



Competition and Markets Authority
United Kingdom

6 September 2024

Response to call for inputs on the Technology Transfer Block Exemption Regulation and the Technology Transfer Guidelines

Sisvel thanks the UK Competition and Markets Authority (CMA) for the opportunity to respond to the call for input on the assimilated Technology Transfer Block Exemption Regulation (Assimilated TTBER) as well as the accompanying Technology Transfer Guidelines (TTG). We believe that a broad-based, consultative and inclusive approach to policy making is key to achieving clear, balanced and reasonable policies. We therefore commend the CMA for its continuous pursuit of evidence-based policy making with an eye on what is best for the UK consumers and businesses.

Sisvel is Europe's biggest and longest-established patent pool administrator. We have been operating for over 40 years, with offices in several countries and count dozens of the world's most cutting-edge technology R&D powerhouses among our partners.

We are active in several standard essential patent (SEP)-related industry sectors, in both the UK and globally, including cellular communication, wireless communication, digital video technologies (e.g., digital video broadcasting), media coding (e.g., audio and video) and broadband communication technologies. A core part of the work we do involves creating licensing solutions that deliver market adoption of technologies underpinned by SEPs. Our mission states: we power innovation. This can only be done successfully with a deep understanding not only of the relevant technology but also of the markets in which it operates. Our belief is that through efficient and effective IP licensing, the necessary incentives for R&D are created, fostering a self-sustaining cycle that can fund further R&D activities. This generates an inventive loop in which intangible assets acquire their real economic value and world class technologies get delivered to the market.

We note that the Assimilated TTBER and the accompanying TTG have remained closely aligned to the EU TTBER and TTG. Having participated in the ongoing EU consultation on its TTBER regime, we believe that a number of concerns we have raised in that context are worth reiterating in the CMA's consultation.

We address these core concerns in our responses to the CMA's questions below:

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.**

Although Sisvel owns and licenses out several SEPs, our primary business is patent pool administration. We support technology markets by designing licensing solutions that reduce friction and enable efficient transactions. Our knowledge of and experience with the Assimilated TTBERs and the TTG is primarily tied to SEP-related industry sectors.

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.

We believe that the Assimilated TTBER and TTG are most relevant for medium to large enterprises that engage in extensive R&D and which hold significant IP portfolios. These enterprises are usually involved in multiple cross-border technology transfer arrangements. This however does not discount the likelihood of R&D-intensive SMEs to rely on the Assimilated TTBER and TTG.

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.

Technology transfer agreements play the vital role of facilitating the dissemination of technology and legitimizing access to IP rights. Sharing of technology yields a number of pro-competitive benefits such as enabling follow-on innovations and providing the right frameworks for further innovative and technological advancements. They also facilitate new market entry by granting firms access to the relevant technologies. This is particularly the case in the field of technical standardization where increased interoperability helps to create a level playing field for technology implementers. It is important however to safeguard against potential anti-competitive effects of such agreements where they may lead to unwanted effects such as market foreclosure or price fixing.

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

By providing a framework for assessing the eligibility of technology transfer agreements for exemption, we believe that the Assimilated TTBER has contributed to promoting competition in the UK. The clear guidance on hardcore restrictions, excluded restrictions and market share thresholds allows companies to assess whether their agreements are in compliance with antitrust requirements. This in turn contributes to promoting competition by giving UK companies the legal certainty they need to conclude technology transfer agreements thus encouraging further dissemination of technology while having due regard to their duty to avoid perpetuating anti-competitive practices.

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.

We believe that the legal certainty that the Assimilated TTBER provide incentives UK companies to pursue collaborative R&D and to share technology in ways that may not have been done without the legal certainty. This in turn spurs economic activity through the development of new products and services, creating new industries, allowing faster time-to-market and facilitating access to technology that may otherwise not have been possible.

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?**

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.**

A lack of legal certainty may indeed have a bearing on the willingness of companies to enter into technology transfer agreements. Companies would incur higher legal costs to determine whether their agreements are anti-competitive. This would be particularly disincentivising for SMEs. In the context of technical standardization, there could potentially be less willingness for companies to collaborate in the development of standards for fear of breach of competition law.

- (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).**

See response to question 8a.

- 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?**

We believe that the Assimilated TTBER has been effective in exempting agreements that can be assumed with a level of certainty to satisfy the exemption conditions. There is sufficient clarity in its provisions to ensure legal certainty. The clear guidance on hardcore restrictions, excluded restrictions and market share thresholds is effective in excluding agreements that may be anti-competitive. The result is a well balanced framework that proscribes problematic agreements without jeopardising those that provide significant pro-competitive effects.

- 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?**

We note that these definitions are intended to be broad enough to afford the Assimilated TTBER the flexibility to cover a wide scope of agreements and technology rights, without compromising on clarity and legal certainty. We believe that it is important that such flexibility be maintained, while having due regard to specific amendments that may need to be made to align the Assimilated TTBER with the UK legal system post-brexit.

- (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)?**

The definition of technology rights may need to be reviewed to make it more in line with the UK technology rights framework. As implied above, there are certain types of rights which are not available in the UK such as utility models that may need to be excluded from the definition.

