will be at the centre of this analysis (2). The accompanying guidelines (TT Guidelines) contain important explanations, clarifications, and refinements (3). FRAND licenses have acquired particular importance in competition law, just as compulsory licenses have always done (4). All these rules only take on practical meaning if mechanisms exist to enforce them (5). The outlook contains remarks on the importance of competition law in practice and on the worldwide convergence of the competition law assessment of licensing agreements (6).

1 PRINCIPLES AND LEGAL SOURCES

1.1 The Relationship Between IP Protection and Competition Law

The principles underlying the competition law of licensing agreements can be best explained by regarding the development in the US. At an early stage, the "legal monopolies" of IP protection were considered to be in fundamental opposition to the "anti-monopolies" rules of antitrust law and were therefore completely isolated. The conflict was solved by a priority rule in favour of IP protection: the US Supreme Court adopted the general rule that there is "absolute freedom […] under the patent laws of the United States", even allowing price fixing in the context of patent pools.[4] It soon became clear that such laxity was devastating for competition. Therefore, the *inherency doctrine* was developed: the primacy of IP protection was confined to conduct within the scope of protection of the respective IP right.[5] This led to a formalistic approach which was followed by many jurisdictions: it had to be examined whether a certain behaviour or a certain contract clause remained within the metes and bounds of an IP right (then it was "immune" from the application of competition law) or whether it went beyond (then competition law was fully applicable). The culmination of this approach was the Nine No-Nos of the Antitrust Division of the US Federal Department of Justice, which applied from 1968 to 1981: based on the inherency doctrine, they established a catalogue of conduct that was generally anti-competitive, e.g. package licensing, tying, mandatory grant-back clauses, exclusive licensing, and vertical price maintenance.[6]

The Nine No-Nos were one of the first targets of the Chicago School antitrust revolution: Ward Bowman showed as early as 1973 that there is no genuine conflict between IP protection and antitrust; both fields share the goal of promoting innovation.[7] For our context, this criticism had an important consequence: according to the circumstances, rigid prohibitions on certain licensing clauses may also discourage efficient behaviour. Therefore, a more flexible approach is needed that must avoid both the weaknesses of the formalistic approach and the

[4] *E. Bement & Sons v. Nat'l Harrow Co.*, 186 U.S. 70, 91 (1902).

[5] *Standard Sanitary Mfg. Co. et. al. v. United States of America,* 226 U.S. 20 (1912).

[6] Bruce B. Wilson, *Patent and Know-How License Agreements: Field of Use, Territorial, Price and Quantity Restrictions* (Address Before the Fourth New England Antitrust Conference, 6 November 1970).

[7] Ward Bowman, *Patent and Antitrust Law – A Legal and Economic Appraisal* (University of Chicago Press 1973).

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

exaggerations of the Chicago School. In any case, it is clear that the *inherency doctrine* is no longer state of the art. A sound economic analysis is required.

1.2 The US Licensing Guidelines

In response to these developments, the US antitrust agencies adopted licensing guidelines in 1995 which were revised in 2017.[8] These guidelines are based on three principles: first, while taking into account the characteristics of different forms of property, the same analysis is applied to cases involving intellectual property as to cases dealing with other forms of property. Second, there is no presumption that intellectual property creates market power, but the standard analysis for finding market power has to be applied. And third, IP licensing is generally considered procompetitive as it allows firms to combine complementary factors of production.[9]

Corresponding to general principles of US antitrust law, most cases are evaluated under the rule of reason, meaning that anti-competitive effects may be outweighed by procompetitive effects.[10] However, and again according to general principles, a per se approach applies with regard to particularly dangerous restrictions like, for example, "naked price-fixing, output restraints, and market division among horizontal competitors, as well as certain group boycotts".[11]

In order to strengthen legal security, the guidelines provide for "safety zones": in the absence of a per se constellation, restraints in an intellectual property licensing arrangement will not be challenged if the combined market share of the licensor and its licensees does not exceed 20 per cent of each relevant market.[12] If an analysis of technology markets and R&D markets is required, and if market shares are unavailable or not meaningful, the "4-plus-test" will become relevant: the authorities will not intervene if there are four or more independently controlled technologies, in addition to the technologies controlled by the parties to the licensing arrangement, that may be considered substitutes at a comparable cost to the user. Like the market share safety zone, the "4-plus-test" is only applicable in the absence of a per se violation.[13] It goes without saying that a licensing agreement is not anti-competitive because it is outside these safety zones. In these frequent cases, standard antitrust analysis applies.

---

[8] U.S. Department of Justice & Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property ("US Licensing Guidelines")* (12 January 2017) <www.justice.gov/atr/IPguidelines/dl> (last accessed 1 August 2024).

[9] US Licensing Guidelines, Section 2.

[10] For details see US Licensing Guidelines, Section 3.4.

[11] US Licensing Guidelines, Section 3.4.

[12] US Licensing Guidelines, Section 4.3: the market share will normally be calculated with regard to goods markets. If this does not adequately reflect the effects on competition, technology markets and research and development (R&D) markets will be looked at, too. For the distinction between goods markets, technology markets and R&D markets see US Licensing Guidelines, Section 3.2.

[13] US Licensing Guidelines, Section 4.3.

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

1.3 EU: Technology Transfer Block Exemption Regulation (TTBER) and the Technology Transfer Guidelines (TT Guidelines)

The US Licensing Guidelines had a tremendous influence on developments in the rest of the world, including the EU. It is true that the EU (or rather its predecessor, the European Economic Community, EEC) had already adopted competition law guidelines on patent licenses as early as 1962, i.e. years before the Nine No-Nos in the US.[14] However, the development from formalistic thinking based on the scope of the IP rights to a more economic assessment of restrictions in licensing agreements was heavily influenced by developments in the US. Yet many EU specificities remain, including, for example, some related to the goal of market integration in the EU (establishment of an "internal market").

The text in force is the Regulation on technology transfer agreements from 2014.[15] The denomination "Block exemption regulation" is due to the structure of Art. 101 of the Treaty on the Functioning of the European Union (TFEU): Art. 101(1) TFEU provides for a prohibition of restrictive agreements whereas, according to Art. 101(3) TFEU, the prohibition may be declared inapplicable to any category ("block") of agreements between undertakings for efficiency reasons. This explains the (unofficial) denomination "Technology Transfer Block Exemption Regulation", abbreviated "TTBER". According to the general rules, EU block exemption regulations can only be made for a specified period ("sunset clause"). According to its Art. 11, the TTBER from 2014 will expire on 30 April 2026.[16]

The TTBER is accompanied by the "Technology Transfer Guidelines" ("TT Guidelines").[17] Their purpose is twofold: on the one hand, they are supposed to give guidance on the application of the TTBER. On the other hand, they explain the application of Art. 101 TFEU to technology transfer agreements outside the scope of the TTBER.[18] Both texts, the TTBER and the TT Guidelines, will receive in-depth treatment in sections 2 and 3 of this chapter. Before that, however, a brief look will be taken at other relevant texts in other jurisdictions.

---

[14] Communication relative aux accords de licence de brevets (Christmas Communication) [1962] OJ 2922; no English version available since English was not an official language of the EEC at that time.

[15] Commission Regulation (EU) 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements [2014] OJ L93/17.

[16] A public consultation was running until 24 July 2023 in order to clarify whether the TTBER (and the accompanying guidelines) should expire or be prolonged or revised; see <https://competition-policy.ec.europa.eu/public-consultations/2023-technology-transfer_en> (last accessed 1 August 2024). On 22 November 2024, the Commission published its Evaluation, Commission Staff Working Document, SWD(2024) 268 final. The evaluation confirmes the effectiveness of the TTBER in providing legal certainty. However, it identified three key areas for change: licensing of data and data rights, technology pools and practical difficulties with the 4-plus-test..

[17] Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements [2014] OJ C89/3.

[18] TT Guidelines, para 2.

