Draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to Technology Transfer Agreements

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1. Introduction and purpose of this guidance

1.1 This guidance (Guidance) explains how the CMA applies the Chapter I prohibition in the Competition Act 1998 (CA98) to technology transfer agreements. Technology transfer agreements are agreements which involve the licensor authorising a licensee to use certain technology rights[1] for the production of goods or services.[2] The Guidance describes the application of the Competition Act 1998 (Technology Transfer Agreements Block Exemption) Order 2026 (TTBEO),[3] which came into force on 1 May 2026. It is intended to help businesses assess their technology transfer agreements and to establish whether they benefit from the block exemption provided by the TTBEO or otherwise comply with competition law.

1.2 The Chapter I prohibition of the CA98 prohibits agreements and concerted practices between undertakings (eg businesses)[4] and decisions by associations of undertakings (eg trade associations) which have as their object or effect the prevention, restriction or distortion of competition within the UK and which (a) in the case of agreements, decisions or practices implemented, or intended to be implemented, in the UK, may affect trade in the UK, or (b) in any other case, are likely to have an immediate, substantial and foreseeable effect on trade within the UK. This is known as the Chapter I prohibition. A prohibited agreement is void[5] and not enforceable.[6] It may also lead to a financial penalty or to damages being awarded to third parties.

1.3 Unless otherwise stated, the term 'agreement' in this Guidance also covers other forms of cooperation, including concerted practices and decisions of associations of undertakings. Similarly, where this Guidance uses the term 'restriction' or its other forms in the context of considering a restriction of competition, it also covers a prevention or distortion of competition, unless stated otherwise.

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[1] See paragraph 4.11 below for a definition of 'technology rights' for these purposes.
[2] A technology transfer agreement for these purposes also includes an agreement between an assignor and assignee where technology rights are assigned for the purposes of the production of goods or services by the assignee in such a way that the risk associated with the exploitation of the technology rights remains with the assignor.
[3] SI 2026/369.
[4] See paragraphs 3.8 and 3.9 for guidance on the circumstances when a natural or legal person constitutes an 'undertaking' for the purpose of the CA98.
[5] Section 2(4) CA98.
[6] If only certain provisions in an agreement are prohibited under Chapter I and they are capable of being severed from the rest of the agreement, then the remainder of the agreement may be enforceable. The ordinary rules of severance will apply. The rules on severance are outside the scope of this Guidance. The relevant principles were considered by the Supreme Court in the context of the common law doctrine of restraint of trade in *Tillman v Egon Zehnder Ltd* [2019] UKSC 32 (see, in particular, paragraphs 85 to 87).

1.4 There are many situations where agreements can be beneficial to consumers and are exempt from the Chapter I prohibition if they meet the conditions for exemption specified in Section 9(1) of the CA98 (Section 9 exemption). Where a category of agreements is likely to meet the criteria for Section 9 exemption, such agreements may be subject to a block exemption, the effect of which is to provide an automatic exemption from the Chapter I prohibition to all agreements that meet the conditions set out in the block exemption.

1.5 Technology transfer agreements enable the dissemination of technology and incentivise initial research and development, thereby promoting innovation. The dissemination of technology and innovation are key drivers of a competitive, resilient and sustainable UK economy.

1.6 In recognition of the benefits that such agreements may bring, the TTBEO provides a block exemption from the Chapter I prohibition for 'technology transfer agreements', as defined in Article 3(2) of the TTBEO, subject to

(a) the conditions set out in Articles 5 (market share and other thresholds), 7 (hardcore restrictions) and 8 (excluded restrictions) of the TTBEO, and

(b) the obligation to provide information set out in Article 10 of the TTBEO.[7]

1.7 By automatically exempting technology transfer agreements meeting these conditions, the TTBEO avoids placing on businesses the unnecessary burden of scrutinising a large number of essentially benign agreements. It also helps to ensure that the CMA is able to concentrate resources on other matters giving rise to significant competition concerns.

1.8 A technology transfer agreement that does not satisfy the conditions or the obligation set out in the TTBEO does not benefit from the automatic exemption provided by the TTBEO. Such a technology transfer agreement may still however satisfy the conditions in the Section 9 exemption and be exempt from the Chapter I prohibition. In such circumstances, the parties would need to scrutinise the technology transfer agreement to see if it fulfils the conditions in the Section 9 exemption. This Guidance therefore also aims to clarify how the Chapter I prohibition applies to technology transfer agreements that do not benefit from the block exemption set out in the TTBEO.

[7] See Article 4 of the TTBEO.

1.9 This Guidance is relevant to both existing and new technology transfer agreements, and it replaces the European Commission's Guidelines on Technology Transfer Agreements.[8]

1.10 Technology transfer agreements can take a large number of different forms and types and in a variety of market contexts. It is not therefore possible to provide specific guidance for every possible scenario. The principles set out in this Guidance should be applied with due consideration for the specific circumstances of each case and each agreement must be assessed in the light of its own facts.

1.11 The Guidance is without prejudice to the case law of the UK courts and assimilated case law (to the extent relevant and binding)[9] that is relevant to the application of the Chapter I prohibition to technology transfer agreements. The CMA will keep under review the application and effectiveness of the TTBEO in achieving its policy and operational objectives, especially with regard to developments in the UK market that would impact its operation, and it may revise this Guidance in light of future developments and evolving experience.

1.12 The remainder of this Guidance is structured as follows:

(a) Part 2 provides a brief overview of the Chapter I prohibition and the exemptions from the Chapter I prohibition under the Section 9 exemption and the TTBEO in relation to technology transfer agreements

(b) Part 3 provides guidance on the various steps in assessing technology transfer agreements under the Chapter I prohibition

(c) Part 4 provides guidance on when a technology transfer agreement falls within the scope of the TTBEO. It also discusses the application of the Chapter I prohibition to agreements for the licensing of intellectual property rights and data not within the scope of the TTBEO, as well as how the TTBEO relates to other block exemptions

(d) Part 5 provides guidance on the conditions for market share and other thresholds set out in Article 5 of the TTBEO

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[8] European Commission *Guidelines on the Application of Article 101 of the Treaty on the Functioning of the European Union to Technology Transfer Agreements* (OJ 2014 C89/3).
[9] See Section 60A CA98 and CMA's Guidance on the functions of the CMA after the end of the Transition Period (CMA125) on the application of EU law following the UK's exit from the EU. Note, however, that Section 4 of the Retained EU Law (Revocation and Reform) Act 2023 provides that with effect from 1 January 2024 general principles of EU law are no longer part of UK law.

(e) Part 6 provides guidance on the conditions relating to hardcore restrictions set out in Articles 7 the TTBEO

(f) Part 7 provides guidance on the conditions relating to excluded restrictions set out in Article 8 of the TTBEO

(g) Part 8 provides guidance on the obligation to provide information set out in Article 10 of the TTBEO

(h) Part 9 provides guidance on transitional provisions, cancellation of the block exemption provided by the TTBEO and expiry of the TTBEO

(i) Part 10 provided guidance on the cancellation of the block exemption provided by the TTBEO in individual cases, and

(j) Part 11 provides guidance on how technology transfer agreements not benefitting from the block exemption provided by the TTBEO are assessed under the Chapter I prohibition and Section 9 of the CA98, and provides guidance on various types of restraints that are commonly found in technology transfer agreements and other agreements relating to technology rights.

1.13 Businesses may wish to cooperate to create technology standards. The application of the Chapter I prohibition to standardisation agreements is discussed in Chapter 8 of the CMA's guidance (CMA184) Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements ('the Horizontal Agreements Guidance').

1.14 This Guidance uses a number of defined terms and abbreviations:

Block exemption	An exemption for particular categories of agreement from the Chapter I prohibition.
CA98	Competition Act 1998.
Chapter I prohibition	The prohibition on anti-competitive agreements contained in Part I, Chapter I of the Competition Act 1998.
Chapter II prohibition	The prohibition on abuse of a dominant position contained in Part I, Chapter II of the Competition Act 1998.
TTBEO	The Competition Act 1998 (Technology Transfer Agreements Block Exemption) Order 2026

Assimilated case law	Any principles laid down by, and any decisions of, the Court of Justice of the European Union, as they have effect in EU law immediately before 31 December 2020, subject to certain exceptions, as those principles and decisions are modified by or under domestic law from time to time.
Section 9 exemption	Section 9(1) CA98 which sets out the conditions for an agreement to be exempt from the Chapter I prohibition.
TFEU	Treaty on the Functioning of the European Union.
Undertaking	Any natural or legal person (or other entity) (eg companies, firms, partnerships, sole traders, public entities) engaged in an economic activity, regardless of its legal status and the way it is financed.

2. Legal Framework

2.1 This Part gives a brief overview of the Chapter I prohibition and the exemption regime, on which the TTBEO is based.

2.2 This Part is structured as follows:

(a) The Chapter I prohibition;

(b) The Section 9 exemption;

(c) Block exemption.

The Chapter I prohibition

2.3 Competition law is designed to protect businesses and consumers from anti-competitive behaviour. To this end, the CA98 prohibits:

(a) agreements which prevent, restrict or distort competition (Chapter I prohibition); and

(b) conduct which constitutes an abuse of a dominant position (Chapter II prohibition).

2.4 The Chapter I prohibition prohibits agreements or concerted practices between undertakings or decisions by associations of undertakings which have as their object or effect the prevention, restriction or distortion of competition within the UK, and which a) in the case of agreements, decisions or practices implemented, or intended to be implemented in the UK, may affect trade in the UK or, b) in any other case, are likely to have an immediate, substantial and foreseeable effect on trade within the UK.[10]

2.5 The objective of the Chapter I prohibition is to ensure that undertakings do not use agreements to prevent, restrict or distort competition on the market to the ultimate detriment of consumers. It is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.[11]

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[10] See Section 2(1) of the CA98.
[11] Judgment of the European Court of Justice (ECJ) of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraphs 38 to 39; judgment of Court of Justice of the European Union (CJEU) of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13P, EU:C:2015:184, paragraph 125.

2.6 The Chapter I prohibition only applies where agreements have as their object or effect an appreciable restriction of competition within the UK or a part of it. In practice it is very unlikely that an agreement which appreciably restricts competition within the UK does not also affect trade within the UK.

2.7 The effect of an agreement has to be assessed in its context, including where the agreement might combine with others to have a cumulative effect on competition.[12] An agreement cannot be isolated from its context and the existence of similar contracts can be taken into account insofar as all the contracts of that type as a whole are such as to restrict competition.[13] Where there is a network of similar agreements concluded by the same supplier, the assessment of the effects of that network on competition applies to all the individual agreements making up the network.[14]

2.8 In some circumstances businesses can benefit from an exemption from the Chapter I prohibition. The following paragraphs set out the framework for the application of the Section 9 exemption and block exemptions.

The Section 9 exemption

2.9 The CA98 provides that some agreements that restrict competition are exempt from the Chapter I prohibition where they satisfy certain conditions because of the efficiencies they generate.

2.10 Section 9(1) CA98 sets out the conditions that must all be met for an agreement to benefit from individual exemption from the Chapter I prohibition.[15] Broadly, first, the agreement must contribute to clear efficiencies. Second, it must provide a fair share of the resulting benefits to consumers. Third, the restrictions on competition that it provides for must be

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[12] Judgment of the ECJ of 12 December 1967, *SA Brasserie de Haecht v Consorts Wilkin-Janssen* C-23/67, EU:C:1967:54, page 415; judgment of the ECJ of 28 February 1991, *Delimitis v Henninger Bräu*, C-234/89, EU:C:1991:91, paragraph 14.
[13] Judgment of the ECJ of 12 December 1967, *SA Brasserie de Haecht v Consorts Wilkin-Janssen*, C-23/67, EU:C:1967:54, page 415; judgment of 28 February 1991, *Delimitis v Henninger Bräu*, C-234/89, EU:C:1991:91, paragraph 14.
[14] Judgment of the Court of First Instance (CFI) of 8 June 1995, *Langnese-Iglo GmbH v European Commission*, T-7/93, EU:T:1995:98, paragraph 129; Judgment of 8 June 1995, *Schöller Lebensmittel GmbH & Co. KG v European Commission*, T-9/93, EU:T:1995:99, paragraph 95.
[15] The cumulative conditions in the Section 9 exemption that must be met in full are that the agreement 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 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.

indispensable to achieving those benefits. Fourth, it must not give the parties to the agreement the possibility of eliminating competition from a substantial part of the relevant products.

2.11 An agreement that satisfies the conditions set out in the Section 9 exemption is exempt from the Chapter I prohibition from the moment that the conditions in the Section 9 exemption are satisfied and for as long as that remains the case. The parties involved in such an agreement do not need to seek authorisation from the CMA. They need to satisfy themselves, based on a self-assessment, that the agreement fulfils the conditions for the Section 9 exemption.

2.12 This Guidance sets out further details on the application of the Section 9 exemption to technology transfer agreements at paragraphs 3.66 to 3.73 below.

Block exemption

2.13 Under the CA98, the Secretary of State may make a block exemption order that exempts from the Chapter I prohibition any particular categories of agreement which the CMA considers are likely to satisfy the conditions for Section 9 exemption.[16] This allows businesses to have confidence that, if their agreement meets the conditions of the block exemption, it is legal under the Chapter I prohibition, without needing to scrutinise that agreement against each of the conditions in the Section 9 exemption. The benefits of such a block exemption include reducing the burden of assessing compliance with UK competition law for the parties to the agreement.

2.14 An agreement that falls within a category specified in a block exemption (and that satisfies any conditions specified in the block exemption) will not be prohibited under the Chapter I prohibition.[17] The parties to the agreement need to satisfy themselves that the agreement meets any conditions set out in the block exemption and be in a position to prove that the agreement benefits from the block exemption.

2.15 In the case of technology transfer agreements, the relevant block exemption is the TTBEO.

2.16 Where a technology transfer agreement has as its object or effect an appreciable restriction of competition but does not benefit from the block

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[16] See Section 6(2) of the CA98.
[17] And, therefore, the agreement will not be made void by virtue of Section 2(4) CA98.

exemption provided by the TTBEO, the parties to that agreement will need to consider the following questions:

(a) Should the agreement be amended to bring it within the terms of the TTBEO?

(b) Does it fulfil the conditions for Section 9 exemption?

2.17 Neither the Section 9 exemption nor the TTBEO exempts agreements from the application of provisions equivalent to the Chapter I prohibition in the laws of other jurisdictions, such as Article 101 of the TFEU in the EU.[18]

2.18 Further details on the application of the TTBEO and the Chapter I prohibition to technology transfer agreements are provided in the remainder of this Guidance.

[18] Although competition laws in other jurisdictions may contain their own exemptions from their prohibitions on anti-competitive conduct.

3. Overview of the assessment of technology transfer agreements under the Chapter I prohibition

3.1 This Part gives a brief overview of the various steps in the assessment of technology transfer agreements under the Chapter I prohibition and the TTBEO. It cross-refers to the relevant parts of the Guidance where those matters are addressed in more detail.

3.2 Typically, the overall assessment of a technology transfer agreement under the Chapter I prohibition will entail the following steps:[19]

(a) **Step 1** — It is necessary to establish whether a technology transfer agreement falls within the scope of the Chapter I prohibition in the first place. This is a preliminary step, since only if such an agreement falls within the Chapter I prohibition is it necessary to consider whether it benefits from the block exemption provided by the TTBEO or meets the conditions for exemption under Section 9 of the CA98. This Part explains that many technology transfer agreements may be considered generally to fall outside of the scope of the Chapter I prohibition.

(b) **Step 2** — If a technology transfer agreement falls within the scope of the Chapter I prohibition, the next step is to assess whether the agreement may benefit from the block exemption provided by the TTBEO. Parts 4—8 of this Guidance explain the category of agreements exempted by the TTBEO and the various conditions to which the exemption provided by the TTBEO is subject.

(c) **Step 3** — If a technology transfer agreement falling within the scope of the Chapter I prohibition does not benefit from the TTBEO, it might still fulfil the conditions for exemption under Section 9. Part 11 of this Guidance sets out guidance for assessments carried out under this legal provision.

The Chapter I prohibition and intellectual property rights

3.3 Intellectual property laws confer exclusive rights on holders of patents, copyright, design rights, trademarks and other legally protected rights. In accordance with those laws, the holder of an intellectual property right is entitled to prevent unauthorised use of that right and to exploit it, including by licensing it to third parties.

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[19] There is no requirement for these steps to be taken in this order.

3.4 The grant of exclusive rights of exploitation under intellectual property laws does not mean that intellectual property rights are immune from the application of competition law. In particular, the Chapter I prohibition applies to agreements under which the holder of an intellectual property right licenses another undertaking to exploit that right.[20] However, the existence of exclusive intellectual property rights does not imply an inherent conflict with competition law. Intellectual property rights and competition law pursue complementary objectives. Intellectual property rights encourage innovation by providing undertakings with incentives to invest in the research and development of new or improved products and processes. Similarly, competition exerts pressure on undertakings to innovate. Innovation constitutes a key component of an open and competitive market economy. Both intellectual property rights and competition are therefore necessary to promote innovation and to ensure that innovation is exploited competitively.

3.5 In assessing technology transfer agreements under the Chapter I prohibition, it is necessary to take into account the fact that the creation of intellectual property rights frequently involves substantial investment and entails significant risk. In order not to undermine dynamic competition or weaken incentives to innovate, the innovator must not be unduly restricted in the exploitation of intellectual property rights that prove to be valuable. For that reason, the innovator should in principle be free to seek appropriate remuneration for successful projects, taking into account the need to recover investments in projects that have failed. Technology transfer may also require the licensee to incur significant sunk costs, including investments in the licensed technology and in production assets necessary for its exploitation, which cannot be redeployed to other activities without incurring a substantial loss. The application of the Chapter I prohibition must therefore take account of the ex-ante investments made by the parties and the risks associated with those investments. Depending on the circumstances, the level of risk and the extent of sunk investment may result in an agreement falling outside the Chapter I prohibition or satisfying the conditions for exemption under Section 9 of the CA98, for the period necessary to recoup the investment.

3.6 The legal framework established by the Chapter I prohibition and the Section 9 exemption is sufficiently flexible to accommodate the dynamic characteristics of technology transfer. There is no presumption that intellectual

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[20] See judgments of the ECJ of 8 June 1971, *Deutsche Grammophon Gesellschaft*, 78/70, EU:C:1971:59, paragraphs 6 and 10, and of 6 October 1982, *Coditel and Others*, 262/81, EU:C:1982:334, paragraph 17. See also, judgment of the CJEU of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 79 and the case-law cited.

property rights or technology transfer agreements, as such, give rise to competition concerns. The majority of technology transfer agreements do not restrict competition and are generally pro-competitive as they facilitate the dissemination of technology and promote innovation by both licensors and licensees. Where technology transfer agreements do restrict competition, they often generate efficiencies capable of satisfying the conditions of Section 9 of the CA98. As a result, the vast majority of technology transfer agreements will not breach the Chapter I prohibition.

Applicability of the Chapter I prohibition to technology transfer agreements

3.7 A technology transfer agreement will fall within the scope of the Chapter I prohibition if there is an 'agreement' between undertakings that may affect trade within the UK and that has as its 'object' or 'effect' an appreciable prevention, restriction or distortion of competition within the UK.[21]

Undertakings

3.8 The Chapter I prohibition applies to 'undertakings'. An undertaking is any natural or legal person or other entity (eg companies, firms, partnerships, sole traders, public entities) engaged in an economic activity, regardless of its legal status and the way it is financed.[22]

3.9 The Chapter I prohibition does not apply to agreements between undertakings which form part of a single economic unit or entity, for instance, an agreement between a company and its wholly-owned subsidiary, as they are considered to form part of the same undertaking.[23] Companies that form part of the same

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[21] An agreement has an effect on trade within the UK where, (a) in the case of an agreements, decision or practice, it is implemented, or intended to be implemented, in the UK, or (b) in any other case, it is likely to have an immediate, substantial and foreseeable effect on trade within the UK. See section 2(1) of the CA98.

[22] See, for example, judgment of the CJEU of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraphs 29 and 36; judgment of the ECJ of 12 July 1984, *Hydrotherm Gerätebau*, 170/83, EU:C:1984:271, paragraph 11; and judgment of the CJEU of 29 September 2011, *Elf Aquitaine v Commission*, C-521/09 P, EU:C:2011:620, paragraph 53 and the case-law cited.

[23] See, for example, judgment of the ECJ of 24 October 1996, *Viho*, C-73/95 P, EU:C:1996:405 (in particular paragraph 51) in which the European Court of Justice held that the European Commission had been correct to reject a complaint that Parker's distribution agreements concluded with its wholly-owned subsidiary infringed Article 101 of the TFEU. See also *Roche Products Ltd and Others v Provimi Ltd* [2003] EWHC 961 (Comm), paragraph 27. In addition, in the context of mergers (including the creation of joint ventures), CA98, schedule 1, paragraph 1 also provides, amongst other things, that the Chapter I prohibition does not apply to certain agreements that result in a merger or joint venture within the merger provisions of the Enterprise Act 2002. That is, the Chapter I prohibition does not apply to an agreement which results or would result in any two enterprises 'ceasing to be distinct enterprises' for the purposes of Part 3 of the Enterprise Act 2002. This exclusion extends to

undertaking are not considered to be competitors for the purposes of this Guidance, even if they are both active on the same relevant product and geographic market(s).

Agreements and concerted practices

3.10 For the Chapter I prohibition to apply, there must be a form of coordination between undertakings, namely, an 'agreement' or 'concerted practice' between two or more undertakings.

3.11 For the purposes of the Chapter I prohibition and this Guidance, an 'agreement' refers to two or more undertakings having expressed a concurrence of wills to cooperate.[24] A 'concerted practice' is a form of coordination between undertakings in which they have not reached an agreement but they knowingly substitute practical cooperation between them for the risks of competition.[25] The concept of a concerted practice implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two.[26]

3.12 The existence of an agreement or concerted practice does not in itself indicate that there is a restriction of competition within the meaning of the Chapter I prohibition.

3.13 As noted above and for ease of reference, references elsewhere in this Guidance to the term 'agreement' also cover concerted practices, unless otherwise stated.

Restriction of competition

3.14 Chapter I prohibits agreements that have as their object or effect the restriction of competition. The Chapter I prohibition applies both to restrictions

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any provision that is directly related and necessary to the implementation of the merger provisions. For further information on the application of competition law to joint ventures, see the CMA's guidance, *Joint Venture Business Advice*, published 12 April 2018. See the Horizontal Agreements Guidance, paragraphs 3.12 to 3.14 for details on how Chapter I applies to agreements between parent companies and their joint venture.

[24] See, for example, judgment of the ECJ of 13 July 2006, *Commission v Volkswagen*, C-74/04 P, EU:C:2006:460, paragraph 37.

[25] See, for example, judgment of the ECJ of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 26 and judgment of 31 March 1993, *Wood Pulp*, C-89/85, C-104/85, C-114/85, C-116/85, C- 117/85 and C-125/85 to C-129/85, EU:C:1993:120, paragraph 63.

[26] See, judgment of the CJEU of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 126 and the case law cited.

of competition between the parties to an agreement and to restrictions of competition between any of the parties and third parties.

3.15 The assessment of whether a technology transfer agreement restricts competition must be made within the actual context in which competition would occur in the absence of the agreement and its restrictions. In particular, the analysis should consider the agreement's impact on both inter-technology competition (competition between undertakings using competing technology rights) and intra-technology competition (competition between undertakings using the same technology rights). Restrictions of either form of competition may fall within the Chapter I prohibition. In this context, and for the purposes of the analytical framework under the TTBEO, it is necessary to assess to what extent the agreement affects or is likely to affect those two aspects of competition on the relevant market(s).

Restriction of competition by object

3.16 The concept of a restriction of competition by object within the meaning of the Chapter I prohibition refers to agreements which, by their very nature, are harmful to the proper functioning of competition.[27] In that regard, certain types of cooperation between undertakings reveal a sufficient degree of harm to competition that, unlike restrictions of competition by effect, there may be no need to examine their effects.[28]

3.17 The concept of a restriction of competition by object is to be interpreted strictly. It can only be applied to certain agreements between undertakings which reveal, in themselves and with regard to their content, objectives and context, a sufficient degree of harm to competition such that it is not necessary to assess their actual effects.[29]

3.18 The following factors are taken into account in assessing whether an agreement belongs to a type of conduct that, by its very nature, reveals a sufficient degree of harm to competition:

(a) the content or provisions of the agreement;

(b) the objectives it seeks to attain; and

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[27] See judgment CJEU of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraphs 29 and 31.
[28] See judgment of CJEU of 11 September 2014, *Groupement des Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 49.
[29] See judgement of the CJEU of 30 January 2020, Generics (UK) Ltd and Others, C-307/18, EU:C:2020:52, paragraph 67 and the case law cited therein.

(c) the economic and legal context of which it forms part.

3.19 When assessing that legal and economic context, it is also necessary to take into consideration:[30]

(a) the nature of the products affected; and

(b) the real conditions of the functioning and structure of the market or markets in question.[31]

3.20 As part of assessing the context of the agreement when considering whether it restricts competition by object, the CMA will take into account pro-competitive effects of the agreement that the parties raise where those effects are demonstrated and relevant, specifically related to the agreement concerned, and sufficiently significant.[32] The CMA will consider pro-competitive effects in those circumstances in order to assess whether the legal and economic context of the agreement means that, despite conforming to a category of agreements usually considered anti-competitive, it is nonetheless, and because of some specific circumstances, incapable of producing any detrimental effect in the market or is even pro-competitive.[33]

3.21 However, when considering whether an agreement restricts competition by object, it is not necessary to prove that the agreement has actual anti-competitive effects on the market concerned.[34] For instance, there does not need to be a direct link between the agreement and consumer prices.[35]

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[30] For agreements that have been held that they constitute particularly serious breaches of the competition law, such as a price-fixing cartel or market sharing agreements, the analysis of the legal and economic context may be limited to what is strictly necessary to establish the existence of a restriction by object. See judgment of the CJEU of 20 January 2016, *Toshiba*, C-373/14 P, EU:C:2016:26, paragraph 29 and judgment of 27 April 2017, *FSL v Commission*, C-469/15 P, EU:C:2017:308, paragraph 107.
[31] See judgment of the CJEU of 11 September 2014, *Groupement des Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 53; judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 117; and judgment of 2 April 2020, *Budapest Bank and Others*, C-228/18, EU:C:2020:265, paragraph 51.
[32] See judgment of the CJEU 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraphs 103 to 107 and *GSK v CMA* [2021] CAT 9, paragraph 41.
[33] See, to that effect, Opinion of Advocate General Bobek delivered on 5 September 2019 in *Budapest Bank and Others*, C-228/18, EU:C:2019:678, paragraph 45 and *Ping Europe Limited v Competition and Markets Authority* [2020] EWCA Civ 13, paragraph 97.
[34] See, to that effect, judgment of the CJEU of 2 April 2020, *Budapest Bank and Others*, C-228/18, EU:C:2020:265, paragraph 36 and 37. See also *Lexon v CMA* [2021] CAT 5, paragraph 183(2).
[35] See *Lexon v CMA* [2021] CAT 5, paragraph 187(5).

3.22 The parties' intention is not a necessary factor in determining whether an agreement has an anti-competitive object, but it may be taken into account.[36]

3.23 An agreement may restrict competition by object even if it does not have the restriction of competition as its sole aim.[37]

Restrictive effects on competition

3.24 A technology transfer agreement that does not in itself reveal a sufficient degree of harm to competition may still be prohibited by the Chapter I prohibition where it has restrictive effects on competition. For such an agreement to have restrictive effects on competition, it must have, or be likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation. To establish whether this is the case (and unlike where the agreement restricts competition by object), it is necessary to establish a counterfactual, that is, to assess competition within the actual context in which it would occur if the agreement had not existed.[38]

3.25 As previously stated, agreements can have restrictive effects by appreciably reducing competition between the undertakings that are parties to the agreement or between any one of them and a third party.[39] The agreement must reduce the parties' decision-making independence,[40] either due to obligations contained in the agreement which regulate the market conduct of at least one of the parties or by influencing the market conduct of at least one of the parties, for example, by causing a change in its incentives.

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[36] See, for example, judgment of the CJEU of14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 37; and judgment of 11 September 2014, *Groupement des Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 54; and judgment of 19 March 2015*, Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 118.
[37] See, for example, judgment of the ECJ of 8 November 1983, *NV IAZ International Belgium and others v Commission* of *the European Communities*, Joined cases 96-102, 104, 105, 108 and 110/82, EU:C:1983:310, paragraphs 22 to 25 and judgment of 20 November 2008, *Competition Authority v Beef Industry Development Society and Barry Brothers*, C-209/07, EU:C:2008:643, paragraph 21.
[38] See judgment of the CJEU of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraph 118; judgment of the General Court (GC) of 12 December 2018, *Krka v Commission*, T-684/14, EU:T:2018:918, paragraph 315; and judgment of the CJEU of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 166.
[39] See judgment of the ECJ of 28 May 1998, *John Deere*, C-7/95 P, EU:C:1998:256, paragraph 88 and judgment of 23 November 2006, *Asnef-Equifax v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, C-238/05, EU:C:2006:734, paragraph 51.
[40] See judgment of the ECJ of 28 May 1998, *John Deere*, C-7/95 P, EU:C:1998:256, paragraph 88; and judgment of 23 November 2006, *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 52.

