Baker McKenzie welcomes the opportunity to respond to the CMA's Call for Input on the retained Horizontal Block Exemption Regulations (HBERs) and Horizontal Guidelines (HGL). Our comments are based on our experience of advising clients on UK and EU competition law.

1. 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;

[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).

(t) Activities of households as employees, or undifferentiated goods- and services-producing activities of households for own use;

(u) Activities of extraterritorial organisations and bodies.

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.

1.1 We are a full service law firm advising large clients in all industry sectors and in particular in the sectors we have highlighted above. Our advice concerns a variety of horizontal cooperation agreements, including agreements relating to joint production; R&D; joint purchasing; joint commercialisation, information exchange and sustainability. In our experience, while the HGL are widely used across all industries, the HBERs less so, as they have developed a reputation for being difficult to reconcile with the requirements and aims of different R&D and specialisation projects in the real world.

1.2 However, in concept, the HBERs and HGL together provide businesses and their advisors with a useful framework of analysis when self-assessing horizontal agreements. In particular, the HBERs aim to provide legal certainty which has the potential to save businesses time and money when assessing their agreements. For this reason, in our view, the current framework should be retained. If the HBERs were to be allowed to expire without replacement, the effects would be primarily negative for businesses, the industries in which they operate, and ultimately for consumers. This is because the HBERs block exempt agreements between actual or potential competitors for which it can be safely assumed they fulfil the exemption criteria of Section 9 of the Competition Act 1998 (CA98). This approach provides significant legal certainty and the absence of block exemptions (and accompanying guidelines) would bring significant uncertainty. In particular, businesses that would otherwise benefit from a safe harbour would not be willing to enter into pro-competitive collaboration agreements due to uncertainties associated with the treatment of horizontal cooperation agreements, including about provisions that do not amount to hardcore restrictions of competition.

1.3 Having said this, there is no doubt that the current HBERs and HGL could be improved and clarified. The HBERs, whilst useful, can be difficult read and to apply in practice. For instance, some agreements are exempt unless hard core restrictions or exclusions apply but those hard core restrictions and exclusions may in turn have exceptions (see for example 5(b)(ii) and 5(c) of the R&D BER, as well as 4 (b) (i) and (ii) of the Specialisation BER, especially in light of paragraph 160 of the HGL). We encourage the CMA to use this opportunity to simplify and streamline the text of its horizontal block exemptions.

1.4 We also query whether it is necessary to include a list of hardcore restrictions in HBERs. By including these, there is a 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. This is particularly the case in R&D efforts where many of the requirements/restrictions related to joint exploitation (currently characterised as "hardcore" restrictions under Article 5 R&D BER) frequently represent fundamental drivers of, if not necessary conditions for, engaging in joint R&D efforts. Innovators would more frequently engage in costly and uncertain joint R&D efforts if they were afforded an effects-based analysis of their exploitation plans instead of being confronted with a set of hardcore restrictions, which operate as presumptions of illegality in practice.

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).

1.5 Large business (law firm) - over 1000 employees in London.

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.

1.6 Our comments are based on our experience of providing competition law advice to large businesses. Baker McKenzie does not often advise small or medium sized businesses so we do not have any strong views on how they would make use of the HBERs and HGL.

2. Specialisation BER

Policy questions

S1:(a) Has the Specialisation BER contributed to promoting competition in the UK? It would be helpful to have some examples, if possible.

2.1 The HGL on joint production and specialisation provides useful guidance and legal certainty to businesses who structure their arrangements to fall within the scope of the Specialisation BER. The emphasis on restrictive effects is the right approach in our view but makes practical guidance all the more important. We consider that the Specialisation BER should remain with some amendments regarding the safe harbour thresholds as outlined below.

(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.

2.2 We do not have any comments.

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

2.3 As indicated above, we have advised businesses in relation to joint production and specialisation. Some of the arrangements that we have advised on have benefitted from the Specialisation BER.

