

# **Assimilated Transfer Technology Block Exemption Review**

**Consultation on the CMA's  
Proposed Recommendation to  
the Secretary of State**



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# 1. About the Consultation

## Introduction

- 1.1 This consultation seeks views on the CMA's proposed recommendation that the Secretary of State for Business and Trade (the Secretary of State) make a new UK block exemption order to replace the assimilated<sup>1</sup> Technology Transfer Block Exemption Regulation (Assimilated TTBER)<sup>2</sup> when it expires on 30 April 2026 (the Proposed Recommendation). The new UK block exemption order would be of 12 years' duration and would be the same as the existing Assimilated TTBER save for certain specific variations. These variations are designed to simplify the market share requirements which agreements must meet to benefit from exemption and to adjust certain defined terms to make them clearer and more appropriate for the UK. These variations are described in more detail in paragraph [1.24] below.
- 1.2 The Assimilated TTBER automatically exempts certain types of technology transfer agreements from the Chapter I prohibition of the Competition Act 1998 (CA98). 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>3</sup>
- 1.3 The Assimilated TTBER is aimed at facilitating important collaboration for the purposes of licensing technology rights. This is in recognition that such agreements can often be pro-competitive and can significantly benefit innovation, investment and growth, including by the following:
- encouraging the cost-effective dissemination of technology;

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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 interpretative 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> Commission Regulation (EU) 316/2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements (see section 10(12)(g) of the CA98).

<sup>3</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 the purposes of the block exemption 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. There is no protection available for utility models in the United Kingdom.

- broadening the reach of the licensed technology into different markets;
- increasing market penetration: the owner of technology rights may license another business to sell products protected by the technology rights in territories that the owner of the licensed technology cannot cover;
- reducing cost: a business may 'license in' innovation to reduce its own research and development costs;
- saving time: a business may get its products or services to market more quickly by acquiring a licence to use existing technology rights, instead of 're-inventing the wheel' (sometimes referred to as an 'engineering workaround'); and
- accessing expertise: by taking a technology licence, a business may be able to tap into expertise that it does not have in-house.<sup>4</sup>

1.4 However, technology transfer agreements can also have negative effects on competition. The aim of the Assimilated TTBER is to provide an automatic exemption to those agreements that, in broad terms, result in benefits to consumers which outweigh the impact of any restrictions on competition they cause. The use of a block exemption also benefits businesses by providing legal certainty as they know that agreements that meet the terms of the block exemption comply with competition law.

## Background

### The Chapter I prohibition of the CA98

- 1.5 The Chapter I prohibition of the CA98 prohibits anticompetitive agreements between undertakings.<sup>5</sup> An undertaking is in effect a business. For the purposes of this Proposed Recommendation, therefore, we will refer to undertakings as businesses.
- 1.6 The Chapter I prohibition applies to agreements between businesses which have as their object or effect the prevention, restriction or distortion of competition within the UK and which:
- in the case of agreements implemented, or intended to be implemented, in the UK, may affect trade within the UK; or

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<sup>4</sup> See, for example, [Licensing intellectual property - GOV.UK](#). And see also Recital 4 of the Assimilated TTBER.

<sup>5</sup> The Chapter I prohibition is set out in section 2 of the CA98.

- in any other case, are likely to have an immediate, substantial and foreseeable effect on trade within the United Kingdom

unless such agreements satisfy the exemption criteria set out in section 9 of the CA98.

## **Exemptions**

1.7 Section 9(1) of the CA98 (the section 9 exemption) provides that an agreement is exempt from the Chapter I prohibition if it:

(a) contributes to

- (i) improving production or distribution; or
- (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.

## **Block exemption orders**

1.8 An agreement may be individually recognised as exempt by a competition authority or a court and, in addition, certain types of agreement will be treated as automatically exempt if they meet conditions set out in a 'block exemption' regulation or order applicable to that category of agreements.

## **Block exemptions – benefits**

1.9 Block exemptions have several benefits for businesses. First, they provide legal certainty to businesses as they enable them to know in advance how to ensure that their agreements comply with competition law. Second, they avoid placing on businesses the burden of scrutinising a large number of agreements that are likely to satisfy the requirements set out in the section 9 exemption. Third, the existence of a block exemption also ensures consistency of approach by providing a common framework for businesses to assess their agreements against the Chapter I prohibition.

1.10 Block exemptions also bring about enforcement efficiencies by removing the need for the CMA to spend considerable time scrutinising agreements likely to be benign, thereby enabling it to concentrate its resources on other matters

that are more likely to give rise to significant competition concerns. In this regard, the CMA notes that the various conditions of the current assimilated block exemptions are designed to ensure that exempted agreements will not give rise to significant competition concerns.

## **The Assimilated TTBER in UK Law**

1.11 The Assimilated TTBER was retained in UK law following the United Kingdom's withdrawal from the European Union (EU) and the end of the Transition Period,<sup>6</sup> and is due to expire on 30 April 2026.<sup>7</sup> The EU TTBER is substantively the same as the Assimilated TTBER except that it applies to the EU rather than the UK.

## **Aims of the Assimilated TTBER**

- 1.12 As set out in paragraph 1.3 above, technology transfer agreements can often be pro-competitive and can benefit innovation, investment and growth.
- 1.13 As such, in many cases, technology transfer agreements either do not restrict competition (i.e. they fall outside the scope of the Chapter I prohibition of the CA98), or, where they fall within that prohibition, they create objective benefits that are passed on to consumers and meet the exemption criteria set out in section 9 of the CA98.
- 1.14 However, technology transfer agreements, or certain clauses within such agreements, can also have negative effects on competition. In particular, they may facilitate collusion, restrict the ability of competitors to enter a market or to expand, or they may harm inter- or intra-technology competition, for example by reducing the incentives to innovate.
- 1.15 Bearing these considerations in mind, the Assimilated TTBER aims to facilitate pro-competitive technology licensing, while providing legal certainty for businesses.<sup>8</sup> It seeks to achieve this aim by automatically exempting technology transfer agreements from the Chapter I prohibition of the CA98, insofar as those agreements meet the conditions set out in Assimilated TTBER. Agreements that do not satisfy those conditions do not necessarily

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<sup>6</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. The assimilated exemptions were created by a combination of the operation of the European Union (Withdrawal) Act 2018 and the Competition (Amendment etc.) (EU Exit) Regulations 2019, as amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020.

<sup>7</sup> Previously, Regulation 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 OJ L 93, 28.3.2014 (the EU TTBER) applied in the UK and provided an automatic exemption for the agreements that met the conditions set out in that regulation.

<sup>8</sup> See Recital 3 of the Assimilated TTBER.

infringe the Chapter I prohibition of the CA98, but they will require individual assessment under that prohibition.

## **Review of the Assimilated TTBER**

- 1.16 The CMA formally launched a review of the Assimilated TTBER in July 2024 for the purpose of making a recommendation to the Secretary of State about whether to replace the Assimilated TTBER with a block exemption order when it expires on 30 April 2026 and, if it is to be so replaced, whether to vary it. A key part of this review included publishing a call for inputs to seek stakeholder feedback on the Assimilated TTBER (the Call for Inputs).<sup>9</sup>
- 1.17 The CMA received 11 responses to the Call for Inputs. The responses were provided by academics, legal professionals, businesses and business associations. A list of respondents to the Call for Inputs is provided in Annex A.
- 1.18 Prior to launching the Call for Inputs, the CMA also had discussions with interested stakeholders about their views on the effectiveness of the Assimilated TTBER.
- 1.19 The European Commission launched an evaluation process in November 2022 (the European Commission Evaluation).<sup>10</sup> As part of this exercise, the European Commission published a Staff Working Document on 22 November 2024 (the European Commission Staff Working Document)<sup>11</sup> and a Call for Evidence for an Impact Assessment on Revision of the Technology Transfer Block Exemption Regulation and Technology Transfer Guidelines on 31 January 2025 (the European Commission Impact Assessment).<sup>12</sup>
- 1.20 In addition to the responses to the Call for Inputs and other stakeholder engagement, the CMA has also taken into consideration the evidence from the European Commission's Evaluation in reaching its proposed recommendation. The CMA considers this to be appropriate among other things because most of the Assimilated TTBER is identical to the EU TTBER. Stakeholder views on the effectiveness of the EU TTBER are obviously relevant to a review of the Assimilated TTBER.
- 1.21 Moreover, businesses often engage in technology licensing programmes on a regional, and even, global basis. This means that the Assimilated TTBER cannot be considered in isolation as such businesses frequently need to

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<sup>9</sup> [Technology Transfer Block Exemption Regulation: Call for inputs.](#)

<sup>10</sup> More information on the European Commission Evaluation can be found [here](#) and [here](#).

<sup>11</sup> The European Commission Staff Working Document can be found [here](#).

<sup>12</sup> [European Commission's Call for Evidence for an Impact Assessment on Revision of the Technology Transfer Block Exemption Regulation and Technology Transfer Guidelines.](#)



consider compliance with both UK competition law and EU competition law when engaging in technology licensing. The CMA considers it appropriate to avoid unnecessary differences between EU and UK technology licensing block exemptions that could increase the cost of, and therefore risk disincentivising, technology licensing in the UK. It should, however, be noted that some variations between such block exemptions may be necessary or appropriate, having regard to any relevant differences between the EU and UK legal and economic contexts.

### **CMA provisional views on the Assimilated TTBER**

- 1.22 The CMA provisionally considers that the exemption provided by the Assimilated TTBER applies to categories of agreements that are likely to satisfy the criteria set out in the section 9 exemption, which is to say, agreements that are pro-competitive. The CMA has not seen any evidence to the contrary.
- 1.23 It also appears to the CMA that, overall, the Assimilated TTBER continues to be a relevant and useful tool for businesses and, moreover, one that is important for innovation and growth in the UK. Though some respondents made suggestions for specific changes, all respondents to the Call for Inputs said that the Assimilated TTBER has worked well overall and created real benefits for technology licensing in the UK. Moreover, no respondents to the Call for Inputs said that the Assimilated TTBER should be allowed to lapse without replacement when it expires.
- 1.24 In this context, the CMA notes that the European Commission Staff Working Document concludes that the EU TTBER and its accompanying Technology Transfer Guidelines (the EU TTGs) have overall met their objectives.<sup>13</sup>
- 1.25 The CMA is also of the provisional view that not replacing the Assimilated TTBER with a similar block exemption order would risk creating legal uncertainty and increasing compliance costs for technology transfer licensing in the UK. This in turn could risk undermining innovation, investment and growth in the UK.

### **Proposed Recommendation**

- 1.26 The CMA proposes to recommend that the Secretary of State make a block exemption order of 12 years duration that exempts the categories of technology transfer agreements currently exempted by the Assimilated TTBER, and which includes the same definitions, conditions and obligations

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<sup>13</sup> See, for example, page 42 of the European Commission Staff Working Document.

as the Assimilated TTBER (adapted as necessary for UK purposes), but with the following variations:

- removing ‘utility models’ from the definition of ‘technology rights’;
- adding ‘copyright in a database’ and ‘database rights’ to the definitions of ‘technology rights’ and ‘intellectual property rights’;
- adding definitions of ‘active sales’ and ‘passive sales’; and
- replacing the market share thresholds in respect of technology markets with a condition that there be at least three independently controlled substitutable technologies in addition to the technologies held by the parties to the agreement

(the Recommended Technology Transfer Block Exemption Order or Recommended TTBEO).

- 1.27 In making this Proposed Recommendation, the CMA has had regard to the importance of prioritising growth and encouraging investment, and also supporting growth and international competitiveness in the eight key sectors set out in the Government’s Industrial Strategy Green Paper.<sup>14</sup> This states that accelerating the rate of innovation and increasing the adoption and diffusion of ideas, technologies, and processes is an essential step for growing the productivity of the UK’s growth-driving sectors.<sup>15</sup> As noted above, the CMA considers that technology licensing helps promote innovation, investment and growth.
- 1.28 The Recommended TTBEO is therefore intended to help ensure that businesses are not deterred from engaging in pro-competitive technology licensing. It aims to do so by providing legal certainty as to when such technology transfer agreements are automatically exempt from the Chapter I prohibition of the CA98.
- 1.29 The CMA also expects in due course to publish a guidance document intended to help businesses understand the application of any block exemption order that the Secretary of State might make for technology transfer agreements. The guidance document is also important because

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<sup>14</sup> See, for example, the [Strategic steer to the Competition and Markets Authority - GOV.UK](#). In the [Government’s Industrial Strategy Green Paper](#), eight growth-driving sectors have been identified: (i) advanced manufacturing; (ii) clean energy industries; (iii) creative industries; (iv) defence; (v) digital and technologies; (vi) financial services; (vii) life sciences; and (viii) professional and business services.