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

1.4 Other Jurisdictions

Initially, several jurisdictions, inspired by the *inherency doctrine*, had express rules in their competition laws that barred the application of competition law to IP-based restrictions. As this approach is unsatisfactory (see *supra* 1.1), such exemptions have become rare today. For unilateral conduct, the Canadian Competition Act still contains a rule (sec. 79(5)) according to which "an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the [IP laws] or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act". Switzerland has a general rule according to which the Swiss Cartel Act "does not apply to effects on competition that result exclusively from the legislation governing intellectual property" (Art. 3(2.1) Swiss Cartel Act). In practice, this exception has become meaningless as effects on competition in the multi-causal economic world never actually arise "exclusively" from intellectual property legislation. Other jurisdictions recently have repealed their IP-related exemptions. Examples are Australia (Art. 51(3) of the Competition and Consumer Act 2010 was repealed in 2019) and New Zealand: with effect in April 2023, the Commerce Amendment Act 2022 repealed IP-related exceptions in sections 36 and 45 of the New Zealand Commerce Act since IP-related conduct shall be assessed under competition law like any other type of conduct.[19]

While the number of IP-related exceptions in national competition laws is decreasing, the popularity of licensing guidelines is increasing. Following the examples of the US and the EU, other jurisdictions are also trying to clarify the competition law requirements for licensing agreements in such texts. Examples are Canada,[20] Japan,[21] and South Korea.,[22] and the United Kingdom.[23] They all share the insight that the general competition rules should be applied also in an IP context.[24]

---

[19] New Zealand Ministry of Business, Innovation & Employment, 'Review of section 36 of the Commerce Act and other matters' (31 May 2022).

[20] Competition Bureau Canada, 'Intellectual Property Enforcement Guidelines' (2023).

[21] Japanese Fair Trade Commission, 'Guidelines for the Use of Intellectual Property under the Antimonopoly Act' (2016).

[22] Korean Fair Trade Commission, 'Review Guidelines on Unfair Exercise of Intellectual Property Rights' (2016).

[23] Following the UK's exit from the EU, the EU block exemption regulations that were in force under EU law at the end of the Transition Period on 31 December 2020 were retained in UK law and are known as assimilated block exemption regulations. The Competition and Markets Authority (CMA) has held a consultation on its proposal to replace the Assimilated TTBER until 14 April 2025. Assimilated Technology Transfer Block Exemption Review Consultation on the CMA's Proposed Recommendation to the Secretary of State https://connect.cma.gov.uk/technology-transfer-block-exemption-regulation, last accessed 7 May 2025).

[24] For an overview, see Robert D. Anderson et al., 'Competition Agency Guidelines and Policy Initiatives Regarding Intellectual Property in the BRICS and Other Major Jurisdictions: A Comparative Analysis' in Robert D. Anderson, Nuno Pires de Carvalho, and Antony Taubman (eds.), *Competition Policy and Intellectual Property in Today's Global Economy* (Cambridge University Press 2021) 517 et seq.

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

1.5 International Law

1.5.1 Trade agreements

Today, bilateral and regional trade agreements usually include competition chapters. Their goal is to complement the rules on the free movement of goods and services and to promote market integration. The abolition of state barriers shall not be undermined by private trade restrictions. IP rights play an important role in this context: because of their territorial character, they may be used to seal off national markets from each other or to restrict trade in other ways.

1.5.2 The TRIPs agreement

The TRIPs Agreement states that World Trade Organization (WTO) members may control IP-related strategies on the basis of competition rules. This clarification was introduced into the TRIPs agreement on the initiative of developing countries. Competition law was supposed to counterbalance the power of IP right holders whose position would be considerably strengthened by the TRIPS agreement.[25] For example, Art. 8(2) TRIPs expressly states that WTO members may provide for "appropriate measures […] to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology". Article 31 TRIPs recognizes (in letters c and k) that the need to correct anti-competitive practices may lead to compulsory patent licenses, i.e. to a use of the protected subject matter without authorization of the right holder. And regarding licensing agreements, Art. 40(1) TRIPs emphasizes that certain licensing practices may restrain competition and have adverse effects on trade and on the transfer of technology. Article 40(2) TRIPs authorizes members to specify in their national legislation licensing practices that in particular cases may constitute an abuse, e.g. exclusive grant-back conditions, no-challenge clauses, and coercive package licensing.[26]

However, the topic of exhaustion, which has the strongest impact on trade flows, has been left open in Art. 6 TRIPs. WTO members are therefore free to choose national, regional, or international exhaustion. If a country opts for national exhaustion, only the first sale of a protected item within that country leads to exhaustion, with the consequence that parallel imports from other countries can be prevented. The difficulty then arises under which conditions the

[25] See Ana Maria Pacón, 'What Will TRIPS Do For Developing Countries?' in Friedrich-Karl Beier and Gerhard Schricker (eds.), *From GATT to TRIPs – The Agreement on Trade-Related Aspects of Intellectual Property Rights* (VCH Publishers 1996) 329 et seq.

[26] For an overview of the competition rules in the TRIPS Agreement, including the legislative history, see Robert D. Anderson, Anna Caroline Müller, and Antony Scott Taubman, 'The WTO TRIPS Agreement as a Platform for Application of Competition Policy to the Contemporary Knowledge Economy' in Robert D. Anderson, Nuno Pires de Carvalho, and Antony Taubman (eds.), *Competition Policy and Intellectual Property in Today's Global Economy* (Cambridge University Press 2021) 62 et seq.

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

blocking of parallel imports constitutes anti-competitive conduct.[27] The TRIPs agreement does not give an answer to that question.[28]

1.5.3 OECD recommendation on IP rights and competition

Starting in 1974, the OECD has adopted several recommendations regarding the application of competition law relating to patent, know-how, and trademark licenses. These texts mirror the development from a rather formalistic to a more economic approach (see *supra* 1.1). In 2023, the OECD adopted a new text, the Recommendation on Intellectual Property Rights and Competition.[29] It is a uniform text covering the entire field of IP protection and replacing the previous recommendations that distinguished between IP rights. Whereas the previous recommendations focused on licensing agreements, the text of 2023 covers the entire intersection of IP protection and competition law. Nevertheless, licensing agreements receive special attention.

Recital 7 of the Recommendation emphasizes that licensing arrangements, while contributing to the dissemination of protected innovations and creations, may contain restrictive clauses that substantially reduce competition in the market or facilitate cartels. According to Section III, a rule of reason analysis applies (weighing the actual or likely anti-competitive effects against the pro-competitive effects), which does not exclude the application of presumptions and does not stand in the way of the rules on per se prohibitions (see *supra* 1.2) or *by object* restrictions.[30] The most important factors are listed in Section III of the Recommendation, such as the legal and economic context, the horizontal and vertical relationship of the parties, as well as the effects on competition both from a static and a dynamic perspective. Regarding licensing agreements, the risk of input foreclosure is particularly emphasized. In sum, the Recommendation offers a precise description of the analytical framework that is state of the art today in the context of IP-related conduct. The level of abstraction is certainly high. However, the text must be suitable for a variety of very different competition jurisdictions.

1.6 Conclusion

The great practical importance of licensing agreements has led many jurisdictions to adopt specific rules on the competition law assessment of restrictive licensing clauses, whether by formal laws or by mere guidelines. As far as the content of the rules is concerned, there has been a significant change. Whereas in former times a rather formalistic perspective based on the scope of the intellectual property right in question was taken, today a more flexible

---

[27] In Switzerland, the application of competition law in these cases is expressly reserved; see Art. 3(2.2) Swiss Cartel Act: "[…] import restrictions based on intellectual property rights shall be assessed under this Act".

[28] On the difficulties of interpreting Art. 6 TRIPs, see UNCTAD-ICTSD, *Resource Book on TRIPS and Development* (Cambridge University Press 2005) 104 et seq.

[29] OECD, *Recommendation of the Council on Intellectual Property Rights and Competition* (OECD/LEGAL/0495, 8 June 2023).

[30] According to EU competition law, it is not necessary to show negative effects of a certain agreement or a concerted practice if the restriction of competition is the object of the conduct in question; see Art. 101(1) TFEU and the settled case law since Case C-56/65 *LTM/Maschinenbau Ulm* [1966] EU:C:1966:38, 249.

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

approach based on an economic assessment prevails. The loss in legal certainty is compensated on the one hand by outright prohibitions of hardcore restrictions and on the other hand by safety zones or block exemptions for simple restrictions. On the international level, general guidance is given by the OECD Recommendation on IP Rights and Competition. However, more detailed rules are needed for practical purposes. This is the task of the competent jurisdictions. As an important example, the competition law of licensing agreements in the EU is outlined next.

