

# Technology Transfer Block Exemption Regulation

Call for inputs

26 July 2024

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## Introduction and background

1. The purpose of this Call for Inputs is to seek stakeholder feedback on the assimilated<sup>1</sup> Technology Transfer Block Exemption Regulation (the Assimilated TTBER).<sup>2</sup>
2. The CMA is now reviewing the Assimilated TTBER for the purpose of making a recommendation to the Secretary of State for Business and Trade in accordance with the Competition Act 1998 (CA98) about whether to replace it when it expires on 30 April 2026 and, if it is to be replaced, whether to vary it.
3. The CMA is also considering the Technology Transfer Guidelines (Guidelines) in its review of the Assimilated TTBER.<sup>3</sup>

### *Chapter I prohibition and exemption*

4. The CA98 prohibits agreements between businesses that restrict competition in the UK (unless they meet the conditions for exemption in section 9(1) of the CA98 or are otherwise excluded).<sup>4</sup> This is known as the ‘Chapter I prohibition.’
5. There are situations where agreements which restrict competition can be beneficial to consumers. For this reason, the CA98 provides that agreements can be exempted from the Chapter I prohibition if they meet certain conditions relating to the benefits they produce. Broadly, the agreement must contribute to clear efficiencies. Second, consumers must receive a fair share of the resulting benefits. Third, the restrictions on competition that the agreement gives rise to must be no more than the minimum that is necessary to enable consumers to gain these benefits. Fourth, the agreement must not give the parties the possibility of eliminating competition in respect of a substantial part of the products concerned.<sup>5</sup>

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<sup>1</sup> Under the Retained EU Law (Revocation and Reform) Act 2023, what was previously ‘retained EU law’ has become ‘assimilated law’ from 1 January 2024. ‘Assimilated law’ is domestic law which was previously retained EU law, but without the application of the EU law interpretive features applied to retained EU law by the European Union (Withdrawal) Act 2018 - namely, supremacy, general principles of EU law and rights retained under section 4 of the European Union (Withdrawal) Act 2018.

<sup>2</sup> [Technology Transfer Block Exemption Regulation 2014](#).

<sup>3</sup> [Communication from the Commission — Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements](#).

<sup>4</sup> The Chapter I prohibition is set out at section 2 of the CA98.

<sup>5</sup> The cumulative conditions in section 9(1) of the CA98 that must be met in full are that the agreement:

- (a) Contributes to:
  - (i) improving production or distribution, or

6. Ordinarily, businesses who wish to enter into an anticompetitive agreement must make their own assessment of whether the agreement can be justified based on its benefits. This is referred to as 'self-assessment.'
7. In certain cases, it may be clear that all agreements in a particular category are likely to be exempt agreements. In these circumstances, a 'block exemption' may be made to exempt agreements in that category automatically provided that they satisfy the conditions set out in the block exemption.

### ***Overview of the Assimilated TTBER***

8. The Assimilated TTBER automatically exempts certain types of technology transfer agreements from the Chapter I prohibition insofar as those agreements meet certain conditions set out in the Assimilated TTBER.
9. A 'technology transfer agreement' for the purpose of the Assimilated TTBER is an agreement in which one party (the licensor) assigns or licences the use of intellectual property rights (such as patents, design rights, software copyrights and know-how) to another party (licensee) for the production of goods or services.<sup>6</sup>

### ***Market share thresholds***

10. The exemption in the Assimilated TTBER only applies if the market share of parties to a technology transfer agreement are within certain thresholds.<sup>7</sup> The market share thresholds are as follows:

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- (ii) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; and
  - (b) does not:
    - (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
    - (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.'

See further the CMA's [Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements](#), paragraphs 3.47 – 3.54.

<sup>6</sup> Article 1(1)(c) of the Assimilated TTBER. Article 1(1)(b) of the assimilated TTBER defines the 'technology rights' to which a technology transfer agreement for these purposes can apply as: patents, utility models, design rights, topographies of semiconductor products, supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained, plant breeder's certificates and software copyrights. For the avoidance of doubt, the CMA is aware that there is no protection available for utility models in the United Kingdom.

<sup>7</sup> As set out in Article 3 of the Assimilated TTBER.

- (a) In the case of agreements between competing undertakings,<sup>8</sup> the parties' combined market share is 20% or less on the relevant market(s).
- (b) In the case of agreements between not competing undertakings, the parties each have a market share of 30% or less on the relevant market(s).