<sup>15</sup> Ibid.

technology transfer agreements that do not meet the requirements of any block exemption order may still be capable of individual exemption. The guidance document will explain how the Chapter I prohibition applies to such agreements not covered by any such block exemption order.

- 1.30 The CMA's detailed reasons for the Proposed Recommendation are discussed in Chapter 3 below.

## **Purpose and Scope of this consultation**

- 1.31 In accordance with section 8(1) of the CA98, the CMA is consulting on the Proposed Recommendation. As outlined in more detail below, this document includes consultation questions that the CMA asks stakeholders to consider when providing their views on the CMA's Proposed Recommendation.<sup>16</sup>
- 1.32 This consultation is aimed at those who may be affected by or have an interest in the Assimilated TTBER, particularly businesses and their legal or other advisors.
- 1.33 Chapters 2 and 3 of this document respectively describe the Assimilated TTBER and discuss the detail of CMA's reasons for the Proposed Recommendation, including the CMA's provisional assessment of stakeholder feedback. Annex B includes the policy and impact questions on which the CMA is seeking stakeholders' views.
- 1.34 Responses to the policy questions in this consultation will inform the CMA's final recommendation to the Secretary of State. The responses to the impact questions in this consultation may be used to inform the preparation by the Department for Business and Trade (DBT) of impact assessments for any block exemption order the Secretary of State might decide to make. Accordingly, responses to the present consultation may be shared with the DBT. For convenience, the list of consultation questions is set out in Annex B.
- 1.35 Following the consultation initiated by this consultation document, the CMA will prepare its final recommendation to the Secretary of State.
- 1.36 This consultation on the CMA's Proposed Recommendation to the Secretary of State is distinct from the European Commission Evaluation of the EU TTBER, which only applies in the EU.

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<sup>16</sup> Section 10A(4) of the CA98 applies the procedure in section 10A(1) to recommendations of the CMA under section 10A(3). Therefore, before making a recommendation under section 10A(3), the CMA must publish details of its Proposed Recommendation in such a way as it thinks most suitable for bringing it to the attention of those likely to be affected, and consider any representations that are made to it about the Proposed Recommendation.

## Consultation process

### How to respond

- 1.37 The CMA is publishing this document in order to consult on the Proposed Recommendation to the Secretary of State. Responses to this consultation should be sent by email to the address provided below. Please provide supporting evidence or examples for your views, where possible.
- 1.38 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest in the Assimilated TTBER.
- 1.39 In accordance with our policy of openness and transparency, we may publish non-confidential versions of responses or a summary of those 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.**
- 1.40 Further details on the Government's consultation principles and the CMA's use of personal data are included in Annex C of this document.

### Duration of consultation

- 1.41 The consultation will run for 4 weeks, from 14 March 2025. Responses should be submitted by email by 5 pm on 11 April 2025 and should be sent to: [ttberreview@cma.gov.uk](mailto:ttberreview@cma.gov.uk).

### Compliance with government consultation principles

- 1.42 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.
- 1.43 Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the General Data Protection Regulation 2016 (GDPR) and the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.
- 1.44 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 consultation responses into account

and to ensure that we properly consult on the Proposed Recommendation to the Secretary of State before it is finalised.

- 1.45 For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long we retain personal data, see our [Privacy Notice](#).
- 1.46 Our use of information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need to exclude from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. 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. When submitting your response please also let us know if you wish to remain anonymous.
- 1.47 Please note that information and personal data 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.
- 1.48 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

### **Next steps**

- 1.49 Following this consultation, the CMA will prepare its final recommendation to the Secretary of State on the Assimilated TTBER.
- 1.50 The CMA will publish the final version of the recommendation to the Secretary of State on its webpages at <http://www.gov.uk/cma>. The CMA will also publish the responses received during the consultation (with any confidential information redacted). These documents will be available on our webpages and respondents will be notified when they are available.

## 2. Background to the Assimilated TTBER

- 2.1 On 31 December 2020, at the end of the Transition Period, 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', became 'Assimilated Law' on 1 January 2024.
- 2.2 The EU TTBER was adopted in March 2014<sup>17</sup> in advance of the expiry on 30 April 2014 of the first 2004 version of the EU TTBER (the 2004 EU TTBER).<sup>18</sup>
- 2.3 As noted above, the EU TTBER expires on 30 April 2026, and it is currently being reviewed by the European Commission.<sup>19</sup>
- 2.4 The EU TTBER is also accompanied by the EU TTGs.<sup>20</sup> The EU TTGs are intended to complement the EU TTBER and set out general principles for the assessment of technology transfer agreements. They 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.
- 2.5 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.

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<sup>17</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.](#) OJ L 93, 28.3.2014.

<sup>18</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.](#) OJ L 123, 27.4.2004.

<sup>19</sup> [Review of the TTBER and related Guidelines.](#)

<sup>20</sup> [Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements \(2014/C 89/03\).](#)

### 3. Rationale for the Proposed Recommendation

- 3.1 The following paragraphs provide more detail of the CMA's rationale for the CMA's Proposed Recommendation set out above.
- 3.2 The CMA also summarises key points made in response to the Call for Inputs and the CMA's views on them. Furthermore, the CMA discusses below, as it considers appropriate and relevant to the Proposed Recommendation, outputs from the European Commission Evaluation.
- 3.3 This document is not intended to be a comprehensive record of all views expressed in response to the Call for Inputs, nor to be a comprehensive response to all individual views.

#### General recommendation

- 3.4 Respondents to the Call for Inputs said that the Assimilated TTBER has worked well overall and created real benefits for technology licensing in the UK.<sup>21</sup> No respondents to the Call for Inputs suggested that the Assimilated TTBER should be allowed to lapse without replacement. There were also no suggestions from respondents that the Assimilated TTBER was exempting categories of agreements unlikely to satisfy the exemption criteria in section 9 of the CA98.
- 3.5 Furthermore, the CMA notes that the European Commission Staff Working Document concludes that the EU TTBER and EU TTGs have overall met their objectives.<sup>22</sup> Moreover, the European Commission states in the same document that a study it commissioned for the purposes of its evaluation did not identify any types of technology transfer agreements that are currently covered by the block exemption, but for which it is not possible to assume with sufficient certainty that they meet the conditions for exemption under Article 101(3) of the TFEU (the EU equivalent of the Section 9 exemption).<sup>23</sup> The European Commission Staff Working Document also states that stakeholders would anticipate increased costs in the absence of the EU TTBER and EU TTGs.<sup>24</sup>

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<sup>21</sup> For instance, one business association said that the Assimilated TTBER has contributed to promoting innovation and technology in the UK. Other respondents include businesses and academics.

<sup>22</sup> See, for example, the European Commission Staff Working Document at page 42.

<sup>23</sup> *Ibid*, at page 25.

<sup>24</sup> *Ibid*, at para. 42.

3.6 Some respondents to the Call for Inputs nevertheless suggested various changes to the Assimilated TTBER. These, suggestions and the CMA's views on them, are discussed below.

### **Policy Questions**

**Question 1:** Do you agree with the CMA's proposed recommendation to the Secretary of State to make a Block Exemption Order to replace the retained TTBER with the Recommended TTBEQ, rather than letting it lapse without replacement or renewing it without varying the retained TTBER?

### **Impact questions**

**Question 2:** In your response to our questions, where possible please indicate the size of your business (or those businesses you represent) in terms of number of employees:

- Less than 10 employees
- Between 10 and 50 employees
- Between 50 and 250 employees
- More than 250 employees

**Question 3:** In your response to our questions, where possible please indicate the industry in which you consider your business (or those businesses you represent) operates (using SIC codes if known):

- Agriculture, forestry, fishing
- Mining and Quarrying
- Manufacturing (Please specify)
- Electricity, gas, steam and air conditioning supply,
- Water supply; sewerage, waste management and remediation activities
- Construction
- Wholesale and Retail Trade, repair of motor vehicles and motorcycles
- Transportation and storage
- Accommodation and food service activities
- Information and communication
- Financial and insurance activities
- Real estate activities
- Professional, scientific and technical activities
- Administrative and support service activities
- Public administration and defence; compulsory social security
- Education
- Human health and social work activities
- Arts, entertainment and recreation
- Other service activities



**Question 4:** In your response to our questions, where possible please indicate how long your business has been in operation (or if you are an advisor, generally how long the businesses you represent have been in operation).

**Question 5:** Relative to current arrangements, if the Assimilated TTBER were allowed to expire without replacement, how much (if at all) would this impact your business or the businesses you represent? Please provide reasons for your view.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 6:** Relative to current arrangements, if the Assimilated TTBER were allowed to expire without replacement, how would this impact consumers? Please provide reasons for your view.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

## Changes to the Assimilated TTBER

### Definitions

#### *Current regime*

- 3.7 The Assimilated TTBER is applicable to technology transfer agreements concerning the licensing or assignment of technology rights and as such covers only bilateral agreements between two businesses.<sup>25</sup> These agreements will usually improve economic efficiency and be pro-competitive as they can reduce duplication of research and development, strengthen the incentives for initial research and development, spur incremental innovation, facilitate diffusion of new technologies, and generate product market competition.<sup>26</sup>
- 3.8 Article 1 of the Assimilated TTBER provides relevant definitions, including the definition of technology rights in Article 1(1)(b) of the Assimilated TTBER:
- ‘(b) ‘technology rights’ means know-how and the following rights, or a combination thereof, including applications for or applications for registration of those rights:
- (i) patents;
  - (ii) utility models;
  - (iii) design rights;
  - (iv) topographies of semiconductor products;
  - (v) supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained;
  - (vi) plant breeder’s certificates; and
  - (vii) software copyrights.’

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<sup>25</sup> Article 1(1)(c) of the Assimilated TTBER.

<sup>26</sup> Recital 4 of the Assimilated TTBER.

## **Recommendation**

3.9 The CMA proposes that the definitions in Article 1 of the Assimilated TTBER should be maintained in the Recommended TTBER, subject to the following proposed variations:

- removal of ‘utility models’ from the definition of ‘technology rights’;
- adding ‘copyright in a database’ and ‘database right’ to the definitions of ‘technology rights’ and ‘intellectual property rights’; and
- adding a definition of ‘active sales’ and ‘passive sales.’

3.10 We explain each of these proposed recommendations in further detail below, summarising the stakeholder feedback taken into account in reaching the recommendations and our views on such feedback.

### *Removal of reference to utility models*

3.11 The CMA proposes that, unlike the Assimilated TTBER, the exemption provided by the Recommended TTBER should not apply to utility models. This is because UK law does not provide protection for utility models and as such, there are unlikely in practice to be utility model licences in the UK. Such a variation can be achieved by not including ‘utility models’ in the definition of ‘technology rights’ in the Recommended TTBER.