2 THE TRANSFER OF TECHNOLOGY BLOCK EXEMPTION REGULATION (TTBER) OF THE EU

2.1 Classification and Structure

The TTBER provides a block exemption for the licensing of certain types of intellectual property rights, referred to as technology transfer agreements. Technology rights in the sense of the TTBER consist of patents, utility models, design rights, topographies of semiconductor products, supplementary protection certificates for medical products or other products for which such supplementary protection certificates may be obtained, plant breeders' certificates, and software rights.[31] The automatic exemption of certain technology transfer agreements reduces the private and public administrative costs and burdens of a case-by-case scrutiny under Art. 101(1) and 101(3) TFEU.[32] The Commission has set out its approach to assessing the effects of technology transfer agreements on competition in its TT Guidelines.[33] If a clause or an agreement is not block exempted, Art. 101(3) TFEU may apply in an individual case.

The Commission states that "the fact that intellectual property laws grant exclusive rights of exploitation does not imply that intellectual property rights are immune from competition law intervention".[34] The TTBER and the TT Guidelines recognize that there is no presumption that intellectual property rights and licensing agreements as such will give rise to competition concerns.[35] Most licensing agreements are procompetitive as they lead to the dissemination of technology and promote innovation by the licensor and the licensees, thereby improving economic efficiency.[36] Nevertheless, even if a licensing agreement does restrict competition prima facie, it may often give rise to pro-competitive efficiencies, which must be considered under Art. 101(3) TFEU and balanced against the negative effects on competition.

2.2 Copyright and Trademark Licenses

From the definition of "technology rights" and "technology transfer agreement" follows that copyright licenses (with the exception of software copyrights) and trademark licenses are not

---

[31] Article 1(1)(b) TTBER.

[32] Monica Armillotta, *Technology Pooling Licensing Agreements: Promoting Patent Access Through Collaborative IP Mechanisms* (Nomos 2010) 86 et seq.

[33] TT Guidelines, paras 1 et seq.

[34] TT Guidelines, para 7.

[35] TT Guidelines, para 8.

[36] TT Guidelines, para 9.

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

covered by the block exemption. However, Art. 2(3) TTBER stipulates that the exemption shall also apply to provisions in technology transfer agreements which "relate to the licensing or assignment of other intellectual property rights or know-how to the licensee, if, and to the extent that, those provisions are directly related to the production or sale of the contract products". Hence, if copyright and/or trademark licenses are integrated into a technology transfer agreement and if they are related to contract products, they benefit from the exemption effect.

In contrast to the previous regulation, the additional condition "that those provisions do not constitute the primary object of the agreement" has been dropped. Thus, connected copyright and trademark licenses that are related to contract products are justified even if the value of the copyright or trademark license exceeds the interest in the technology rights. The TT Guidelines push this to the extreme. In these cases, the block exemption applies "even if the principal interest of the parties lies in the exploitation of the trademark rather than the technology".[37]

In contrast, copyright licenses without a connection to technology rights are not covered by the TTBER. However, the Commission will apply the principles set out in the TTBER and the TT Guidelines to copyright licenses as well (if their purpose is the production of contract products).[38] This is different from the treatment of stand-alone trademark licenses: here, the focus is on the distribution aspect, which is why the general rules on vertical agreements (including Block Exemption Regulation 2022/720), and not the rules on technology transfer, are applied.[39] In spite of this restriction, the scope of the TTBER and the TT Guidelines is larger than expected.

2.3 Exemption

The TTBER, as with all block exemption regulations, follows the principle of legal exception, providing a safe harbour for agreements which are covered by the regulation. If the prerequisites of the block exemption regulation are met, the whole agreement is exempted *ipso iure*. The burden of proof lies in favour of the undertaking invoking the block exemption regulation. The broad exemption conferred by Art. 2 TTBER is deceptively simple, since it is the exceptions and market threshold requirements which define the true ambit of the exemption.

The Commission or a national competition authority may withdraw the block exemption if it finds in any particular case that a technology transfer agreement which is exempted by Art. 2 TTBER has effects that are incompatible with Art. 101(3) TFEU, or declare the regulation non-applicable if parallel networks of similar agreements cover more than 50 per cent of the relevant market.[40] Up to now, this power has not been used.

---

[37] TT Guidelines, para 47.

[38] TT Guidelines, para 48; but see the exception for the licensing of rental rights and public performance rights in para 49.

[39] TT Guidelines, para 50.

[40] Article 6 para 1 and Art. 7 TTBER; TT Guidelines, paras 144 et seq. Since a withdrawal implies that the agreement falls within Art. 101(1) and does not fulfil the criteria of Art. 101(3) TFEU, it must necessarily be accompanied by a negative decision under Regulation 1/2003, see TT Guidelines, para 146.

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

2.4 Market-Share Thresholds

The Commission states that the pro-competitive character of a technology transfer agreement depends on the degree of market power of the parties.[41] The exemption, therefore, only applies below a certain market share threshold. The focus on market share in the relevant market was a crucial development first shown in the TTBER of 2004[42] and reflects the shift from a form-based towards an effects-based approach in European (licensing) competition law.[43]

If the market share of the parties is below the threshold set out in Art. 3 TTBER, the Commission presumes that the conditions of Art. 101(3) TFEU are fulfilled.[44] If the parties exceed the thresholds, the individual exemption under Art. 101(3) TFEU may apply.

The market share is calculated on the basis of market sales value data. If this information is not available, it is calculated on the basis of an estimate based on other reliable market information, including market sales volume, based on the basis of data relating to the preceding calendar year.[45] Even if the market share increases, the exemption remains in force for a further two years.[46]

2.4.1 Different treatment of competing and non-competing undertakings

The market share threshold for an exemption depends on whether the two parties to the agreement are competitors according to the definition in Art. 1(1)(n) TTBER. According to Art. 3(1) TTBER, competing undertakings may not exceed a market share of 20 per cent, and non-competing undertakings may not exceed a market share of 30 per cent.[47] The risks to competition are likely to be significantly higher in the case of agreements between competitors than in the case when the parties to the agreement do not compete in the relevant market.[48]

If the parties are competitors, a distinction must be made between reciprocal and non-reciprocal agreements according to the definition in Art. 1(1)(d) TTBER. While the Commission

---

[41] TTBER, Recital 5.

[42] Commission Regulation (EC) 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements [2004] OJ L123/11.

[43] The legal framework of the TTBER demonstrates a flexible and economic approach as it features: (i) a more economic goal to EU competition policy; (ii) the use of economic analysis; (iii) the offer of safe harbour-based legal certainty; and (iv) the procedural change in enforcement (see Steven Anderman and John Kallaugher, *Technology Transfer and the New EU Competition Rules, Intellectual Property Licensing after Modernisation* (Oxford University Press 2006); Steven Anderman, 'The New EC Competition Law Framework for Technology Transfer and IP Licensing' in Josef Drexl (ed.), *Research Handbook on Intellectual Property and Competition Law* (Edward Elgar 2008) 110; Steven Anderman and Hedvig Schmidt, *EU Competition Law and Intellectual Property Rights: The Regulation of Innovation* (2nd ed., Oxford University Press 2011) 204.

[44] TTBER, Recital 10 et seq., TT Guidelines, para 79.

[45] Article 8 lit. a and b TTBER.

[46] Article 8 lit. e TTBER.

[47] See also TT-Guidelines, paras 19 et seq., 79 et seq.

[48] While agreements between competitors may restrict inter-technology and intra-technology competition, an agreement between non-competitors may only restrict intra-technology competition. This argues for a more lenient treatment of agreements between non-competitors. See also OECD (n 2), para 50.

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

has strong reservations about reciprocal agreements, non-reciprocal agreements are subject to a more generous standard of review.[49]

2.4.2 Relevant market(s)

A particular feature of technology transfer agreements is that they can have an impact on several markets.[50] While the US Licensing Guidelines distinguish between goods, technology, and research and development markets and may include all three in the antitrust assessment, the TT Guidelines rather emphasize the role of product and technology markets only. Competition in innovation is taken into consideration mainly as a source of potential competition within the analysis of product and technology markets. Only exceptionally will the Commission analyse the effects on competition in innovation separately.[51]

Undertakings compete on the relevant technology market if they license competing technology rights.[52] The relevant technology market comprises technologies that are regarded as interchangeable with or substitutable for the licensed technology rights by reason of the characteristics of the technology, their intended use, or their royalties.[53] Undertakings compete on the relevant product market if they are both active in the relevant product and geographic market on which the contract products are sold (actual competitors) or if they are realistically able to enter and compete in the market within a two-year period[54] in response to a small but permanent increase in relative prices (potential competitors).[55] The relevant product market for competing undertakings includes products that are interchangeable with or substitutable for the contract product by reason of the products' characteristics, their prices, or their intended use.[56] If the parties do not compete according to the definition of Art. 1(1)(n) TTBER, the higher market share of 30 per cent applies.

