Response to the CMA's call for input on the retained Horizontal Block Exemption Regulations

Introduction

Dentons welcomes this opportunity to provide its views on the retained Specialisation Block Exemption Regulation ("Specialisation BER), the retained Research and Development Block Exemption ("R&D BER") (referred to collectively as "the retained HBERs") and the EU Guidelines on Horizontal Co-operation Agreements ("the Horizontal Guidelines").

The retained HBERs and the Horizontal Guidelines provide essential guidance for applying the Chapter I prohibition in the Competition Act 1998 ("Chapter I") to agreements between and among businesses at different levels of the supply chain. They can, however, be improved, particularly considering the changing economic dynamics since their publication, as well as the CMA's and stakeholders' experiences in their application. Taking into account specific features of the UK economy in the review is welcomed. However, it is also important to keep to a minimum any differences between the UK and the EU, given international businesses' general preference for consistency.

Dentons regularly advises UK and international clients on horizontal agreements and practices affecting UK markets. Therefore, our response to this consultation is informed by our experience of advising clients on these issues. Where we are not in a position to respond to a specific question, we have not answered it.

We would be pleased to discuss any part of our response further with the CMA.

We have followed the structure of the CMA Call for Inputs to provide our responses.

Executive Summary

We recommend several changes to the retained BERs and Horizontal Guidelines, although are generally of the view that they play an important role in encouraging pro-competitive collaboration and should be retained. The Specialisation and R&D BERs, due to their complexity, are not frequently relied upon, though they do have the potential to promote competition and economic activity that benefits consumers, particularly if amended and clarified in certain respects.

The scope of the Specialisation BER could be widened to include additional categories of agreements and the market share thresholds should be increased. The use of the R&D BER could also be encouraged by producing further guidance on its interpretation and clarifying certain, difficult to apply, provisions.

Although we make several recommendations to improve the Horizontal Guidelines, overall we consider them to be a valuable way for businesses in a wide range of sectors and industries (and their advisers) to obtain some legal certainty about their commercial arrangements. However, they do not necessarily capture all relevant types of collaboration in sufficient detail and require updating in light of market and enforcement developments.

Nevertheless, when amending the Horizontal Guidelines it is important not to simplify them unnecessarily, as the detail is helpful. Remaining broadly consistent with the EU block exemption

when revising the BERs and Horizontal Guidelines is also crucial for international businesses. In making changes, the CMA should carefully consider the practical and economic consequences on companies, and ensure that the guidelines reflect UK competition law terminology and concepts.

General impact assessment questions for all respondents to complete

IA1: Please confirm which of the following industries you operate in, or, if you are submitting a response to this Call for Input as an adviser or other third party, which of the following industries you consider are particularly relevant to this Call for Input

[1]

- **(a) Agriculture, forestry and fishing;**
- **(b) Mining and quarrying;**
- **(c) Manufacturing;**
- **(d) Electricity, gas, steam and air conditioning supply;**
- **(e) Water supply, sewerage, waste management and remediation activities;**
- **(f) Construction;**
- **(g) Wholesale and retail trade, or repair of motor vehicles and motorcycles;**
- **(h) Transportation and storage;**
- **(i) Accommodation and food service activities;**
- **(j) Information and communication;**
- **(k) Financial and insurance activities;**
- **(l) Real estate activities;**
- **(m) Professional, scientific and technical activities;**
- **(n) Administrative and support service activities;**
- **(o) Public administration and defence, or compulsory social security;**
- **(p) Education;**
- **(q) Human health and social work activities;**
- **(r) Arts, entertainment and recreation;**
- **(s) Other service activities;**
- **(t) Activities of households as employees, or undifferentiated goods- and services- producing activities of households for own use;**

[1] This list is taken from the SIC codes classifications, available here with further detail about the activities that sit under each category: Nature of business: Standard Industrial Classification (SIC) codes (companieshouse.gov.uk)

(u) Activities of extraterritorial organisations and bodies.

Dentons is an international law firm, but considers that the HBERs and, in particular, the Horizontal Guidelines are relevant to a wide range of sectors and commercial activities, including those highlighted above.

IA2: Whether you are making a submission as a business in industry, an adviser, or otherwise, please provide any observations you have on the industry or industries that you consider each of the HBERs and the relevant portions of the Horizontal Guidelines to be particularly relevant to, including how widespread relevant agreements are within each such industry.

The Specialisation BER is relevant mainly to manufacturing industries, although as explained below, we do not see it being relied upon frequently.

The R&D BER is relevant to a range of sectors, particularly life sciences, technology, and manufacturing, but as with the Specialisation BER, we do not see it being relied upon frequently.

The Horizontal Guidelines can be applied to arrangements in virtually any sector, particularly as regards information exchange. Of the different sections of the Horizontal Guidelines, information exchanges or commercialisation agreements are the most common across a range of different industries.

IA3: Please provide an indication of whether you are a small (<50 employees), or medium (50 to 249 employees) or large (250+ employees) business (and if the latter, give a broad indication of the number of employees you employ).

N/A

IA4: Whether you are making a submission as a business in industry, an adviser, or otherwise, please provide any observations you have on the size of business that, in your experience, typically makes use of each of the HBERs (distinguishing between the Specialisation BER and the R&D BER) and the relevant sections of the Horizontal Guidelines.

In our experience, it is typically large businesses that make use of the HBERs and the Horizontal Guidelines.

Whilst the R&D BER may be particularly relevant to SMEs (e.g. smaller start-ups with new technology), they will usually not have the resources to seek specialist competition advice on their commercial agreements with partners.

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Response to the CMA's call for input on the retained Horizontal Block Exemption Regulations

Specialisation BER

Policy questions

S1: We would welcome your responses to the following questions:

(a) Has the Specialisation BER contributed to promoting competition in the UK? It would be helpful to have some examples, if possible.