### *Copyright in databases and database rights*

3.12 Respondents to both the Call for Inputs, as well as to the European Commission Evaluation noted that the Assimilated TTBER and the EU TTBER do not include data or database rights in the definition of ‘technology rights’ in Article 1. They said that data was of much greater importance in the modern economy than when the EU TTBER was adopted in 2014 and suggested that, in view of this, agreements for the licensing of data and database rights should come within the scope of covered technology rights, subject to such agreements otherwise meeting the criteria for exemption.<sup>27</sup>

### *CMA views*

3.13 The CMA is aware of the increased significance of data in the modern economy and the fact that the licensing of data can lead to innovation. Indeed, the Government’s Industrial Strategy Green Paper among other things

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<sup>27</sup> One academic; pages 40 to 42 of the of the European Commission Staff Working Document.

discusses the importance of data for innovation and growth. It refers to the need to ensure that data is created, handled, and shared in a way that both unlocks economic opportunities and is safe and ethical across the economy.<sup>28</sup>

- 3.14 The European Commission Staff Working Document also notes the growing importance of data in the digital economy. The European Commission Staff Working Document further observes that technology transfer agreements relating to technology rights falling within the scope of the EU TTBER increasingly include clauses governing the transfer of data, in particular the data generated in the development of the transferred technologies and during the life of the agreements.<sup>29</sup>
- 3.15 The CMA sees force in suggestions that licences for data should fall within the category of agreements capable of exemption under the Assimilated TTBER. That said, the CMA's understanding is that in UK law, there is no UK intellectual property right for data as such. However, the CMA notes that there can be copyright in a database under UK law<sup>30</sup> and databases in the UK can also be protected by sui generis database rights.<sup>31</sup> Copyright protects the selection or arrangement of material in a database, where that selection or arrangement is original. Database rights protect the contents of a database where there has been a substantial investment in obtaining, verifying or presenting the data.<sup>32</sup>
- 3.16 The CMA therefore proposes that licences for copyright in a database and database right should come within the category of agreements capable of exemption under the Recommended TTBER. In addition, the CMA proposes that the exemption for technology transfer agreements set out in the Recommended TTBER<sup>33</sup> should also apply to provisions relating to the licensing or transfer of such rights to the licensee, if and to extent that those provisions are directly related to the production or sale of contract products. In the CMA's view, these proposals could be achieved by including 'copyright in a database' and 'database rights' in the 'technology rights' defined in the Recommended TTBER, as well as including 'database rights' in the 'intellectual property rights'<sup>34</sup> defined in that order.

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<sup>28</sup> See [Invest 2035: the UK's modern industrial strategy - GOV.UK](#).

<sup>29</sup> See page 40 of the European Commission Staff Working Document.

<sup>30</sup> See for example, section 3(1)(d) of the Copyright, Designs and Patents Act 1988.

<sup>31</sup> See The Copyright and Rights in Databases Regulations 1997 (SI 1997/3032).

<sup>32</sup> See for example [Sui generis database rights - GOV.UK](#).

<sup>33</sup> See the current exemption in Article 2(1) of the Assimilated TTBER.

<sup>34</sup> See Article 1(1)(h) of the Assimilated TTBER.

3.17 The CMA does not however consider it appropriate to recommend that the Recommended TTBE0 include 'data' in the defined technology or intellectual property rights, given that under UK law there is no UK intellectual property right for data. Moreover, the CMA understands that depending upon the circumstances, data may be protected by the technology rights already covered by the Assimilated TTBER. For example, the CMA notes that in some cases, data might fall within the definition of 'know how' in Article 1(1)(i) of the Assimilated TTBER.

*Adding a definition of 'active sales' and 'passive sales'*

3.18 As will be explained further below, the CMA proposes that the approach to active and passive sales restrictions set out in Article 4 of the Assimilated TTBER (relating to hardcore restrictions) should be adopted in the Recommended TTBE0. The CMA notes however that these terms are not currently defined in the Assimilated TTBER.

3.19 The CMA considers that it would be helpful for the Recommended TTBE0 to define these terms consistently with the corresponding definitions used in the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (the VABEO).<sup>35</sup> The VABEO provides a well-established framework for defining active and passive sales. Aligning the definitions ensures legal certainty and predictability for businesses when assessing compliance of their transfer technology agreements. Further, by adopting a consistent approach, unnecessary divergence in interpretation can be avoided which could result in inconsistencies which could undermine the objectives of the Block Exemption and the application of the hardcore restrictions.

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<sup>35</sup> SI 2022/516.

3.20 The CMA therefore proposes that the Recommended TTBE0 should include the definitions of ‘active sales’<sup>36</sup> and ‘passive sales’<sup>37</sup> corresponding to those used in Article 8(7) of the VABEO.

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<sup>36</sup> Article 8(7) of the VABEO defines active sales as: ‘(a) actively targeting customers by for instance calls, e-mails, letters, visits or other direct means of communication; (b) targeted advertising and promotion, by means of print or digital media, offline or online, including online media, digital comparison tools or advertising on search engines targeting customers in specific geographical areas or customer groups; (c) advertisement or promotion that is only attractive for the buyer if it (in addition to reaching other customers) reaches a specific group of customers or customers in a specific geographical area (and is considered active selling to that customer group or customers in that geographical area); (d) offering on a website language options different to the ones commonly used in the geographical area in which the distributor is established; or (e) using a domain name corresponding to a geographical area other than the one in which the distributor is established, and the expressions “actively sell” and “actively selling” should be construed accordingly...’

<sup>37</sup> Article 8(7) of the VABEO defines passive sales as: ‘a) sales in response to unsolicited requests from individual customers, including delivery of goods or services to such customers without the sale having been initiated through advertising actively targeting the particular customer group or geographical area; (b) general advertising or promotion that reaches customers in other distributors’ geographical areas or customer groups (whether exclusive or not) but which is a reasonable way to reach customers not in those other distributors’ geographical areas or customer groups (whether exclusive or not), for instance to reach customers in a supplier’s own geographical area; or (c) participating in a public procurement exercise undertaken in accordance with—(i) in England, Wales or Northern Ireland, the Defence and Security Public Contracts Regulations 2011, the Public Contracts Regulations 2015, the Concession Contracts Regulations 2016 or the Utilities Contracts Regulations 2016, and (ii) in Scotland, the Defence and Security Public Contracts Regulations 2011, the Public Contracts (Scotland) Regulations 2015), the Concession Contracts (Scotland) Regulations 2016 or the Utilities Contracts Regulations 2016, and the expressions “passively sell” and “passively selling” should be construed accordingly...’

## **Policy questions**

**Question 7:** Do you agree with the CMA's Proposed Recommendation not to include 'utility models' in the definition of 'technology rights' in the Recommended TTBE0?

**Question 8:** Do you agree with the CMA' proposal to add copyright in data and database rights, but not data, in the definition of 'technology rights' in the Recommended TTBE0?

**Question 9:** Do you have any suggestions for whether and if so, how, data could be covered in a definition of 'technology rights' in the Recommended TTBE0?

**Question 10:** Do you agree with the CMA's Proposed recommendation to include the definitions of 'active sales' and 'passive sales' used in Article 8(7) of the VABEO in the Recommended TTBE0?

## **Impact questions**

**Question 11:** Relative to current arrangements, if the CMA's Proposed Recommendation for definitions in the Recommended TTBE0 were to be adopted, how do you anticipate that this would impact your business or those that you represent? Please describe the scale of any legal or expert advice needed (e.g. time spent with consultants).

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

## Scope

### *Current regime*

3.21 The Assimilated TTBER can apply to;

- reciprocal agreements: these are technology transfer agreements which involve two businesses granting each other a technology rights licences where those licences concern competing technologies or technologies that can be used in the production of competing products;<sup>38</sup> and
- non-reciprocal agreements: these are technology transfer agreements which involve only one business grants the other business a technology licence, or each business grants the other a technology licence of non-competing technology that cannot be used for the production of competing products.<sup>39</sup>

3.22 The Assimilated TTBER applies to agreements between competitors and between non-competitors. These key terms are defined in Article 1 of the Assimilated TTBER. Different rules apply to these different types of agreements.

3.23 Article 3 of the Assimilated TTBER applies different market share thresholds depending upon whether the technology transfer agreement is between competing or non-competing businesses (20% and 30% respectively). Article 4 also applies hardcore restrictions differently depending upon whether the parties are competing businesses (Article 4(1)) or non-competing businesses (Article 4(2)).

3.24 With respect to competing businesses, as discussed below, the hardcore restrictions set out in Article 4(1) of the Assimilated TTBER apply differently, depending upon whether the technology transfer agreement in question is reciprocal or non-reciprocal.<sup>40</sup> The hardcore list in the Assimilated TTBER is stricter for reciprocal agreements than for non-reciprocal agreements between competitors.

3.25 This distinction between reciprocal and non-reciprocal agreements was first included in the 2004 EU TTBER<sup>41</sup> for a number of hardcore restrictions between competitors.

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<sup>38</sup> Article 1(1)(d) of the Assimilated TTBER.

<sup>39</sup> Article 1(1)(e) of the Assimilated TTBER.

<sup>40</sup> Article 4(1)(b) and (c) of the Assimilated TTBER.

<sup>41</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](#). OJ L 123, 27.4.2004.



## **Recommendation**

3.26 The CMA does not propose to recommend changing the scope of the current Assimilated TTBER's distinctions between (i) competing and non-competing businesses; and (ii) reciprocal and non-reciprocal agreements in the Recommended TTBERO.

3.27 We summarise below the stakeholder feedback and evidence we have taken into account in reaching the provisional conclusion that the scope of the Assimilated TTBER should not be amended.

### *Summary of stakeholders' feedback*

3.28 One respondent to the Call for Inputs suggested that the difference in treatment in the Assimilated TTBER between competing and non-competing businesses should be removed, as should the difference in treatment in respect of reciprocal and non-reciprocal treatments between competing businesses.<sup>42</sup>

3.29 The same respondent argued that these distinctions led to dubious differences in the treatment of similar agreements and that the CMA should instead focus in adopting a pragmatic approach focusing on efficiencies and undesirable effects regardless of the type of licensing agreement. This was especially the case, the respondent suggested, due to complex market environments in which it might not be practical to distinguish between competing and non-competing businesses.

3.30 On reciprocal and non-reciprocal agreements, one stakeholder argued that this differentiation between in the Assimilated TTBER should be removed as it led, in its view, to unwarranted differences in the treatment of similar agreements.<sup>43</sup>

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<sup>42</sup> One business said that the Assimilated TTBER could be greatly simplified without these distinctions.

<sup>43</sup> One business.

## *CMA views*

### *Agreements between competitors and non-competitors*

- 3.31 The CMA notes that agreements between competitors can pose a greater risk to competition than agreements between non-competitors, especially where the competing businesses might have some degree of market power. Accordingly, if the CMA were to remove the distinction in treatment of agreements between competitors and non-competitors, then the CMA would likely propose the application of the stricter set of rules to all agreements. This might mean that fewer agreements between non-competing businesses would benefit from the block exemption, potentially reducing legal certainty.
- 3.32 Moreover, the CMA has not seen persuasive evidence suggesting that the distinction between competing and non-competing businesses in the Assimilated TTBER has been difficult to apply in practice and has reduced legal certainty for businesses.
- 3.33 In view of this, the CMA does not propose to recommend removing the current Assimilated TTBER's distinction between competing and non-competing businesses in the Recommended TTBE0. Instead, the CMA considers that retaining the different exemption criteria between competitors and non-competitors remains valid. It provides the right legal framework for most technology transfer agreements. It also helps to ensure effective protection of competition, while providing adequate legal security for businesses.

### *Reciprocal and non-reciprocal agreements*

- 3.34 The CMA considers that there are sound economics-based reasons for treating non-reciprocal agreements between competitors more leniently than reciprocal agreements between competitors. For example, two-way output restrictions between competing businesses are treated as hardcore restrictions under Article 4(1)(b) of the Assimilated TTBER given their greater potential to have an anti-competitive effect.
- 3.35 In contrast, a one-way restriction between competing businesses is comparatively less likely to have an anti-competitive effect than a two-way restriction, and can in fact encourage the dissemination of technology.<sup>44</sup> The rationale is that a licensor might be unwilling to license technology at all if it is concerned about output from a licensee which may impact its business negatively. Further, the CMA understands that a one-way restriction may lead

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<sup>44</sup> Paragraph 131 of the EU TTGs.

to a real integration of complementary technologies or an efficiency-enhancing integration of the licensor's superior technology with the licensee's productive assets.<sup>45</sup>

3.36 Accordingly, the CMA considers that it is appropriate that the Recommended TTBER retain this distinction between reciprocal and non-reciprocal agreements.

### **Policy questions**

**Question 12:** Do you agree with the CMA's proposal not to recommend any change in the distinction between competing and non-competing businesses set out in the Assimilated TTBER? Please provide reasons for your view.

**Question 13:** Do you agree with the CMA's proposal not to recommend any change in the distinction between reciprocal and non-reciprocal agreements currently set out in the Assimilated TTBER? Please provide reasons for your view.