2.5 Selected Clauses with Relevance to Competition Law

2.5.1 Hardcore restrictions

Hardcore restrictions are clauses mentioned in Art. 4 TTBER which, in principle, constitute serious restrictions of competition and therefore – irrespective of the market share of the parties – lead to the exclusion of the *entire* agreement from the block exemption.[57] The

---

[49] TT Guidelines, para 98.

[50] TT Guidelines, paras 21 et seq.

[51] TT Guidelines, para 26; see also the European Commission's Horizontal Guidelines 2023 ([2023] OJ C259/1) para 150; Vladimir Bastidas Venegeas, 'Shifting Towards a Dynamic Efficiency Test?: Evaluating Licensing Agreements under Antitrust Law' in Steven Anderman and Ariel Ezrachi (eds.), *Intellectual Property and Competition Law, New Frontiers* (Oxford University Press 2011) 482; Alfred Früh, *Immaterialgüterrechte und der relevante Markt, Eine wettbewerbsrechtliche und schutzrechtliche Würdigung technologischer Innovation* (Carl Heymanns 2013) 145 et seq., 300.

[52] Article 1(1)(n)(i) TTBER.

[53] TT Guidelines, para 22.

[54] TT Guidelines, para 34.

[55] Article 1(1)(n)(ii) TTBER.

[56] TT Guidelines, para 21.

[57] Article 4 TTBER and Recital 14.

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

decisive factor for the classification of a restriction of competition as a hardcore restriction is the nature of the restriction and experience, which, in the Commission's view, is almost always anti-competitive.[58]

Also in the context of hardcore restrictions, the Commission applies the usual distinction between competitors and non-competitors: if companies compete in a market, generally less is allowed in comparison to the situation where companies are not competitors. An individual exemption under Art. 101(3) TFEU is possible but unlikely, in most cases.[59] Nevertheless, the merits of the individual case will always have to be assessed. Hardcore restrictions are therefore not prohibited but impermissible from the point of view of the TTBER and therefore not block exempted. If no individual exemption applies, the restrictive parts of the technology transfer agreement are null and void pursuant to Art. 101(2) TFEU. According to general principles, the impact of this nullity on the validity of the rest of the contract is governed by the applicable national law.

2.5.2 Hardcore restrictions for competing undertakings

2.5.2.1 Territorial exclusivity and customer allocation

The TTBER identifies agreements between competing undertakings containing clauses that allocate markets or customers as hardcore restrictions.[60] However, it lists four exceptions to that principle.[61] The Commission clarifies that "field-of-use clauses", i.e. sales restrictions with regard to a branch of an industry, product market, or field of application, are exempt.[62] It must be ensured that the field-of-use clauses are defined on the basis of objective, clearly defined, and relevant technical characteristics of the contractual products.

i) Between and in favour of one or both parties

The first exemption concerns the case of an exclusive license.[63] An obligation of any party in a non-reciprocal agreement to not produce with the licensed technology rights and/or not conduct active and/or passive sales into the exclusive territory or the exclusive customer group reserved for the other party is exempted from the general ban on the allocation of markets or customers set out in Art. 4(1)(c) TTBER. The position of the licensee is exclusive, meaning it is the only one that can produce, use, and distribute products containing the licensed rights within its exclusive territory and/or exclusive customer group.

---

[58] TT Guidelines, para 94. For a hardcore restriction to exist, it is not necessary that it constitutes the direct content of an agreement; it is sufficient that it has as its object, directly or indirectly, either alone or in combination with others, a hardcore restriction of competition within the meaning of Art. 4 TTBER.

[59] TT Guidelines, para 94.

[60] Article 4(1)(c) TTBER, for the definitions of the terms "exclusive territory" and "exclusive customer group" see Art. 1(1)(q) and (r) TTBER.

[61] Article 4(1)(c)(i–iv) TTBER.

[62] TT Guidelines, paras 113, 208 et seq.

[63] TT Guidelines, para 107, this understanding of the exclusive license corresponds with the definition in Art. 1(1)(p) TTBER. For further reference see Giulia Mara Meier, *Die Exklusivlizenz, Eine wettbewerbsrechtliche Würdigung aus europäischer und schweizerischer Perspektive*, (EIZ Publishing 2021) 9 et seq., 124 et seq.

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

A reciprocal exclusive license between competitors constitutes a hardcore restriction within the meaning of Art. 4(1)(c) TTBER because it leads to market foreclosure.[64] A non-reciprocal exclusive license between competitors is a hardcore restriction but is exempted up to the market share threshold of 20 per cent by Art. 4(1)(c)(i) TTBER.[65] A sole license[66] does not constitute a hardcore restriction, even if it is reciprocal.[67]

ii) Between the licensing parties, in favour of another licensee

As the first exemption listed in Art. 4(1)(c) TTBER concerns a clause between the parties in favour of one of the parties, the second concerns the case where the parties agree to favour a third party by prohibiting the licensee from active and/or passive sales into the exclusive territory or to the exclusive customer group allocated to a third party, another licensee.[68] If the agreement is non-reciprocal and the other benefited licensee was not a competitor of the licensor at the time of the conclusion of its own license, it is exempted under Art. 4(1)(c)(ii) TTBER. However, such a clause is only exempted in this triangular constellation: if the licensees were to agree directly not to conduct active or passive sales to each other's exclusive territory and/or exclusive customer group, this constitutes a licensees' cartel, which is null and void pursuant to Art. 101(2) TFEU.[69]

Contrary to the first exception, the second one only covers restrictions imposed on the licensee regarding active sales. The restriction on passive sales to the benefit of third parties, i.e. to the exclusive territory and/or to the exclusive customers of other licensees, is a hardcore restriction. This benefits the licensor, who can comprehensively protect itself from active and passive sales in its exclusive territory and/or to its exclusive customers from any of its licensees. A licensee, on the other hand, is always exposed to passive sales by other licensees to its exclusive territory or to its exclusive customers. The possibility for absolute territorial protection for the exclusive licensor was accepted in the drafting of the TTBER as the public interest in the dissemination of information and technology was considered to be crucial.[70] In addition, the licensor bears considerable investment risks in the development of new technology which it should be able to pass on to its licensees via royalties.

The third exemption of Art. 4(1)(c)(iii) TTBER concerns the "captive use restriction". The obligation on the licensee to produce the contract products only for its own use, provided that the licensee is not restricted in the active or passive sale of spare parts of its own products, is exempted and does not constitute a hardcore restriction. The fourth exemption set out in Art. 4(1)(c)(iv) TTBER concerns an obligation on the licensee in a non-reciprocal agreement to produce the contract products only for a particular customer if the license was granted in order to create an alternative source of supply to that specific customer ("second sourcing").

---

[64] TT Guidelines, para 192.

[65] This is in line with ECJ, 8 June 1982, C-258/78, *Nungesser and Kurt Eisele v Commission* ("Maize Seeds") EU:C:1982:211.

[66] A sole license gives the licensee the right to use the intellectual property to the exclusion of all persons, except the licensor.

[67] TT Guidelines, para 109.

[68] TT Guidelines, para 110.

[69] Such an agreement would, moreover, not fall within the scope of the TTBER as it does not involve any transfer of technology; see TT Guidelines, para 110.

[70] Recital 4 TTBER.

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

2.5.2.2 Output restrictions

Article 4(1)(b) TTBER provides that agreements between competing undertakings that have as their object the limitation of output are hardcore restrictions, except limitations on the output of contract products imposed on the licensee in a non-reciprocal agreement or imposed on one of the parties in a reciprocal agreement. Since non-reciprocal agreements are less likely to lead to a restriction of output and more likely to improve economic efficiency, they are treated more favourably than reciprocal agreements.[71]

2.5.3 Hardcore restrictions for non-competing undertakings

Article 4(2) TTBER lists agreements that are qualified as hardcore restrictions between non-competitors. These are mainly restrictions on the licensee.

