Draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements

Consultation document

25 January 2023 CMA174con



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1. Introduction

- 1.1 The Competition and Markets Authority (CMA) is consulting on draft guidance (Draft Guidance) on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements.
- 1.2 When finalised, this guidance is intended to replace the EU's Guidelines on horizontal cooperation agreements (EU Horizontal Cooperation Guidelines) in the UK.¹
- 1.3 The CMA is inviting comments on the Draft Guidance by 8 March 2023.

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¹ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, European Commission, OJ C 11/1, 14.1.2011.

2. Background

- 2.1 The Competition Act 1998 (CA98) prohibits anticompetitive agreements between 'undertakings' (eg businesses). This prohibition is known as the Chapter I prohibition.² The Chapter I 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 UK.
- 2.2 There are many situations where agreements that restrict competition can, on balance, be beneficial to consumers. For this reason, the CA98 provides that agreements can be exempted from the Chapter I prohibition if they meet certain conditions relating to the benefits they produce.
- 2.3 Section 9(1) CA98 sets out the conditions that must all be met for an agreement to benefit from individual exemption from the Chapter I prohibition. Broadly, the agreement must contribute to clear efficiencies. Second, it must provide a fair share of the resulting benefits to consumers. Third, the restrictions on competition that it provides for must be no more than the minimum that is necessary to enable consumers to gain these benefits. Fourth, it must not give the parties to the agreement the opportunity to eliminate competition from a substantial part of the relevant market.³
- 2.4 An agreement may be assessed for exemption on an individual basis, applying the conditions set out above. Alternatively, a 'block exemption' exempts whole categories of agreements on the basis that agreements within the category would be likely to be treated as exempt if they were assessed individually. If an agreement meets the conditions set out in a block exemption, it is automatically exempt.
- 2.5 The Draft Guidance under consultation is aimed at helping businesses make their own assessment of common types of agreements between actual and potential competitors, which are referred to as 'horizontal agreements'. This includes:

³ The cumulative conditions in section 9(1) CA98 that must be met in full are that the agreement: (a) Contributes to:

while allowing consumers a fair share of the resulting benefit; and

(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or

² Section 2 of CA98.

⁽i) improving production or distribution, or

⁽ii) promoting technical or economic progress,

⁽b) does not:

⁽ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

- a) guidance on when horizontal agreements are likely to restrict competition;
- b) guidance on when horizontal agreements are likely to be treated as exempt under section 9(1) CA98, on the basis that they produce benefits which outweigh any restriction of competition, and;
- c) guidance on the application of two block exemptions relating to horizontal agreements (further details on these two block exemptions is set out below).
- 2.6 When finalised, the Draft Guidance is intended to replace in the UK the EU Horizontal Cooperation Guidelines, which were issued by the European Commission in 2011.

The Block Exemptions relating to Horizontal Agreements

- 2.7 Block exemptions are a feature of both EU and UK competition law. Before the UK's withdrawal from the EU, the EU Research & Development Agreement Block Exemption and EU Specialisation Agreement Block Exemption applied in the UK.⁴ These were referred to collectively as the EU Horizontal Block Exemption Regulations (EU HBERs).⁵
- 2.8 The EU HBERs provided an automatic exemption for certain types of horizontal agreements meeting its conditions. Agreements which were exempted from EU competition law under the EU HBERs were also exempted from the Chapter I prohibition of the CA98.
- 2.9 When the transition period for the withdrawal of the UK from the EU came to an end on 31 December 2020, the EU HBERs were retained in UK law. This meant that businesses in the UK could still benefit from the EU HBERs, provided that their conduct met the relevant conditions. The retained EU HBERs expired on 31 December 2022.

Replacement of the retained EU HBERs

2.10 On 28 June 2022, the CMA recommended to the Secretary of State for Business Energy and Industrial Strategy that he replace the two retained EU HBERs with two UK block exemption orders (UK HBEOs).⁶

⁴ EU Regulation 1218/2010 on the application of Article 101(3) of the TFEU to categories of specialisation Agreements and EU Regulation 1217/2010 on the application of Article 101(3) of the TFEU to categories of R&D agreements.