11. If the market share of a party or parties is initially within the applicable threshold but subsequently rises above the threshold, the exemption in the Assimilated TTBER continues to apply for a period of two consecutive calendar years following the year in which the threshold was exceeded.<sup>9</sup>

*Hardcore restrictions*

12. The exemption in the Assimilated TTBER will not apply to any technology transfer agreement containing 'hardcore restrictions.'<sup>10</sup> What constitutes a hardcore restriction depends on whether a technology transfer agreement is between competing undertakings or not competing undertakings.<sup>11</sup> The table below sets out in broad terms the hardcore restrictions for both types of agreement.

<b>Agreement between competing undertakings</b>	<b>Agreement between not competing undertakings</b>
Price-fixing or restrictions on a party's ability to determine its prices when selling to third parties.	Price-fixing (other than imposing a maximum price or recommending a retail price).

<sup>8</sup> Article 1(1)(n) of the Assimilated TTBER defines 'competing undertakings' as:

- (i) competing undertakings on the relevant market where the technology rights are licensed, that is to say, undertakings which license out competing technology rights (actual competitors on the relevant market);
- (ii) competing undertakings on the relevant market where the contract products are sold, that is to say, undertakings which, in the absence of the technology transfer agreement, would both be active on the relevant market(s) on which the contract products are sold (actual competitors on the relevant market) or which, in the absence of the technology transfer agreement, would, on realistic grounds and not just as a mere theoretical possibility, in response to a small and permanent increase in relative prices, be likely to undertake, within a short period of time, the necessary additional investments or other necessary switching costs to enter the relevant market(s) (potential competitors on the relevant market).

<sup>9</sup> Article 8(e) of the Assimilated TTBER.

<sup>10</sup> Article 4 of the Assimilated TTBER.

<sup>11</sup> For agreements between competing undertakings, hardcore restrictions are set out in Articles 4(1)(a)-(d) of the Assimilated TTBER. For agreements between not competing undertakings, hardcore restrictions are set out in Article 4(2)(a)-(c) of the Assimilated TTBER.

Limitations on output (subject to certain exceptions).	Restrictions on the territories into which, or the customers to whom, the licensee may passively sell the contract goods or services (subject to certain exceptions).
Allocation of markets or customers (subject to certain exceptions).	Restrictions on active or passive sales to end-users by licensees which are members of a selective distribution system operating at the retail level of supply (although it is permitted to include a clause prohibiting a licensee from operating out of an unauthorised place of establishment).
Restrictions on the licensee's ability to exploit its own technology rights or restrictions on any party's ability to carry out research and development (except where they are necessary to prevent disclosure of licensed know-how to third parties).	

### *Excluded restrictions*

13. The exemption in the Assimilated TTBER will not apply to the following 'excluded restrictions' contained in a technology transfer agreement,<sup>12</sup> namely:
- (a) obligations on the licensee to grant an exclusive licence or assign rights to the licensor or a third party designated by the licensor in respect of its own improvements to, or its own new applications of, the licensed technology;
  - (b) obligations on a party not to challenge the validity of intellectual property rights which the other party holds in the UK, without prejudice to the possibility, in the case of an exclusive licence, of providing for the termination of the technology transfer agreement in the event that the licensee challenges the validity of any of the licensed technology rights;
  - (c) in agreements between not competing undertakings, restrictions on the licensee's ability to exploit its own technology or restrictions on any of the parties' ability to carry out research and development (except where necessary to prevent disclosure of licensed know-how to third parties).

<sup>12</sup> As set out in Article 5 of the Assimilated TTBER.

## ***Background to the Assimilated TTBER***

14. At the end of the transition period<sup>13</sup> on 31 December 2020, the EU TTBER was retained into UK law under the EU Withdrawal Act 2018. Under the Retained EU Law (Revocation and Reform) Act 2023, legislation which was previously 'Retained EU Law' – such as the EU TTBER – became 'Assimilated Law' on 1 January 2024.
15. The European Union (EU) adopted the EU TTBER in March 2014<sup>14</sup> in advance of the first version of the EU TTBER expiring on 30 April 2014.<sup>15</sup> The EU TTBER also expires on 30 April 2026 and is currently being reviewed by the European Commission.<sup>16</sup>

## ***The Guidelines***

16. Alongside the EU TTBER, the European Commission published the Guidelines in 2014.
17. The Guidelines are intended to complement the EU TTBER and set out general principles for the assessment of technology transfer agreements and provide guidance on both the application of the EU TTBER to technology transfer agreements and the assessment of other technology transfer agreements that are not covered by the EU TTBER.