3.26 The following factors are relevant to assessing whether an agreement has restrictive effects:

(a) the nature and content of the agreement;

(b) the actual context in which the cooperation occurs, in particular the economic and legal context in which the undertakings concerned operate, the nature of the products affected, and the real conditions of the functioning and the structure of the market or markets in question;[41]

(c) the extent to which the parties individually or jointly have or obtain some degree of market power and the extent to which the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power;[42] and

(d) both actual and potential restrictive effects on competition, which must be sufficiently appreciable.[43]

Pro-competitive effects of technology transfer agreements on competition

3.27 Technology transfer agreements may give rise to a range of pro-competitive effects, in particular by facilitating the dissemination of technology and promoting innovation on the part of both licensors and licensees. The vast majority of such agreements are likely to be pro-competitive. Licensing agreements may enable innovators to earn returns to recoup, at least in part, the costs incurred in carrying out research and development.

3.28 The dissemination of technologies may generate efficiencies by lowering the licensee's production costs or by enabling the production of new or improved products. Such efficiencies often arise from the combination of the licensor's

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[41] See judgment of the CJEU of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraph 116, and the case law cited therein. The actual context of the cooperation may include factors such as the presence of sufficient possibilities for customers to switch supplier; the likelihood that competitors increase supply if prices increase; whether the market characteristics are conducive to anti-competitive coordination; whether the activities covered by the cooperation account for a high proportion of the parties' variable costs in the relevant market, etc. It may also be relevant to assess whether the parties combine their activities covered by the cooperation to a significant extent. This could be the case, for instance, where they jointly manufacture or purchase an intermediate product which is an important input for their production of downstream products, or where they jointly manufacture or distribute a large proportion of their total output of a final product.

[42] Market power is the ability to profitably maintain prices above competitive levels for a period of time or to profitably maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a period of time. The degree of market power generally required for a finding of an infringement under the Chapter I prohibition is less than the degree of market power required for a finding of dominance under the Chapter II prohibition.

[43] See judgment of the CJEU of 11 September 2014, *Groupement des Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 52.

licensed technology rights with the licensee's existing assets, capabilities or complementary technology rights. Licensing often occurs because it is more efficient for a licensor to make its technology rights available to third parties than to exploit them itself. This is often the case where the licensee already possesses the relevant production facilities allowing the licensed technology rights to be deployed more effectively through integration with the licensee's assets.

3.29 Licensing may also be efficiency-enhancing where the licensee already possesses its own technology rights and the combination of those rights with the licensor's technology rights generates synergies. Through such a combination, the licensee may be able to achieve a cost structure or level of output that would not be attainable using either of the technology rights in isolation.

3.30 Technology transfer agreements may also generate efficiencies at the level of distribution in a way comparable to vertical agreements relating to the supply of goods or services.[44] Such efficiencies may include cost reductions or the provision of enhanced services to customers.

3.31 Licensing of technology rights may further serve a pro-competitive function by removing barriers to the development and exploitation of the licensee's own technology rights. This is particularly relevant in sectors characterised by dense patent landscapes, where licensing agreements may be used to secure freedom to operate by reducing the risk of infringement proceedings being brought by the licensor.[45]

Anticompetitive effects of technology transfer agreements on competition

3.32 Although technology transfer agreements are generally pro-competitive, there are circumstances in which they may have an adverse effect on competition and ultimately harm consumers.

3.33 Restrictive technology transfer agreements may give rise to a range of adverse effects on competition, including in particular:

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[44] The positive effects of vertical agreements are addressed in more detail in the CMA's guidance (CMA166) Vertical agreements block exemption order guidance.
[45] However, where such licensing agreements lead to the exit from the market by one of the parties, they may fall within the scope of Chapter I prohibition.

(a) a reduction of competition between technology rights (inter-technology rights competition), including through the facilitation of explicit or tacit collusion;

(b) a reduction in competition between undertakings using the same technology rights (intra-technology rights competition), and

(c) the foreclosure of actual or potential competitors, for example by increasing their costs, limiting access to essential inputs, or raising barriers to entry.

3.34 The likelihood of a reduction in competition between technology rights (inter-technology rights competition) is greater where agreements contain reciprocal obligations.[46] This may arise, for example, where competitors cross-license competing technology rights and are subject to reciprocal obligations to share future improvements of those technology rights. Where such agreements prevent either party from establishing a technological advantage over the other, competition in innovation between the parties may be hindered (see also paragraph 11.92 on settlement agreements and incentives to innovate).

3.35 Technology transfer agreements between competitors may also facilitate collusive outcomes. This risk is likely to be greater in concentrated markets.[47] Technology transfer agreements may increase market transparency, constrain competitive behaviour, or raise barriers to entry, thereby making coordination more likely. Collusion may also be facilitated where agreements lead to greater symmetries and commonalities in cost structures, as undertakings with similar costs may be more likely to coordinate more easily.[48]

3.36 Collusion may also be facilitated by the exchange of competitively sensitive information between competitors in the context of implementing a technology transfer agreement. The implementation of a licensing agreement may require the exchange of competitively sensitive information. Where the agreement itself does not infringe the Chapter I prohibition, an information exchange that is ancillary to that agreement will also fall outside the prohibition, provided that

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[46] An example would be where two undertakings established in different parts of the UK cross-license competing technologies to each other and agree not to sell products in each other's local markets. Such an agreement restricts potential competition between them.

[47] Collusion requires that the undertakings concerned share a common understanding of their mutual interests and of the mechanisms by which coordination is to be achieved. Effective coordination also requires that undertakings are able to observe each other's conduct on the market and that credible deterrents are in place to discourage deviations from the agreed course of action. In addition, barriers to entry or expansion must be sufficiently high to prevent competitive pressure from new entrants or fringe competitors.

[48] See paragraph 3.31 of the Guidance on Horizontal Agreements.

the exchange is objectively necessary for the implementation of that agreement and proportionate to the objectives of the agreement.

3.37 Where the information exchange exceeds what is objectively necessary to give effect to the licensing agreement or is not proportionate to the objectives of that agreement, it should be assessed by reference to the principles set out in Chapter 8 of the CMA Horizontal Agreements Guidance. Where such an information exchange falls within the scope of the Chapter I prohibition, it may nevertheless satisfy the conditions for exemption under Section 9 of the CA98.

3.38 Technology transfer agreements may also restrict competition between technology rights (inter-technology rights competition) by giving rise to barriers to entry or expansion. This may occur, for example, where incumbent licensors impose non-compete obligations on licensees to such an extent that an insufficient pool of licensees remains available for third parties to license their technology rights, and where entry at the level of licensees is difficult.[49] In such circumstances, third party competing technology rights may be foreclosed from effective access to the market.

Market definition

3.39 The CMA's Guidance on Market Definition sets out the main criteria which the CMA applies and the main evidence to which it has regard when considering market definition issues for the purpose of enforcing UK competition law.[50] This Guidance only addresses aspects of market definition that are of particular relevance to technology transfer.

3.40 Technology is an input that is integrated into a product or a production process. Licensing of technology may affect competition both upstream (in input markets, including technology) and downstream (in output markets for goods and services). Where parties that compete in downstream markets cross-licence technology rights relating to the production of those products, such arrangements may restrict competition in the relevant downstream market. Cross-licensing arrangements may also restrict competition in the upstream market for technology and, in some cases, in other upstream input markets. When assessing the competitive effects of licence agreements, it will

[49] Another example concerns the potential foreclosure of suppliers of substitutable technology rights. This may arise when a licensor with significant market power offers a bundled licensing package covering multiple technology components, even though only some of those components are necessary to produce a particular product.
[50] OFT 403, Market Definition. Any future guidance relating to market definition for the purposes of UK competition law, as applicable, will also be taken into account.

generally be necessary to define the relevant product market(s) and, where appropriate, the relevant technology market(s).[51]

3.41 The relevant product market consists of the contract products (ie, goods or services produced, directly or indirectly, using the licensed technology rights), and any products that buyers regard as interchangeable with, or substitutable for, those products. This assessment is based on the products' characteristics, prices, and intended use, taking into account the prevailing conditions of competition and the structure of supply and demand in the market.[52] Contract products may form part of a final product market or an intermediate product market.

3.42 The relevant technology market, in relation to licensed technology rights, refers to the market for those rights and any other technology rights that licensees regard as interchangeable with, or substitutable for, the licensed rights. This assessment is based on the characteristics of the technology rights, the royalties payable, and their intended use. The starting point of the assessment is the technology rights marketed by the licensor on the basis of which the identification of other technology rights that licensees could switch in response to either (i) a small but significant non-transitory amount in the range of 5-10% (the SSNIP test) or (ii) a small but significant non-transitory decrease of quality (the SSNDQ test).[53] An alternative approach is to consider the market for products produced, directly or indirectly, using the licensed technology rights (see paragraph 3.45 below).

3.43 The term 'relevant market', as used in Articles 5 and 6 of the TTBEO and defined in Article 2(1), refers to both the relevant product market and the relevant technology market, each considered in their product and geographic dimensions.

3.44 The term 'relevant geographic market', as defined in Article 2(1) of the TTBEO, refers to an area in relation to products or technology rights where

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[51] See, for example, Commission Decision of 17 November 2010 in Case No COMP/M.5675 - *Syngenta/Monsanto* where the Commission analysed the merger of two vertically integrated sunflower breeders by examining both (i) the upstream market for the trading (namely the change and licensing) of varieties (parental lines and hybrids) and (ii) the downstream market for the commercialisation of hybrids. In its Decision of 13 March 2009 in COMP/M.5406, *IPIC/MAN Ferrostaal AG*, the Commission defined besides a market for the production of high-grade melamine also an upstream technology market for the supply of melamine production technology. See also Commission decision of 8 June 1995 in Case No COMP/M.269, *Shell/Montecatini*

[52] See *Aberdeen Journals v Director General of Fair Trading [2002]* CAT 4, paragraph 94.

[53] See the CMA's submissions in *Dr. Rachel Kent v. Apple Inc.* [2025] CAT 67 at paragraph 157 point (3) on the general principles that apply to market definition exercises which CAT had accepted and adopted (see paragraph 171), and the case-law cited.

undertakings are involved in the supply or demand for those products or the licensing of those technology rights, and (a) in which the conditions of competition within that area are sufficiently homogeneous; and (b) the area can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

3.45 Once relevant markets have been defined, market shares can be assigned to the various sources of competition in the market and used as an indication of the relative strength of market players. For technology markets, one approach is to calculate market shares based on each technology's share of total licensing income from royalties, representing the share of the market where competing technologies are licensed. However, this approach may often have to be theoretical rather than practical, due to a lack of clear information about royalty income.

3.46 An alternative approach, which is applied for the purpose of the block exemption under the TTBEO, is to calculate market shares in the technology market on the basis of sales of products incorporating the licensed technology in downstream product markets (see paragraphs 5.18 to 5.24 of this Guidance for further detail). In individual cases outside the legal safe harbour, it may be necessary, where practicable, to apply both approaches to assess the licensor's market position more accurately and to take into account other factors that provide a reliable indication of the relative strength of the available technologies (see paragraphs 11.8 to 11.19 of this Guidance for more detail on those factors).[54]

3.47 Technology transfer agreements may affect competition in innovation.[55] When analysing such effects, the CMA will normally focus on the impact of the agreement on competition within existing product and technology markets. Competition in these markets may be influenced by agreements that delay the introduction of improved or new products which, over time, could replace existing products. In such cases, innovation represents a source of potential competition that must be considered when assessing the impact of the agreement on product and technology markets.

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[54] See e.g. Commission Decision of 20 December 2012, in Case AT.39230 – *Rio Tinto Alcan*, paragraphs 3841. See also Commission Decision in Cases No COMP/M.5675 *Syngenta/Monsanto* and COMP/M.5406 *IPIC/MAN Ferrostaal AG* cited in footnote 51.

[55] For instance, technology transfer agreements may affect the development of products or technologies that will (i) improve existing products or technologies; (ii) replace existing products or technologies, or that would (iii) create an entirely new demand. Technology transfer agreements may also affect (iv) early innovation efforts, namely research and development activities that are not closely related to a specific product or technology.

3.48 In a limited number of cases, it may also be useful and necessary to analyse the effects on competition in innovation separately. This is particularly relevant for highly innovative markets characterised by frequent and significant research and development, where the agreement affects innovation aimed at creating new products or technologies. In such cases, the analysis may consider whether, following the agreement, a sufficient number of competing research and development projects remain to ensure effective competition in innovation.[56]

Actual and potential competitors

3.49 Generally, agreements between competitors are more likely to give rise to competition concerns than agreements between non-competitors.

3.50 The Chapter I prohibition applies to agreements restricting potential competition as well as actual competition.[57]

3.51 In order to determine whether the parties to an agreement are competitors, it is therefore necessary to assess whether, in the absence of the agreement, they would be actual or potential competitors in any relevant market affected by the agreement. Where, absent the agreement, the parties would not have been actual or potential competitors in any such market, they are treated as non-competitors.

3.52 Two undertakings are treated as actual competitors if they are active on the same relevant (product and geographic) market(s).[58]

3.53 An undertaking is considered a potential competitor if there are real, concrete possibilities for that undertaking to enter the market in question and compete with established undertakings.[59]

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[56] See Article 5(2)(b)(ii) and Article 5(4)(b)(ii) of the TTBEO which provide a safe harbour based on the three or more independent competing technologies test (see also paragraph 5.29 below).
[57] See for example *GlaxoSmithKline PLC v Competition and Markets Authority* [2018] CAT 4, paragraph 91, and the case law cited.
[58] See for example *GlaxoSmithKline PLC v Competition and Markets Authority* [2018] CAT 4, paragraph 91, and the case law cited.
[59] See judgment of the CJEU of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraph 36; *GSK v CMA* [2018] CAT 4, paragraph 92; judgment of the GC of 14 April 2011, *Visa Europe Ltd and Visa International Service*, T-461/07, EU:T:2011:181, paragraphs 68 and 166. For the purposes of TTBEO entry must be likely to occur within a timeframe that is sufficiently short to impose competitive pressure on the undertakings that are already active on the relevant market. Normally, a period of no more than three years is appropriate. However, in certain cases (for example, in pharmaceutical markets), longer periods may be more appropriate.

3.54 An undertaking will therefore be considered a potential competitor of another undertaking if, absent the agreement, the former would on realistic grounds[60] and not just as a mere theoretical possibility be likely within a short period of time[61] to undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the latter is active.

3.55 This assessment has to be based on realistic grounds, having regard to the structure of the market and the economic and legal context in which the agreement operates;[62] the mere wish, desire or purely hypothetical possibility to enter a market is not sufficient.[63] Conversely, there is no need to demonstrate with certainty that the undertaking will in fact enter the market concerned or that it will be capable of retaining its place there.[64] For instance, entry is more likely where, for example, the potential entrant possesses assets that can be readily redeployed to enter the market without incurring significant sunk costs, or where it has already developed concrete plans or made initial investments aimed at entering the market.

3.56 In the specific context of intellectual property rights, one or both parties may hold valid intellectual property rights that prevent or block the other from operating in, or entering, the relevant market without infringing those rights (also known as a 'blocking position'). In assessing the possible impact of a blocking position on their competitive relationship, the following factors are relevant:

(a) Where both parties are already operating in the relevant market, a blocking position is very unlikely to exist unless a final, non-appealable court judgment has confirmed both the validity and infringement of the intellectual property rights. In the absence of such a judgment, the parties will generally be regarded as actual competitors.

(b) Where one party is not yet operating in the market but has made substantial investments or taken significant preparatory steps to enter, it is

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[60] See for example judgment of the CJEU of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraph 36 and judgment of 28 February 1991, *Delimitis v Henninger Bräu*, C-234/89, EU:C:1991:91, paragraph 21.
[61] See, for example, judgment of the GC of 14 April 2011, *Visa Europe Ltd and Visa International Service*, T-461/07, EU:T:2011:181, paragraph 189.
[62] See for example judgment of the CJEU of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraph 39.
[63] See judgment of the CJEU of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraphs 37 and 38.
[64] See judgment of the CJEU of 30 January 2020, *Generics (UK)*, C-307/18, EU:C:2020:52, paragraphs 36 to 39.

unlikely that a blocking position will exist, but very likely that the parties are at least potential competitors.[65]

(c) In the absence of such investments or steps, the assessment of potential competition should be based on all evidence reasonably available at the time, including: (i) whether the relevant intellectual property rights would in fact be infringed; (ii) the validity of the rights in question; and (iii) whether there are effective possibilities to work around existing intellectual property rights. The CMA will expect to see particularly convincing evidence of a blocking position where the parties have a common interest in being characterised as non-competitors, for example, where the alleged blocking position concerns technologies that are technological substitutes or where there is a significant inducement from one or both parties to the other.[66]

3.57 The parties will be regarded as actual competitors on the technology market where they either (i) both are already licensing out substitutable technology rights; or (ii) the licensee is already licensing out its technology rights and the licensor enters the technology market by granting a licence over competing technology rights to the licensee.[67]

3.58 The parties will be regarded as potential competitors on the technology market where they each own substitutable technology rights and the licensee is not, at present, licensing out its own technology rights, provided that it would be likely to do so in the event of a deterioration in the conditions of supply of the licensor's technology rights relative to those of other technology rights (such as a small but significant, non-transitory increase in the cost of licensing that technology).[68] In practice, assessing potential competition in technology markets is generally more difficult.[69]

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[65] By way of example, the parties are likely to be regarded as potential competitors on a relevant market for the supply of products where a licensee manufactures on the basis of its own technology in one geographic market and begins producing in another geographic market using a licensed competing technology. In such circumstances, it is likely that the licensee would have been able to enter the second geographic market relying on its own technology, unless entry is precluded by objective factors, including the existence of blocking intellectual property rights.
[66] See, to that effect, the judgment of the CJEU of 30 January 2020, *Generics (UK) and Others*, C-307/18, ECLI:EU:C:2020:52, paragraphs 54 to 56.
[67] See paragraph 3.42 above for a discussion of the relevant technology markets.
[68] For operational and practical purposes, that assessment typically focuses on reactions to price increases. For example, one method is to consider whether the licensee would be likely to start licensing out its own technology in response to a small but permanent increase in technology prices. However, the assessment can also take into account chang es affecting other parameters of competition, such as product quality or the level of innovation.
[69] Accordingly, for the purposes of the TTBEO, potential competition on the technology market is not taken into account, and the parties are treated as non-competitors (see Article 5(5)(a) of the TTBEO and paragraph 5.12 of this Guidance).

3.59 In certain cases, although the licensor and licensee supply competing products, they may nonetheless be non-competitors on the relevant product market and the relevant technology market where the licensed technology constitutes a drastic innovation such that the licensee's technology becomes obsolete or uncompetitive. In such circumstances, the licensor's technology may either create a new market or exclude the licensee's technology from the existing market.

3.60 It is, however, often not possible to determine whether this is the case at the time the agreement is concluded. Typically, it becomes apparent only after the technology, or products incorporating it, have been available to consumers for some time that the older technology has become obsolete or uncompetitive. For instance, when compact disc technology was developed and players and discs were introduced to the market, it was not evident that this new technology would replace vinyl records; this only became apparent some years later. Accordingly, at the time of the conclusion of the agreement, the parties will be considered competitors unless it is obvious that the licensee's technology is obsolete or uncompetitive.

3.61 However, both the Chapter I prohibition and the Section 9 exemption must be applied in light of the actual context in which the agreement occurs. The assessment is therefore sensitive to material changes in the facts, and the categorisation of the parties' relationship may subsequently change to one of non-competitors if, at a later point in time, the licensee's technology becomes obsolete or uncompetitive on the market.

3.62 In some cases, the parties might become competitors subsequent to the conclusion of the agreement because the licensee develops or acquires, and begins to exploit, a competing technology. In such circumstances, the CMA will take into account the fact that the parties were non-competitors at the time of conclusion of the technology transfer agreement, and that the agreement was entered into in that context. The CMA will focus primarily on the impact of the agreement on the licensee's ability to exploit its own (competing) technology.[70]

3.63 The undertakings party to a technology transfer agreement might also become competitors after its conclusion where the licensee was already active on the relevant market for the sale of the contract products prior to the

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[70] Accordingly, the list of hardcore restrictions in the TTBEO applicable to agreements between competitors does not apply to such agreements unless the agreement is subsequently amended in any material respect after the parties have become competitors (see Article 7(9) of the TTBEO and paragraph 5.14 and 6.52 below).

agreement, and the licensor subsequently enters that market, whether on the basis of the licensed technology rights or a new technology. In that case, the list of hardcore restrictions in the TTBEO applicable to agreements between non-competitors will continue to apply for the full duration of the agreement, unless the agreement is subsequently amended in any material respect or a new technology transfer agreement is entered into between the parties concerning competing technology rights (see Article 7(9) of the TTBEO and paragraph 5.14 and 6.52 below).

Territorial application of the Chapter I prohibition

3.64 The Chapter I prohibition applies to agreements implemented, or intended to be implemented, in the UK.[71] In the case of agreements which are not implemented, or intended to be implemented, in the UK, the Chapter I prohibition applies if the agreements are likely to have an immediate, substantial and foreseeable effect on trade within the United Kingdom.[72]

Ancillary restraints

3.65 The Chapter I prohibition will not apply to an agreement that is an 'ancillary restraint', that is, where it restricts the commercial autonomy of one or more of its parties but that restriction is objectively necessary to implement, and proportionate to the objectives of, another form of cooperation that has neutral or positive effects on competition.[73] [74] To determine whether a restriction is an

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[71] See Section 2(1)(a) of the CA98.
[72] See Section 2(1)(b) of the CA98.
[73] See for example paragraph 6.19 below in the context of purchasing agreements, which refers to the ECJ's judgment of 15 December 1994, *Gøttrup-Klim*, C-250/92, EU:C:1994:413. That case concerned a cooperative association set up to purchase agricultural products in bulk, with the aim of achieving lower prices. The ECJ held that a prohibition on members of the cooperative from holding membership of other purchasing cooperatives did not constitute an infringement of competition law so long as it was necessary to 'ensure that the cooperative functions properly and maintains its contractual power in relation to producers'. See also the judgment of the Court of Appeal in *Bookmakers Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd* [2009] EWCA Civ 750, paragraphs 111 to 123, in the context of an agreement to promote a new entrant into a market previously occupied by only one other undertaking. The Court of Appeal accepted that racecourse owners' collective selling of media rights to horseracing events in support of that purpose was 'both objectively necessary for the implementation of the main operation and proportionate to it' and that '[w]ithout the restrictions, the main object would have been, at the very least, difficult, and in reality impossible, to implement'. The Court of Appeal later added that the position may well be different on expiry of the licences at issue, after which the joint selling arrangement would no longer 'need the sort of protection which was necessary to secure its entry into the market at the outset'.
[74] Judgment of the CJEU of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 89. In accordance with Section 60A CA98, to the extent that there is inconsistency between the European Commission's Ancillary Restraints Notice, OJ 2005 C56/24, and the principles laid down by the CJEU before the end of the Transition Period, the CMA will act with a view to securing that there is no inconsistency between the principles the CMA applies and the

ancillary restraint, it is necessary to examine whether the main cooperation would be impossible to carry out absent the restriction in question.[75] The fact that the main cooperation would be more difficult to implement, or less profitable without the restriction concerned, does not in itself make that restriction objectively necessary and thus 'ancillary'.[76]

Assessment under the Section 9 exemption

3.66 The assessment of restrictions of competition by object or effect is only one step of the analysis under the Chapter I prohibition. Another step is the assessment of whether the agreement meets the conditions set out in the Section 9 exemption, because of the efficiencies it generates.[77]

3.67 Where an agreement restricts competition by object or by effect within the meaning of the Chapter I prohibition, the parties to that agreement can invoke the Section 9 exemption as a defence.

3.68 The burden of proof under the Section 9 exemption rests on the undertaking(s) invoking the benefit of that provision.[78] In other words, it is for the undertaking(s) to prove that the agreement in question is likely to give rise to objective[79] efficiencies within the meaning of the Section 9 exemption. Cogent empirical evidence is needed to carry out the required evaluation of any claimed efficiencies for the purposes of fulfilling the conditions of the Section 9 exemption.[80]

3.69 For the Section 9 exemption to apply, the following conditions must all be fulfilled:

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principles laid down by the CJEU, so far as applicable immediately before the end of the Transition Period (subject to Section 60A(4) to (7) CA98).

[75] Judgment of the CJEU of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 91. See also the judgment of 4 July 2018 of the Court of Appeal in the joined cases of *Sainsburys v MasterCard*; *AAM v MasterCard; Sainsbury's v Visa* [2018] EWCA 1536 (Civ), paragraph 58 to 74 (issue not considered on appeal to the Supreme Court).

[76] See for example the judgment of the CJEU of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 91.

[77] The European Commission's general approach to the EU-equivalent of the Section 9 exemption, ie Article 101(3) of the TFEU (formerly Article 81(3) of the Treaty establishing the European Community), is presented in the European Commission (2004) Guidelines on the application of Article 81(3) of the Treaty, OJ C 101. The CMA will have regard to those guidelines in accordance with Section 60A CA98.

[78] Section 9(2) CA98.

[79] See the judgment of the CJEU 6 of October 2009, *GlaxoSmithKline v Commission*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraphs 92 to 95.

[80] See the judgment of the Supreme Court in *Sainsbury's v Visa and Sainsbury's Mastercard* [2020] UKSC 24, in particular paragraph 116.

— the agreement must contribute to improving the production or distribution of products or contribute to promoting technical or economic progress. In this Guidance, the attainment of these objectives will generally be referred to as 'efficiencies';

— consumers must receive a fair share of the resulting benefits, that is, the efficiencies, including qualitative efficiencies, attained by the indispensable restrictions must be sufficiently passed on to consumers such that consumers are at least compensated for the restrictive effects of the agreement. Hence, efficiencies that only accrue to the parties to the agreement will not suffice. For the purposes of this Guidance, 'consumers' includes all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers;[81]

— the restrictions must be indispensable to the attainment of the efficiencies; and

— the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products concerned.

3.70 The assessment of agreements under the Section 9 exemption is made within the actual context in which they occur[82] and based on the facts existing at any given point in time.[83] The assessment is sensitive to material changes in the facts. Therefore, the exemption applies provided that the four conditions above are fulfilled and ceases to apply when that is no longer the case.[84]

3.71 When applying the Section 9 exemption it is necessary to take into account the investments made by any of the parties and the time needed and the restraints required to commit and recoup an efficiency enhancing investment.

3.72 The exemption provided by the TTBEO is based on the premise that, to the extent that they fall within the Chapter I prohibition, many technology transfer agreements fulfil the Section 9 exemption criteria. The market share and other thresholds (see Article 5 of the TTBEO), the hardcore restrictions (Article 7 of

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[81] More detail on the concept of consumers is provided at paragraph 84 of the European Commission [2004] Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, to which the CMA will have regard in accordance with Section 60A CA98.
[82] See judgment of the ECJ of 17 September 1985, *Ford*, 25/84 and 26/84, EU:C:1985:340.
[83] In *Sainsbury's v Visa* and *Sainsbury's v Mastercard* [2020] UKSC 24, paragraphs 109 to 138, the Supreme Court held that the standard of proof under the Section 9 exemption is the civil standard of balance of probabilities.
[84] An agreement that falls within the Chapter I prohibition might fall outside that prohibition over time following a change in circumstance (and vice versa). See for example *Passmore v Morland plc* [1999] 3 All ER 1005.

the TTBEO) and the excluded restrictions (Article 8 of the TTBEO) are intended to ensure that only restrictive agreements that can reasonably be presumed to fulfil the Section 9 exemption criteria are block exempted.

3.73 There is no presumption that technology transfer agreements restricting competition that are not block exempted by the TTBEO infringe the Chapter I prohibition. In particular, the mere fact that the conditions in Article 5 of the TTBEO relating market share and other thresholds are not met is not a sufficient basis for finding that the agreement infringes the Chapter I prohibition. An individual assessment of the agreement is required. Part 11 of this Guidance discusses the assessment of technology transfer agreements not benefitting from the block exemption provided by the TTBEO.

Technology transfer agreements that generally fall outside the scope of the Chapter I prohibition

3.74 This parts of the Guidance gives an overview of technology transfer agreements which generally fall outside of the scope of the Chapter I prohibition. If a technology transfer agreement falls outside the scope of the Chapter I prohibition, it follows that the TTBEO is not applicable.

3.75 This part is structured according to the various types of technology transfer agreements which typically do not fall within the scope of the Chapter I prohibition:

(a) agreements that do not restrict competition appreciably, lack an effect on trade or are of minor importance;

(b) conduct required by law;

(c) agreements excluded by the CA98.

