

**ACEA'S ANSWERS TO THE CMA'S CALL FOR INPUTS
CONCERNING THE ASSIMILATED TTBER / GUIDELINES**

Stakeholder information

1. Please confirm the capacity in which you are responding to this Call for Inputs.

[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.]

(a) If you are responding as a business:

(i) Please confirm whether you are primarily a licensor or a licensee of technology rights.

ACEA, as a trade association bringing together key participants in the automotive industry, is mostly representative of licensees 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.

ACEA's experience primarily relates to patent rights, specifically in the areas technologies within vehicles, including those related to wireless communication and autonomous driving.

(iii) Please identify the sector(s) to which your knowledge of and/or experience with the Assimilated TTBER and the Guidelines primarily relates.

The sector of relevance is the automotive industry, with a particular focus on advanced standardized communication technologies and patents essential for those technologies.

(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.

N/A

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.

Given the focus of ACEA and the automotive industry, we will respond only to specific licensing related matters as covered by Questions 17, 18 and 22, as these questions are

touching upon the industry's experience as relating to the coverage of the Assimilated TTBER and Guidelines.

For completeness, we note that ACEA has made a number of submissions as part of the parallel review ongoing at EU level into the functioning of the EU TTBER and Guidelines. The present submission to the CMA is consistent with the positions taken in the EU process.

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.

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4. Has the Assimilated TTBER contributed to promoting competition in the UK? If possible, please provide examples.

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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.

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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?

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(b) Are these restrictions necessary in order to achieve any benefits identified in response to question 5?

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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.

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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.

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(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).

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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?

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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?

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(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)?

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(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?

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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?

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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?

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(b) If not, would either of the market share thresholds benefit from modification? Please provide reasons for your answer.

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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?

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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?

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(b) Would any of the current restrictions benefit from modification?

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(c) Are there any further restrictions that it would be appropriate to include, in addition to those already included in the Assimilated TTBER?

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(d) Are there any restrictions that it would be appropriate to remove from the Assimilated TTBER?

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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?

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(b) Would any of the current excluded restrictions benefit from modification?

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(c) Are there any further restrictions that it would be appropriate to include, in addition to those already included in the Assimilated TTBER?

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(d) Are there any excluded restrictions that it would be appropriate to remove from the Assimilated TTBER?

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16. The CMA is aware that the EU TTBER in 2014 amended the scope of ‘excluded restrictions’ in respect of grant-back obligations¹ and non-challenge termination clauses in licenses² in comparison to the EU TTBER’s 2004 predecessor.³ Have these changes improved the Assimilated TTBER?
Please provide examples and reasons for your answer.

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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?
The effectiveness of the Guidelines in providing legal certainty appears to be limited, particularly when dealing with complex issues like Fair, Reasonable, and Non-Discriminatory (FRAND) licensing, and patent pools for Standard Essential Patents (SEPs). There are various challenges that create uncertainty for businesses, such as:
- **Insufficient Monitoring of Patent Pool Compliance:** There is a lack of oversight to ensure that patent pools comply with the conditions necessary to benefit from safe harbor provisions under the Guidelines. This absence of monitoring means that businesses cannot rely on clear, consistent standards for compliance, reducing legal certainty.
 - **Challenges in Essentiality Checks:** The evidence suggests that a significant portion of patents declared as essential to a standard may not actually be essential. The lack of consistent and reliable essentiality checks, which is a key concern highlighted also by the European Commission in parallel developments in the European Union (EU), contributes to uncertainty in technology transfer agreements involving SEPs.
 - **Questionable FRAND Licensing Terms:** The uncertainty surrounding whether technologies are licensed on FRAND terms also complicates the assessment of agreements. Confidentiality clauses and the delegation of FRAND determinations to pool members further exacerbate the problem, leading to doubts about the fairness of terms and hindering legal certainty.
 - **Uncertainty Regarding FRAND Commitments and Patent Pools:** There remains ambiguity about whether patent pools are obligated to adhere to FRAND commitments. Some patent pool members assert that FRAND declarations are

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

² Article 5(1)(b) of the Assimilated TTBER. Paragraph 13(b) of this Call for Inputs describes ‘termination clauses’.

³ See Article 5 of Commission Regulation (EC) No 772/2004.

personal commitments that do not extend to the pools themselves, which they argue only collect royalties on behalf of SEP holders without owning the SEPs. The application of rulings like the Huawei/ZTE case becomes difficult in multi-party settings. Additionally,, as patent pools' sole business is (SEP) patent licensing, they sometimes act similar to Non-Practising Entities (NPEs), complicating matters further. This perception often results in aggressive enforcement tactics and a lack of transparency in licensing activities.