### **Impact questions**

**Question 14:** If the CMA were to recommend removing the distinction between competing and non-competing businesses currently set out in the Assimilated TTBER, what impact would this have on your business or the businesses of those you represent? Please describe the scale of any impact (e.g. as a result of time spent with consultants).

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 15:** If the CMA were to recommend removing the distinction between reciprocal and non-reciprocal agreements currently set out in the Assimilated TTBER, what impact would this have on your business or the businesses of those you represent? Please describe the scale of any legal or expert advice needed (e.g. time spent with consultants).

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

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<sup>45</sup> Paragraph 104 of the EU TTGs.

## Technology pools and Licensing Negotiation Groups (LNGs)

### *Current regime*

- 3.37 Technology pools involve at least two or more patent holders agreeing to contribute their patents to a 'pool' or package of intellectual property rights that is licensed.<sup>46</sup> Each contributor typically enters into a licensing agreement with the pool, under which the pool may grant licences to licensees, on the members' behalf, in respect of all patents contributed by or declared essential by the members of the pool.<sup>47</sup> Associated royalties are then allocated to each member and to the pool administrator according to agreed rules.<sup>48</sup>
- 3.38 In terms of their structure, technology pools can take the form of simple arrangements between a limited number of parties or more elaborate organisational arrangements whereby the organisation of the licensing of the pooled patents is entrusted to a separate entity. In both cases the pool may allow licensees to operate on the market on the basis of a single licence.<sup>49</sup> Agreements establishing technology pools are generally multilateral.<sup>50</sup>
- 3.39 A SEP is a patent which protects technology which is essential to implementing a technical standard.<sup>51</sup> A technical standard is an agreed technical description of an idea, product, service, or way of doing things.<sup>52</sup> These are usually produced by standard developing organisations, established for the purpose of creating standards, with inputs from industry, government, academia and other technical experts.<sup>53</sup> LNGs in this context refers to industry associations or groups representing implementers of standards that jointly negotiate licences with individual SEP holders and SEP technology pools.<sup>54</sup>
- 3.40 The Assimilated TTBER only covers technology transfer agreements between two businesses.<sup>55</sup> Technology pools and LNGs are generally multiparty agreements and as such are not covered.

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<sup>46</sup> See [Standard Essential Patent licensing - GOV.UK](#).

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Paragraph 244 of the EU TTGs.

<sup>50</sup> Paragraph 56 of the EU TTGs.

<sup>51</sup> See [Standard Essential Patent licensing - GOV.UK](#).

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> See, for example, page 169 of the document published by the European Commission [SEPs Expert Group - Contribution to the Debate on SEPs.pdf](#).

<sup>55</sup> Paragraph 54 of the EU TTGs. Section 4.4. of the TTGs provides guidance on technology pools.

## ***Recommendation***

3.41 The CMA proposes not to include technology pools and LNGs in the Recommended TTBER. However, it proposes to consider providing further guidance on these in its planned guidance document.

3.42 We summarise below the stakeholder feedback we have taken into account in reaching our view that we should not recommend the inclusion of technology pools and LNGs in the Recommended TTBER.

### *Summary of stakeholders' feedback*

3.43 A number of respondents to the CMA Call for Inputs suggested that the scope of the Assimilated TTBER and/or guidelines should be expanded variously to apply to arrangements relating to technology pools and LNGs.<sup>56</sup> Those advocating for such content on technology pools tended to be from the licensor community. In contrast, those calling for content on LNGs tended to be from the licensee community. There also was little consensus between respondents from each community as to how these issues should be treated under the CA98.

3.44 One respondent to the Call for Inputs said that the CMA should consider the implications of proposed EU SEPs Regulation for the Assimilated TTBER and guidelines to avoid unnecessary burdens in cross-border agreements.<sup>57</sup> However, the CMA understands that the European Commission has recently withdrawn its legislative proposal on SEPs.<sup>58</sup>

### *CMA views*

3.45 The CMA notes that agreements establishing technology pools and LNGs will usually involve multi-party arrangements.<sup>59</sup> They are of a very different nature and purpose to the technology transfer agreements covered by the Assimilated TTBER, which only involve two parties, under which a licensor

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<sup>56</sup> One academic, two businesses and one business association drew attention to the treatment of technology pools, SEPs and LNGs within the Assimilated TTBER and the Guidelines.

<sup>57</sup> One business association.

<sup>58</sup> See element 17 of Annex IV at page 24 of the Annexes to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region, [Commission work programme 2025](#).

<sup>59</sup> Paragraph 56 of the EU TTGs.

allows the licensee to use the licensed technology rights for the purpose of producing goods or services.<sup>60</sup>

- 3.46 Including such arrangements in the Recommended TTBE0 would, in the view of the CMA, significantly change the scope and purpose of the Recommended TTBE0 from the Assimilated TTBER. Moreover, given the absence of relevant case law, and lack of consensus on these matters in the academic literature, the CMA does not consider that it is currently in a position to reach a view on whether and when such arrangements constitute categories of agreements that are likely to satisfy the exemption criteria set out in section 9 of the CA98. The CMA therefore does not propose to recommend that the Recommended TTBE0 be extended to cover agreements establishing technology pools or LNGs.<sup>61</sup>
- 3.47 The CMA notes that technology pools are discussed in the EU TTGs and that arrangements for the establishment of technology standards are covered in the CMA's Guidance on Horizontal Agreements. The CMA therefore proposes to consider providing guidance on agreements relating to technology pools and LNGs in its planned guidance document rather than include such arrangements in the Recommended TTBE0.

### **Policy question**

**Question 16:** Do you agree with the CMA's proposal to recommend that the Recommended TTBE0 should not apply to agreements establishing technology pools or LNGs, but instead to consider whether to cover such issues in guidance? Please provide reasons for your answer.

### **Impact questions:**

**Question 17:** What impact would have it have on your business or those you represent if the Recommended TTBE0 applied to agreements establishing technology pools or LNGs? Please provide reasons for your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

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<sup>60</sup> Recitals 6 and 7 of the Assimilated TTBER. Paragraph 54 of the EU TTGs.

<sup>61</sup> For the avoidance of doubt, licences of SEPs between two parties are not explicitly excluded by the Assimilated TTBER, and could benefit from exemption under it, if such a licence satisfied the criteria set out in that block exemption.

**Question 18:** What impact would have it have on consumers if the Recommended TTBER applied to agreements establishing technology pools or LNs? Please provide the reasoning behind your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

## Market share thresholds

### *Current regime*

3.48 The exemption in the Assimilated TTBER only applies if the market shares of parties to a technology transfer agreement are within certain thresholds.<sup>62</sup> The market share thresholds are as follows:

- (a) In the case of agreements between competing businesses, the parties' combined market share is 20% or less on the relevant market(s);<sup>63</sup> and
- (b) In the case of agreements between non-competing businesses, the parties each have a market share of 30% or less on the relevant market(s).<sup>64</sup>

3.49 The term 'relevant market' is defined in Article 1(1)(m) of the Assimilated TTBER. It means the combination of the relevant product or technology market with the relevant geographic market.

3.50 'Relevant product market' is defined in Article 1(1)(j) of the Assimilated TTBER and comprises the contract products (incorporating the licensed technology) and products which are regarded by the buyers as interchangeable with or substitutable for the contract products, by reason of the products' characteristics, their prices and their intended use.

3.51 'Contract products' is defined in Article 1(1)(g) of the Assimilated TTBER and means products produced directly or indirectly on the basis of the licensed technology rights. The market share of the licensee on the relevant product

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<sup>62</sup> As set out in Article 3 of the Assimilated TTBER.

<sup>63</sup> Article 3(1) of the Assimilated TTBER.

<sup>64</sup> Article 3(2) of the Assimilated TTBER.

market is calculated on the basis of the licensee's sales of products incorporating the licensor's technology and competing products. When the licensor is at the same time also a supplier of products on the relevant market, its sales will also be taken into account. Sales made by other licensees are not taken into account when calculating the licensee's or the licensor's market share.<sup>65</sup>

- 3.52 'Relevant technology market' is defined in Article 1(1)(k) of the Assimilated TTBER and consists of the licensed technology rights and its substitutes, that is to say, all those technology rights which are regarded by the licensees as interchangeable with or substitutable for the licensed technology rights, by reason of the technology rights' characteristics, their royalties and their intended use. In the case of technology markets, the TTBER provides<sup>66</sup> that the licensor's market share is to be calculated on the basis of the sales of the licensor and all its licensees of products incorporating the licensed technology.<sup>67</sup> This calculation applies both for the product and the geographic dimension of the relevant market of the licensed technology rights, Under this approach, the combined sales of the licensor and its licensees of contract products are calculated as part of all sales of competing products, irrespective of whether these competing products are produced with a technology that is being licensed.<sup>68</sup> This approach of calculating the market share of the licensor on the technology market as its 'footprint' at the product level, is used because of the practical difficulties in calculating a licensor's market share based on royalty income.<sup>69</sup>
- 3.53 'Relevant geographic market' is defined in Article 1(1)(l) of the Assimilated TTBER and means the area in which the businesses concerned are involved in the supply of and demand for products or the licensing of technology, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.
- 3.54 If the parties' market shares are initially within the applicable thresholds but subsequently rise above the thresholds, 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>70</sup> For the purposes of this consultation, this will be referred as 'the two year grace period'.

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<sup>65</sup> See the EU TTGs at paragraph 91.

<sup>66</sup> Article 8(d) of the Assimilated TTBER.

<sup>67</sup> See the EU TTGs at paragraph 86.

<sup>68</sup> Ibid.

<sup>69</sup> See the EU TTGs at paragraph 87.

<sup>70</sup> Article 8(e) of the Assimilated TTBER.



## ***Recommendation***

3.55 The CMA is minded to propose:

- (a) no change to the market share thresholds in the Assimilated TTBER with respect to product markets; and
- (b) replacing the market share threshold for technology markets in the Assimilated TTBER with a test based on there being three or more competing technologies.

3.56 The CMA does not propose any change to the two year grace period provided in the Assimilated TTBER.

3.57 We summarise below the stakeholder feedback and evidence we have considered on the market share thresholds issue, our views on these, and the different options we have considered in reaching our proposed recommendation.

### *Summary of stakeholders' feedback*

3.58 Only three respondents commented on the market share provisions and, of those, two agreed with them and only one raised concerns.<sup>71</sup> That respondent suggested that specific market share thresholds were not appropriate indications of market power in markets concerning innovative markets involving new technology, where dynamic developments are the norm. Another respondent noted that the Assimilated TTBER creates a safe harbour, which it acknowledged must be conservative. That respondent suggested that the current thresholds should not be changed in the absence of positive evidence that a different threshold was more appropriate.

3.59 The respondent that raised concerns about market shares noted difficulties in calculating market shares for the purposes of the Assimilated TTBER, especially in technology markets (where there might be little or no information about competing technologies and their licensing conditions). The respondent questioned whether market share thresholds should be used at all.<sup>72</sup>

3.60 The CMA also notes that in discussions with stakeholders prior to the Call for Inputs on the Assimilated TTBER, some stakeholders said that the market share thresholds in such innovative markets were often easily exceeded from

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<sup>71</sup> One business and one academic advocated for maintaining the current market share thresholds; while another business raised concerns.

<sup>72</sup> One business.

the outset. This was because a new technology might – initially at least – capture a very large share of the relevant market. Such stakeholders nevertheless said that the Assimilated TTBER set out a useful framework for structuring technology transfer agreements, even if there were concerns that the market share thresholds might be exceeded.