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(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).

2.4 We consider that it would be beneficial for the UK to adopt an approach that is consistent with the EU approach as this will provide legal certainty and efficiency for business. If the UK adopts a different approach, this will create complexity for businesses that want to engage in pan-European cooperation agreements with competitors. Having said this, the UK has an opportunity to bring more clarity to the necessary assessments by building out the EU approach as suggested in this submission.

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

2.5 We do not have any comments.

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?

2.6 We do not have any comments.

(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]

2.7 We see two areas with a particular need for clarification: First, more clarity on the assessment of economic factors when a cooperation enables the parties to launch a new product or service would be welcome (cf. paragraph 163 of the HGL). Secondly, more guidance 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" would be welcome.

Objective criteria for counterfactual

2.8 The HGL could provide more clarity on the circumstances in which there would an objective justification for an agreement that one party will not launch a product or service.

2.9 In paragraph 163, the HGL propose that restrictive effects are unlikely when the agreement enables the parties' launch of a product or service which they would otherwise, on the basis of

[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.

[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.

objective factors, not have been able to launch. (Missing) technical capabilities of the parties are named as the only example. In practice, often more important is the economic viability of a launch. It might be technically possible, in the near or at least mid-term, for each party to independently invest and launch a product or service. However, the investment costs and uncertainties associated with the launch of such a new product or service would likely lead the parties to fail to invest alone. Any additional guidance as to when the CMA considers restrictive effects unlikely, even when both parties have the necessary technical capabilities, would be welcome.

"Main" economic activity and relation between production costs overall variable costs

2.10 More clarity would be helpful with respect to the question of when, according to the HGL, production represents the "main economic activity" (cf. paragraph 164 of the HGL) and when exactly the CMA considers that the production costs represent a "large or substantial proportion" of the variable costs (cf. paragraphs 177, 188 HGL). The share provided in example 3 (paragraph 189 of the HGL) as a singular example provides insufficient guidance in relation to a question that is highly relevant in practice and often comparatively easy for firms to estimate.

2.11 In particular, the relevance of the commonality of costs (and how this is assessed in practice) should be further explored in order to provide more useful guidance. It would also be helpful to know how this concept should be applied in practice by giving case examples.

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?

2.12 We do not have any comments.

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

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.

2.13 We consider that the threshold should be increased to 25%.

2.14 We also recommend introducing an additional safe harbour based on the percentage share of the production costs in relation to the overall variable costs of a product and/or service: 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.

(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.

2.15 See above.

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.

(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?

(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?

2.16 Please see above our comments on the inclusion of hardcore restrictions in both the Specialisation and R&D BERS. We also have the following additional comments in relation to specialisation agreements:

Revised examples

2.17 The examples provided in the HGL should be revisited, clarified where needed, and/or replaced or deleted where they add little practical guidance: Example 2 (paragraph 188 HGL) suggests that in a market with similar market shares and one pre-existing production JV, an additional link would likely produce a collusive outcome. However, there are a number of other additional factors (e.g. type of product, share of total production) that should play a key role as to whether collusion in such a scenario is really the likely outcome.

Joint Production and Joint Distribution

2.18 It would be helpful to have more guidance 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". In particular, it would be useful to see more guidance on the conditions and circumstances the CMA will consider are required for a joint distribution agreement to be necessary for the joint production agreement. In this respect, it would be useful for the CMA to explore why the R&D BER allows joint exploitation by virtue of one party as the sole distributor (Art. 3 (5)), as opposed to an exploitation "only" by a team, organisation, undertaking or third party under the Specialisation BER (Art. 2 (3) (b)).

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?

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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?

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 (e.g., 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.

(b) Would you expect your business, or the businesses that you advise, to incur costs to implement the relevant legal framework (e.g., 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.