⁵ By virtue of former section 10 of the CA98, before it was amended as part of the UK's withdrawal from the EU.

⁶ On 8 April 2022, the CMA published a consultation document pursuant to section 8(1) of the CA98, seeking views on its proposed recommendation to the Secretary of State to replace the EU HBERs on their expiry with UK HBERs. The CMA's consultation ran until 6 May 2022.

- 2.11 The Secretary of State for Business Energy and Industrial Strategy accepted the CMA's recommendation, and made two UK Block Exemption Orders on 5 December 2022:
 - (a) the Competition Act 1998 (Specialisation Agreements Block Exemption) Order (the SABEO);⁷ and
 - (b) the Competition Act 1998 (Research and Development Agreements Block Exemption) Order 2022 (the R&D BEO).⁸
- 2.12 The two UK HBEOs came into force on 1 January 2023.

Separate developments in the EU

- 2.13 The EU Commission is separately proposing revisions to the EU HBERs and the EU Horizontal Cooperation Guidelines. It published drafts of revised EU HBERs and revised EU Horizontal Cooperation Guidelines on 1 March 2022 and invited stakeholder comments. It is expected to respond to the consultation in due course.⁹
- 2.14 In developing the Draft Guidance under consultation, the CMA has been mindful of the EU's proposed approach in its revised EU Horizontal Cooperation Guidelines. A relevant consideration has been that respondents to the CMA's consultation on its recommendation to the Secretary of State on the two UK HBEOs have indicated that in some instances divergence from the EU regime could result in compliance costs for some firms. However, the CMA has sought to be guided by what is best for UK consumers and businesses. In addition, the Draft Guidance takes into account UK case law as well as relevant differences between the UK and the EU, and between the UK HBEOs and the equivalent block exemptions proposed by the European Commission.

Guidance on sustainability

2.15 Competitors may wish to cooperate with one another in order to achieve more environmentally sustainable outcomes. For instance, competitors may want to work together to reduce their carbon footprints or improve the environmental standards of their products. The CMA intends to issue guidance to assist

⁷ SI 2022/1272 - The Competition Act 1998 (Specialisation Agreements Block Exemption) Order 2022.

⁸ SI 2022/1271 - The Competition Act 1998 (Research and Development Agreements Block Exemption) Order 2022.

⁹ On 8 December, the European Commission extended the two EU HBERs by 6 months, so that they both expire on 30 June 2023 instead of 31 December 2022, to allow more time to complete its process for adopting new block exemptions.

- businesses with the application of competition law to these type of agreements (Sustainability Guidance).
- 2.16 The Sustainability Guidance is intended to be integrated into the broader guidance on the application of the Chapter I prohibition to horizontal agreements, when finalised. However, the CMA intends to seek views on its proposed approach to the Sustainability Guidance via a separate consultation, in light of the specific issues it raises. The separate consultation on the Sustainability Guidance will therefore follow after this consultation, which concerns the remainder of the guidance on the application of the Chapter I prohibition to horizontal agreements.
- 2.17 Certain cross-references are made to the Sustainability Guidance in the Draft Guidance under consultation. These cross-references reflect the CMA's intention that the Sustainability Guidance form part of the same overall guidance document when the Draft Guidance is issued in its final form.
- 2.18 In addition to cross references to Sustainability Guidance, there are certain references to sustainability objectives made in the Draft Guidance. These references are made in the context of providing guidance on the other common types of horizontal agreement. We welcome feedback on these parts of the Draft Guidance via this consultation, although note there will be a subsequent consultation specifically on the Sustainability Guidance.

Summary of changes

2.19 The table below summarises the main changes between the CMA's Draft Guidance under consultation and the EU's 2011 guidelines, which it will replace when finalised.

