

The retained Horizontal Block Exemption Regulations - R&D and specialisation agreements

Consultation document

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1. About the consultation

Introduction

- 1.1 The purpose of this consultation is to seek views on the CMA's proposed recommendation to the Secretary of State to replace each of the two retained Horizontal Block Exemption Regulations when they expire on 31 December 2022.
- 1.2 Horizontal agreements are agreements entered into between actual or potential competitors.¹
- 1.3 The Competition Act 1998 (the Act) prohibits anticompetitive agreements between businesses (known as the Chapter I prohibition).² The prohibition applies to agreements and concerted practices between undertakings and to decisions by associations of undertakings (eg trade associations) which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom (UK) and which may affect trade within the UK.
- 1.4 However, section 9(1) of the Act provides that an agreement is exempt from the Chapter I prohibition if it:
 - (a) contributes to
 - i. improving production or distribution, or
 - ii. promoting technical or economic progress,
 - (b) while allowing consumers a fair share of the resulting benefit; and
 - (c) 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.

¹ Agreements are vertical when they are between businesses operating at different levels of the production or distribution chain, for example, between manufacturers and wholesalers. See the CMA's recommendation on [Vertical Agreements](#).

² The Act, section 2.

- 1.5 An agreement may be individually recognised as exempt by a competition authority or a court and, in addition, certain types of agreement will be treated as automatically exempt if they meet conditions set out in a ‘block exemption’ regulation or order applicable to that category of agreements.
- 1.6 Under UK law, there are currently two retained Horizontal Block Exemption Regulations (retained HBERs), which provide automatic exemptions for certain categories of horizontal agreements subject to meeting specific conditions.³ These are the retained Research and Development Block Exemption (R&D BER).⁴ and the retained Specialisation Block Exemption Regulation (Specialisation BER).⁵ The retained R&D BER relates to certain research and development (R&D) agreements that are entered into between two or more parties.⁶ The retained Specialisation BER relates to certain unilateral and reciprocal specialisation agreements, alongside joint production agreements.
- 1.7 These BERs were retained in UK law⁷ following the UK’s withdrawal from the European Union (EU) and the end of the Transition Period,⁸ and are due to expire on 31 December 2022.
- 1.8 As a result of the retained HBERs, agreements between businesses that meet the conditions of the retained HBERs are automatically exempt from the Chapter I prohibition.⁹ This is because the parties to an agreement covered by the block exemption would not need to conduct a further self-assessment as to whether the agreement might benefit from individual exemption under section 9(1) CA98. In this way, the retained HBERs provide legal certainty for businesses.

³ The retained HBERs are two of the ‘retained exemptions’ created by a combination of the operation of the European Union (Withdrawal) Act 2018 and the Competition (Amendment etc.) (EU Exit) Regulations 2019 (as amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020). See here: <https://www.legislation.gov.uk/eur/2010/330/contents>.

⁴ Regulation 1217/2010 on the application of Article 101(3) of the TFEU to categories of R&D agreements

⁵ Regulation 1218/2010 on the application of Article 101(3) of the TFEU to categories of specialisation agreements.

⁶ Article 1(1)(a) of the retained R&D BER includes a definition of the R&D agreements that can fall within the scope of the R&D BER.

⁷ The retained exemptions were created by a combination of the operation of the European Union (Withdrawal) Act 2018 and the Competition (Amendment etc.) (EU Exit) Regulations 2019, as amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020.

⁸ Previously, the EU Horizontal Research and Development Block Exemption Regulation (EU HBER R&D) and the EU Horizontal Specialisation Block Exemption Regulation (EU HBER Specialisation) applied in the UK and provided an automatic exemption for horizontal agreements meeting their conditions. The block exemption set out in these Regulations are substantively the same as the retained HBERs except that they apply to the EU rather than the UK.

⁹ Unless the block exemption has been cancelled, varied or revoked in accordance with the Act.

- 1.9 In relation to the R&D BER, for example, two competitors may agree to carry out R&D together, or that one will carry out paid-for R&D that is financed by the other, to ensure that the R&D can benefit from their combined know-how, expertise and/or resources. Entering into such an agreement increases the likelihood that the competitors will achieve earlier breakthroughs in their research or product development and helps the parties to allocate their resources more efficiently. Subject to meeting the conditions set out in the R&D BER,¹⁰ and the agreement not containing any prohibited restrictions,¹¹ the R&D agreement may benefit from the block exemption.
- 1.10 Another example, in this case in relation to the Specialisation BER, would be where two competitors work together to improve production processes for certain products (for these purposes, 'Product A' and 'Product B') in a way that will enable them to lower their costs, which in turn could lead to lower prices for consumers of Products A and B. They may agree on a reciprocal basis that one of them will cease producing Product A and buy it instead from the other, while the other ceases producing Product B and buys it from the other. Subject to meeting the conditions set out in the Specialisation BER (such as market share thresholds) and not containing any prohibited restrictions (such as certain restrictions on fixing prices, allocating customers or markets and certain limits on output or sales) the specialisation agreement may benefit from the block exemption.¹²
- 1.11 In accordance with the Act, the Competition and Markets Authority (CMA) has reviewed the retained HBERs for the purpose of making a recommendation to the Secretary of State for Business, Energy and Industrial Strategy (Secretary of State) about whether to replace the retained HBERs when they expire on 31 December 2022.
- 1.12 The CMA is proposing to recommend that the Secretary of State replace the retained HBERs with a UK Specialisation Block Exemption Order and a UK R&D Block Exemption Order (the Specialisation BEO and the R&D BEO, respectively). The CMA has developed this proposed recommendation following a review of the retained HBERs and their effect on UK markets. The CMA's review has:

¹⁰ Conditions such as (i) the competitors' combined market shares not exceeding certain thresholds and (ii) on the kind of access they each need to give each other to the R&D results.

¹¹ Such as certain restrictions on the parties carrying out R&D independently or with third parties or certain limits on output or sale.

¹² An example of a prohibited restriction in this context could include where two companies enter into a reciprocal specialisation agreement under which they agree not to cross-supply the relevant products to each other and cease to sell the other's product (having previously manufactured it); this could qualify as market allocation, a hardcore restriction under Article 4(c) of the retained Specialisation BER.

- (a) Gathered evidence relating specifically to the application of the retained HBERs in the UK. This evidence was principally gathered by the CMA through its Call for Inputs ('CFI') launched on 24 November 2021, and includes input from:
- i. businesses with operations in the UK that rely on the retained HBERs (for example, suppliers of goods and services, distributors/retailers of goods and services, and platforms/intermediaries in e-commerce).
 - ii. law firms and economists advising businesses on the application of competition law to horizontal agreements in the UK; and
 - iii. industry associations.
- (b) Drawn on relevant evidence from the European Commission's evaluation (the Evaluation)¹³ of the EU HBERs and related Guidelines on Horizontal co-operation agreements (the EU Horizontal Guidelines). The CMA and UK stakeholders have contributed actively to this Evaluation as the EU HBERs were fully applicable in the UK during most of the period under review and since then have been applicable in retained form. In its Evaluation, the Commission has gathered evidence relevant to the UK, including to businesses operating in the UK and to UK consumers.
- (c) In addition, since the CFI, the European Commission has published its proposals,¹⁴ and the CMA has taken these into account in formulating its own draft recommendation. While the main objective of the CMA's proposals is to ensure that the UK HBEOs reflect UK, we are mindful of the general feedback provided by a number of stakeholders that divergence between the UK and EU rules can lead to increased compliance costs. Our proposals seek to appropriately balance these considerations. Moreover, a number of the EC's proposals seem to the CMA to offer a sensible and proportionate basis to address issues raised by UK stakeholders.

1.13 Since the CFI we have also conducted targeted stakeholder engagement with UK Research and Innovation ('UKRI') to understand the impact of the R&D BER on the universities sector and small and medium-sized enterprises (SMEs). UKRI is the UK public body that directs research and innovation

¹³ Evaluation which was launched in September 2019. In this recommendation, we cite summaries of the evidence gathered in the Evaluation in a Staff Working Document published by the EC (available [here](#)) and an Evaluation support study on the EU HBERs and Horizontal Cooperation Guidelines also published by the EC (available [here](#)).

¹⁴ See the European Commission press release [here](#). The European Commission draft revised Specialisation BER and draft revised R&D BER can be found on the EC's [consultation page](#).

funding, and has drawn on initial views from relevant higher education representative groups and other relevant organisations.

Scope of this consultation

- 1.14 This consultation document seeks views on the CMA's proposed recommendation to the Secretary of State to replace each of the retained HBERs with UK HBEOs under section 6(1) of the Act,¹⁵ in accordance with section 8(1) of the Act when they expire on 31 December 2022.¹⁶ As outlined in more detail below, this document includes consultation questions that stakeholders are invited to consider when providing their views on the CMA's proposed recommendation.
- 1.15 An overview of the CMA's proposed recommendation in relation to the future UK HBEOs is set out in detail in Section 2, alongside some high-level consultation questions. In Sections 3 and 4, the CMA addresses more detailed recommendations on each proposed HBEO. In Sections 5 and 6 the CMA addresses the proposed duration of each HBEO and some other provisions that would be common to both HBEOs. Each of those sections contains both policy and impact questions. Responses to the policy questions will inform our final recommendation to the Secretary of State. The responses to the impact questions will be used to inform the preparation by BEIS of impact assessments for any block exemption orders the Secretary of State may decide to make. Accordingly, responses to the present consultation may be shared with BEIS. For convenience, the list of consultation questions is set out in full in Annex A.
- 1.16 As explained further below (see paragraphs 1.30 and 1.31), following the consultation initiated by this consultation document, the CMA will prepare its final recommendation to the Secretary of State.
- 1.17 The CMA envisages preparing guidance to accompany any UK HBEOs (CMA HBEOs Guidance). This consultation document therefore includes references to some issues that the CMA proposes to address in any such CMA HBEOs Guidance and not in the UK HBEOs themselves. The draft Guidance that the CMA will develop will also deal with other categories of horizontal agreement, in addition to specialisation and R&D agreements. The CMA plans to publish

¹⁵ Under section 6(1) of the Act if agreements which fall under a particular category of agreements are, in the opinion of the CMA, likely to be exempt agreements, the CMA may recommend that the Secretary of State make an order specifying that category for the purposes of this section.

¹⁶ Under section 8(1) of the Act, before making a recommendation under section 6(1), the CMA must publish details of its proposed recommendation in such a way as it thinks most suitable for bringing it to the attention of those likely to be affected; and consider any representations about it which are made to it.

a draft for consultation later this year so that this can be finalised and become effective at the same time as any UK HBEOs would come into force. In the meantime, the EU Horizontal Guidelines remain relevant to interpreting the retained HBERs.¹⁷

- 1.18 This consultation on potential UK HBEOs is distinct from the European Commission's consultation on the EU HBERs, which apply in the EU.¹⁸

Consultation process

How to respond

- 1.19 We are publishing this consultation document on the CMA webpages and drawing it to the attention of a range of stakeholders to invite comments. We welcome comments on the proposed recommendation to the Secretary of State to make two UK HBEOs, as well as the specific issues we address in the proposed recommendation.
- 1.20 We encourage you to respond to the consultation in writing (by email) using the contact details provided below. Please provide supporting evidence or examples for your views where possible.
- 1.21 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.
- 1.22 In accordance with our policy of openness and transparency, we will publish non-confidential versions of responses on our webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide at the same time a non-confidential version for publication on our webpages which omits that material and which explains why you regard it as sensitive (see also paragraph 1.27 below).

¹⁷ As set out in the CMA's *Guidance on the functions of the CMA after the end of the Transition Period* (CMA 125) at paragraph 4.36, such guidance constitutes a relevant statement of the European Commission to which the CMA, concurrent regulators and UK courts must have regard after 31 December 2020.

¹⁸ For further details see the [current EC Consultation](#), which will close on 26 April 2022; see also [Horizontal agreements between companies – revision of EU competition rules \(europa.eu\)](#).

Duration

The consultation will run for 4 weeks, from 8 April 2022 to 6 May 2022. Responses should be submitted by email by 5:00 p.m. on 6 May 2022 and should be sent to: hbersreview@cma.gov.uk.

Compliance with government consultation principles

- 1.23 In preparing this consultation document, the CMA has taken into account the published [government consultation principles](#), which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders.

Statement about how we use information and personal data that is supplied in consultation responses

- 1.24 Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the General Data Protection Regulation 2016 (GDPR) and the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.
- 1.25 We are processing this personal data for the purposes of our work. This processing is necessary for the performance of our functions and is carried out in the public interest, in order to take consultation responses into account and to ensure that we properly consult on the proposed recommendation to the Secretary of State before it is finalised.
- 1.26 For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long we retain personal data, see our [Privacy Notice](#).
- 1.27 Our use of all information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.

When submitting your response please also let us know if you wish to remain anonymous.

- 1.28 Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, we will take fully into consideration representations made by you in support of confidentiality. We will also be mindful of our responsibilities under the data protection legislation referred to above and under Part 9 of the Enterprise Act 2002.
- 1.29 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

Next steps

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

2. The CMA's proposed recommendation

- 2.1 The CMA's proposed recommendation to the Secretary of State is that it would be appropriate to replace both the R&D BER and the Specialisation BER when they expire on 31 December 2022 with, respectively, an R&D BEO and a Specialisation BEO that are tailored to the needs of businesses operating in the UK and UK consumers.¹⁹ The CMA's proposal is that the two UK BEOs would be similar to the retained HBERs that expire at the end of 2022 in order to ensure the continuity of the current regime for businesses while making some amendments to improve them.
- 2.2 The CMA's proposed recommendation reflects the evidence we reviewed, and which indicates that the Specialisation BER and the R&D BER are relevant and useful tools for businesses that increase legal certainty compared to a situation where businesses would have to rely solely on self-assessment.²⁰
- 2.3 The evidence confirmed that R&D agreements can lead to significant efficiencies and accelerate and improve the pace and quality of innovation that can then benefit consumers. The evidence also confirmed that specialisation agreements can lead to significant improvements to production processes and/or cost efficiencies which can in turn lead to lower prices for consumers.
- 2.4 The CMA is also conscious that its recommendations to the Secretary of State need to be consistent with, and to the extent possible, support the UK government's [Innovation Strategy](#), given that R&D and specialisation agreements can be closely interlinked with innovative activity.²¹
- 2.5 Block exemptions have several benefits for businesses. First, they provide legal certainty to businesses as they enable them to know in advance how to ensure that their agreements comply with competition law. Second, they avoid placing on businesses the burden of scrutinising a large number of

¹⁹ The replacement will result in the adoption of a UK block exemption order under section 6 of the Act (Part I of the Act), the provisions of which will be interpreted in accordance with section 60A of the Act (see the CMA's *Guidance on the functions of the CMA after the end of the Transition Period* (Brexit Guidance), paragraphs 4.18–4.24).

²⁰ See responses received to [our CFI](#). See also the evidence published by the EC in the [Evaluation](#) (which, as set out above in paragraph 1.12, includes evidence relevant to the UK and UK businesses) which found that overall, the EU HBERs and Horizontal Guidelines have made it easier for companies to cooperate in ways which are economically desirable and without adverse effects from the point of view of competition policy. However, the Evaluation found that the HBERs had not fully lived up to their potential and there were a number of areas where effectiveness could be improved.

²¹ Under its strategy, the UK government has committed to encouraging a significant increase in private sector investment in innovation, alongside increasing direct public expenditure on R&D to £22 billion per year.

agreements that are likely to satisfy the requirements for exemption under section 9 of the Act. Third, the existence of a block exemption also ensures consistency of approach by providing a common framework for businesses to assess their horizontal agreements against the Chapter I prohibition.

- 2.6 Block exemptions also help to ensure that the CMA does not need to spend time scrutinising these essentially benign agreements, and so is able to concentrate its resources on other matters that are more likely to give rise to significant competition concerns. In this regard, the CMA notes that the various conditions of the current block exemptions ensure that they are unlikely to apply to agreements that may give rise to significant competition concerns.²²
- 2.7 Given the evidence in favour of block exemptions for specialisation and R&D agreements, the CMA has concluded that there should continue to be a safe harbour and that letting the retained HBERs expire without providing for replacement is not currently appropriate in the UK. In this context, the CMA notes that specialisation and R&D agreements falling within the current 'safe harbour' are considered likely to continue to satisfy the requirements for exemption under section 9 of the Act.
- 2.8 The evidence we have seen also indicates that the current regime for the horizontal agreements block exemptions should be revised in certain respects. Evidence we have reviewed indicates a need to address certain issues with the retained HBERs, including:
- Difficulties in calculating market shares with regards to the market share threshold in the R&D BER;
 - Difficulties that SMEs, in particular, face with regard to calculating their market shares under both retained HBERs;
 - A need for clarification and further guidance on the application of the retained HBERs, as well as other areas such as standardisation and sustainability agreements.²³
- 2.9 When deciding whether to recommend providing greater clarity on certain definitions and provisions in the block exemption itself or in the CMA HBEOs Guidance, the CMA has considered the advantages and disadvantages of

²² For example, through the operation of the market share threshold and list of hardcore and excluded restrictions

²³ The CMA did not however receive evidence suggesting additional categories of standardisation or that sustainability agreements should be brought within the scope of the HBERs and would therefore merit being block exempted.

these two approaches and has reached a conclusion that varies from case to case.

- 2.10 The main advantage of providing greater clarity through guidance is that the guidance can, in principle, be adapted to reflect important market developments that the CMA becomes aware of during the life of the block exemption. The main disadvantage is that guidance provides less legal certainty than changes to the text of the block exemption itself. Conversely, making clarificatory changes in the text of the block exemption provides a greater degree of legal certainty than providing additional guidance but also less flexibility to make additional clarifying changes during the life of the block exemption.
- 2.11 As outlined above, the CMA has also been mindful of the approach proposed by the EU. The CMA is conscious that there may be advantages in divergence from the EU in certain circumstances – for example to address peculiarities of UK markets and better protect UK consumers. Equally, the CMA recognises that there can also be benefits in consistency between the EU and the UK block exemptions, particularly for businesses with activities in both the UK and the EU (eg by reducing compliance costs). We have sought to be guided by what is best for UK consumers and businesses when balancing these considerations.

Specific recommendation for each of the UK HBEOs

- 2.12 In making its proposed recommendation to the Secretary of State, the CMA considers that large-scale and fundamental changes to the current exemption for horizontal agreements are not appropriate. However, the CMA is proposing some limited changes in relation to both Specialisation and R&D, complemented by additional guidance within the CMA HBEOs Guidance. These proposals are summarised below, and explained in more detail in the following sections.