2.19 We are not in a position to provide the information requested in this section. However, if the Specialisation BER is not retained in some form, the costs of compliance for firms undertaking specialisation and joint production would increase significantly, which would ultimately be to the detriment of the consumers. This is because, in the absence of a block exemption, every aspect of a company's specialisation and joint production endeavours would require self-assessment and be subject to scrutiny by the CMA and, potentially, the UK courts.

3. Research and Development BER

Policy questions

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

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

3.1 We consider that there is value in retaining the R&D BER (subject to our comments below). The block exemption provides legal certainty and is a useful tool for businesses entering into R&D cooperation. However, the R&D BER, and the corresponding section of the HGL, are far too conservative in our view and are also difficult to apply in practice. In our experience, legal certainty is accorded only to very obviously pro-competitive R&D efforts. The current review process should focus on simplifying those texts, in particular by removing any disincentive against innovation and growth. Given the focus of the UK Government on innovation[4], this should be a critical area of focus for the CMA.

Conservative approach does not foster innovation

3.2 It is recognised that R&D agreements are generally pro-competitive and raise concerns in rare circumstances. It is telling that antitrust enforcement in this area has been very limited. Innovators require a pragmatic approach which will incentivise companies to jointly profit from the exchange of ideas. For the reasons explained below, the current framework when followed to the letter often results in the imposition of unhelpful compliance "straitjackets" on innovators at every stage of the collaboration. This must change.

Definition of actual and potential competition is particularly difficult/speculative

3.3 Realistically, identifying potential competition is very challenging in practice. 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.

3.4 Recent merger control cases have identified the challenges/methodological issues that exist when it comes to defining existing markets, in light of future innovation. These cases also demonstrate challenges in identifying potential competition by accurately determining the realistic entry scenario in light of the overall uncertainty that characterises R&D efforts. Such cases arguably expand the notion of a potential competitor[5] (see especially innovation theories of harm/ enhanced scrutiny of so-called "killer acquisitions") and add significant complexity to the assessment. It is unrealistic to expect that innovators and their advisors will undertake the same level of analysis as the CMA when assessing essentially the counterfactual of complex collaboration. The assessment of such cases, at the heart of which lies the question of potential competition, usually takes months, if not years, and both advisors and authorities have access to thousands of internal documents, detailed submissions, studies and analyses.

3.5 In our view, parties should not be treated as competitors in the innovation space unless it is absolutely clear that their innovation efforts are in direct competition with one another. It should also be clear that the mere targeting of a similar application or innovation space is not

[4] See the UK Innovation Strategy: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1009577/uk-innovation-strategy.pdf

[5] For example: Amazon/Deliveroo; Roche/Spark Therapeutics; Illumina Inc/Pacific Biosciences of California Inc. See also EU merger decisions Case M.7932 Dow/DuPont; Case M.8401 J&J/Actelion.

sufficient to characterise two companies as potential competitors. This is especially the case in the vast majority of applications where the "target" or "application" is not well-defined at the start and the focus of the R&D efforts changes/morphs along the journey of innovation. It is only at the stage where the parties are very close to production that a clear position on the potential overlap can be determined.

3.6 This issue is critical including in industries where the innovation journey is generally determined in advance. In relation to paragraph 120 of the HGL, for example, can it really be argued that two pharmaceutical companies engaging in similar "credible" target programmes at the pre-clinical stage are potential competitors? In our view, the pre-clinical stage is far too early in the innovation journey to take such a position. In our experience, it is only at much later stages of development (Phase III) that it is actually possible to have a clear understanding as to whether the poles of innovation are credible and competing. More generally, it is extremely difficult to identify in practice a credible pole of innovation. For a pole of innovation to be credible, it should be the case that there is at least a high likelihood of achieving a competing solution. This is not the same as a mere ability and/or interest in conducting research in the same "space". Examples to explain the position in paragraphs 119 and 120 of the current HGL would be most helpful.