Agreements that do not restrict competition appreciably, lack an effect on trade or are of minor importance

3.76 The Chapter I prohibition applies only where an agreement brings about an *appreciable* restriction of competition within the UK and affects trade within the UK.[85] Agreements that do not have as their object or effect an appreciable

[85] See for example *North Midland Construction v OFT* [2011] CAT 14, paragraphs 35 to 63. An agreement has an effect on trade within the UK where, (a) in the case of an agreements implemented, or intended to be implemented in the UK, it may affect trade in the UK, or (b) in any other case, is likely to have an immediate, substantial and foreseeable effect on trade within the UK.

restriction of competition within the UK or that are not capable of affecting trade within the UK do not fall within the scope of the Chapter I prohibition.[86]

3.77 In determining whether an agreement is an *appreciable* restriction of competition for the purposes of the Chapter I prohibition, the CMA will have regard to the European Commission's approach as set out in its Notice on Agreements of Minor Importance (also known as the De Minimis Notice).[87] Its application is particularly relevant for assessing technology transfer agreements between small and medium-sized enterprises ('SMEs').[88]

Conduct required by law

3.78 The Chapter I prohibition does not apply to an agreement or the conduct of undertakings to the extent it is made or done to comply with a legal requirement under UK law[89] or to the extent UK legislation precludes all scope for competitive activity for the undertakings involved.[90] Nonetheless, the fact that public authorities encourage an agreement does not mean that it is permitted under the Chapter I prohibition.[91] Undertakings also remain subject to the Chapter I prohibition if for example a law or public authority merely

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[86] See for example *Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] EWHC 2313 (Ch), paragraphs 149 to 150, and *P&S Amusements v Valley House Leisure* [2006] EWHC 1510 (Ch), paragraphs 20 to 26. See also CMA decisions, e.g. Online resale price maintenance in the light fittings sector, CMA decision of 3 May 2017, paragraphs 4.156 to 4.157 and 4.166; *Cleanroom laundry services and products*, CMA decision of 14 December 2017, paragraph 5.167; *Nortriptyline tablets (market sharing)*, CMA decision of 4 March 2020, paragraphs 6.172 to 6.173.

[87] Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (2014), OJ C 291, (the 'De Minimis Notice'), paragraph 1, to which the CMA will have regard in accordance with Section 60A CA98

[88] Also relevant for SMEs is Section 39 CA98 which provides limited immunity from financial penalties for 'small agreements' infringing the Chapter I prohibition. The immunity applies only to financial penalties, such that a 'small agreement' may still infringe the Chapter I prohibition. Therefore, it does not prevent the CMA from taking other enforcement action, nor does it prevent third parties from bringing damages actions. The immunity does not apply to infringements of the Chapter I prohibition which are price-fixing agreements. The CMA may also withdraw immunity in certain circumstances. See further the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262) (as amended by The Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93)) and the Competition (Amendment etc.) (EU Exit) Regulations 2020).

[89] 'Legal requirement' in this context means a requirement imposed by or under any enactment in force in the United Kingdom, and certain requirements imposed under the EU withdrawal agreement or the EEA EFTA separation agreement and having legal effect in the United Kingdom. See further Schedule 3, paragraph 5 of the CA98.

[90] See judgment of the CJEU of 14 October 2010, *Deutsche Telekom*, C-280/08 P, EU:C:2010:603, paragraphs 80 to 81. The courts have interpreted this exception narrowly. See, for example, judgment of the ECJ of 29 October 1980, *Van Landewyck*, 209 to 215 and 218/78, EU:C:1980:248, paragraphs 130 to 134; and judgment of 11 November 1997, *Ladbroke Racing*, C-359/95 P and C-379/95 P, EU:C:1997:531, paragraph 33 and further.

[91] See for example judgment of the CFI of 13 December 2006, *FNCBV and Others v Commission*, T-217/03 and T-245/03, EU:T:2006:391, paragraph 92.

encourages or makes it easier for them to engage in anti-competitive activity.[92]

Agreements excluded by the CA98

3.79 Certain types of agreement are excluded from the scope of the Chapter I prohibition as a result of being listed in the Schedules 1, 2 and 3 CA98, for example, agreements to the extent they result in a merger or joint venture falling within the merger provisions of the Enterprise Act 2002,[93] and in relation to agricultural products, certain agreements between 'recognised producer organisations' or 'recognised associations of producer organisations'.[94]

[92] Judgment of the CJEU of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraph 82.
[93] That is, the Chapter I prohibition does not apply to an agreement which results or would result in any two enterprises 'ceasing to be distinct enterprises' for the purposes of Part 3 of the Enterprise Act 2002. This exclusion extends to any provision directly related and necessary to the implementation of the merger provisions (CA98, schedule 1, paragraph 1(2)).
[94] See schedule 3, paragraph 9 of the CA98.

4. Technology transfer agreements within the scope of the TTBEO

4.1 Where a technology transfer agreement falls within the scope of the Chapter I prohibition, the parties to the agreement need to consider if the agreement benefits from the block exemption provided by the TTBEO.

4.2 The TTBEO block exempts an agreement that constitutes a 'technology transfer agreement', as defined in Article 3(2) of the TTBEO. The block exemption provided by the TTBEO applies to such an agreement subject to:

(a) the conditions set out in Articles 5 (market share and other thresholds), 7 (hardcore restrictions) and 8 (excluded restrictions) of the TTBEO, and

(b) the obligation set out in Article 10 of the TTBEO (obligation to provide information).[95]

4.3 Where a technology transfer agreement for these purposes falls within the Chapter I prohibition, but does not satisfy the conditions set out in Articles 5, 7 or 8 of the TTBEO, it will need an individual assessment as to whether the agreement satisfies (or, in the case of Article 8 excluded restrictions, the specific restrictions in question satisfy) the Section 9 exemption criteria.

4.4 This part of the Guidance provides guidance on the definition of 'technology transfer agreements' set out in Article 3(2) the TTBEO. It also discusses the application of the Chapter I prohibition to licences of intellectual property rights or data not within the scope of the TTBEO, and the relationship of the TTBEO to other block exemptions.[96]

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[95] See Article 4 of the TTBEO.

[96] Part 5 of this this Guidance provides further guidance on the conditions set out in Article 5 of the TTBEO (market share and other thresholds). Part 6 of this Guidance provides further guidance on the conditions set in Article 7 of the TTBEO (hardcore restrictions). Part 7 of this Guidance provides further guidance on the conditions set out in Article 8 of the TTBEO (excluded restrictions). Part 8 of this Guidance provides further guidance on the obligation set out in Article 10 of the TTBEO (obligation to provide information). The effect of breach of such conditions or the Article 10 obligation is also discussed in these parts of the Guidance.

Technology transfer agreements for the purposes of Article 3(2) of the TTBEO

4.5 The TTBEO provides that the category of agreements identified in Article 3(2) of TTBEO as 'technology transfer agreements' are block exempted from the Chapter I prohibition.[97]

4.6 Article 3(2) of the TTBEO defines 'technology transfer agreements' for these purposes as agreements entered into between two undertakings to the extent they provide for—

(a) technology rights to be licensed for the purpose of the production of particular products by the licensee or a sub-contractor of the licensee, or

(b) technology rights to be assigned for the purpose of the production of particular products by the assignee in such a way that part of the risk associated with the exploitation of the technology rights remains with the assignor,

but also to the extent they include further provision (if any) of the kind in Article 3(3) of the TTBEO.

4.7 The provision for the purposes of Article 3(3) of the TTBEO is provision for

(a) the purchase of products by the licensee, or

(b) any licensing or assignment of intellectual property rights or know-how that does not fall within paragraph (2)(a) or (b) of Article 3 of the TTBEO[98]

but only to the extent that the provision is directly related to the production or sale of the contract products.

Agreements between two undertakings

4.8 The TTBEO only applies to technology transfer agreements between two undertakings. Technology transfer agreements between more than two undertakings are not covered by the TTBEO.

4.9 Licensing agreements between two undertakings can be technology transfer agreements for the purposes of the TTBEO, even where the agreements include provisions relating to more than one level of trade. For example, an

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[97] Article 3(1) of the TTBEO.
[98] See paragraph 4.2(a)4.2 above.

agreement for these purposes can cover both the production stage and the distribution stage, including provisions relating to obligations that the licensee must or may impose on resellers of products produced under the licence.[99]

4.10 Agreements establishing technology pools or licensing out from technology pools are generally multi-party arrangements and are therefore not covered by the TTBEO. The term 'technology pool' refers to agreements whereby two or more parties combine their respective technologies and license them as a package. It also includes arrangements in which two or more undertakings license a third party and authorise that third party to license the package of technologies.

4.11 Licence agreements concluded between more than two undertakings may give rise to similar issues as agreements of the same type concluded between two undertakings. In such cases, the CMA would, in any individual assessment it conducted, apply by analogy the principles set out in the TTBEO. Technology pools and sublicensing from technology pools are addressed specifically in paragraphs 11.98 to 11.129 of this Guidance.

Technology rights and intellectual property rights

4.12 For the purposes of the TTBEO, 'technology rights' are defined as follows:

(a) know-how;

(b) patents;

(c) design rights (whether registered or unregistered);

(d) rights in semiconductor topographies;

(e) supplementary protection certificates;

(f) plant breeders' rights granted in accordance with the Plant Breeders' Rights Act 1997;

(g) copyright in software;

(h) copyright in a database and database right;[100]

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[99] See Article 3(3) of the TTBEO.
[100] 'Database right' has the same meaning as in Part 3 of the Copyright and Rights in Databases Regulations 1997 (SI 1997/3032, as amended): see Article 2(1) of the TTBEO.

(i) any applications for, or applications for registration of, any rights referred to in (b), (c), (e) and (f) above.[101]

4.13 Article 2(1) of the TTBEO defines 'know-how' as a package of practical information resulting from experience and testing which is secret, significant and useful and sufficiently described as to make it possible to verify that it fulfils the preceding criteria of secrecy, significance and usefulness. It follows that the TTBEO applies to know-how to the extent that it fulfils the following criteria:

(a) First, it is not generally known or easily accessible.

(b) Second, know-how comprises information that is significant and useful for the production or sale of particular products. In other words, the information must make a meaningful contribution to, or materially facilitate, the production or sale of particular products. Where the licensed know-how relates to a product rather than a process, this requires that it is useful for the production or sale of the particular product. This condition is not satisfied where the particular product can be produced or sold solely on the basis of freely available technology. In the case of process technologies, the know-how must be capable, at the date of conclusion of the agreement, of significantly improving the competitive position of the licensee, for example by reducing production or sale costs.

(c) Third, know-how must be described in a sufficiently comprehensive manner to make it possible to verify that the licensed know-how fulfils the criteria of secrecy, significance and usefulness. This requirement is satisfied where the licensed know-how is so described in writing, whether in digital or paper form. In certain circumstances, however, it may not be reasonably possible to describe the know-how in writing. The know-how may instead consist of practical knowledge held by the licensor's employees and transferred to the licensee, for example, through training. In such cases, it is sufficient for the agreement to describe the general nature of the know-how and to identify the employees who are, or have been, involved in transferring it to the licensee.

4.14 Article 2(1) of the TTBEO defines 'intellectual property rights' as including:

(a) industrial property rights (in particular, patents and trademarks), and

(b) copyright and related rights, and database right.

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[101] Article 2(1) of the TTBEO.

Production of particular products

4.15 An agreement between two undertakings will constitute a technology transfer agreement for the purposes of Article 3(2) to the extent it provides for technology rights to be licenced for the purpose of the production of particular products. 'Products' for these purposes means a good or service, and includes both intermediate goods or services and final goods or services.[102] For the purposes of the TTBEO, goods or services produced, directly or indirectly, on the basis of the licensed technology rights are referred to as 'contract products'.[103]

4.16 Where an agreement is not concluded for the purpose of the production of particular products, but instead serves, for example, to prevent the development or commercialisation of a competing technology, it will not benefit from the block exemption provided by the TTBEO, and the principles set out in this Guidance may not be appropriate for its assessment

4.17 Similarly, to the extent that a licence of database right or of copyright in database is not concluded for the purpose of the production of particular products (such as if it is for the purpose of providing competitively sensitive information between competitors to co-ordinate their commercial behaviour), it will not be a technology transfer agreement for the purposes of the TTBEO and will not be block exempted by the TTBEO.[104]

4.18 More generally, where the parties do not exploit the licensed technology rights, no efficiency-enhancing activity takes place and the underlying rationale for the block exemption is absent. Therefore, the TTBEO cannot apply to such an agreement.

4.19 Exploitation of licensed technology rights does not necessarily require the integration of assets. Exploitation may also occur where the licence confers design freedom on the licensee, for example, by allowing it to develop or use its own technology without exposure to infringement claims by the licensor. In licensing arrangements between competitors, the absence of exploitation of the licensed technology may indicate that the agreement serves purposes unrelated to technology transfer, including the coordination of competitive behaviour (e.g. a disguised cartel). For these reasons, cases involving non-exploitation of licensed technology rights, to which (as previously explained) the TTBEO will not apply will be closely examined by the CMA.

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[102] See Article 2(1) of the TTBEO.
[103] Ibid.
[104] And see paragraphs 4.9 to 4.12 above.

4.20 Technology transfer agreements for the purposes of the TTBEO can include licences of technology rights concluded for the production of particular products by the licensee and/or its subcontractor(s). It follows that those parts of technology transfer agreements that permit sublicensing do not fall within the scope of the TTBEO. However, provided they meet the applicable conditions, agreements between the licensee and sublicensees for the production of contract products fall within the scope of the TTBEO. The CMA will also apply, by analogy, the principles set out in the TTBEO and this Guidance to so-called master licensing agreements, under which the licensor authorises the licensee to grant such sublicences.

4.21 References in this Guidance refers to 'products incorporating the licensed technology' include references to products produced using the licensed technology. The framework of the TTBEO and this Guidance is based on the premise that there is a direct link between the licensed technology rights and a contract product. Where no such link exists, and the purpose of the agreement is not to enable the production of a contract product, the analytical framework of the TTBEO and this Guidance may not be appropriate.

4.22 The licensing of software copyright for the purpose of reselling or otherwise distributing software, whether through physical or digital channels, does not constitute 'production' within the meaning of the TTBEO and is therefore not covered by the TTBEO or this Guidance. Such arrangements are instead assessed, by analogy, under the Vertical Agreements Block Exemption Order and its associated Guidance. Accordingly, the TTBEO and this Guidance do not apply to licensing arrangements under which the licensee is provided with a physical or digital copy of software for distribution to end users, including distribution through click-wrap licences or by means of online downloading or streaming.

4.23 By contrast, where licensed software is incorporated by the licensee into a contract product, this constitutes production of a contract product, rather than mere resale of that software. Agreements for the licensing of software copyright where the licensee is authorised to incorporate software into a device with which it interacts, where the software is used as an input into the licensee's industrial processes, or where the licensee adds significant value to the software through modification or further development, can fall within the scope of TTBEO and this Guidance.

4.24 Subcontracting arrangements under which the licensor licenses technology rights to the licensee, who undertakes to produce goods or services exclusively for the licensor, are covered by the TTBEO. Such arrangements may include the supply of equipment by the licensor for use in production. For equipment supply to be covered by the TTBEO as part of a technology

transfer agreement, the equipment must be directly related to the production of the contract products. Subcontracting is also covered by the Commission Notice on subcontracting agreements.[105] The subcontracting notice provides that subcontracting agreements, whereby the subcontractor undertakes to produce certain products exclusively for the contractor, generally fall outside the scope of the Chapter I prohibition provided that the technology or equipment is necessary to enable the subcontractor to produce the products. Similarly, subcontracting arrangements whereby the contractor determines the transfer price of an intermediate contract product between subcontractors within a subcontracting chain generally fall outside the Chapter I prohibition, provided that the contract products are produced exclusively for the contractor. However, other restrictions imposed on the subcontractor such as the obligation not to conduct or exploit its own research and development or not to produce for third parties may fall within the Chapter I prohibition.[106]

4.25 Provided that the TTBEO's conditions are otherwise met,[107] the TTBEO block exempts agreements under which the licensee is required to carry out research and development activities before obtaining a product or process that is ready for commercial exploitation, provided that the object of the agreement is the production of an identifiable contract product, that is, a product produced using the licensed technology rights. Where the licensor is an academic institution, research organisation or an SME that is not itself engaged in production activities, the contract product may be identified in more general terms in the technology transfer agreement.

4.26 By contrast, the TTBEO and this Guidance do not apply to agreements under which technology rights are licensed for the purpose of enabling the licensee to carry out further research and development across one or more fields, including the further development of a product resulting from such research. Such agreements need to be considered under The Competition Act 1998 (Research and Development Agreements Block Exemption) Order 2022 ('the R&D BEO')[108] and Part 4 of the Horizontal Agreements Guidance.[109] This includes, for example, research and development subcontracting arrangements under which the licensee undertakes research and development in the field of the licensed technology and is required to transfer

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[105] Commission Notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty (OJ C 1, 3.1.1979, p. 2) to which the CMA will have regard in accordance with Section 60A of the CA98.
[106] See (OJ C 1, 3.1.1979, p. 2) paragraph 3.
[107] See Article 4 of the TTBEO.
[108] The Competition Act 1998 (Research and Development Agreements Block Exemption) Order 2022.
[109] See paragraphs 51 and the following of the Horizontal Agreements Guidance.

any resulting improvements back to the licensor.[110] Similarly, the licensing of a technological research tool for use in further research activities is generally more akin to a research and development agreement for the purposes of the assessment under the Chapter I prohibition. In assessing such agreements, the CMA will generally apply the principles set out in the R&D BEO and the corresponding part of the Horizontal Agreements Guidance.

Ancillary provisions directly related to the production or sale of contract products

4.27 A technology transfer agreement can still fall within the definition of technology transfer agreement in Article 3(2) of the TTBEO, and therefore be block exempted, if it includes provisions for the purchase of products by the licensee to the extent that such provisions are directly related to the production or sale of contract products.[111] For example, a technology transfer agreement for these purposes would include an agreement with provisions for the supply of milk together with a licence of technology rights for the production of cheese, where the milk is to be used in producing cheese with the licensed technology.

4.28 A technology transfer agreement for the purposes of Article 3(2) of the TTBEO can also include provisions relating to the licensing or assignment of intellectual property rights or know-how that does not fall within Article 3(2)(a) or (b) of the TTBEO, to the extent that these are directly related to the production or sale of contract products.[112]

4.29 This ensures that such provisions benefit from the block exemption only where those other intellectual property rights or know-how enable the licensee to better exploit the licensed technology rights. For example, authorising the licensee to use the licensor's trademark on products incorporating the licensed technology may facilitate the exploitation of that technology by allowing consumers to associate the product with the characteristics conferred by the licensed technology. An obligation on the licensee to use the licensor's trademark may also promote more effective dissemination of the technology by enabling the licensor to identify itself as the source/holder of the underlying technology rights. In such circumstances, the TTBEO may apply even where

[110] However, this last example falls within the scope of the R&D BEO. See also paragraph 4.43. of this Guidance.
[111] See Article 3(3) of the TTBEO.
[112] Ibid.

the parties' principal interest lies in the exploitation of the trademark rather than the technology.[113]

Licensing of intellectual property rights outside the scope of the TTBEO

4.30 The TTBEO, and the principles set out in this Guidance, do not apply to trademark licensing, except in the circumstances described in paragraph 4.27 of this Guidance. Trademark licensing typically takes place in the context of the distribution and resale of goods or services and is generally closer in nature to distribution agreements than to technology transfer agreements. Where a trademark licence is directly related to the use, sale or resale of goods or services and does not constitute the primary object of the agreement, and the licence agreement should instead be considered under the Vertical Agreements Block Exemption Order ('the VABEO') and the CMA's guidance (CMA166) Vertical agreements block exemption order guidance ('the Vertical Agreements Guidance').[114]

4.31 The TTBEO also does not cover the licensing of copyright other than software copyright, except in the circumstances described in paragraph 4.27 of this Guidance. However, as a general rule the CMA will apply the principles set out in the TTBEO and this Guidance when assessing copyright licensing agreements relating to the production of contract products under the Chapter I prohibition.[115] By contrast, those principles do not apply to copyright licensing in merchandising agreements. Such agreements typically involve the licensing of a brand, fictional character or public figure for the manufacture and sale of products bearing that sign or character and are generally more akin to distribution agreements than to technology transfer agreements.[116]

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[113] For example, the TTBEO could cover the technology transfer agreement assessed in Commission Decision 90/186/EEC of 23 March 1990 relating to a proceeding under Article 85 of the EEC Treaty (IV/32.736 – in *Moosehead/Whitbread*) (OJ L 100, 20.4.1990, p. 32, ELI: http://data.europa.eu/eli/dec/1990/186/oj), see in particular paragraph 16 of that Decision.

[114] The Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022.

[115] In assessing whether to apply the principles set out in the TTBEO and these Guidance, the CMA will consider the specificities of the legal and economic context. With respect to the application of the Chapter I prohibition to copyright licences, see e.g. the judgments of the CJEU of 4 October 2011, *Football Association Premier League and Others*, C-403/08, ECLI:EU:C:2011:631, paragraphs 137-146 and of 9 December 2020, *Groupe Canal+ v Commission*, C-132/19 P, ECLI:EU:C:2020:1007.

[116] See, for example, Commission Decisions of 25 March 2019 in case AT.40436 – *Ancillary sports merchandise*; of 9 July 2019 in case AT.40432 – *Character merchandise*; and of 30 January 2020 in case AT. 40433 – *Film merchandise.*

Licensing of data

4.32 The TTBEO does not cover the licensing of data, except where the licensed data falls within any of the definitions of 'technology rights' or 'intellectual property rights' in Article 2(1) of the TTBEO. These definitions include 'copyright in a database' and 'database right'.[117] Depending on the circumstances, 'data' may also fall within the definition of know-how in Article 2(1) of the TTBEO.

4.33 Where an agreement provides for the licensing of data not protected by copyright in database or database right, or that does not constitute know-how for the purposes of the TTBEO, the CMA will consider, on case by case basis, whether it is appropriate to apply the principles of the TTBEO and this Guidance to such agreements. Data licensing agreements entered into for the purpose of producing goods or services may concern heterogeneous types of data. Owing to differences in (i) the characteristics of the data; (ii) the applicable regulatory framework; and (iii) the manner in which the data is collected or generated, the principles set out in the TTBEO and in this Guidance may not be suitable in all cases for assessing such agreements under the Chapter I prohibition. However, those principles will generally be appropriate where the licensing of such data is directly related to the production or sale of products.

The exchange of competitively sensitive information

4.34 The exchange of competitively sensitive information between competitors, whether directly or indirectly, including through a third party, may infringe the Chapter I prohibition.[118]

4.35 When assessing exchanges of competitively sensitive information in data licensing agreements between competitors, the CMA will generally apply the principles set out in Part 8 of the Horizontal Agreements Guidance relating to information exchange. In particular, where the licensing of the data itself does not fall within the Chapter I prohibition because it has neutral or positive effects on competition, an information exchange that is ancillary to that licensing arrangement will likewise fall outside the Chapter I prohibition. This

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[117] See Article 2(1) of the TTBEO. For a detailed discussion on the reasons for extending the scope of the TTBEO, see further the CMA's Final Recommendation to the Secretary of State on the Assimilated TTBEO, paragraphs 2.16 to 2.29.
[118] See Part 8 of the Horizontal Agreements Guidance; see also the Judgment of 21 January 2016, *Eturas and Others*, C-74/14, EU:C:2016:42, paragraph 27 and judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraphs 32 to 33. See also *Balmoral v CMA* [2017] CAT 23, paragraph 38, upheld on appeal, *Balmoral v CMA* [2019] EWCA Civ 162, paragraph 17.

will be the case if the exchange is objectively necessary for the implementation of the agreement and proportionate to its objectives.

4.36 Where competitors use data licensing agreements as a vehicle for engaging in exchanges of competitively sensitive information with the object of restricting competition, the CMA will not apply the principles set out in this Guidance when assessing the agreement under the Chapter I prohibition.

The concept of 'transfer'

4.37 The concept of a 'transfer' of technology implies that technology flows from one undertaking to another. Such transfers most commonly take the form of licensing arrangements, under which the licensor grants the licensee the right to use its technology rights in return for remuneration, typically in the form of royalties.

4.38 As set out in Article 3(2)(b) of the TTBEO, assignments of technology rights are also treated as technology transfer agreements for the purposes of the TTBEO where part of the risk associated with the exploitation of the technology remains with the assignor. This is the case, in particular, where the consideration payable for the assignment depends on the turnover generated by the assignee from sales of products produced using the assigned technology, the quantity of such products produced, or the number of operations carried out using the technology.

4.39 An agreement under which the holder of technology rights undertakes not to enforce its rights against another undertaking may also constitute a transfer of technology. The core element of a patent licence is the right to operate within the scope of the exclusive right conferred by the patent. Accordingly, the TTBEO can also apply to so-called non-assertion agreements, under which the licensor permits the licensee to produce within the scope of the patent.[119]

Duration

4.40 The block exemption provided by the TTBEO applies to a technology transfer agreement (as defined in Article 3(2) of the TTBEO) for as long as at least one of the licensed technology rights has not expired, lapsed or been declared invalid, or in the case of know-how, remains secret.[120] Where know-how which is a licensed technology right ceases to be secret as a result of

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[119] The terms 'licensing' and 'licensed' used in these Guidance also include non-assertion arrangement as long as a transfer of technology rights takes place as described in this Guidance.
[120] Article 3(4) of the TTBEO.

any act or omission by the licensee, the exemption applies for the duration of the agreement.[121]

Relationship with other block exemptions

4.41 The TTBEO covers agreements between two undertakings concerning the licensing of technology rights for the purpose of producing contract products. However, technology rights can also be an element of other types of agreements. Moreover, products incorporating the licensed technology are subsequently sold on the market. It is therefore necessary to address the interface between the TTBEO and the Specialisation Agreements Block Exemption Order (SABEO),[122] the R&D BEO[123] and the VABEO.[124]

The block exemption orders on specialisation and research and development agreements

4.42 Article 3(6) of the TTBEO provides that the TTBEO does not apply to licensing in the context or research and development agreements which fall within the scope the R&D BEO or specialisation agreements which fall within the scope of the SABEO.

4.43 The R&D BEO deals with agreements between two or more undertakings relating to joint or paid-for research and development and the joint exploitation of the results thereof.[125] For the purposes of Article 2(1) of the R&D BEO, research and development and the exploitation of the results are carried out jointly where the work is (i) undertaken by a joint team, organisation or undertaking; (ii) jointly entrusted to a third party; or (iii) allocated between the parties by way of specialisation, either in the context of the research and development or in the context of exploitation (which includes production and distribution, including licensing). Where licensing forms part of such joint exploitation and is directly related to and necessary for the implementation of the arrangement, it needs to be assessed under the R&D BEO and Part 4 of the Horizontal Agreements Guidance.

4.44 It follows that the R&D BEO deals with licensing between the parties, and licensing by the parties to a joint entity, where such licensing occurs in the context of a research and development agreement within the scope of the R&D BEO. Such licensing is not covered by the TTBEO. In the context of a

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[121] Article 3(5) of the TTBEO.
[122] The Competition Act 1998 (Specialisation Agreements Block Exemption) Order 2022.
[123] Cited in footnote 108.
[124] Cited in footnote 114.
[125] See Article 3(2) of the R&D BEO.

research and development agreement, the parties may also set the conditions for licensing the results of the joint or paid-for research and development to third parties. However, because third-party licensees are not party to the research and development agreement, the individual licence agreements concluded with such third parties do not fall within the R&D BEO. Those licence agreements may benefit from the block exemption provided in the TTBEO if they fall within the definition of technology transfer agreements in Article 3(2) of the TTBEO and the TTBEO's conditions are met.

4.45 The SABEO deals with specialisation agreements as defined in Article 3(2) of the SABEO. These can include agreements such as where one or more parties agree to cease producing certain products and to purchase them from another party and joint production agreements, whereby two or more parties agree to produce certain products jointly.[126] The SABEO also extends to provisions concerning the assignment or use of intellectual property rights, provided such provisions do not constitute the primary object of the agreement and are directly related to and necessary for its implementation.[127]

4.46 Where undertakings establish a production joint venture and grant that joint venture a technology licence for the purpose of production, the licensing provisions need to be considered under the SABEO and Part 5 of the Horizontal Agreements Guidance, and not the TTBEO or this Guidance. By contrast, where the joint venture licenses the technology to third parties, that activity is not linked to production by the joint venture and therefore falls outside the scope of the SABEO. Such licensing arrangements, particularly where the parties' technologies are combined and licensed further, constitute technology pools, which are addressed in paragraphs 11.98 to 11.129 of this Guidance.

The Vertical Agreements Block Exemption Order (VABEO)

4.47 The VABEO deals with vertical agreements, which for these purposes are agreements entered into between two or more undertakings, each operating, for the purposes of the agreement, at different levels of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.[128] It therefore covers supply and distribution agreements.

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[126] See Part 5 of the Horizontal Agreements Guidance.
[127] See Article 3(3) of the SABEO.
[128] See Article 3(2) of the VABEO.

4.48 Given that the TTBEO only covers agreements between two parties, and that a licensee that sells products incorporating the licensed technology is a supplier for the purposes of the VABEO, those two block exemptions are closely related. Technology transfer agreements between a licensor and a licensee might be covered by the TTBEO, whereas agreements between a licensee under a technology transfer agreement and buyers of the contract products might be covered by the VABEO.

4.49 The TTBEO also exempts agreements between the licensor and the licensee where the agreement imposes obligations on the licensee as to the way in which it must sell the products incorporating the licensed technology. In particular, the licensor can require the licensee to establish a certain type of distribution system such as exclusive distribution or selective distribution. However, the distribution agreements concluded for the purposes of implementing such obligations need to be considered under the VABEO and the Vertical Agreements Guidance.[129] For example, the licensor can oblige the licensee to establish an exclusive distribution system to sell the contract products. However, to be able to benefit from the VABEO, the licensee must in principle ensure that its distributors of contract products remain free to make passive sales into territories allocated to other exclusive distributors appointed by the licensee.[130]

4.50 Furthermore, for a distribution agreement to be able to benefit from the VABEO, distributors of the contract products produced by the licensee must in principle be free to sell both actively and passively into territories covered by the distribution systems of other suppliers, that is to say, other licensees producing their own contract products on the basis of the licensed technology rights.[131] That is because, for the purposes of the VABEO, each licensee is a separate supplier.