- **Challenges in FRAND Compliance and Transparency:** Patent pools are sometimes seen as employing strategies that are not compliant with FRAND principles, such as selective licensing (e.g. OEMs only), which complicates bilateral negotiations. A lack of transparency in patent pools, especially regarding the proportion of SEPs held by individual members and how royalties are calculated, makes it difficult for licensees to verify whether royalties are really FRAND-compliant.
- **Licensing Practices in the Automotive Sector:** In the automotive industry, wireless communication technologies are often not licensed to “all potential licensees” as stipulated by the Guidelines. Instead, these licenses are typically limited to vehicle manufacturers and do not extend to suppliers.

Therefore, while the Guidelines may provide some clarity for more straightforward agreements, they fall short in offering sufficient certainty in more complex licensing environments, particularly involving patent pools and SEPs.

Without taking a position on the pending matters as such, ACEA also notes:

1. The Tesla dispute with Interdigital and Avanci presently pending before the English courts (see Case No. HP-2023-000042), where the underlying issues of the claim are illustrative for the lack of transparency and the difficulty of obtaining information to gauge FRANDness and essentiality when up against pool-type structures in the automotive industry;
2. The ongoing investigation by SAMR in China into Avanci's licensing practices, identifying potential antitrust risks in the licensing of SEPs associated with automotive wireless-communication technologies (English language public sources are limited, but recent reporting can be found in MLex, August 2, 2024, “China's SAMR deepens automotive survey, following reminder to Avanci over antitrust risks involving patent licensing”).

(b) Are there any changes that could improve the effectiveness of the Guidelines? Please provide reasons for your answer.

Yes, the effectiveness of the Guidelines could be significantly improved by implementing several changes, such as:

- **Clarification of FRAND obligations:** The Guidelines should explicitly state that patent pools must adhere to the same FRAND obligations as individual SEP

licensors. This would help resolve uncertainties about whether FRAND terms are being applied consistently in pooled licensing scenarios, enhancing fairness and predictability in negotiations.

- **Strengthening Essentiality Checks:** The Guidelines should reflect the need for essentiality checks as emphasized also by the European Commission in parallel developments in the EU in its proposed regulation on SEPs. Ensuring that only truly essential patents are included in patent pools would reduce uncertainty and improve the effectiveness of technology transfer agreements.
- **Enhanced disclosure and transparency obligations:** The Guidelines should mandate stricter transparency requirements for patent pools, including the public disclosure of key information such as licensed standards, pool administration structures, and SEP evaluations (see also Art. 9 of the proposed EU SEP regulation). This would enable businesses to better assess the fairness of agreements and determine whether terms are FRAND-compliant.
- **Protection of bilateral licensing rights:** The Guidelines should ensure that businesses have the option to acquire licenses outside of patent pools through bilateral negotiations. In particular, the licensing via patent pools should not influence the FRAND process and obligations, nor negate the obligations under the Huawei/ZTE framework. This would safeguard individual licensing rights and prevent patent pools from becoming the only licensing option available to businesses.
- **Commitment to license all willing licensees:** The Guidelines should require patent pools to extend licensing to all potential licensees requesting a license, regardless of their position in the supply chain. This would ensure fair access to essential technologies for a wider range of businesses.

These changes would help address the identified uncertainties and improve the overall effectiveness of the Guidelines for UK businesses.

- (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?

Yes, Licensee Negotiation Groups (LNGs) are a critical area that is not currently addressed by the Guidelines but should be taken into account in future versions. The argument for this inclusion is strongly grounded in the need for fair and efficient licensing practices, particularly in sectors like automotive and the Internet of Things (IoT), where SEPs play a significant role:

- **LNGs as the Demand-Side Equivalent of Patent Pools:** LNGs are comparable to patent pools on the demand side. Patent pools help SEP holders to collectively license their patents, reducing transaction costs and fostering efficiency. Similarly, LNGs allow multiple implementers (such as manufacturers or suppliers) to negotiate licenses collectively. This would reduce transaction costs for implementers much like how patent pools work for SEP holders. Including LNGs in the Guidelines would acknowledge their role in achieving similar efficiency gains as patent pools.