Information exchange and innovation

3.7 The implications of a potential mischaracterisation of actual or potential competition are significant: can firms which are potential competitors freely discuss their programmes to see whether a joint R&D effort makes sense or is there a risk that such information exchange would violate competition law and leave them at risk of fines for sharing strategically important "technology data"? At present, advisors are assisting firms that are essentially non-competitors to put in place unnecessary safeguards in their collaborations, to manage the competition law risk.

3.8 Moreover, whilst information exchange is key to determining whether combining forces in R&D projects is meaningful/desirable, it is unclear which technology data referred to at paragraph 86 of the HGL could be considered strategic enough to create issues/require safeguards for information exchange. What is the relevant test? A few examples are highly desirable.

Centre of gravity

3.9 In our view, a stronger presumption that the centre of gravity should be at the R&D level is required, even if the R&D involves pairing/combination of existing technologies/developed products. The word "decisive" in paragraph 14 of the HGL does not help. Collaboration agreements are increasingly complex and typically involve a combination of R&D, joint production/specialisation, distribution etc. As long as there is meaningful R&D at the centre of joint R&D efforts, the R&D BER and HGL should apply. It is important to bear in mind that innovation most frequently takes place in small incremental steps not in giant leaps. Every step is characterised by uncertainty. Being one step closer to joint production does not mean that the centre of gravity is joint production or commercialisation. For example, in the pharmaceutical industry, a collaboration between two companies with potential drugs at

Phase III trials should never be viewed as joint production. Paragraphs 137-139 of the HGL explain the scepticism against R&D which may have restrictive effects and this suffices in practice.

(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.

3.10 We do not have any further comments.

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

3.11 We have advised a number of clients who have structured their agreements to benefit from the R&D BER.

(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).

3.12 We consider that it would be beneficial for the UK to adopt an approach that is consistent with the EU approach as this will provide legal certainty and efficiency for business. If the UK adopts a different approach, this will create complexity for businesses that want to engage in pan-European R&D agreements with competitors. Having said this, the UK has an opportunity to bring more clarity to the necessary assessments by building out the EU approach as suggested in this submission. As explained above, this should be a critical focus for the CMA given the UK Government's Innovation Strategy.

(e) Are the current rules discouraging any category of business, institute or body from entering R&D agreements?[6]

3.13 We do not have any comments.

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?

3.14 We do not have any comments.

(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

[6] 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 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.

to meet the requirements for exemption from the Chapter I prohibition under section 9 of the Competition Act 1998?

3.15 We do not have any comments.

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?

(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?

(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?

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

3.16 We do not have any comments on Article 3.

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.

3.17 In our view, the application of market share thresholds is quite difficult in practice, especially when market share needs to be calculated on the basis of total licensing income as usually, no real data is available to advisors. In our view, it is time to increase the threshold, or even abolish the market share test in light of the overwhelmingly positive effects of joint R&D. The current cap of 25% is not sufficient to indicate market power, since market shares at that level are unlikely to raise significant antitrust concerns. Removing the market share threshold would materially contribute to the UK Government's Innovation Strategy.

(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.

3.18 We do not have any comments.

(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.

3.19 Please see our comments above in relation to the market share threshold.

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.

(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?

3.20 Currently, there is no guidance/analysis available on the hardcore restrictions contained in Article 5 of the R&D BER. The HGL correctly point out at paragraph 128 that joint exploitation is not necessarily restrictive of competition and do not identify any meaningful R&D-related "by object" restriction. However, Article 5 of the R&D BER introduces hardcore restrictions. We are of the view that there should not be any R&D-related hardcore restrictions. At most, some restrictions could be excluded (by moving them to Article 6 of R&D BER). It is particularly baffling that the exemption for fixing prices in Article 5(c) does not cover joint exploitation by way of specialisation and requires the existence of a joint team or entrustment to a third party.

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?

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:

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(a) Would you expect your business to incur costs to understand the relevant legal framework and how it may impact your business (e.g., 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.