## ***This Call for Inputs***

18. The CMA is reviewing the Assimilated TTBER to inform its recommendation to the Secretary of State on whether to replace the Assimilated TTBER when it expires on 30 April 2026 and, if it is to be replaced, whether to vary it.
19. The CMA's review will assess whether the Assimilated TTBER continues to meet its intended purpose and will take account of the any specific features of the UK economy and interests of businesses and consumers. The CMA's

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<sup>13</sup> The transition period began when the UK left the EU on 31 January 2020 and ended on 31 December 2020. During this period, the UK ceased to be an EU Member State but remained subject to most EU rules.

<sup>14</sup> [Commission Regulation \(EU\) No 316/2014 of 21 March 2014 on the application of Article 101\(3\) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements.](#)

<sup>15</sup> [Commission Regulation \(EC\) No 772/2004 of 27 April 2004 on the application of Article 81\(3\) of the Treaty to categories of technology transfer agreements.](#)

<sup>16</sup> [Review of the TTBER and related Guidelines.](#)



review will also consider the Guidelines, including how well they work alongside the Assimilated TTBER and in the context of the UK.

20. Stakeholders are encouraged to provide feedback in response to the questions set out in this Call for Inputs with a specific focus on the operation and application of the Assimilated TTBER and the Guidelines in the UK, including (where they have knowledge of this), relevant differences between the UK position and the EU position.
21. Our questions have been grouped into six sections and, for each section, we have included a brief introduction to our rationale for the questions.
22. The CMA will consider the responses to the questions included in this Call for Inputs to reach a view on how best to address the underlying substantive issues.
23. Appendix A also includes information on how the CMA may use information provided to it during the course of this project.

## Questions for stakeholders

### *Stakeholder information*

*We would like to understand the types of stakeholders responding to this Call for Inputs, and the types of business which use the Assimilated TTBER and the Guidelines.*

1. Please confirm the capacity in which you are responding to this Call for Inputs.
  - (a) If you are responding as a business:
    - (i) Please confirm whether you are primarily a licensor or a licensee of technology rights.
    - (ii) Please specify the technology right(s) to which your knowledge of and/or experience with the Assimilated TTBER and the Guidelines primarily relate.
    - (iii) Please identify the sector(s) to which your knowledge of and/or experience with the Assimilated TTBER and the Guidelines primarily relates.
  - (b) If you are submitting a response as an advisor or other third party:
    - (i) Please specify whether you primarily advise and/or represent licensor(s) or licensees.
    - (ii) Please specify the technology right(s) to which your knowledge of and/or experience with the Assimilated TTBER and the Guidelines primarily relates.
    - (iii) Please confirm which sector(s) you consider are particularly relevant to the Assimilated TTBER and the Guidelines.
2. Whether you are making a submission as a business, an advisor, or otherwise, please provide any observations you have on the size of business that, in your experience, typically makes use of the Assimilated TTBER and the Guidelines.

## **Benefits and impacts on competition**

*The following questions seek views on whether technology transfer agreements covered by the Assimilated TTBER continue to produce benefits outweighing their potential harmful effects on competition.*

3. What are the main effects (if any) on competition of technology transfer agreements covered by the Assimilated TTBER? To what extent do these agreements restrict competition? If possible, please provide examples.
4. Has the Assimilated TTBER contributed to promoting competition in the UK? If possible, please provide examples.
5. Has the Assimilated TTBER contributed to promoting economic activity that benefits consumers in the UK and would not otherwise have occurred? If possible, please provide examples.
6. If, in response to question 3, you consider that technology transfer agreements covered by the Assimilated TTBER restrict competition, to what extent:
  - (a) Do any benefits identified in response to question 5 compensate consumers for any such restriction of competition?
  - (b) Are these restrictions necessary in order to achieve any benefits identified in response to question 5?