- Reducing Information Asymmetry: In industries like automotive, there is a significant information asymmetry between SEP implementers (e.g., vehicle manufacturers or upstream suppliers) and SEP holders. SEP holders usually have more information about the patents and licensing terms, while implementers may lack the resources to evaluate whether the license terms offered are FRAND-compliant. LNGs provide a mechanism for implementers to pool their knowledge and resources in line with the compliance principles enshrined in competition laws, enabling them to better assess whether the offered licenses are fair. By including provisions on LNGs in the Guidelines, the Guidelines would help mitigate these asymmetries, facilitating more balanced negotiations.
- Supporting SEP Holders' Compliance and Enforcement: SEP holders often face challenges in enforcing their intellectual property rights (IPR) against all implementers due to time and resource constraints. By facilitating collective negotiation through LNGs, SEP holders can reach a larger pool of licensees at lower enforcement costs, increasing compliance with IPR. This broader reach could support the dissemination of standards, ensuring that more implementers are licensed appropriately, which would benefit the entire ecosystem of SEP licensing. The Guidelines should therefore support the creation of LNGs as a tool for improving compliance and reducing enforcement costs for SEP holders and reduce defense costs for SEP licensees.
- Safe Harbor for LNGs: LNGs should be provided with a safe harbor provision similar to that afforded to patent pools. Safe harbor protections would shield LNGs from certain competition law risks, encouraging their formation. This would be particularly valuable in sectors where SEP negotiations are complex and burdensome for individual companies. The introduction of such provisions would ensure that LNGs can function without fear of violating competition laws, thus promoting their pro-competitive effects.
- To prevent potential anti-competitive behavior within the LNGs safeguards are needed:
 - Safeguards to Prevent Collusion Risks: LNG members must be prohibited from discussing product prices, profit margins, or market shares during negotiations. These safeguards would ensure that LNGs for SEP's do not act as buyers' cartels but instead focus on legitimate collective negotiations around essential patent issues, such as SEP essentiality and validity. Including such provisions in the Guidelines would help encouraging the formation of LNGs and ensure FRAND negotiations for SEPs with manageable competition risks.
 - Black Box Administration: LNG administrators should act as "black boxes" to prevent the inappropriate exchange of individualized data among LNG members. This would ensure that sensitive competitive information is not shared inappropriately during negotiations, thus protecting the integrity of the competitive process. Including such a provision in the Guidelines would ensure that LNGs operate within the bounds of competition law, while still achieving their efficiency-enhancing goals.
 - Framework for LNG and Licensor Negotiations: To mitigate the risk of "hold-out" (where implementers delay licensing negotiations in bad faith), LNGs and SEP holders could agree on a mutually acceptable framework for negotiations. This also would help ensure that negotiations proceed

efficiently and that neither party is perceived as unwilling to engage in good faith negotiations. Including provisions for such a framework in the Guidelines would promote smoother negotiation processes and reduce litigation risks.

- Alignment with the principles of the European Court of Justice (ECJ) decision in Case C-170/13 *Huawei v. ZTE*: LNGs should adhere to the principles established in the *Huawei v. ZTE* framework, which outlines the obligations of SEP holders and implementers in negotiating FRAND terms. This would help LNGs operate within an established legal framework, ensuring that negotiations are fair and balanced for all parties. Incorporating this alignment in the Guidelines would provide further legal certainty to both SEP holders and implementers involved in LNGs.

The inclusion of LNGs in the Guidelines would reflect their growing importance in sectors with complex SEP licensing environments, such as automotive and IoT. These groups serve an essential function in leveling the playing field between SEP holders and implementers by reducing transaction costs, minimizing information asymmetry, and promoting compliance with IPR. However, safeguards such as the prohibition of price discussions and black box administration would be necessary to prevent anti-competitive behaviors.

The recent clearance in Germany by the Bundeskartellamt in re the Automotive-LNG on June 10, 2024 is illustrative (see Case No. B4-136/23; English language public sources can be retrieved via https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2024/10_06_2024_ALNG.html?nn=55030).

- (d) Are there any matters which are covered by the Guidelines that it would be appropriate to remove?

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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.

Yes, the Guidelines should be updated to reflect any modifications made to the Assimilated TTBER. Specifically, if changes are introduced to improve transparency, essentiality checks, and FRAND obligations within the Assimilated TTBER, these should be mirrored in the Guidelines. Ensuring coherence between the Assimilated TTBER and the Guidelines would create a consistent framework for businesses to follow, enhancing legal certainty and compliance:

- **FRAND Obligations:** If the Assimilated TTBER is updated to clarify the FRAND obligations of patent pools, the Guidelines should provide detailed guidance on how these obligations should be applied in practice.