4.51 However, the reasons underlying the block exempting of active sales restrictions within a supplier's distribution system contained in the VABEO, may also apply where the contract products incorporating the licensed technology are sold by different licensees under a common brand belonging to the licensor. When the products incorporating the licensed technology are sold under a common brand identity, there may be the same efficiency reasons for applying the same types of restraints between licensees' distribution systems for those contract products as within a single vertical distribution system. In such cases, the CMA would be unlikely to challenge

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[129] Vertical agreements block exemption order guidance
[130] See Article 8(2)(b) and Article 8(3)(a) of the VABEO.
[131] Ibid.

restraints where, by analogy, the requirements of the VABEO would be satisfied. For a common brand identity to exist, the products must be sold and marketed under a common brand, capable of conveying quality and other relevant information to the consumer. It is not sufficient that, in addition to the licensees' brands, the product carries the licensor's brand, which identifies it as the source of the licensed technology.

5. Market share and other thresholds in the TTBEO (Article 5)

5.1 The block exemption provided by the TTBEO has effect subject to the conditions set out in TTBEO.[132] This part of the Guidance provides guidance on the conditions set out in Article 5 of the TTBEO which relate to market share and other thresholds.

5.2 The conditions in Article 5 are as follows:

(a) where the parties to the technology transfer agreement are competing undertakings:

(i) the combined market share of the parties does not exceed 20% of any relevant market for the contract products, and

(ii) either

i. the combined market share of the parties does not exceed 20% of any relevant market for the licensed technology rights; or

ii. there are three or more independent competing technology rights.[133]

(b) where the parties to the technology transfer agreement are not competing undertakings:

(i) the market share of each party does not exceed 30% of any relevant market for the contract products, and

(ii) either

i. the market share of each party does not exceed 30% of any relevant market for the licensed technology rights; or

ii. there are three or more independent competing technology rights.[134]

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[132] See Articles 4 to 8 of the TTBEO and paragraph 4.2 above.
[133] See Articles 5(1) and (2) of the TTBEO.
[134] See Articles 5(3) and (4) of the TTBEO.

5.3 The market share thresholds apply both to the relevant market(s) for the contract products and for the licensed technology rights. Paragraphs 3.39 to 3.48 above discuss market definition.

5.4 A technology transfer agreement that exceeds the applicable market share thresholds for any relevant market for the contract products will breach the conditions of Article 5 of the TTBEO.

5.5 A technology transfer agreement will also breach the conditions of Article 5 of the TTBEO if either it exceeds the applicable market share threshold for any relevant market for the licensed technology rights or alternatively, if there are fewer than three or more independent competing technology rights. For the avoidance of doubt these two sub-conditions are alternatives in respect of the relevant market for the licensed technology rights. This means that a technology transfer agreement does not need to satisfy both the applicable market share threshold for the licensed technology rights and the requirement for there to be three or more independent competing technology rights.

5.6 Breach of any of the applicable conditions in Article 5 has the effect of cancelling the block exemption in respect of a technology transfer agreement, unless the applicable condition was met initially and only subsequently breached.[135] In the latter situation, the breach will have the effect of cancelling the block exemption in respect of agreement only from the end of three consecutive calendar years following the calendar year in which the applicable condition was first breached.[136]

5.7 Where a block exemption is cancelled in respect of a technology transfer agreement, that agreement will require an individual assessment under the Chapter I prohibition.

5.8 The remaining part of this Guidance discusses:

(a) Calculating market share thresholds under the TTBEO.

(b) The three or more independent competing technology rights threshold.

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[135] See Article 9(1) of the TTBEO.
[136] See Article 9(2) of the TTBEO.

Applicable market share thresholds

5.9 The applicable market share threshold for the purpose of the safe harbour of the TTBEO depends on whether the agreement is concluded between competing undertakings.

Competing undertakings

5.10 For the purposes of the TTBEO, Article 5(5) of the TTBEO provides that undertakings party to a technology agreement are competing undertakings if—

(a) they are both an actual competitor on the relevant market for the licensed technology rights, and if there is more than one relevant market for the licensed technology rights, they are both an actual competitor on the same relevant market, or

(b) they are both an actual competitor or a potential competitor on the relevant market for the contract products, and if there is more than one relevant market for the contract products, they are both an actual competitor or potential competitor on the same relevant market.

5.11 For these purposes, Article 5(6) of the TTBEO provides that, an undertaking party to a technology transfer agreement is—

(a) an actual competitor on a relevant market for the licensed technology rights, if it grants licences of technology rights on that relevant market;

(b) an actual competitor on a relevant market for the contract products if, ignoring the technology transfer agreement, it sells products on that relevant market;

(c) a potential competitor on a relevant market for the contract products if, ignoring the technology transfer agreement, it would, on realistic grounds and not just as a mere theoretical possibility, in response to a small and permanent increase in relative prices, be likely to undertake the necessary additional investments or incur other necessary costs to enter that relevant market within a period of time that is sufficiently short to impose competitive pressure on undertakings that are already selling products on that relevant market.

5.12 It therefore follows from Article 5(5) of the TTBEO that, for the application of the market share threshold in Article 5(2) and the assessment of hardcore restrictions relating to agreements between competitors, potential competition on the licensed technology rights market is not taken into account. Outside of

the TTBEO, potential competition on the technology market is taken into account when assessing a technology transfer agreement under the Chapter I prohibition.

Market share threshold condition — competing undertakings

5.13 Where the parties to a technology transfer agreement are competing undertakings for the purposes of the TTBEO, the market share threshold condition set out in Article 5(2) of the TTBEO is that the parties' combined market share does not exceed 20% on any relevant product and licensed technology rights market(s).[137]

5.14 Where the undertakings party to the technology transfer agreement become competing undertakings within the meaning of Article 5(5) of the TTBEO at a later point in time (for example, where the licensee was already present on the relevant market for the contract products prior to licensing and the licensor subsequently becomes an actual or potential supplier on the same relevant market) the 20% combined market share threshold applicable to agreements between competing undertakings applies from the point in time at which they become competing undertakings. However, in such circumstances, the hardcore restrictions list applicable to agreements between non-competing undertakings continues to apply for the full life of the agreement, unless the agreement is subsequently amended in any material respect (see Article 7(9)(a) of the TTBEO and paragraph 3.63 of this Guidance).

Market share threshold condition — parties not competing undertakings

5.15 Where the undertakings party to the technology transfer agreement are not competing undertakings, the market share threshold condition set out in Article 5(4) of the TTBEO applies. This condition is that the market share of each party does not exceed 30% on the relevant markets affected by the agreement, namely the relevant market(s) for the licensed technology and the relevant market(s) for the contract products.[138]

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[137] Note that in respect of technology rights markets, Article 5(2)(b)(ii) sets out an alternative threshold of three or more independent competing technology rights. This is discussed at paragraphs 5.25-5.30 below.

[138] Note that in respect of technology rights markets, Article 5(2)(b)(ii) sets out an alternative threshold of three or more independent competing technology rights. This is discussed at paragraphs 5.25-5.30 below.

The calculation of market shares under the TTBEO

5.16 Article 6(1) of the TTBEO sets out rules for applying the market share thresholds. Where available, sales value data are to be used,[139] as such data generally provide a more accurate indication of the strength of a technology than volume-based data. However, where sales value-based data are not available, market shares are to be determined using other reliable market information, such as market sales volumes.[140] Market shares are to be calculated using data or information for the calendar year preceding that in which the calculation is being made.[141] However, where the data or information for the preceding calendar year are not representative of the parties' position in the relevant market(s), market shares are calculated as the average of the parties' market shares for the three preceding calendar years.[142]

The calculation of market shares for product markets

5.17 For the purposes of the TTBEO, the licensee's market share on the relevant markets where the contract products are sold is calculated on the basis of the licensee's sales of products incorporating the licensor's technology rights and sales of competing products. In other words, it is based on the total sales of the licensee on the product market in question. Where the licensor also supplies products on the relevant market, the licensor's own sales on the product market in question are taken into account. Sales made by other licensees are not taken into account for the purpose of calculating the licensee's or the licensor's market share on the relevant product market(s).

The calculation of market shares for technology market

5.18 Article 6(1)(d) of the TTBEO provides that the market share of any party on the relevant market for the licensed technology rights is to be calculated by reference to the presence of its technology rights on the relevant market for the contract products. This means that such a market share is to be calculated on the basis of data or information relating to the combined sales of the licensor and its licensees of products incorporating the licensor's technology rights expressed as a share of total sales of competing products on the relevant market(s) for the contract products, irrespective of whether

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[139] Article 6(1)(a) of the TTBEO.
[140] Ibid.
[141] Article 6(1)(b) of the TTBEO.
[142] Ibid. See also paragraph 5.57 of the Horizontal Agreements Guidance.

those competing products are produced using a technology that is being licensed. Where the licensee is itself active as a licensor on the relevant market for the licensed technology rights, the same method applies to the calculation of the market shares of both the licensor and the licensee.

5.19 This is called the 'footprint' approach to market-share calculation, as it involves calculating the market shares of the parties on relevant markets for the licensed technology rights by reference to the technology's 'footprint' at the product level. It is used for these purposes owing to the following considerations:

(a) There can be practical difficulties in calculating market shares on technology markets using royalty income (see paragraph 3.45 above); and

(b) Reliance solely on actual royalty income risks significantly underestimating a technology's market position where royalty payments are reduced as a result of cross-licensing or the supply of tied products. By contrast, the footprint at the product level will generally accurately reflect the market position of the technology and does not entail the same risk.

5.20 It follows from Article 5 and Article 6(1)(d) of the TTBEO that where a licensed technology has not generated sales of contract products in the preceding calendar year (for example, because the technology is new and products incorporating the technology have not yet been commercialised), the market share for the licensed technology rights is considered to be zero for that calendar year.

5.21 Ideally, products produced using in-house technologies that are not licensed out would be excluded from the product market for the purpose of calculating the footprint, as those in-house technologies are only an indirect constraint on the licensed technology. However, licensors and licensees may face practical difficulties in gauging whether other products in the same product market are produced with licensed or in house technologies. Thus, the calculation of the share of the relevant market for the licensed technology rights, for the purposes of the TTBEO, is based on the products produced with the licensed technology as a share of all products sold in that product market.

5.22 Whilst this approach may reduce the calculated market share by including products produced with in-house technologies, it will nonetheless provide an appropriate indicator of the market position of the licensed technology because:

(a) It captures potential competition from undertakings producing with their own technology which are likely to commence licensing if the licensor's terms deteriorate relative to those of other technology rights (for example, in the event of a small but permanent increase in licence fees charged by the licensor);

(b) Even where it is unlikely that other technology owners would start licensing, the licensor does not necessarily have market power on the technology market even if it has a high share of licensing income; and

(c) Where the downstream product market is competitive, competition at that level may effectively constrain the licensor. An increase in royalties at the upstream level raises the licensee's costs, reduces its competitiveness and may thereby cause a loss of sales. The technology rights' footprint on the product market also captures this element and is therefore ordinarily a good indicator of licensor market power on the technology market.

5.23 In assessing the market position of the licensed technology, the geographic dimension of the technology market must also be taken into account. The geographic scope of the technology market may, in certain cases, differ from that of the corresponding downstream product market. For the purpose of applying the TTBEO, the geographic dimension of the relevant technology market is also determined by reference to the product market(s). However, outside the TTBEO safe harbour, it may be appropriate to consider a wider geographic area, in which the licensor and licensees of competing technologies are active, in which the conditions of competition are sufficiently homogeneous and where the area can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

5.24 Pursuant to Article 9(2) of the TTBEO, where, during the life of the agreement, the parties' market share(s) exceed the relevant threshold of 20% or 30%, the safe harbour continues to apply for a period of three consecutive calendar years following the year in which the threshold was exceeded. After the expiry of that period, the block exemption will be cancelled in respect of the technology transfer agreement, if any of those thresholds continue to be exceeded.

The three or more independent competing technology rights threshold

5.25 Market shares remain an important and generally workable method for assessing market power where calculation is feasible. However, there are circumstances, particularly in technology markets, where reliable market

share data may not be available, or where market share calculations are not practicable or do not render meaningful results (see the 'footprint' approach in paragraph 5.19 above or an example of an alternative approach in such circumstances).

5.26 To address these circumstances, the TTBEO provides an alternative to the applicable market share thresholds in respect of technology (but not product) markets. This is the 'three or more independent competing technology rights' threshold set out in Articles 5(2)(b)(ii) and 5(4)(b)(ii) of the TTBEO. Unlike the market share thresholds set out in Article 5, this threshold applies equally to technology transfer agreements between competing and non-competing undertakings. The inclusion of this alternative threshold can enable the block exemption to continue to apply to categories of agreements that are likely to satisfy the conditions of the Section 9, where the calculation of technology market shares is difficult, unreliable, or impracticable.

5.27 Article 5(7) of the TTBEO provides that 'independent competing technology rights' refers to technology rights that are owned or controlled by a third party, and that compete with the licensed technology rights. In accordance with Article 5(7)(b) of the TTBEO, technology rights will be considered competing where, having regard to their characteristics, the royalties payable, their commercial strength and their intended use, they are interchangeable with, or substitutable for, the licensed technology rights.

5.28 Therefore, when applying this alternative test, only technology rights which exert genuine competitive pressure are to be taken into account. Obsolete or clearly inferior technologies should not be counted. Furthermore, technology rights that provide only a limited competitive constraint, such as where competing rights cover only a small part of the market relative to the parties' technology rights, should not be treated as effective competing technology rights for the purposes of the assessment.

5.29 The assessment for the purposes of this threshold may take into account, in particular, the following factors:

(a) Stage and development of competing technologies. The size, stage of development and timing of the relevant technology rights, including whether the technology rights are already commercially available, close to commercialisation, or still at an early stage of development. Technology rights that are sufficiently advanced to be licensed and implemented within a reasonable period may constitute credible substitutes.

(b) Technical substitutability. Whether the alternative technology rights are technically capable of achieving comparable functionality or performance,

such that downstream producers could reasonably switch between them in order to manufacture substitutable products.

(c) Commercial viability and adoption. Whether the competing technologies are commercially viable alternatives, taking into account factors such as expected implementation costs, switching costs, regulatory requirements, compatibility with existing production processes and the expected timeframe for adoption.

5.30 Technology rights may be regarded as competing technologies where, having regard to these factors, they constitute realistic and sufficiently immediate alternatives for licensees seeking access to technology rights for the production of the relevant products.

5.31 The principles set out in this part can be illustrated by the following examples:

Examples concerning licensing between non-competitors

Example 1

Company A (the licensor) is active in the development of advanced industrial process technologies and has developed a material technology, Technology Z (the licensed technology), for which there are also three independent competing technology rights. Company A is not active in the manufacture or supply of products incorporating Technology Z and does not have manufacturing or distribution facilities for such products.

Company B (the first licensee) is an established supplier of substitutable products manufactured using generally available, non-proprietary technologies. In Year 1, Company B generated sales of approximately £27 million from products manufactured using those technologies.

In Year 2, Company A grants a licence to Company B to manufacture products incorporating Technology Z. In that year, Company B generated sales of approximately £16 million from products manufactured using generally available technologies and approximately £16 million from products incorporating the licensed technology. In Year 3 and subsequent years, Company B manufactures and supplies only products incorporating the licensed technology, generating annual sales of approximately £41 million.

Also in Year 2, the licensor grants a licence to a second licensee, Company C, which was not previously active on the relevant product market. Company C manufactures and supplies only products incorporating Technology Z, generating sales of approximately £20 million in Year 2 and approximately £25 million in Year 3 and subsequent years.

The total value of the relevant product market, comprising products incorporating Technology Z and substitutable products, is approximately £205 million in each year.

In Year 2, being the year in which the licence agreements are concluded, Company A's market share on the relevant market for the licensed technology rights is 0%, as, for the purposes of applying the TTBEO, market shares are calculated on the basis of sales of products incorporating the licensed technology in the preceding year. In Year 3, Company A's market share on the relevant market for the licensed technology rights is approximately 17%, reflecting the value of products incorporating Technology Z manufactured by the first and the second licensee in Year 2. In Year 4 and subsequent years, Company A's share of the relevant market for the licensed technology rights is approximately 32%, reflecting the value of products incorporating Technology Z manufactured by the first and second licensee in the preceding year.

In Year 2, Company B's market share on the relevant product market is approximately 13%, reflecting sales of £27 million in Year 1. In Year 3, Company B's market share is approximately 15%, reflecting sales of £32 million in Year 2. In Year 4 and subsequent years, the Company B's market share is approximately 20%, reflecting annual sales of £41 million.

Company C's market share on the relevant product market is 0% in Years 1 and 2, approximately10% in Year 3, and approximately 12% thereafter.

Since licence agreements between Company A (the licensor) and Company B (the first licensee), and between Company A (the licensor) and Company C (the second licensee), are concluded between non-competing undertakings, the applicable market share thresholds are 30% for each of the parties. The individual product market shares of each of the parties remain below the 30% threshold in each relevant year.

Although Company A's share of the relevant market for the licensed technology rights exceeds 30% from year 4 onwards, there are nevertheless three independent competing technology rights. Each technology transfer agreement therefore meets the conditions Article 5(4) of the TTBEO, benefits from the block exemption provided by the TTBEO.

Example 2

The situation is the same as in the preceding example. However, in this case, Company B (the first licensee) and Company C (the second licensee) are active in different geographic product markets. It is established that, in each geographic market, the total value of products incorporating Technology Z and substitutable products is approximately £110 million per year.

There are also three independent competing technology rights in each market.

In these circumstances, the licensor's market share on the relevant markets for the licensed technology rights must be calculated separately for each geographic product market, by reference to product sales data for each market.

In the geographic market in which Company B (the first licensee) is active, Company A's market share of the relevant market for the licensed technology rights depends on sales of products incorporating the licensed technology by the first licensee. As the total market value in this example is assumed to be approximately £110 million, that is, around half the size of the market considered in the preceding example, Company B's market share in that geographic market is 0% in Year 2, approximately 14.5% in Year 3, and approximately 37.3% in Year 4 and subsequent years.

Company B's market share in that geographic product market is approximately 24.5% in Year 2, approximately 29.1% in Year 3, and approximately 37.3% in Year 4 and subsequent years.

In Years 2 and 3, the individual market shares of both Company A and Company B licensees do not exceed the 30% threshold respectively in the relevant markets for the licensed technology rights and the relevant product markets. Those thresholds are, however, exceeded from Year 4 onwards.

With respect to the technology market, there are three or more independent competing technology rights. Nevertheless, the conditions in Article 5(4)(a) of the TTBEO have not been met from Year 4 onward, as Company B's share of the relevant market for the contract products now exceeds 30%. For the block exemption to apply, the conditions in both Article 5(4)(a) and (b) of the TTBEO must be met.

As a result, and in accordance with Article 9(2) of the TTBEO, after Year 7 (i.e. after the end of three consecutive calendar years following the year in which the relevant condition was breached) the licence agreement between Company A and Company B can no longer benefit from the safe harbour and must be assessed on an individual basis.

In the geographic market in which Company B, the second licensee, is active, the licensor's market share of the relevant market for the licensed technology rights depends on sales of products incorporating the licensed technology by the second licensee. On the basis of the second licensee's sales in the preceding year, Company A's market share on the relevant market for the licensed technology rights is therefore 0% in Year 2, approximately 9% in Year 3, and approximately 14% in Year 4 and subsequent years.

The market share of Company B, the second license, on the relevant product market is the same, namely 0% in Year 2, approximately 9% in Year 3, and approximately 14% in Year 4 and subsequent years.

The conditions in Article 5(4)(a) and (b) have been met. Accordingly, the licence agreement between the licensor and the second licensee falls within the safe harbour provided by the Technology Transfer Block Exemption Order for the entire period.

Examples concerning licensing between competitors

Example 3

Two undertakings (the parties) are active on the same relevant product and geographic market for a particular industrial product. Each party holds a patent relating to a distinct technology used in the manufacture of that product.

In Year 1, the parties enter into a reciprocal licence agreement,[143] pursuant to which each party licenses the other to use its respective technology. In that year, each party manufactures the product exclusively using its own technology. One party generates sales of approximately £16 million, while the other generates sales of approximately £21 million.

From Year 2, each party manufactures the product using both its own technology and the technology licensed from the other party. From that year onwards, the first party generates sales of approximately £11 million from products manufactured using its own technology and £11 million from products manufactured using the licensed technology. Over the same period, the second party generates sales of approximately £16 million from products manufactured using its own technology and

[143] See paragraph 6.13 below for the meaning of reciprocal licence agreement.

approximately £11 million from products manufactured using the licensed technology.

The total value of the relevant product market, comprising the product and its substitutes, is approximately £105 million in each year.

For the purposes of applying the market share thresholds in the TTBEO, the market shares of the parties must be assessed both on the relevant market for the licensed technology rights and on the relevant market for the contract products.

The market share of each party on the relevant market for the licensed technology rights depends on the value of products sold in the preceding year that were manufactured, by either party, using that party's technology. In Year 2, the first party's market share on the relevant market for the licensed technology rights is therefore approximately 15%, reflecting its own production and sales of £16 million in Year 1. From Year 3 onwards, its market share on the relevant market for the licensed technology rights is approximately 21%, reflecting combined sales of approximately £22 million of products manufactured using its technology by both parties.

Similarly, in Year 2, the second party's market share on the relevant market for the licensed technology rights is approximately 20%, increasing to approximately 26% from Year 3 onwards.

The market shares of the parties on the product market are calculated by reference to their respective sales of the product in the preceding year, irrespective of the technology used. On that basis, the first party's market share on the product market is approximately 15% in Year 2 and approximately 21% thereafter. The second party's market share on the product market is approximately 20% in Year 2 and approximately 26% thereafter.

Throughout this period, there are two independent competing technology rights to the parties' own technology rights.

As the licence agreement is concluded between competing undertakings, their combined market share, both on the technology market and on the product market, must not exceed the 20% threshold in order to benefit from the safe harbour provided by the TTBEO. The conditions set out in Article 5(2) of the TTEBO are not satisfied in this case. The parties' combined market share on both the relevant market for the licensed technology rights and the product market is approximately 35% in Year 2 and approximately 47% thereafter.

Accordingly, the reciprocal licence agreement between the parties does not benefit from the block exemption provided by the TTBEO and must be assessed on an individual basis.

6. Hardcore restrictions (Article 7)

6.1 This part of the Guidance considers the conditions in Article 7 of the TTBEO concerning hardcore restrictions. Breach of any of the applicable conditions in Article 7 of the TTBEO has the effect of cancelling the block exemption provided by the TTBEO in respect of the technology transfer agreement concerned.[144]

6.2 Where a block exemption is cancelled in respect of a technology transfer agreement, that agreement will require an individual assessment under the Chapter I prohibition.

6.3 The remainder of this part of the Guidance considers:

(a) general principles relating to hardcore restrictions;

(b) hardcore restrictions in agreements between competitors:

(i) price restrictions between competitors;

(ii) output restrictions between competitors;

(iii) market and customer allocation between competitors;

(iv) restrictions on the parties' abilities to carry out research and development;

(v) restrictions on the use of the licensee's own technology.

(c) Hardcore restrictions in agreements between non-competitors:

(i) price fixing;

(ii) restrictions on the licensee's ability to make passive sales.

General principles

6.4 Article 7(2) and Article 7(5) of the TTBEO set out what constitute hardcore restrictions in respectively technology transfer agreements between competing undertakings and in technology transfer agreements between non-competing undertakings. Article 5(5) the TTBEO sets out when undertakings party to a technology transfer agreement are competing undertakings.[145]

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[144] See Article 9(1) of the TTBEO.
[145] See also paragraph 3.49—3.63 for discussion of when undertakings are competing undertakings for the purposes of the TTBEO.

Hardcore restrictions are serious restrictions of competition for the purposes of such agreements. Technology transfer agreements that include one or more hardcore restrictions for the purposes of the agreement in question cannot benefit of the block exemption provided by the TTBEO.[146]

6.5 The hardcore restrictions listed in Articles 7(2) and 7(5) of the TTBEO are generally restrictions of competition by object which fall within the Chapter I prohibition.[147] Restrictions of competition by object within the meaning of the Chapter I prohibition are agreements which, by their very nature, have the potential to prevent, restrict or distort competition.[148] In that regard, certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects.[149]

6.6 However, to say that a restriction is a hardcore restriction for the purposes of the TTBEO is not the same as saying that it is a restriction of competition by object for the purposes of the Chapter I prohibition.[150] Under the TTBEO, hardcore restrictions are restrictions which for the purposes of the TTBEO it is presumed will generally result in harm to competition, such that a technology transfer agreement containing such a hardcore restriction cannot benefit from the block exemption provided by the TTBEO. It must then be examined individually to determine whether it has the object or effect of restricting competition and if so whether it can benefit individually from the application of the Section 9 exemption.

6.7 In the light of the above, the CMA will nevertheless adopt the following approach when assessing a technology transfer agreement:

(a) A technology transfer agreement that includes a hardcore restriction under the TTBEO for the purposes of the agreement in question is likely to fall within the Chapter I prohibition.

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[146] See Article 9(1) of the TTBEO

[147] European Commission Guidance (2014) on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD 198, which is a statement of the European Commission for the purpose of Section 60A CA98.

[148] See judgment of the CJEU of 20 January 2016, *Toshiba Corporation v Commission*, C-373/14 P, EU:C:2016:26, paragraph 26 and judgment of 4 June 2009, *T-Mobile Netherlands*, C-8/08, EU:C:2009:343, paragraphs 29 and 31 and see paragraph 3.16 above.

[149] See judgment of the CJEU of 2 April 2020, *Budapest Bank and Others*, Case C-228/18, EU:C:2020:265, paragraphs 35 to 37 and case law cited. See judgment of the CJEU of 11 September 2014, *Groupement des Cartes Bancaires*, C-67/13 P, EU:C:2014:2204, paragraph 49.

[150] See by analogy *Ping Europe Limited v Competition and Markets Authority* [2020] EWCA Civ 13, paragraph 29, in which the Court of Appeal held that 'to say that a restriction is a hardcore restriction for the purposes of Regulation 330/2010 is not the same as saying that it is a restriction by object for the purposes of Article 101(1).

(b) The inclusion of a hardcore restriction under the TTBEO for the purposes of the technology transfer agreement in question will have the effect of cancelling the benefit of the block exemption provided by the TTBEO in relation to that agreement.

(c) A technology transfer agreement that includes a hardcore restriction under the TTBEO for the purposes of the agreement in question is unlikely to fulfil the conditions of the Section 9 exemption.

6.8 Parties to a particular technology transfer agreement that does not benefit from block exemption under the TTBEO may nevertheless be able to demonstrate pro-competitive effects which fulfil the conditions of the Section 9 exemption, and the CMA will carefully consider these efficiency justifications in any investigation under the CA98. For this purpose, when seeking to demonstrate that all the conditions of the Section 9 exemption are fulfilled, the undertaking should substantiate the efficiencies that are likely and that these efficiencies are likely to result from including the hardcore restriction in the agreement. Where this is the case, the negative impact on competition that is likely to result from including the hardcore restriction in the agreement should be assessed before making an ultimate assessment of whether the conditions of the Section 9 exemption are fulfilled (see further paragraphs 11.20 to 11.25).[151]

Agreements between competitors

6.9 As noted above, what constitutes a hardcore restriction under Article 7 depends upon whether the technology transfer agreement in question is concluded between competing undertakings or between non-competitors.

6.10 Article 7(2) of the TTBEO lists the hardcore restrictions for technology transfer agreements between competitors. There are provisions which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object any of the following:

(a) the restriction of a party's ability to determine its prices when selling products to third parties;

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[151] See for general guidance on the application of the conditions for exemption under the Section 9 exemption, the Communication from the Commission – Notice – Guidelines on the application of Article 101(3) of the Treaty, OJ C 101, 27.4.2004, p. 97. The Guidelines on the application of the Article 101(3) of the Treaty is a statement of the European Commission for the purpose of Section 60A CA98.

(b) the limitation of output, except limitations on the output of contract products imposed on the licensee in a non-reciprocal agreement or imposed on only one of the licensees in a reciprocal agreement;

(c) the allocation of markets or customers, subject to the exceptions set out in Article 7(3) of the TTBEO, which are discussed in paragraphs 6.22 to 6.28 below);

(d) the restriction of the licensee's ability to exploit its own technology rights; or

(e) the restriction of the ability of either of the parties to the agreement to carry out research and development, unless that restriction is indispensable to prevent the disclosure of the know-how licensed under the agreement to third parties.

6.11 Article 7(3) of the TTBEO provides a list of exceptions by which the restriction on the allocation of markets or customers does not constitute a hardcore restriction falling within Article 7(2)(c) of the TTBEO. The exceptions are as follows:

(a) an obligation on the licensors or the licensee, in a non-reciprocal agreement—

(i) not to produce products with the licensed technology rights within the exclusive territory reserved for the other party; or

(ii) not to sell the contract products actively or passively into the exclusive territory or to the exclusive customer group reserved for the other party.

(b) the restriction, in a non-reciprocal agreement, of active sales of the contract products by the licensee into the exclusive territory or to the exclusive customer group allocated by the licensor to another, third party, licensee (L) provided L and the licensor were not competing undertakings at the time of the conclusion of the licensing agreement between them;

(c) an obligation on the licensee to produce the contract products only for its own use, provided that, where the licensee incorporates the contract products into its own products, it is not restricted from selling the contract products actively or passively as spare parts for its own products;

(d) an obligation on the licensee, in a non-reciprocal agreement, to produce the contract products only for a particular customer, where the licence

was granted in order to create an alternative source of supply for that customer.

