

Response to CMA consultation on the Assimilated TTBER

As a solicitor in private practice, author and teacher of IP law subjects, I have worked with versions of the TTBER and its predecessors for several decades - going back to the separate block exemptions for patent licensing and know-how licensing, as well as franchising, in the 1980s and 1990s.


A fundamental question is whether the UK wishes to align itself with the approach of the European Union, or follow a different approach, e.g. similar to the USA and certain other countries that have followed a similar model to the USA (e.g. Japan).

A significant part of the EU approach is to support the single market, which results in some non-intuitive hardcore clauses that have this objective in mind (e.g. the distinction between active and passive sales outside the licensee's EU territory). I am guessing that this aspect would not be a priority for the UK as we don't benefit from the single market. However, other aspects of the TTBER are focused on more general competition law issues, e.g. the provisions of Article 5 in relation to licensee improvements and no-challenge clauses.

In practice, the US approach is far less intrusive in relation to the terms of IP licence agreements than the EU approach. See in particular the US *Antitrust Guidelines for the Licensing of Intellectual Property*, and the "safety zone" provisions in those Guidelines.

In my view, any decision on the approach to be taken to IP agreements should be part of a wider review of the CMA's general approach to assessing contracts of different types. For example, if the CMA has an approach for distribution agreements, a similar approach might be taken for IP licence agreements. Historically, my impression has been that the CMA and its predecessors have not had the same keen interest in the competition law aspects of IP agreements that the European Commission has had.

My instinctive view is that the "hands off" approach of the US competition authorities is probably preferable to the more *dirigiste* approach of the European Commission. However, in general I think UK business is used to the legal framework of the TTBER and probably wouldn't regard divergence from the EU approach to be a major issue. If the CMA considers that the UK may, in future, align more closely with the approach of the EU on competition law issues, then it may be preferable to make minimal changes to the TTBER. Of course, future alignment also depends on what the European Commission propose for any 2026 TTBER; it may be appropriate to have a dialogue with the European Commission to see what its approach is likely to be. Past experience, which may not be reliable, suggests that the EC will merely tweak the 2014 TTBER.


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