(b) Would you expect your business to incur costs to implement the relevant legal framework (e.g., 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.

3.21 We are not in a position to provide the information requested in this section. However, if the R&D BER is not retained, the costs of compliance for firms undertaking R&D would increase significantly, which would ultimately be to the detriment of the consumers and the UK Government's Innovation Strategy. This is because in the absence of the block exemption, every aspect of a company's R&D endeavours would be subject to self-assessment and subject to scrutiny by the CMA and, potentially, the UK courts.

4. 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.[7]

[7] Although the Horizontal Guidelines provide guidance on the application of EU competition law, in applying UK competition law the CMA must have regard to relevant EU decisions or statements that were in place ahead of the EU Exit Transition Period to the extent

4.1 We consider that the HGL in relation to the HBERs could be improved/clarified, as indicated in our comments above. We also consider that there are additional areas that could be clarified:

Potential competition

4.2 We would welcome more clarity and a sufficiently flexible approach regarding the meaning of "potential competitor". The 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. In our view, the ability to enter into the market in the short term needs to be evidence-based and not merely speculative. In deciding whether a firm is a potential competitor, 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. This would be particularly relevant where market impact/results are very difficult to predict, such as R&D (see comments above).

Commonality of costs

4.3 The current HGL rightly explain that commonality of costs is an important parameter and that "*significant commonality of costs achieved by a horizontal co-operation agreement can only allow the parties to more easily coordinate market prices and output where the parties have market power, the market characteristics are conducive to such coordination, the area of cooperation accounts for a high proportion of the parties' variable costs in a given market, and the parties combine their activities in the area of co-operation to a significant extent*" (paragraph 36 HGL). However, throughout the HGL, there are references to "high" or "significant" commonality of costs without any concrete guidance on what this actually means. For example, in paragraph 221, 50% of commonality of costs is considered to be high, whilst in the example at paragraph 222, 80% is considered as significant.

4.4 In practice, it is difficult to assess whether cost commonality is significant and this will usually be industry-specific e.g. 80% commonality of costs in a highly competitive market may not necessarily raise competition concerns. It would be useful to understand how the CMA assesses commonality of costs in practice.

(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, e.g., 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.

4.5 In our view the current HGL provide insufficient guidance on joint bidding. This is especially important given that the EU Commission and Member States in the European Union appear to be taking an increasingly hard line on joint bidding arrangements. For example in the *EFTA Ski Taxi* case, the EFTA Court ruled that joint bidding between actual or potential

that they are not withdrawn, as explained in the CMA's Guidance on the functions of the CMA after the end of the Transition Period (publishing.service.gov.uk) (see paragraphs 4.18-4.24 and 4.36).

competitors could be likened to a price-fixing arrangement and therefore should amount to a "by object" restriction of competition. In a recent article, a senior European Commission official (Cyril Ritter) concurred with this approach and arguably went further by stating that "*compared to a situation where the parties could have placed separate tenders, a joint tender eliminates choice and competition between the parties in all respects, including on price, quality, and the price-quality ratio*."[8] Guidelines on joint bidding adopted by the Danish competition authority in 2018 follow the same approach.[9] At this time, there is no case law available from the UK or EU Courts on this issue and it is not addressed in the current HGL. The CMA should not follow the aforementioned strict approach. This would be a real blow to business collaboration as it would make joint bidding between actual or potential competitors difficult to justify from a competition law perspective.

4.6 We are of the view that the HGL should expressly acknowledge that joint bidding arrangements where companies pull their resources together in order to submit an improved offer, even between actual or potential competitors, should not be deemed a 'by object' restriction. Rather they should be assessed against an effects standard. In our experience, economic theory, empirical research and comparative/past experience do not support the categorisation of joint bidding (even between actual or potential competitors) as a by object restriction of competition. To be clear, we are not advocating that bid-rigging arrangements should be treated as 'effects' restrictions. Bid-rigging arrangements where, for example, firms involved in a tender agree to quote identical prices or to rotate orders so as to drive the price up, are and should be treated as 'by object' restrictions under UK competition law since they do not involve companies pulling their resources together in order to submit a better offer. Conversely, joint bidding arrangements offer the potential for substantial economic benefits because competitors share risk, increase investments, pool knowhow and launch innovation faster.