In our experience of advising clients, they have not frequently relied on the Specialisation BER. Since its introduction, we have encountered relatively few examples of proposed arrangements that might fall within the scope of the exemption. As a result, we do not have evidence of it having an effect on promoting competition in the UK.

(b) Has the Specialisation BER contributed to promoting economic activity that benefits consumers in the UK and would not otherwise have occurred? It would be helpful to have some examples, if possible.

We are not aware of any such examples, although we are of the view that, in principle, it has the potential to do so if there are also commercial benefits to rationalising a company's own production or joining up with another party.

(c) Has your business entered into specialisation agreements that have benefited from the block exemption in the Specialisation BER?

N/A

(d) Are there UK-specific considerations that the CMA should take into account in its review of the Specialisation BER? If so, it would be helpful if you could indicate why those differences are needed or justified (which might, for example, be because of particular characteristics you identify in the UK market that differ from the EU market).

Terminology can be made consistent with other areas of UK competition law.

(e) Might any category of business, institute or body be discouraged from entering specialisation agreements under the current rules in the UK?[2]

The complexities involved in assessing the availability of the Specialisation BER are likely to discourage companies that are not inclined or in a position to seek specialist legal advice.

[2] For example, evidence received in the EU evaluation raises the question of whether SMEs may be discouraged from entering into specialisation agreements under the current rules.

Response to the CMA's call for input on the retained Horizontal Block Exemption Regulations

S2: In relation to the definitions included in Article 1 of the Specialisation BER:

(a) Are these sufficiently clear to allow you to identify the categories of agreement that can benefit from the Specialisation BER? If not, how should the definitions, in your view, be clarified or amended?

The definition of "joint" in the context of distribution could be further clarified, particularly the meaning of: "*carry out the distribution of the products by way of a joint team, organisation or undertaking*". The definition suggests that joint distribution need not involve a corporate distribution joint venture, but it is not clear what level of formality, if any, is required in the absence of a corporate JV. For example, is it enough for the parties' respective sales teams to discuss and agree on distribution strategy and prices? Since the consequences of getting this wrong are serious, the boundaries of the safe harbour should be clearer in this respect.

"Production" for the purposes of the Specialisation BER includes production by way of sub-contracting. "Joint production agreement" means an agreement by virtue of which two or more parties agree to produce certain products jointly. It is not clear whether the sub-contracting agreement between a contractor and the sub-contractor who are competitors is itself a joint production agreement which could benefit from the Specialisation BER or whether sub-contracting is only relevant as a possible way for a party to obtain production to contribute to the joint production agreement with another party. As is set out more fully below, sub-contracting could be dealt with more clearly either in the Specialisation BER or the Horizontal Guidelines.

(b) Are there any additional categories of agreement that are not already included in the definition of 'specialisation agreement' that, in your view, would be likely to meet the requirements for exemption from the Chapter I prohibition under section 9 of the Competition Act 1998?[3]

We agree that the Specialisation BER should cover agreements among more than two parties, provided the combined market share thresholds are not exceeded. In that situation, there seems to be no clear reason why more than two parties cannot produce the acknowledged efficiency-enhancing effects of specialisation agreements between two parties.

We note the contributions to the EU evaluation in relation to sub-contracting agreements that aim to expand production, with which we agree.

It is not clear why the Specialisation BER should not apply to rental markets (or distribution services for that matter). Companies in those markets may wish to enter into arrangements with actual or potential competitors to deal with capacity

[3] For example, evidence received in the EU evaluation raises the question of whether the Specialisation BER should cover unilateral specialisation agreements with more than two parties and horizontal subcontracting agreements that aim to expand production.

constraints or the requirements of a tender (which are effectively "joint production" of services, sometimes implemented by way of sub-contracting arrangements between actual or potential competitors).

S3: In relation to the conditions for block exemption under Article 2 of the Specialisation BER:

(a) Are the conditions for block exemption under Article 2 sufficiently clear?

No.

(b) If not, please explain how they should be clarified, and why this is needed.

See comments above in relation to joint distribution and excluded services. Otherwise, we consider the conditions to be sufficiently clear.

S4: In relation to the market share threshold under Article 3 of the Specialisation BER:

(a) From your experience, does this threshold allow most specialisation agreements that would be likely to benefit from an individual exemption to be block exempted? If not, please provide examples and indicate any alternative threshold which would, in your view, achieve this aim.

In our view, the market share threshold is too low and may be discouraging parties from entering into efficiency-enhancing arrangements. It could be increased to 25% or 30% without threatening competition.

(b) Are the terms on which the market share threshold shall apply (as explained in Article 5 of the Specialisation BER) sufficiently clear and do they remain appropriate? If not, please explain why, and how they should be clarified or amended

Yes.

S5: In relation to the 'hardcore' restrictions listed in Article 4 of the Specialisation BER:

(a) Is the current list of hardcore restrictions sufficiently clear? Please explain your position.

Please see above comments in relation to joint distribution and how that can make the exception to the hard core restriction relating to price fixing difficult to apply.

Customer allocation is a hard core restriction and is usually straightforward to identify. However, in the context of sub-contracting, it is common to see parties seek to agree non-poaching provisions in relation to customers (i.e. the sub-contractor will not seek to supply the contractor's customers outside the joint arrangement during the agreement and potentially for a period after). It would be helpful to see further clarity

about the treatment of non-poaching clauses in sub-contracting arrangements either in the Specialisation BER to the extent relevant or the Horizontal Guidelines, beyond the one current example provided in an outsourcing context. This guidance could also cover the territorial aspects of such arrangements (for example, if the sub-contracting arrangement provides greater geographical coverage).

(b) Are there any further restrictions that it would be appropriate to treat as hardcore restrictions, in addition to those set out in Article 4 of the Specialisation BER?

No.