Distinction between reciprocal and non-reciprocal agreements between competing undertakings

6.12 For the purposes of certain hardcore restrictions, the TTBEO distinguishes between reciprocal and non-reciprocal agreements. The list of hardcore restrictions applicable to reciprocal agreements between competitors is more extensive than that applicable to non-reciprocal agreements between competitors.

6.13 Reciprocal agreements are technology transfer agreements under which two undertakings grant each other, whether in the same or separate agreements, a licence of technology rights for the purposes of the production of products, where the licensed technology rights cover competing technologies or can be used for the production of competing products.[152] By contrast, a non-reciprocal agreement is a technology transfer agreement under which one undertaking grants another undertaking a licence of technology rights for the purposes of the production of products, or two undertakings grant each other such a licence, and those licences do not concern competing technology rights and cannot be used for the production of competing products.[153] An agreement does not qualify as reciprocal for the purposes of the TTBEO solely because it contains a grant-back obligation or because the licensee licenses back its own improvements to the licensed technology.[154]

6.14 Where an agreement that is initially non-reciprocal subsequently becomes reciprocal as a result of the conclusion of a second licence between the same parties, the parties may be required to revise the first licence in order to ensure that the agreement does not contain a hardcore restriction. In assessing such cases, the CMA will take into account the length of time between the conclusion of the first and the second licence.

Price restrictions between competitors

6.15 The hardcore restriction contained in Article 7(2)(a) of the TTBEO concerns agreements between competitors which have as their object the fixing of prices for products sold to third parties, including the products incorporating the licensed technology rights. Price fixing between competitors generally

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[152] See Article 7(10) of the TTBEO.

[153] Ibid.

[154] See paragraphs 7.4 to 7.9 below for a discussion of grant-back obligations.

constitutes a restriction of competition by object. Price fixing may take the form of an agreement on the exact price to be charged or on a price list with certain allowed maximum rebates. It is immaterial whether the agreement concerns fixed, minimum, maximum or recommended prices. Price fixing may also be implemented indirectly, for example by applying disincentives to deviate from an agreed price level, such as providing that the royalty rate will increase if product prices are reduced below a certain level. However, an obligation on the licensee to pay a specified minimum royalty does not, in itself, amount to price fixing.

6.16 Where royalties are calculated on the basis of individual product sales, the amount of the royalty has a direct impact on the marginal cost of the product and, consequently, on product prices.[155] Competitors may therefore use cross-licensing arrangements with reciprocal running royalties as a means of coordinating and/or increasing prices on downstream product markets.[156] However, the CMA will only treat cross licence agreements with reciprocal running royalties as price fixing in specific circumstances, such as where the agreement provides for the payment of royalties irrespective of whether the technology rights are actually used, or where the agreement lacks any pro-competitive purpose and therefore does not constitute a bona fide licensing arrangement.

6.17 Exceptionally, an agreement under which royalties are calculated on the basis of all product sales may, in an individual case, satisfy the conditions of the Section 9 exemption where, on the basis of objective factors, it can be concluded that the restriction is indispensable for pro-competitive licensing to take place. This may be the case, for example, where, in the absence of the restriction, it would be impossible or unduly difficult to calculate and monitor the royalty payable by the licensee, for instance because the licensor's technology leaves no identifiable trace on the final product and no practicable alternative monitoring methods are available.

Output restrictions between competitors

6.18 The hardcore restriction contained in Article 7(2)(b) of the TTBEO concerns agreements between competitors which contain reciprocal output restrictions. An output restriction is a limitation on the quantity of products a party may produce or sell. Article 7(2)(b) does not apply to output limitations on the

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[155] See in this respect paragraph 98 of the European Commission Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, to which the CMA will have regard in accordance with Section 60A CA98.
[156] That is also the case where one party grants a licence to the other party and accepts to buy a physical input from the licensee. The purchase price can serve the same function as the royalty.

licensee in a non-reciprocal agreement, nor to output limitations on only one of the licensees in a reciprocal agreement, provided that the output limitation only concerns products produced with the licensed technology rights. By contrast, Article 7(2)(b) categorises as hardcore restrictions reciprocal output restrictions as well as output restrictions imposed on either party – whether a licensor or licensee – in respect of that party's use of its own technology. Where competitors agree to impose reciprocal output limitations, the object and likely effect of the agreement is to reduce output in the market. The same applies to agreements that reduce the parties' incentive to expand output, including through reciprocal running royalties per unit which increase as output increases or through reciprocal obligations to make payments once a specified output threshold is exceeded.

6.19 The more favourable treatment of non-reciprocal output limitations is based on the consideration that a one-way restriction does not necessarily result in a reduction of overall market output and entails a lower risk that the agreement is not a bona fide licensing arrangement. Acceptance by the licensee of a one-way output limitation may indicate that the agreement will result in a real integration of complementary technology rights or an efficiency-enhancing integration of the licensor's superior technology rights with the licensee's production assets. Similarly, in a reciprocal agreement, an output restriction imposed on only one of the licensees is likely to reflect the difference in the value of the licensed technology rights and may facilitate pro-competitive licensing.

Market and customer allocation between competitors

The hardcore restriction on market and customer allocation

6.20 The hardcore restriction contained in Article 7(2)(c) of the TTBEO concerns agreements between competitors which involve the allocation of markets or customers. Agreements under which competitors allocate markets or customers generally constitute restrictions of competition by object. In particular, a reciprocal agreement under which competitors agree not to produce in certain territories or not to sell, whether actively, passively or both, into certain territories or to certain customers allocated to the other party constitutes a hardcore restriction. Reciprocal exclusive licensing arrangements between competitors therefore amount to market allocation for the purposes of Article 7(2)(c) of the TTBEO.

6.21 Article 7(2)(c) of the TTBEO applies to a market allocation restriction irrespective of whether the licensee remains free to use its own technology rights. Once a licensee has invested in adapting its production facilities to use

the licensed technology for a given product, it may be costly to maintain a separate production line based on an alternative technology in order to supply customers not covered by the restriction. In addition, in the light of the anti-competitive potential of such restraints, the licensee may have limited incentive to produce using its own technology rights. Such restrictions are also, as a general rule, unlikely to be indispensable for pro-competitive licensing to take place.

The exceptions to the hardcore restriction on market and customer allocation

6.22 Article 7(3)(a)(i) of the TTBEO provides that, in a non-reciprocal agreement, it is not a hardcore restriction for the licensor to grant the licensee an exclusive licence to produce using the licensed technology in a particular territory and, as a result, to agree not to produce or supply the contract products in or from that territory. Such exclusive licences benefit from the block exemption irrespective of the geographic scope of the territory concerned, provided they otherwise satisfy the conditions of the TTBEO. In a worldwide licence, exclusivity implies that the licensor will abstain from entering or remaining on the market. Provided the conditions of the TTBEO are otherwise satisfied, the block exemption provided by the TTBEO also applies to a non-reciprocal agreement, where the licensee is obliged not to produce using the licensed technology rights in an exclusive territory reserved for the licensor. Such arrangements may be intended to create incentives for the licensor, the licensee, or both, to invest in and develop the licensed technology and therefore do not necessarily have as their object the allocation or sharing of markets.

6.23 By virtue of Article 7(3)(a)(ii) of the TTBEO, provided the conditions in the TTBEO are otherwise met, the block exemption provided by the TTBEO also applies to non-reciprocal agreements under which the parties agree not to sell the contract products, whether actively, passively or both, into a territory or to a customer group exclusively reserved for the other party. 'Active' and 'passive' sales are defined in Article 7(10) of the TTBEO.[157] Restrictions of the

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[157] "Active sales" means—
(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

ability of the licensee or licensor to sell actively, passively, or both, into the other party's territory or customer group can only be block-exempted where that territory or customer group has been exclusively reserved to that other party.

6.24 In specific circumstances, agreements containing such sales restrictions may, in an individual case, also satisfy the conditions of the Section 9 exemption where exclusivity is shared on an ad hoc basis, for example where this is necessary to address a temporary shortage in the production capacity of the party to which the territory or customer group is exclusively allocated.

6.25 By implication, the appointment by a licensor of a sole licensee for a particular territory, such that no third parties are licensed to produce using the licensed technology rights in that territory, does not constitute a hardcore restriction.[158] In the case of such sole licences, provided that the conditions in the TTBEO are otherwise met, the block exemption provided by the TTBEO applies irrespective of whether the agreement is reciprocal or on-reciprocal, as the agreement does not affect the parties' ability to exploit their own technology rights in their respective territories.

6.26 Article 7(3)(b) of the TTBEO provides that, in a non-reciprocal agreement, it is not a hardcore restriction to restrict active sales of contract products by a licensee into a territory or to a customer group allocated by the licensor to another licensee provided that the protected licensee was not a competitor of the licensor at the time the agreement was concluded. In such circumstances, it is not appropriate to treat the restriction as a hardcore restriction. By enabling the licensor to protect a licensee that was not previously active on

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(e) using a domain name corresponding to a geographical area other than the one in which the distributor is established.

"Passive sales" means—

(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, in that, for example, it would be attractive for the buyer to incur the costs of the general advertising or promotion concerned even if it would not reach customers in other distributors' geographical areas or customer groups (whether exclusive or not), or

(c) participating in a public procurement exercise undertaken in accordance with—(i) the Procurement Act 2023, or (ii) in respect of a public authority that is a devolved Scottish authority, the Public Contracts (Scotland) Regulations 2015(**a**), the Concession Contracts (Scotland) Regulations 2016(**b**) or the Utilities Contracts (Scotland) Regulations 2016(**c**).

For further guidance on the concepts of 'active' and 'passive' sales, see paragraphs 211—215 of the Vertical Agreements Guidance.

[158] See paragraph 11.38 below for a discussion of sole licences.

the relevant market against active sales by licensees that are competitors of the licensor and already established on that market, such restrictions may facilitate the effective and efficient exploitation of the licensed technology rights. By contrast, agreements between licensees to restrict active or passive sales into particular territories or to particular customer groups would amount to a cartel between licensees and, as they do not involve any transfer of technology rights, would fall outside the scope of the TTBEO.

6.27 Article 7(3)(c) of the TTBEO further provides that so-called captive use restrictions do not constitute hardcore restrictions. These are provisions obliging the licensee to manufacture products incorporating the licensed technology exclusively for its own internal use. Where the contract product is a component, the licensee may therefore be required to produce that component only for incorporation into its own products and not to sell the components to other producers. However, the licensee must remain free to sell the components as spare parts for its own products, including to supply third parties engaged in aftersales servicing for those products. Captive use restrictions may be necessary to facilitate dissemination of technology rights, in particular between competitors, and are covered by the block exemption. These restrictions are considered further in Part 11 of this Guidance.

6.28 Article 7(3)(d) of the TTBEO provides that, in a non-reciprocal agreement, it is not a hardcore restriction to oblige the licensee to manufacture the contract products for exclusive supply to a specified customer. The application of this provision is conditional on the licence being granted for the purpose of establishing an alternative source of supply for that customer. The exception is not limited to situations where only a single licence is granted, and it may apply where more than one undertaking is authorised to supply the same customer. The duration of the licence is not decisive. For example, a licence granted for the purpose of fulfilling a one-off project for a particular customer may fall within this provision. Where licensing is confined in this way, the scope for market sharing is limited and, in such circumstances, it cannot be assumed that the licensee will cease to exploit its own technology.

6.29 Field of use restrictions, ie restrictions which limit the field of use of the licensed technology rights to particular product markets, technical applications or industrial sectors, are not treated as hardcore restrictions in agreements between competitors.[159] Provided the conditions in the TTBEO are otherwise met, such field of use limitations may therefore benefit from the block exemption provided by the TTBEO, regardless of whether the agreement is reciprocal or non-reciprocal. These restrictions are not, in themselves,

[159] For more detail on field of use restrictions see Part 11 of this Guidance.

regarded as amounting to market or customer allocation. However, the block exemption applies in such circumstances only where the restriction is limited to the use of the licensed technology rights. For example, where the agreement also limits the parties' ability to use their own technology rights in certain technical fields, this will instead amount to market sharing and a hardcore restriction for the purposes of the TTBEO.

6.30 Field of use restrictions will benefit from the block exemption regardless of whether they are structured symmetrically or asymmetrically. In a reciprocal arrangement, an asymmetrical restriction allows each party to use the technology rights licensed from the other only for different fields of use. Provided that each party remains free to exploit its own technology rights without restriction, there is no presumption that the agreement will lead to exit from, or deter entry into, the fields covered by the licence to the other party. Investment in production assets to use the licensed technology rights within the agreed field does not necessarily affect production outside that field. The assessment differs where restrictions are framed by reference to customers or territories within the same product market, sector or technical application, as the risk of market sharing is materially higher in those circumstances (see paragraph 6.20). Field of use restrictions may, in appropriate cases, support pro-competitive licensing (see paragraph 11.64).

Restrictions on the parties' ability to carry out research and development

6.31 The hardcore restriction contained in Article 7(2)(e) of the TTBEO concerns agreements between competitors which restrict either party's ability to carry out research and development independently. As a general rule, each party must remain free to undertake its own research and development activities, regardless of whether those activities relate to areas covered by the licence or to other fields. The inclusion in an agreement of an obligation to exchange or grant access to future improvements of the parties' respective technology rights does not, of itself, restrict the ability to carry out independent research and development. The competitive impact of such arrangements depends on the circumstances of the individual case and requires case-by-case assessment.

6.32 In addition, Article 7(2)(e) of the TTBEO does not preclude restrictions on a party's ability to engage in research and development with third parties where such restrictions are required to protect the licensor's know-how against disclosure. To fall within the scope of this exception, any such limitations imposed to protect the licensor's know-how against disclosure must be confined to what is necessary and proportionate to achieve that objective. By way of example, where the agreement identifies specific employees of the

licensee who receive access to, and are responsible for, the licensed know-how, it may be sufficient to prevent those employees from participating in research and development activities with third parties. Other measures capable of ensuring adequate protection of the licensor's know-how may also be appropriate, depending on the circumstances.

Restrictions on the use of the licensee's own technology

6.33 The hardcore restriction contained in Article 7(2)(d) of the TTBEO concerns agreements between competitors which restrict the licensee's ability to exploit its own technology rights (except where exploitation of the licensee's technology rights involves also using the technology rights licensed from the licensor). In particular, the licensee should not be constrained, in respect of its own technology, as to the location of production or sales, the technical fields of application or product markets in which it operates, the quantities produced or sold, or the prices at which products are supplied. Similarly, the licensee should not be required to pay royalties on products manufactured using its own technology rights, as such obligations raise the cost of using those rights.[160] In addition, the licensee must remain free to license its own technology rights to third parties.

6.34 Restrictions which limit the licensee's use of its own technology or its ability to carry out research and development are liable to weaken the competitive position of the licensee's technology rights. Such constraints may reduce competitive pressure on existing product and technology markets and may also harm the licensee's incentives to invest in further development or improvement of its technology rights. Article 7(2) of the TTBEO does not, however, classify as hardcore restrictions any restrictions on the licensee's use of third-party technology rights that compete with the licensed technology rights. While such non-compete obligations may give rise to foreclosure concerns in relation to third party technology rights (see Part 11 of this Guidance), they will not generally reduce the licensee's incentives to invest in the development and improvement of its own technology rights.

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[160] See the judgment of the ECJ of 25 February 1986, *Windsurfing International*, C-193/83, ECLI:EU:C:1986:75, paragraph 67. Outside the block exemption, agreements under which royalties are calculated on the basis of all product sales may exceptionally fulfil the Section 9 exemption criteria where, on the basis of objective factors, it can be concluded that the restriction is indispensable for pro-competitive licensing to occur. This may be the case where, in the absence of the restraint, it would be impossible or unduly difficult to calculate and monitor the royalty payable by the licensee, for example, because the licensor's technology leaves no visible trace on the final product and there are no practicable alternative monitoring methods.

Agreements between non-competitors

6.35 Article 7(5) of the TTBEO lists the hardcore restrictions for licensing between non-competitors. These are provisions which, directly or indirectly, in isolation or in combination with other factors under the control of the parties to the technology transfer agreement, have as their object—

(a) the restriction of a party's ability to determine its prices when selling products to third parties, except those imposing a maximum sale price or recommend a sale price, provided that the price does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by either of the parties to the technology transfer agreement;[161]

(b) the restriction of the territory into which, or the customers to whom, the licensee may passively sell the contract products, except:

(i) the restriction of passive sales into an exclusive territory or to an exclusive customer group reserved for the licensor;

(ii) an obligation on the licensee to produce the contract products only for its own use, provided that, where the licensee incorporates the contract products into its own products, it is not restricted from selling the contract products actively or passively as spare parts for its own products;

(iii) an obligation to produce the contract products only for a particular customer, where the licence was granted in order to create an alternative source of supply for that customer;

(iv) the restriction of sales to end-users by a licensee operating at the wholesale level of trade;

(v) the restriction of sales to unauthorised distributors located in a territory where the licensor operates a selective distribution system for the contract products;[162] or

(c) the restriction of active sales or passive sales to end-users by a licensee which is a member of a selective distribution system for the contract products and operates at the retail level, without prejudice to the possibility or prohibiting a member of a selective distribution system for

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[161] See Article 7(5)(a) and Article 7(6) of the TTBEO.

[162] See Article 7(5)(b) and Article 7(7) of the TTBEO. See Article 7(10) of the TTBEO and footnote 157 above for the definition of passive sales.

the contract products from operating out of a place of establishment which is not authorised under the selective distribution system.[163]

Price fixing

6.36 The hardcore restriction contained in Article 7(5)(a) of the TTBEO concerns agreements between non-competitors which have as their object the restriction of a party's ability to determine its prices when selling products to third parties. This includes provisions which are intended, whether directly or indirectly, to impose a fixed or minimum selling price, or a fixed or minimum price level to be applied by either the licensor or the licensee when selling products to third parties.

6.37 Where an agreement explicitly sets the selling price, the restrictive nature of the provision is evident. However, price fixing may also be implemented through indirect mechanisms. Indirect forms of price fixing may include, for example, provisions that fix margins, cap the maximum level of discounts, link the sales prices with those of competitors, or impose minimum advertised prices. The use of pressure or enforcement mechanisms, such as threats, warnings, penalties or termination of the agreement in response to deviations from a specified price level, may likewise serve to ensure compliance with a pricing policy. Such direct or indirect arrangements may be reinforced by monitoring tools designed to detect price reductions, including price deviation reporting obligations or price monitoring systems.[164] Measures that reduce a licensee's incentives to compete on price may have a similar effect. This may arise, for instance, where the licensor requires the licensee to apply a most-favoured-customer obligation, under which any more favourable terms offered to one customer must be extended to others.

6.38 Pursuant to Article 7(6) of the TTBEO, the use of recommended resale prices or the imposition of maximum resale prices does not amount to the fixing or the imposition of minimum prices, provided that the price does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, either of the parties to the technology transfer agreement. Where such recommended or maximum prices are accompanied by measures that encourage adherence to a particular price level or that deter the licensee from reducing its selling price, this can amount to price fixing.

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[163] See Article 7(5)(c) and Article 7(8) of the TTBEO.

[164] However, price monitoring and price reporting do not, by themselves, amount to price fixing.

Restrictions on the licensee's ability to make passive sales

6.39 The hardcore restriction contained within Article 7(5)(b) of the TTBEO concerns agreements between non-competitors which have as their object a restriction of the licensee's ability to engage in passive sales of products incorporating the licensed technology rights.[165][166] Such passive sales restrictions may arise through explicit contractual obligations, such as, for example, requirements not to supply certain customers or customers located in particular territories, or obligations to redirect orders from these customers to another licensee. Passive sales may also be curtailed through indirect means intended to discourage the licensee from responding to such demand, including the use of financial incentives or systems that monitor the final destination of the contract products.[167]

6.40 Quantity limitations in themselves are not presumed to operate as an indirect restriction on passive sales. However, limitations on quantities may, in certain circumstances, be found to act as an indirect restriction on passive sales. This might be the case where quantities are adjusted over time to cover only local demand, or where there is a combination of quantity limitations and an obligation to sell minimum quantities in the territory, or where minimum royalty obligations are linked to sales in the territory, or differentiated royalty rates apply depending on the destination of the products and where there is monitoring of the destination of products sold by individual licensees.

Exceptions from the general hardcore restriction on passive sales under Article 7(7) of the TTBEO

6.41 The general prohibition on restrictions of passive sales by licensees is subject to a number of exceptions. These exceptions are addressed in paragraphs 6.42 to 6.52 below.

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[165] See Article 7(10) of the TTBEO and footnote 157 above for a definition of passive sales.
[166] This hardcore restriction applies to technology transfer agreements which affect trade within the UK. For guidance on technology transfer agreements affecting exports outside the UK, see, by analogy, paragraphs 100 and the following of the European Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, 2004/C 101/07, which is a statement of the European Commission for the purpose of Section 60A CA98.
[167] Measures that allow the licensor to verify the destination of the licensed products, such as the threat or performance of audits to verify the licensee's compliance with other restrictions, are not in themselves restrictions of competition. However, they may be considered to form part of a hardcore restriction of passive sales when used by the licensor to control the destination of the supplied goods, for instance when used in conjunction with other practices. See, by analogy, the Commission decision of 30 January 2020 in Case AT.40433 – *Film merchandise*, paragraphs 65 and 66.

Exception 1

6.42 Under Article 7(7)(a) of the TTBEO, sales restrictions (both active and passive) imposed on the licensor do not constitute hardcore restrictions under Article 7(5)(b). Restrictions on the licensor's sales, whether active or passive, are therefore block-exempted subject to the other conditions in the TTBEO being met. The same treatment applies to restrictions on active sales by the licensee, subject to the specific qualification discussed in paragraph 6.50 (under exception 6) of this Guidance. The block exemption of active sales restrictions reflects the assumption that such limitations may encourage investment, non-price competition and improvements in service quality by addressing free-riding and hold-up concerns. In the context of restrictions on active sales between the territories or customer groups of different licensees, it is not necessary that the protected licensee has been granted an exclusive territory or an exclusive customer group. The block exemption may also apply where more than one licensee has been appointed for a given territory or customer group. In such circumstances, incentives to make efficiency-enhancing investments are more likely to be preserved where a licensee can expect to face active sales competition only from a limited number of licensees operating within the same territory, rather than also from licensees located outside that territory.

Exception 2

6.43 Under Article 7(7)(a) of the TTBEO, restrictions on both active and passive sales by licensees into a territory or to a customer group exclusively allocated to the licensor do not constitute hardcore restrictions under Article 7(5)(b) and may therefore benefit from the block exemption, subject to the other conditions of the TTBEO being met. Such restrictions are presumed, where they have restrictive effects, to support the efficient dissemination of technology and its integration into the licensee's production assets.

6.44 A territory or customer group may be regarded as being reserved for the licensor even where the licensor is not, at the relevant time, producing using the licensed technology in that territory or supplying that customer group. A territory or customer group can also be reserved for the purpose of future exploitation by the licensor.

Exception 3

6.45 Article 7(7)(b) of the TTBEO, obligations requiring a licensee to manufacture products incorporating the licensed technology solely for its own (captive) use do not constitute hardcore restrictions under Article 7(5)(b) any may therefore benefit from the block exemption, subject to the other conditions in the

TTBEO being met. Therefore, where the contract product is a component, the licensee can be required to use that product only for incorporation into its own downstream products and not to supply that component to other producers.

6.46 Such captive use obligations must not, however, prevent the licensee from selling the products as spare parts for its own products. In particular, the licensee must remain free to supply spare parts, whether through active or passive sales, to third parties providing after-sales services on the licensee's products. Captive use restrictions are considered further in Part 11 of this Guidance.

Exception 4

6.47 As is the case for agreements between competitors, under Article 7(7)(c) of the TTBEO, arrangements under which a licensee is required to manufacture the contract products solely for supply to a specified customer, where the purpose of the licence is to create an alternative source of supply for that customer, do not constitute hardcore restrictions falling within Article 7(5)(b). Technology transfer agreements including such provisions may therefore benefit from the block exemption, provided that the conditions in the TTBEO are otherwise met. This applies irrespective of the duration of the technology transfer agreement. In the context of agreements between non-competitors, restrictions of this nature are unlikely, in any event, to infringe the Chapter I prohibition.

Exception 5

6.48 Under Article 7(7)(d) of the TTBEO, an obligation on a licensee operating at the wholesale level not to supply end-users, and instead to limit sales to retailers, does not constitute a hardcore restriction under Article 7(5)(b). Technology transfer agreements including such provisions may therefore benefit from the block exemption, provided that the conditions in the TTBEO are otherwise met. Such restrictions enable the licensor to assign the licensee to a wholesale distribution function and will normally fall outside the scope of the Chapter I prohibition.

Exception 6

6.49 Under Article 7(7)(e) of the TTBEO, an obligation preventing the licensee from supplying unauthorised distributors in a territory where the licensor operates a selective distribution system for the contract products does not constitute a hardcore restriction. A technology transfer agreement including such a provision that otherwise satisfies the conditions of the TTBEO can benefit from the block exemption. This enables a licensor to require licensees to

participate in a selective distribution system. Where such a system is in place, Article 7(5)(c) of the TTBEO requires that licensees must remain free to sell to end users, whether actively or passively. This is without prejudice to the possibility of restricting the licensee to a wholesale function in accordance with Article 7(7)(d) of the TTBEO (see paragraph 6.48 of this Guidance).

6.50 Within a territory in which a selective distribution system operates, that system must not be combined with exclusive territories or exclusive customer groups where the effect would be to restrict active or passive sales to end users, as such restrictions constitute hardcore restrictions under Article 7(5)(c) of the TTBEO. This does not prevent the licensor from prohibiting a licensee from operating from an unauthorised place of establishment.

Hardcore restrictions on passive sales that might temporarily fall outside of the Chapter I prohibition

6.51 Restrictions on passive sales by licensees into a territory or to a customer group that has been exclusively allocated to another licensee constitute hardcore restrictions under Article 7(5)(b) of the TTBEO. In specific circumstances, however, such restrictions may fall outside the Chapter I prohibition for a time-limited period, where they are objectively necessary to enable the protected licensee to penetrate a new market. This may arise, for example, where a licensee is required to incur significant start-up or development costs in order to serve a new territory or customer group and a temporary limitation on passive sales by other licensees is necessary to allow those investments to be recovered. Any such restrictions must be confined to what is strictly necessary for that purpose and will, in most cases, not exceed two years from the date on which the contract products are first placed on the market in the exclusive territory by the licensee or first supplied to the exclusive customer group.

Parties to the agreement becoming competitors

6.52 As noted above at paragraph 3.63, parties to a technology transfer agreement might not initially be competitors but might become competing undertakings within the meaning of Article 5(5) of the TTBEO at a later point in time. This might occur, for instance, where the licensee was already present, before the technology transfer agreement was concluded, on the relevant market where the contract products are sold and the licensor subsequently becomes an actual or potential supplier on the same relevant market. In this case, the 20% market share thresholds will apply from the point in time when they became

competitors.[168] However, in such a situation, the hardcore list applicable to agreements between non-competitors will continue to apply for the full duration of the agreement unless the agreement is subsequently amended in any material respect or a new technology transfer agreement is entered into between the parties concerning competing technology rights (see Article 7(9) of the TTBEO).

[168] See paragraph 5.14 above.

7. Excluded restrictions (Article 8)

7.1 Article 8 of the TTBEO sets out excluded restrictions. Excluded restrictions are those obligations for which it cannot be assumed with sufficient certainty that they fulfil the conditions for exemption under the Section 9 exemption. There is no presumption that the excluded restrictions specified in Article 8 of the TTBEO fall within the scope of the Chapter I prohibition or otherwise fail to fulfil the conditions for the Section 9 exemption.

7.2 As set out in Article 9(3) of the TTBEO, where a technology transfer agreement contains an excluded restriction, the remainder of the agreement continues to benefit from the block exemption in the TTBEO, provided that the excluded restriction is capable of being severed from the rest of the agreement. If the restriction is not severable, the block exemption is cancelled in respect of that agreement. For these purposes, the ordinary rules on severance will apply.[169]

7.3 This part of the Guidance considers each of the excluded restrictions in Article 8 of the TTBEO in turn:

(a) Exclusive grant-backs;

(b) No-challenge and termination clauses;

(c) Limiting the licensee's use or development of its own technology (agreements between non-competitors).

Exclusive grant-backs

7.4 Article 8(2)(a) of the TTBEO identifies as excluded restrictions provisions in a technology transfer agreement that require the licensee to grant an exclusive license back, or to assign rights, in respect of improvements to the licensed technology rights, whether to the licensor or to a third party designated by the licensor. An exclusive grant-back arises where the effect of the obligation is to prevent the licensee, as the innovator and licensor of the improvement, from exploiting that improvement itself or from licensing it out to third parties. Such obligations are liable to reduce the licensee's incentive to innovate, as they restrict the licensee's ability to benefit commercially from its improvements. This concern arises both where the improvement relates to the same

[169] The rules on severance are outside the scope of this Guidance. The relevant principles were considered by the Supreme Court in the context of the common law doctrine of restraint of trade in *Egon Zehnder Ltd v Tillman* [2020] AC 154 (see, in particular, paragraphs 85 to 87).

application as the licensed technology rights and where it concerns new applications of the licensed technology rights developed by the licensee.