- 3.61 One respondent also suggested that the two year grace period provided by Article 8(e) of the Assimilated TTBER should be extended.<sup>73</sup>
- 3.62 The CMA observes that in its Staff Working Document, the European Commission also said that overall market share thresholds remained useful and necessary to exclude from EU TTBER’s safe harbour technology transfer agreements that might not meet the condition for exemption set out in Article 101(3) of the Treaty on the Functioning of the European Union (TFEU). However, there were challenges in the effectiveness of the markets share thresholds for technology markets.<sup>74</sup> The European Commission said that the evidence points to a number of practical difficulties in calculating the market share of the parties to the technology transfer agreements, which reduced the legal certainty provided by the thresholds.<sup>75</sup>
- 3.63 The CMA also notes that in its Impact Assessment, in addition to noting the possibility of making no change to the EU TTBER, the European Commission is inviting views on the following possible options for a revised TTBER and EU TTGs:
- not changing the approach to market share thresholds, but considering changing the conditions relating to the soft safe harbour in paragraph of 157 of the EU TTGs
  - removing the market share threshold for relevant technology markets, leaving only the threshold for relevant product markets, or
  - replacing the current market share threshold for technology markets, for example with a condition based on the existence of a certain number of other independently controlled technologies that are substitutable for the licensed technology, similar to the soft safe

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<sup>73</sup> One business added that the “*grace period*” should also be updated as it is very difficult to recoup investments in the period of two years.

<sup>74</sup> See pages 29—30 of the European Commission Staff Working Document.

<sup>75</sup> Ibid at page 30. See also the [European Commission’s Call for Evidence for An Impact Assessment on Revision of the Technology Transfer Block Exemption Regulation and Technology Transfer Guidelines](#) at page 2.

harbour currently provided in point 157 of the EU TTGs and with related guidance to be provided in revised EU TTGs.<sup>76</sup>

### *CMA views*

- 3.64 As Recital 5 of the Assimilated TTBER discusses, the likelihood that the efficiency enhancing and pro-competitive effects of technology transfer agreements will outweigh the anti-competitive effects of restrictions contained in such agreements depends upon the degree of market power of the businesses concerned, and therefore on the extent to which those businesses face competition from businesses owning substitute technologies or which produce substitute products.
- 3.65 Having regard to this consideration, the CMA considers that market share thresholds, or some other mechanism for assessing the market power of the businesses concerned, do provide a useful general indication for when technology transfer agreements restrictive of competition can nevertheless be considered likely to fulfil the exemption requirements in section 9 of CA98. Indeed, other UK Block Exemption Orders (the Specialisation Block Exemption Order (SABEO),<sup>77</sup> the Research and Development Agreements Block Exemption Order (R&DABEO)<sup>78</sup> and the VABEO<sup>79</sup> use market share thresholds.
- 3.66 The CMA further considers that the market share thresholds in the Assimilated TTBER will normally (in combination with other requirements in the Assimilated TTBER) help to ensure that technology transfer agreements otherwise satisfying the requirements for exemption will not, for example, enable the participating businesses to eliminate competition in respect of a substantial part of the products in question. The fact that market shares of the parties to an agreement might exceed the thresholds does not give rise to any presumption either that the relevant technology transfer agreement does not fulfil the exemption conditions in section 9 of CA98 or otherwise infringes the Chapter I prohibition in CA98. An individual assessment of the technology transfer agreement will be required in such circumstances.
- 3.67 Having regard to the potentially different impact on competition of technology transfer agreements between competing and non-competing businesses, the CMA also considers that the approach in the Assimilated TTBER of having

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<sup>76</sup> [European Commission's Call for Evidence for an Impact Assessment on Revision of the Technology Transfer Block Exemption Regulation and Technology Transfer Guidelines](#) at page 2.

<sup>77</sup> [The Competition Act 1998 \(Specialisation Agreements Block Exemption\) Order 2022](#).

<sup>78</sup> [The Competition Act 1998 \(Research and Development Agreements Block Exemption\) Order 2022](#).

<sup>79</sup> [The Competition Act 1998 \(Vertical Agreements Block Exemption\) Order 2022](#).

different market share thresholds for such agreements is appropriate. Similarly, the CMA also considers that the Assimilated TTBER sets each such threshold at an appropriate level for ensuring that only agreements capable of meeting the section 9 exemption criteria are covered by the block exemption. The CMA has not seen evidence that either of these market share thresholds is set at a level that undermines the achievement of the Assimilated TTBER's goals of ensuring effective protection of competition and providing adequate legal certainty for businesses.

- 3.68 Furthermore, in the CMA's view, the current two year grace period provides a good balance between providing legal certainty for businesses and promoting competition by ensuring that agreements that go on to exceed the market share thresholds are reviewed within a reasonably prompt period. The CMA also considers that the current two year grace-period is consistent with the grace periods contained within other UK block exemption regulations, such as the SABEO<sup>80</sup> or the R&DABEO<sup>81</sup> which also include a similar two year grace period.
- 3.69 The CMA is minded to recommend that the Recommended TTBER retain the Assimilated TTBER's market share thresholds in respect of product markets. The calculation of the market shares in the product markets follows the traditional manner of calculation of market shares based on the sales of products as explained in paragraph 3.50 above.<sup>82</sup> The CMA has not seen persuasive evidence that the need to calculate product market shares undermines the legal certainty that the Assimilated TTBER is intended to create.
- 3.70 However, the CMA has noted stakeholder concerns, both in response to the Call for Inputs and those discussed in the European Commission's Staff Working Document, that market share thresholds can be particularly difficult to calculate in respect of technology markets. Moreover, the CMA also observes that the 'footprint' approach discussed in paragraph 3.52 above itself was adopted in recognition of the practical challenges involved in calculating technology market shares and requires using product market sales as a proxy for determining the market position of the licensed technology.

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<sup>80</sup> Section 5(3) SABEO.

<sup>81</sup> Section 11(2) R&DABEO.

<sup>82</sup> See for instance section 6 of the SABEO and paragraphs 5.54 to 5.59 of [the Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements on Horizontal Agreements](#) (Guidance on Horizontal Agreements) on the calculation of market shares for Standardization Agreements; and section 9 of the R&DABEO and paragraph 4.60 of the Guidance on Horizontal Agreements on the calculation of market shares for existing products in R&D agreements.

- 3.71 The CMA considers that the first option to address these practical difficulties in calculating technology market shares could be for the Recommended TTBE0 to retain the Assimilated TTBER's market share thresholds in respect of product market, but simply to remove the market share thresholds in respect of technology markets and not to replace them with some other condition approximating the market power of the businesses concerned. However, the CMA can only make a recommendation for a block exemption in respect of a particular category of agreements that are, in the opinion of the CMA, likely to satisfy the exemption criteria in section 9 of the CA98.<sup>83</sup> Having regard to the points made in paragraph 3.65 above, the CMA is concerned that such an option would omit an important safeguard against the risks of granting the benefit of the block exemption to agreements likely to have anti-competitive effects in technology markets.
- 3.72 A second option would be to carry over to the Recommended TTBE0 the existing market share thresholds in respect of product markets but to replace the market share threshold for technology markets. The replacement threshold would make the application of the block exemption subject to a condition that there is a minimum number of independently controlled technologies in addition to the technologies controlled by the parties to the agreement that may be substitutable for the licensed technology. A similar approach has been used in the R&DABEO with respect to innovation, for example.<sup>84</sup> This would also be similar to the 'soft safe harbour' in paragraph 157 of the EU TTGs.
- 3.73 This alternative test would provide a proxy for assessing market power in technology markets that does not involve the practical difficulties of calculating market share thresholds in such markets. Moreover, as noted above at paragraph 3.70, the existing 'footprint' approach to calculating market share thresholds for technology market itself involves using product market sales as a proxy for determining the market position of the licensed technology. Thus, in principle adopting the alternative test would not provide a less effective mechanism for assessing market power than the existing 'footprint' approach, but the CMA provisionally considers that it is likely to be an easier test to apply.
- 3.74 The CMA provisionally considers that three or more independently controlled substitutable technologies, in addition to the technologies held by the parties to the agreement in question, would be the appropriate number of competing

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<sup>83</sup> See section 6(1) of the CA98.

<sup>84</sup> *Ibid.*

technologies for these purposes. Three is also the number used with respect to competing innovation under the R&DABEO.<sup>85</sup> The CMA provisionally considers that this sets out a reasonable number of competing technologies in lieu of market share thresholds for technology markets. This is on the basis that this number of competing technologies should, in principle, be able to ensure that parties face sufficient competition on the technology market.

- 3.75 The CMA does not consider that a lower number of competing technologies would be effective for these purposes as it could risk exempting agreements that are unlikely to benefit from the exemption criteria in section 9(1) of the CA98 given their impact on the market. The CMA would also be concerned that, at least where the relevant geographical market is national in scope, a requirement that there be four additional technologies risk setting the bar too high and risk excluding pro-competitive agreements from the benefit of the block exemption.
- 3.76 In practice, setting the threshold at three competing technologies would mean that in respect of agreements between competing businesses on the technology market, there would be at least five competing technologies (i.e. three alternative technologies to the two technologies of the parties to the agreement) and four in the case of agreements between non-competing businesses on the technology market. In the event the parties could not satisfy this condition, it would still be open to them to self-assess their agreement to determine whether it meets the conditions for exemption under section 9(1) of the CA98, and there would be no assumption that it would not. The CMA would in guidelines provide further clarity as to how to identify and assess substitutable technology for these purposes.
- 3.77 The CMA acknowledges that parties would need to identify competing technologies under this approach and that may in some situations be challenging (for the same reasons identified with respect to market share thresholds), However, it would nevertheless in most cases simplify assessment and provide greater legal certainty in relation to technology markets in comparison to calculating markets shares on such markets. At the same time, it would also ensure the block exemption only applies to technology transfer agreements in respect of which parties face sufficient competition in technology markets.
- 3.78 The CMA is aware that such a test might be difficult to apply if the technology market were asymmetric, such as where the parties to the agreement had

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<sup>85</sup> See Article 8(5) of the R&DABEO.

only very low market shares on the technology market, and there were only one or two additional competing technologies held by independent parties with very large market shares. However, the CMA considers that these circumstances could be addressed in the guidance that the CMA plans to produce to accompany any TTBE0 that might be adopted.

3.79 A third option would simply be to carry over to the Recommended TTBE0 the existing market share thresholds and continuing to apply them in respect of both product and technology markets. Indeed, the CMA notes that one stakeholder in its response to the Call for Inputs suggested that the Assimilated TTBER put in place an appropriate framework for calculating market shares, and that any necessary further clarification in this area could be provided in guidance.<sup>86</sup> Under this option, CMA could in guidance clarify further how market share thresholds are to be calculated under the Recommended TTBE0, as well as how to assess technology transfer agreements that exceed these thresholds. However, this option would be less preferable if it simply maintained a market share threshold for technology markets that was difficult in practice to apply.

3.80 Of the three options, the CMA does not consider the first option to be appropriate for the reasons set out above. As between the second and third option, the CMA, on balance, is minded to propose the option which involves carrying over the market share thresholds from the Assimilated TTBER with respect to product markets, and replacing the market share threshold for technology markets with a three or more competing technologies condition. However, the CMA would welcome stakeholders' views on whether this alternative approach would be as effective as the existing market share thresholds in identifying where parties to an agreement have market power. In addition, the CMA would welcome views on whether, in practice, this option would provide a greater degree of legal certainty and be easier to apply than simply carrying over the Assimilated TTBER's market share thresholds in respect of both product and technology markets.

3.81 Whichever of the two options above the CMA will include in the final Recommendation, for the reasons discussed in paragraph 3.68 above, the

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<sup>86</sup> One business. The CMA also notes that the European Commission's Evaluation received a number of indications that both markets share thresholds remained useful and necessary (though as already mentioned, there were also a number of stakeholders expressing concerns about such thresholds, in particular in relation to technology markets): see the European Commission Staff Working Document at pages 28—31.

CMA proposes that the Recommended TTBER continue the two year grace period provided in the Assimilated TTBER.

### **Policy questions**

**Question 19:** Do you agree that the Recommended TTBER should retain the Assimilated TTBER's market share thresholds in respect of product markets but that in respect of technology markets, instead of having a market share threshold, the block exemption in the Recommended TTBER would apply subject to the condition there be at least three other independently controlled technologies substitutable for the licensed technology? Please provide reasons for your answer.

**Question 20:** Would the approach proposed in question 19 be as effective as the existing market share threshold for technology markets in assessing the level of market power held by the parties to the agreement? Please provide reasons for your answer.

**Question 21:** Would the approach proposed in question 19 in practice provide greater legal certainty and be easier to apply than one which involves retaining the Assimilated TTBER's market share thresholds for both product and technology markets and providing further clarity about such thresholds in guidance? Please provide reasons for your answer.

