

Response of Dentons UK & Middle East LLP to the CMA's Consultation Questions on its Proposed Recommendations on the Assimilated TTBER

General recommendation

Policy questions¹

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 TTBER, rather than letting it lapse without replacement or renewing it without varying the retained TTBER?

Answer: Yes

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 TTBER?

Answer: We have no strong view on this point.

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

Answer: Yes. We strongly favour the addition of copyright in data and database rights to the definition of "technology rights", as their omission from the current definition is a significant shortcoming in practice, given the substantial importance and value of data and databases in a knowledge-based economy, which has grown significantly since the last review of the EU TTBER. They are particularly important for some of our clients, such as those in the technology sector.

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

Answer: We suggest adding "copyright in data" and "database rights" to the list of rights in the definition of "technology rights".

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 TTBER?

Answer: Yes, but definitions relating to public procurement would need to be updated to reflect the Procurement Act 2023.

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.

Answer: Yes, because this distinction is long-standing and is likely to be maintained within the EU TTBER, and we generally favour minimising differences between UK and EU competition law given the impact on clients with business operations across Europe.

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.

¹ We have grouped the policy questions and the impact questions together, as per the Annexes to the Consultation Document, rather than answering them in numerical order.

Answer: Yes, because this distinction is long-standing and is likely to be maintained within the EU TTBER, and we generally favour minimising differences between UK and EU competition law given the impact on clients with business operations across Europe.

Question 16: Do you agree with the CMA's proposal to recommend that the Recommended TTBER 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.

Answer: We have no strong view on this point. However, if the TTBER does not apply to agreements establishing technology pools or LNGs, we would welcome guidance on the treatment of technology pools and LNGs.

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.

Answer: Yes, because that condition should be easier to assess in practice and therefore provide greater legal certainty for our clients.

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.

Answer: Not necessarily, but its advantages in terms of practical application would in our view probably justify this change. The Recommended TTBER would not in any event provide exemption from the Chapter II prohibition.

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.

Answer: Yes, because it is a simpler and clearer "bright-line" test.

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.

Answer: Yes, we do not see any reason to remove this grace period, which provides a measure of reassurance.

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?

Answer: Yes.

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 TTBER? Please provide reasons for your view.

Answer: Yes, as this remains a reasonable approach and consistent with the position under the EU TTBER.

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

Answer: Not applicable

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 TTBER? Please provide reasons for your view.

Answer: Yes, as this remains a reasonable approach and consistent with the position under the EU TTBER.

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

Answer: Not applicable

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

Answer: No

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

Answer: We have no objection to any of the proposed recommendations.

Question 40: Do you agree with the CMA's Proposed Recommendation that the Recommended TTBER 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.

Answer: Yes, noting that it could be reviewed during that period. We agree with the CMA that this period would provide legal certainty without precluding a review.

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:

Answer: Our business has 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):

Answer: We operate in the legal services sector and our clients operate in many different sectors, including energy, transport, financial services, retail, real estate, manufacturing and technology.

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).

Answer: We and our predecessor firms have been in operation for over 100 years; our clients range from long-established businesses to more recently established businesses.

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.

Answer: Moderate negative impact for us and many of our clients; significant negative impact for some clients.

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.

Answer: moderate negative impact in the medium term, as innovation would suffer.

Question 11: Relative to current arrangements, if the CMA's Proposed Recommendation for definitions in the Recommended TTBER 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).

Answer: moderate positive impact for us and most of our clients; significant positive impact for some of our clients.

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).

Answer: that would depend on which of the exceptions to excluded hardcore restrictions were retained, but we would not expect the impact to be significant.

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).

Answer: that would depend on the detail of what was permitted and what was excluded, but we would not expect the impact to be significant.

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.

Answer: negligible impact for our business and for most of our clients, as we do not often encounter such agreements in practice.

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

Answer: we do not know.

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.

Answer: Moderate positive impact for us and our clients, as it should be easier to apply in practice for technology markets.

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.

Answer: Moderate positive impact for us and our clients, as it should be easier to apply in practice for technology markets.

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.

Answer: Moderate positive impact from increased innovation due to greater willingness to enter into technology agreements.

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

Answer: Moderate positive impact, as it provides a measure of reassurance/comfort.

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.

Answer: Negligible impact, on the basis that these are well established. A change could have a negative impact for our clients in terms of creating an unnecessary difference between the UK and EU position, involving additional analysis and therefore costs for our clients.

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.

Answer: Negligible impact, on the basis that these are well established. A change could have a negative impact for customers in terms of creating an unnecessary difference between the UK and EU position, which could ultimately reduce innovation and choice for UK consumers.

Question 34: If the CMA were to recommend that the Recommended TTBER 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.

Answer: we do not know, but would not anticipate significant positive impact from such a change, as the current rules remain effective.

Question 35: If the CMA were to recommend that the Recommended TTBER 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.

Answer: we do not know, but would not anticipate significant positive impact from such a change, as the current rules remain effective

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.

Answer: we do not know, but would not anticipate significant positive impact from such a change, as the current rules remain effective.

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.

Answer: we do not know, but would not anticipate significant positive impact from such a change, as the current rules remain effective.

Dentons UK & Middle East LLP (Ref: ADCM)

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