7.5 The application of Article 8(2)(a) of the TTBEO is not dependent on whether the licensor provides consideration in return for acquiring rights in the improvement or obtaining an exclusive licence. The presence and level of any such consideration, including whether it reflects the value of the improvement, may however be relevant when assessing the arrangement on an individual basis under the Chapter I prohibition. Where an exclusive grant-back is provided in return for consideration, the risk that the obligation will undermine the licensee's incentives to innovate is likely to be reduced.

7.6 In assessing exclusive grant-back obligations on an individual basis outside the scope of the block exemption, the licensor's position on the relevant technology market is a further relevant consideration. Where the licensor holds a strong market position, exclusive grant-back obligations are more likely to give rise to restrictive effects on competition in innovation. Similarly, where the licensor's technology is particularly strong, the ability of the licensee to act as a source of innovation and potential future competitive constraint becomes correspondingly more significant.

7.7 Additionally, the presence of parallel networks of technology transfer agreements incorporating exclusive grant-back obligations may further exacerbate the potential restrictive effects of grant-back obligations. Where a small number of licensors control the available technologies and systematically require exclusive grant-backs from their licensees, the risk of adverse effects on competition is greater. This contrasts with situations in which a wider range of alternative technologies is available and only some licences are subject to exclusive grant-back obligations.

7.8 Non-exclusive grant-back obligations are not excluded restrictions for the purposes of the TTBEO. This also includes obligations that are imposed on the licensee only (ie non-reciprocal grant-back obligations) and which allow the licensor to feed-on the improvements to other licensees. Such non-reciprocal grant-back obligations may facilitate the dissemination of technological developments by enabling the licensor to decide whether, and on what basis, to make improvements available to its other licensees. Feed-on provisions may also promote the dissemination of technology rights, in particular where licensees are aware at the time of contracting that improvements will be shared on a non-discriminatory basis and that all licensees will benefit on equivalent terms from subsequent technological advances.

7.9 However, outside the scope of the block exemption provided by the TTBEO, non-exclusive grant-back obligations may, in certain circumstances, give rise to adverse effects on competition and innovation. This may occur, for example, in the context of cross-licensing arrangements between competitors where each party is subject to a grant-back obligation and is also required to make available to the other party all improvements to its own technology rights. The systematic sharing of improvements in such circumstances may limit the ability of each competitor to obtain a competitive advantage over the other (see also paragraph 11.93). The likelihood of such effects increases where the licensor has significant market power and where grant-back obligations are widely used across its licensing arrangements, as this may limit inter-technology rights competition and reduce incentives to innovate.

No-challenge and termination clauses

No-challenge clauses

7.10 Article 8(2)(b) of the TTBEO provides that no-challenge clauses are excluded restrictions for the purposes of the TTBEO. No challenge clauses are provisions which impose, directly or indirectly, an obligation on a party not to challenge the validity of intellectual property rights held by the other party in the United Kingdom. This is without prejudice to the ability of the licensor in the case of an exclusive licence, to terminate the technology transfer agreement where the licensee brings a challenge to the validity of any of the licensed technology rights (see paragraph 7.17 below).

7.11 No-challenge obligations are excluded restrictions on the basis that licensees are generally best placed to assess the validity of the licensed intellectual property rights. In the interests of ensuring that competition is not distorted, and in line with the principles underpinning the regime of intellectual property protection, invalid rights should be capable of being challenged and, where appropriate, removed.[170] Maintaining invalid intellectual property rights is liable to stifle rather than to promote innovation. No-challenge clauses are therefore likely to infringe the Chapter I prohibition where the licensed technology rights are valuable and the restrictions places competing undertakings at a competitive disadvantage by preventing them from using the technology rights or by permitting their use only subject to the payment of royalties. In such circumstances, it will generally be unlikely that the conditions of the Section 9 exemption are met. The treatment of no-challenge

[170] See the judgment of the ECJ of 25 February 1986, *Windsurfing International*, C-193/83, ECLI:EU:C:1986:75, paragraph 92.

clauses in the context of settlement agreements is addressed further in paragraphs 11.96 and 11.97 of this Guidance.

7.12 As a general rule however, an obligation requiring the licensee not to challenge the ownership of the technology rights does not constitute a restriction of competition for the purposes of Chapter I prohibition. Irrespective of whether ownership of the technology rights ultimately rests with the licensor, the use of the technology by the licensee or by third parties will in any event be dependent on obtaining a licence. In this case, competition will generally not be affected.[171]

7.13 Provisions which, in the context of a non-exclusive licence, permit the licensor to terminate the agreement where the licensee challenges the validity of any of the licensed technology rights will also be a restricted exclusion for the purposes of Article 8(2)(b) of the TTBEO. A termination clause of this kind may, in practice, have effects equivalent to those of a no-challenge obligation. This may be the case, in particular, where switching away from the licensor's technology would entail significant costs for the licensee, for example because the licensee has made technology-specific investments (eg in tools and machinery) that cannot readily be used in production using another technology, or where the licensor's technology rights constitute a necessary input for the licensee's production activities.

7.14 By way of example, in the context of standard-essential patents, a licensee producing products that comply with the relevant standard will necessarily have to use all patents essential to that standard. In this case, termination of the technology transfer agreement following a validity challenge may expose the licensee to significant commercial loss. A comparable concern may arise where the licensor's technology is not standard-essential but nevertheless holds a strong position on the market, such that suitable alternative technology rights are not readily available. In those situations, the prospect of termination may similarly disincentivise a challenge to validity of those intellectual property rights. Whether the potential loss faced by the licensee is sufficiently substantial to constitute a strong disincentive to challenge must be assessed on a case-by-case basis.

7.15 In the circumstances described in paragraph above, the prospect of termination may deter the licensee from challenging the validity of the licensed technology right where such termination would expose the licensee

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[171] See, by analogy, Commission Decision 90/186/EEC, paragraph 15 (discussing clauses that prevent the challenge of trademark ownership), which is a statement of the European Commission for the purpose of Section 60A CA98.

to significant risks extending beyond its obligation to pay royalties. Outside those circumstances, however, a termination-on-challenge clause provision will often not create a sufficiently strong disincentive to challenge and therefore not have effects equivalent to a no-challenge clause.

7.16 The assessment of the effects of termination-on-challenge clauses requires balancing the interest in strengthening the licensor's incentive to license out by not requiring it to continue a contractual relationship with a licensee that disputes the subject matter of the licensing agreement against the public interest in removing barriers to economic activity that may arise where an invalid intellectual property right has been granted in error. In carrying out this assessment, consideration should be had to whether the licensee has complied with its obligations under the agreement at the time the challenge is brought, in particular the obligation to pay the agreed royalties.

7.17 Article 8(3) of the TTBEO provides that termination-on-challenge clauses in exclusive licensing agreements are not excluded restrictions and may therefore benefit from the block exemption provided that the other conditions of the TTBEO are met. However, outside of the scope of the block exemption, a case-by-case assessment is necessary. This is because, in the context of exclusive licenses, termination-on-challenge clauses are generally less likely to give rise to anticompetitive effects. Once an exclusive licence has been granted, the licensor may become economically dependent on the licensee, in particular where royalties are linked to the production using the licensed technology rights, as this may often constitute an efficient way to structure royalty payments. In such circumstances, the licensor's incentives to innovate and license out its technology rights could be reduced if, for example, the licensor were to remain bound by an agreement with an exclusive licensee that no longer takes adequate action to develop, produce and commercialise products based on the licensed technology rights.[172]

7.18 No-challenge and termination-on-challenge provisions that relate exclusively to know-how are not excluded restrictions and may therefore benefit from the block exemption. The CMA adopts a more permissive approach to such clauses, reflecting the practical difficulty, or impossibility, of recovering know-how by the licensor once it has been disclosed. In such circumstances, obligations preventing the licensee from challenging the licensed know-how

[172] In the context of an agreement that is not formally exclusive, and where a termination provision therefore falls outside the scope of the block exemption, the licensor may nevertheless, in certain cases, find itself in a comparable position of economic dependence vis-à-vis a licensee with significant buyer power. Any such dependency is a relevant factor in the individual assessment of the agreement under the Chapter I prohibition.

may facilitate the dissemination of technology, in particular by enabling weaker licensors to license know-how to stronger licensees without the risk of a challenge once that know-how has been absorbed by the licensee.

Limiting the licensee's use or development of its own technology (agreements between non-competitors)

7.19 The excluded restriction in Article 8(2)(c) of the TTBEO concerns agreements between non-competitors which, directly or indirectly, restrict the licensee's ability to exploit its own technology rights or limit the ability of the parties to undertake research and development, except where such restrictions are indispensable to prevent the disclosure of licensed know-how to third parties. This condition reflects the same conditions as set out in Article 7(2)(d) and (e) of the TTBEO, which are discussed in paragraphs 7.20 and 7.21 of this Guidance. However, in the context of agreements between non-competitors, such restrictions cannot be presumed to have negative effects on competition or not to satisfy the conditions under the Section 9 exemption. An individual assessment under the Chapter I prohibition is therefore required.

7.20 Where agreements are between non-competitors, the licensee will typically not hold competing technology rights. There may, however, be situations in which the parties are treated as non-competitors for the purposes of the TTBEO notwithstanding the fact that the licensee owns competing technology rights. This may arise where the licensee owns technology rights but does not license them and the licensor is neither an actual nor a potential competitor on the product market. For the purposes of the TTBEO, the parties are regarded as non-competitors on both the technology market and the downstream product market (see paragraph 3.52 of this Guidance). In these cases, it is important that the licensee remains free to exploit and further develop its own technology rights however, as those technology rights may constitute important competitive constraints in the market. In this context, restrictions which limit the licensee's ability to use its own technology rights or to carry out research and development will therefore normally be regarded as restrictive of competition and will not, as a general rule, meet the conditions of the Section 9 exemption. By way of example, an obligation requiring the licensee to pay royalties not only on sales of products produced with the licensed technology, but also on sales of products produced solely on the basis of its own technology rights, will typically constrain the licensee's ability to exploit its own technology rights and will thus be excluded from the block exemption.

7.21 Where the licensee does not hold competing technology rights and is not engaged in the development of such technology rights, restrictions on the parties' ability to conduct independent research and development may

nevertheless restrict competition in certain circumstances. This may arise, for example, where only a limited number of alternative technologies are available or where the parties represent an important actual or potential source of innovation in the market, in particular where they possess the relevant assets and capabilities to undertake further research and development. In this instance, the conditions of the Section 9 exemption are unlikely to be met. By contrast, where a range of alternative technology rights are available and where the parties do not have particular assets or expertise, restrictions on independent research and development are unlikely to give rise to anticompetitive effects. In those circumstances, the restriction may fall outside the Chapter I prohibition for lack of an appreciable restrictive effect or may satisfy the conditions of the Section 9 exemption. Such restrictions may, for example, support the dissemination of technology by encouraging the licensee to concentrate its efforts on the exploitation and further development of the licensed technology rights.

8. Obligation to provide information to the CMA (Article 10)

8.1 Article 10(1) of the TTBEO requires any party to a technology transfer agreement for which the benefit of the TTBEO is being claimed to provide the CMA with such information in connection with that agreement as the CMA may request by notice in writing. This allows the CMA to monitor technology transfer agreements and to require parties to provide information, for example, if a complaint is made about the agreement.

8.2 Such requests for information must be made by notice in writing[173] and must be complied with within ten working days commencing with the relevant day, 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 party in writing.[174]

8.3 If the CMA considers that the party has without reasonable excuse failed to comply with the obligation to provide information under Article 10(1) of the TTBEO, the CMA may by notice in writing cancel the block exemption in respect of the technology transfer agreement to which the request relates, subject to the CMA:

(a) giving notice in writing of its proposal to cancel the block exemption, and

(b) considering any representations made to it.[175]

8.4 In appropriate cases, the CMA will seek to give recipients advance notice of information requests and, where it is practical and appropriate to do so, the CMA may send the information request in draft. The CMA can then take into account comments on the scope of the request, the actions that will be needed to respond, and the deadline by which the information must be received. The time frame for comment on the draft will depend on the

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[173] See Article 12 of the TTBEO for how the CMA is to give notice in writing under Article 10 of the TTBEO.

[174] In accordance with Article 10(5) of the TTBEO 'relevant day' means—

(a) where article 12(1)(a)(i) (notice given directly) applies, the day on which the party receives the notice;

(b) where article 12(1)(b) (notice given via publication) applies, the day on which the notice is published,

except that, if the day referred to in sub-paragraph (a) or (b) is not a working day, 'relevant day' means the next working day after that day.

[175] Article 10(2) of the TTBEO.

particular circumstances of the case, including the nature and scope of the request.

8.5 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 (CMA8) *Guidance on the CMA's Investigation Procedures in Competition Act 1998 Cases*, to which the CMA will have regard when exercising the powers in Article 10 of the TTBEO.[176]

[176] CMA investigation procedures in Competition Act 1998 cases: CMA8 - GOV.UK

9. Transitional provisions and expiry of the TTBEO (Articles 13 and 16)

9.1 The TTBEO entered into force on 1 May 2026 and will cease to have effect at the end of 31 December 2038, save with respect to Article 14 of the TTBEO.[177]

9.2 Article 13 of the TTBEO provides a one-year transitional provision for technology transfer agreements which, immediately prior to 1 May 2026 were exempt from the Chapter I prohibition by virtue of the Assimilated Technology Transfer Block Exemption Regulation (Assimilated TTBER)[178] and which from 1 May 2026 would not otherwise be an agreement to which the block exemption provided by the TTBEO applies.

9.3 For the purposes of the TTBEO, such an agreement is a 'pre-existing technology transfer agreement'.[179] Until the end of 30 April 2027, a pre-existing technology transfer agreement is to be treated as an agreement satisfying the conditions that need to be met in order to benefit from the TTBEO (as set out in Article 4(a)), and therefore block exempted.[180]

9.4 The block exemption provided by the TTBEO will not however apply to any obligation in a pre-existing technology transfer agreement that before 1 May 2026 fell within Article 5 of the Assimilated TTBER (ie an excluded restriction).[181]

9.5 Articles 10 (obligation to provide information and effect of a breach), 11 (cancellation in individual cases) and 12 (notices in writing) of the TTBEO apply to a pre-existing technology transfer agreement as they apply to a technology transfer agreement within the scope of the TTBEO.[182]

9.6 The CMA also has the power by virtue of Section 8(3) CA98 to recommend variation or revocation of a block exemption order, if in its opinion, such a course would be appropriate. Where industry participants or public authorities call for an earlier review by the CMA, they will need to explain why the block

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[177] See Article 1(1) and Article 16 of the TTBEO. Article 14 of the TTBEO amends the R&D BEO.
[178] 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 (Text with EEA relevance), as amended by SI 2019/93 and SI 2022/1271. The Assimilated TTBER expired on 30 April 2026.
[179] See Article 13(2) of the TTBEO.
[180] Article 13(1) of the TTBEO.
[181] Article 13(3) of the TTBEO.
[182] See Parts 8 and 10 of this Guidance respectively for discussion of the obligation to provide information under the TTBEO and cancellation of the TTBEO in individual cases.

exemption needs reviewing and the detriment that will arise in the absence of a review.

10. Cancellation of the block exemption in individual cases

10.1 Not complying with the conditions defined in the TTBEO will have the effect of cancelling all or part of the block exemption in relation to a technology transfer agreement.[183] The CMA may also cancel the block exemption in relation to a specific technology transfer agreement.

Breach of any conditions in the TTBEO (Articles 5, 7 and 8)

10.2 Further to Article 9(1) of the TTBEO, breach of a condition imposed by article 5 (market share and other thresholds) or 7 (hardcore restrictions) has the effect of cancelling the block exemption in respect of the technology transfer agreement concerned, subject to Article 9(2) in the case of a breach of a condition imposed by Article 5.[184] Where the block exemption is cancelled in such circumstances, this means that all of the technology transfer agreement will no longer benefit from the block exemption provided by the TTBEO and the undertakings must ensure that the agreement does not infringe the Chapter I prohibition, either by removing any relevant infringing provision or by ensuring its agreement fulfils the conditions for the Section 9 exemption).

10.3 Where a technology transfer agreement contains an excluded restriction under Article 8 of the TTBEO, the block exemption provided by the TTBEO is cancelled:

(a) in respect of the entire agreement, if the excluded restriction is not severable from the rest of the agreement

(b) in respect of the excluded restriction only, if the excluded restriction is severable from the rest of the agreement.[185]

Breach of the obligation to provide information (Article 10)

10.4 If the CMA considers that the party has without reasonable excuse failed to comply with the obligation to provide information under Article 10(1) of the TTBEO, the CMA may by notice in writing cancel the block exemption in respect of the technology transfer agreement to which the request relates.[186]

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[183] See Article 9 of the TTBEO and Parts 5, 6, 7 and 8 of this Guidance, above.
[184] See Parts 5 and 6 of this Guidance, above.
[185] See Article 9(3) of the TTBEO and Part 8 of this Guidance, above.
[186] See Article 10(3) of the TTBEO and Part 8 this Guidance, above.

Cancellation of the block exemption in individual cases

10.5 Article 11 of the TTBEO provides that the CMA may withdraw the benefit of the block exemption from a particular technology transfer agreement, where the CMA considers that agreement is not exempt from the Chapter I prohibition as a result of Section 9, ie the CMA considers that particular agreement does not satisfy the Section 9 exemption criteria.

10.6 Circumstances in which withdrawal of the block exemption under Article 11 of the TTBEO may be appropriate include where:

(a) Access to the market for third-party technology rights is restricted, such as where third-party licensors, including potential licensors, are foreclosed from relevant technology markets due to the cumulative effect of networks of technology transfer agreements that prevent licensees from exploiting competing technologies, for example, as a result of the cumulative effect of parallel networks of similar restrictive agreements that prohibit licensees from using technology rights owned by third parties. Such foreclosure is likely to arise where most undertakings that could efficiently obtain a competing licence are prevented from doing so as a result of restrictive agreements, and where potential licensees face relatively high barriers to entry.

(b) Access to the market for potential licensees is restricted, for example, where potential licensees are foreclosed from relevant product markets as a result of the cumulative effect of technology transfer agreements that prevent licensors from licensing additional licensees, thereby limiting potential licensees' access to the necessary technology, or where the only technology rights owner licensing relevant technology rights grants an exclusive licence to a licensee that is already active on the product market on the basis of substitutable technology rights. For technology rights to be considered relevant in this context, they must be both technically and commercially substitutable, such that the licensee could be active on the relevant product market using those rights.

10.7 Foreclosure is examined in more detail in paragraphs 10.8 and 10.9 below.

10.8 Other circumstances in which withdrawal of the benefit of the block exemption might also be appropriate include where:

(a) Competition between licensors is restricted, for example, where a significant number of competing licensors require licensees to grant them more favourable terms than those agreed with other licensors.

(b) Customer access to contract products is unduly limited, for example, where the licensor or licensees are restricted from making passive sales into an exclusive territory or to an exclusive customer group reserved for the licensor or another licensee.

(c) Royalties in a relevant technology market are maintained at supra-competitive levels as a result of the cumulative effect of similar cross-licensing agreements between competing undertakings.

10.9 Where the CMA proposes to withdraw the benefit of the block exemption provided by the TTBEO, the CMA must first give notice in writing of its proposal to those persons whom it can reasonably identify as being parties to the technology transfer agreement in question.[187] This notice must state the facts on which the CMA bases its proposal and its reasons for making it.[188] The CMA must consider any representations made to it on the proposal.[189]

10.10 Where the CMA withdraws the benefit of the block exemption, it must give written notice in accordance with Article 11(2) and 12 of the TTBEO. Withdrawal takes effect 'ex nunc', which means that the agreement will benefit from the exemption until the date at which the cancellation becomes effective. It does not affect the exempted status of the agreement for the period preceding the date on which the withdrawal becomes effective.

[187] See Article 11(3)(a) and Article 12(1)(b) of the TTBEO.
[188] Article 12(2) of the TTBEO.
[189] Article 11(3)(b) of the TTBEO.

11. Assessment of technology transfer agreements not block exempted by the TTBEO

11.1 Where a technology transfer agreement does not benefit from the TTBEO and has an appreciable impact on competition, it may nonetheless be exempt from the Chapter I prohibition if it fulfils the conditions of the Section 9 exemption. Such an agreement is valid and enforceable from the moment the conditions in Section 9(1) are fulfilled and for as long as that remains the case.

11.2 This part of the Guidance provides an overview of the effects of technology transfer agreements on competition as well as guidance on key principles to consider when analysing restrictions in technology agreements.

Effects of technology transfer agreements on competition

11.3 In assessing technology transfer agreements under the Chapter I prohibition, it is necessary to consider all relevant parameters of competition. These include, in particular, price, output measured in terms of volumes supplied, quality and diversity of products, and innovation. The following paragraphs provide examples of how individual licensing restraints may affect these parameters of competition, distinguishing between pro-competitive and anticompetitive effects.

The general framework of analysis

11.4 Technology transfer agreements that do not benefit from the block exemption, for example, because the market share or other thresholds conditions are not met, or because the agreement involves more than two parties, are not presumed to be unlawful. Such agreements require an individual assessment under the Chapter I prohibition. Such agreements must be assessed on an individual basis under the Chapter I prohibition. Agreements which do not restrict competition within the meaning of the Chapter I prohibition, or which satisfy the conditions of the Section 9 exemption are lawful and remain valid and enforceable.

Safe harbour where there are sufficient independent competing technology rights

11.5 In order to promote predictability beyond the application of the TTBEO and to confine detailed analysis to cases that are likely to present real competition concerns, the CMA takes the view that outside the area of hardcore restrictions, the Chapter I prohibition is unlikely to be infringed where there are four or more independent competing technology rights in addition to the

technologies controlled by the parties to the agreement that are substitutable for the licensed technology at a comparable cost to the user.[190]

11.6 'Independent competing technology rights' for these purposes will be assessed in the same manner as those under the TTBEO, which is to say, they are technology rights which are—

(a) owned or controlled by a third party, and

(b) interchangeable with, or substitutable for, the licensed technology rights, by reasons of the technology rights' characteristics, the royalties payable in respect of those rights, their commercial strength and intended use.[191]

11.7 The fact that a technology transfer agreement falls outside the safe harbour set out in paragraph 11.5 of this Guidance does not imply that it falls within the Chapter I prohibition and, if so, that the conditions for Section 9 exemption are not met. Such agreements require an individual assessment, based on the principles set out in this Guidance, below.

Relevant factors for the assessment under the Chapter I prohibition

11.8 Where an agreement does not contain restrictions of competition by object, it is necessary to assess whether it nonetheless has the effect of restricting competition.[192] Examples of potential restrictive effects are set out in paragraphs 3.32 to 3.38 of this Guidance.

11.9 In assessing whether an agreement gives rise to an appreciable restriction of competition, due regard must be had to the competitive conditions prevailing on the relevant market. In particular, the assessment should take account of:

(a) The nature and content of the agreement;

(b) The market position of the parties to the agreement;

(c) The market position of competitors;

(d) The market position of buyers on the relevant markets;

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[190] For the avoidance of doubt, a technology transfer agreement not containing hardcore restrictions but that nevertheless breaches the applicable conditions set out in Article 5 of the TTBEO (ie the market share and other thresholds) could benefit from this safe harbour in the Guidance, where the licensed technology rights have four or more independent competing rights for these purposes.
[191] See Article 5(7) of the TTEO. See also paragraphs 5.25—5.30 above for further guidance on the assessment of independent competing technology rights.
[192] See paragraph 3.24 of this Guidance.

(e) The existence and extent of barriers to entry or expansion; and

(f) The competitive dynamics of the market.

11.10 The weight to be attached to individual factors will vary according to the circumstances of each case and must be assessed in the round. For example, while high market shares of the parties may indicate the existence of market power, this may not necessarily be the case where barriers to entry are low. It is therefore not possible to lay down fixed rules as to the relative importance of the different factors.

11.11 Technology transfer agreements may take a wide range of forms. It is therefore necessary to examine the nature of the agreement, including the competitive relationship between the parties and the restraints it contains. The assessment of the restraints contained by the agreement should not be confined only to the agreement's express terms. Implicit restrictions may also arise from the way in which the agreement is implemented in practice and from the incentives faced by the parties resulting from the agreement.

11.12 The market position of the parties, including any undertakings over which they exercise de facto or legal control may provide an indication of the degree of market power held by the licensor, the licensee, or both. The higher the market share, the greater their market power is likely to be, in particular where those shares reflect underlying cost advantages or other sources of competitive advantages relative to competitors. Such advantages may arise, for example, from first-mover advantage, the ownership of standard-essential patents, or superior technology rights. Market shares are, however, only one element in the assessment of market position. In technology markets in particular, market shares may not reliably reflect the competitive strength of a given technology, and the results may vary substantially depending on the methodology used to calculate them.

11.13 Market shares, together with any competitive advantages or disadvantages, are also relevant to the assessment of the market position of competing undertakings. Where actual competitors are numerous and hold strong positions on the market, the likelihood that the parties can exercise market power is reduced. However, markets characterised by a limited number of competitors with broadly similar positions, for example, in terms of size, cost structure or research and development capability, may present an increased risk of collusive behaviour.

11.14 The position of buyers is relevant to determining whether buyer power is present on the market. A buyer's share of the relevant purchasing market is an initial indicator as it reflects the importance of that buyer's demand to

suppliers. Further indicators relate to the buyer's position downstream, including factors such as the geographic scope of its activities and the strength of its brand with final customers. In certain circumstances, buyer power may constrain the licensor or the licensee and thereby limit the exercise of market power that might otherwise arise. This is more likely to be the case where buyers have both the ability and the incentive to sponsor alternative sources of supply in response to a small but permanent increase in relative prices. Where buyers are instead able only to secure more favourable terms or to pass price increases onto their own customers, their position is unlikely to prevent the exercise of market power by the licensee on the relevant product market.[193]

11.15 Barriers to entry are assessed by reference to whether incumbent undertakings are able to sustain prices above the competitive level without inducing entry. Where entry is timely, likely and sufficient, attempts to raise prices will generally be unprofitable. As a general indication, barriers to entry may be regarded as low where effective entry is capable of constraining or undermining the exercise of market power and can be expected to occur within one to two years. Barriers to entry may arise from a wide range of sources. These include, in particular, economies of scale or scope (including network effects, such as those present in multi-sided markets), regulatory constraints, especially where they confer exclusive rights, government subsidies, trade barriers, intellectual property rights, and control over scarce or essential inputs. Barriers may also stem from advantages enjoyed by incumbents, such as first-mover advantage or strong brand loyalty built up over time. In addition, restrictive agreements may themselves create barriers to entry where they restrict access to key inputs or customers and thereby foreclose actual or potential competitors.

11.16 Barriers to entry may exist at different stages of the value chain, including research and development, production or distribution. Whether a particular factor constitutes a material barrier to entry depends in particular on the extent to which it involves sunk costs. Sunk costs are costs that must be incurred in order to enter or operate on a market and which cannot be recovered upon exit. The higher the level of sunk costs, the greater the risk faced by potential entrants and the more credible the ability of incumbents to respond to entry, as exit from the market would itself be costly.

11.17 While market entry will generally involve some degree of sunk costs, their magnitude may vary significantly. As a result, actual competition will normally

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[193] See the judgment of the ECJ of 7 October 1999, *Irish Sugar*, T-228/97, ECLI:EU:T :1999:246, paragraph 101.

provide a more reliable constraint on market power than potential competition and will therefore carry greater weight in the competitive assessment.

11.18 The assessment must also take account of the dynamic characteristics of the relevant market. In markets characterised by rapid innovation, the potential restrictive effects of particular restraints may be mitigated where competition between alternative technology rights (inter-technology rights competition) provides an effective constraint, such as that from dynamic and innovative competitors. In other circumstances, however, restraints may enable an incumbent in a dynamic market to secure a durable competitive advantage, giving rise to longer-term harm to competition. This may occur, for example, where restrictions prevent rivals from benefiting from network effects, or where market conditions are conducive to tipping.

11.19 In evaluating specific restraints, additional contextual factors may also be relevant. These include cumulative effects arising from the extent of market coverage by similar agreements, the duration of the arrangements, and the applicable regulatory framework. Consideration may also be given to conduct indicative of, or conducive to, collusion, such as price leadership, advance signalling of price changes, discussions concerning appropriate price levels, limited price responsiveness in the presence of excess capacity, price discrimination, or evidence of past collusive behaviour.

Relevant factors for the assessment under the Section 9 exemption

11.20 Technology transfer agreements which give rise to restrictions of competition may nonetheless generate efficiencies capable of outweighing their anticompetitive effects. The assessment of such efficiencies is carried out by reference to Section 9 of the CA98, which provides an exemption from the Chapter I prohibition. For the exemption to apply, the agreement must satisfy each of the four cumulative conditions set out in the Section 9 exemption (see paragraph 2.10 of this Guidance). The burden rests on the undertaking relying on the Section 9 exemption to substantiate, with cogent evidence and arguments, that those conditions are met.[194]

11.21 For the purposes of the Section 9 exemption, the assessment is carried out by reference to the actual context in which the agreement operates[195] and on the

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[194] See judgments of the ECJ of 11 July 1985, *Remia and Others* v *Commission*, 42/84, EU:C:1985:327, paragraph 45, and of 6 October 2009, *GlaxoSmithKline Services and Others* v *Commission and Others*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 82.