(c) The Specialisation BER does not currently set out any 'excluded restrictions' that would not benefit from the block exemption, but instead would need to be individually assessed to establish whether they benefit from exemption. Are there any such restrictions that it would be appropriate to exclude from the benefit of the exemption?

No.

Impact assessment questions

S6: To the extent your answers to questions S1 to S5 suggest potential changes to the Specialisation BER, what impact would these have on your business or the businesses that you advise? Would this impact be *negligible*, *moderate* or *significant*?

Negligible to moderate

S7: If the market share threshold under Article 3 of the Specialisation BER were to change, what would the impact on your business, or the businesses that you advise, be? For example, if the threshold were to be raised or lowered by 5% what would the impact be, and would it be *negligible*, *moderate* or *significant*?

If the market share threshold were to be increased, we consider that the impact would be negligible to moderate.

S8: To help us to understand the impact of any changes to, or expiry of, the Specialisation BER:

(a) Would you expect your business, or the businesses that you advise, to incur costs to *understand* the relevant legal framework and how it may impact your business (eg costs for legal or expert advice) in the following scenarios?

(i) The Specialisation BER lapses on expiry on 31 December 2022.

(ii) The Specialisation BER is replaced from 1 January 2023 by an equivalent UK block exemption.

If you do consider that you would incur costs, it would help to understand whether these would be *negligible*, *moderate* or *significant*. If you are submitting a response to this Call for Input as an adviser, we would be grateful for any observations you can share on the likely costs for your clients in each relevant industry.

If the Specialisation BER lapses, costs are likely to be negligible for existing arrangements, as parties are likely to rely on previous analysis (albeit under general principles of competition law). For proposed new arrangements, the lack of a Specialisation BER would potentially lead to an increase in costs than if there had continued to be a Specialisation BER.

If the Specialisation BER is replaced, the costs related to implementation would depend on how radical the changes to the legal framework were.

(b) Would you expect your business, or the businesses that you advise, to incur costs to *implement* the relevant legal framework (eg costs to change your current business plans) in the following scenarios?

(i) The Specialisation BER lapses on expiry on 31 December 2022.

(ii) The Specialisation BER is replaced from 1 January 2023 by an equivalent UK block exemption.

If you do consider that you would incur costs, it would help to understand whether these would be *negligible*, *moderate* or *significant*. If you are submitting a response to this Call for Input as an adviser, we would be grateful for any observations you can share on the likely costs for your clients in each relevant industry.

The costs of the Specialisation BER lapsing are likely to be negligible in view of the frequency with which it is used by clients.

If the Specialisation BER is replaced, the costs related to implementation would depend on how radical the changes to the legal framework were and whether that would necessitate amendments to legal agreements or changes in behaviour.

Response to the CMA's call for input on the retained Horizontal Block Exemption Regulations

Research and Development BER

Policy questions

R&D1: We would welcome your responses to the following questions.

(a) Has the R&D BER contributed to promoting competition in the UK? It would be helpful to have some examples, if possible.

In our experience of advising clients, they have not frequently relied on the R&D BER. In contrast to the Specialisation BER, we have encountered a number of proposed arrangements that might fall within the scope of the exemption, but the complexities of applying the R&D BER or an inability to fit the arrangement squarely into the R&D BER have meant that it has not often been relied upon. As a result, we do not have clear evidence of it having an effect on promoting competition in the UK.

(b) Has the R&D BER contributed to promoting economic activity that benefits consumers in the UK and would not otherwise have occurred? It would be helpful to have some examples, if possible.

We are not aware of many such examples, although we are of the view that, in principle, it has the potential to do so.

(c) Has your business entered into R&D agreements that have benefited from the block exemption in the R&D BER?

We have advised clients on their arrangements for [REDACTED], which have benefited from the block exemption.

(d) Are there UK-specific considerations that the CMA should take into account in its review of the R&D BER? If so, it would be helpful if you could indicate why those differences are needed or justified (which might, for example, be because of particular characteristics you identify in the UK market that differ from the EU market).

It is not clear that the territorial restrictions in the list of hard-core restrictions in the R&D BER (Articles 5(d), (e), (f) and (g)) should be retained, as these are included in the BER because of the EU's single market objective.

However, we would encourage the CMA to keep to a minimum any differences between the UK's exemptions and those of the EU, given international businesses' general preference for consistency.

(e) Are the current rules discouraging any category of business, institute or body from entering R&D agreements?[4]

[4] For example, evidence received in the EU evaluation raises the question of whether SMEs, research institutes and academic bodies may be discouraged from entering into R&D agreements under the current rules. We also

We do not see evidence of clients being discouraged from entering R&D agreements specifically because of the current rules, but would observe that the rules do not serve to promote collaboration, mainly due to the complexity and areas of uncertainty.

R&D2: In relation to the definitions included in Article 1 of the R&D BER:

(a) Are the definitions included in Article 1 sufficiently clear to allow you to identify the categories of agreement that can benefit from the retained R&D BER? If not, how should the definitions, in your view, be clarified or amended?

The number of definitions and their complexity mean that it is often difficult to identify whether a particular R&D agreement (which can be complex and multi-faceted) benefits from the BER. Usually there is at least one element which gives rise to some uncertainty, such as whether the "exploitation" envisaged and associated restrictions fall squarely within the definitions.

However, rather than make significant changes to the BER, it may be more helpful to produce specific guidance on its interpretation and implementation.

(b) Are there any additional categories of agreement that are not already included in the definition of 'research and development agreement' that, in your view, would be likely to meet the requirements for exemption from the Chapter I prohibition under section 9 of the Competition Act 1998?

Not as far as we are aware.

R&D3: In relation to the conditions for exemption in Article 3 of the R&D BER:

(a) Is the requirement for 'full access' rights to the results of the R&D covered by an agreement sufficiently clear to allow you to identify the circumstances in which agreements will benefit from the R&D BER?