**Question 22:** Do you agree with the CMA's proposal that the Recommended TTBER should retain the two year grace period established in the Assimilated TTBER? Please provide reasons for your answer.

### **Impact questions**

**Question 23:** How would the CMA's proposal that the Recommended TTBER should retain the Assimilated TTBER's market share thresholds in respect of product markets but that in respect of technology markets, instead of having a market share threshold, the block exemption in the Recommended TTBER would apply subject to the condition there be at least three other independently controlled technologies substitutable for the licensed technology impact your business or those you represent? Please provide reasons for your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact



**Question 24:** How would this proposal impact your business or those you represent in comparison to the two other options discussed above with respect to market share thresholds? Please provide reasons for your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 25:** How would this proposal impact consumers in comparison to the two other options discussed above with respect to market share thresholds? Please provide reasons for your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 26:** How would the CMA's proposal that the Recommended TTBE0 should retain the two year grace established in the Assimilated TTBER impact your business or those you represent? Please provide reasons for your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

## Hardcore restrictions

### Current regime

3.82 The exemption in the Assimilated TTBER will not apply to any technology transfer agreement containing 'hardcore restrictions'.<sup>87</sup> The hardcore restrictions differ depending on whether a technology transfer agreement is entered into between competing businesses or non-competing businesses.<sup>88</sup> The table below sets out an overview of the hardcore restrictions for each type of agreement.

Agreement between competing businesses	Agreement between non-competing businesses
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).
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).	

3.83 Where the businesses that entered into the agreement were non-competing businesses at the time of conclusion of the agreement but became competing businesses afterwards, the hardcore restrictions for agreements between non-competing businesses will apply for the full term of the agreement.<sup>89</sup>

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<sup>87</sup> Article 4 of the Assimilated TTBER.

<sup>88</sup> For agreements entered into between competing undertakings, hardcore restrictions are set out in Articles 4(1) of the Assimilated TTBER. For agreements between non-competing undertakings, hardcore restrictions are set out in Article 4(2) of the Assimilated TTBER.

<sup>89</sup> Article 4(3) of the Assimilated TTBER. This will apply unless the agreement is subsequently amended in any material aspect; including the conclusion of a new technology transfer agreement between the parties concerning competing technology rights.

- 3.84 The hardcore restrictions set out in Article 4 of the Assimilated TTBER include several exceptions which vary depending on whether the agreements are entered into between competing or non-competing businesses; and, for agreements between competitors, depending on whether the agreements are reciprocal or non-reciprocal.
- 3.85 The exceptions are set out in Articles 4(1)(c), 4(2)(b) and 4(2)(c) of the Assimilated TTBER, allow different restrictions in relation to active and passive sales.
- 3.86 The Assimilated TTBER does not define active and passive sales. However, as noted in paragraph 3.20 above, relevant definitions of these terms can be found in Article 8(7) of the VABEO.<sup>90</sup>

### ***Recommendation***

3.87 The CMA proposes that the Recommended TTBER should retain the hardcore restrictions set out in Article 4 of the Assimilated TTBER. This includes retaining provisions in Article 4 relating to active and passive sales restrictions.<sup>91</sup> However, the CMA proposes to further clarify in Guidance as how the hardcore restrictions should be applied.

- 3.88 We summarise below the evidence we have taken into account in reaching this proposed recommendation.

### *Summary of stakeholders' feedback*

- 3.89 Only three respondents to the Call for Inputs commented on the existing hardcore restrictions.<sup>92</sup> While one respondent appeared content with maintaining the existing hardcore restrictions,<sup>93</sup> a different respondent submitted that the hardcore restrictions are too complicated and should be simplified to remove distinctions between competing and non-competing businesses and reciprocal and non-reciprocal agreements. It argued that the safe harbour should be simplified and unified for all type of agreements.<sup>94</sup>

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<sup>90</sup> SI 2022/516. Paragraph 108 of the EU TTGs suggests for the TTBER to apply the interpretation of active and passive sales as defined in the EU Guidelines on Vertical Restraints.

<sup>91</sup> As noted in 3.13 the CMA is also proposing for the Recommended TTBER to include specific definitions for active and passive sales that track the definitions in the VABEO.

<sup>92</sup> Two businesses and one legal professional shared their thoughts on the current hardcore restrictions.

<sup>93</sup> One business said these were sufficiently clear, particularly when read together with the Guidelines.

<sup>94</sup> One business.

3.90 One respondent suggested that maintaining provisions relating to passive sales in the Assimilated TTBER was no longer necessary, since the UK was no longer part of the EU internal market.<sup>95</sup> Another respondent said that the Assimilated TTBER should have a more lenient approach towards active and passive sales in the UK due to the differences between the technology industry from traditional industries.<sup>96</sup>

#### *CMA views*

3.91 In the CMA's view, the hardcore restrictions address those provisions in technology transfer agreements which involve serious restrictions of competition that will in general cause harm to the market and to consumers. Moreover, as noted above, the CMA considers that the different treatment in Article 4 for hardcore restrictions in terms of the type of agreement and whether it is between competing and non-competing businesses is appropriate, since in general, agreements between competitors can pose a greater risk to competition than agreements between non-competitors.

3.92 With respect to the latter, the CMA does not agree with the argument that the passive and active sales distinction is no longer appropriate following the UK's exit from the EU. This distinction remains appropriate in respect of, among other things, protecting intra-brand competition.

3.93 Indeed, the CMA previously analysed the differentiation between active and passive when it made the recommendation to the Secretary of State to make the VABEO.<sup>97</sup> On that occasion the CMA examined whether the then-current distinction between active and passive sales remained fit-for-purpose. The CMA in that exercise concluded that the distinction between active and passive sales was still relevant in the UK, especially in relation to intra-brand competition and exclusive distribution systems. Therefore, the CMA recommended that the Secretary of State include definitions of 'active sales' and 'passive sales' in the UK VABEO, with an explanation about the interpretation of those terms in the CMA VABEO Guidance.<sup>98</sup>

3.94 The CMA recommends that the Recommended TTBER should retain the approach to active and passive sales restrictions set out in Article 4 of the

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<sup>95</sup> One legal professional.

<sup>96</sup> One business.

<sup>97</sup> [The retained Vertical Agreements Block Exemption Regulation Consultation document](#).

<sup>98</sup> Paragraph 4.35 of [the retained Vertical Agreements Block Exemption Regulation Consultation document](#). The distinction between active and passive sales is included in Article 8(7) of the of the Vertical Agreements Block Exemption Order and covered in paragraphs 8.44 to 8.50 of the [Vertical Agreements Block Exemption Order, CMA guidance, CMA 166 of 12 July 2022](#).

Assimilated TTBER. As set out in the section on Definitions above, the CMA proposes to recommend including specific definitions for active and passive sales in the Recommended TTBER that track the definitions in the VABEO.

### **Policy question**

**Question 27:** Do you agree with the CMA's Proposed Recommendation that the Recommended TTBER should retain the hardcore restrictions set out in Article 4 of the Assimilated TTBER, including with respect to active and passive sales restrictions?

### **Impact questions**

**Question 28:** How would the CMA's Proposed Recommendation that the Recommended TTBER should retain the hardcore restrictions set out in Article 4 of the Assimilated TTBER, including with respect to active and passive sales restrictions, impact your business or those you represent? Do you think that the block exemption would be used differently if the hardcore restrictions were altered? Please provide the reasoning behind your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 29:** How would the CMA's Proposed Recommendation that the Recommended TTBER should retain the hardcore restrictions set out in Article 4 of the Assimilated TTBER, including with respect to active and passive sales restrictions, impact consumers? Please provide the reasoning behind your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

## Excluded restrictions

### *Current Regime*

3.95 The exemption in the Assimilated TTBER will not apply to the following obligations or restrictions contained in a technology transfer agreement (whether direct or indirect),<sup>99</sup> namely:

- (a) any obligation on the licensee to assign or license exclusively to the licensor (or someone designated by the licensor) any improvements to the licensed technology (such as incremental innovation) made by the licensee, or new applications for the licensed technology discovered by that licensee;<sup>100</sup>
- (b) any restriction prohibiting one of the parties from challenging the validity of the other party's UK intellectual property rights, with the exception that the exemption will apply to a provision in an **exclusive** licence allowing the technology transfer agreement to be terminated if the licensee challenges the validity of the licensed technology rights;<sup>101</sup>
- (c) where the technology transfer agreement is between non-competing businesses, any restriction limiting the licensee's ability to exploit its own technology rights or limiting any of the parties' ability to carry out their own research and development (unless such a restriction is indispensable to prevent disclosure of licensed know-how to third parties).<sup>102</sup>

3.96 EU technology transfer block exemptions prior to the EU TTBER distinguished between severable and non-severable improvements to underlying technologies for the purpose of excluded restrictions.<sup>103</sup> A 'severable' improvement is one which can be used without infringing the rights in the underlying technology. In contrast, a 'non-severable' improvement cannot be used without infringing the rights in the underlying technology.

3.97 Under the existing Assimilated TTBER, an obligation to grant back to the licensor an exclusive licence to any improvements of the underlying technology is treated as an excluded restriction. By contrast, under the 2004

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<sup>99</sup> As set out in Article 5 of the Assimilated TTBER.

<sup>100</sup> Article 5(1)(a) of the Assimilated TTBER.

<sup>101</sup> Article 5(1)(b) of the Assimilated TTBER.

<sup>102</sup> Article 5(2) of the Assimilated TTBER.

<sup>103</sup> See for example, Article 5(1) of the EU TTBER.

EU TTBER, only an obligation to grant back to the licensor an exclusive license to severable improvements was treated as an excluded restriction.<sup>104</sup>

### **Recommendation**

3.98 The CMA is proposing to recommend maintaining the existing approaches in the Assimilated TTBER for grant-back and termination on challenge clauses in the Recommended TTBE0.

3.99 We summarise below the stakeholder feedback and evidence we have taken into account in making this recommendation, and our views on these.

#### *Summary of stakeholders' feedback*

3.100 A number of respondents commented on these excluded restrictions.<sup>105</sup> Two said that the existing excluded restrictions were sufficiently clear.<sup>106</sup> While one of those two respondents went on to say that there was no need for modifications, additions or removal of any of the restrictions;<sup>107</sup> the second respondent gave specific recommendations for changes in respect of grant backs and termination on challenge clauses.<sup>108</sup>

3.101 A further two respondents noted that the current excluded restrictions in regard to grants backs of severable and non-severable innovations were an improvement from the previous iteration of the block exemption.<sup>109</sup>

3.102 One stakeholder argued that the treatment of grant backs should be amended to reinstate a distinction in the treatment of grant backs of severable and non-severable innovations.<sup>110</sup> It was argued this would increase certainty in the licensing of technology rights. The CMA also notes that stakeholders responding to the European Commission Evaluation made similar comments in respect of grant backs.<sup>111</sup>

3.103 Three respondents to the Call for Inputs commented on the issue of termination on challenge clauses.<sup>112</sup> Two of those respondents asserted that

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<sup>104</sup> Ibid.

<sup>105</sup> Two academic, two businesses and one business association.

<sup>106</sup> Two businesses.

<sup>107</sup> One business.

<sup>108</sup> One business.

<sup>109</sup> One academic and one business association.

<sup>110</sup> In the UK one academic has advocated this position. The European Commission Evaluation received four responses in this regard (three business associations and one association of lawyers).

<sup>111</sup> See pages 32-33 of the European Commission Staff Working Document at pages.