## **Benefits of a block exemption over self-assessment**

*We would like to understand the extent to which the Assimilated TTBER is relied upon, and the value of the Assimilated TTBER for the businesses which rely on it.*

7. Are you aware of businesses having relied on the Assimilated TTBER, when entering into technology transfer agreements? If possible, please provide examples.
8. In the absence of the Assimilated TTBER, operators would need to self-assess their compliance with Chapter I prohibition. For any agreements currently covered by the Assimilated TTBER:

- (a) To what extent would licensors or licensees be discouraged from entering into technology transfer agreements in the absence of the Assimilated TTBER? Please provide examples and reasons for your answer.
- (b) Please provide estimates for any additional costs an operator would incur, in the absence of an Assimilated TTBER, to carry out the relevant self-assessment for agreements which currently benefit from exemption. If it is not possible to provide a quantified estimate of additional costs, please estimate the cost in terms of time and/or estimate the increased complexity of carrying out the relevant competition law self-assessment (including, for example, whether external advice might be needed).

### ***Effectiveness of the Assimilated TTBER***

*We would like to understand if there are changes to the Assimilated TTBER which could improve its effectiveness, including to reflect any technological or business changes since its adoption in 2014.*

#### **Scope**

- 9. In your view, has the Assimilated TTBER been effective in exempting only those technology transfer agreements for which it can be assumed with sufficient certainty that they satisfy the conditions for an exemption under section 9 of the CA98?
- 10. In relation to the definitions of 'technology transfer agreements' and 'technology rights' in Article 1 of the Assimilated TTBER:
  - (a) Are these definitions sufficiently clear to allow you to identify the categories of agreements and intellectual property rights that are covered by the Assimilated TTBER? If not, how should these definitions, in your view, be clarified or amended?
  - (b) Are there any types of intellectual property right agreements or other technology rights which, in your view, should not be covered by these definitions (for example, because they do not apply in the UK)?

- (c) Are there any types of intellectual property right agreements or other technology rights, which are not covered by the Assimilated TTBER that, in your view, would be likely to meet the requirements for exemption from the Chapter I prohibition under section 9 of the CA98?
11. In relation to the definition of ‘competing undertakings’ in Article 1, is this sufficiently clear for the purposes of assessing a technology transfer agreement under the Assimilated TTBER? If not, how should this definition, in your view, be clarified or amended?

#### *Market share thresholds*

12. Article 3 of the Assimilated TTBER sets out various market share thresholds that must be met in order for technology transfer agreements to be exempted: businesses’ market shares cannot exceed 20 percent when they are competing undertakings and 30 percent in each market in which they are not competing undertakings. In relation to the thresholds:
- (a) Are the market share thresholds set at an appropriate level?
  - (b) If not, would either of the market share thresholds benefit from modification? Please provide reasons for your answer.
13. Article 8 of the Assimilated TTBER contains rules setting out how parties are to calculate their market share(s) for the purposes market share thresholds. Are these rules sufficiently clear to allow parties to calculate their market shares? If not, how should these rules, in your view, be clarified or amended?

#### *Hardcore restrictions*

14. Article 4 of the Assimilated TTBER lists ‘hardcore restrictions’ that a technology transfer agreement must not contain if it is to be exempted. In relation to the ‘hardcore restrictions’:
- (a) Are the current restrictions sufficiently clear?
  - (b) Would any of the current restrictions benefit from modification?
  - (c) Are there any further restrictions that it would be appropriate to include, in addition to those already included in the Assimilated TTBER?
  - (d) Are there any restrictions that it would be appropriate to remove from the Assimilated TTBER?

### *Excluded restrictions*

15. Article 5 of the Assimilated TTBER contains a list of ‘excluded restrictions’ that do not benefit from exemption. In terms of the ‘excluded restrictions’:
- (a) Is the current list sufficiently clear?
  - (b) Would any of the current excluded restrictions benefit from modification?
  - (c) Are there any further restrictions that it would be appropriate to include, in addition to those already included in the Assimilated TTBER?
  - (d) Are there any excluded restrictions that it would be appropriate to remove from the Assimilated TTBER?
16. The CMA is aware that the EU TTBER in 2014 amended the scope of ‘excluded restrictions’ in respect of grant-back obligations<sup>17</sup> and non-challenge termination clauses in licenses<sup>18</sup> in comparison to the EU TTBER’s 2004 predecessor.<sup>19</sup> Have these changes improved the Assimilated TTBER? Please provide examples and reasons for your answer.