The exception to "full access" rights could be clearer, in particular, how it can be limited by exclusive licensing to one party.

(b) Is the requirement for access to pre-existing know-how sufficiently clear to allow you to identify the circumstances in which agreements will benefit from the R&D BER?

It 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.

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would like to understand more broadly whether stakeholders consider the R&D BER strikes the correct 'balance' between the promotion of competition and incentives to invest in R&D activity.

(c) **From your perspective, should the requirement(s) of full access to the results and/or access to pre-existing know–how be maintained? Would you or those you represent benefit from any modification or removal of these requirements?**

(d) **To what extent might the scope of the R&D BER need to be extended to adequately capture the pre-commercialisation stages of R&D, including the early stages where any prospect of commercialisation is several years away?**

We agree that this would be helpful.

(e) **To the extent not already covered by your responses to questions 18(a) to (d), are the conditions for exemption sufficiently clear?**

See comments above in relation to the desirability of guidance on the application of the R&D BER (similar to accompanying guidance for the Technology Transfer Block Exemption Regulation).

R&D4: In relation to the market share threshold and duration of exemption under Article 4 of the R&D BER:

(a) **From your experience, does the 25% market share threshold allow most R&D agreements that would be likely to benefit from an individual exemption to be block exempted? It would be helpful to have some examples, if possible.**

On balance, we think that the market share is appropriate; however, we do not have specific examples to support this.

(b) **Does the current duration of the benefit of the R&D BER for non-competing companies under Article 4(1) and competing companies under Article 4 (2) of the R&D BER remain appropriate? If not, please explain why this is so and set out what would in your view be an appropriate duration.**

(c) **Are the terms on which the market share threshold shall apply, as explained in Article 7 of the R&D BER, sufficiently clear and do they remain appropriate? If not, please explain why and how they should be clarified or amended.**

Yes.

R&D5: In relation to the 'hardcore restrictions' listed in Article 5 of the R&D BER and the 'excluded restrictions' listed in Article 6 of the R&D BER:

(a) **Is the current list of hardcore restrictions sufficiently clear? Please explain your position.**

Please refer to our response to Question R&D1(d).

(b) **Are there any further restrictions that it would be appropriate to treat as hardcore restrictions, in addition to those set out in Article 5 of the R&D BER?**

(c) **Is the current list of excluded restrictions sufficiently clear? Please explain your position.**

(d) **Would it be appropriate to remove or modify any of the excluded restrictions? Please explain your position.**

(e) **Are there any further restrictions that it would be appropriate to exclude from the benefit of the exemption, in addition to those set out in Article 6 of the R&D BER?**

Impact assessment questions

R&D6: To the extent your answers to questions R&D1 to R&D5 suggest potential changes to the Specialisation BER, what impact would these have on your business or the businesses that you advise? Would this impact be *negligible*, *moderate* or *significant*?

Negligible to moderate.

R&D7: If the market share threshold under Article 4 of the R&D BER were to change, what would the impact on your business, or the businesses that you advise, be? For example, if the threshold were to be raised or lowered by 5% what would the impact be, and would it be *negligible*, *moderate* or *significant*?

R&D8: To help us to understand the impact of any changes to or expiry of, the block exemption included in the R&D BER:

(f) **Would you expect your business to incur costs to *understand* the relevant legal framework and how it may impact your business (eg costs for legal or expert advice) in the following scenarios?**

(i) **The R&D BER lapses on expiry on 31 December 2022.**

(ii) **The R&D BER is replaced from 1 January 2023 by an equivalent UK block exemption.**

If you do consider that you would incur costs, it would help to understand whether these would be *negligible*, *moderate* or *significant*. If you are submitting a response to this Call for Input as an adviser, we would be grateful for any observations you can share on the likely costs for your clients in each relevant industry.

See comments above in relation to the Specialisation BER.

(g) Would you expect your business to incur costs to *implement* the relevant legal framework (eg costs to change your current business plans) in the following scenarios?

(i) The R&D BER lapses on expiry on 31 December 2022.

(ii) The R&D BER is replaced from 1 January 2023 by an equivalent UK block exemption.

If you do consider that you would incur costs, it would help to understand whether these would be *negligible*, *moderate* or *significant*. If you are submitting a response to this Call for Input as an adviser, we would be grateful for any observations you can share on the likely costs for your clients in each relevant industry.

See comments above in relation to the Specialisation BER.

Horizontal Guidelines

Policy questions

HGL1: We would welcome your response to the following questions:

(a) **We are interested in understanding how coherently the retained HBERs work with the Horizontal Guidelines and alongside other rules and guidance in the UK, including other block exemptions. Are there any issues that could be usefully resolved or clarified either in revisions to the retained HBERs or additional guidance in the Horizontal Guidelines? If so please explain and, if possible, provide examples of the sort of agreements that could be impacted by these changes.**

If the HBERs are retained, it would be helpful to have additional guidance in the Horizontal Guidelines on the application and interpretation of the HBERs, rather than the focus being on arrangements falling outside of those HBERs.

Otherwise, we consider the relationship and sign posting between the various block exemptions to be clear, albeit it can be difficult in some situations to identify the centre of gravity of a particular arrangement, leading to uncertainty as to the correct assessment.

(b) **Would guidance in relation to any categories of horizontal cooperation agreement that are not covered in the Horizontal Guidelines be of benefit to UK businesses, eg in relation to infrastructure sharing, collective bargaining, industry alliances, industry-wide cooperation agreements, and insolvency restructuring agreements? If so, please provide evidence of this, including details of the questions that you believe this guidance should address.**

We agree that guidance on these categories of horizontal cooperation agreement would be helpful, including some case studies / hypothetical examples, as they do not fall neatly within the existing categories of horizontal cooperation agreement.