Part	Changes
Introduction	This part has been updated to provide additional general guidance on undertakings' self-assessment of agreements under the Chapter I prohibition. This includes additional guidance on the application of the Chapter I prohibition in the context of joint ventures.
Research &	This part has been updated to provide additional
Development	guidance on various aspects of the assessment of R&D
(R&D)	agreements. It has been updated to reflect the new UK
Agreements	R&D Block Exemption Order, which includes the
	introduction of a new threshold for undertakings competing in innovation.

Production Agreements	This part has been updated to provide additional guidance on various aspects of the assessment of production agreements. It has been updated to reflect the new UK Specialisation Block Exemption Order. It also includes a new section specifically concerning the assessment of mobile infrastructure sharing agreements.
Purchasing Agreements	This part has been updated to provide additional guidance on various aspects of the assessment of purchasing agreements. This includes clarification that the Guidance may apply to joint purchasing agreements and joint negotiations in all sectors, including by groups of potential intellectual property rights (IPR) licensees. It also includes further clarification on the distinction between potentially legitimate joint purchasing arrangements and buyer cartels.
Commercialisation Agreements	This part has been updated to provide additional guidance on various aspects of the assessment of commercialisation agreements. This includes a section specifically concerning the assessment of bidding consortia.
Information Exchange	This part has been updated to provide clarified guidance on a number of factors relevant to the assessment of information exchange. The clarifications relate to the specific contexts in which information exchange may take place and the various aspects of the information exchange which are relevant to self-assessment.
Standardisation Agreements	This part has been updated to provide additional guidance on a number of aspects of standardisation agreements, including guidance on agreements involving standard development organisations, the assessment of effective access to standards through the grant of licences to standard-essential IPR on fair, reasonable and non-discriminatory terms, restrictions on participation in the development in certain standards and the assessment of disclosures of information relating to IPR.
Standard Terms	New part: The guidance on standard terms was previously contained in the part on standardisation. The guidance on standard terms is now contained in its own separate part.

3. Scope of the consultation

- 3.1 This consultation seeks the views of interested parties on the Draft Guidance which is published separately on the consultation page.
- 3.2 After the consultation initiated by this consultation document, the CMA will prepare its final guidance taking into account the feedback received as part of this consultation.

4. Consultation process

How to respond

- 4.1 We are publishing this consultation on the CMA webpages and drawing it to the attention of a range of stakeholders to invite comments on the Draft Guidance.
- 4.2 We encourage you to respond to the consultation in writing (by email) using the contact details provided in paragraph 4.5 below. Please provide supporting evidence or examples for your views where possible.
- 4.3 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.
- 4.4 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.

Duration

4.5 The consultation will run from 25 January 2023 to 8 March 2023. Responses should be submitted by email by 5pm on 8 March 2023 and should be sent to: hbersreview@cma.gov.uk.

Compliance with government consultation principles

4.6 In preparing this consultation, 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

4.7 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.
- 4.8 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.
- 4.9 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.
- 4.10 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.
- 4.11 Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, if you have made any representations about the confidentiality of any information contained in your response, we will take such representations into consideration. We will also be mindful of our responsibilities under the data protection legislation referred to above and under Part 9 of the Enterprise Act 2002.
- 4.12 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

- 4.13 After the consultation, the CMA will prepare the final version of the guidance. As noted above, the CMA intends to integrate into the final version of the guidance the Sustainability Guidance, which will be subject to a separate consultation on the CMA's proposed approach.
- 4.14 The CMA will publish the final version of the guidance on its webpages at http://www.gov.uk/cma. The CMA will also publish the responses received

during the consultation. These documents will be available on our webpages and respondents will be notified when they are available.

5. Consultation questions

- 5.1 Is the content, format and presentation of the Draft Guidance sufficiently clear? If there are particular parts of the Draft Guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.
- 5.2 Do you have any other comments on the Draft Guidance?