Specialisation

- 2.13 The CMA's proposed recommendation to the Secretary of State is that changes be made to a number of provisions in the retained Specialisation BER for the UK Specialisation HBEO to provide greater clarity and make it easier to apply. This includes changes to the definitions in Article 1 (see paragraphs 3.7 to 3.33), conditions for exemption in Article 2 (see paragraphs 3.34 to 3.40), and market share thresholds and provisions concerning their application in Articles 3 and 5 (see paragraphs 3.41 to 3.62). The CMA also proposes to recommend complementary clarifications in the CMA HBEOs Guidance to these changes, as well as additional clarity in guidance

concerning the hardcore restrictions listed in Article 4 (see paragraphs 3.63 to 3.71).

R&D

2.14 Similarly, the CMA's proposed recommendation to the Secretary of State is that changes be made to a number of provisions in the retained R&D BER for the UK R&D HBEO for greater clarity and to make it easier to apply. This includes changes to the definitions in Article 1 (see paragraphs 4.10 to 4.19), conditions for exemption in Article 3 (see paragraphs 4.20 to 4.31), and market share thresholds and provisions concerning their application in Articles 4 and 7 (see paragraphs 4.32 to 4.53). The CMA also proposes to recommend complementary clarifications in the CMA HBEOs to these changes, as well as additional clarity in guidance concerning the hardcore restrictions and excluded restrictions listed in Articles 5 and 6 respectively (see paragraphs 4.54 to 4.61).

3. Specialisation BER

Overview of block exemption

- 3.1 The Specialisation BER was originally introduced because of the potential that specialisation agreements have to improve production processes, lower costs, and lead to lower prices for consumers.
- 3.2 The Specialisation BER defines three types of specialisation agreement that can benefit from exemption, subject to meeting certain criteria:
- **Unilateral specialisation agreements:** these are agreements between two parties (and no more) that are active on the same product market and where one party agrees fully or partly to cease production of certain products, or to refrain from producing those products and purchase them from the other party (which agrees to produce and supply those products).
 - **Reciprocal specialisation agreements:** these are agreements between two or more parties that are active on the same product market and agree, on a reciprocal basis, fully or partly to cease or refrain from producing certain (but different) products, and to purchase these products from the other parties (which agree to produce and supply them).
 - **Joint production agreements:** these are agreements between two or more parties that agree to produce certain products jointly.
- 3.3 Chapter 4 of the Horizontal Guidelines complements the Specialisation BER and provides guidance on the circumstances in which production agreements (which include the three types of specialisation agreement covered by the BER as well as a few other types of agreement) may restrict competition and, if they do, whether they can benefit from an individual exemption in the absence of an applicable block exemption.

General recommendation

- 3.4 The CMA proposes to recommend that there should continue to be a safe harbour for some specialisation agreements and that letting the retained Specialisation BER expire without providing for a replacement is currently not appropriate in the UK.
- 3.5 The CMA has also concluded that changes could be made to update the terms of the retained Specialisation BER to provide greater clarity to

businesses and to make the block exemption a more effective tool. In particular, the CFI and Evaluation identified areas where stakeholders have suggested improvements to the Specialisation BER. These relate to the scope of the BER, the market share thresholds and their application, and more broadly clarifying some definitions and the conditions to be met to benefit from the exemption.²⁴

- 3.6 The CMA therefore proposes to recommend to the Secretary of State that the Specialisation BER should be replaced with a new Specialisation Block Exemption Order that would include some changes compared to the existing BER.²⁵ The details of these changes and proposed clarifications to guidance are set out in greater detail below.

Policy question

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

Impact Question

Question 2: Relative to current arrangements, if the retained Specialisation BER were allowed to expire, how would the absence of legal certainty and clarity affect your business or those that you represent? Please describe the scale of any legal or expert advice needed (eg time spent with consultants).

²⁴ The Evaluation (page 50 of the Staff Working Document) also identified certain aspects that could be improved, namely the market share threshold, its application and calculation, the potentially limited scope of the Specialisation BER and the lack clarity of some definitions and the conditions necessary to benefit from an exemption under the Specialisation BER.

²⁵ The European Commission draft Specialisation BER includes the following changes:

- (i) amending the definitions of 'unilateral specialisation agreement' to also cover agreements between more than two parties, 'reciprocal specialisation agreement', 'potential competitor', 'actual competitor', 'competing undertaking', 'exclusive supply obligation', 'exclusive purchase obligation', 'production', 'downstream product', and 'distribution';
- (ii) clarifying that the block exemption can apply even if the parties have not accepted exclusive purchase or exclusive supply obligations;
- (iii) clarifying that the market share threshold applies if an agreement concerns intermediary products;
- (iv) simplifying the grace period that applies if market shares increase above the exemption threshold;
- (v) introducing an alternative timeframe and method for the calculation of market shares (by reference to the average of the parties' market shares of the last three preceding calendar years);
- (vi) explicitly setting out the framework for a withdrawal of the benefit of the Specialisation BER (formerly contained in Recitals 13 and 14 of the BER).

Detailed recommendations

Definitions included in Article 1

Current regime

3.7 Article 1 of the Specialisation BER provides definitions for the key terms used, thereby setting out the scope of the BER. A 'specialisation agreement' is currently defined as including (1) unilateral specialisation agreements, (2) reciprocal specialisation agreements or (3) joint production agreements. Specialisation agreements concern production which is defined as the manufacture of goods or the preparation of services.

Recommendation

3.8 In relation to Article 1, the CMA proposes to recommend:

- expanding the scope of the Specialisation BEO by amending Article 1(1)(a) to include 'unilateral specialisation agreements' concluded between more than two parties (currently, only agreements between two parties are covered by the Specialisation BER); and
- modifying the definition of 'potential competitor' to take out the reference to 'a small but permanent increase in relative prices' and to replace the words 'within not more than 3 years' with 'typically within three years, although depending on the nature of the market, the CMA may consider a period of time shorter or longer than this'.

3.9 We explain each of these proposals in more depth below, summarising the stakeholder feedback on which our proposals are based.²⁶ We also set out some of changes to the block exemption that were suggested but that the CMA is not recommending making (eg the inclusion of horizontal sub-contracting agreements, distribution, and rental services).

²⁶ See Section 4.1.3 of Annex 4 of the [Staff Working Document](#), which notes that 'Several concepts included in the Specialisation BER and/or in Chapter 4 of the Horizontal Guidelines raise issues for several respondents due to their lack of clarity, including the notions of 'reciprocal specialisation agreements', 'joint production', 'joint distribution' and 'price fixing' in the context of joint distribution. Some respondents also consider that unilateral specialisation, as defined in Article 1(1)(b) of the Specialisation BER, should not be restricted to agreements between two parties. In addition, the application of the definitions of the Specialisation BER to different types of specialisation agreements was considered difficult.' The European Commission's subsequent Inception Impact Assessment document noted that the Evaluation 'identified questions regarding horizontal subcontracting agreements with the aim of expanding production, which are currently not explicitly exempted'.

Suggested changes to the scope of Specialisation BEO

Unilateral specialisation agreements between more than two parties

- 3.10 We are proposing to recommend that unilateral specialisation agreements entered into by more than two parties should fall within the scope of the new block exemption order.
- 3.11 Under Article 1 of the Specialisation BER, unilateral specialisation agreements entered into by more than two parties are not block exempted, whilst reciprocal and joint production specialisation agreements are.
- 3.12 We received submissions in response to the CFI that the scope of the Specialisation BER should be amended so that agreements concluded between more than two parties could also be block exempted. Stakeholders argued that such agreements could also produce the efficiency-enhancing effects of specialisation agreements that could be achieved in agreements between two parties.²⁷
- 3.13 Our view is that there do not seem to be strong reasons for unilateral specialisation agreements to be treated differently from reciprocal and joint production specialisation agreements and that unilateral specialisation agreements between more than two parties are likely to be as beneficial as those agreements between two parties.
- 3.14 In particular, unilateral specialisation agreements entered into between more than two parties are also likely to contribute to improving the manufacture of goods or the preparation of services or their distribution while having a limited restrictive impact on competition (as a result of the 20% combined market share requirements the parties must satisfy to benefit from the block exemption). Like other specialisation agreements covered by the Specialisation BER, when the parties have complementary skills, assets or activities and are, as a result of the agreement, able to focus their efforts on the manufacture of those goods or the preparation of those services, they are likely to be able to operate more efficiently and supply the products more cheaply. These agreements also have the potential to enable the production of higher quality products.
- 3.15 Furthermore, the evidence gathered in the Evaluation indicated that the definition of unilateral specialisation agreements (limited to agreements

²⁷ Eversheds Sutherland, Dentons, American Bar Association Antitrust Law and International Law Sections.

between two parties) may stand in the way of concluding pro-competitive agreements.²⁸

Sub-contracting agreements

- 3.16 We are not minded to recommend any amendments to be made in the new block exemption order in relation to horizontal sub-contracting agreements with a view to expanding production. This is because we have not seen sufficient evidence to suggest that Article 1 of the Specialisation BER should be modified to explicitly include such agreements and that addressing this issue through the CMA HBEOs Guidance would not be appropriate.
- 3.17 We explored this issue because concerns were raised in response to the CFI that horizontal subcontracting agreements with the aim of expanding production were not explicitly exempted and it was suggested that Article 1 of Specialisation BER should therefore be modified to include horizontal sub-contracting agreements with a view to expanding production.²⁹
- 3.18 The current horizontal guidelines already provide reassurance that, if the parties' combined market share does not exceed 20%, it is likely that horizontal sub-contracting agreements with a view to expanding production would fulfil the conditions for individual exemption.³⁰ However, respondents argued that a change to the Specialisation BER itself could provide additional legal certainty.
- 3.19 We note that the European Commission received similar feedback but did not propose to change the block exemption itself.³¹ Instead, it proposed that the matter would continue to be dealt with in the horizontal guidelines.
- 3.20 In addition, in this context, the European Commission has amended the draft horizontal guidelines to provide reassurance that sub-contracting agreements in general, and not just those with a view to expanding production falling

²⁸ See page 2 of the European Commission's [Inception Impact Assessment](#).

²⁹ Such agreements concern the situation where the contractor does not at the same time cease or limit its own production of the product. American Bar Association Antitrust Law and International Law Sections, Dentons. The Sections noted that under paragraph 169 of the Horizontal Guidelines, these agreements were already assessed today in a manner similar to agreements falling within the scope of the Specialisation BER. Moreover, the Sections believed there were no substantive reasons to exclude sub-contracting agreements with a view to expanding production from the benefits of the Specialisation BER. They submitted that in most situations, sub-contracting agreements raised similar competitive risks as unilateral specialisation agreements, which are covered by the Specialisation BER. It therefore seemed appropriate to treat both types of agreements in the same way.

³⁰ Paragraph 169 of the Horizontal Guidelines.

³¹ The European Commission's subsequent Inception Impact Assessment document noted that the Evaluation 'identified questions regarding horizontal subcontracting agreements with the aim of expanding production, which are currently not explicitly exempted'.

outside the definition of specialisation agreements, are likely to fulfil the conditions for individual exemption under Article 101(3) if the parties' combined market share does not exceed 20%.³²

- 3.21 Our view is that a legislative change is not necessary given that further clarification can usefully be provided in the CMA HBEOs Guidance and easily address the concerns raised.

Distribution and rental services

- 3.22 Stakeholders suggested that the scope of the Specialisation BER should be expanded by removing the current exclusion of distribution and rental services from the definition of 'product' in Article 1(1)(f). It was argued that rental/distribution services companies may wish to enter into arrangements with actual or potential competitors to deal with capacity constraints or the requirements of a tender.³³
- 3.23 We have not received sufficient evidence to suggest that the current carve out from the definition of 'product' that applies to distribution and rental services results in inefficient outcomes and should be abandoned. We are therefore not proposing to recommend a change to this definition in the Specialisation BEO.³⁴

Clarifications considered to the defined terms in Article 1

- 3.24 The evidence in the responses that we reviewed indicates that the effectiveness of the Specialisation BEO could be improved by providing greater clarity about the application of certain definitions.

Clarificatory changes

- 3.25 We propose to recommend that BEIS considers making a number of clarificatory changes to Article 1 when drafting any Specialisation BEO. We

³² 'For horizontal subcontracting agreements, which fall outside the definition of specialisation agreement of the Specialisation BER (Article paragraph 1(a)), it is, in most cases, unlikely that market power exists, if the parties to the agreement have a combined market share not exceeding 20 %. In any event, horizontal subcontracting agreements in which the parties' combined market share does not exceed 20 % are likely to fulfil the conditions of Article 101(3)'.

³³ Dentons, noting that rental/distribution services companies may wish to enter into arrangements with actual or potential competitors to deal with capacity constraints or the requirements of a tender (which in their view are effectively 'joint production' of services, sometimes implemented by way of sub-contracting arrangements between actual or potential competitors).

³⁴ This approach is consistent with the one the European Commission is taking in its draft Specialisation Block Exemption (Article 1(1)(c)).

will also consider what further we can do by way of guidance to support stakeholders' understanding of the Article 1 definitions.

- 3.26 In terms of the case for clarifying definitions, a suggestion made in response to the CFI was that, while Article 1 of the Specialisation BER provided basic legal certainty, it would be helpful to simplify the definitions to make them more accessible for non-legal professionals, perhaps by offering specific examples of what each type of agreement is intended to cover.³⁵ We note that the European Commission has made a number of clarificatory changes to the wording of a certain definitions in the draft Specialisation BER (see Annex B).³⁶ Such changes are likely to improve the effectiveness of the block exemption by removing ambiguities and making it easier to be relied upon by businesses, and our view is that similar clarificatory changes should be considered by BEIS when drafting any Specialisation BEO.

Potential competitor

- 3.27 Over and above those changes mentioned in paragraph 3.26, we propose to modify the definition of 'potential competitors' to take out the reference to 'a small but permanent increase in relative prices':

'potential competitor' means an undertaking that, in the absence of the specialisation agreement, would, on realistic grounds and not just as a mere theoretical possibility, ~~in case of a small but permanent increase in relative prices~~ be likely to undertake, within not more than 3 years, the necessary additional investments or other necessary switching costs to enter the relevant market

- 3.28 The removal of 'a small but permanent increase in relative prices' from the definition should simplify and in turn facilitate the assessment by companies of what may constitute a potential competitor.³⁷
- 3.29 We note in this context that one of the reasons for deleting the concept of 'a small but permanent increase in relative prices' is that it is more relevant to the assessment of market definition and is a less relevant criterion for identifying a potential competitor (and consequently is not generally used in antitrust cases for such purposes).

³⁵ Eversheds Sutherland.

³⁶ See the European Commission's draft revised Specialisation BER. The European Commission has, for example, proposed that 'exclusive purchase obligation' could be amended by using the plural of 'specialisation product'.

³⁷ The European Commission has also made the same change in its draft revised Specialisation BER.

3.30 It was submitted in response to the CFI that more clarity regarding the meaning of ‘potential competitor’³⁸ would be welcome. Concerns were raised that the test under the current horizontal guidelines for assessing whether a company constitutes a ‘potential competitor’ is difficult to apply in practice. It was suggested that the ability of the potential competitor to enter into the market in the short term needs to be evidence-based rather than speculative and suggested that there should be evidence of a clear commercial strategy within the business, supported by internal documents showing a clear plan to invest in entering the market.³⁹ We consider that the most appropriate way of providing greater clarity in relation to these points is through guidance, and therefore propose to address these points in the CMA HBEOs Guidance.

Joint distribution and production

3.31 We received feedback that “*Joint*” in the context of distribution, particularly the meaning of: “*carry out the distribution of the products by way of a joint team, organisation or undertaking*”⁴⁰ should be clarified. In particular it was noted that the definition suggested that joint distribution need not involve a corporate distribution joint venture, but it was unclear what level of formality, if any, was required in the absence of a corporate joint venture (for example, whether it was enough for the parties’ respective sales teams to discuss and agree on distribution strategy and prices).⁴¹

3.32 Similarly, concerns were flagged in response to our CFI about the concepts of ‘production’ and ‘joint production agreement’ in the Specialisation BER.⁴² ‘Production’ for the purposes of the Specialisation BER includes production by way of sub-contracting, and ‘joint production agreement’ means an agreement by virtue of which two or more parties agree to produce certain products

³⁸ Article 1(1)(n): defines “potential competitor” as an undertaking that, in the absence of the specialisation agreement, would, on realistic grounds and not just as a mere theoretical possibility, in case of a small but permanent increase in relative prices be likely to undertake, within not more than 3 years, the necessary additional investments or other necessary switching costs to enter the relevant market’. Baker McKenzie suggest that the current test set out in paragraph 10 of the HGL and accompanying footnotes is essentially based around market definition and can be difficult to apply in practice.

³⁹ Baker McKenzie.

⁴⁰ Article 1(1)(q) ‘joint’, in the context of distribution, means that the parties: (i) carry out the distribution of the products by way of a joint team, organisation or undertaking; or (ii) appoint a third-party distributor on an exclusive or non-exclusive basis, provided that the third party is not a competing undertaking. The CMA notes that the EU’s draft revised Specialisation BER has made changes to this provision. It has now been reworded to now read:

“joint”, in the context of distribution, means activities where the work involved is: (1) carried out by a joint team, organisation or undertaking, or (2) undertaken by a jointly appointed third party distributor on an exclusive or non-exclusive basis, provided that the third party is not a competing undertaking’ (Art. 1(1)(l) of the draft Specialisation BER)

⁴¹ Dentons.

⁴² Dentons.

jointly. It was submitted in response to our CFI that it was not clear whether the sub-contracting agreement between a contractor and the sub-contractor who were competitors was itself a joint production agreement which could benefit from the Specialisation BER or whether sub-contracting was only relevant as a possible way for a party to obtain production to contribute to the joint production agreement with another party.

- 3.33 The CMA is of the view that a change to the text of the Specialisation BER in relation to both 'joint' and 'production' is not required given that it is a highly specific point of detail that we can more appropriately address in the CMA HBEOs Guidance.

Policy questions

Question 3: Do you agree with the CMA's proposed recommendation to expand the definition of 'unilateral specialisation agreement' to bring unilateral specialisation agreements between more than two parties within the scope of the Specialisation BEO?

Question 4: Do you agree with the CMA's proposed recommendation to address the issue of horizontal subcontracting agreements with a view to expanding production through guidance rather than through changing Article 1 of the Specialisation BER?

Question 5: Do you agree with the CMA's proposed recommendation not to remove the current exclusion of distribution and rental services from the definition of 'product' in Article 1(1)(f) of the Specialisation BER?