We have advised clients on infrastructure sharing, industry alliances and industry-wide cooperation agreements in a variety of sectors, including [REDACTED].

The guidelines should address the same issues as those already included for other types of horizontal cooperation, such as applicable market share thresholds below which there will be no infringement of Chapter I, the distinction between by object and by effect restrictions, practical examples of the assessment of different types of collaboration (with reference to relevant case-law), restrictions which may be regarded as objectively necessary in the relevant context and the types of efficiencies / pro-competitive arguments which may fulfil Section 9 CA98. Of particular importance to all of the issues on which we have advised is the extent to which risk

and cost sharing can be considered a justification for collaboration, assessing the indispensability of the cooperation and the types of efficiencies that can be taken into account (see also our comments on sustainability agreements in this regard).

A further obvious omission from the current Horizontal Guidelines is specific and detailed consideration of joint bidding and consortia agreements. Currently, there is a reference in the guidelines to the possibility that consortia agreements may not engage competition law if they allow the companies involved to participate in projects that they would not be able to undertake individually. In such a scenario, the parties are not regarded as potential competitors for implementing the project. The Danish Competition Authority has published detailed guidance on consortia agreements and further, more detailed, consideration of this issue in the UK guidelines would be helpful (both for bidders and public authorities seeking to manage competition law risks in procurement processes).

As mentioned above, examples on sub-contracting arrangements between competitors would be useful, beyond what is already in the Horizontal Guidelines (e.g. the example at Paragraph 256 relating to outsourcing, which is limited to its facts). Sub-contracting arrangements between competitors are common in a number of industries, such as parcel delivery and logistics, which do not fit neatly into the current guidance.

(c) Would guidance in relation to digital-related issues, in revised or supplemented Horizontal Guidelines be of benefit to UK businesses, eg in relation to data pooling, data sharing and network sharing?[5] If so, please provide evidence of issues and details of the questions that you believe this guidance should address.

Yes, this guidance would be useful.

The CMA might also want to consider in this context whether guidance and/or examples can be provided on when the use of algorithms and related software by companies would be problematic under Chapter I, as well as platform / online intermediation issues.

It would be helpful to include any digital-related guidance in the Horizontal Guidelines, given that one of the key issues raised by all such digital cooperation will be information exchange (unless the CMA considers that a separate block exemption order might be appropriate).

[5] These examples are drawn from the EU evaluation, which indicated that these categories of agreements might usefully be covered in revised Horizontal Guidelines. Data pooling is a form of data sharing arrangement in which data is shared with some element of reciprocity and at least some parties to the arrangement agree to share data (source: Competition policy for the digital era - Publications Office of the EU (europa.eu)). Network sharing agreements are a form of infrastructure sharing agreement entered into between telecoms operators; they were raised in the EU evaluation as especially relevant in the current context of the deployment of 5G technology (source: EU evaluation study).

(d) Should the CMA provide guidance in revised or supplemented Horizontal Guidelines on horizontal cooperation agreements that pursue sustainability goals? Would a dedicated chapter in the Horizontal Guidelines improve legal certainty in this area? If so, please provide evidence of this including details of the questions that you believe this guidance should address.

We have advised a number of clients on potential projects or initiatives which have a sustainability focus, but which are or could be thought to be constrained by the CA98 regime.[6]

In our experience, cooperation between competitors may be necessary in scenarios such as the following:

(A) Manufacturers establishing an industry scheme intended to increase the recycling of industrial plastics;

(B) Competitors in developing markets that support the UK's Net Zero ambitions – for example new renewable energy, hydrogen and carbon capture technologies, electric vehicle and battery manufacture – collaborating in relation to joint purchasing (to improve buyer power), joint bidding (for government funding, for example) and joint production (as facilities require high capital investment at high risk of technology or commercial failure); or

(C) Market participants (comprising all or the majority of the market) meeting to discuss industry-wide standard setting, the phase-out of certain products (e.g. palm oil, fossil fuels, non-recyclable packaging), or cost reduction measures associated with sustainability compliance.

Whilst some of the above initiatives may be able to be justified under the current CA98 regime, this will depend on the specific facts of each case. Generally speaking, however, such scenarios might give rise to concerns under the CA98, limiting the speed at which the proposed arrangements take place, and/or their scope. These concerns could potentially include but are not limited to: information exchange, collective boycott, price coordination and the applicability of an exemption.

Many sustainability agreements contemplated by companies will not benefit from exemption under the retained HBERs (for example because the parties' market shares exceed the relevant thresholds or they are just not relevant). Accordingly, many companies will seek to rely on an individual exemption (under section 9

[6] See our Response to the CMA's call for input on environmental sustainability and the competition and consumer law regimes (10 November 2021).

CA98[7]), but it may not be clear whether all the criteria for individual exemption are met, particularly if the sustainability agreement results in higher costs or a reduction in choice or quality for end-consumers.[8]

The CMA's guidance on environmental sustainability agreements and competition law[9] provides a useful summary of the position under the existing regime, but does not introduce specific measures for companies engaging in sustainability initiatives. As such, it still leaves some important questions unanswered[10] and risks sustainability projects being constrained.

The Horizontal Guidelines do not make any reference to sustainability, except the reference to *environmental standards* in Chapter 7. The CMA should provide guidance in revised or supplemented Horizontal Guidelines on horizontal cooperation agreements that pursue sustainability goals.[11] The 2001 EC Horizontal Guidelines, which did include guidance on environmental agreements (and gave an example of such agreements), may be a useful starting point.[12]

A dedicated chapter in the Horizontal Guidelines would improve legal certainty in this area. It would help parties and their advisers self-assess their proposed agreements and to formulate and implement their arrangements with greater

[7] To qualify for exemption under section 9(1) CA98 the agreement must: (i) contribute to improving production or distribution; or (ii) promote technical or economic progress (while allowing consumers a fair share of the resulting benefit); but not (iii) impose restrictions which are not indispensable to achieve these aims; or (iv) eliminate competition in a substantial part of the market.