The TTBER prohibits agreements which restrict the licensee in the passive sale[72] of products incorporating the licensed technology.[73] Hence, direct territorial and customer restrictions are not allowed. Indirect measures such as financial incentives or the establishment of a control system to verify the destination of the goods are also prohibited. Quantitative restrictions are considered as bans of passive sales when they are a means of enforcing market foreclosure. However, the Commission does not start from the assumption that quantitative restrictions as such serve the purpose of market foreclosure.[74] Prohibitions of active sales are not covered by Art. 4(2)(b) TTBER and do not constitute hardcore restrictions.[75] It should be noted that Art. 4(2)(b) TTBER only regulates sales restrictions imposed on the licensee. Sales restrictions imposed on the licensor do not constitute hardcore restrictions.[76] Again, the Commission clarifies that field-of-use clauses are exempt.[77]

Article 4(2)(b)(i) TTBER constitutes an exception to the general prohibition of passive sales by licensees in favour of the licensor's exclusivity. Restrictions on passive sales by the licensee into an exclusive territory or to an exclusive customer group of the licensor are not hardcore restrictions and therefore remain exempted.[78] It is not necessary that the licensor is already producing in the reserved territory or for the reserved customer group. However, the licensor's reservation must be explicit, meaning that it is necessary that the territories or customer groups are identifiable.

---

[71] TT Guidelines, paras 103, 204 et seq.

[72] For a definition of passive sales, see TT Guidelines, para 108; Guidelines on vertical restraints [2022] OJ C248/1, paras 211 et seq.

[73] Article 4(2)(b) TTBER.

[74] TT Guidelines, para 119.

[75] The block exemption of restrictions on active sales is based on the assumption that such restrictions promote investments, non-price competition, and improvements in the quality of services provided by the licensees by solving free rider and hold-up problems (TT Guidelines, para 120).

[76] TT Guidelines, para 120.

[77] According to the Commission, these are generally procompetitive: they promote the dissemination of new technology by giving the licensor an incentive to license for exploitation in fields in which she does not want to exploit the technology herself. If the licensor could not prevent licensees from operating in fields where the licensor exploits the technology herself, it would likely create a disincentive for the licensor (TT Guidelines, para 212).

[78] TT Guidelines, para 121.

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

The Commission justifies very broad exemptions on the grounds of the pro-competitive dissemination and integration of the technology into the production facilities of the protected licensee.[79] Indeed, it is unlikely that a licensor would be willing to license his or her technology if it had to face competition from its own licensee in its exclusive territory or for its exclusive customer group.

The preceding regulation (TTBER 2004) allowed the licensor to prohibit a licensee's passive sales into the exclusive territory and/or to the exclusive customer group of other licensees for the first two years of the licensees' sales activities.[80] This provision is not included in the current version. The crucial amendment was intended to align the provisions of the TTBER with the Vertical Block Exemption Regulation,[81] which also only exempts the restriction of active sales.[82] Thus, in principle, if a licensee is prohibited from passive sales into the exclusive territory and/or to the exclusive customer group of another licensee, it is to be considered a hardcore restriction. In the TT Guidelines, this principle is relativized with the argument of the amortization of the market development costs and (again) for the period of two years.[83] If the restraints are objectively necessary to enable the licensee to enter a new market, the Commission concludes that in most cases a period of up to two years from the date on which the contract product was first put on the market in the exclusive territory by the licensee in question or sold to its exclusive customer group would be considered sufficient for the licensee to recoup the investments made. In exceptional cases, a longer protection could be possible.[84]

The current legal situation is similar to that under the TTBER of 2004.[85] Territorial protection in an initial phase, even against passive sales, may be necessary to allow a licensee to amortize its investment. This concern is to be promoted if the investment is objectively necessary to open up a new market. An important difference from the previous legal situation is that the legal basis is no longer to be found in the TTBER itself but in the TT Guidelines, which means that there is no longer an automatic exemption. It is up to the parties to assess whether the conditions of the TT Guidelines are fulfilled and whether they would be able to prove them in a possible dispute. Thus, the Commission has further complicated the already sophisticated regime of hardcore restrictions. The admissibility or exclusion of a contract clause should, however, not depend on whether the parties are risk-averse or not.

The second exception in Art. 4(2)(b)(ii) TTBER concerns the obligation of the licensee to only produce the contract goods for its own use, provided that the licensee is not restricted in active and passive sales of the contract products as spare parts for its own products. The third exception in Art. 4(2)(b)(iii) TTBER covers the "second-sourcing". It exempts the obligation of the licensee to only produce the contract products for a particular customer where

---

[79] TT Guidelines, para 121.

[80] Article 4(2)(b)(ii) TTBER 2004.

[81] Now see Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2022] OJ L134/4.

[82] Article 4(b)(i) Vertical BER.

[83] Note that this was also the argument for the exemption made in the TTBER 2004; see TT Guidelines 2004, para 101.

[84] TT Guidelines, para 126.

[85] However, the possibility of extending the two-year protection has only existed since 2014 (see TT Guidelines, para 126).

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

the licensee was granted a license in order to create an alternative source of supply for that customer. The fourth exception in Art. 4(2)(b)(iv) TTBER covers the restrictions of sales to end-users by a licensee that operates at the wholesale level of trade. The fifth exception in Art. 4(2)(b)(v) TTBER covers restrictions of sales to unauthorized distributors by the members of a selective distribution system.

2.5.4 Excluded restrictions

Article 5 TTBER lists clauses which are considered anti-competitive and therefore are excluded from the block exemption. In contrast to the hardcore restrictions listed in Art. 4 TTBER, the existence of an excluded restriction does not lead to the exclusion of the entire agreement from the safe harbour of the block exemption regulation. Only the relevant clause – provided it is severable from the rest of the agreement[86] – will be excluded from the block exemption.[87] The excluded clause will be assessed individually on the basis of the criteria set out in Art. 101(3) TFEU. If a clause does not fulfil these criteria, it is null and void pursuant to Art. 101(2) TFEU. Due to the principle of self-assessment, the qualification of whether there is a hardcore restriction or an excluded restriction is left to the parties.

Article 5(1)(a) TTBER concerns exclusive grant-back clauses. An obligation on the licensee to grant an exclusive license or to assign rights to the licensor or a third party designated by the licensor in respect of its own improvements to, or its own new application of, the licensed technology is not block-exempted.[88] This provision protects the licensee's right to use or license the improvements it has developed. An obligation to grant a non-exclusive license or a sole license remains possible. The Commission states that an obligation to grant the licensor an exclusive license to improvements of the licensed technology or to assign such improvements to the licensor or to third parties is likely to reduce the licensee's incentive to innovate since it prevents the licensee from exploiting the improvements themself.[89] In drafting the current Regulation, the Commission has abandoned the distinction between severable and non-severable improvements. The current version of Art. 5(1)(a) TTBER is primarily aimed at assessing exclusive grant-backs on a more case-by-case basis.[90]

Article 5(1)(b) TTBER regards no-challenge clauses. An obligation on the licensee not to challenge the validity of intellectual property rights held by the licensor in the EU is not block-exempted, without prejudice to the right of the licensor to terminate the license in the event of a challenge.[91] The Commission considers that non-challenge clauses are in principle anti-competitive if the licensed technology is valuable; however, it does not specify how to

---

[86] TT Guidelines, para 128.
[87] TTBER, Recital 15.
[88] See also TT Guidelines, paras 129 et seq.
[89] TT Guidelines, para 129.
[90] Cf. TT Guidelines, para 130.
[91] TT Guidelines, paras 133 et seq. For an assessment of the enforcement costs of no-challenge clauses see Vladimir Bastidas Venegas, 'Intellectual property rights, enforcement costs and EU Competition law' (2023) 11 J. of Antitrust Enf't, Supplement Issue 1, i35.

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

measure the value of a technology.[92] In *Moosehead/Whitbread*, the Commission took a rather effects-based approach with a focus on barriers to entry into a market.[93]

Article 5(2) TTBER excludes a restriction in an agreement between non-competing undertakings that imposes an obligation limiting the licensee's ability to exploit their own technology or limiting either party's ability to carry out research and development, unless the latter restriction is indispensable to prevent the disclosure of the licensed know-how to third parties.[94]

2.5.5 Other restrictions

2.5.5.1 Royalty obligations

Provisions in a license agreement relating to royalties for the use of the technology will normally not have restrictive effects prohibited by Art. 101(1) TFEU, irrespective of whether the agreement is concluded between competitors or non-competitors.[95] The Commission states that hardcore price fixing may be seen if the parties are competitors and conduct reciprocal royalties calculated on the basis of sales, where the license does not provide for the integration of complementary technologies, and where the royalties payable have a significant impact on market prices.[96] A restrictive effect on competition may also arise where royalties in reciprocal licenses increase as output increases, because if the parties have market power, such royalties may act as a limitation on output.[97]

2.5.5.2 Tying and bundling

Article 101(1) TFEU does not apply where the licensor reasonably insists that the licensee purchases certain products or obtains a license for another technology from the licensor if such arrangements are indispensable for the exploitation of the licensed technology[98] or to ensure the production meets certain quality standards.[99] Only if the licensor has significant market power in the tying product and the tie covers a certain proportion of the market for the tied product may anti-competitive effects such as the foreclosure of competitors arise.[100]

---

[92] In TT Guidelines, para 134, the Commission only states that if the licensed technology is related to a technically outdated process which the licensee does not use, no restriction of competition arises. This is not fully convincing: In case of doubt, any technology for which a licensee was prepared to acquire a royalty-bearing license at the time of the license agreement was concluded can be qualified as valuable.