Question 6: Do you agree with the CMA's recommendation that BEIS should consider making a number of clarificatory changes to Article 1 when drafting any Specialisation BEO (see Annex B for an illustration of what changes this could involve)?

Question 7: Do you agree with the CMA's recommendation to modify the definition of 'potential competitor' to take out the reference to 'a small but permanent increase in relative prices', and to provide further clarity about the application of the definition in the CMA HBEOs guidance?

Question 8: Do you agree with the CMA's recommendation that a change to the text of the Specialisation BER in relation to both 'joint' and 'production' is not required and that this issue can be addressed in the CMA HBEOs Guidance?

Impact questions

Question 9: How would expanding the current definition of 'specialisation agreement' in the proposed Specialisation BEO to add agreements among more than two parties impact consumers?

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

Question 10: How would expanding the current definition of 'specialisation agreement' in the proposed Specialisation BEO to add agreements among more than two parties impact your business or those that you represent?

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

Question 11: Describe/list some of the expected ongoing costs or benefits faced by your business or those that you represent as a result of expanding the current definition of 'specialisation agreement' in the proposed Specialisation BEO to add agreements among more than two parties.

Question 12: If agreements made by your business or those you represent would be included as a result of expanding the current definition of 'specialisation agreement' in the proposed Specialisation BEO to add agreements among more than two parties, please specify the types of relevant agreements and industries benefitted by this increased scope.

Question 13: How would amending the current definition of 'potential competitor' in the proposed Specialisation BEO impact consumers?

- a) Significant positive impact
- b) Moderate positive impact

- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

Question 14: How would amending the current definition of 'potential competitor' in the proposed Specialisation BEO impact your business or those that you represent?

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

Question 15: How would amending the current definition of 'potential competitor' in the proposed Specialisation BEO facilitate the use of the block exemption? As part of the response, please describe the types of business agreement affected.

Conditions for block exemption under Article 2

Current regime

- 3.34 Article 2 of the Specialisation BER sets out the exemption for specialisation agreements. The exemption applies to the extent that such agreements contain restrictions of competition falling within the scope of Chapter I CA98 and the conditions for exemption are met.
- 3.35 Article 2(3) provides that the exemption applies where the parties accept an exclusive purchase or supply obligation; or the parties do not independently sell the specialisation products but jointly distribute those products.

Recommendations

- 3.36 The CMA proposes to recommend that the Secretary of State amend Article 2(3) of the Specialisation BEO to make it clearer that the block exemption applies even where parties have not accepted exclusive purchase or exclusive supply obligations or are not jointly distributing the specialisation products (see paragraph 3.40 below).
- 3.37 We are also minded to consider what further clarification we can provide in the CMA HBEOs Guidance on the application of Article 2, for example in relation to specialisation agreements between joint ventures and parent companies.
- 3.38 Concerns were raised that the current Article 2 of the Specialisation BER does not make it sufficiently clear that the block exemption can apply whether one or both parties have accepted exclusive purchase or exclusive supply obligations.⁴³ They also suggest that further clarification of the scope of the exemption between joint ventures and parent companies is needed where the parties have not accepted any exclusive purchase or exclusive supply obligations (subject to all other conditions being met).⁴⁴

⁴³ The American Bar Association Antitrust Law and International Law Sections suggested amending Article 2 in order to expand the scope of the exemption to otherwise eligible unilateral or reciprocal specialisation agreements under which the parties agree that only one of them will distribute the contract products. A similar point was made in the Evaluation Support Study Final Report.

⁴⁴ The Evaluation Support Study Final Report provides more detail on the concerns raised about parent companies and joint ventures: '*respondents mentioned that issues arise from a lack of clarity and consistency for the assessment of the relationship between parent companies and joint ventures: namely, parent companies which created joint ventures and moved most activities to these joint ventures, whilst retaining some activities/areas in which they compete with the joint venture. The Specialisation BER and Chapter 4 of the Horizontal Guidelines do not specify if in such a case the companies are to be treated as competitors or as the same economic entity for the assessment of competition compliance*'.

3.39 Our view is that the language of the current Article 2(3) of the Specialisation BER could be improved to avoid the lack of clarity described by stakeholders in relation to whether the block exemption can apply even where the parties have not accepted exclusive purchase or exclusive supply obligations, subject to all other conditions being met. A possible solution to address this issue would be to amend the relevant article with appropriate changes to clarify that it does apply even where parties have not accepted exclusive purchase or exclusive supply obligations. The proposed change would be of general application and would not specifically deal with specialisation agreements entered into between joint ventures and parent companies. Our view is that this specific situation should be dealt with in the CMA HBEOs Guidance, and we will consider what further guidance we could usefully provide.⁴⁵

3.40 We note that the European Commission has made a change to Article 2(3) of its draft Specialisation BER that addresses the point by adding the word ‘also’ in Article 2(3) so that it reads:

‘The exemption provided for in paragraph 1 shall also apply to specialisation agreements whereby: (a) the parties accept an exclusive purchase or an exclusive supply obligation, or (b) the parties jointly distribute the specialisation products and do not independently sell them’.

Policy questions

Question 16: Do you agree with the CMA’s recommendation to retain the current conditions for exemption as set out in Article 2 of the Specialisation BER in the proposed Specialisation BEO?

Question 17: Do you agree with the CMA’s recommendation to clarify that the block exemption can apply even if the parties have not accepted exclusive purchase or supply obligations or are not jointly distribute the specialisation products?

Impact questions

Question 18: How would retaining the current Conditions of the specialisation BER in the proposed Specialisation BEO impact consumers?

⁴⁵ We note that paragraph 13 of the proposed draft horizontal guidelines includes a new paragraph which provides more clarity on when parent companies and joint ventures are considered a single economic unit. Under the draft, entities are considered a single economic unit and, therefore, a single undertaking as regards competition law, in so far as it is demonstrated that the parent companies of a joint venture exercise decisive influence over that joint venture.

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

Question 19: How would clarifying that the block exemption can apply even if the parties have not accepted exclusive purchase or supply obligations in the proposed Specialisation BEO impact consumers?

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

Market share threshold under Article 3 and application of the market share threshold under Article 5

Current regime

- 3.41 Article 3 of the Specialisation BER provides a safe harbour for specialisation agreements where the parties have a combined market share lower than 20% on any relevant market.
- 3.42 Recital 10 of the Specialisation BER explains that where the products manufactured under a specialisation agreement are intermediary products which one or more of the parties then use as an input for their own production of downstream products (which they subsequently sell on the market), the exemption should also be conditional on the parties' share on the relevant downstream market not exceeding a certain level.
- 3.43 If the parties' combined market share is initially below 20% but rises above that level, Article 5 of the Specialisation BER provides that the parties can continue to benefit from the block exemption for a further two years following the year in which the 20% threshold was first exceeded, provided that the parties' combined market share remains below 25%. If the parties' combined market share is initially below 20% but subsequently rises above 25%, Article 5 of the Specialisation BER provides that the parties can continue to benefit from the block exemption for a further year following the year in which the 25% threshold was first exceeded.

Recommendations

- 3.44 We propose to make a limited number of changes to the market share thresholds and to the rules governing its application. Below we set out our recommendations in relation to Article 3 and then to Article 5 as well as the evidence (including responses to our CFI and the Evaluation) that we took into account in making our recommendations.

In relation to the market share threshold set out in Article 3

- 3.45 The CMA proposes to recommend that:
- the Specialisation BEO should retain the current 20% market share threshold in relation to specialisation agreements;
 - Article 3 of the Specialisation BER should be amended in the proposed Specialisation BEO to clarify that in relation to intermediary products, the 20% market share threshold also applies to the parties' market share on the relevant downstream market;

- further guidance should be provided by the CMA to help undertakings calculate their market shares. This would help all undertakings, but particularly SMEs that have had difficulty engaging with competition law, as it would increase their understanding of the requirements that they would need to meet in order to gain the benefit of exemption under the Specialisation BEO.

Market share threshold

3.46 It is apparent, both from the CFI respondents and the Evaluation, that some stakeholders consider that the market share threshold should be raised.⁴⁶ For example, one respondent recommended increasing the market share threshold to 25%.⁴⁷ Another suggested that a 25% or 30% market share threshold would not threaten competition.⁴⁸

3.47 Arguments made in favour of increasing the market share threshold included:

- The current threshold is too low and discourages firms from entering into agreements.⁴⁹
- A higher market share threshold would provide greater legal certainty for businesses.⁵⁰ The current 20% threshold can easily be met (ie market shares in the range of 10-15% for each undertaking involved would be sufficient) leading to complicated and legally uncertain self-assessment.

⁴⁶ See Section 4.1.3 of Annex 4 to the [Staff Working Document](#), which notes that ‘Several respondents consider that the current market/s share threshold of 20% is too low to exempt pro-competitive horizontal specialisation agreements. Some respondents also consider that a safety margin should be introduced in case an agreement surpasses the threshold. A few respondents request to increase [sic] in the market share threshold, while they also referred to issues concerning the calculation of the market shares, the implementation period during which the exemption continues to apply once the 20% share has been exceeded (up to 2 calendar years) or the coherence between the threshold of the Specialisation BER and other EU and national competition law regulations.’ The European Commission’s subsequent Inception Impact Assessment document noted that the Evaluation ‘identified that SMEs have difficulty self-assessing their specialisation agreements in order to establish whether they qualify for exemption’. CFI respondents: Baker McKenzie, Eversheds Sutherland, Dentons.

⁴⁷ Baker McKenzie.

⁴⁸ Dentons. Eversheds Sutherland also suggested an increase in the market share thresholds but did not provide a figure.

⁴⁹ Dentons, Eversheds Sutherland.

⁵⁰ Eversheds Sutherland.

- 3.48 One respondent proposed an additional safe harbour based on the percentage share of production costs in relation to the overall variable costs of a product and/or service.⁵¹
- 3.49 The evidence the CMA has seen is not sufficient to conclude that a higher market share threshold would be appropriate, or indeed which alternative level would be appropriate. Similarly, the CMA has not seen sufficient evidence to recommend that an additional safe harbour would be appropriate. The market share threshold is an important safeguard against the risks of granting the benefit of a safe harbour to anticompetitive conduct.

Intermediary products

- 3.50 We believe that it would add clarity and facilitate compliance with the block exemption to consolidate the provisions that relate to the 20% market share requirement in one place. This could be achieved by moving the text in recital 10 into Article 3. In addition, our view is that the rationale for the requirement under recital 10, which is to limit the potential risk of foreclosure or an increase in the price of the input for competitors at the downstream level, remains valid and important so we are not proposing that this should be changed. The CMA notes that the European Commission in its revised draft Specialisation BER has changed Article 3 to incorporate the text from Recital 10.
- 3.51 Accordingly, for the reasons set out above, the CMA considers that the text from Recital 10 would be a useful addition to Article 3 and we are minded to recommend that this change be made in the Specialisation BEO.

Small and medium enterprises (SMEs)

- 3.52 The CFI respondents and the Evaluation have also highlighted that SMEs may find it difficult, in practice, to apply the threshold because of a lack of access to market data and a limited understanding of the requirements.⁵² We have considered the possibility of carving out SMEs from the market share

⁵¹ Baker McKenzie. This respondent submitted that as long as the ratio production cost/overall variable costs is limited, the risk of cost commonalities and price commonalities should be minor and not give rise to competition concerns.

⁵² The EC IIA notes that SMEs have difficulty self-assessing their agreements to establish whether they qualify for exemption, page 2. Furthermore, the EC expert report ('Specialisation Agreements and SMEs') finds that SMEs may be insufficiently informed about the requirements that competition law imposes on horizontal cooperation and may face difficulties establishing with sufficient certainty whether they are below the 20% market threshold. Another source of difficulty for SMEs identified in the EC expert report is the identification of the relevant markets affected by a certain agreement and the calculation of the market shares, page 33.

threshold requirement, but concluded that this would not be appropriate given that SMEs may have market power.

3.53 Our view is that we should instead provide further practical guidance within the CMA HBEOs Guidance to help SMEs establish their market shares. This guidance would also aim to assist undertakings which are not SMEs.⁵³

In relation to the application of the market share threshold as set out in Article 5⁵⁴

3.54 The CMA proposes to recommend that:

- The requirement under Article 5 that parties should use data relating to the preceding calendar year when they calculate their combined market share for the purpose of Article 3 should be amended to allow the market share to be calculated as an average of the parties' market shares of the three preceding calendar years in circumstances where the preceding year's market share is not representative of their position in the relevant market(s). This would require an amendment to the existing Article 5(b) of the Specialisation BER.
- the one-year grace period for the exemption to continue to apply after the 20% market share is exceeded be no longer subject to the requirement that the increased market share remain below 25%. This would require removing the current Article 5(e) in the proposed Specialisation BEO.

3.55 We explain our recommendations in greater detail in the relevant subsections below.

Period to consider for establishing parties' market shares

3.56 The Evaluation reported that companies and law firms consider the calculation of market shares to be complex and burdensome due to the difficulty of gathering the information needed to make such assessments.⁵⁵ Concerns were raised that for example, in bidding markets where procurements take place at irregular intervals, there may be a case for looking

⁵³ Eversheds Sutherland noted that necessary assessments and the detailed and often complex market analysis required to determine a market share cannot easily be undertaken by businesses (SMEs in particular), who have to rely instead on imprecise 'best guess' market share estimates.

⁵⁴ The CMA notes that in the European Commission's draft revised Specialisation BER, the articles of that BER have been renumbered and what was Article 5 in the Specialisation BER is now Article 4.

⁵⁵ See pages 40 and 74 of the [Staff Working Document](#).

at market shares over a longer period but that this possibility is not expressly contemplated by the HBERs.⁵⁶

- 3.57 The Evaluation suggests that the complexity of the current rules on market share calculation may hamper parties' willingness to conclude horizontal cooperation agreements, as they often apply a restrictive approach to ensure maximum legal certainty.⁵⁷ For this reason, it is helpful to simplify the current rules by providing an alternative that parties could use when market share data from the preceding year is not representative of the parties' position in the relevant market(s).
- 3.58 The CMA notes that the European Commission in its revised draft Specialisation BER has introduced some flexibility for the situation where the preceding year's market share is not representative of their position in the relevant market(s). This flexibility is achieved by making it possible to calculate the market share on the basis of an average of the parties' market shares of the three preceding calendar years. The CMA considers that this is a sensible approach that should improve how the market share is calculated where the preceding calendar year is not representative of the parties' position.

Grace period

- 3.59 With regards to Article 5 of the Specialisation BER⁵⁸ on the application of the market share threshold, concerns were expressed by stakeholders about it being difficult to apply. One respondent to the CFI suggested that Article 5 is a useful starting point but given the complexity of determining market share the

⁵⁶ Allen and Overy submission to the European Commission.

⁵⁷ See page 94 of the [Staff Working Document](#), which notes that '[r]espondents commented that the complexity of the current rules, notably as regards [...] calculation of market shares, has hampered the conclusion of horizontal cooperation agreements'.

⁵⁸ *'For the purposes of applying the market share threshold provided for in Article 3 the following rules shall apply: (a) the market share shall be calculated on the basis of the market sales value; if market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the parties;*
(b) the market share shall be calculated on the basis of data relating to the preceding calendar year;
(c) the market share held by the undertakings referred to in point (e) of the second subparagraph of Article 1(2) shall be apportioned equally to each undertaking having the rights or the powers listed in point (a) of that subparagraph;
(d) if the market share referred to in Article 3 is initially not more than 20 % but subsequently rises above that level without exceeding 25 %, the exemption provided for in Article 2 shall continue to apply for a period of 2 consecutive calendar years following the year in which the 20 % threshold was first exceeded;
(e) if the market share referred to in Article 3 is initially not more than 20 % but subsequently rises above 25 %, the exemption provided for in Article 2 shall continue to apply for a period of 1 calendar year following the year in which the level of 25 % was first exceeded;
(f) the benefit of points (d) and (e) may not be combined so as to exceed a period of 2 calendar years.'

current rules do not provide sufficient/meaningful guidance.⁵⁹ Similarly, the Evaluation indicated that the criterion is hard to apply, including in relation to the calculation of market shares and determining whether the implementation period continues to apply once the 20% market share threshold has been exceeded.⁶⁰ SMEs flagged concerns regarding the difficulty of conducting a self-assessment of the application of the Specialisation BER.⁶¹ However, not all stakeholders proposed a change: one respondent to the CFI argued that the terms remained sufficiently clear and appropriate.⁶²

- 3.60 As indicated above, where firms exceed the market share threshold, a grace period applies. On balance, the CMA considers that there is merit in simplifying the provisions for the grace period given the difficulties in applying it.
- 3.61 In this context, the CMA notes that the European Commission in its revised draft Specialisation BER has proposed a simplification of the grace period under Article 5 which the CMA considers to be helpful. The change envisaged here would be to delete the current reference to ‘without exceeding 25%’ in Article 5(d), and to clarify that the provision will deal with the situation in which a market share is initially not more than 20% but subsequently rises above that level in at least one market concerned by the specialisation agreement. The CMA is also minded to recommend removing the current Article 5(e) in the proposed Specialisation BEO, which provides that if the market share referred to in Article 3 is initially not more than 20% but subsequently rises above 25%, the exemption provided for in Article 2 shall continue to apply for a period of 1 calendar year following the year in which the level of 25% was first exceeded.
- 3.62 As a result of the proposed change, the grace period would apply where the market share was initially not more than 20% but had subsequently risen above that level for a period of two years following the calendar year in which the 20% threshold was first exceeded. This would facilitate the implementation of the grace period by removing the obligation on businesses to keep monitoring the level of their market share during that period.

⁵⁹ Eversheds Sutherland.

⁶⁰ See footnote 46 above.

⁶¹ Section A of the Inception Impact Assessment.

⁶² Dentons.

Policy questions

Question 20: Do you agree with the CMA's proposed recommendation to retain the current market share threshold in the proposed Specialisation BEO?

Question 21: Do you agree with the CMA's proposed recommendation that Article 3 of the Specialisation BER should be amended to clarify that in relation to intermediary products, the 20% market share threshold also applies to the parties' market share on the relevant downstream market?

Question 22: Do you agree with the CMA's proposed recommendation to provide further guidance to help undertakings calculate their market share?

Question 23: Do you agree with the CMA's proposed recommendation to introduce an alternative to the current way of calculating the market share whereby the market share is calculated as an average of the parties' market shares of the three preceding calendar years in circumstances where the preceding year's market share is not representative of their position in the relevant market(s)?

Question 24: Do you agree with the CMA's proposed recommendation that the one-year grace period for the exemption to continue to apply after the 20% market share is exceeded be no longer subject to the requirement that the increased market share remain below 25%?