[8] See comments in this regard made by Dentons Europe in its Reply to the European Commission (**EC**) Consultation on Competition Policy Supporting the Green Deal (20 November 2020), in particular paragraph 21(iii), available at: https://ec.europa.eu/competition-policy/green-gazette/conference-2021_en

[9] CMA's Guidance on Environmental Sustainability Agreements and Competition Law (27 January 2021), available at: https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-com petition-law.

[10] For examples of such questions, see our comments at 1.5(a) of this response.

[11] This approach would be consistent with the CMA's proposal to introduce guidance on environmental sustainability in the CMA VABEO Guidance, see CMA145con (3 October 2021), paragraphs 7.16-7.18, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1030880/VABER_Final_RecommendationOctober2021 PVedit.pdf

[12] Guidelines on the applicability of Article 81 of the EC Treaty [Article 101 TFEU] to horizontal cooperation agreements, OJ [2001] C 3/2, paragraphs 179-198.

ease, certainty and confidence.[13] Particular issues which would benefit from greater clarity include:

(1) *Meaning of sustainability agreement*: a clear explanation of what qualifies as a legitimate horizontal cooperation agreement pursuing a sustainability goal, with examples of such agreements;[14]

(2) *Individual exemption*: how to conduct a "fair share of the benefits" assessment under section 9 CA98, in particular:

(A) whether wider benefits can be taken into account beyond those accruing to direct consumers of the product or service in question (so-called "*out-of-market efficiencies*", such as improved air quality);

(B) how broad these benefits can be, i.e. considering not only short-term monetary factors (e.g. impact of product prices), but longer-term qualitative efficiencies (e.g. reduction in CO2 emissions)[15]; and

(C) how these benefits can be meaningfully quantified;[16]

(3) the CMA's approach to enforcement in relation to sustainability agreements, and whether these are to be treated differently to other horizontal agreements.[17]

(e) To the extent not covered by your responses to the other questions, please outline areas of the retained HBERs or Horizontal Guidelines where clarification or simplification would be useful.

The level of detail in the Horizontal Guidelines is helpful to companies and their advisers and should not be diluted or simplified unnecessarily.

[13] This proposed guidance could complement and build on the guidance on environmental sustainability issues which the CMA intends to include in the CMA Verticals Guidance (as set out in its Recommendation to BEIS (CAM145con, 3 November 2021).

[14] This was identified by the EC in its findings in its Evaluation of the Horizontal Block Exemption Regulations (5 May 2021), available at: https://ec.europa.eu/competition-policy/system/files/2021-05/HBERs_evaluation_SWD_en.pdf.

[15] See page 68, *ibid*.

[16] For example in the second draft of The Guidelines on Sustainability Agreements, the Netherlands Authority for Consumers and Markets (ACM) proposed considering the benefits of certain sustainability agreements for the wider society as a whole, rather than focusing only on the benefits for consumers of the specific product. See https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf

[17] The Guidelines also clarify that the ACM aims to find solutions, rather than imposing fines while using its enforcement powers in relation to sustainability agreements. See *ibid*.

The CMA could provide further guidance on whether Chapter I is engaged by arrangements between certain actors. For example, clarification on the application of Chapter I to agreements between joint venture parties would be welcome, including the CMA's view on when the joint venture and its respective parent companies are part of a single economic entity, excluding the application of competition law. Are the factors that the CMA would take into account the same as the European Commission pursuant to the concept of "decisive influence" under EU law?

Similarly, it would be useful to outline the CMA's thinking on the treatment of publicly-owned companies under competition law and when different publicly-owned companies (assuming they are acting as undertakings) might be considered to be a single economic entity.

Generally, it would be helpful for the guidelines to be updated to reflect UK competition law terminology and concepts.

It would be helpful for the references to cases and decisions in footnotes throughout the Horizontal Guidelines to be updated to reflect cases and decisions since its publication (including UK cases), in the same way as has been done with other CMA guidance.

The examples provided in relation to each category of agreement are generally very helpful and we would encourage the CMA to include these examples (and potentially new ones) in the UK's Horizontal Guidelines, perhaps with reference to some of the CMA's own cases and work.

It would also be useful to have an indication of the type of economic analysis and evidence that could provide reassurance to companies that the principles outlined in the Horizontal Guidelines are met (given that such evidence plays an important part in CMA competition investigations and in assessing the competitive effects of mergers). Clearly, the need for and the use of such economic analysis should not become the norm for companies, but may be an option to explore for larger scale collaborations where the market share thresholds are not met.

(f) To the extent not covered by your responses to other questions in this Call for Input, are there any categories of horizontal agreement that you believe are likely to be efficiency-enhancing and should be sufficiently unlikely to raise competition concerns that they should benefit from a block exemption, or at least be covered in the Horizontal Guidelines? If so, please explain your response by reference to the conditions set out in section 9(1) of the Competition Act 1998 and, where possible, provide relevant evidence.

As set out in our response to Question HGL1(d) above, legitimate horizontal cooperation agreements pursuing sustainability goals are efficiency enhancing and

they are unlikely to raise competition concerns. The CMA should recommend that the Secretary of State introduce a *Sustainability Block Exemption* specifically to cover sustainability agreements**.**

Having an exemption specifically tailored for sustainability agreements would provide legal certainty and accelerate the implementation of sustainability initiatives.