- (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?**

We believe that the definition of technology transfer agreements under the Assimilated TTBER is sufficiently broad enough and has the flexibility to cover unforeseen agreements. However, as noted above, the definition of technology rights may need to be reviewed to align it to the UK IP rights legal framework.

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?

We believe that the definition of competing undertakings is sufficiently clear for the purposes of assessing a technology transfer agreements under the Assimilated TTBER. Rather than making the Assimilated TTBER overly prescriptive, the CMA should remain open to reviewing on a case-by-case basis instances where there is a lack of clarity.

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.

Since these thresholds were set with the EU markets in mind, it may be worth considering whether they work in the UK-only context. Irrespective of this, we believe that the CMA should likewise have the flexibility to assess potentially problematic agreements on a case-by-case basis.

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?

The rules set out in Article 8 of the Assimilated TTBER have put in place an appropriate framework for calculating market shares. If further clarification is necessarily this could be elaborated in the TTG. As it stands, paragraphs 86 to 93 of the TTG already provide further guidance on the calculation of market shares. Naturally, not all new and emerging issues can be addressed within the Assimilated TTBER so it is important that the CMA remains open to reviewing such issues on a case-by-case basis.

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?

We believe that the hardcore restrictions set out in Article 4 of the Assimilated TTBER are sufficiently clear, particularly when read together with the guidance provided in chapter 3.4 of the TTG. We do not consider it necessary for modifications, additions or removal of any of the 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?**

We believe that the excluded restrictions set out in Article 5 of the Assimilated TTBER are sufficiently clear, particularly when read together with the guidance provided in chapter 3.5 of the TTG. We do not consider it necessary for modifications, additions or removal of any of the restrictions.

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

We generally consider the changes particularly when read together with the guidance in chapter 3.5 of the TTG to have improved the clarity and legal certainty of the Assimilated TTBER.

The Technology Transfer Guidelines

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?**

We believe that the TTG work well and have been effective in providing legal certainty, giving sufficient guidance and clarity to industry regarding what needs to be done to avoid unfair market practices. We believe this to be the case for UK businesses as well. From our perspective as a patent pool administrator, a very strict adherence to the measures set out in the paragraph 261 safe harbour provisions of the TTG has been critical and instrumental to our success.

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

While we believe that the safe harbour provisions for technology pools have been clear and effective in providing legal certainty, there is one aspect for which we believe there is room for further clarity. In paragraph 261(e), provides that one of the safe harbour conditions for technology pools is that the pooled technologies are licensed out to all potential licensees on FRAND terms.

Concerns have been expressed regarding the definition of the FRAND commitment as entailing a commitment to license to all potential licensees given the propensity of implementers to use it as a justification to argue that SEP owners are obliged to license at a component or chip level. We believe the words ‘to all potential licensees’ should be removed for three main reasons:

1. It does not align to the actual formulation of the FRAND commitment by the standards development organizations that are recognized in Europe. Neither the ETSI IPR Policy, the joint IPR Policy of CEN-CENELEC nor the Common Patent Policy for ITU-T/ITU-R/ISO/IEC require granting of licenses to all potential licensees. In fact, the ETSI IPR Policy could be interpreted as recommending licensing at the end product level.
2. It does not align to the guidance from courts in other jurisdictions which have rejected the contention that SEP owners are required to grant licenses to component and chip makers. We believe that the guidance from these courts is equally relevant in the UK context. See for instance *Nokia v Daimler*, LG Mannheim 18 August 2020 - Case No. 2 O 34/19; *Sharp v Daimler*, District Court of Munich, judgment dated 10 September 2020, Case-No. 7 O 8818/19; *Continental Automotive Systems, Inc. v. Avanci, LLC et al.*, Case No. 20-11032 (5th Cir. Feb. 28, 2022); *Judgement of the US Court of Appeal for the Ninth Circuit in Federal Trade Commission v Qualcomm Inc.* 19-16122, dated 11 August 2020.

In *Sharp v Daimler* for instance, the court noted in paragraph 171 that,

In principle, the patent owner can choose the licensing level. To the extent that the Court of Justice of the European Union emphasizes that the owner of a SEP can prevent products from entering the market (cf. ECJ, *loc. cit.* para. 53), nothing else follows from this. A product's access to the market does not necessarily require a license in favor of the supplier, but only a legal possibility of use, such as a license in the value chain, which gives the suppliers (or buyers) permission to use it (have-made rights). (online translation)

In *Nokia v Daimler*, the court similarly noted in paragraph 202 that in principle, it is up to the patentee to choose which sales level he enforces his property right.

In both *Nokia v Daimler* (paras 210, 211) and *Sharp v Daimler* (para 164) the court determined that the fact it is common practice in the automotive industry (regarding other components) for suppliers to take licenses (based on the component price) does not compel *Nokia* to comply with this practice in the absence of a competitive relationship. The court noted that the mobile communications industry's licensing practice in which the manufacturers of mobile phones take licenses or the license rates are based on sales prices of mobile phones as end products, has already been applied to the automotive industry.