Impact questions

Question 25: How would retaining the current market share threshold of the Specialisation BER in the proposed Specialisation BEO impact consumers?

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

Question 26: If you are an SME, or an advisor or representative of SMEs: what would the impact on consumers be if a new presumption was introduced that SMEs do not exceed the market share threshold unless the SME is aware, or reasonably ought to be aware, that its market share exceeds the threshold?

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

Question 27: Does the complexity of current rules hamper willingness of your business or those you represent to conclude horizontal co-operation agreements? In your response, please provide examples of the types of agreements where complexity has affected this decision making.

Question 28: If you are an SME, or an advisor or representative of SMEs: what would the impact on the business if a new presumption was introduced that SMEs do not exceed the market share threshold unless the SME is aware, or reasonably ought to be aware, that its market share exceeds the threshold? What are some of the expected impacts of the business being included in scope of the block exemption?

Question 29: How would the recommendation to provide an alternative way of calculating market shares impact your business or those you represent in making use of the benefits of the block exemption? How would your business benefit?

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

'Hardcore' restrictions listed in Article 4

Current regime

3.63 Specialisation agreements containing certain 'hardcore' restrictions will not benefit from the 'safe harbour' outlined in Article 2. These restrictions, as set out in Article 4 of the retained Specialisation BER, are:

- fixing prices when selling the contract product to third parties other than immediate customers in the context of joint distribution;
- limiting output or sales, apart from provisions to agree amounts of products to be produced or supplied under a unilateral or reciprocal specialisation agreement; to set capacity and production volumes in a joint production agreement; or to set sales targets in the context of joint distribution; and
- the allocation of markets or customers.

3.64 Unlike certain other block exemptions, the retained Specialisation BER does not contain any 'excluded restrictions', ie restrictions that are excluded from the benefit of the exemption and that must be individually assessed to establish whether they benefit from the individual exemption under section 9 CA98.

Recommendation

3.65 The CMA proposes to recommend that:

- the Secretary of State retain the hardcore restrictions currently included in Article 4 of the retained Specialisation BER in a revised Specialisation BEO;
- the CMA considers what further guidance it can provide to help stakeholders complying with Article 4.

3.66 Below we set out the evidence we took into account in making our recommendation and provide more detail.

List of hardcore restrictions

- 3.67 The Evaluation indicated that the majority of those consulted considered that the lists of hardcore and in the Specialisation BER provided legal certainty.⁶³ One CFI respondent specifically expressed the view that the hardcore restrictions are sufficiently clear and that the prohibitions on price-fixing, limitation of output and market-sharing are well-understood.⁶⁴
- 3.68 It should be noted that one respondent to the CMA's CFI queried whether the Specialisation BER, and the HBERs as a whole, required a list of hardcore restrictions at all. In particular, they were concerned about the risk that such restrictions automatically mean that the block exemption will not apply (which in turn is interpreted as engaging in a hardcore practice that can never be defended or at least is very risky behaviour) when in some cases these restrictions could contribute to underpinning the beneficial pro-competitive nature of the agreement in question.⁶⁵
- 3.69 However, in the absence of more evidence as to why it would be appropriate to remove the hardcore restrictions, the CMA does not consider there to be sufficient evidence to conclude that a change of this nature should be made. Hardcore restrictions include some of the most serious restrictions of competition and the CMA considers that they should not benefit from an automatic safe harbour. So far as concerns the respondent's submission that the presumption of illegality should be replaced by an effects-based analysis, given the serious nature of these restrictions, and in the absence of more evidence as to why such a change would be appropriate, we do not consider that the CMA has a sufficient basis to conclude that a change of this nature should be made either.

Hardcore restrictions and the horizontal guidelines

3.70 A number of stakeholders argued that:

- The current hardcore restrictions with their exceptions as for example set out in Article 4(b)(i) and 4(b)(ii) and in paragraph 160 of the HGL, could be simplified and streamlined.⁶⁶

⁶³ In relation to the Evaluation, see Section 5.1.2 of the [Staff Working Document](#) p50. In particular: *'the majority of respondents (mainly business associations and law firms) to the public consultation that expressed a view considered that the explanations on the type of specialisation agreements to which the exemption applies under Article 2 of the Specialisation BER and the list of hardcore restrictions such as price fixing certain limitation of output sales or allocation of markets/customers (Article 4 of the Specialisation BER) allowed to identify agreements compliant with Article 101 of the Treaty.'*

⁶⁴ Eversheds Sutherland.

⁶⁵ Baker McKenzie, answer to IA2 (Baker McKenzie referred to the retained HBERs as a whole with regards to the need for hardcore restrictions).

⁶⁶ Baker McKenzie.

- Examples used in the HGL are currently unclear (eg paragraph 188 on collusive outcomes).⁶⁷
- The customer allocation hardcore restriction can be more difficult to analyse in the context of non-poaching provisions which are common in sub-contracting arrangements;⁶⁸ further clarity on this area would be welcome.⁶⁹
- More guidance is needed on how the CMA assesses the ‘overall effects’ of production agreements that also provide for the joint distribution of the jointly manufactured goods or other ‘integrated commercialisation functions’⁷⁰
- More guidance is needed on the conditions and circumstances which the CMA considers are required for a joint distribution agreement to be necessary for the joint production agreement.⁷¹

3.71 The points made in the CFI indicate that there are certain areas of Article 4 on hardcore restrictions on which stakeholders would value greater clarity. We are therefore minded to consider what further guidance we can provide and engage with stakeholders to ensure that it addresses the issues they face in practice.

Policy questions

Question 30: Do you agree with the CMA’s recommendation to retain the current hardcore restrictions in the Specialisation BEO?

Question 31: Do you agree with the CMA’s recommendation to address the issues regarding the hardcore restrictions that have been raised by stakeholders through the provision of guidance?

⁶⁷ Baker McKenzie.

⁶⁸ Such arrangements might involve the sub-contractor agreeing not seek to supply the contractor’s customers outside the joint arrangement during the agreement and potentially for a period after.

⁶⁹ Dentons.

⁷⁰ Baker McKenzie.

⁷¹ Baker McKenzie.

Impact questions

Question 32: How would retaining the current hardcore restrictions in the Specialisation BER in the proposed Specialisation BEO impact consumers?

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

4. R&D BER

Overview of block exemption

- 4.1 The retained R&D BER provides an exemption for agreements pursuant to which two or more parties agree to collaborate in relation to the research and development of products, technologies, or processes. The agreement may involve the joint exploitation of the results of the R&D and it may also cover paid-for R&D (where one-party finances R&D conducted by the other).
- 4.2 The R&D BER was originally introduced because of the significant advantages that R&D cooperation agreements can bring, including the efficient allocation of tasks and resources and the likelihood of earlier breakthroughs.
- 4.3 For an R&D agreement to benefit from the block exemption, certain criteria need to be met during the period of research and development and then, if the products are jointly exploited by the parties, for up to 7 years from the time the contract products or technologies are first put on the market in the EU or UK.
- 4.4 Chapter 3 of the Horizontal Guidelines complements the R&D BER and provides guidance on the circumstances in which an R&D agreement may restrict competition and, if it does, whether it can benefit from an individual exemption in the absence of an applicable block exemption.
- 4.5 The evidence gathered suggests that the retained R&D BER, together with Chapter 3 of the Horizontal Guidelines, are overall useful instruments that increase legal certainty as compared to a situation without the BER.⁷² However, as set out further below, stakeholders indicated that certain aspects of the retained R&D BER could be improved or clarified.

General recommendation

- 4.6 The CMA proposes to recommend that there should continue to be a safe harbour for some R&D Agreements and that letting the retained R&D BER expire without providing for a replacement is currently not appropriate in the UK.

⁷² As reflected in CFI responses from Baker McKenzie, Eversheds Sutherland, Nokia, Dentons, Fraunhofer, The App Association. As regards the Evaluation – see main findings at Section 5.1.2 of the [Staff Working Document](#).

- 4.7 In reaching this proposed recommendation, the CMA has taken into account the fact that all respondents to the CFI considered that there was value in retaining the R&D BER.⁷³
- 4.8 The CMA has also concluded that changes could be made to the terms of the retained R&D BER to provide greater clarity to businesses and make the block exemption a more effective tool. In particular, the CFI and Evaluation identified areas where stakeholders have suggested improvements to the R&D BER.⁷⁴ These relate to market share thresholds and their application, issues with current full access requirements in Article 3, and a broader need for clarifying certain definitions. As a result, the CMA has also concluded that it would be appropriate to update the terms of the R&D BER to reflect the feedback we have received rather than renew them without varying them.
- 4.9 The CMA therefore proposes to recommend to the Secretary of State that the R&D BER should be replaced with a new R&D Block Exemption Order that would include some changes compared to the existing BER. The details of these changes and proposed clarifications to guidance are set out in greater detail below.

Policy question

Question 33: Do you agree with the CMA's proposed recommendation to the Secretary of State to make a Block Exemption Order to replace the retained R&D BER with a new R&D BEO, rather than letting it lapse without replacement or renewing without varying the retained R&D BER?

Impact question

Question 34: Relative to current arrangements, if the retained R&D BER were allowed to expire, how would the absence of legal certainty and clarity affect your

⁷³ All CFI respondents considered that there was value in retaining the R&D BER. These respondents are: Baker McKenzie, Eversheds Sutherland, Nokia, Dentons, Fraunhofer, The App Association and Ericsson. One law firm (Eversheds Sutherland) responding to the CFI highlighted that Covid-19 had provided an important opportunity to note the importance of coordinated R&D of new pharmaceutical products and that common R&D efforts generally allowed the creation of new products and the emergence of new markets.

⁷⁴ The four respondents (Dentons, Baker McKenzie, Eversheds Sutherland and Nokia), who made detailed CFI submissions on the R&D BER qualified their view on the positive effect of the R&D BER and highlighted significant improvements they considered should be made. For example, Nokia said that it regularly consulted the R&D BER and the relevant section of the HGL and had relied on the R&D BER previously, but noted that the R&D BER should be updated to reflect 'business realities of today' and 'should seek to better meet the demands of highly dynamic and innovative markets related to technological and digital industries in order to boost growth and competition'.

business or those that you represent? Please describe the scale of any legal or expert advice needed (eg time spent with consultants).

Detailed recommendations

Definitions in Article 1

Current regime

4.10 Article 1 sets out definitions of key terms that are used in the BER. These include, among other things, the definition of ‘research and development agreement’, definitions of ‘actual’ and ‘potential’ competitors and other definitions that have a significant impact on the scope of the block exemption under the R&D BER.

Recommendation

4.11 In relation to Article 1, the CMA proposes to recommend a number of modifications to increase legal certainty for businesses and other undertakings seeking to benefit from the R&D BEO and the introduction of new definitions in Article 1 to clarify the block exemption. The CMA proposes to recommend:

- the introduction of new definitions for ‘R&D pole’, ‘competing R&D effort’, ‘not competing undertaking’, ‘undertaking competing in innovation’ and ‘new product or technology’;
- amending the existing definitions of ‘research and development agreement’ and ‘research and development’; and
- modifying the definition of ‘potential competitors’ to take out the reference to ‘a small but permanent increase in relative prices’ as well as modifying the three-year period within which entry by a potential competitor should occur.

4.12 We explain each of these proposals in more depth below, summarising the stakeholder feedback on which our proposals are based.

4.13 The evidence submitted in response to our CFI indicated that increased clarity in definitions would be of benefit in the UK.⁷⁵ Indeed, all CFI respondents who

⁷⁵ One law firm (Baker McKenzie) noted that the R&D BER, and the corresponding section of the HGL, were ‘far too conservative in our view and are also difficult to apply in practice... legal certainty is accorded only to very

made detailed submissions on the R&D BER emphasised that the definitions in Article 1 of the R&D BER would benefit from clarification. Furthermore, evidence gathered in the European Commission's Evaluation also suggested that several definitions in the R&D BER (or concepts and terms used in the Regulation but not yet defined in Article 1) could usefully be clarified.⁷⁶

4.14 The changes we are proposing to recommend reflect a number of amendments and additions proposed by the European Commission in the draft R&D BER.⁷⁷ The changes proposed by the European Commission are set out in greater detail in Annex B. We propose BEIS consider making similar clarificatory changes since we consider that such changes are likely to improve the effectiveness of the block exemption by removing ambiguities, making it easier to be relied upon by businesses. As highlighted above, a degree of consistency may also benefit UK businesses. We also propose to consider what further we can do by way of guidance to ensure that stakeholders understand the Article 1 definitions. We have set out below an explanation of the new definitions that we propose to recommend be added to the HBEO and we have also highlighted the key definitions that we propose to recommend be modified.

Proposed new definitions to be added to Article 1

4.15 The CMA proposes to recommend that the following new definitions be considered for inclusion in Article 1:

- 'R&D pole';
- 'competing R&D effort';
- 'not competing undertaking';
- 'undertaking competing in innovation';

obviously pro-competitive R&D efforts'. It considered that the current review process should focus on simplifying those texts, in particular by removing any disincentive against innovation and growth.

⁷⁶ See Section 4.1.2 of Annex 4 of the [Staff Working Document](#), which notes that '*respondents requested the clarification of several notions addressed in the R&D BER and in Chapter 3 of the Horizontal Guidelines*'. Two law firms (Baker McKenzie and Eversheds Sutherland) responding to the CMA's CFI indicated that it would be beneficial for the UK to adopt an approach to renewing or updating the R&D BER consistent with the EU's approach in renewing and updating the EU HBERs. One (Baker McKenzie) emphasised that this would provide legal certainty, efficiency and avoid complexity for businesses that want to engage in pan-European R&D agreements with competitors. However, it added that the UK could bring more clarity to the necessary assessments by building out the EU approach.

⁷⁷ See the European Commission's draft revised R&D BER.

- ‘new product or technology’.

4.16 The CMA is proposing that the above terms be added as definitions to Article 1 on the basis of the evidence gathered in the European Commission’s Evaluation which suggested that there were concepts and terms used in the Regulation that were not yet defined in Article 1 and could benefit from clarification.⁷⁸ We consider that such new definitions would add helpful clarity to the R&D BEO, as well as provide consistency with the EU BERs,⁷⁹ and explain below how we propose these terms could be defined:

- ‘R&D pole’ could be added as a new definition to address concerns raised by respondents, and shared by national competition authorities in the Evaluation, on the lack of clarity as to the definition of an R&D pole.⁸⁰

‘R&D pole’ could be defined as ‘R&D efforts directed primarily towards a specific aim or objective. The specific aim or objective of an R&D pole cannot yet be defined as a product or technology or involves a substantially broader target than products or technologies on a specific market.’

- ‘competing R&D effort’ could be added in the event that the CMA’s proposed recommendation to adopt a ‘separate test’ as an alternative to the market share threshold under Article 4 (see paragraph 4.47)⁸¹ is pursued. ‘Competing R&D effort’ is a key term in the proposed ‘separate test’. We consider that it would be beneficial to include a

⁷⁸ See Section 4.1.2 of Annex 4 of the [Staff Working Document](#), which notes that ‘respondents requested the clarification of several notions addressed in the R&D BER and in Chapter 3 of the Horizontal Guidelines, including the boundaries between joint R&D, paid-for R&D and agreements falling outside R&D, and the notions of ‘joint exploitation’, ‘field of use’ restrictions, ‘compensation’, ‘competition in innovation’, ‘R&D poles’ or ‘decisiveness’. Furthermore, the concept of ‘not competing undertaking’ seems to also raise issues.’

⁷⁹ Two law firms (Baker McKenzie and Eversheds Sutherland) submitted that it would be beneficial for the UK to adopt an approach to renewing or updating the R&D BER consistent with the EU’s approach in renewing and updating the EU HBERs. One (Baker McKenzie) emphasised that this would provide legal certainty, efficiency and avoid complexity for businesses that want to engage in pan-European R&D agreements with competitors. However, it added that the UK could bring more clarity to the necessary assessments by building out the EU approach.

⁸⁰ See Section 4.1.2 of Annex 4 of the [Staff Working Document](#), which notes that: ‘respondents requested the clarification of several notions addressed in the R&D BER and in Chapter 3 of the Horizontal Guidelines, including [...] the notions of [...] ‘R&D poles’; and ‘A few NCAs, on the other hand, agreed with the respondents to the public consultation that there are certain areas where guidance is lacking, namely clarification of certain definitions (e.g. R&D poles)’

⁸¹ The proposed ‘separate test’ asks whether ‘at the time the R&D agreement is entered into, there are three or more competing R&D efforts in addition to and comparable with those of the parties to the R&D agreement’.

definition of ‘competing R&D agreement’, to explain how the new test would apply.

‘Competing R&D effort’ could be defined as *‘an R&D effort in which a third party engages, alone or in cooperation with other third parties, or in which a third party is able and likely to independently engage, and which concerns: (a) the research and development of the same or likely substitutable new products and/or technologies as the ones to be covered by the R&D agreement; or (b) R&D poles pursuing substantially the same aim or objective as the ones to be covered by the R&D agreement; These third parties must be independent from the parties to the R&D agreement’.*

- ‘not competing undertaking’ could be added as a new definition to address concerns on lack of clarity raised by respondents in the Evaluation.⁸² The inclusion of the defined term would also bring improved clarity to Article 4 of the R&D BER.⁸³

‘Not competing undertaking’ could be defined as *‘an undertaking that is neither an undertaking competing for an existing product and/or technology nor an undertaking competing in innovation’.*

- ‘undertaking competing in innovation’ could be added to address respondents’ comments that the R&D BER does not make it sufficiently clear that early-stage R&D is covered by the block exemption.⁸⁴

‘Undertaking competing in innovation’ could be defined as *‘an undertaking that is not competing for an existing product and/or technology and that independently engages in or, in the absence of the R&D agreement, would be able and likely to independently engage in R&D efforts which concern: (a) the R&D of the same or likely substitutable new products and/or technologies as the ones to be covered by the R&D agreement; or (b) R&D poles pursuing substantially the same aim or objective as the ones to be covered by the R&D agreement’.*

⁸² See Section 4.1.2 of Annex 4 of the [Staff Working Document](#), which notes that ‘Furthermore, the concept of ‘not competing undertaking’ seems to also raise issues.’

⁸³ Under Article 4 of the R&D Ber, where the parties are not competing undertakings, the exemption provided for in Article 2 applies for the duration of the research and development.

⁸⁴ Eversheds Sutherland. See also page 116 of the [Staff Working Document](#), which note that ‘the HBERs [...] do not provide sufficient guidance on the early stages of R&D’.