- **Transparency Requirements:** Any new transparency obligations introduced into the Assimilated TTBER should be clearly explained and elaborated upon in the Guidelines, including practical steps for businesses to meet these requirements.
- **LNGs:** If LNGs are introduced into the Assimilated TTBER, the Guidelines should offer guidance on how these groups can operate within competition law, ensuring they adhere to the same safeguards as patent pools.

By aligning the Guidelines with changes in the Assimilated TTBER, the CMA would ensure that businesses are better equipped to assess their technology transfer agreements within the current legal framework.

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.

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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?

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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).

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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.

Yes, the CMA should take into account the recently proposed SEPs Regulation (COM (2023) 232 final) in the EU and the ongoing discussion around the EU TTBER and its TTGL

(Technology Transfer Guidelines), as well as the EU Amicus in re HMD (Case No 6 U 5066/22 Kart, as lodged April 15, 2024). The key considerations are:

- The proposed EU SEPs Regulation emphasizes enhancing transparency, essentiality checks, aggregate royalty determinations, and facilitating dispute resolution through FRAND determination procedures, as also supported by ACEA in its various submissions made as part of the EU process. However, these objectives are not explicitly reflected in the EU TTBER and its TTGL. This lack of coherence presents a risk of fragmentation and inefficiency in how SEP licensing is regulated, particularly concerning patent pools and FRAND commitments. The CMA should consider whether the Assimilated TTBER and the Guidelines should incorporate provisions that mirror the objectives of the proposed SEPs Regulation to harmonize these frameworks and promote fair competition.
- The EU SEPs Regulation introduces the establishment of a public register, essentiality checks, and aggregate royalty determinations, which aim to address long-standing inefficiencies. These measures enhance transparency in SEP licensing and aim to reduce disputes by providing more clarity upfront. However, such transparency measures and dispute resolution mechanisms are currently absent from the TTBER and TTGL. The CMA should therefore explore how similar provisions could be introduced into the Assimilated TTBER and Guidelines to ensure a more consistent and transparent SEP licensing framework in the UK. This would help streamline the licensing process, improve the fairness of FRAND terms, and reduce litigation risks.
- The proposed EU SEPs Regulation emphasizes the role of essentiality checks and aggregate royalty determinations, particularly regarding patent pools. Patent pools play a significant role in SEP licensing, yet there is currently no direct reference in the TTBER or TTGL that explicitly addresses the obligations of patent pools concerning these issues. The CMA should consider incorporating obligations for patent pools that align with the transparency and essentiality check requirements set out in the proposed SEPs Regulation. This would provide greater clarity to businesses and ensure that patent pools adhere to fair competition practices.
- One of the key aims of the proposed EU SEPs Regulation is to promote fair competition by ensuring that SEP holders and implementers can operate under clear, transparent, and fair licensing conditions. This is also reflective of the EU position in the recent Amicus in re HMD. However, the TTBER and TTGL currently do not reflect these specific objectives. The CMA should assess how the goals of fair competition outlined in the EU SEPs Regulation - particularly regarding transparency, royalty determinations, and FRAND dispute resolution - can be harmonized with the existing competition rules. Doing so would ensure that the legal frameworks governing SEP licensing are consistent, reducing the risk of regulatory overlap or conflict, and fostering a more competitive environment.
- Although the UK has left the EU, there remains significant alignment between UK and EU competition law. Given that the EU SEPs Regulation will apply across the EU, the UK may benefit from considering similar measures to avoid regulatory divergence in SEP licensing practices. This would help UK businesses stay competitive in a global market where many of their counterparts will be subject to the EU's enhanced SEP framework. Ensuring that the UK's competition law (through the TTBER and Guidelines) is aligned with the EU's SEPs Regulation could foster smoother cross-

border technology transfer agreements and avoid unnecessary complexity for businesses operating in both markets.

In conclusion, the CMA should seriously consider the implications of the proposed EU SEPs Regulation (and ACEA`s suggested amendments) and its relationship to the TTBER and TTG. Incorporating similar transparency, royalty determination, and dispute resolution provisions into the UK framework would ensure that SEP licensing remains competitive, efficient, and fair, while avoiding fragmentation between UK and EU regulations. This alignment would also strengthen the legal certainty for businesses navigating SEP licensing in both jurisdictions.

SOURCES:

¹: Evans, Schmalensee, Some economic aspects of antitrust analysis in dynamically competitive industries, NBER Working Paper 8268 (Mai 2001), S. 20.