In *Continental v Avanci*, the US Court of Appeals at page 12 noted that

The supplier acknowledges that Avanci and Patent-Holder Defendants are “actively licensing the SEPs to the OEMs[,]” which means that they are making SEP licenses

available to Continental on FRAND terms. As it does not need to personally own SEP licenses to operate its business, it has not been denied property to which it was entitled.

In *FTC v Qualcomm*, the US Court of Appeals determined that Qualcomm had no antitrust duty to licence rival chipmakers. This was in reference to Qualcomm's practice of licensing end product manufacturers.

3. It risks reigniting the 'license to all' discussion which has already been addressed by courts and which is not in line with the typical industry practice of licensing at the end user device level.
4. It incorrectly characterises the FRAND commitment as a requirement to make an offer to licence. The FRAND commitment is not an active obligation to make an offer to license. The FRAND commitment is the expression by the SEP owner of their willingness to enter into licenses on FRAND terms.

It is therefore our opinion that the removal of the words 'to all potential licensees' would bring much needed clarity.

(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?

During the consultation on the recently adopted Guidance on Horizontal Agreements (Horizontal Guidelines) some stakeholders proposed that guidance should be provided on so-called 'licence negotiation groups' (LNGs), which were described as a counterpart to technology pools. We note that the CMA decided to leave out the competitive assessment of LNGs from the Horizontal Guidelines framework. We believe that this is a realisation by the CMA that the concept of a LNG does not fit within the context of joint purchasing arrangements, but more crucially that they pose grave competition concerns relating to inter alia potential collusive conduct.

In our response to the Horizontal Guidelines consultation, we noted the potential for LNGs to result in coordinated behaviour among unwilling licensees that is aimed at distorting competition, particularly where LNGs are permitted on a longer term and structural basis and pursued by licensees with significant buyer power. LNGs that seek to coordinate several potential licensees to establish pricing and other conditions of such licenses raise grave competition concerns in relation to cartel conduct and would allow for tremendous gains in their ability to hold-out. They could virtually decide to indefinitely push the time when concluding the licenses, advancing unreasonable requests. This would in turn force the income of innovators/licensors to cease and this would deprive such entities of the funding to invest in further innovation.

We are aware that there are renewed calls by some stakeholders in Europe to expand the safe harbour provisions in the TTG to cover LNGs. It is therefore to be expected that the CMA will face similar calls. We believe that the CMA will likewise exercise caution in its consideration of such proposals. We would in this regard like to highlight a fundamental distinction between patent pools and LNGs. The safe harbour provisions in the TTG are primarily directed at the pooling of technologies by participants in technology pools. Through the pooling of complementary patents, technology pools offer a tried and tested market-based solution to efficiently and effectively facilitate the licensing of technology rights. The

same cannot be said of LNGs. LNGs do not pool technologies. A LNG is essentially a collaboration between competitors or potential competitors for the purpose of negotiating on price. There is no underlying pooling of technologies.

Furthermore, it is important to consider the nuances of licensing negotiations within a FRAND context and the already weaker bargaining position that SEP holders have. Patent licensing is unlike markets for tangible goods where the owner can gatekeep access to the goods. Implementers of patented technology already have access to the technology. Implementation of the technology in the products usually precedes licensing discussions with patent owners. Negotiations therefore tend towards being essentially on price rather than access.

There is no clear definition of what constitutes FRAND when considering what is expected from a willing licensee. Many technology implementers, particularly large multinationals, are therefore prone to abusing the system by delaying substantially and even failing to take a license to SEPs, i.e. holding-out.

One major factor that encourages hold-out is the fact that large implementers who are unwilling to conclude a license on FRAND terms feel safe in the knowledge that patents expire and even after the court determines that they are infringing SEPs, they would only be required to pay damages computed based on a FRAND rate, and any royalties set going forward will also be limited to FRAND. This is in addition to already having access to the patented technology. On the other hand, a SEP holder who has made a FRAND commitment is in a position where failure to adhere to FRAND could mean that they may have limited access to injunctive relief or damages in case of infringement of their SEPs.

From this perspective, the odds of concluding a license on FRAND terms in a timely manner are already stacked against the SEP holder. The system as-is is not balanced. Giving a greenlight to large implementers with significant buyer power to use LNGs as a tool to easily further tilt the bargaining position would only make the problem worse by adding another layer through which a coordinated hold-out strategy could be pursued. Such a coordinated hold-out strategy could be used by licensees participating in the LNG to steer negotiations towards the LNG by making it difficult to proceed with negotiations bilaterally. This would essentially limit the freedom of licensors to decide whether and on what terms to negotiate with the LNG thus compounding the potential anticompetitive effects of the LNG.

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

See response to question 17b.

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.

See response to question 17b.

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?

See response to question 10b.

We would like to note that while the UK continues to chart an appropriate path post-Brexit it is important to consider the interconnected and globalised nature of commerce and the need to have an appropriate level of legal certainty and predictability across borders. The EU remains the UK's biggest trading partner. Therefore, having the legal frameworks as closely aligned as possible is vital.

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).

See response to questions 10b and 20.

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.