<sup>112</sup> One business, one business association and one academic.

the current provisions on termination on challenge clauses in the Assimilated TTBER tilted the balance of bargaining power in favour of licensees, and that it provided licensees an instrument to use against licensors (such as leverage in negotiations). It was suggested that this risked creating a disincentive for holders to license and thereby disseminate their technology.<sup>113</sup>

- 3.104 A different stakeholder indicated that it was content with the Assimilated TTBER's existing treatment of termination on challenge clauses as excluded restrictions. It noted that termination on challenge clauses prevent licensees from contesting the validity of patents, allowing licensors to maintain control over potentially weak or invalid patents. It said that it helped to avoid perpetuating a situation where the market is distorted by the enforcement of patents that do not meet the legal standards for patentability, thereby hindering technological progress and innovation, and distorting the competitive landscape.<sup>114</sup>
- 3.105 The CMA notes that according to the European Commission Staff Working Document, the majority of respondents to the Commission's public consultation confirmed the effectiveness of the excluded restrictions on termination on challenge clauses in the EU TTBER.<sup>115</sup> According to the European Commission Staff Working Document, one respondent said that the current no-challenge restrictions in the EU TTBER were too restrictive and that it damaged licensors, and that the 2004 EU TTBER struck a better balance between allowing parties to challenge invalid patents and protecting good faith in licensing negotiations.<sup>116</sup> Another respondent to the European Commission consultation said that one of the objectives of the current provisions in the EU TTBER – enabling licensees to challenged invalid intellectual property rights without the risk of the licensor retaliating by terminating the licence – was extraneous to antitrust law and should not be protected as such.<sup>117</sup>

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<sup>113</sup> One academic and one business advocated in this regard.

<sup>114</sup> One business association.

<sup>115</sup> See page 32 of the European Commission Staff Working Document.

<sup>116</sup> The 2004 EU TTBER all termination on challenge clauses were covered by the block exemption. Under the Assimilated TTBER and the EU TTBER, only termination on challenge clauses in exclusive licences are block exempted, whereas termination on challenge clauses in non-exclusive agreements are excluded from the block exemption: see the European Commission Working Document at page 32.

<sup>117</sup> Ibid.



## *CMA views*

### *Grant back clauses*

3.106 As the European Commission explained in the Staff Working Document, the reason for the approach to grant backs that was adopted in the Assimilated TTBER is that:

- block-exempting exclusive grant back obligations for non-severable improvements can disincentivise the licensee from engaging in incremental innovation with the licensed technology, as this completely prevents the innovator from using its own innovation; and
- non-severable improvements cannot in any case be exploited by the licensee without also using the licensor's original licensed technology, which will generally benefit the licensor by leading to increased sales of products incorporating the licensed technology.<sup>118</sup>

3.107 In the same document, the European Commission states that the majority of stakeholders responding to its evaluation confirmed the effectiveness of the current rules on grant backs and that critical voices to the contrary did not advance new facts or arguments not already considered prior to the adoption of the EU TTBER. In the European Commission's view, this indicates that the current rules on the EU TTBER on grant backs remain effective in meeting the objectives of the block exemption.<sup>119</sup>

3.108 The CMA has not seen any evidence that the approach to grant backs under Article 5 of the Assimilated TTBER has hindered innovation or licensing and that there should be a return to the approach in 2004 EU TTBER of block exempting exclusive grant back only for non-severable improvements.<sup>120</sup> Moreover, the CMA also considers that the grant back provisions in Article 5 of the TTBER are simpler to apply than those under the 2004 EU TTBER, since there is no need to determine whether the underlying technology will necessarily be infringed through the use of the improvement.

3.109 Furthermore, the CMA notes that retaining the current limitation of the grant back provision to requirements that the licensee grant exclusive licenses or assignments of the rights in improvements is not a restriction against all grant backs. Indeed, requirements on the licensee to grant non-exclusive licences

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<sup>118</sup> See page 32 of the European Commission Staff Working Document.

<sup>119</sup> Ibid.

<sup>120</sup> And in this regard, the CMA has also taken into consideration the comments in pages 32-33 of the European Commission Staff Working Document.

for improvements to the licensor can benefit from the exemption established in the Assimilated TTBER, provided that the other requirements of the block exemption are satisfied.

- 3.110 Moreover, the inclusion of an exclusive grant back requirement in a technology transfer agreement does not mean that such a provision will automatically infringe the Chapter I prohibition. Such a provision will simply need individual assessment, as it is not covered by the Assimilated TTBER.<sup>121</sup>
- 3.111 Accordingly, the CMA provisionally considers that the existing approach to the treatment of grant backs in Article 5 of the Assimilated TTBER should be retained in the Recommended TTBERO.

#### *Termination on challenge clauses*

- 3.112 The CMA provisionally considers that the existing provisions on termination on challenge clauses in the Assimilated TTBER continue to strike the right balance, on the one hand between preserving incentives to innovate and license technology, and on the other, ensuring that invalid intellectual property rights are removed as a barrier to innovation and economic activity. The CMA has not, in its view, seen persuasive evidence to suggest that a change in approach to termination on challenge clauses is warranted, including with respect to the different rights covered by the Assimilated TTBER.
- 3.113 In reaching this provisional view, the CMA has also taken into account the comments in the European Commission Staff Working Document to the effect that the identical provisions on termination on challenge clauses in Article 5 of the EU TTBER have, notwithstanding some criticisms, met their objectives.<sup>122</sup> In the same document, the European Commission refers to a study report commissioned for the purposes of its evaluation finding that the current approach to termination on challenge clauses in the EU TTBER helps to re-balance the position of licensors where they are significantly smaller than licensees, and therefore cannot afford to defend their technology in court if challenged – this is especially the case, for example, in the biotechnology sector.<sup>123</sup>
- 3.114 Having regard the above considerations, the CMA provisionally considers that the approach to the treatment of termination on challenge clauses in Article 5

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<sup>121</sup> Ibid.

<sup>122</sup> See the European Commission Staff Working Document at page 33.

<sup>123</sup> Ibid. The European Commission's study report is available [here](#) and the relevant discussion of no-challenge clauses is at pages 78-79 of that report.

of the Assimilated TTBER should be retained in the recommended TTBE0 and is therefore not proposing to recommend any changes to such clauses.

### **Policy questions**

**Question 30:** Do you agree with the CMA's proposal that the approach to the treatment of grant backs in Article 5 of the Assimilated TTBER be retained in the Recommended TTBE0? Please provide reasons for your view.

**Question 31:** If you disagree with this this proposal, please discuss how – if at all – the Recommended TTBE0 should deal with grant backs, providing your reasons when doing so.

**Question 32** Do you agree with the CMA's proposal to recommend that the approach to the treatment of termination on challenge clauses in Article 5 of the Assimilated TTBER be retained in the Recommended TTBE0? Please provide reasons for your view.

**Question 33:** If you disagree with this proposal, please explain how – if at all – the Recommended TTBE0 should deal with termination on challenge clauses, providing your reasons when doing so.

### **Impact questions**

**Question 34:** If the CMA were to recommend that the Recommended TTBE0 only exclude from the block exemption requirements on the licensee to provide exclusive grant backs of non-severable improvements, what impact would this have on your business and those you represent? Please provide the reasons for your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 35:** If the CMA were to recommend that the Recommended TTBE0 only exclude from the block exemption requirements on the licensee to provide exclusive grant backs of non-severable improvements, how would this impact consumers? Please provide the reasons for your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 36:** If the CMA were to recommend that the Recommended TTBE0 should provide block exemption to all termination of challenge clauses, how would this impact your business or those you represent? Please provide the reasoning behind your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 37:** If the CMA were to recommend that the Recommended TTBE0 should provide block exemption to all termination of challenge clauses, how would this impact consumers? Please provide the reasoning behind your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

## **Additional stakeholder suggestions**

3.115 As set out in paragraph 3.4 in the section on our General Recommendations, respondents to the Call for Inputs indicated that the Assimilated TTBER worked well overall and created real benefits for technology licensing in the UK. We would however welcome stakeholder suggestions for any other provisions that the Recommended TTBE0 could include to help improve the dissemination of technology in the UK.

### **Policy question**

**Question 38:** Are there any other provisions you think should be included in the Recommended TTBE0 that would improve technology dissemination in the UK?

## Other considerations

3.116 Some respondents to the Call for Inputs suggested issues that should be considered for any technology transfer guidelines that the CMA might adopt. These included suggestions for guidance on issues such as intra-technology competition; cross licensing in settlement agreements; safe harbours if there are sufficiently independently controlled technologies; and standardisation agreements.<sup>124</sup>

### *CMA views*

3.117 The CMA will consider the case for covering these issues in guidance.

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<sup>124</sup> Two businesses.

## 4. Other Provisions and Duration of the Recommended TTBE0

### Transitional period

- 4.1 The CMA proposes that the Recommended TTBE0 should provide for a transitional period of one year. This means that the Chapter I prohibition would not apply during a period of one year from the date on which the Recommended TTEBO comes into effect in respect of technology transfer agreements already in force on that date which do not satisfy the conditions for exemption provided for in the Recommended TTBE0, but on that date, satisfied the conditions for exemption provided for in the Assimilated TTBER.<sup>125</sup>
- 4.2 In other words, existing agreements that meet the conditions of the Assimilated TTBER could continue to benefit from its terms for a year after its expiry, whereas agreements entered into after its expiry would need to meet the conditions of the Recommended TTBE0 to benefit from the block exemption.
- 4.3 The CMA is therefore proposing to recommend that the Recommended TTBE0 has a transitional period of one year to allow businesses that wish to take advantage of the 'safe harbour' to review and (if necessary) revise their technology transfer agreements.

### Cancellation in individual cases

- 4.4 Section 6(6)(c) of the CA98 provides that a block exemption order may provide that if the CMA considers that a particular agreement is not an exempt agreement,<sup>126</sup> it may cancel the block exemption in respect of that agreement.
- 4.5 The CMA proposes that the Recommended TTBE0 should contain such a provision.
- 4.6 CMA proposes that any cancellation, i.e. withdrawal of the benefit of the Recommended TTBE0 in an individual case, should be in writing, and that the CMA should first give notice in writing of its proposal and consider any representations made to it before making a decision to cancel the block exemption in respect of that agreement. The CMA proposes that any notice should state the facts on which the CMA bases its decision or proposal and its

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<sup>125</sup> Unless the benefit of the block exemption is cancelled, or otherwise varied or revoked, in accordance with the provisions of the Recommended TTBE0 or the CA98.

<sup>126</sup> 'Exempt agreement' means an agreement which is exempt from the Chapter I prohibition as a result of Section 9 of the CA98: Section 6(8) of the CA98.

reasons for making it. The CMA envisages that these provisions would be similar to those in the R&DABEO.<sup>127</sup>

- 4.7 The CMA is therefore proposing to recommend that the Recommended TTBE0 allow the CMA to cancel the benefit of the block exemption in individual cases to ensure that the 'safe harbour' is only available for those agreements that satisfy the conditions for exemption under section 9 of the CA98. The CMA considers that this provision is likely only to be used in exceptional circumstances and that the proposal to provide notice in writing and to consider any representations would ensure that the provision was used appropriately.

## **Obligation to provide information**

- 4.8 Section 6(5) of the CA98 provides that a block exemption order may impose obligations subject to which a block exemption is to have effect. Section 6(6)(b) of the CA98 provides that a block exemption order may provide for the cancellation of the block exemption with respect to the agreement where there is a failure to comply with an obligation imposed by the order. The CMA proposes that the Recommended TTBE0 should impose an obligation for parties to provide the CMA with information in connection with those technology transfer agreements to which they are a party if requested to do so, and that failure to do so without reasonable excuse should result in cancellation, i.e. withdrawal, of the block exemption.
- 4.9 The CMA proposes that the obligation should be for businesses to supply the CMA with such information in connection with those technology transfer agreements to which they are a party as the CMA may require, within ten working days from the date on which the party receives notice in writing of the request or within such longer period of working days commencing with the relevant day as the CMA may, having regard to the particular circumstances of the case, agree with the person in writing.<sup>128</sup> The CMA also proposes that if it proposes to cancel the block exemption, it should first give notice in writing of its proposal and consider any representations made to it. The CMA envisages that these provisions would be similar to those in the R&DABEO.<sup>129</sup>

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<sup>127</sup> See Articles 15 and 16 of the R&DABEO.

<sup>128</sup> The CMA is minded to clarify in any guidance on technology transfer agreements that where appropriate, it will seek to give recipients of large information requests advance notice so that they can manage their resources accordingly. The CMA is also minded to clarify that, in certain circumstances and, where it is practical and appropriate to do so, it may send the information request in draft.

<sup>129</sup> See Articles 14-16 of the R&DABEO.