[93] *Moosehead/Whitbread* (Case IV/32.736) Commission Decision 90/186/EEC [1990] OJ L100/32.

[94] TT Guidelines, paras 141 et seq.

[95] TT Guidelines, para 184.

[96] TT Guidelines, paras 185 et seq. For an overview of the competition assessment of clauses concerning royalties in license agreements see David Bailey and Laura Elizabeth John, 'Intellectual Property Rights', in Bellamy & Child's *European Union Law on Competition* (8th edn, Oxford University Press 2018) paras 9.090 et seq.

[97] TT Guidelines, para 103.

[98] *Rio Tinto Alcan* (Case AT.39230) Commission Decision C(2012) 9439 [2012] OJ C89/5.

[99] TT Guidelines, para 224.

[100] TT Guidelines, para 223.

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

3 THE TRANSFER OF TECHNOLOGY GUIDELINES (TT GUIDELINES)

As already mentioned (*supra* 1.3), the TT Guidelines of the EU interpret, on the one hand, the content of the TTBER. On the other hand, they contain important principles on the application of EU competition law to technology transfer agreements outside the scope of the Regulation. Therefore, the Guidelines should always be consulted when questions arise in the interpretation of the Regulation, but also if problems arise for which the TTBER is not applicable. In the following, three particularly important and challenging problems will be addressed for which the TT Guidelines offer solutions.

3.1 The "4-Plus-Test"

We have already seen that the US Licensing Guidelines have introduced the "4-plus-test" as one of the "safety zones" which are supposed to strengthen legal security (*supra* 1.2). The EU has embraced this concept and has incorporated it into the TT Guidelines. It is an important example of the convergence of the two legal systems, which serve as models in the field of competition law all over the world.

According to the TT Guidelines, "Article 101 of the Treaty is unlikely to be infringed where there are four or more independently controlled technologies in addition to the technologies controlled by the parties to the agreement that may be substitutable for the licensed technology at a comparable cost to the user."[101] Substitutability presupposes commercial viability and strength. The TT Guidelines mention the example of network effects: if the number of users is a value in itself, alternative technologies may not constitute a real competitive constraint.[102] The question of whether the alternative technologies can really exercise competitive control is therefore of particular importance. An alternative technology is only relevant if it is to be taken seriously. Moreover, as in the US, the 4-plus-test does not apply in the case of hard restrictions. Hence, there are no "safety zones" for the most dangerous types of conduct in the competitive process.

3.2 Technology Pools

Patent pools have been known for a long time.[103] Patent owners decide not to exploit their patents alone, but jointly with others. If the patents are substitutes, competition will be restricted. If, by contrast, the pooled patents are complementary, economic advantages are obtained since future licensees are not obliged to negotiate with different patent owners, but only with one entity, the patent pool. Whereas traditional competition policy has taken a rather critical stance towards patent pools, the economic approach prevailing today leads to a nuanced assessment.

---

[101] TT Guidelines, para 157.

[102] TT Guidelines, para 157.

[103] The first known patent pool is that of the sewing machine producers in the USA, established in 1856. It ended the Sewing Machine War that had been triggered by a "patent thicket"; see <https://americanhistory.si.edu/collections/search/object/nmah_630930> (last accessed 7 May 2025).

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

The TTBER does not apply to (multiparty) patent pools because its scope of application is limited to two-party agreements, and because such pools do not aim at the production of contract products but solely at the joint granting of licenses. However, the TT Guidelines contain a separate chapter on "technology pools" (a more comprehensive term than just "patent pools") with a detailed examination of the possible effects on competition.[104] Technology pools are defined as "agreements whereby two or more parties agree to pool their respective technologies and license them as a package".[105] One-stop licensing reduces transaction costs and avoids double marginalization. On the other hand, there is the risk of restrictive behaviour, even of horizontal price fixing, if substitute technologies are pooled.[106]

The TT Guidelines provide for a safe harbour if the following requirements are fulfilled: participation in the pool must be open to all relevant technology owners on a non-exclusive basis. No substitute technologies must be brought into the pool, but only technological complements that are essential in order to produce a particular product or to comply with a standard. As a rule, independent experts should verify the essentiality of a patent. There have to be safeguards against the exchange of sensitive information. The licensing of the pooled technologies must be done on a FRAND basis (see *infra* 4.2), and the parties have to refrain from no-challenge and non-competition clauses.[107]

The TT Guidelines contain detailed guidance for the analysis of technology pools outside the safe harbour. In sum, the entire legal and economic context must be included. Technology pools are not prohibited or permitted per se but must fulfil certain requirements in order to overcome competition concerns. The modern analytical tools have given technology pools a great degree of latitude under competition law.

3.3 Settlement Agreements

Settlements are an efficient instrument to resolve legal disputes. However, they must not be used to conceal prohibited restrictions of competition. These principles also apply to disputes in the field of IP protection and licensing. The best-known group of cases in which consensual dispute resolution has exceeded the limits of what is permissible under competition law are the "pay-for-delay" settlements in the pharmaceutical industry. Some originators and generic manufacturers have resolved their disputes through settlements in which the generic producer agreed to later market access while the originator agreed to pay a certain sum of money. Such settlements including "reverse payments" (which are not made from the user to the right holder but in the opposite direction) are, according to the European Court of Justice, restrictions by object pursuant to Art. 101(1) TFEU if the payment "cannot have any explanation other than the commercial interest of both the holder of the patent at issue and the party allegedly infringing the patent not to engage in competition on the merits".[108] In the case of value transfers from the originator to the generic producer, such an anti-competitive object

[104] TT Guidelines, ch 4.4.
[105] TT Guidelines, para 56, with an extension of the definition to the situation where a third party is licensed to license-on the package of technologies.
[106] TT Guidelines, paras 245 et seq., 255.
[107] TT Guidelines, para 261 in conjunction with paras 252 and 256.
[108] Case C-591/16 P *Lundbeck/Commission* EU:C:2021:243, para 114.

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

can be assumed if the payment cannot be justified by the need to compensate litigation costs, to remunerate supplies to the originator, or to remedy other disadvantages.[109]

In the same sense, the TT Guidelines emphasize that settlements are "in principle a legitimate way to find a mutually acceptable compromise to a *bona fide* legal disagreement". However, there is also a strong public interest in removing invalid IP rights.[110] Therefore, licensing agreements that are supposed to resolve a legal dispute and that provide for significant value transfers from the licensor to the licensee will be scrutinized by the European Commission to determine whether they aim at market allocation or market sharing.[111]

4 COMPULSORY AND FRAND LICENSING UNDER COMPETITION LAW

An outline on intellectual property licensing and competition law would not be complete without including the classical problem of compulsory licensing and the more recent phenomenon of FRAND licensing.

4.1 Compulsory Licensing

The principle of freedom of contract also applies to the holders of IP rights. They are free to decide whether, with whom, and on what terms they wish to grant a license. In many jurisdictions, IP laws restrict this freedom in specific situations and under strict conditions. This is particularly the case for patent law: Art. 31 TRIPs allows the use of a patent without authorization of the right holder but subjects it to twelve conditions. The patent laws of many countries contain corresponding rules for compulsory licenses. An example is the phenomenon of dependent inventions: if a patented invention cannot be used without infringing a prior patent, the owner of the second patent may request the owner of the first patent to grant a license. However, this compulsory license is subject to conditions: for example, the invention claimed in the second patent must involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent (Art. 31 letter l TRIPs). This rule shall promote cumulative innovation.

In addition to compulsory licenses under intellectual property law, compulsory licenses under general competition law are conceivable. An exception is the US, which traditionally rejects the application of antitrust law to the refusal to license a patent.[112] However, many other jurisdictions, including the EU, affirm this possibility.[113] In a series of cases, the most famous of which are the *Magill* and the *IMS Health* cases, the European Court of Justice has decided that the exercise of an exclusive right by the owner may, in exceptional circumstances, involve

---

[109] Case C-307/18 *Generics (UK)* EU:C:2020:52, para 86.