4.7 Additionally, areas where further guidance is needed include:

- How to assess, in the specific context of joint bidding, whether companies are actual or potential competitors. The current guidance (paragraph 237 HGL[10]) is helpful in the sense that it seems to focus on the practical reality: only treating as competitors companies that could bid individually for a particular contract. However, further guidance is needed on, for example, how to assess whether a company has the ability to bid individually. The CMA could break this down further by explaining that 'ability to bid' means the ability to meet the tender specifications – in terms of having sufficient spare capacity, equipment, staff, regulatory permits, quality certifications, etc. We do not think that a company should be treated as a competitor where it does not have sufficient capacity to bid individually and could only acquire such capacity by assuming significant financial risk.

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[8] Ritter, Cyril, *Joint Tendering Under EU Competition Law* (February 1, 2017). Available at SSRN: https://ssrn.com/abstract=2909572 or http://dx.doi.org/10.2139/ssrn.2909572

[9] See Danish Guidelines, available at: https://www.en.kfst.dk/media/50765/050718_joint-bidding-guidelines.pdf

[10] Para 237 of the HGL explains that with regard to "*consortia arrangements that allow the companies involved to participate in projects that they would not be able to undertake individually*"*...the parties to the consortia arrangement are therefore not potential competitors for implementing the project*".

- Examples of efficiency gains that could make a joint bidding arrangement lawful and an explanation of how the companies can evidence those claims. The guidance should cover both (i) cost efficiencies; and (ii) qualitative efficiencies. Cost efficiencies would arise, e.g. where competitors bring different proprietary technologies that work together to reduce the costs involved in undertaking the project or where coming together allows efficiencies of scale. Qualitative efficiencies would, for example, be better products or services (than would have been possible absent the joint bid) or the faster launch of services.

- Practical steps to reduce the risk that a joint bid breaches competition law, for example: (i) how to manage the risks involved in information exchange between competitors at each stage of a project and (ii) what information should, in the interests of transparency, be provided to the purchasing body (e.g. the fact a bid is, in fact, a joint bid; the extent to which members may be participating in more than one consortium etc.)[11]

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

4.8 The HGL provide limited guidance on new forms of information exchange using digital means. We acknowledge that this is a complex field which is constantly subject to change. However, we invite the CMA to set out principles on how it will assess digital forms of exchange. In particular, the monitoring of competitor information, programmes that are self-learning and data pooling.

(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.

4.9 We would welcome guidance from the CMA on horizontal cooperation agreements that pursue sustainability goals. We have submitted our views on this in our response to the CMA's recent Call for Input on environmental sustainability the competition and consumer regimes. That response is attached as a separate Annex.

(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.

4.10 We have no further comments.

(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

[11] See for example paragraph 3.10 of the Irish Competition and Consumer Protection Commission's guidance on consortium bidding: TCA Report Template (ccpc.ie).

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should benefit from a block exemption, or at least be cove red 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.

4.11 We have no further comments.

5. Information Exchange

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?

(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?

(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.

5.1 The current HGL are useful but we would welcome some clarification as follows:

Restriction by object vs. restriction by effect

5.2 In regard to "by object" or "effect" restrictions paragraph 72 of the HGL states that it "w*ill take into account whether the information exchange, by its very nature, may possibly lead to a restriction of competition*". The following two paragraphs clarify that information exchange which by its "*very nature*" may lead to a restriction of competition is the exchange of information which concerns future conduct regarding prices and quantities.