[195] See the judgment of the ECJ of 17 September 1985, *Ford v Commission*, joined cases 25/84 and 26/84, ECLI:EU:C:1985:340, paragraphs 25 and 26 and paragraph 44 of the European Commission

basis of the facts prevailing at any relevant time. The assessment is therefore sensitive to material changes in the factual circumstances. The Section 9 exemption applies only for so long as the four conditions are met and will cease to apply where that is no longer the case.[196] However, in applying the Section 9 exemption, it is necessary to take proper account of any sunk investments undertaken by the parties, as well as the time period and contractual restraints required to commit to, and recover, an efficiency-enhancing investment. The application of the Chapter I prohibition cannot be assessed in isolation from the ex-ante investment decisions and the commercial risks associated with them. In certain cases, the scale of the sunk costs incurred, and the level of risk borne by the parties may mean that the agreement either falls outside the scope of the Chapter I prohibition or satisfies the conditions for the Section 9 exemption for the period necessary to allow the investment to be recouped.

11.22 The first condition for exemption under Section 9 of the CA98 requires an assessment of whether the agreement gives rise to objective efficiency gains. Examples of the types of efficiencies that may be relevant for this purpose are set out in paragraphs 3.27 to 3.31 of this Guidance.

11.23 The second condition for the Section 9 exemption requires that consumers receive a fair share of the resulting benefits. This entails that consumers of the products manufactured or supplied under the licence are adequately compensated for any restrictive effects arising from the agreement.[197] In practical terms, the efficiency gains generated must be sufficient to offset any likely adverse impact on prices, output, quality, choice or innovation. Such compensation may take different forms. It may arise, for example, where efficiencies alter the cost structure of the undertakings in a manner that creates incentives to reduce prices, or where the agreement enables consumers to benefit from the introduction of new or improved products.[198]

11.24 The third condition for the Section 9 exemption requires that the agreement does not contain restrictions which are not indispensable to the achievement of the objective efficiency gains. In assessing indispensability, the CMA will

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Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, to which the CMA will have regard in accordance with Section 60A CA98.

[196] See, for example, Commission Decision 1999/242/EC of 3 March 1999, relating to a proceeding pursuant to Article 85 of the EC Treaty (*IV/36.237 – TPS*) (OJ L 90, 2.4.1999, p. 6, ELI: http://data.europa.eu/eli/dec/1999/242/oj)). Similarly, the Chapter I prohibition only applies as long as the agreement has a restrictive object or restrictive effects.

[197] See paragraph 85 of the Guidance on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, to which the CMA will have regard in accordance with Section 60A CA98.

[198] See paragraphs 98 and 102 of the Guidance on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, to which the CMA will have regard in accordance with Section 60A CA98.

consider in particular whether the individual restrictions enable the relevant activity to be carried out more efficiently than would be possible in their absence. This assessment must take account of prevailing market conditions and the commercial realities faced by the parties. Undertakings relying on Section 9 are not required to assess purely hypothetical or speculative alternatives. They must, however, explain why alternatives that appear commercially realistic and materially less restrictive would result in a significant loss of efficiencies. Where the adoption of such an alternative would substantially undermine the efficiency gains, the restriction in question may be regarded as indispensable. In certain cases, it may also be necessary to assess whether the agreement itself is indispensable to achieving the efficiencies. In the context of a non-complicated bilateral licensing arrangements, it will generally be sufficient to examine the indispensability of the individual restrictions, as there will typically be no less restrictive means of achieving the efficiencies than through the licence itself.

11.25 The fourth condition for the Section 9 exemption requires that the agreement does not eliminate competition in respect of a substantial part of the products concerned. This requires an assessment of the competitive constraints that remain on the market and of the effect of the agreement on those constraints. In applying this condition, regard must also be had to the relationship between the Section 9 exemption and the Chapter II prohibition on abuse of dominance. Consistent with established case law, the application of the Section 9 exemption cannot preclude the application of the Chapter II prohibition.[199] Moreover, as the Chapter I and Chapter II prohibitions are both directed at preserving effective competition, consistency requires that the Section 9 exemption is not interpreted so as to permit the exemption of restrictive agreements that amount to an abuse of a dominant position.[200] The fact that an agreement significantly reduces competition along one competitive parameter does not, in itself, mean that competition has been eliminated for the purposes of the Section 9 exemption. For example, a technology pool agreement (see paragraph 11.99 below) can contribute to the emergence of a de facto industry standard,[201] potentially reducing competition between alternative technological formats. Network effects may then make market entry by competing formats difficult. This does not necessarily imply

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[199] See by analogy the judgment of the Court of Justice of the EU of 16 March 2000, *Compagnie Maritime Belge*, Joined cases C-395/96 P and C-396/96P, ECLI:EU:C:2000:132, paragraph 130.
[200] See in this respect the judgment of the CFI of 10 July 1990, *Tetra Pak(I)*, T-51/89, ECLI:EU:T:1990:41. See also paragraph 106 of the Guidance on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, to which the CMA will have regard in accordance with Section 60A CA98.
[201] For these purposes, a de facto industry standard is a standard not formally required by law or adopted by a standard-setting body, but which has been widely adopted in practice by an industry and its customers

that competition has been eliminated for the purposes of the last condition of Section 9 of the CA98. This is particularly the case where suppliers continue to face competitive pressure in relation to price, quality, choice, innovation or product characteristics.

Analysis of specific types of licensing restraints

11.26 This part examines a range of individual licensing restraints that are commonly found in technology transfer agreements. Restraints that have already been considered elsewhere in this Guidance, in particular Part 6 on hardcore restrictions and Part 7 on excluded restrictions, are addressed here only in summary form.

11.27 This part applies to both agreements between competitors and agreements between non-competitors. In the case of agreements between competitors, a distinction is drawn, where relevant, between reciprocal and non-reciprocal arrangements. No such distinction is required for agreements between non-competitors. Where the parties are neither actual nor potential competitors on the relevant technology market or on the market for products incorporating the licensed technology rights, a reciprocal licence is, in practical terms, equivalent to two separate bilateral licences. Different considerations arise where the parties jointly combine technologies into a package that is licensed to third parties. Such arrangements are addressed in this part.

11.28 This part of the Guidance does not address obligations in technology transfer agreements which are generally not regarded as restricting competition for the purposes of the Chapter I prohibition. Such obligations include, in particular, but are not limited to:

(a) obligations relating to the confidentiality of the licensed technology or know-how;

(b) restrictions on the licensee's ability to grant sub-licences;

(c) obligations not to use the licensed technology rights following the expiry of the agreement, provided that the relevant technology rights remain valid and enforceable;

(d) obligations requiring the licensee to assist the licensor in the protection or enforcement of the licensed intellectual property rights;

(e) obligations to pay minimum royalties or to produce a minimum volume of products incorporating the licensed technology; and

(f) obligations to apply the licensor's trademark or to indicate the licensor's name on the relevant products.

Royalty obligations

11.29 In general, the setting of royalties in a technology transfer agreement, including both their level and the method of calculation, is the prerogative of the parties and does not of itself raise issues under the Chapter I prohibition. This applies irrespective of whether the agreement is concluded between competitors or non-competitors. Royalty obligations may take a variety of forms, including lump-sum payments, royalties calculated as a share of the sales price, or fixed amounts payable per unit of product incorporating the licensed technology rights.

11.30 Where the licensed technology rights form an input used in the production of a final product, it will not normally restrict competition for royalties to be calculated by reference to the value or price of that final product, provided that the technology is in fact incorporated into it.[202] In addition, in the context of software licensing, royalty structures based on the number of users or on a per-machine basis will generally be compliant with the Chapter I prohibition.

11.31 Where a technology transfer agreement between competitors falls outside the scope of the block exemption, royalty provisions may give rise to concerns under the Chapter I prohibition in certain circumstances. This may be the case, for example, where competitors cross-license technologies and apply running royalties that are manifestly out of line with the market value of the licence, in particular where the parties have broadly comparable cost structures or where the level of the royalties materially influences market prices. In assessing whether the loyalties are disproportionate, it will be relevant to consider the level of royalties paid by other licensees on the relevant product market for the same or for substitutable technologies. Where royalties are clearly disproportionate, it will generally be unlikely that the agreement satisfies the conditions for exemption under Section 9 of the CA98.

11.32 The block exemption applies only for so long as the technology rights licensed under the agreement remain valid and in force. The inclusion of royalty obligations that continue beyond the expiry of the licensed technology rights does not, however, automatically give rise to a restriction of competition within the meaning of the Chapter I prohibition. This will be the case, in particular,

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[202] This is without prejudice to the possible application of the Chapter II prohibition to the setting of royalties (see the judgment of the ECJ of 14 February 1978, *United Brands*, C-27/76, ECLI:EU:C:1978:22, paragraph 250, see also the judgment of the ECJ of 16 July 2009, *Der Grüne Punkt – Duales System Deutschland GmbH*, C-385/07 P, ECLI:EU:C:2009:456, paragraph 142).

where the licensee is free to terminate the agreement and where such arrangements serve, for example, to allow the royalty burden to be spread over a longer period.

11.33 Where, following the expiry of the licensed technology rights, third parties are able lawfully to exploit the technology and thereby exert effective competitive pressure, post-expiry royalty obligations are unlikely to restrict competition.[203]

11.34 In agreements between non-competitors, the block exemption may extend to royalty arrangements under which payments are calculated by reference to products manufactured using the licensed technology rights as well as products produced using technology rights licensed from third parties. Such arrangements may serve to simplify or facilitate the calculation and monitoring of royalties. However, they may also give rise to foreclosure concerns by increasing the effective cost of using third-party technology rights and may therefore have effects comparable to those of a non-compete obligation.

11.35 Where royalties are payable not only on products incorporating the licensed technology rights, but also on products produced using third-party technology rights, this may reduce demand for those alternative technology rights by raising their relative cost. Outside the scope of the block exemption, it is therefore necessary to assess whether such provisions give rise to appreciable foreclosure effects. That assessment should be carried out by reference to the analytical framework used for non-compete obligations set out in paragraphs 11.78 to 11.85 of this Guidance. Where appreciable foreclosure is established, the agreement will fall within the scope of the Chapter I prohibition and will generally be unlikely to satisfy the conditions for exemption under Section 9 of the CA98, unless there is no other practicable means of calculating and monitoring royalty payments.

Exclusive licensing and sales restrictions

11.36 For the purposes of this Guidance, a distinction is drawn between (i) restrictions relating to production in a particular territory, such as those arising under exclusive or sole licensing agreements, and (ii) restrictions concerning the sale of products incorporating the licensed technology into a territory or to specified customer groups.

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[203] See the judgment of the CJEU of 7 July 2016, *Genentech*, C-567/14, ECLI:EU:C:2016:526, paragraphs 39 and 40.

Exclusive and sole licences

11.37 An exclusive licence is one under which the licensor agrees neither to exploit the licensed technology rights itself nor to grant licences to third parties, whether generally or for a particular use or territory. In such circumstances, the licensee is the only undertaking authorised to produce using the licensed technology rights for the relevant use or within the relevant territory.

11.38 A sole licence differs in that the licensor undertakes not to license the technology to third parties within a specified territory, while retaining the right to exploit the licensed technology itself.

11.39 A commitment by the licensor not to produce or to license production may apply to any geographic scope, including a worldwide geographical scope or a more limited area. Exclusive and sole licensing agreements are frequently combined with restrictions governing the territories or customer groups into which products incorporating the licensed technology rights may be sold.

11.40 Reciprocal exclusive licensing between competitors constitutes market or customer allocation within the meaning of Article 7(2)(c) of the TTBEO. However, reciprocal sole licensing between competitors may benefit from the block exemption, provided that other conditions in the TTBEO are met. Under such agreements, the parties agree not to license their competing technology rights to third parties but remain free to use those technologies themselves. Where the parties possess significant market power, however, such agreements may facilitate coordination by limiting the number of undertakings supplying products based on the licensed technology rights.

11.41 Non-reciprocal exclusive licensing between competitors may benefit from the block exemption where the conditions in the TTBEO – for example, market share and other thresholds – are met. Outside of the block exemption, exclusive licensing agreements may give rise to restrictive effects, with the likelihood of such effects increasing as the market power of either party increases. The competitive assessment will therefore depend on the market position of both the licensor and the licensee.

11.42 Where an exclusive licence is granted on a worldwide basis, the licensor will, in practice, withdraw from the market.

11.43 Where exclusivity is limited to a particular territory, such as a substantial part of the UK, the licensor will refrain from producing or supplying products based on the licensed technology rights within that territory. In assessing such agreements, it is necessary to consider whether either party possesses market power and whether the licensor would, absent the agreement, be in a position to exert a meaningful competitive constraint on the licensee.

11.44 Where both parties have a limited presence on the relevant product market and the licensor lacks the ability to exploit the technology rights effectively in the licensee's territory, an exclusive licence is unlikely to restrict competition within the meaning of the Chapter I prohibition. Particular considerations arise where the parties compete only on the technology market. This may be the case, for example, where the licensor is a research organisation or a small research-based undertaking that does not have the production or distribution capabilities necessary to commercialise products incorporating the licensed technology rights. In such circumstances, the licensor is not an effective competitor on the downstream product market and, provided that the licensee does not hold significant market power on that market, an exclusive licence will generally not give rise to competition concerns.

11.45 Exclusive licensing between non-competitors will, where it falls within the scope of the Chapter I prohibition, often satisfy the conditions for exemption under Section 9 of CA98. Exclusivity may be required to provide the licensee with sufficient incentive to invest in the licensed technology rights and to commercialise products within a reasonable timeframe. This is particularly relevant where significant further development or commercial investment is required. Intervention against exclusivity after successful market entry would risk undermining the licensee's ability to recover its investment and may be detrimental to competition, innovation and the dissemination of technology. The CMA will therefore intervene only in limited circumstances in relation to exclusive licences between non-competitors, regardless of the geographic scope of the licence.

11.46 Different considerations arise where the licensee already controls a substitutable technology that it uses for its own use production. In such circumstances, exclusivity may not be necessary to induce market entry and may instead raise competition concerns, particularly where the licensee holds market power on the relevant product market. Where entry into the technology market is difficult and the licensed technology rights represents a meaningful competitive constraint, an exclusive licence is more likely to fall within the Chapter I prohibition. In such cases, exclusivity may foreclose access to the technology for third parties, raise barriers to entry, and enable the licensee to maintain or strengthen its market power. The risk of restrictive effects is particularly pronounced where a licensee with significant market power obtains exclusive rights to one or more competing technologies. In those circumstances, the agreement is unlikely to satisfy the conditions for exemption under Section 9 of the CA98.

11.47 Cross-licensing arrangements under which two or more parties agree to license their technologies exclusively to one another, to the exclusion of third parties, raise particular concerns where the combined technologies amount to

a de facto industry standard[204] that competitors must access in order to compete effectively. Such arrangements may result in a closed standard reserved to the participating undertakings. The CMA will assess these situations by reference to the principles applicable to technology pools (see paragraphs 11.98 to 11.129 of this Guidance). In particular, technologies underpinning a standard should ordinarily be made available to third parties on fair, reasonable and non-discriminatory terms,[205] consistent with the relevant standard-setting process.[206] Where the parties to the arrangement compete with third parties on an existing product market and the agreement relates to that market, a closed standard is likely to have significant exclusionary effects, which can generally only be mitigated through access for third parties.

Sales restrictions

11.48 In assessing sales restrictions in technology transfer agreements, it is necessary to distinguish between agreements concluded between competitors and those concluded between non-competitors.

11.49 In reciprocal agreements between competitors, restrictions on active or passive sales imposed on one or both parties constitute hardcore restrictions within the meaning of Article 7(2)(c) of the TTBEO. Such provisions amount to market sharing, as they prevent the parties from supplying territories or customer groups which they currently serve, or could realistically serve, absent the agreement. These restrictions are therefore caught by the Chapter I prohibition and will generally not satisfy the conditions for exemption under Section 9.

11.50 Different considerations apply to non-reciprocal agreements between competitors. In such cases, restrictions on active or passive sales by either the licensor or the licensee into a territory or to a customer group exclusively reserved for the other party may benefit from the block exemption, provided the conditions in the TTBEO are otherwise met (see Article 7(3)(a)(i) of the TTBEO). Where those conditions are not met, such restrictions will fall within the Chapter I prohibition where one or both parties possess significant market power. They may nevertheless, in certain circumstances, satisfy the conditions for exemption under Section 9 of CA98 where they are

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[204] See footnote 201 above.

[205] See in that respect the Commission's Notice in the *Canon/Kodak Case* (OJ C 330, 1.11.1997, p. 10) and the *IGR Stereo Television* Case mentioned in: "*European Commission, Eleventh report on competition policy"* – Published in conjunction with the '*Fifteenth General Report on the Activities of the European Communities in 1981*', Publications Office of the European Union, 1982, paragraph 94.

[206] See the guidance on standardisation in Part 9 of the Horizontal Agreements Guidance.

indispensable to the dissemination of valuable technologies. This may arise, for example, where the licensor has a relatively weak position in the territory in which it exploits the technology rights and requires protection from active sales by the licensee in order to be willing to grant the licence. Similarly, restrictions on active sales by the licensor may be indispensable where the licensee has a limited market position in the allocated territory and must undertake substantial investment to exploit the technology rights effectively.

11.51 The block exemption also extends to restrictions on active sales by a licensee into a territory or customer group allocated to another licensee, provided that the protected licensee was not a competitor of the licensor at the time the agreement was concluded, the agreement is non-reciprocal and that the conditions in the TTBEO are otherwise met (Article 7(3)(b) of the TTBEO). Where market shares exceed the applicable threshold and the parties hold significant market power, such restrictions are likely to fall within the Chapter I prohibition. They may nonetheless be indispensable, within the meaning of the Section 9 exemption, for a limited period where they are necessary to enable the protected licensee to enter and establish itself in a new market. By contrast, restrictions on passive sales by licensees into territories or customer groups exclusively allocated to another licensee constitute hardcore restrictions under Article 7(5)(b) of the TTBEO.

11.52 In agreements between non-competitors, restrictions on the licensee's ability to make active or passive sales into a territory or customer group exclusively reserved for the licensor are block-exempted provided the conditions of the block exemption are otherwise met. Where those conditions are not met, such restrictions require an individual assessment. In some cases, they may fall outside the Chapter I prohibition or satisfy the conditions for exemption under Section 9, for example where they are objectively necessary to facilitate the dissemination of valuable technologies. This may be the case where the licensor has a relatively weak market position in the territory in which it exploits the technology and requires protection from active sales by the licensee. In other circumstances, particularly where the licensor holds significant market power or where a series of similar agreements has cumulative effects, such restrictions are likely to infringe the Chapter I prohibition and fail to meet the conditions for Section 9 exemption.

11.53 Restrictions on the licensor's sales, where they fall within the Chapter I prohibition, are generally more likely to satisfy the conditions for Section 9 exemption. In particular, restrictions on active sales may be indispensable to induce the licensee to invest in the production, marketing and distribution of products incorporating the licensed technology. This is especially so where the licensor's costs are not subject to royalty payments and direct competition from the licensor would materially weaken the licensee's incentives to invest.

Different considerations may apply where there are no realistic alternative technologies available on the market.

11.54 Finally, in agreements between non-competitors, restrictions on a licensee's active sales into territories or customer groups exclusively allocated to other licensees are block-exempted, provided the other conditions in the TTBEO are met.[207] Where those conditions are not met, an individual assessment is required. Where the licensee holds significant market power, such restrictions may limit competition between users of the same technology and are likely to fall within the Chapter I prohibition. They may nevertheless satisfy the conditions for exemption under Section 9 where they are necessary to prevent free-riding and to encourage the licensee to make the investments required for the effective exploitation and promotion of the licensed technology. Restrictions on passive sales remain hardcore restrictions under Article 7(5)(b) of the TTBEO and will, as a general rule, not fulfil the conditions for exemption under Section 9 of CA98.

Output restrictions

11.55 Reciprocal output restrictions in technology transfer agreements between competitors constitute hardcore restrictions within the meaning of Article 7(2)(b) of the TTBEO (see paragraph 6.18 of this Guidance). By contrast, output limitations relating to the licensed technology that are imposed on the licensee in a non-reciprocal agreement, or that apply only to one licensee in a reciprocal arrangement, do not fall within that provision. Such restrictions may benefit from the block exemption, provided the other conditions on the TTBEO are met.

11.56 Where the conditions of the block exemption are not met (such as because the applicable thresholds set out in Article 5 of the TTBEO are not satisfied), output restrictions require an individual assessment. They may infringe the Chapter I prohibition where the parties hold significant market power. However, the Section 9 exemption may be available in circumstances where the licensed technology represents a substantial improvement over the licensee's existing technology and where the output limitation permits production levels that significantly exceed the licensee's pre-licence output. In such cases, the competitive impact of the restriction may be limited, even in markets where demand is growing. Account should also be taken of whether

[207] Where a licensor operating a selective distribution system allocates exclusive territories or customer groups in agreements between non-competitors, that system must not be combined with restrictions that prevent active or passive sales to end users. Any such combination constitutes a hardcore restriction under Article 7(5)(c) of the TTBEO (see paragraph 6.50 of this Guidance).

the output restriction is necessary to incentivise the licensor to make its technology available, for example, where the licence is confined to a particular production site or capacity. Where the agreement involves a genuine integration of complementary assets, output restrictions imposed on the licensee may therefore satisfy the conditions for exemption, although this is unlikely where the parties enjoy significant market power.

11.57 In agreements between non-competitors, output restrictions are block-exempted, provided the other conditions in the TTBEO are met. Outside of the block exemption, an effects-based assessment is required. The principal competition concern in such cases is a reduction in competition between licensees using the same technology. The significance of any adverse effects will depend on the market position of the licensor and the licensees, as well as the extent to which the output limitation constrains the licensee's ability to meet demand for products incorporating the licensed technology.

11.58 The restrictive effects of output limitations are likely to be more pronounced where they are combined with exclusive territorial or customer allocations. The interaction of these restraints increases the risk that the agreement results in market partitioning.

11.59 Output restrictions imposed on licensees in agreements between non-competitors may nevertheless generate efficiencies by facilitating the dissemination of technology rights. In particular, a licensor may be unwilling to enter into a technology transfer agreement unless it can limit the output of its licensee. This consideration is particularly relevant where the licensor is also active downstream and the licensee's output could compete directly with the licensor's core activities. By contrast, the case for output restrictions as a means of ensuring the dissemination of the licensor's technology is weaker where they are combined with sales restrictions that prevent the licensee from supplying territories or customer groups reserved for the licensor.

Field of use restrictions

11.60 A field of use restriction limits the licensee's exploitation of the licensed technology rights to specified technical fields of application, product markets or industrial sectors. As a result, the licensee is authorised to use the technology only within those specified areas. The same technology may often be applied to produce different products, which may fall within the same or different product markets. Conversely, a single product market may involve multiple technical applications. For instance, a moulding technology could be used within the same industrial sector to make plastic bottles and plastic glasses, each product belonging to a separate product market. However, a single product market may encompass several technical fields of use. For

instance, a technology to make chipsets may be used to produce chipsets with up to four CPUs and more than four CPUs. A licence limiting the use of the licensed technology to the production of chipsets with up to four CPUs constitutes a technical field of use restriction.

11.61 Given that field of use restrictions may benefit from the block exemption, whereas certain customer restrictions constitute hardcore restrictions under Articles 7(2)(c) and 7(5)(b) of the TTBEO, it is necessary to distinguish clearly between the two. Paragraph 6.30 provides guidance on the circumstances in which field of use restrictions are more likely to be considered a form of market allocation. Customer restrictions presuppose the identification of specific customer groups and prohibit sales to those groups as such. The fact that a field of use restriction may, in practice, correspond to purchasing patterns of certain customers does not convert it into a customer restriction. For instance, the fact that certain customers buy predominantly or exclusively chipsets with more than four CPUs does not imply that a licence that is limited to chipsets with up to four CPUs constitutes a customer restriction. Nonetheless, a field of use restriction must be defined by reference to objective and meaningful technical criteria relating to the contract product.

11.62 Field of use restrictions should also be distinguished from output restrictions. Although certain output limitations constitute hardcore restrictions under Article 7(2)(b) of the TTBEO, a field of use restriction does not, as such, limit the quantity that the licensee may produce within the permitted field and is therefore not treated as an output restriction.

11.63 As with territorial limitations, fields of use may be allocated under exclusive or sole licensing arrangements. The distinction between those forms of licensing, including their implications for the licensor’s ability to exploit the technology within the relevant field, is set out in paragraphs 11.37 to 11.47 of this Guidance. In agreements between competitors, reciprocal exclusive field-of-use licensing constitutes market allocation and is treated as a hardcore restriction under Article 7(2)(c) of the TTBEO.

11.64 Field of use restrictions may generate efficiencies by enabling the licensor to license its technology for applications outside its core area of activity. Absent such protection, the licensor may be unwilling to license or may seek a higher royalty, particularly where it exploits the technology itself or in fields where the value of the technology is uncertain. In sectors characterised by dense patent landscapes, field of use licensing may also facilitate design freedom by allowing licensees to develop their own technologies within the licensed scope without exposure to infringement claims.

11.65 In agreements between actual or potential competitors, field of use restrictions imposed on the licensee are block-exempted provided the other conditions in the TTBEO are met. Where those conditions are not met, an individual assessment is required. The principal concern is that the licensee may cease to exert competitive pressure outside the licensed field. This risk is heightened in cross-licensing arrangements between competitors involving asymmetrical field of use restrictions, where each party is licensed to operate in different fields, ie in different industrial sectors, product markets or technical fields of application. Competition concerns may arise in particular where the licensee's production assets have been adapted to the licensed technology and are also used to produce products outside the licensed field of use using the licensee's production facility. If the agreement is likely to result in a reduction of output outside the licensed field of use without objective justification, it may fall within the Chapter I prohibition. By contrast, symmetrical field of use restrictions, under which the parties are licensed to operate within the same field(s) of use, are unlikely to restrict competition that existed absent the agreement and are therefore unlikely to fall within the Chapter I prohibition. Similarly, agreements that merely enable a licensee to develop and exploit its own technology rights within the licensed scope, without fear of infringement claims, will not normally restrict competition. In such cases, field of use restrictions do not in themselves restrict competition that existed in the absence of the agreement. In the absence of the agreement, the licensee also risked infringement claims outside the scope of the licensed field of use. However, if the licensee terminates or scales back its activities in the area outside the licensed field without having a business justification, this may indicate an underlying market-sharing arrangement, amounting to a hardcore restriction under Article 7(2)(c) of the TTBEO.

11.66 In agreements between non-competitors, field of use restrictions imposed on either the licensor or the licensee are block-exempted provided the other conditions in the TTBEO are met. Where these conditions are not met, an individual assessment is required. In most cases, such restrictions either do not restrict competition within the meaning of the Chapter I prohibition or they generate efficiencies capable of satisfying the conditions for Section 9 exemption. In particular, they may promote the dissemination of technology by giving the licensor an incentive to license for fields of application it does not intend to exploit itself. Without such protection, the licensor's incentive to license may be reduced.

11.67 In this context, the licensor may normally also grant exclusive or sole licences to different licensees limited to one or more fields of use. Such arrangements limit competition between licensees using the same technology in a manner analogous to licences involving territorial exclusivity and are assessed by

reference to the same principles (see paragraphs 11.37 to 11.47 of this Guidance).

Captive use restrictions

11.68 A captive use restriction requires the licensee to limit the manufacture of products incorporating the licensed technology to quantities necessary for the production, maintenance or repair of its own products. The effect of such a restriction is to require the licensee to use the licensed technology only to produce inputs for incorporation into its own products and not to supply those products for incorporation into the products of third-party manufacturers.

11.69 Captive use restrictions can benefit from the block exemption, provided the applicable conditions (which will depend upon whether the technology transfer agreement is between competitors or non-competitors) in the TTBEO are met. Outside of the block exemption, an individual assessment is required, taking account of the competitive relationship between the parties.

11.70 In agreements between competitors, a captive use obligation prevents the licensee from supplying components to third party manufacturers. Where, prior to the agreement, the licensee was neither an actual nor a potential supplier of components to other producers, the restriction does not alter the pre-existing competitive situation and should be assessed in the same manner as in agreements between non-competitors. Where, however, the licensee was an actual or potential component supplier, the impact of the restriction on that activity must be examined. If, as a result of adopting the licensed technology, the licensee abandons production based on its own technology and withdraws from supplying components to third parties, the agreement may restrict competition that existed prior to its conclusion. The risk of significant anticompetitive effects is heightened where the licensor holds substantial market power on the component market.

11.71 In agreements between non-competitors, captive use restrictions may give rise to two principal competition concerns:

(a) a reduction in competition between licensees using the same technology on the input market; and

(b) the elimination of arbitrage opportunities between licensees, which may increase the licensor's ability to apply discriminatory royalty terms.

11.72 Captive use restrictions may nevertheless give rise to efficiencies. Where the licensor is a supplier of components, the restriction may be necessary for the dissemination of technology between non-competitors to occur. In the absence of the restriction, the licensor may be unwilling to license or may do

so only by charging higher royalties, as the licence would create direct competition with its own component supply. In these circumstances, the restriction may fall outside the scope of the Chapter I prohibition or satisfy the conditions for exemption under Section 9. However, the restriction must not prevent the licensee from supplying replacement parts for its own products. In particular, the licensee must remain free to serve the aftermarket, including sales to independent operators providing maintenance and repair services.