[110] TT Guidelines, para 235. Therefore, non-challenge clauses receive special attention in paras 242 et seq.

[111] TT Guidelines, para 239.

[112] US Licensing Guidelines, Section 2.1: "The antitrust laws generally do not impose liability upon a firm for a unilateral refusal to assist its competitors, in part because doing so may undermine incentives for investment and innovation."

[113] See the comparative survey in OECD (n 2), ch 6.

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

abusive conduct. However, the finding of an abuse is subject to strict conditions. The owner of the IP right must have a dominant position within the internal market or in a substantial part of it, and trade between Member States must be affected. The IP right in question gives access to a product or service indispensable for carrying on a particular business. There are two separate markets, i.e. an upstream market for the indispensable product and a downstream market for the dependent business. The refusal to grant a license prevents the emergence of a new product not offered by the IP owner and for which there is a potential consumer demand. Moreover, the refusal excludes all competition on a secondary market. And, finally, the refusal is not justified by objective considerations.[114]

The impressive number of conditions makes clear that the application of competition law to the refusal to grant licenses does not lead to a generalized system of compulsory licenses under competition law. This insight is confirmed by the fact that, also in the EU, cases on competition law-based compulsory licenses have remained the rare exception.[115] Against this background, the difference between US and EU law on this topic is not as big as it seems at first sight. Also in the EU, the goal of competition law is not restricted to the protection of short-term competition by imitation but aims to promote competition by innovation in the medium and long term. Compulsory licenses presuppose exceptional circumstances and a case-specific analysis.[116]

4.2 FRAND Licensing

In all fields of technology, interoperability and compatibility are key, especially in the information and communication technology (ICT) sector. Standard setting organizations (SSOs) play an important role in this context.[117] Standards set by such organizations confer considerable market power on the owners of standard essential patents (SEPs) that have been incorporated into the standard. Therefore, SSOs normally require SEP holders to declare their willingness to license on "fair, reasonable and non-discriminatory (FRAND)" terms.[118]

Due to the vagueness of this concept, much dispute occurs in practice. Often, the holder of an SEP seeks injunctive relief against implementers of a standard, although a FRAND commitment has been given. The question arises whether this behaviour can violate competition law. As with regard to compulsory licensing, there is a transatlantic divide on this issue.[119]

---

[114] Cf. Joined Cases C-241/91 P and C-242/91 P *RTE and ITP/Commission* ("*Magill*") [1995] EU:C:1995:98, paras 50 et seq.; Case C-418/01 *IMS Health* EU:C:2004:257, para 38.

[115] See Steven Anderman, 'Overplaying the innovation card: The stronger intellectual property rights and competition law' in Peter Drahos, Gustavo Ghidini, and Hanns Ullrich (eds.), *Kritika: Essays on Intellectual Property* (Edward Elgar 2015) 58: "Competition law offers a reserve power, available in occasional egregious cases."

[116] OECD (n 2), para 101.

[117] See Rolf H. Weber, 'Competition Law Versus FRAND Terms in IT Markets' (2011) 34 *World Competition* 51; see Jorge Contreras, 'Licensing of Standards-Essential Patents on FRAND Terms', Chapter 12 in this book, p. 246.

[118] See Peter G. Picht, 'Standard-essential patents – Limiting Exclusivity for the Sake of Innovation' in Josef Drexl and Anselm Kamperman Sanders (eds.), *The Innovation Society and Intellectual Property* (Edward Elgar 2019) 208 et seq.

[119] See OECD (n 2), para 72: "An area of particular controversy".

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

Whereas in the US, the problem of patent holdout, i.e. opportunistic behaviour of standard implementers, is emphasized, and the non-respect of FRAND commitments is attributed to contract law rather than competition law,[120] the EU has made it clear that not meeting FRAND commitments can also be a matter of competition law.

In the *Huawei* case, the European Court of Justice has outlined a road map that an SEP holder must follow in order to escape charges of a competition violation. Before bringing an action for injunctive relief, the SEP holder has to alert the alleged infringer. If the alleged infringer expresses their willingness to conclude a licensing agreement on FRAND terms, it is up to the patent owner (not the implementer) to present an offer for a license and to specify the terms, in particular the royalties. If the implementer does not agree, he or she has to promptly submit a counteroffer on FRAND terms. Of course, the parties may involve an independent third party to determine the FRAND terms. In any case, the implementer has the right to challenge the validity or the essential nature of the patent in question.[121] The European Commission has submitted a Draft Regulation on SEPs that includes an alternative dispute resolution mechanism for setting FRAND terms and conditions in 2023, but withdrew the proposal in 2025 due to controversy due over its economic impact.[122]

The European approach towards the application of competition law to SEPs seems to be followed in a number of other jurisdictions.[123] In any event, standard-setting procedures and the use of SEPs are so important for technological progress that their legal treatment should not focus on short-term advantages for right holders but on the overall consequences for innovation. Thus, the FRAND question shares the same basic concern as many other issues at the interface of IP and competition law.

5 LEGAL CONSEQUENCES: PUBLIC AND PRIVATE ENFORCEMENT

The European competition law enforcement system is, like most other systems, based on two pillars: public and private enforcement.[124]

---

[120] This was at least the position of the 2019 SEP Statement of the antitrust agencies under the first Trump administration. Under the Biden administration, this statement was withdrawn in 2022 but has not been replaced by another text, see US Department of Justice et al., Press Release 22-610 of 8 June 2022 <www.justice.gov/opa/pr/justice-department-us-patent-and-trademark-office-and-national-institute-standards-and> (last accessed 7 May 2025). No new official guidance has been issued under the second Trump administration so far.

[121] Case C-170/13 *Huawei Technologies* EU:C:2015:477, paras 60 et seq.

[122] Commission, Proposal for a Regulation of the European Parliament and the Council on standard essential patents, COM (2023) 232 final; the Proposal was removed in Commission, Commission work programme 2025, COM (2025) 45 final; Commission, European Commission Withdraws Proposals for Standard Essential Patent Regulation <https://intellectual-property-helpdesk.ec.europa.eu/news-events/news/european-commission-withdraws-proposals-standard-essential-patents-regulation-2025-02-21_en> (last assessed May 7 2025).

[123] See Yo Sop Choi and Andreas Heinemann, 'Standard essential patents – a comparison of approaches between East and West' (2018) 8 Queen Mary J. of Intell. Prop. 313.

[124] For a figure of the various public *ex ante* and *ex post* enforcement options, see Kai Hüschelrath, 'How Are Cartels Detected, The Increasing Use of Proactive Methods to Establish Antitrust

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

5.1 Public Enforcement

The Commission is the main enforcer of the EU competition rules. It has the power and responsibility to investigate suspected anti-competitive behaviour, to adopt prohibition decisions, to impose fines, and to enter into binding agreements with companies.[125]

In 2004, the public enforcement of EU competition law underwent a paradigm shift when Regulation 1/2003[126] came into force. It introduced a decentralized enforcement system based on the direct application of EU competition rules in their entirety.[127] Crucially, Regulation 1/2003 abolished the system of *ex ante* notification of potentially restrictive agreements to the Commission, thus ending the Commission's monopoly on granting exemptions.[128] The Commission states that national courts have an essential part to play in applying the EU competition rules and refers to the (national) courts as "complement" to the national competition authorities;[129] however, only the Commission has the power to adopt a finding of inapplicability under Arts 101 and 102 TFEU.[130] The Regulation also establishes a cooperation mechanism between the Commission and the national courts.[131] The competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings.[132] In the context of IP licensing, a possible commitment may be to no longer enforce a clause which probably hinders competition.[133]

An important feature of Regulation 1/2003 is to be found in Art. 9, which empowers the Commission to accept commitments in cases where it intends to adopt a decision requiring that an infringement be brought to an end and where the undertakings concerned offer commitments to meet the concerns the Commission expressed in its preliminary statement. These commitments may be limited in time.[134]

Infringements' [2014] J. of Eur. Competition L. and Prac. 524.

[125] See e.g. Eddy De Smijter and Ailsa Sinclair, 'The Enforcement System Under Regulation 1/2003' in Jonathan Faull and Ali Nikpay (eds.), *The EU Law of Competition*, (3rd edn, Oxford University Press 2014) paras 2.01 et seq.; David Bailey and Laura Elizabeth John, 'Enforcement and Procedure' in Bellamy and Child, *European Union Law on Competition*, (8th edn, Oxford University Press 2018) paras 13.001 et seq.