- ‘new product or technology’ could be added to address respondents’ comments that the R&D BER does not make it sufficiently clear that early-stage R&D is covered by the block exemption.⁸⁵

‘New product or technology’ could be defined as ‘a product, technology or process that does not yet exist at the time when the R&D agreement [...] is entered into and that will, if emerging, create its own new market and not improve, substitute or replace an existing product, technology or process’.

4.17 We are not minded to propose adding the definitions of ‘active sales’ and ‘passive sales’ in the R&D BEO, although we note that the European Commission included these two definitions in its draft R&D BER. Our view is that these two terms, which are already defined in the vertical block exemption order (VABEO), may need to evolve to reflect market developments, especially to reflect the evolution of online markets. Given the shorter duration of the VABEO (six years), we will have the opportunity to test those definitions at that point and check that they remain useful. However, if these definitions were included in the R&D BEO, which we propose to recommend should expire in twelve years, it would be harder to adjust them to reflect any relevant market evolution. At the same time, we are conscious that parties using the R&D BEO need to know what active and passive sales mean. We are therefore proposing to define those terms in the CMA HBEOs Guidance and cross refer to the VABEO. Should these two definitions then evolve as a result of the VABEO review, we will be able to adapt the CMA HBEOs Guidance more easily than if we had to included them as definitions in the R&D BEO.

Proposed modifications to existing defined terms in Article 1

4.18 The CMA proposes to recommend that modifications be made to the following existing definitions in Article 1.

- ‘research and development agreement’;
- ‘research and development’;
- ‘potential competitors’.

⁸⁵ Eversheds Sutherland. See also page 116 of the [Staff Working Document](#), which note that ‘the HBERs [...] do not provide sufficient guidance on the early stages of R&D’.

4.19 The responses received and the evidence we have gathered and reviewed indicates that the effectiveness of the R&D BER could be improved by providing greater clarity on these definitions. For example:

- ‘Research and development agreement’ could be amended to address concerns raised that this definition lacks clarity.⁸⁶ More specifically, ‘research and development agreement’ could be amended to explain that the reference to ‘prior agreement’ in the relevant subsections of the definition only refers to agreements between the same parties for *‘joint research and development of contract products or contract technologies’* or agreements for *‘paid-for research and development of contract products or contract technologies’* under Article 1.
- ‘Research and development’ could be amended to address responses to the CFI regarding the desirability of inclusion of more speculative, earlier stage R&D where it may be far from clear whether the parties’ cooperation will generate any tangible results.⁸⁷ More specifically, we would propose that the definition of ‘research and development’ could be amended to include *‘activities aimed at acquiring know-how’* instead of *‘the acquisition of know-how’*. We also propose to amend this definition to clarify that acquiring know-how related to both ‘new’ as well as ‘existing’ products, technologies and processes are in scope.
- The definition of ‘potential competitors’ could be modified to take out the reference to ‘a small but permanent increase in relative prices’, in line with the changes made to the definition in Article 1 of the VBER. The removal of ‘a small but permanent increase in relative prices’ from the definition should simplify and in turn facilitate easier assessment by companies of what may constitute a potential competitor.⁸⁸ This change increases the clarity of the definition and goes some way to addressing the concerns raised by respondents about the definition of ‘potential competitor’.⁸⁹

⁸⁶ Eversheds Sutherland.

⁸⁷ Eversheds Sutherland.

⁸⁸ We are proposing the same change to the definition of ‘potential competitor’ under the Specialisation BER and the European Commission has also made the same change in its draft revised R&D BER.

⁸⁹ Baker McKenzie indicated that this issue is even more prominent when it comes to competition in innovation (R&D efforts), where even identifying actual competitors is far from easy. Their response cited the recent challenges/methodological issues in recent merger control cases in defining existing markets in-light-of future innovation. It highlighted that the implications of a mischaracterisation of actual or potential competition are significant, particularly if it unnecessarily prevents potential competitors from freely discussing their programmes to see whether a joint R&D effort makes sense, and in circumstances where it is unclear which technology data

This change reflects the change that we are also proposing to recommend in relation to the definition of 'potential competitor' in the Specialisation BEO (see paragraphs 3.27 to 3.30 above).

Policy questions

Question 35: Do you agree with the CMA's proposed recommendation to amend Article 1 to include a definition for R&D pole'?

Question 36: Do you agree with the CMA's proposed recommendation to amend Article 1 to include a definition for 'competing R&D effort'?

Question 37: Do you agree with the CMA's proposed recommendation to amend Article 1 to include a definition for 'not competing undertaking'?

Question 38: Do you agree with the CMA's proposed recommendation to amend Article 1 to include a definition for 'undertaking competing in innovation'?

Question 39: Do you agree with the CMA's proposed recommendation to amend Article 1 to include a definition for 'new product or technology'?

Question 40: Do you agree with the CMA's proposed recommendation not to include definitions of 'active sales' and 'passive sales' in Article 1 of the R&D VBEO, but to provide an explanation of those terms in the CMA HBEOs Guidance?

Question 41: Do you agree with the CMA's proposed recommendation to modify the existing definition of 'research and development agreement' in Article 1?

Question 42: Do you agree with the CMA's proposed recommendation to modify the existing definition of "potential competitors"?

Question 43: Do you agree with the CMA's proposed recommendation to modify the existing definition of 'research and development' in Article 1?

Impact questions

Question 44: How would changing the current definitions of 'research and development agreement', 'research and development', and 'potential competitor' in the R&D BER in the proposed R&D BEO impact consumers?

referred to at paragraph 86 of the Horizontal Guidelines could be considered strategic enough to create issues/require safeguards for information exchange. Nokia also identified 'potential competitor' under Article 1 of the R&D BER as not always straightforward in complex markets and which would benefit from further guidance.

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

Question 45: How would changing the current definitions of ‘research and development agreement’, ‘research and development’, and ‘potential competitor’ in the R&D BER in the proposed R&D BEO impact your business or those that you represent?

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

Question 46: If agreements made by your business or those that you represent would now be included in the block exemption as a result of changing the current definitions of ‘research and development agreement’, ‘research and development’, and ‘potential competitor’ in the proposed R&D BEO, please specify the types of relevant agreements and industries benefitted by this increased scope.

Question 47: How would changing the current definitions of ‘competing undertaking’, ‘contract technology’, ‘contract product’, ‘exploitation of the results’, ‘intellectual property rights’, ‘know-how’, and ‘substantial’ in the R&D BER in the proposed R&D BEO respectively impact consumers?

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

Question 48: How would adding new definitions of 'R&D pole', 'competing R&D effort', and 'not competing undertaking', in the proposed R&D BEO respectively impact consumers?

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

Conditions for block exemption under Article 3

Current regime

4.20 Article 3 of the R&D BER sets out the conditions that must be satisfied for the exemption for R&D agreements to apply.

4.21 These include:

- A requirement that the R&D agreement must stipulate that all the parties have full access to the final results of the joint research and development or paid-for research and development, including any resulting intellectual property rights and know-how, for the purposes of further research and development and exploitation, as soon as they become available (the **'full access to results requirement'**) (Article 3(2)). A carve-out from the full access to results requirement, which provides that where either party limits its rights of exploitation in accordance with the R&D BER, in particular where they specialise in the context of exploitation, access to the results for the purposes of exploitation may be limited accordingly. (Article 3(2)).
- A provision that, without prejudice to the full access to results requirement, where the research and development agreement provides only for joint research and development or paid-for research and development, the research and development agreement must stipulate that each party must be granted access to any **pre-existing know-how** of the other parties, if this know-how is indispensable for the purposes of its exploitation of the results (the **'full access to know-how requirement'**). The research and development agreement may foresee that the parties compensate each other for giving access to their pre-existing know-how, but the compensation must not be so high as to effectively impede such access. (Article 3(3)).

Recommendation

4.22 The CMA proposes to recommend that Article 3 be clarified:

- by the Secretary of State retaining the substantive conditions currently included in Article 3 of the R&D BER in a R&D BEO, but, in order to make the conditions as clear as possible, to consider restructuring the provisions of Article 3, for example into three separate articles; and

- by the CMA considering what further guidance can be provided to help stakeholders understand and apply the conditions, including full access, in Article 3.

4.23 Responses to the CFI indicated that UK stakeholders could benefit from greater clarity on the application of the requirements in Article 3 for full access to results and know-how. For example, responses to our CFI included suggestions that:

- More clarity is needed on what the ‘full access to results’ requirement means in practice.⁹⁰
- More clarity is needed on how ‘full access to results’ requirement can be limited by exclusive licensing to one party.⁹¹
- It is unclear what would be considered sufficient to comply with the ‘full access to results’ requirement (eg, whether the condition requires parties to transfer/license any IP rights to each other, or whether other, more informal arrangements suffice).⁹²
- Limited access rights would make cooperation agreements less attractive for large companies as this would negatively impact the exploitation potential of the outcome of any cooperation.⁹³
- Under the current rules, an intellectual property licence under future intellectual property rights with a field of use designation may, erroneously, not qualify as ‘full access’.⁹⁴
- It may be uncertain which ‘results’ the project may generate in the future and how those results may be ‘exploited’.⁹⁵
- It would be preferable to specify that that access rights to R&D results and pre-existing know-how are granted if needed for the exploitation of the results as provided under the R&D agreement.⁹⁶

⁹⁰ Eversheds Sutherland.

⁹¹ Dentons.

⁹² Eversheds Sutherland.

⁹³ Nokia.

⁹⁴ Ericsson noted the pro-competitive benefits of field of use designations, see eg [U.S. Dept. of Justice Business Review Letter re the Avanci patent licensing platform](#) at pages 19-20.

⁹⁵ Ericsson.

⁹⁶ Nokia.

- By requiring that 'access to any pre-existing know-how' must be given in the case of joint R&D projects that do not involve exploitation and where that know-how is indispensable for the exploitation of the results, the BER discourages ventures that may result in significant efficiencies but that do not provide for licenses to pre-existing (foreground and background) know-how and intellectual property.⁹⁷
- It would be preferable to rely on the parties' own incentives to enter into the R&D project, instead of reserving the benefit of the BER to R&D projects that involve full access to pre-existing know-how and the results of the collaboration.⁹⁸
- With regards to pre-existing know-how, further clarity on when know-how might be indispensable for the purposes of exploitation of R&D results would be useful, as would further clarity on what the access requirement for pre-existing know-how would comprise.⁹⁹

4.24 Evidence gathered in the Evaluation also indicated that stakeholders found several aspects of the conditions in Article 3 to be unclear and that there could be a risk that these conditions would not allow the correct identification of R&D agreements compliant with Article 101 TFEU.¹⁰⁰

4.25 Some stakeholders went further and recommended that the conditions requiring full access to know-how and results be removed from the R&D BER. One technology company argued that the current conditions set out in Articles 3(2) and 3(3) may create a disincentive to enter into a pro-competitive R&D agreement. By requiring one party to give the other party full access on penalty of losing the benefit of the exemption, the R&D BER potentially had a chilling effect on R&D projects that provide for less-than-full access, but are nonetheless pro-competitive.¹⁰¹ A research company also pointed out that R&D agreements that assign the exploitation of the R&D results to one party is simpler from a legal, commercialisation and management perspective and may be more efficient and attractive to the parties.¹⁰² Another respondent

⁹⁷ Ericsson.

⁹⁸ Ericsson.

⁹⁹ Eversheds Sutherland.

¹⁰⁰ See Section 4.1.2 of Annex 4 to the [Staff Working Document](#). The Commission notes that several aspects were considered unclear, namely the requirement of 'full access' rights, the access to 'pre-existing know-how' and the notion and calculation of 'compensation' among the parties to the agreement.

¹⁰¹ Ericsson.

¹⁰² Fraunhofer. The CMA notes that the Commission has not removed the requirement of full access to the final results of the R&D. Article 3 of the draft R&D BER continues to require that R&D agreements 'stipulate that all the parties have full access to the final results of joint or paid-for research and development for the purpose of

considered that removing these conditions in the R&D BER would also benefit SMEs, research institutes and academic institutes and that no specific rules for these entities were warranted.¹⁰³

- 4.26 However, other stakeholders argued that the conditions played an important role. For example, another technology company noted that *'the condition of full access rights to final R&D results and the access to pre-existing know-how are an important element when such access is necessary for allowing the parties to exploit the results based on their entitlement under the R&D cooperation agreement. If these access rights would be limited, this would possibly lead to making the cooperation agreements less attractive for large companies...'*. That technology company preferred that full access rights to R&D results continue to be required if needed for the exploitation of the results as provided under the R&D agreement.¹⁰⁴ The same company also considered that the condition to provide access rights to pre-existing know-how did not discourage the conclusion of cooperation agreements. Similarly, one law firm stated that it is 'not in principle' opposed to the full access condition, and noted that requiring parties to R&D agreements to share intellectual property rights and know-how between them helped minimise any anti-competitive effects that R&D agreements could entail and ensured a fair balance of power between parties.¹⁰⁵
- 4.27 A number of further points were raised in response to the Evaluation. For example, a few EU stakeholders noted that the pro-competitiveness of joint R&D does not depend on future R&D efforts based on the results and that in any event, future competition on innovation should be safeguarded by the R&D BER's prohibition of any limitation on R&D activities in the same or a connected field after the completion of R&D.¹⁰⁶ Others noted that strict access requirements could give rise to commercially unreasonable requirements¹⁰⁷ and/or are often not reasonable in vertical R&D scenarios.¹⁰⁸ Some provided relatively detailed descriptions of the practical limitations that the requirements for full access entailed and suggested that there was a lack of clarity on the

exploitation'. However, the provisions of Article 3 have now been split into three separate sub-articles, seemingly for greater clarity.

¹⁰³ American Bar Association Antitrust Law and International Law Sections

¹⁰⁴ Nokia, noting that it is standard practice for the know-how contributed to the cooperation to be listed in an annex to the cooperation agreement, so a party could always choose to not list any know-how.

¹⁰⁵ Eversheds Sutherland.

¹⁰⁶ Article 5(a) R&D BER, cited in the submissions made by ERT and the In-House Competition Lawyers' Association to the European Commission in the Evaluation.

¹⁰⁷ ICC submission to the European Commission in the Evaluation.

¹⁰⁸ CMS submission to the European Commission in the Evaluation.

circumstances in which the R&D BER will cover specialisation following on from R&D.¹⁰⁹

- 4.28 Respondents to the Evaluation also submitted that the exceptions included in the R&D BER to the principle of full access were insufficient. One respondent argued that the exception in the BER concerning research institutes and academic bodies appears to be based on an (allegedly incorrect) assumption that they are not normally active in exploiting the results, which can mean that they are not able to benefit from the block exemption as the European Commission might have intended them to, and the notion of ‘compensation’ in exchange for access is not clear and may be difficult to calculate.¹¹⁰ A UK law firm¹¹¹, making the same submission to the European Commission that it made to the CMA, suggested that the exception to ‘full access’ rights could be clearer. The same firm also considered that the requirement for access to pre-existing know-how is a difficult issue to assess objectively, as the commercial arrangements may reflect the negotiating strength of the parties rather than indispensability of pre-existing know how to future exploitation.
- 4.29 The evidence we have reviewed and gathered indicates that the effectiveness of the R&D BER could be improved by providing greater clarity about the application of certain conditions (particularly, those relating to access to results). We have not, however, received sufficient evidence of the benefits to competition of removing, or substantially broadening, these conditions in situations that stakeholders commonly face. The key theme that emerges across the evidence is that stakeholders could benefit from a better understanding of *how to apply* the conditions.
- 4.30 The main advantages and disadvantages of clarification through guidance and through the text of the R&D BEO are the same as those described above in paragraphs 2.9 and 2.10.¹¹² The CMA is minded to recommend a hybrid approach to clarifying the conditions contained in Article 3. In particular, we

¹⁰⁹ For example, see the Commeo and Allen & Overy submissions to the European Commission in the context of the Evaluation.

¹¹⁰ See Section 4.1.2 of Annex 4 to the [Staff Working Document](#).

¹¹¹ Dentons.

¹¹² In this context, we note that the European Commission has, in its parallel review of the EU R&D BER, proposed changes to the R&D BER itself to retain but clarify the articulation of, the ‘full access’ requirements and the other conditions included in Article 3, having received similar feedback to that which we received in our CFI. However, these changes are primarily to restructure and simplify the articulation of the requirements that are currently contained in Article 3 rather than to include additional conditions. The Commission has proposed to complement this with additional guidance in the Horizontal Cooperation Guidelines on how to apply the conditions in practice. In light of the feedback we received from CFI respondents that it could raise compliance costs for businesses if any UK BEO were to diverge from its EU equivalent, we can see benefits in following a similar approach.

are proposing to recommend that the R&D BEO include clarifying changes to ensure that the 'full access' requirements and other requirements in Article 3, are articulated clearly. Specifically, we are minded to recommend that the provisions of Article 3 be split into three separate articles (the first dealing with access to the final results; the second with access to pre-existing know-how; and the third with joint exploitation) and reworded, where appropriate, for greater clarity. The changes will address the fact that the current wording of Article 3(2) is dense and difficult to follow.

- 4.31 Assuming these changes were to be made, we would also be minded to complement them with practical guidance that would be provided in the course of our review of the Horizontal Cooperation Guidelines. This guidance would be intended to help businesses better understand the application of the proposed recommended R&D BEO and the concepts and definitions used in the BEO.

Policy questions

Question 49: Do you agree with the CMA's recommendation to retain and clarify the current conditions of the full access requirements and other requirements in Article 3 of the R&D BER and as set out above?

Impact questions

Question 50: How would retaining and clarifying the current Conditions of the R&D BER in this way impact consumers?

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

Market share threshold and duration of exemption under Article 4 and application of the market share threshold under Article 7

Current regime

- 4.32 Under Article 4 of the R&D BER, where parties are actual or potential competitors, their combined market share must not exceed 25% to benefit from the exemption set out in Article 2.¹¹³ Article 7 sets out rules for the purposes of applying the market share threshold in Article 4. This includes a requirement that market shares should be calculated on the basis of the preceding calendar year.
- 4.33 Where the parties are not competing undertakings, the exemption applies for the duration of the research and development irrespective of their market shares.
- 4.34 Where results are jointly exploited, the exemption applies for seven years from the point at which the contract products or contract technologies are first put on the market. After this period of time, the 25% market share threshold applies. If the parties' combined market share is initially below 25% but rises above that level, Article 7 of the R&D BER provides that parties can still receive the benefit of the block exemption for a further two years after they exceed the 25% threshold (if the parties' combined market share remains below 30%). If the parties' combined market share is initially not more than 25% but subsequently rises above 30%, the parties can still receive the benefit of the block exemption for a further year after their market share rises above 30%, starting from the point at which the parties' combined market share first exceeded 30%.