11.73 Where the licensor is not active as a supplier on the relevant component market, the rationale described above does not apply. In such cases, while a captive use restriction may still be capable of supporting technology dissemination by preventing sales to producers competing with the licensor on other product markets, less restrictive means will normally be available. In particular, targeted restrictions on sales into specified customer groups that are reserved for the licensor are likely to constitute a less restrictive alternative. As a result, captive use restrictions will generally not be indispensable to the dissemination of technology in these circumstances.

Tying and bundling

11.74 In the context of technology transfer, tying arises where the grant of a licence for one technology (the tying product) is made conditional on the licensee also obtaining a licence for another technology or purchasing a product from the licensor or a party designated by it (the tied product). Bundling refers to situations in which two technologies, or a technology and a product, are supplied only as a single package. In both cases, it is necessary that the technologies or products concerned are distinct, in the sense that there is separate demand for each. For the purposes of this part, the term *tying* is used to refer both to tying and to bundling.

11.75 Article 5 of the TTBEO limits the availability of the block exemption for tying arrangements through the application of the market share and other thresholds. As a result, tying is not block-exempted where the relevant conditions in Article 5 are not met. The relevant thresholds apply to the relevant affected technology and product markets, including the market for the tied product. The paragraphs below set out the CMA's approach to the assessment of tying arrangements that fall outside the block exemption.[208]

11.76 The principal competition concern associated with tying is the foreclosure of competing suppliers of the tied product. Tying may also reinforce or extend

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[208] For an example of how this analytical framework has been applied in practice, see Commission decision of 20 December 2012 in case AT.39230 – *Rio Tinto Alcan*, paragraphs 96 *et seq.*

market power in the tying market by increasing barriers to entry, for example, by requiring new entrants to enter multiple markets simultaneously. In addition, tying may enable the licensor to increase royalty levels, particularly where the tying and tied products are partially substitutable and not used in fixed proportions, as the licensee may be prevented from switching to alternative inputs in response to higher royalties for the tying product. These concerns arise irrespective of whether the parties are competitors. For tying to be capable of producing appreciable anticompetitive effects, the licensor must hold a significant degree of market power in the market for the tying product, such that it is able to restrict competition in the market for the tied product. In the absence of such power, leveraging effects are unlikely. As with non-compete obligations, appreciable foreclosure effects will only arise where the tying arrangement covers a sufficiently large share of the market for the tied product. Where market power exists primarily in the market for the tied product rather than the market for the tying product, the restraint is more appropriately analysed as a non-compete obligation or a form of quantity forcing, reflecting the fact that any competition concern is likely to originate in the market for the tied product and not in the market for the tying product.[209]

11.77 Tying arrangements may also generate efficiencies. This may be the case, for example, where the tied product is objectively necessary for the technically sound exploitation of the licensed technology or to ensure that production under the licence complies with quality standards applied by the licensor and other licensees. In such circumstances, tying may satisfy the conditions for Section 9 exemption. Where products incorporating the licensed technology are marketed under the licensor's trademark or brand, or where consumers perceive a clear association with the licensor, the licensor has a legitimate interest in safeguarding product quality in order to protect the value of its technology and reputation. Moreover, where it is apparent to consumers that multiple undertakings are exploiting the same technology, licensees may be unwilling to enter into a licensing arrangement unless there is assurance that the technology is used in a technically satisfactory and consistent manner across all licensees.

Non-compete obligations

11.78 Non-compete obligations are provisions which require the licensee to refrain from using technologies owned or licensed by third parties that compete with the licensed technology. Non-compete obligations relating to a product or an

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[209] For the applicable analytical framework see paragraphs 11.78 to 11.85 of this Guidance and paragraphs 10.37 *et seq*. of the VABEO Guidance.

additional technology supplied by the licensor are addressed separately in paragraphs 11.74 to 11.77 of this Guidance. Non-compete obligations may benefit from the block exemption in agreements between competitors and between non-competitors, provided the conditions in the TTBEO are otherwise met. Where those conditions are not met, an individual assessment is required. The remainder of this part sets out the CMA's approach to the assessment of non-compete obligations outside the safe harbour.

Risks of non-compete obligations

11.79 The principal competition concern associated with non-compete obligations is the foreclosure of third-party technologies. These obligations may also facilitate coordination between licensors where they are used cumulatively by several licensors or, in the context of cross-licensing between competitors, where the parties mutually commit not to use third-party technologies. Foreclosure of alternative technologies weakens competitive pressure on royalty levels and reduces competition between the incumbent technologies by limiting the scope for licensees to switch to competing technologies. Given that foreclosure is the central concern in both contexts, the analytical approach will generally be similar for agreements between competitors and non-competitors.

11.80 Foreclosure may arise where a substantial proportion of potential licensees are already tied to one or, in the case of cumulative effects, to more sources of technology and are thereby prevented from exploiting competing technologies. Such effects may result either from agreements entered into by a single licensor with significant market power or from the cumulative impact of agreements concluded by several licensors, even where each agreement taken in isolation benefits from the block exemption. In the latter case, material foreclosure is unlikely where less than half of the relevant market is tied. Above that level, significant foreclosure concerns are more likely to arise where barriers to entry for new licensees are significant. Where entry barriers are low, new licensees may be able to enter the market and exploit commercially attractive technologies held by third parties, thereby constraining incumbent licensees.[210]

11.81 In assessing the scope for entry and expansion by third parties, it is also necessary to consider the extent to which distributors are tied to licensees by non-compete obligations. Third party technologies will only exert an effective competitive constraint if they have the necessary production and distribution

[210] See footnote 45.

assets needed to be able to enter the market. That is to say that the ease of entry will depend not only on the availability of licensees, but also on the extent to which they have access to distribution. The assessment of foreclosure at the level of distribution will therefore follow the analytical framework set out in paragraphs 10.37 to 10.56 of the Vertical Agreements Guidance.

11.82 Where the licensor holds significant market power, obligations requiring licensees to source the relevant technology exclusively from that licensor may give rise to substantial foreclosure effects. The stronger the licensor's market position, the greater the risk that competing technologies are excluded. Foreclosure may occur even where non-compete obligations do not cover a large proportion of the market, in particular where they target licensees that are the most likely candidates to license alternative technologies. The risk is especially pronounced where the pool of potential licensees is limited.

Pro-competitive effects of non-compete obligations

11.83 Non-compete obligations may also generate efficiencies. In particular, they may facilitate the dissemination of technology by reducing the risk of misappropriation of licensed know-how. Where a licensee is free to exploit competing technologies, there is a risk that the licensor's know-how is used in connection with those technologies, benefiting competitors. In addition, the use of multiple competing technologies by a licensee may complicate the monitoring of royalty payments, which may discourage licensors from entering into licensing arrangements.

11.84 In certain cases, non-compete obligations, possibly combined with territorial exclusivity, may be necessary to ensure that the licensee has adequate incentives to invest in and exploit the licensed technology. Where such obligations give rise to appreciable foreclosure effects and are therefore caught by the Chapter I prohibition, reliance on the Section 9 exemption may require the use of less restrictive alternatives. These may include minimum output or minimum royalty obligations, which typically involve a lower risk of foreclosing competing technologies.

11.85 Finally, where the licensor undertakes substantial client-specific investments, for example, in adapting the technology or providing training to the licensee's needs, non-compete obligations or minimum output or royalty commitments may be necessary to protect against hold-up risks and to induce the licensor to make those investments. In many cases, however, such costs can be recovered through a lump-sum payment, indicating that less restrictive means may be available.

Settlement agreements

11.86 Licensing of technology rights in the context of settlement agreements may constitute a means of resolving disputes, including by avoiding a situation in which one party exercises its intellectual property rights to prevent the other party from exploiting its own intellectual property rights.[211]

11.87 Settlement agreements relating to technology disputes are, in principle, a legitimate means of reaching a mutually acceptable compromise to a bona fide legal dispute. However, challenges to the validity and scope of intellectual property rights are part of normal competition in sectors characterised by exclusive technology rights.[212] It is also in the public interest to remove invalid intellectual property rights, as they may otherwise operate as barrier to innovation and economic activity.[213]

11.88 Subject to an assessment of its specific content and economic context, licensing, including cross-licensing, concluded as part of a settlement agreement may be compatible with competition law where, in the absence of the licence, the licensee would be excluded from the relevant market.[214]

11.89 However, settlement agreements may restrict competition within the meaning of the Chapter I prohibition, depending on their terms, any related agreements between the parties, and the relevant legal and economic context.[215] In such cases, particular regard should be had to whether the parties are actual or potential competitors.

Pay-for-restriction in settlement agreements

11.90 'Pay-for-restriction' or 'pay-for-delay' type settlement agreements typically do not involve the licensing or transfer of technology rights. Instead, they are characterised by a value transfer from one party in return for a limitation on the entry into, or expansion within, the market by the other party, and may

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[211] The TTBEO and this Guidance are without prejudice to the application of the Chapter I prohibition to settlement agreements which do not contain a licensing agreement.
[212] See judgments of the CJEU of 30 January 2020, *Generics (UK) and Others*, C-307/18, ECLI:EU:C:2020:52, paragraph 81. See also, by analogy with EU law, judgments of the CJEU 27 June 2024, *Commission v Krka*, C-151/19 P, ECLI:EU:C:2024:546, paragraph 72; of 27 June 2024, *Commission v Servier and Others*, C-176/19 P, ECLI:EU:C:2024:549, paragraph 105.
[213] See judgment of the ECJ of 25 February 1986, *Windsurfing v Commission*, C-193/83, ECLI:EU:C:1986:75, paragraph 92.
[214] See for example, by analogy with EU law, judgment of the Court of Justice of the EU of 27 June 2024, *Commission v Krka*, C-151/19 P, ECLI:EU:C:2024:546, paragraph 398, which clarifies that this does not apply if the agreements between the parties also prohibit the licensee from entering other markets.
[215] See to that effect judgment of the CJEU of 27 June 2024, *Commission v Servier and Others*, C-176/19 P, ECLI:EU:C:2024:549, paragraphs 178—179.

constitute a restriction of competition within the meaning of the Chapter I prohibition.[216]

11.91 In particular, 'pay-for-restriction' or 'pay-for-delay' settlement agreements between actual or potential competitors are liable to constitute a restriction by object where it is apparent, from an examination of the agreement, that the value transfers involved cannot be explained other than by the common commercial interest of the parties in avoiding competition on the merits.[217] This may be the case, for example, where one party makes value transfers to one or more other parties resulting in a net gain for those parties that is sufficiently significant to disincentivise them from entering, or expanding within, the market independently.[218]

Cross licensing in settlement agreements

11.92 Settlement agreements under which the parties merely cross-license their respective technologies and impose restrictions on their use, including restrictions on licensing to third parties, may restrict competition within the meaning of the Chapter I prohibition. Such agreements are unlikely to raise competition concerns where the parties are not actual or potential competitors, and the cross-licensing is limited to what is necessary to resolve

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[216] See e.g. the judgment of the CJEU of 30 February 2020, *Generics (UK) and Others*, C-307/18, ECLI:EU:C:2020:52, paragraphs 60 et seq. See also, *GSK v CMA* [2021] CAT 9, *Allergan and Others v. CMA,* [2024] EWCA Civ 1023, *Advanz Pharma and Others v. CMA* [2024] CAT 36. See also, by analogy with EU law, the judgment of the CJEU of 27 June 2024, *Commission v Servier* and Others, C-176/19 P, ECLI:EU:C:2024:549, paragraph 104. This judgment clarifies that, in the specific context of the pharmaceutical industry and patent settlements between an originator medicine manufacturer and a generic medicine manufacturer, a value transfer may be considered legitimate if it is fully justified by the need to compensate for costs or disruptions caused by the settled litigation – such as expenses and fees of the generic manufacturer's advisers – or by the need to remunerate the actual and proven supply of goods or services provided by the generic manufacturer to the originate or manufacturer.

[217] See judgment of the CJEU of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraphs 83 and 87. See also, *GSK v CMA* [2021] CAT 9, *Allergan and Others v. CMA,* [2024] EWCA Civ 1023, *Advanz Pharma and Others v. CMA* [2024] CAT 36. See also, by analogy with EU law, the judgment of the CJEU of 25 March 2021, *Lundbeck v Commission*, C-591/16 P, ECLI:EU:C:2021:243, paragraph 114.

[218] There is no requirement for that net gain to necessarily be great er than the profits which the competitor would have made if it had been successful in the patent proceedings. See, for example, the judgment of the CJEU of 30 January 2020, *Generics (UK) and Others*, C-307/18, ECLI:EU:C:2020:52, paragraphs 87—94 of competition. Such agreements are also unlikely to satisfy the conditions of the Section 9 exemption. It is particularly unlikely that the restriction can be considered indispensable within the meaning of the third condition of the Section 9 exemption. The achievement of the objective of the agreement, namely, to ensure that the parties can continue to exploit their own technology without being blocked by the other party, does not require that the parties agree to share future innovations. However, the parties are unlikely to be prevented from gaining a competitive lead over each other where the purpose of the licence is to allow the parties to develop their respective technologies and where the licence does not lead them to use the same technological solutions. Such agreements merely create design freedom by preventing future infringement claims by the other party.

a genuine two-way blocking position. By contrast, where the parties are competitors and the agreement involves market sharing or the fixing of reciprocal running royalties with a significant effect on prices, it is likely to fall within the Chapter I prohibition.

11.93 Where a settlement agreement entitles the parties to use each other's technology and extends to future developments, it is necessary to assess its effects on the parties' incentives to innovate. In particular, where the parties possess a significant degree of market power, such an agreement is likely to restrict competition where it prevents the parties from gaining a competitive lead over each other. Agreements that eliminate or substantially reduce the ability of one party to gain a competitive lead diminish incentives to innovate and adversely affect a key parameter of competition.

11.94 Agreements of this kind are also unlikely to satisfy the conditions for exemption under the Chapter I prohibition. In particular, it is unlikely that restrictions preventing the parties from gaining a competitive lead can be regarded as indispensable for the purposes of the third Section 9 exemption criterion. The objective of enabling the parties to continue exploiting their respective technologies without being blocked by the other party does not require the sharing of future innovations.

11.95 By contrast, a licence that allows the parties to develop their respective technologies independently, and that does not lead them to adopt the same technological solutions, is less likely to restrict competition. Such agreements may merely confer design freedom by preventing future infringement claims, without reducing the parties' incentives to compete through innovation.

No-challenge clauses in settlement agreements

11.96 In the context of a settlement agreement, no-challenge clauses will frequently fall outside the scope of the Chapter I prohibition.

11.97 However, no-challenge clauses may, in certain circumstances, restrict competition within the meaning of the Chapter I prohibition.[219] This may be the case, for example, where a no-challenge clause is used to eliminate a competitor that would otherwise have posed a credible competitive threat. A no-challenge clause may also restrict competition where the intellectual property right in question was granted on the basis of incorrect or misleading

[219] See e.g. the judgment of the CJEU of 30 February 2020, *Generics (UK) and Others*, C-307/18, ECLI:EU:C:2020:52, paragraph 82.

information.[220] In addition, closer scrutiny may be warranted where the licensed technology constitutes a necessary input for the licensee's production (see also paragraph 7.13 of this Guidance).

Technology pools

11.98 Technology pools are arrangements under which two or more parties assemble a package of technologies that is licensed both to contributors to the pool and to third parties. Such arrangements may take the form of relatively simple agreements between a limited number of parties or more complex structures in which the licensing of the pooled technologies is organised through a separate entity. In both cases, technology pools typically enable licensees to obtain access to the pooled technologies through a single licence. There is no inherent link between technology pools and standards. However, technology pools frequently support, in whole or in part, a de facto industry standard[221] or a de jure industry standard,[222] and different pools may support competing standards.[223] Technology pools may generate pro-competitive effects, in particular, by reducing transaction costs and limiting cumulative royalties so as to prevent double marginalisation. They facilitate one-stop licensing, which may be especially valuable in sectors characterised by extensive intellectual property rights and where licences from multiple licensors are needed to operate on the market. Where licensees also receive ongoing services relating to the application of the licensed technologies, joint licensing and service provision through a pool may lead to further cost savings. Technology pools may also play a beneficial role in the implementation of pro-competitive standards.

11.99 However, technology pools might also be restrictive of competition. The creation of a pool necessarily involves joint selling of the pooled technologies. Where a pool is composed solely or predominantly of substitute technologies, this may amount to a form of price fixing. Technology pools may also foreclose alternative technologies, for example, where the pool supports, or establishes, an industry standard. In such circumstances, the combination of

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[220] See to that effect the Commission Decision of 26 November 2020 in case in AT.39686 – *Cephalon*, paragraph 1208.

[221] See footnote 201 above

[222] A de jure industry standard for these purposes is a standard formally adopted by a standard-setting body and/or required by law.

[223] See concerning the treatment of standards and the treatment of standardisation agreements in Part 9 of the Horizontal Agreements Guidance. Technology pools typically operate licensing programmes that are structured around specific industry standards.

the standard and the pool may hinder the entry of new technologies or foreclose competing technologies already present on the market.

11.100 Agreements establishing technology pools and governing their operation are not covered by the TTBEO, irrespective of the number of parties involved. This is because such agreements do not permit a particular licensee to produce contract products (see paragraphs 4.5 to 4.7 of this Guidance). These agreements must therefore be assessed solely under this Guidance.

11.101 Technology pools raise issues that do not arise in other forms of technology transfer, in particular, as regards the selection of technologies included in the pool and the rules governing its operation. Licensing out from a pool will generally constitute a multi-party agreement, as the contributors commonly determine the licensing terms. For this reason, licensing out from a technology pool is also not covered by the TTBEO and is addressed separately in paragraph 11.116 and 11.123 to 11.129 of this Guidance.

The assessment of the creation and operation of technology pools

11.102 The way a technology pool is established, organised, and operated may reduce the risk that it has the object or effect of restricting competition and may support pro-competitive outcomes. In assessing potential competitive risks and efficiencies, the CMA will have regard, among other factors, to the transparency of the pool creation process; the selection and nature of the pooled technologies; the extent to which independent experts are involved in the establishment and operation of the pool; and whether appropriate safeguards are in place, including measures to prevent the exchange of competitively sensitive information and the availability of independent dispute resolution mechanisms.

Open participation

11.103 Where participation in the creation of a technology pool, and in any standard supported by the pool, is open to all interested parties, it is more likely that the technologies included in the pool will be selected on the basis of price and quality considerations than where the pool is established by a limited group of technology owners.

Selection and nature of the pooled technologies

11.104 The competitive risks and potential efficiencies associated with technology pools depend to a significant extent on the relationship between the pooled technologies and technologies outside the pool. In particular, two distinctions

are relevant: (i) first, between complementary and substitute technologies; and (ii) second, between essential and non-essential technologies.

11.105 Technologies are complementary where each is required in order to produce the relevant product or to carry out the relevant process. By contrast, technologies are substitutes where either technology enables the holder to produce the product or carry out the process independently of the other.

11.106 A technology may be regarded as essential in two circumstances:

(a) where it is indispensable to produce a particular product or to carry out a particular process to which the pooled technologies relate; or

(b) where it is indispensable to produce such a product or carry out such a process in accordance with a standard that incorporates the pooled technologies.

11.107 In the first case, a technology is essential where there are no viable substitutes, from both a technical and commercial perspective, inside or outside the pool, and the technology constitutes a necessary element of the package required to produce the relevant product or carry out the relevant process. In the second case, a technology is essential where it constitutes a necessary element of the pooled technologies required to comply with the relevant standard (standard-essential technology). Essential technologies are, by definition, complementary. A declaration by a technology holder that a technology is essential does not, in itself, establish essentiality for the purposes of this Guidance.

11.108 Where a pool contains substitute technologies, royalties are likely to be higher than would otherwise be the case, as licensees do not benefit from competition between alternative technologies. By contrast, where the pooled technologies are complementary, a technology pool may reduce transaction costs and lead to lower aggregate royalties. This reflects the ability of the pool to set a single royalty for the package, rather than each licensor setting royalties independently without accounting for the fact that increasing the royalty for one technology will usually decrease the demand for complementary technologies.

11.109 The distinction between complementary and substitute technologies is not always clear-cut, as technologies may be substitutes in part and complements in part. Where efficiencies arising from the joint use of two technologies are such that licensees are likely to demand both, the technologies will generally be treated as complementary, even if they are partially substitutable. In such circumstances, it is likely that, absent the pool, licensees would have sought

separate licences for each technology due to the additional economic benefit of combined use.

11.110 The inclusion of substitute technologies in a technology pool will generally restrict competition and breach the Chapter I prohibition, as it may amount to collective bundling and lead to price coordination between competing technologies. Such arrangements are also unlikely to satisfy the conditions for Section 9 exemption, as the inclusion of alternative technologies does not generate transaction-cost efficiencies and, absent the pool, licensees would not have demanded licences for both technologies. The fact that contributors remain formally free to license independently will not, in itself, remove these concerns, as contributors may have limited incentives to do so where independent licensing would undermine the joint exercise of market power through the pool.

Selection and function of independent experts and dispute resolution

11.111 A further relevant factor in assessing the competitive risks and potential efficiencies of technology pools is the extent to which independent experts are involved in their establishment and operation. In particular, the assessment of whether a technology is essential to a standard supported by a pool may involve complex technical judgments. The involvement of independent experts in such assessments may help to ensure that only essential technologies are included and that competition between alternative technological solutions is not distorted.

11.112 In this context, the CMA will have regard to the manner in which experts are selected and to the functions they perform. Experts should be independent of the undertakings forming the pool. Where experts are connected to, or otherwise dependent on, licensors or pool administrators, their involvement is likely to be afforded less weight. Experts should also possess the technical expertise necessary to perform their assigned functions, which may include verifying whether the technology rights proposed for inclusion in the pool are valid and essential. The inclusion of invalid intellectual property rights is liable to hinder, rather than promote, innovation.

11.113 The existence and design of dispute resolution mechanisms provided for in the arrangements establishing the pool are also relevant. Where dispute resolution is entrusted to bodies or individuals that are independent of the pool and its members, it is more likely to operate in an impartial and effective manner.

Safeguards against the exchange of competitively sensitive information

11.114 The arrangements governing the exchange of competitively sensitive information between the parties are also relevant to the assessment.[224] The CMA will have regard to the safeguards in place to prevent the exchange of such information. In this context, an independent expert, licensing body, or pool administrator may play an important role, for example by ensuring that information on output or sales, where required for the calculation or verification of royalties, is not disclosed to pool members that compete in affected markets.

11.115 Appropriate safeguards should also be in place to prevent the exchange of competitively sensitive information between competing technology pools, in particular where technology holders participate in the establishment or operation of more than one competing pool.

Safe harbour for technology pools

11.116 The creation and operation of a technology pool, and licensing out from the pool, will generally fall outside the scope of the Chapter I prohibition, irrespective of the market position of the parties, where all of the following conditions are satisfied:

(a) participation in the pool creation process is open to all interested holders of relevant technology rights;

(b) the technology rights included in the pool are disclosed in an effective manner to existing and potential licensees;[225]

(c) appropriate safeguards are in place to ensure that only essential technologies (and therefore ones that are necessarily complementary technologies) are included in the pool, and that the methodology used to conduct essentiality assessments is disclosed in an effective manner to existing and potential licensees;[226]

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[224] See Part 8 of the Horizontal Agreements Guidance.

[225] Effective disclosure should include at least the patent number or patent application number where that information is publicly available, and the country of registration. Disclosures should be updated at reasonable intervals upon request.

[226] Effective disclosure should include at least an explanation of the scope of the essentiality checks (including any sampling technique), the content of the checks (for example which elements are assessed) and the criteria used to select the assessors (for example, regarding expertise and independence). Disclosures should be updated at reasonable intervals upon request.

(d) appropriate safeguards are in place to ensure that the exchange of competitively sensitive information is limited to what is necessary for the creation and operation of the pool;

(e) the pooled technologies are licensed into the pool on a non-exclusive basis;

(f) the pooled technologies are licensed out to all potential licensees on fair, reasonable and non-discriminatory (FRAND) terms,[227] including safeguards to ensure that licensees are not charged more than once for the same technology rights;

(g) contributors to the pool and licensees remain free to challenge the validity and essentiality of the pooled technologies; and

(h) contributors to the pool and licensees remain free to develop competing products and technologies.

Outside the safe harbour

11.117 Where significant complementary but non-essential technologies are included in a pool, there is a risk of foreclosure of third-party technologies. Once a technology is included in the pool and licensed as part of a package, licensees may have limited incentives to license competing technologies outside the pool, particularly where the royalty for the package already covers a substitute solution. The inclusion of technologies that are not necessary to produce the relevant product or carry out the relevant process, or to comply with a relevant standard, may also force licensees to pay for technology they do not require. Such inclusion may amount to collective bundling.

11.118 Where a technology pool includes non-essential technologies and holds a significant position on a relevant market, the arrangement is likely to restrict competition within the meaning of the Chapter I prohibition.

11.119 Given that substitute and complementary technologies may emerge after a pool has been established, the assessment of essentiality should not be limited to the point of creation. A technology that was initially essential may become non-essential over time due to technological developments, changes in standards, or their implementation. Where alternative technologies are available and demanded by licensees, foreclosure concerns may be mitigated, for example, by offering licences excluding the no-longer essential

[227] For further discussion of FRAND terms, see Part 9 of the Horizontal Agreements Guidance.

technology at a correspondingly reduced royalty. Other measures may also be capable of addressing such concerns.

11.120 In assessing pools that include non-essential but complementary technologies, relevant factors include, in particular:

(a) whether there are objective, pro-competitive reasons for including the non-essential technologies;

(b) whether contributors remain free to license their technologies independently, enabling licensees to assemble alternative technology packages;

(c) whether, where pooled technologies have multiple applications, the pool offers differentiated packages limited to the technologies required for particular applications; and

(d) whether licensees can obtain licences for only part of the package with a corresponding reduction in royalties.

11.121 The availability of partial licences may reduce the risk of foreclosure, particularly where royalties are adjusted accordingly. This generally requires that a share of the overall royalty is attributable to each technology in the pool. Where licence agreements are of long duration and the pool supports a de facto industry standard,[228] it is also relevant whether licensees can terminate part of the licence on reasonable notice and obtain a corresponding reduction in royalties.

11.122 Technology pools that restrict competition may nevertheless generate efficiencies which must be assessed under the Section 9 exemption and balanced against their restrictive effects. For example, where a pool includes non-essential technologies but otherwise satisfies the safe harbour conditions, includes non-essential technologies for objective pro-competitive reasons, and allows licensees to obtain partial licences with reduced royalties, the Section 9 exemption conditions are more likely to be met.

Assessment of individual restraints in agreements between the pool and its licensees

11.123 Where the agreement establishing a technology pool does not infringe the Chapter I prohibition, a separate assessment is required of the licensing agreements concluded between the pool and its licensees. The terms of those licences may themselves restrict competition. The TTBEO does not apply to

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[228] See footnote 201 above.

licensing agreements concluded between a pool and third-party licensees. This part therefore addresses the assessment of restraints commonly found in pool licensing arrangements.

11.124 In assessing licensing agreements between a pool and its licensees, the CMA will be guided by the following principles:

(a) the stronger the market position of the pool, the greater the risk of anti-competitive effects;

(b) the stronger the market position of the pool, the greater the risk that refusal to license to all potential licensees, or discriminatory licensing, will restrict competition;

(c) pools should not unduly foreclose third-party technology rights or prevent the formation of competing pools; and

(d) licence agreements should not contain any hardcore restrictions of the kind listed in Article 7 of the TTBEO.

11.125 Where a technology pool is compatible with the Chapter I prohibition, the parties are generally free to agree royalties for the technology package and to allocate those royalties among the included technologies, subject to any applicable commitment to license on FRAND terms.[229] Such arrangements are inherent in the creation of the pool and do not, in themselves, restrict competition. In some circumstances, agreeing royalties prior to standard-setting may be efficiency-enhancing by preventing the standard-setting process from conferring excessive market power on particular technologies. Licensees must, however, remain free to determine the prices of products manufactured under the licence.

11.126 Where a pool holds a dominant position, royalties and other licensing terms should be non-excessive, non-discriminatory, and licences should be non-exclusive.[230] These requirements are intended to prevent foreclosure and downstream anti-competitive effects. These requirements do not preclude different royalty rates for different uses. Different royalty rates for different product are generally permissible, provided there is no rate discrimination within the same product market. In particular, the treatment of licensees should not depend on whether they are also licensors.

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[229] See paragraph 11.116 above for the definition of FRAND.
[230] However, if a technology pool has no market power, licensing out from the pool will normally not restrict competition within the meaning of the Chapter I prohibition even if those conditions are not fulfilled.

11.127 Contributors and licensees should remain free to develop competing products, technologies, and standards, and to license technology outside the pool. These freedoms are particularly important where pooled technologies are incorporated into a de facto industry standard,[231] as non-compete obligations in such circumstances may significantly reduce incentives to innovate.

11.128 Grant-back obligations should be non-exclusive and limited to developments that are essential or important for the use of the pooled technology. This may be necessary to prevent hold-up and to ensure effective exploitation of the pooled technologies, including where essential technologies are developed by licensees or their subcontractors.

11.129 It is important that technology pools do not reduce incentives to challenge invalid technology rights or otherwise operate to shield such rights from scrutiny. Therefore, no-challenge clauses (including termination on challenge clauses) in technology transfer agreements between a pool and its licensees are likely to restrict competition within the meaning of the Chapter I prohibition.

[231] See footnote 201 above.