4.10 The CMA is therefore proposing to recommend that the Recommended TTBER include an obligation to provide information. This will ensure that the CMA is in a position to assess whether an agreement that benefits from the block exemption is one that satisfies the conditions for exemption under section 9 of the CA98. This provision would also enable the CMA to investigate instances where competition law concerns arise from parallel networks of similar technology transfer agreements.<sup>130</sup>

## Duration

4.11 The current Assimilated TTBER has a duration of 12 years and is due to expire on 30 April 2026.<sup>131</sup>

4.12 Under Section 6(7) of the CA98, a block exemption order may provide that the order is to cease to have effect at the end of a specified period. A benefit of a block exemption having a fixed duration is that it provides businesses with legal certainty whilst also providing an opportunity for the CMA to conduct a further review of the operation of the block exemption, taking account of market developments since the last review, after a specified period.

4.13 An alternative approach is to propose that the Recommended TTBER not have a fixed duration. An advantage of such an approach is that it would give the CMA flexibility to carrying out a review of the Recommended TTBER, if for example, market circumstances significantly changed. This approach makes particular sense when there is evidence that there are likely to be market developments, but there is some uncertainty as to when those developments might arise.<sup>132</sup>

4.14 However, providing for a fixed duration of 12 years would not prevent a review of the Recommended TTBER at an earlier stage if, during the course of that period, market circumstances did in fact significantly change. Indeed, there is a statutory requirement for DBT to carry out and publish a post-implementation review of any block exemption order within five years of it coming into force and then regularly thereafter on a five-year cycle.<sup>133</sup>

4.15 On balance, given that the CMA has not received specific evidence of likely imminent changes in market circumstances, the CMA is provisionally minded

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<sup>130</sup> The process for providing representations where a response contains commercially sensitive information or details of an individual's private affairs and the sender considers that disclosure might significantly harm their interests or the interests of the individual, is explained in Chapter 7 of the Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8.

<sup>131</sup> See Article 11 of the Assimilated TTBER.

<sup>132</sup> The CMA followed this approach in its review of other Block Exemptions like the Public Transport Ticketing Schemes Block Exemption, for example.

<sup>133</sup> Section 28 of the Small Business, Enterprise and Employment Act 2015.



to recommend that the Recommended TTBE0 have a fixed duration of 12 years. This is consistent with the Assimilated TTBER. The CMA considers that a 12 year duration would provide the benefits of legal certainty without precluding a review if developments had arisen that called into question any aspect of the TTBE0.

**Policy questions:**

**Question 39:** The CMA invites views on the above proposed recommendations for the Recommended TTBE0 in respect of transitional provisions, cancellation and obligations to provide information.

**Question 40:** Do you agree with the CMA's Proposed Recommendation that the Recommended TTBE0 should have a 12 year duration? If you disagree, do you have a suggestion for what the duration should be? Please provide reasons for your answer.

## **Annex A: List of respondents**

1. Anderson Law LLP
2. Avanci
3. Dr. Gail Evans from the Queen Mary Intellectual Property Institute
4. European Automobile Manufacturers' Association (ACEA)
5. Fair Standards Alliance
6. IP Europe
7. Nokia Technologies
8. Professor Katharine Rockett from the University of Essex
9. Sisvel International
10. The App Association
11. A Business

## Annex B: Consultation Questions

### General recommendation

#### Policy questions

**Question 1** Do you agree with the CMA's proposed recommendation to the Secretary of State to make a Block Exemption Order to replace the retained TTBER with the Recommended TTBE0, rather than letting it lapse without replacement or renewing it without varying the retained TTBER?

**Question 7:** Do you agree with the CMA's Proposed Recommendation not to include 'utility models' in the definition of 'technology rights' in the Recommended TTBE0?

**Question 8:** Do you agree with the CMA' proposal to add copyright in data and database rights, but not data, in the definition of 'technology rights' in the Recommended TTBE0?

**Question 9:** Do you have any suggestions for how data could be covered in a definition of 'technology rights' in the Recommended TTBE0?

**Question 10:** Do you agree with the CMA's Proposed recommendation to include the definitions of 'active sales' and 'passive sales' used in Article 8(7) of the VABEO in the Recommended TTBE0?

**Question 12:** Do you agree with the CMA's proposal not to recommend any change in the distinction between competing and non-competing businesses set out in the Assimilated TTBER? Please provide reasons for your view.

**Question 13:** Do you agree with the CMA's proposal not to recommend any change in the distinction between reciprocal and non-reciprocal agreements currently set out in the Assimilated TTBER? Please provide reasons for your view.

**Question 16:** Do you agree with the CMA's proposal to recommend that the Recommended TTBE0 should not apply to agreements establishing technology pools or LNGs, but instead to consider whether to cover such issues in guidance? Please provide reasons for your answer.

**Question 19:** Do you agree that the Recommended TTBE0 should retain the Assimilated TTBER's market share thresholds in respect of product markets but that in respect of technology markets, instead of having a market share threshold, the block exemption in the Recommended TTBE0 would apply subject to the condition there be at least three other independently controlled technologies substitutable for the licensed technology? Please provide reasons for your answer.

**Question 20:** Would the approach proposed in question 19 be as effective as the existing market share threshold for technology markets in assessing the level of market power held by the parties to the agreement? Please provide reasons for your answer.

**Question 21:** Would the approach proposed in question 19 in practice provide greater legal certainty and be easier to apply than one which involves retaining the Assimilated TTBER's market share thresholds for both product and technology markets and providing further clarity about such thresholds in guidance? Please provide reasons for your answer.

**Question 22:** Do you agree with the CMA's proposal that the Recommended TTBE0 should retain the two year grace period established in the Assimilated TTBER? Please provide reasons for your answer.

**Question 27:** Do you agree with the CMA's Proposed Recommendation that the Recommended TTBE0 should retain the hardcore restrictions set out in Article 4 of the Assimilated TTBER, including with respect to active and passive sales restrictions?

**Question 30:** Do you agree with the CMA's proposal that the approach to the treatment of grant backs in Article 5 of the Assimilated TTBER be retained in the Recommended TTBE0? Please provide reasons for your view.

**Question 31:** If you disagree with this this proposal, please discuss how – if at all – the Recommended TTBE0 should deal with grant backs, providing your reasons when doing so.

**Question 32:** Do you agree with the CMA's proposal to recommend that the approach to the treatment of termination on challenge clauses in Article 5 of the Assimilated TTBER be retained in the Recommended TTBE0? Please provide reasons for your view.

**Question 33:** If you disagree with this proposal, please explain how – if at all – the Recommended TTBE0 should deal with termination on challenge clauses, providing your reasons when doing so.

**Question 38:** Are there any other provisions you think should be included in the Recommended TTBE0 that would improve technology dissemination in the UK?

**Question 39:** The CMA invites views on the above proposed recommendations for the Recommended TTBE0 in respect of transitional provisions, cancellation and obligations to provide information.

**Question 40:** Do you agree with the CMA's Proposed Recommendation that the Recommended TTBE0 should have a 12 year duration? If you disagree, do you have a suggestion for what the duration should be? Please provide reasons for your answer.

## Impact questions

**Question 2:** In your response to our questions, where possible please indicate the size of your business (or those businesses you represent) in terms of number of employees:

- Less than 10 employees
- Between 10 and 50 employees
- Between 50 and 250 employees
- More than 250 employees

**Question 3:** In your response to our questions, where possible please indicate the industry in which you consider your business (or those businesses you represent) operates (using SIC codes if known):

- Agriculture, forestry, fishing
- Mining and Quarrying
- Manufacturing (Please specify)
- Electricity, gas, steam and air conditioning supply,
- Water supply; sewerage, waste management and remediation activities
- Construction
- Wholesale and Retail Trade, repair of motor vehicles and motorcycles
- Transportation and storage
- Accommodation and food service activities
- Information and communication
- Financial and insurance activities
- Real estate activities
- Professional, scientific and technical activities
- Administrative and support service activities
- Public administration and defence; compulsory social security
- Education
- Human health and social work activities
- Arts, entertainment and recreation
- Other service activities

**Question 4:** In your response to our questions, where possible please indicate how long your business has been in operation (or if you are an advisor, generally how long the businesses you represent have been in operation).

**Question 5:** Relative to current arrangements, if the Assimilated TTBER were allowed to expire without replacement, how much (if at all) would this impact your business or the businesses you represent? Please provide reasons for your view.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 6:** Relative to current arrangements, if the Assimilated TTBER were allowed to expire without replacement, how would this impact consumers? Please provide reasons for your view.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 11:** Relative to current arrangements, if the CMA's Proposed Recommendation for definitions in the Recommended TTBE0 were to be adopted, how do you anticipate that this would impact your business or those that you represent? Please describe the scale of any legal or expert advice needed (e.g. time spent with consultants).

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 14:** If the CMA were to recommend removing the distinction between competing and non-competing businesses currently set out in the Assimilated TTBER, what impact would this have on your business or the businesses of those you represent? Please describe the scale of any impact (e.g. as a result of time spent with consultants).

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 15:** If the CMA were to recommend removing the distinction between reciprocal and non-reciprocal agreements currently set out in the Assimilated TTBER, what impact would this have on your business or the businesses of those you represent? Please describe the scale of any legal or expert advice needed (e.g. time spent with consultants).

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 17:** What impact would it have on your business or those you represent if the Recommended TTBER applied to agreements establishing technology pools or LNGs? Please provide reasons for your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact



**Question 18:** What impact would it have on consumers if the Recommended TTBE0 applied to agreements establishing technology pools or LNGs? Please provide the reasoning behind your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 23:** How would the CMA's proposal that the Recommended TTBE0 should retain the Assimilated TTBER's market share thresholds in respect of product markets but that in respect of technology markets, instead of having a market share threshold, the block exemption in the Recommended TTBE0 would apply subject to the condition there be at least three other independently controlled technologies substitutable for the licensed technology impact your business or those you represent? Please provide reasons for your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 24:** How would this proposal impact your business or those you represent in comparison to the two other options discussed above with respect to market share thresholds? Please provide reasons for your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 25:** How would this proposal impact consumers in comparison to the two other options discussed above with respect to market share thresholds? Please provide reasons for your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 26:** How would the CMA's proposal that the Recommended TTBE0 should retain the two year grace established in the Assimilated TTBER impact your business or those you represent? Please provide reasons for your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 28:** How would the CMA's Proposed Recommendation that the Recommended TTBE0 should retain the hardcore restrictions set out in Article 4 of the Assimilated TTBER, including with respect to active and passive sales restrictions, impact your business or those you represent? Do you think that the block exemption would be used differently if the hardcore restrictions were altered? Please provide the reasoning behind your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 29:** How would the CMA's Proposed Recommendation that the Recommended TTBE0 should retain the hardcore restrictions set out in Article 4 of the Assimilated TTBER, including with respect to active and passive sales restrictions, impact consumers? Please provide the reasoning behind your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 34:** If the CMA were to recommend that the Recommended TTBE0 only exclude from the block exemption requirements on the licensee to provide exclusive grant backs of non-severable improvements, what impact would this have on your business and those you represent? Please provide the reasons for your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 35:** If the CMA were to recommend that the Recommended TTBE0 only exclude from the block exemption requirements on the licensee to provide exclusive grant backs of non-severable improvements, how would this impact consumers? Please provide the reasons for your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 36:** If the CMA were to recommend that the Recommended TTBE0 should provide block exemption to all termination of challenge clauses, how would this impact your business or those you represent? Please provide the reasoning behind your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

**Question 37:** If the CMA were to recommend that the Recommended TTBE0 should provide block exemption to all termination of challenge clauses, how would this impact consumers? Please provide the reasoning behind your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

## Annex C: Processing of personal data and Government consultation principles

1. 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.
2. Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the General Data Protection Regulation 2016 (GDPR) and the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.
3. 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 consultation responses into account and to ensure that we properly consult on the Proposed Recommendation to the Secretary of State before it is finalised.
4. For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long we retain personal data, see our Privacy Notice.
5. Our use of all information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need to exclude from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. 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. When submitting your response please also let us know if you wish to remain anonymous.
6. Please note that information and personal data 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, if you have made any representations about the confidentiality of any information contained in your response, we will take such representations into consideration. 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.

7. If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.