Recommendations

In relation to the threshold itself (Article 4)

- 4.35 The CMA recommends that:
- the current market share threshold should not be raised (or abolished) for undertakings competing or in potential competition for existing products or service (except for parties competing in innovation); and

¹¹³ Where the agreement is for 'paid-for R&D', the market share thresholds apply to the combined market share of the financing parties and all parties with which the financing party has entered into R&D agreements in relation to the relevant products or technologies.

- there should be a separate test for R&D agreements between parties competing in innovation (ie not in relation to existing products or services). This test would require that there should be three or more competing R&D efforts in addition to and comparable with those of the parties.

Raising or abolishing the current market share threshold

4.36 CFI responses on these provisions were mixed. A number of respondents engaged with our CFI question on the market share threshold and duration of exemption provisions in Article 4 of the R&D BER.¹¹⁴ One respondent stated that the current market share threshold remained appropriate.¹¹⁵ However, a significant majority of these respondents argued that the market share threshold should, at the very least, be raised.¹¹⁶ For example, one respondent argued that the 25% threshold is not sufficient to indicate market power since market shares at that level are unlikely to raise significant antitrust concerns and that the 25% cap should be increased or abolished.¹¹⁷ One respondent argued that the market share threshold should be raised or preferably removed entirely, and that this would 'materially contribute to the UK Government's Innovation Strategy'.¹¹⁸

4.37 Issues with the current market share threshold raised by respondents included that:

- a) Applying the threshold was difficult (especially when market share needs to be calculated on the basis of total licensing income) as usually no real data is available to advisors.¹¹⁹
- b) Information on market shares or volumes necessary can be unavailable in certain industries, complicating the application of the threshold in practice.¹²⁰

¹¹⁴ Baker McKenzie, Eversheds Sutherland, Nokia, Dentons.

¹¹⁵ Dentons.

¹¹⁶ Baker McKenzie, Eversheds Sutherland, Nokia.

¹¹⁷ Baker McKenzie. This respondent also noted that it would be beneficial for the UK to adopt an approach that was consistent with the EU approach as this will provide legal certainty and efficiency for business and that if the UK adopted a different approach, this would create complexity for businesses that want to engage in pan-European R&D agreements with competitors

¹¹⁸ Baker McKenzie.

¹¹⁹ Baker McKenzie.

¹²⁰ Nokia.

- c) R&D agreements often relate to markets ‘that do not exist or whose boundaries are not well defined’, making it difficult to rely on market shares to determine whether the exemption applies.¹²¹
- d) There is no need for market share tests given the ‘overwhelmingly positive effects of joint R&D’.¹²²
- e) Meeting the current threshold can be relatively easy (particularly where established firms cooperate to develop improved products). These agreements will then be subject to self-assessment, meaning that efforts beneficial for consumers will be subject to legal uncertainty.¹²³
- f) In relation to SMEs, a specific ‘SME exemption’ for R&D ventures was requested, in order to provide legal certainty.¹²⁴ This echoed feedback gathered in the EU Evaluation, which surveyed SMEs.¹²⁵ The CFI respondent suggested that the SME exemption could be based on market shares, revenues or agreement duration.

4.38 In addition to the points above, one respondent requested that the terms of Article 7 be made clearer to allow businesses to undertake market share analysis in order to determine whether they are covered by the R&D BER.¹²⁶ Another respondent suggested that the distinction between non-competing companies under Article 4(1) and competing companies under Article 4(2) remained appropriate, even if the boundaries between the two were increasingly blurred.¹²⁷

4.39 Evidence from the Evaluation raised similar concerns to the ones highlighted by responses to our CFI. In particular, some stakeholders considered that the 25% market share threshold should be increased, although others suggested that the threshold should instead be aligned with the lower market share thresholds in other regulations. Respondents also mentioned similar difficulties to those raised in the CFI about defining markets and identifying

¹²¹ Nokia.

¹²² Baker McKenzie.

¹²³ Eversheds Sutherland.

¹²⁴ The App Association. In addition to arguing for a specific exemption for R&D agreements involving SMEs, the App Association provided some brief comments indicating that if the UK should discard the R&D BER, small businesses like the ones it represented, would be increasingly discouraged from entering into R&D agreements.

¹²⁵ EU Evaluation Support Study.

¹²⁶ Eversheds Sutherland.

¹²⁷ Eversheds Sutherland.

competitors (with SMEs noting that this was particularly difficult given the administrative burden and their lack of technical skills).¹²⁸

- 4.40 As noted above, the concerns raised about the current market shares thresholds are that they are too low (or should be abolished). The main advantage of abolishing the market share threshold is that this would provide certainty and avoid issues around the practicability of defining markets and calculating market shares. The main disadvantage is that it would remove an important safeguard against the risks of granting the benefit of a safe harbour to agreements likely to have marked anticompetitive effects. This is particularly the case for agreements between competitors or potential competitors. Raising the market share threshold or removing it would risk undermining the effectiveness of this safeguard.
- 4.41 Although stakeholders challenged the current market share threshold in the R&D BER, the evidence that the CMA has reviewed and gathered is not sufficient for the CMA to conclude that a higher market share threshold (or no market share threshold at all) would be appropriate.

Separate test for R&D agreements between parties competing in innovations

- 4.42 The concerns raised by stakeholders (as set out above) are mainly about the practicability of defining markets and calculating market shares in order to assess whether the R&D BER might apply. Based on the feedback received, we understand that these issues are likely to be most pressing where R&D may be giving rise to entirely new markets, and/or may present particular difficulties for smaller and medium-sized businesses who may not be resourced well enough to undertake a market definition exercise or have significant access to market data. On that basis, we have explored the following two solutions:
- introducing a separate test, as an alternative to a market share threshold, for R&D agreements where markets are particularly hard to define and market shares particularly hard to calculate (these would be agreements where the R&D is focused on innovation and may create new markets, rather than R&D in relation to existing contracts or technologies). This is the approach followed by the US DOJ and the FTC and the European Commission (see below); and/or

¹²⁸ See Section 5.1.2 of the [Staff Working Document](#). Respondents included business and legal associations, companies and several law firms.

- in relation to SMEs specifically, abolishing the market share threshold or introducing a separate test.¹²⁹

4.43 The main advantages of a separate test for R&D agreements focused on innovation (rather than existing products or technologies) are that this would provide greater legal certainty on the application of the R&D BEO to these agreements. The main disadvantage is that, in principle, removing the market share threshold in relation to even a limited category of agreements may remove an important safeguard. We note that this disadvantage could be mitigated by the introduction of another test – as opposed to the absence of a test. For example, the European Commission has proposed a test which asks whether, *‘at the time the R&D agreement is entered into, there are three or more competing R&D efforts in addition to and comparable with those of the parties to the R&D agreement’*.¹³⁰ A test like this should, in principle, be easier to apply than a market share threshold but still ensure that the parties to an R&D agreement benefiting from the R&D block exemption face sufficient competition.

4.44 In relation to SMEs, there is currently limited UK evidence to warrant an SME market share exemption. Input from stakeholders has not identified a UK specific market requirement for an SME exemption. The CMA considers that the main advantage of an abolition of the market share threshold or a possible separate test for SMEs would be to facilitate their use of the block exemption and improve legal certainty for those enterprises. The main disadvantage would be that it could remove an important safeguard and allow a relatively small player with significant market power to benefit from the block exemption even though this could harm competition in the relevant market. Unlike the solution proposed in relation to innovation/novel markets, this solution would

¹²⁹ [‘R&D cooperation agreements concluded by SMEs – Exempted under the EU R&D Block Exemption Regulation?’](#) by Björn Lundqvist. European Commission, Final Report (EC SME Report). This expert report considers, among other things, whether SMEs should be granted special status under the R&D BER to promote SMEs’ involvement in horizontal R&D cooperation agreements and discusses options to identify pro-competitive horizontal R&D agreements concluded by SMEs to trigger the applicability of the exemption under the R&D BER. One of the tests the report identifies is one whereby SMEs would have to show that they are not amongst the largest firms on the relevant market. This test suggests using a number of factors such as access to financial support, access to intellectual property, skilled personnel, or other specialized assets to show that the SME is not part of the largest firms on the market.

¹³⁰ We note that under the European Commission’s proposal, ‘competing R&D effort’ is defined in article 1(1)(19) as *‘an R&D effort in which a third party engages, alone or in cooperation with other third parties, or in which a third party is able and likely to independently engage and which concerns: (a) the R&D of the same or likely substitutable new products and/or technologies as the ones to be covered by the R&D agreement; or (b) R&D poles pursuing substantially the same aim or objective as the ones to be covered by the R&D agreement. These third parties must be independent from the parties to the R&D agreement.’* The CMA also notes that the US DOJ and FTC have introduced a similar ‘safety zone’ for R&D agreements in innovative markets in paragraph 4.3 of their [‘Antitrust Guidelines for Collaborations Among Competitors’](#) (April 2000) (the FTC and DoJ Guidelines).

not benefit larger businesses who enter into innovation R&D agreements and might still face uncertainty as to whether they meet the market share threshold.

- 4.45 In view of this and the factors above, the CMA is not recommending a specific SME-based exemption.
- 4.46 Instead, in light of this current position and also considering general feedback we received from stakeholders which identified concerns regarding the cost of compliance arising from divergence from the EU block exemption, we are proposing to adopt a similar approach in the UK BEO to the approach adopted by the EU BER.¹³¹ This approach would also benefit SMEs, but would involve SMEs exempting themselves through the standard rules, rather than through an SME-specific exemption.¹³² Many SMEs will continue to be able to exempt themselves through the *de minimis* market share rules.
- 4.47 So, in order to best support UK innovation and in line with UK Government's [Innovation Strategy](#), we are minded to recommend that the R&D BEO introduce a separate test for R&D agreements between parties competing in innovation. R&D agreements focused on innovation would not be subject to a market share threshold but could only benefit from the block exemption under the R&D BEO if there were three or more competing R&D efforts in addition to and comparable with those of the parties. This would require consequential amendments to the definitions of competing undertaking and the possible introduction of other definitions in the part of the BEO that is equivalent to Article 1 of the R&D BER.
- 4.48 We are minded to recommend that the R&D BEO should retain the market share threshold in relation to R&D agreements that concern R&D agreements between undertakings competing (or in potential competition) in relation to existing products and technologies.

In relation to the application of the market share threshold (Article 7)

- 4.49 We are minded to recommend that:
- the R&D BEO simplify the application of the market share threshold in instances where the parties initially do not exceed the market share

¹³¹ An expert report Expert report on R&D cooperation agreements concluded by SMEs – Exempted under the EU R&D Block Exemption Regulation by Björn Lundqvist had suggested that the European Commission consider a separate test, or an abolition of the market share threshold, in relation to SMEs, but this suggestion was not taken up by the European Commission.

¹³² The EU does not propose to make any separate SME test or abolish the market share test for SMEs in the EU R&D BER.

threshold (and meet the other conditions for block exemption) but then exceed the threshold. In this instance, we are minded to recommend that the parties should continue to benefit from the block exemption for two years after they first exceed the threshold.

- market shares should be calculated in the R&D BEO on the basis of the preceding calendar year or, when the preceding calendar year is not representative of the parties' position in the relevant market(s), the market share should be calculated as an average of the parties' market shares of the three preceding calendar years.

4.50 These proposals respond to stakeholder concerns that the thresholds in the R&D BER are difficult to apply, and seek to avoid assessments being made on the basis of unrepresentative data.

4.51 In relation to the grace periods specifically, a possible solution would be to simplify the conditions for an agreement to continue to benefit from the BER when parties' combined market share moves from below 25% to exceed that threshold. For example, one could remove the requirement for the parties' market shares to remain below 30%¹³³ in order to continue to benefit from the block exemption for 2 years after they first exceed 25%.¹³⁴

4.52 The main advantage of this proposed solution is that it would further simplify the application of market thresholds to the extent they still apply. The main disadvantage is that it might allow parties with significant market power (which quickly increases from below the 25% threshold) to benefit from the block exemption for up to two years without any additional safeguard beyond this time limit. However, the CMA would expect that it would typically be unlikely for market shares to rise so quickly that there could be significant harm to competition within this period.

4.53 We note that the European Commission has proposed in its draft revised R&D BER that market shares should be calculated on the basis of the preceding calendar year *or*, alternatively, when the preceding calendar year is not representative of the parties' position in the relevant market(s), the market share should be calculated as an average of the parties' market shares of the

¹³³ As noted above, Article 7 of the R&D BER allows that parties can still receive the benefit of the block exemption for a further two years after they exceed 25% (if the parties' combined market share remains below 30%) or for a further year after their market share rises above 30%, starting from the point at which the parties' combined market share first exceeded 30%.

¹³⁴ This is the approach the EC is proposing to adopt in its revised R&D BER. As noted in paragraph 4.39 above, respondents to the Evaluation mentioned similar difficulties to those raised in the CFI about defining markets and identifying competitors (with SMEs noting that this was particularly difficult given the administrative burden and their lack of technical skills).

three preceding calendar years (the current R&D BER only foresees the preceding calendar year as calculation basis). Although we did not receive any CFI responses specifically on this point¹³⁵, this seems to the CMA to be helpful in offering an alternative means of calculating market shares where to take a single year would not be representative of the parties' position.

Policy questions

Question 51: Do you agree with the CMA's proposed recommendation to retain the current market share threshold in the R&D BER for undertakings competing or in potential competition for existing products or service?

Question 52: Do you agree with the CMA's proposed recommendation to introduce a separate test for undertakings competing in innovation (ie not in relation to existing products or service), requiring that there should be three or more competing R&D efforts in addition to and comparable with those of the parties?

Question 53: Do you agree with the CMA's proposed recommendation to simplify the application of the market share threshold in instances where the parties initially do not exceed the market share threshold (and meet the other conditions for block exemption) but then exceed the threshold?

Question 54: Do you agree with the CMA's proposed recommendation to allow market shares to be calculated as an average of the parties' market shares of the three preceding calendar years when the preceding calendar year is not representative of the parties' position in the relevant market(s)?

Impact questions

Question 55: How would these proposed changes impact consumers?

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

¹³⁵ The respondents to the CFI did not propose the specific solution the European Commission has proposed (nor any other particular alternative approach or language). However, the CMA considers that the change which it is recommending would assist in addressing the concerns which were expressed by respondents to the CFI that market shares are difficult to calculate, particularly in R&D intended to create new markets or where little data is available.

e) Significant negative impact

Question 56: How would the recommendation to provide an alternative way of calculating market shares impact your business in making use of the benefits of the R&D block exemption? How would your business benefit?

a) Significant positive impact

b) Moderate positive impact

c) Negligible impact

d) Moderate negative impact

e) Significant negative impact

Question 57: How would the CMA's proposed recommendation to introduce a separate test for undertakings competing in innovation (ie not in relation to existing products or service) impact your business or those that you represent?

a) Significant positive impact

b) Moderate positive impact

c) Negligible impact

d) Moderate negative impact

e) Significant negative impact

Question 58: How would the CMA's proposed recommendation to introduce a separate test for undertakings competing in innovation (ie not in relation to existing products or service) facilitate use of the block exemption? As part of the response, please describe the types of business agreement affected.

Question 59: Would the CMA's proposed recommendation to introduce a separate test for undertakings competing in innovation (ie not in relation to existing products or service) introduce any potential new compliance costs as a result of familiarisation with the new rules for innovation? As part of the response, please describe/list the types of business agreement affected and the scale of legal or expert advice (eg time spent with consultants] needed where possible.

‘Hardcore’ restrictions listed in Article 5 and Excluded Restrictions in Article 6

Current regime

4.54 R&D agreements containing certain ‘hardcore’ restrictions that will not benefit from the ‘safe harbour’ outlined in Article 2 of the R&D BER. These restrictions, as set out in Article 5 of the R&D BER, are:

- a) Restricting parties from carrying out R&D independently or with third parties in an unrelated field (or, after the completion of the R&D in question, in the same or a related field) (Article 5(a)).
- b) Limiting output or sales (subject to various exceptions set out in the Article)¹³⁶ (Article 5(b)).
- c) Fixing prices when selling the contract product or licensing the contract technologies to third parties (subject to certain exceptions for the fixing of prices or licence fees to immediate customers or licensees in certain circumstances)¹³⁷ (Article 5(c)).
- d) Restricting the territory in which, or of the customers to whom, the parties may passively sell the contract products or license the contract technologies (with the exception of the requirement to exclusively licence the results to another party) (Article 5(d)).
- e) Imposing a requirement not to make any, or to limit, active sales of the contract products or contract technologies in territories or to customers which have not been exclusively allocated to one of the parties by way of specialisation in the context of exploitation (Article 5(e)).
- f) Imposing a requirement to refuse to meet demand from customers in the parties’ respective territories, or from customers otherwise allocated between the parties by way of specialisation in the context

¹³⁶ Not including certain exceptions set out in Article 5(b)(i) to (iv) which allow that, in certain specified circumstances, the setting of production or sales targets, specialisation in the context of exploitation, and certain restrictions relating to competing products or technologies during a period of joint exploitation will not be ‘hardcore’ restrictions.

¹³⁷ Subject to the exceptions in Article 5(c), which allow that the fixing of prices when selling or licensing to immediate customers or licensees where joint exploitation includes joint distribution of contract products or joint licensing of contract licensing will not be treated as ‘hardcore’ restrictions.

of exploitation, who would market the contract products in other territories within the United Kingdom. (Article 5(f))

- g) Imposing a requirement to make it difficult for users or resellers to obtain the contract products from other resellers within the United Kingdom. (Article 5(g))

4.55 The R&D BER also sets out several ‘excluded restrictions’ to which the benefit of the exemption will not apply, although the rest of the agreement can still benefit from the BER’s safe harbour. The excluded restriction must be individually assessed to establish whether they benefit from the individual exemption under section 9 CA98. These restrictions, as set out in Article 6, are:

- a) Obligations that prohibit challenges to the validity of IP rights which the parties hold in the United Kingdom and which are relevant to the R&D or, after the expiry of the R&D agreement, the validity of IP rights which the parties hold in the United Kingdom and which protect the results of the R&D. However, provisions which allow termination of the R&D agreement if such IP rights are challenged by one of the parties to the R&D agreement are not excluded, so could benefit from the block exemption (Article 6(a)).
- b) Obligations not to grant licences to third parties to manufacture contract products or to apply contract technologies. If the agreement provides for the exploitation of the results of the joint R&D or paid-for R&D by at least one of the parties and such exploitation takes place in the United Kingdom vis-à-vis third parties this is not excluded, so could benefit from the block exemption (Article 6(b)).