5.3 It would be helpful for the HGL to clarify whether the principles set out in paragraph 74 HGL on "by object" restrictions could also apply to other types of information exchange. This clarification is important in our view, as it should be clear and self-evident why a practice is assumed to be harmful to competition. The HGL should address, in particular, whether past information exchange, not related to price or quantity, should be subject to an "effects assessment" rather than a "by object" assessment.

Form of distancing from information received

5.4 Paragraph 62 of the HGL provides that a firm will be presumed to have accepted "strategic information" and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data.

5.5 There are situations when the information disclosed unilaterally is clearly strategically relevant. This certainly applies to future prices or quantities. However, a company may receive a multitude of data either directly or indirectly from a competitor (without providing data itself). Arguably, there are many instances where it is unclear whether the information

received is strategic. In particular, the information may only have strategic value when put into context and may require an in-depth analysis. Alternatively, the same set of data may potentially be of value for one competitor, but not for another.

5.6 In such instances, the guidance set out in the HGL is arguably not practical and we submit that a "general presumption" is inappropriate.

6. R&D Agreements

HGL3: In relation to R&D agreements:

(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.

6.1 Please see our comments above in relation to R&D agreements.

7. Production Agreements

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.

7.1 Please see our comments above in relation to specialisation agreements.

8. Purchasing Agreements

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.

(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.

8.1 The HGL are useful but in our experience, further clarity would be helpful in a number of areas:

Legitimate joint purchasing

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8.2 It would be helpful for the HGL to clearly set out the conduct that falls within the Chapter I prohibition and whether that conduct is an "object" restriction. The dividing line between a buyer cartel and legitimate joint purchasing is not always clear from the HGL. For example, paragraph 205 of the HGL warns that agreements that involve the fixing of purchase prices can be a "by object" restriction of competition and that joint purchasing arrangements which serve as a tool to engage in price fixing, output limitation or market allocation are a disguised cartel. This seems straightforward.

8.3 However, the HGL also says that this does not apply where the parties to a joint purchasing agreement agree on the prices which the joint purchasing arrangement (for example, the buying group) may pay to its suppliers for the jointly purchased products (paragraph 206 HGL). In those circumstances, an assessment of the anti-competitive effects of the purchasing agreement is required. At first sight, there appears to be no clear distinction between the two types of arrangements. A buyer cartel and legitimate joint purchasing both involve an agreement on the purchase price. Further clarity on the distinction is required. We would like to see a clear statement in the HGL on how the CMA distinguishes legitimate joint purchasing from an outright buyer cartel.

8.4 We submit that the HGL should take the following approach:

(a) A "restriction by object" categorisation should be reserved only for discussions/agreements between competitors on purchase prices which have no connection whatsoever to any conceivable (joint) purchasing initiative. This would be, for example, a sham/blatant cartel as opposed to a (potentially) legitimate enterprise with a centre of gravity founded on legitimate collaboration on joint purchasing; and

(b) Where there is an attempt at genuine joint purchasing, it should be analysed "by effect" and subject to assessment under the HGL. Factors such as the safe harbour on market shares, avoiding foreclosure, the impact on the downstream market will be relevant to the effects assessment.

8.5 We consider that the key difference between legitimate joint purchasing and a purchasing cartel is that in the case of a purchasing cartel, there is no actual joint purchasing. For example, in the EU *Ethylene* cartel, the parties were simply interested in affecting purchase prices without intending to make joint purchases. We consider that, absent a legitimate reason (i.e. to enter into joint purchasing), a discussion on purchase prices is likely to amount to a cartel. In contrast, where parties come together to jointly buy large volumes from the supplier, this should be subject to an effects analysis. Genuine joint purchasing entails buyers combining their volume requirements in order to extract better terms from the supplier. This type of arrangement should not be viewed as a "by object" restriction and is clearly different to a scenario where buyers discuss or manipulate purchase prices without combining their purchase volumes.