Sustainability agreements are capable of being efficiency-enhancing considering the conditions set out in section 9 CA98:

(A) **the agreement contributes to improving the production or distribution of goods or to promoting technical or economic process** - although this condition seems to focus on economic efficiency, the case law indicates that a broader range of socio-political benefits, including those related to the environment, might be sufficient;

(B) **a fair share of the benefits are passed on to consumers** - indirect sustainability benefits revealing themselves in the long term (e.g. reduction in CO_2 emissions) and out-of-market benefits (rather than those benefits which are passed on directly to the consumer of the specific product in the form of lower prices) could meet this condition. For this purpose, it is important to clarify how these benefits could be meaningfully quantified;

(C) **all the restraints are indispensable** - this will be fact-dependent, but in principle seems capable of being met; and

(D) **the agreement does not eliminate competition in respect of a substantial part of the products in question** – this can be managed by appropriate market share thresholds.

HGL2: In relation to information exchange:

(a) Do the Horizontal Guidelines offer sufficient legal certainty on types of information exchange that may be considered pro-competitive?

No, there is little legal certainty on the types of information exchange that may be considered pro-competitive. Often the costs involved in assessing whether there are pro-competitive arguments which can outweigh any restrictions on competition are too great and it is quicker (but potentially less efficiency-enhancing) to design a solution which does not restrict competition in the first place.

Whilst the examples provided in Paragraph 57 are useful, the guidelines should provide further detail or examples of how these arguments can be used in practice in relation to arrangements which would otherwise be restrictive of competition.

For example, in relation to benchmarking, the assumption is generally made that this is permissible only to the extent that no competitively sensitive information regarding the competitor set is revealed (e.g. the names are anonymised). Is the intention that benchmarking can be pro-competitive in other situations and, if so, under what parameters? The same uncertainties arise in relation to the other types of information sharing highlighted in the paragraph.

(b) Do the Horizontal Guidelines account sufficiently for business models or scenarios whereby parties are at the same time in a horizontal and vertical relationship?

No, the current Horizontal Guidelines do not deal with this type of relationship adequately. It is deserving of specific treatment given how relationships in the supply chain have evolved.

(c) Are there otherwise any areas of Chapter 2 of the Horizontal Guidelines on information exchange which require further clarification? If so, please explain which areas are unclear and, to the extent possible, provide examples of the sort of co-operation that would benefit from this clarification.

The guidance on the sharing of strategic (or competitively sensitive) information in the Horizontal Guidelines is particularly important and we (and our clients) use it regularly; it is key to navigating the potential competition risks presented by many forms of commercial arrangements. In general, the limits on the type of information which can be shared between competitors are well understood.

However, since it was drafted, enforcement practice, case-law and markets have developed and in our view, the information exchange section should be reviewed carefully and could be supplemented as follows:

- **Further guidance based on the CMA/OFT's work**. For example, the OFT looked closely at issues of pure information exchange in the WhatIf? Private Motor case relating to a data analysis tool for private motor insurers. Although specific to the facts of the case, it would be useful for the CMA to outline the relevant aspects of its approach to the assessment of the issues in that case and, for example, set out the requirements for data to be appropriately anonymised and aggregated to avoid concerns.
- **Publicly available information**. Genuinely public information is not regarded as strategic data the exchange of which could lead to an infringement of Chapter I. However, the guidance defines genuinely public information narrowly and notes that exchanges of genuinely public data are unlikely; competitors would not normally choose to exchange data that they can collect from the market at equal ease. It is not clear that this assumption holds true in the context of commercial arrangements, such as joint ventures, where it may be necessary (and more efficient) to categorise the type of information which can reasonably be shared between parties on the basis that it is in the public domain. In addition, it may be helpful to draw a

clear distinction between information exchanges between competitors and permissible market intelligence provided by independent third parties (where there will often be no real exchange of information between competitors) unless it is jointly commissioned by competitors and is not equally accessible to all customers or competitors.

- **Operation of the presumption that a concerted practice can arise as a result of the unsolicited (one-off) receipt of competitively sensitive information from a competitor which is accepted by the recipient.** The Horizontal Guidelines are clear that the recipient can rebut this presumption only by responding with a clear statement that it does not wish to receive such data. Although that seems clear in principle, the precise requirements for companies finding themselves in that situation would benefit from being clarified, as in practice it can be considerably more challenging and involve more risk for the recipient than the guidelines suggest. Electronic communications, namely emails[18], are the most common form of communication in business and create a record which can later be found by a competition authority. A recipient needs to be able to prove that it has "distanced" itself sufficiently from the information in order to rebut the presumption that it participated in an illegal information exchange. In some cases, a response which states that the recipient does not want to receive such data may not be enough to remove all competition law risk. Further steps may be required, such as quarantining the information (and perhaps removing the individual from decision-making for a period). Clearer guidance on the CMA's expectations in relation to "public distancing" in the context of unsolicited email communications would be helpful. It is an area that in practice can be hugely onerous for and damaging to the innocent party.
- **Hub and spoke information exchanges.** Guidance based on the UK courts' position on this issue would be helpful.
- **Guidance on ways in which information exchange risks can be managed.** As mentioned above, appropriate anonymisation and aggregation can reduce the risk of data being regarded as competitively sensitive. There may also be other ways to reduce risks, such as establishing clean teams to handle the data. Guidance on the CMA's expectations in relation to robust clean team arrangements would be helpful for clients.

HGL3: In relation to R&D agreements:

[18] Or more broadly any form of electronic communication where the recipient is passive and not in an active conversation with the sender e.g. text, WhatsApp or Teams message.

(a) **Are there areas of Chapter 3 of the Horizontal Guidelines on R&D agreements which require further clarification? If so, please explain which areas are unclear and, to the extent possible, provide examples of the sort of co-operation that would benefit from this clarification.**

As mentioned above, guidance on the interpretation and application of the R&D BER would be helpful.

HGL4: In relation to production agreements:

(a) **Are there areas of Chapter 4 of the Horizontal Guidelines on production agreements which require further clarification? If so, please explain which areas are unclear and, to the extent possible, provide examples of the sort of co-operation that would benefit from this clarification.**

Further examples related to sub-contracting to expand production would be helpful. In particular, an example dealing with sub-contracting arrangements in the context of bidding for contracts/tenders. There are also no examples dealing with service markets.