Recommendation

4.56 The CMA proposes to recommend that:

- the Secretary of State retain the hardcore and excluded restrictions currently included in Articles 5 and 6 of the R&D BER in a revised R&D BEO.¹³⁸

¹³⁸ The EU is not proposing to make any changes to the hardcore and excluded restrictions in the EU R&D BER. Thus, in view of the feedback we received from stakeholders about the cost of compliance arising from divergence from the EU block exemption, the UK BEO adopting a different approach might give rise to such costs.

- the CMA considers what further guidance it can provide to help stakeholders complying with Article 5 and 6.

List of hardcore restrictions

- 4.57 The Evaluation suggested that the majority of the respondents considered that the lists of hardcore and excluded restrictions in the R&D BER provided legal certainty.¹³⁹ As noted in relation to the Specialisation BER (paragraph 3.67 above), one CFI respondent noted that the logic of both the hardcore and excluded restrictions was sufficiently clear and that businesses were familiar with the issues at play.¹⁴⁰
- 4.58 It should be noted that one respondent to the CMA’s CFI queried whether the HBERs as a whole (so including the R&D BER), required a list of hardcore restrictions at all.¹⁴¹ We have addressed this concern in paragraphs 3.68 and 3.69 above in more detail, and for the reasons set out in those paragraphs, we do not consider that the CMA has a sufficient basis to conclude that a change should be made. Hardcore restrictions include some of the most serious restrictions of competition and should not benefit from an automatic safe harbour.

Territorial restrictions

- 4.59 One respondent to the CMA’s CFI queried whether territorial restrictions should continue to be treated as ‘hardcore’ (Articles 5(d), (e), (f) and (g)), given the EU Single Market rationale for these.¹⁴²
- 4.60 In that respect, the CMA refers to its discussion and conclusion on this in its recommendations to BEIS on the Vertical Agreements Block Exemption Order.¹⁴³ For the same reasons as set out in that recommendation, the CMA expects to recommend that territorial restrictions continue to be treated as ‘hardcore’ and considers that it will be appropriate to keep this under review in order to take into account any market developments, if and when they arise.

¹³⁹ See Section 5.1.2 of the [Staff Working Document](#). In particular: ‘the majority of respondents to the public consultation that expressed a view considered that the other provisions of the R&D BER provided legal certainty, namely the list of hardcore restrictions (Article 5 of the R&D BER), the list of obligations included in horizontal R&D agreement to which the exemption does not apply (‘excluded restrictions’) (Article 6 of the R&D BER) and, to a lesser extent, the duration (7 years) of the exemption applicable to R&D agreements between not competing undertakings where the results were jointly exploited. Respondents considered that these provisions contributed to identifying horizontal R&D agreements compliant with Article 101 of the Treaty’.

¹⁴⁰ Eversheds Sutherland.

¹⁴¹ Baker McKenzie.

¹⁴² Dentons (answer in R&D1(d)).

¹⁴³ [CMA Recommendation to the Secretary of State \(publishing.service.gov.uk\)](#) – see paragraphs 5.40 to 5.42.

Further clarity on certain areas of Article 5 and 6

4.61 It was suggested that Articles 5 and 6 on hardcore and excluded restrictions could usefully benefit from further clarity, and in particular that it would be helpful to provide further clarity on excluded restrictions in the form of practical examples.¹⁴⁴ One respondent also stated that there was currently no guidance or analysis available for assessing the Article 5 hardcore restrictions.¹⁴⁵ We are minded to consider what further guidance we can provide.

Policy questions

Question 60: Do you agree with the CMA's recommendation to retain the current hardcore restrictions and excluded restrictions in the R&D BER in the proposed R&D BEO?

Question 61: Do you agree with the CMA's proposed recommendation to consider what further guidance can be provided?

Impact questions

Question 62: How would retaining the current hardcore and excluded restrictions in the R&D BER in the proposed R&D BEO impact consumers?

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

¹⁴⁴ Eversheds Sutherland.

¹⁴⁵ Baker McKenzie.

5. Duration of HBEOs

- 5.1 Under section 6(7) of the Act, a block exemption order may provide that the order is to cease to have effect at the end of a specified period. The CMA proposes that the UK HBEOs should include such a provision.
- 5.2 Part of the benefit of the UK HBEOs expiring after a specified period is that it provides the opportunity for the CMA to conduct a further review of the regime for horizontal agreements, taking account of market developments since the last review. The CMA considers that it would be appropriate for a review of the UK HBEOs to take place twelve years after its current review of the retained HBERs. Such a duration would give certainty to businesses for a reasonable period of time and would be consistent with the duration of the EU Specialisation BER. In our review of the retained VABER, we concluded that a shorter period of six years was necessary given recent market developments, such as the growth in online sales, the UK's withdrawal from the EU and the impact of the Coronavirus (COVID-19) pandemic. We do not consider that these market developments would have a similar impact on HBEOs and therefore do not propose reducing the period below twelve years.

Policy question

Question 63: The CMA invites views on whether the UK HBEOs should have a duration of twelve years.

6. Other provisions common to both HBEOs

Transitional period

- 6.1 The CMA proposes that the UK HBEOs should provide for a transitional period of one year. This means that the Chapter I prohibition would not apply during a period of one year from the date on which the UK HBEOs come into effect in respect of agreements already in force on that date which (i) do not satisfy the conditions for exemption provided for in the UK HBEOs, but (ii) on that date, satisfied the conditions for exemption provided for in the retained HBERs.¹⁴⁶ In other words, existing agreements that meet the conditions of the retained HBERs could continue to benefit from its terms for a year after its expiry, whereas agreements entered into after its expiry would need to meet the conditions of the new UK HBEOs to benefit from the block exemptions.
- 6.2 The CMA is proposing to recommend that the UK HBEOs have a transitional period of one year to allow businesses that wish to take advantage of the 'safe harbour' to review and (if necessary) revise their horizontal agreements.

Cancellation in individual cases

- 6.3 Section 6(6)(c) of the Act provides that a block exemption order may provide that if the CMA considers that a particular agreement is not an exempt agreement,¹⁴⁷ it may cancel the block exemption in respect of that agreement. The CMA proposes that UK HBEOs should contain such a provision.
- 6.4 The CMA proposes that any cancellation, ie withdrawal of the benefit of the UK HBEOs in an individual case, should be in writing, and that the CMA should first give notice in writing of its proposal and consider any representations made to it before making a decision to cancel the block exemption in respect of that agreement. The CMA proposes that any notice should state the facts on which the CMA bases its decision or proposal and its reasons for making it. The CMA envisages that these provisions would be similar to those in the Public Transport Ticketing Schemes Block Exemption.¹⁴⁸

¹⁴⁶ Unless the benefit of the block exemption is cancelled, or otherwise varied or revoked, in accordance with the provisions of the UK HBEO or the Act.

¹⁴⁷ Exempt agreement means an agreement which is exempt from the Chapter I prohibition as a result of section 9 of the Act (the Act, section 6(8)).

¹⁴⁸ Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001, articles 19–21.

6.5 The CMA is therefore proposing to recommend that the UK HBEOs provide for the CMA to cancel the benefit of the block exemption in individual cases to ensure that the ‘safe harbour’ is only available for those agreements that satisfy the conditions for exemption under section 9 of the Act. The CMA considers that this provision is likely only to be used in exceptional circumstances and that the proposal to provide notice in writing and to consider any representations would ensure that the provision was used appropriately.

Obligation to provide information

6.6 Section 6(5) of the Act provides that a block exemption order may impose obligations subject to which a block exemption is to have effect and section 6(6)(b) of the Act provides that a block exemption order may provide that if there is a failure to comply with an obligation imposed by the order, the CMA may, by notice in writing, cancel the block exemption in respect of the agreement. The CMA proposes that the UK HBEOs should impose an obligation for parties to provide the CMA with information in connection with those horizontal agreements to which they are a party if requested to do so and that failure to do so without reasonable excuse should result in cancellation, ie withdrawal, of the block exemption.

6.7 The CMA proposes that the obligation should be for businesses to supply the CMA with such information in connection with those horizontal agreements to which they are a party as the CMA may require within ten working days from the date on which the party receives notice in writing of the request or within such longer period of working days commencing with the relevant day as the CMA may, having regard to the particular circumstances of the case, agree with the person in writing.¹⁴⁹ The CMA also proposes that if it proposes to cancel the block exemption, it should first give notice in writing of its proposal and consider any representations made to it. The CMA envisages that these provisions would be similar to those in the Public Transport Ticketing Schemes Block Exemption.¹⁵⁰

6.8 The CMA is therefore proposing to recommend that the UK HBEOs provide for an obligation to provide information to ensure that the CMA is in a position to assess whether an agreement that benefits from the block exemption is

¹⁴⁹ The CMA is minded to clarify in any horizontal guidance that where appropriate, it will seek to give recipients of large information requests advance notice so that they can manage their resources accordingly. The CMA is also minded to clarify that, in certain circumstances and, where it is practical and appropriate to do so, it may send the information request in draft.

¹⁵⁰ Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001, articles 17–18 and 20–21.

one that satisfies the conditions for exemption under section 9 of the Act. This provision would also enable the CMA to investigate instances where competition law concerns arise from parallel networks of similar horizontal restraints.¹⁵¹

Policy question

Question 64: The CMA invites views on the above proposed recommendations in respect of the other provisions in the UK HBEOs.

¹⁵¹ The process for providing representations where a response contains commercially sensitive information or details of an individual's private affairs and the sender considers that disclosure might significantly harm their interests or the interests of the individual, is explained in Chapter 7 of the Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8, which the CMA will have regard to when exercising the power in Article 12(1) VABEO.

The retained Horizontal Agreements Block Exemption Regulation

Annexes to consultation document

Annex A: Consultation Questions

Annex B: Proposed Definitions in the Specialisation BEO.

Annex C: Proposed Definitions in the R&D BEO

Annex A: Consultation Questions

In this Annex the CMA sets out the full list of consultation questions.

Specialisation BER

Policy questions

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

Impact questions

Question 2: Relative to current arrangements, if the retained Specialisation BER were allowed to expire, how would the absence of legal certainty and clarity affect your business or those that you represent? Please describe the scale of any legal or expert advice needed (eg time spent with consultants).

Specialisation BER: Definitions included in Article 1

Policy questions

Question 3: Do you agree with the CMA's proposed recommendation to expand the definition of 'unilateral specialisation agreement' to bring unilateral specialisation agreements between more than two parties within the scope of the Specialisation BEO?

Question 4: Do you agree with the CMA's proposed recommendation to address the issue of horizontal subcontracting agreements with a view to expanding production through guidance rather than through changing Article 1 of the Specialisation BER?

Question 5: Do you agree with the CMA's proposed recommendation not to remove the current exclusion of distribution and rental services from the definition of 'product' in Article 1(1)(f) of the Specialisation BER?

Question 6: Do you agree with the CMA's recommendation that BEIS should consider making a number of clarificatory changes to Article 1 when drafting any Specialisation BEO (see Annex B for an illustration of what changes this could involve)?

Question 7: Do you agree with the CMA's recommendation to modify the definition of 'potential competitor' to take out the reference to 'a small but permanent increase

in relative prices' and to provide further clarity about the application of the definition in the CMA HBEOs guidance?

Question 8: Do you agree with the CMA's recommendation that a change to the text of the Specialisation BER in relation to both 'joint' and 'production' is not required and that this issue can be addressed in the HBEOs Guidance?

Impact questions

Question 9: How would expanding the current definition of 'specialisation agreement' in the proposed Specialisation BEO to add agreements among more than two parties impact consumers?

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

Question 10: How would expanding the current definition of 'specialisation agreement' in the proposed Specialisation BEO to add agreements among more than two parties impact your business or those that you represent?

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

Question 11: Describe/list some of the expected ongoing costs or benefits faced by your business or those that you represent as a result of expanding the current definition of 'specialisation agreement' in the proposed Specialisation BEO to add agreements among more than two parties.

Question 12: If agreements made by your business or those you represent would be now be included as a result of expanding the current definition of 'specialisation agreement' in the proposed Specialisation BEO to add agreements among more than two parties, please specify the types of relevant agreements and industries benefitted by this increased scope.

Question 13: How would amending the current definition of 'potential competitor' in the proposed Specialisation BEO impact consumers?

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

Question 14: How would amending the current definition of 'potential competitor' in the proposed Specialisation BEO impact your business or those that you represent?

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

Question 15: How would amending the current definition of 'potential competitor' in the proposed Specialisation BEO facilitate the use of the block exemption? As part of the response, please describe the types of business agreement affected.

Specialisation BER: Conditions for block exemption under Article 2

Policy questions

Question 16: Do you agree with the CMA's recommendation to retain the current conditions for exemption as set out in Article 2 of the Specialisation BER in the proposed Specialisation BEO?

Question 17: Do you agree with the CMA's recommendation to clarify that the block exemption can apply even if the parties have not accepted exclusive purchase or supply obligations or are not jointly distribute the specialisation products.?

Impact questions

Question 18: How would retaining the current Conditions of the Specialisation BER in the proposed Specialisation BEO impact consumers?

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

Question 19: How would clarifying that the block exemption can apply even if the parties have not accepted exclusive purchase or supply obligations in the proposed Specialisation BEO impact consumers?

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

Specialisation BER: Market share threshold under Article 3 and application of the market share threshold under Article 5

Policy questions

Question 20: Do you agree with the CMA's proposed recommendation to retain the current market share threshold in the proposed Specialisation BEO?

Question 21: Do you agree with the CMA's proposed recommendation that Article 3 of the Specialisation BER should be amended to clarify that in relation to intermediary products, the 20% market share threshold also applies to the parties' market share on the relevant downstream market?

Question 22: Do you agree with the CMA's proposed recommendation to provide further guidance to help undertakings calculate their market share?

Question 23: Do you agree with the CMA's proposed recommendation to introduce an alternative to the current way of calculating the market share whereby the market share is calculated as an average of the parties' market shares of the three preceding calendar years in circumstances where the preceding year's market share is not representative of their position in the relevant market(s)?

Question 24: Do you agree with the CMA's proposed recommendation that the one-year grace period for the exemption to continue to apply after the 20% market share is exceeded be no longer subject to the requirement that the increased market share remain below 25%?

Impact questions

Question 25: How would retaining the current market share threshold of the Specialisation BER in the proposed Specialisation BEO impact consumers?

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

Question 26: If you are an SME, or an advisor or representative of SMEs: what would the impact on consumers be if a new presumption was introduced that SMEs do not exceed the market share threshold unless the SME is aware, or reasonably ought to be aware, that its market share exceeds the threshold?

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

Question 27: Does the complexity of current rules hamper willingness of your business or those you represent to conclude horizontal co-operation agreements? In your response, please provide examples of the types of agreements where complexity has affected this decision making.

Question 28: If you are an SME, or an advisor or representative of SMEs: what would the impact on the business if a new presumption was introduced that SMEs do not exceed the market share threshold unless the SME is aware, or reasonably ought to be aware, that its market share exceeds the threshold? What are some of the expected impacts of the business being included in scope of the block exemption?

Question 29: How would the recommendation to provide an alternative way of calculating market shares impact your business or those you represent in making use of the benefits of the block exemption? How would your business benefit?

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

Specialisation BER: ‘Hardcore’ restrictions listed in Article 4

Policy questions

Question 30: Do you agree with the CMA’s recommendation to retain the current hardcore restrictions in the Specialisation BEO?

Question 31: Do you agree with the CMA’s recommendation to address the issues regarding the hardcore restrictions that have been raised by stakeholders through the provision of guidance?

Impact questions

Question 32: How would retaining the current hardcore restrictions in the Specialisation BER in the proposed Specialisation BEO impact consumers?

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

R&D BER

Policy questions

Question 33: Do you agree with the CMA’s proposed recommendation to the Secretary of State to make a Block Exemption Order to replace the retained R&D

BER with a new R&D BEO, rather than letting it lapse without replacement or renewing without varying the retained R&D BER?

Impact questions

Question 34: Relative to current arrangements, if the retained R&D BER were allowed to expire, how would the absence of legal certainty and clarity affect your business or those that you represent? Please describe the scale of any legal or expert advice needed (eg time spent with consultants).

R&D BER – Definitions included in Article 1

Policy questions

Question 35: Do you agree with the CMA's proposed recommendation to amend Article 1 to include a definition for R&D pole'?

Question 36: Do you agree with the CMA's proposed recommendation to amend Article 1 to include a definition for 'competing R&D effort'?

Question 37: Do you agree with the CMA's proposed recommendation to amend Article 1 to include a definition for 'not competing undertaking'?

Question 38: Do you agree with the CMA's proposed recommendation to amend Article 1 to include a definition for 'undertaking competing in innovation'?

Question 39: Do you agree with the CMA's proposed recommendation to amend Article 1 to include a definition for 'new product or technology'?

Question 40: Do you agree with the CMA's proposed recommendation not to include definitions of 'active sales' and 'passive sales' in Article 1 of the R&D VBEO, but to provide an explanation of those terms in the Guidance?

Question 41: Do you agree with the CMA's proposed recommendation to modify the existing definition of 'R&D agreement' in Article 1?

Question 42: Do you agree with the CMA's proposed recommendation to modify the existing definition of 'research and development' in Article 1?

Question 43: Do you agree with the CMA's proposed recommendation to modify the existing definition of 'potential competitors'?

Impact questions

Question 44: How would changing the current definitions of ‘research and development agreement’, ‘research and development’, and ‘potential competitor’ in the R&D BER in the proposed R&D BEO impact consumers?

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

Question 45: How would changing the current definitions of ‘research and development agreement’, ‘research and development’, and ‘potential competitor’ in the R&D BER in the proposed R&D BEO impact your business or those that you represent?

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

Question 46: If agreements made by your business or those that you represent would now be included in the block exemption as a result of changing the current definitions of ‘research and development agreement’, ‘research and development’, and ‘potential competitor’ in the proposed R&D BEO, please specify the types of relevant agreements and industries benefitted by this increased scope.

Question 47: How would changing the current definitions of ‘competing undertaking’, ‘contract technology’, ‘contract product’, ‘exploitation of the results’, ‘intellectual property rights’, ‘know-how’, and ‘substantial’ in the R&D BER in the proposed R&D BEO respectively impact consumers?

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact

- d) Moderate negative impact
- e) Significant negative impact

Question 48: How would adding new definitions of 'R&D pole', 'competing R&D effort', and 'not competing undertaking', in the proposed R&D BEO respectively impact consumers?

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

R&D BER: Conditions for block exemption under Article 3

Policy questions

Question 49: Do you agree with the CMA's recommendation to retain and clarify the current conditions of the full access requirements and other requirements in Article 3 of the R&D BER and as set out above?