### ***The Technology Transfer Guidelines***

*We are interested in understanding how effectively the Technology Transfer Guidelines are working and whether any changes to the Guidelines could improve their effectiveness.*

17. The purpose of the Guidelines is to assist businesses in their assessment of technology transfer agreements. In your view:
- (a) Have the Guidelines been effective in providing legal certainty for UK businesses in their assessment of technology transfer agreements?
  - (b) Are there any changes that could improve the effectiveness of the Guidelines? Please provide reasons for your answer.

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<sup>17</sup> Article 5(1)(a) of the Assimilated TTBER. Paragraph 13(a) of this Call for Inputs describes ‘grant back’ obligations.

<sup>18</sup> Article 5(1)(b) of the Assimilated TTBER. Paragraph 13(b) of this Call for Inputs describes ‘termination clauses’.

<sup>19</sup> See Article 5 of Commission Regulation (EC) No 772/2004.

- (c) Are there any matters not covered by the Guidelines (for example, recent developments in the market for technology transfer licensing) that should be taken into account by any future Guidelines?
  - (d) Are there any matters which are covered by the Guidelines that it would be appropriate to remove?
18. If, in response to questions above, you have specified that the Assimilated TTBER should be modified, please explain whether the Guidelines should be changed to reflect any modifications.
19. To the extent not covered by your responses to the other questions, please outline areas of the Guidelines where clarification or simplification would be useful.

### ***The Assimilated TTBER and Guidelines in a UK context***

*At the end of the transition period, the EU TTBER was retained into UK law under the EU Withdrawal Act 2018. The Assimilated TTBER only applies in the UK. We would like to understand if changes to the Assimilated TTBER and the Guidelines are required to reflect that it only applies in the UK.*

20. Are there UK-specific considerations that the CMA should take into account in its review of the Assimilated TTBER and the Guidelines? For example, are there restrictions and/or conditions included in the Assimilated TTBER that are not appropriate in a UK-only context?
21. If so, it would be helpful if you could indicate why those differences are needed or justified (which might, for example, be because of particular characteristics you identify in the UK market that differ from the EU market).

### ***Other considerations***

22. Are there, in your view, any other considerations relevant to the Assimilated TTBER and the Guidelines that the CMA should take into account? Please provide any relevant evidence that you have to support your views.

## **Appendix A: Use of information provided to the CMA**

1. This Appendix sets out how the CMA may use information provided to it during the course of this project.

### **Why is the CMA asking for information?**

2. The information you provide will help us to inform the CMA's review of the Assimilated TTBER and the Guidelines.

### **Compliance with government consultation principles**

3. In preparing this consultation document, the CMA has taken into account the published government consultation principles, which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders.

### **Statement about how we use information and personal data that is supplied in consultation responses**

4. In accordance with our policy of openness and transparency, we will publish non-confidential versions of responses on our webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide at the same time a non-confidential version for publication on our webpages which omits that material and which explains why you regard it as sensitive. When submitting your response please also let us know if you wish to remain anonymous.
5. The responses to the present Call for Inputs may also be shared with the Department for Business and Trade and other relevant Government departments in order to facilitate consideration of the CMA's recommendation.
6. Any personal data you provide to the CMA will be handled in accordance with our obligations under the UK General Data Protection Regulation and the Data Protection Act 2018 and other law designed to protect sensitive information. Our [personal information charter](#) set out the standards you can expect from us when we collect, use, or share personal data and provides details of your rights in relation to that personal data and how to contact us.
7. 'Personal data' is information that relates to an identified or identifiable living individual. We are processing this personal data for the purposes of our work. This processing is necessary for the performance of our functions and is carried out in the public interest, in order to take responses into account



and to ensure that we properly consult on matters relevant to the advice requested by the Secretary of State before it is finalised.

8. We may only publish or share with others information that you provide to us in specific circumstances set out in legislation (principally Part 9 of the Enterprise Act 2002). In particular, prior to publication or any such disclosure, we must have regard to (among other considerations) the need for excluding, so far as is practicable: (a) any information relating to the private affairs of an individual which might significantly harm the individual's interests; or (b) any commercial information which, if published or shared, we think might significantly harm the legitimate business interests of the undertaking to which it relates. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.
9. Please note that information provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, we will take fully into consideration representations made by you in support of confidentiality. We will also be mindful of our responsibilities under the data protection legislation referred to above and under Part 9 of the Enterprise Act 2002.