HGL5: In relation to purchasing agreements:

(a) **The Horizontal Guidelines currently state that market power is unlikely when parties to a joint purchasing agreement have a combined market share below 15% on the purchasing market or markets as well as on the selling market or markets. Does 15% remain an appropriate level for this 'safe harbour'? If not, please explain your position.**

The 15% combined market share threshold for joint purchasing agreements is low. An increase would be welcomed.

In the UK, the OFT issued a short opinion on P&H/Makro which focused on whether the parties had "market power". Market power should not be assumed above 15%. An increase to at least 25% would seem to be appropriate, may encourage joint purchasing arrangements and would be consistent with our comments on the HBERs above.

We are aware of clients with market shares of more than 15% in the purchasing or downstream market that are reluctant to take the risk of entering into joint purchasing arrangements with smaller rivals. This is despite such arrangements arguably having pro-competitive effects (and in some circumstances third parties applying pressure on larger purchasers to share the benefits of their economies of scale with smaller rivals).

A joint purchasing arrangement may be more competitive in that scenario, allowing the smaller rival to continue to compete with the larger player, whilst taking advantage

of its buyer power. Yet current guidance may act as a disincentive to pursuing such cooperation.

(b) Are there any other areas of Chapter 5 of the Horizontal Guidelines on purchasing agreements which require further clarification? If so, please explain which areas are unclear and, to the extent possible, provide examples of the sort of co-operation that would benefit from this clarification.

It would be helpful for the guidelines to clarify how the principles set out apply to public sector buying consortia (and when they are considered to be acting as undertakings and when they are not).

HGL6: In relation to commercialisation agreements (defined in the Horizontal Guidelines as agreements which "involve co-operation between competitors in the selling, distribution or promotion of their substitute products"):

(a) Is further guidance needed on any other category of commercialisation agreement not already covered in Chapter 6 of the Horizontal Guidelines, eg the assessment of joint bidding and non-indispensable consortia?

Yes, as mentioned above, we consider that further guidance on joint bidding and consortia arrangements would be very helpful both for bidders and contracting authorities managing bidding processes.

(b) The Horizontal Guidelines currently state that market power is unlikely when parties to a commercialisation agreement have a combined market share below 15%. Does 15% remain an appropriate level for this 'safe harbour'? If not, please explain why, and what you think would be a more appropriate threshold.

The 15% market share thresholds for commercialisation agreements are low. An increase would be welcomed.

(c) Are there otherwise any areas of Chapter 6 of the Horizontal Guidelines on commercialisation agreements which require further clarification? If so, please explain which areas are unclear and, to the extent possible, provide examples of the sort of co-operation that would benefit from this clarification.

The guidance on distribution agreements between competitors is rather vague and difficult to apply in practice. In one paragraph, the guidance states that a non-reciprocal agreement can restrict competition by object if it provides the basis for a mutual understanding to avoid entering each other's markets, though it is not clear what evidence would be required for this in the absence of restrictions in the agreement. In a later paragraph, it states that the risks of restrictive effects (in particular reducing incentives to enter each other's territory) are less pronounced.

HGL7: In relation to standardisation agreements (defined in the Horizontal Guidelines as agreements which 'have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply') and standard terms of conditions of sale or purchase elaborated by trade associations or competing companies (which are also covered by Chapter 7 of the Horizontal Guidelines):

(a) How easy is it to apply the provisions of the Horizontal Guidelines on standardisation agreements in practice?

(b) Do the provisions in the Horizontal Guidelines that describe the role of FRAND (fair, reasonable, and non-discriminatory) terms, and the example given of how FRAND terms could impact the analysis of a standard essential patent licence, provide sufficient clarity?

(c) Are there any other areas of Chapter 7 of the Horizontal Guidelines on standardisation agreements which require further clarification? If so, please explain which areas are unclear and, to the extent possible, provide examples of the sort of co-operation that would benefit from this clarification.

Keeping the standardisation chapter of the Horizontal Guidelines as simple as possible would be useful, considering the drastic divergence of stakeholder views on the standardisation issues, particularly in the ICT sector. The European Commission's staff working document on its evaluation of the Horizontal Block Exemption Regulations[19] also shows how difficult to find the right balance in the standardisation ecosystem. The controversial issues in the dynamic standardisation environment change quickly. Consequently, any detailed guidance would risk being redundant in a few years. Thus, the CMA may more efficiently deal with the standardisation issues by favouring simplicity and flexibility.

Holistically approaching the controversial standardisation issues (e.g. essentiality, meaning of FRAND, license to all v access to all) is also crucial, as introducing a radical change could frustrate the delicate balance of interests between licensors and licensees. The CMA should always carefully consider the practical and economic consequences of proposed changes since putting onerous burdens on companies could prejudice the incentive to contribute standardisation.

The European Commission's regulation proposal, *IP – new framework for SEPs*[20], which aims to make the SEP licensing system more transparent, predictable and efficient, should be followed closely. The CMA could consider this regulation or the

[19] See page 121, https://ec.europa.eu/competition-policy/system/files/2021-05/HBERs_evaluation_SWD_en.pdf
[20] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13109-Intellectual-property-new-framework-for-standard-essential-patents_en

interim relevant publications in the revision of Chapter 7. This information may also prevent the divergence of the EU and UK rules significantly.

Impact assessment questions

HGL8: To the extent your answers to questions HGL1 to HGL7 indicate potential changes to the HBERs or Horizontal Guidelines, or the introduction of new block exemptions, what impact would these have on your business or the businesses that you advise? Would this impact be *negligible*, *moderate* or *significant*?

Moderate

Dentons UK & Middle East LLP
11 January 2022