Impact questions

Question 50: How would retaining and clarifying the current Conditions of the R&D BER in this way impact consumers?

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

R&D BER: Market share threshold and duration of exemption under Article 4 and application of the market share threshold under Article 7

Policy questions

Question 51: Do you agree with the CMA's proposed recommendation to retain the current market share threshold in the R&D BER for undertakings competing or in potential competition for existing products or service?

Question 52: Do you agree with the CMA's proposed recommendation to introduce a separate test for undertakings competing in innovation (ie not in relation to existing products or service), requiring that there should be three or more competing R&D efforts in addition to and comparable with those of the parties?

Question 53: Do you agree with the CMA's proposed recommendation to simplify the application of the market share threshold in instances where the parties initially do not exceed the market share threshold (and meet the other conditions for block exemption) but then exceed the threshold?

Question 54: Do you agree with the CMA's proposed recommendation to allow market shares to be calculated as an average of the parties' market shares of the last three preceding calendar years when the preceding calendar year is not representative of the parties' position in the relevant market(s)?

Impact questions

Question 55: How would these proposed changes impact consumers?

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

Question 56: How would the recommendation to provide an alternative way of calculating market shares impact your business in making use of the benefits of the R&D block exemption? How would your business benefit?

- a) Significant positive impact
- b) Moderate positive impact

- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

Question 57: How would the CMA's proposed recommendation to introduce a separate test for undertakings competing in innovation (ie not in relation to existing products or service) impact your business or those that you represent?

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

Question 58: How would the CMA's proposed recommendation to introduce a separate test for undertakings competing in innovation (ie not in relation to existing products or service) facilitate use of the block exemption? As part of the response, please describe the types of business agreement affected.

Question 59: Would the CMA's proposed recommendation to introduce a separate test for undertakings competing in innovation (ie not in relation to existing products or service) introduce any potential new compliance costs as a result of familiarisation with the new rules for innovation? As part of the response, please describe/list the types of business agreement affected and the scale of legal or expert advice (eg time spent with consultants] needed where possible.

R&D BER: 'Hardcore' restrictions listed in Article 5 and Excluded Restrictions in Article 6

Policy questions

Question 60: Do you agree with the CMA's recommendation to retain the current hardcore restrictions and excluded restrictions in the R&D BER in the proposed R&D BEO?

Question 61: Do you agree with the CMA's proposed recommendation to consider what further guidance can be provided?

Impact questions

Question 62: How would retaining the current hardcore and excluded restrictions in the R&D BER in the proposed R&D BEO impact consumers?

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

Duration of the HBEOs

Question 63: The CMA invites views on whether the UK HBEOs should have a duration of twelve years.

Other provisions common to both HBEOs

Question 64: The CMA invites views on the above proposed recommendations in respect of the other provisions in the UK HBEOs.

Annex B: Proposed Definitions in the Specialisation BEO

The CMA proposes to recommend that the following modifications be considered for inclusion in Article 1:¹⁵²

	Description	Old Definition	Proposed Definition
1	<p>‘Specialisation agreement’ could be clarified by including the current definition of ‘joint production agreement’ and the amended definitions of ‘unilateral specialisation agreement’ and ‘reciprocal specialisation agreement’. For the proposed amendments of the definitions of ‘unilateral specialisation agreement’ and ‘reciprocal specialisation agreement’, see <i>infra</i>, rows 2 and 3.</p>	<p>‘a unilateral specialisation agreement, a reciprocal specialisation agreement or a joint production agreement’</p>	<p>‘a unilateral specialisation agreement, a reciprocal specialisation agreement or a joint production agreement; (1) ‘unilateral specialisation agreement’ means an agreement between two or more parties which are active on the same product market and by virtue of which a party or parties agree to fully or partly cease production of certain products or to refrain from producing those products and to purchase them from the other party or parties, who agree to produce and supply those products; (2) ‘reciprocal specialisation agreement’ means an agreement between two or more parties which are active on the same product market and by virtue of which two or more parties, on a</p>

¹⁵² The proposed changes draw on the changes proposed by the EC in its draft Specialisation BER – ‘Annex to the Communication from the Commission: Approval of the content of a draft for a Commission Regulation on the application of Article 101(3) of the TFEU to certain categories of specialisation agreements’ C(2022) 1160 final (1 March 2022).

			reciprocal basis, agree to fully or partly cease or refrain from producing certain but different products and to purchase these products from the other parties, who agree to produce and supply them; (3) 'joint production agreement' means an agreement by virtue of which two or more parties agree to produce certain products jointly'
2	' unilateral specialisation agreement ' could be amended to include agreements concluded between more than two parties (described in paragraphs 3.10 to 3.15 of the recommendation). Furthermore, it could be made a subsection of the definition of 'specialisation agreement' (see <i>supra</i> , row 1).	'an agreement between two parties which are active on the same product market by virtue of which one party agrees to fully or partly cease production of certain products or to refrain from producing those products and to purchase them from the other party, who agrees to produce and supply those products'	'an agreement between two or more parties which are active on the same product market and by virtue of which a party or parties agree to fully or partly cease production of certain products or to refrain from producing those products and to purchase them from the other party or parties, who agree to produce and supply those products'
3	' reciprocal specialisation agreement ' could be amended to increase clarity by inserting the connector 'and' between the clauses and changing the punctuation. Furthermore, it could	'an agreement between two or more parties which are active on the same product market, by virtue of which two or more parties on a reciprocal basis agree to fully or partly cease or refrain from producing certain but different products and	'an agreement between two or more parties which are active on the same product market and by virtue of which two or more parties, on a reciprocal basis, agree to fully or partly cease or refrain from producing certain but different

	be made a subsection of the definition of 'specialisation agreement' (see <i>supra</i> , row 1).	to purchase these products from the other parties, who agree to produce and supply them'	products and to purchase these products from the other parties, who agree to produce and supply them'
4	' joint production agreement ' could be amended and made a subsection of the definition of 'specialisation agreement' (see <i>supra</i> , row 1).	'an agreement by virtue of which two or more parties agree to produce certain products jointly'	'an agreement by virtue of which two or more parties agree to produce certain products jointly'
5	' potential competitor ' could be amended to remove the reference to 'a small but permanent increase in relative prices' (described in paragraphs 3.27 to 3.30 of the recommendation). Furthermore, it could be made a subsection of the definition of 'competing undertaking' (the latter could continue to be defined as 'an actual or potential competitor').	'an undertaking that, in the absence of the specialisation agreement, would, on realistic grounds and not just as a mere theoretical possibility, in case of a small but permanent increase in relative prices be likely to undertake, within not more than 3 years, the necessary additional investments or other necessary switching costs to enter the relevant market'	'an undertaking that, in the absence of the specialisation agreement, would, on realistic grounds and not just as a mere theoretical possibility, be likely to undertake, within not more than 3 years, the necessary additional investments or other necessary costs to enter the relevant market'
6	' actual competitor ' could be made a subsection of the definition of 'competing undertaking' (the latter could continue to be defined as 'an actual or potential competitor').	'an undertaking that is active on the same relevant market'	'an undertaking that is active on the same relevant market'

7	<p>‘relevant market’ could be clarified by replacing ‘used captively for the production of downstream products’ with ‘use captively as input for downstream products’.</p>	<p>‘the relevant product and geographic market to which the specialisation products belong, and, in addition, where the specialisation products are intermediary products which one or more of the parties fully or partly use captively for the production of downstream products, the relevant product and geographic market to which the downstream products belong’</p>	<p>‘the relevant product and geographic market to which the specialisation products belong, and, in addition, where the specialisation products are intermediary products which one or more of the parties fully or partly use captively as input for downstream products, the relevant product and geographic market to which the downstream products belong’</p>
8	<p>‘exclusive supply obligation’ (mentioned at footnote 25 of the recommendation) could be clarified by changing the order of the words contained therein and using the plural of ‘specialisation product’.</p>	<p>‘an obligation not to supply a competing undertaking other than a party to the agreement with the specialisation product’</p>	<p>‘an obligation not to supply the specialisation products to a competing undertaking other than a party or parties to the agreement’</p>
9	<p>‘distribution’ could be amended by including a cross reference to the definition of ‘specialisation products’.</p>	<p>‘distribution, including the sale of goods and the provision of services’</p>	<p>‘the provision of the specialisation products’</p>
10	<p>‘downstream product’ could be amended to change the order of the words.</p>	<p>‘a product for which a specialisation product is used by one or more of the parties as an input and which is sold by those parties on the market’</p>	<p>‘a product for which a specialisation product is used as an input by one or more of the parties and which is sold by those parties on the market’</p>

Annex C: Proposed Definitions in the R&D BEO

The CMA proposes to recommend that the following new definitions and modifications be considered for inclusion in Article 1:¹⁵³

	Description	Current Definition	Proposed Definition
1	'contract product' could be amended to clarify that it includes <i>'products obtained through an R&D pole as well as new products'</i> and products arising out of joint and paid-for R&D, and also to substitute the term <i>'manufactured'</i> with the term <i>'produced'</i> .	'a product arising out of the joint research and development or manufactured or provided applying the contract technologies'	'a product arising out of the joint or paid-for research and development or produced or provided applying the contract technologies. This includes products obtained through an R&D pole as well as new products'
2	'contract technology' could be amended to clarify that it includes <i>'technologies or processes obtained through an R&D pole as well as new technologies or processes'</i> and technology or processes arising out of joint and paid-for R&D.	'a technology or process arising out of the joint research and development'	'a technology or process arising out of the joint or paid-for research and development. This includes technologies or processes obtained through an R&D pole as well as new technologies or processes'
3	'competing R&D effort' could be added as a new definition (see paragraph 4.16 of the recommendation) in the event that the CMA's proposed recommendation to	No current definition.	'an R&D effort in which a third party engages, alone or in cooperation with other third parties, or in which a third party is able and likely to independently engage, and which concerns: (a) the research and development of

¹⁵³ The proposed changes draw on the changes proposed by the EC in its draft R&D BER - ['Annex to the Communication from the Commission: Approval of the content of a draft for a Commission Regulation on the application of Article 101\(3\) of the TFEU to certain categories of research and development agreements'](#) C(2022) 1161 final (1 March 2022).

	adopt a 'separate test' as an alternative to the market share threshold under Article 4 is pursued (see paragraph 4.47 of the recommendation for the details of that proposal).		the same or likely substitutable new products and/or technologies as the ones to be covered by the R&D agreement; or (b) R&D poles pursuing substantially the same aim or objective as the ones to be covered by the R&D agreement; These third parties must be independent from the parties to the R&D agreement.'
4	' competing undertaking ' could be deleted, as it is proposed to be replaced by 'undertaking competing for an existing product and/or technology' which is a slight re-formulation, and 'undertaking competing in innovation', which is a proposed new definition.	'competing undertaking' means an actual or potential competitor'	No proposed definition.
5	' exploitation of the results ' could be amended to replace the term 'manufacture' with the term 'production'.	'the production or distribution of the contract products or the application of the contract technologies or the assignment or licensing of intellectual property rights or the communication of know-how required for such manufacture or application.	'the production or distribution of the contract products or the application of the contract technologies or the assignment or licensing of intellectual property rights or the communication of know-how required for such production or application.'
6	' intellectual property rights ' could be amended to replace the term 'intellectual property rights' with the term 'industrial property rights'.	'intellectual property rights, including industrial property rights, copyright and neighbouring rights.'	'industrial property rights, in particular patents and trade marks; as well as copyright and neighbouring rights.'

7	<p>'know-how' could be amended by absorbing the reworded definitions of 'secret', 'substantial' and 'identified' as subsections, and by removing the term 'non-patented'. 'Substantial' could be absorbed into the definition of 'know-how' and amended to replace the term 'manufacture' with the term 'production'.</p>	<p>'a package of non-patented practical information, resulting from experience and testing, which is secret, substantial and identified.'</p>	<p>'a package of practical information, resulting from experience and testing, which is:</p> <p>(a) 'secret', that is to say, not generally known or easily accessible;</p> <p>(b) 'substantial', that is to say, significant and useful for the production of the contract products or the application of the contract technologies; and</p> <p>(c) 'identified', that is to say, described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality.'</p>
8	<p>'new product or technology' could be added as a new definition to address respondents' comments that the R&D BER does not make it sufficiently clear that early-stage R&D is covered by the block exemption (see paragraph 4.16 of the recommendation).</p>	<p>No current definition.</p>	<p>'a product, technology or process that does not yet exist at the time when the R&D agreement [...] is entered into and that will, if emerging, create its own new market and not improve, substitute or replace an existing product, technology or process.'</p>
9	<p>'not competing undertaking' could be added as a new definition to address concerns on lack of clarity raised by respondents in the European Commission's Evaluation (see</p>	<p>No current definition.</p>	<p>'not competing undertaking' means an undertaking that is neither an undertaking competing for an existing product and/or technology nor an undertaking competing in innovation.'</p>

	paragraph 4.16 of the recommendation).		
10	<p>'potential competitor' could be modified to take out the reference to '<i>a small but permanent increase in relative prices</i>' (see paragraph 4.19 of the recommendation). Furthermore, it could be made a subsection of the definition of 'competing undertaking' (the latter could continue to be defined as 'an actual or potential competitor').</p>	<p>'an undertaking that, in the absence of the research and development agreement, would, on realistic grounds and not just as a mere theoretical possibility, in case of a small but permanent increase in relative prices be likely to undertake, within not more than 3 years, the necessary additional investments or other necessary switching costs to supply a product, technology or process capable of being improved, substituted or replaced by the contract product or contract technology on the relevant geographic market.'</p>	<p>'an undertaking that, in the absence of the R&D agreement, on realistic grounds and not just as a mere theoretical possibility, would be likely to undertake, within not more than 3 years, the necessary additional investments or incur the necessary costs to supply a product, technology or process capable of being improved, substituted or replaced by the contract product or contract technology on the relevant geographic market.'</p>
11	<p>'research and development' could be amended to include '<i>activities aimed at acquiring know-how</i>' instead of '<i>the acquisition of know-how</i>'. We also propose the amendment of this definition to clarify that acquiring know-how related to both '<i>new</i>' as well as '<i>existing</i>' products, technologies and processes are in scope (see paragraph 4.19 of the recommendation).</p>	<p>'the acquisition of know-how relating to products, technologies or processes and the carrying out of theoretical analysis, systematic study or experimentation, including experimental production, technical testing of products or processes, the establishment of the necessary facilities and the obtaining of intellectual property rights for the results.'</p>	<p>'activities aimed at acquiring know-how relating to existing or new products, technologies or processes, the carrying out of theoretical analysis, systematic study or experimentation, including experimental production, technical testing of products or processes, the establishment of the necessary facilities and the obtaining of intellectual property rights for the results.'</p>
12	<p>'research and development agreement' could be amended to explain</p>	<p>'an agreement entered into between two or more parties which relate to the</p>	<p>'an agreement entered into between two or more parties which relates to the conditions</p>

<p>that the reference to 'prior agreement' in the relevant subsections of the definition refers only to agreements between the same parties for <i>'joint research and development of contract products or contract technologies'</i> or agreements for <i>'paid-for research and development of contract products or contract technologies'</i> under Article 1(a) and (b) (see paragraph 4.19 of the recommendation).</p>	<p>conditions under which those parties pursue:</p> <p>(i), joint research and development of contract products or contract technologies and joint exploitation of the results of that research and development;</p> <p>(ii), joint exploitation of the results of research and development of contract products or contract technologies jointly carried out pursuant to a prior agreement between the same parties;</p> <p>(iii), joint research and development of contract products or contract technologies excluding joint exploitation of the results;</p> <p>(iv), paid-for research and development of contract products or contract technologies and joint exploitation of the results of that research and development;</p> <p>(v), joint exploitation of the results of paid-for research and development of contract products or contract technologies pursuant to a prior agreement between the same parties; or</p> <p>(vi), paid-for research and development of contract products or contract technologies excluding joint exploitation of the results.'</p>	<p>under which those parties pursue:</p> <p>(a) joint research and development of contract products or contract technologies which:</p> <p>(i) excludes joint exploitation of the results of that research and development, or</p> <p>(ii) includes joint exploitation of the results of that research and development; or</p> <p>(b) paid-for research and development of contract products or contract technologies which:</p> <p>(i) excludes joint exploitation of the results of that research and development, or</p> <p>(ii) includes joint exploitation of the results of that research and development; or</p> <p>(c) joint exploitation of the results of research and development of contract products or contract technologies carried out pursuant to a prior agreement falling under paragraph (1)(a) between the same parties; or</p> <p>(d) joint exploitation of the results of research and development of contract products or contract technologies carried out pursuant to a prior agreement falling under paragraph (1)(b) between the same parties.'</p>
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13	<p>'R&D pole' could be added as a new definition to address concerns raised by respondents, and shared by national competition authorities in the Evaluation, on the lack of clarity as to the definition of an R&D pole (see paragraph 4.16 of the recommendation).</p>	No current definition.	<p>'R&D efforts directed primarily towards a specific aim or objective. The specific aim or objective of an R&D pole cannot yet be defined as a product or technology or involves a substantially broader target than R&D products or technologies on a specific market.'</p>
14	<p>'undertaking competing in innovation' could be added to address respondents' comments that the R&D BER does not make it sufficiently clear that early-stage R&D is covered by the block exemption (see paragraph 4.16 of the recommendation).</p>	No current definition.	<p>'an undertaking that is not competing for an existing product and/or technology and that independently engages in or, in the absence of the R&D agreement, would be able and likely to independently engage in R&D efforts which concern: (a) the R&D of the same or likely substitutable new products and/or technologies as the ones to be covered by the R&D agreement; or (b) R&D poles pursuing substantially the same aim or objective as the ones to be covered by the R&D agreement.'</p>
15	<p>'undertaking competing for an existing product and/or technology' could be added as a new definition and would absorb, as subsections, the modified definitions of 'actual competitor' and 'potential competitor'. The proposed definition is substantially similar to</p>	No current definition.	<p>'an actual or a potential competitor:</p> <p>(a) 'actual competitor' means an undertaking that is supplying an existing product, technology or process capable of being improved, substituted or replaced by the contract product or the contract technology on the relevant geographic market;</p>

	<p>the previous definition of 'competing undertaking'.</p>		<p>(b) 'potential competitor' means an undertaking that, in the absence of the R&D agreement, on realistic grounds and not just as a mere theoretical possibility, would be likely to undertake, within not more than 3 years, the necessary additional investments or incur the necessary costs to supply a product, technology or process capable of being improved, substituted or replaced by the contract product or contract technology on the relevant geographic market.'</p>
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