[126] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L1/1.

[127] Article 3(1), Recitals 6 et seq. Regulation 1/2003. See Wouter P.J. Wils, 'Regulation 1/2003: An Assessment after Twenty Years (2023) 46 *World Competition* 3.

[128] Article 1(1), Recital 4 Regulation 1/2003.

[129] Regulation 1/2003, Recital 7.

[130] Article 10 Regulation 1/2003, see Case C-375/09 *Tele2 Polska* EU:C:2011:270, paras 24 et seq.

[131] Article 15 Regulation 1/2003; this is supplemented by the Notice on the Cooperation between the Commission and the Courts of the EU Member States in the application of Articles 101 and 102 TFEU [2004] OJ C101/43.

[132] Article 11 para 6, Recital 17 Regulation 1/2003.

[133] Cf. *Cross-border access to pay-TV* (Case AT.40023) Commission Decision C(2019) 1772 [2019] paras 76, 114, 116, regarding an exclusive copyright license which contained, inter alia, clauses restricting passive sales.

[134] For a comprehensive overview, see Ulrich Von Koppenfels and Flavien Christ, 'Commitments' in Ekaterina Rousseva (ed.), *EU Antitrust Procedure* (Oxford University Press 2020) 254.

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

As a result of the entry into force of Regulation 1/2003, the total number of decisions taken under Arts 101 and 102 TFEU has increased more than tenfold. Around 90 per cent of these decisions were taken by national competition authorities.[135]

5.2 Private Enforcement

Another pillar of EU competition law is private enforcement, litigation initiated by individual plaintiffs before a court to remedy an infringement of competition law. Remedies include damages, restitution, injunction, nullity[136] or interim relief. They can be asserted in stand-alone actions or can follow an infringement decision by a competition authority. Unlike public enforcement agencies, private parties have no special powers in civil law disputes.

After a relatively slow start, prompted by the European Court of Justice's (ECJ's) *Courage*[137] and *Manfredi*[138] decisions[139] and followed by the Commission's Damages Directive,[140] damage actions, alongside public enforcement, are now an essential tool of EU competition law. It is widely recognized that private enforcement plays an essential and complementary role to public enforcement in order to maintain effective competition within the EU.[141]

In 2014, the EU adopted the Damages Directive, which regulates civil actions for damages for breach of Arts 101 and 102 TFEU before national courts and harmonizes the rules to ensure that anyone who has been harmed by an infringement of competition law by an undertaking can effectively exercise their right to obtain full compensation for that harm from the infringer.[142] It facilitates the exercise of the right to compensation for victims of antitrust infringements by ensuring the disclosure of evidence relevant to the claim, recognizing the binding effect of national competition authorities' decisions, introducing a presumption of harm in the case of an antitrust infringement, and empowering national courts to estimate

---

[135] European Commission, 'Aggregate figures on antitrust cases' <https://competition-policy.ec.europa.eu/european-competition-network/statistics_en> (last accessed 7 May 2025).

[136] Hanns Ullrich, 'Private Enforcement of the EU Rules on Competition – Nullity Neglected' (2021) Int'l Rev of Intell. Prop. & Competition L. 606.

[137] Case C-453/99 *Courage and Crehan* EU:C:2001:465, paras 24 et seq.

[138] Joined Cases C-295/04 to C-298/04 *Manfredi and others* EU:C:2006:461, para 59.

[139] For other landmark cases in the evolution of damage claims, see Richard Whish and David Bailey, 'Private Enforcement of Competition Law: Its Role and Development in the EU' in Barry J. Rodger, Miguel Sousa Ferro, and Francisco Marcos (eds.) *Research Handbook on Private Enforcement of Competition Law in the EU* (Edward Elgar 2023) 1, 8 et seq.; David Ashton, 'The Legal Basis of the Right to Damages' in David Ashton (ed.), *Competition Damages Actions in the EU and the UK* (3rd edn, Edward Elgar 2023) para 1.025 et seq.

[140] Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1 ("Damages Directive").

[141] Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions* EU:C:2019:100, Opinion of AG Wahl EU:C:2019:100, para 31; see also Case C-557/12 *KONE AG and others* [2014] EU:C:2014:45, Opinion of AG Kokott EU:C:2014:45, paras 57 et seq.; see also Damages Directive, Recital 3.

[142] Article 1(1) Damages Directive; Recital 8 states that the Directive's aim is to protect competition as well as the internal market; therefore, the Directive is based on the dual legal bases of Arts 103 and 114 TFEU.

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

damages.[143] The Commission recognizes the need for economic analysis in a typical case, along with the complexity such analysis brings.[144] The substantive claim – meaning the constitutive conditions of the rights to compensation – is determined by Arts 101 and 102 TFEU. By contrast, the rules actually governing actions for compensation have to be determined by the national law of the Member States.[145]

6 OUTLOOK

IP law and competition law are two separate fields of law that are subject to different enforcement regimes. As far as registered rights are concerned, such as for patents and trademarks, IP law provides rules for invalidation procedures and infringement lawsuits. Even if IP offices are involved, these proceedings may be qualified as "private enforcement", since it is usually private plaintiffs who want to enforce their rights and preserve room for manoeuvre in the competitive process. The application of competition law leads to additional enforcement mechanisms. Although competition law is also enforced by private plaintiffs in civil courts, public enforcement by competition authorities and courts has a much greater practical significance in many jurisdictions.[146] By identifying certain practices in the context of licensing as anti-competitive, the competition authorities enter the scene. Much better than private parties, they can clarify the facts in public investigations and punish competition violations with fines. In this way, competition law has gained a major influence on the practice of licensing agreements.

As far as substantive competition law of licensing agreements is concerned, there are differences in international comparison. Due to the goal of market integration, the EU provides strict rules against contract clauses on territorial exclusivity and rejects resale price maintenance, also in the context of licensing agreements. Regarding unilateral conduct, US law is sceptical of compulsory licensing of IP rights and the application of competition law to the violation of FRAND commitments in the context of SEPs.

However, as the analysis above has shown, the differences should not be exaggerated. As the OECD has put it, they "pale in comparison to the increasing level of agreement that has been achieved over the last century regarding the balance of IP and competition laws, and the

---

[143] Article 12(5) and 17(1) Damages Directive.

[144] Damages Directive, Recitals 14 and 45, see for an overview Maximilian Langer, Erik Lindén, Asger Lunde, Claus Kastberg Nielsen and Jouni Sohkanen, 'The Economics of Private Enforcement of Competition Law' in Barry J. Rodger, Miguel Sousa Ferro, and Francisco Marcos (eds.), *Research Handbook on Private Enforcement of Competition Law in the EU* (Edward Elgar 2023) 28 and Frank Maier-Rigaud and Ulrich Schwalbe, 'Quantification of Antitrust Damages' in David Ashton (ed.), *Competition Damages Actions in the EU and the UK* (Edward Elgar 2023) 459.

[145] See Juliane Kokott and Hanna Schröder, 'Respective Roles of EU and National Law' in Barry J. Rodger, Miguel Sousa Ferro, and Francisco Marcos (eds.), *Research Handbook on Private Enforcement of Competition Law in the EU* (Edward Elgar 2023) 82.

[146] An exception is the US, where private enforcement has always had the highest importance. In the EU, since the enactment of the Damages Directive, private enforcement has flourished but still lags far behind public enforcement.

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich

correct approach by competition law to IP licensing practices".[147] A worldwide convergence can be observed with regard to the application of competition law to licensing agreements in particular, and to intellectual property rights in general.[148] This development is to be welcomed. Drafters of licensing agreements need legal certainty for the clauses they include in their contracts. Clear competition rules for licensing practices are an important contribution to promoting innovation and its diffusion.

[147] OECD (n 2), para 7.

[148] Yo Sop Choi and Andreas Heinemann, 'Restrictions of Competition in Licensing Agreements: The Worldwide Convergence of Competition Laws and Policies in the Field of Intellectual Property' (2017) 17 Eur. Bus. Org. L. Rev 405.

Andreas Heinemann and Giulia Mara Meier - 9781839108747
Downloaded from https://www.elgaronline.com/ at 11/23/2025 08:32:01AM by
andreas.heinemann@ius.uzh.ch
via Zentralbibliothek Zurich