8.6 A legitimate joint purchasing agreement where parties combine their volumes to extract a better price does not restrict competition by object. Where a buyer alliance includes an element of secrecy towards sellers about the buyer cooperation, this could be relevant to a finding that the arrangement may constitute a restriction "by object". In particular, deliberate

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concealment, covert behaviour or misrepresentation towards the sellers may be relevant to a finding of such restriction. However, we consider that it would be simplistic to conclude that an element of secrecy is determinative to finding a "by object" restriction. For example, if three small purchasers came together to jointly purchase a product and nominated one member of their group to conduct the negotiations with the supplier on behalf of the group but did not disclose the existence of the group to the seller, this should not automatically be characterised as a cartel without further investigation. We accept that in practice, such a scenario is unlikely to occur and does not seem commercially sensible but nonetheless it would not automatically be a cartel, despite the secrecy.

8.7 Pre-Brexit EU case law[12] confirms that a competition authority will always need to assess carefully whether conduct reveals "a sufficient degree of harm to competition" before labelling it a by object infringement. To do this, there should be "sufficiently solid and reliable experience" available showing that the conduct is commonly regarded as being anti-competitive. *Budapest Banks* confirms that an agreement that is capable of having pro-competitive effects (which is true of purchasing alliances) should not be considered restrictive by object. The EU court has also confirmed that the by object concept should be interpreted restrictively.[13] We note that in *Car Battery Recycling*, the EU Commission rejected the parties' argument (paragraph 234) that a cartel which led to lower prices did not reveal a sufficient degree of harm to competition. The Commission's view was that a horizontal agreement on purchasing price is an object restriction, a view upheld by the General Court in Case No. T-240/17 *Campine and Campine Recycling v Commission* (paragraph 247). Given this approach, clear guidance is needed on the distinction between a legitimate alliance and a cartel.

8.8 We agree with paragraph 204 in the current HGL which states that joint purchasing arrangements are less likely to give rise to competition concerns when the parties do not have market power on the selling market. In our experience, joint purchasing enables buyers to exert collective bargaining power, offering significant cost savings which may be passed on to consumers. For example, buyer groups can aggregate their individual members' purchases in order to obtain volume discounts for bulk purchases. Buyer groups which are able to secure better trading terms due to bulk purchases, but which do not have a significant influence on those specific terms, are unlikely to restrict competition among their suppliers. On the other hand, where buyer groups play a more active role e.g. by bargaining on behalf of their members, this would lead the group to having greater influence on the terms of supply. The greater the level of influence the buyer group has over the terms of supply, the greater the likelihood of its ability to impact on the competitive process. Increased bargaining power can generate significant pro-competitive benefits for consumers where there is downstream competition. This was recognised by the CMA's predecessor, the OFT, in its Short Form Opinion P&H/MAKRO [2010][14] (SFO), where it noted in section 5.1 that joint purchasing can (i) lower consumer prices through negotiating better terms of supply; (ii) generate upstream procompetitive effects, as the increased ability of purchasers to switch supplier - or

[12]Case C-228/18 *Budapest Bank*; paragraph 37.

[13]Case C-67/13 P Groupement des Cartes Bancaires

[14]P&H/Makro Joint Purchasing Agreement

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sponsor a new entrant - can intensify rivalry among suppliers; (iii) generate downstream pro-competitive effects, as smaller businesses joining a purchasing group might compete more effectively with their rivals, and (iv) increase innovation or investment. Cooperation between purchasers can solve purchaser coordination problems which result in underinvestment or reduced innovation; or suppliers' incentives to innovate could increase as they seek to improve their bargaining position when faced with a purchasing group.

8.9 The SFO also acknowledged (section 5.3) the potential competition concerns around joint purchasing. These include:

- Demand withholding, where downstream prices to final consumers increase as a result of reduced quantity (purchasers agree to withhold their joint demand upstream in order to generate greater profits by restricting quantity in the downstream (selling) market);
- Increased likelihood of tacit collusion in the downstream market among members of the purchasing group (for example, by facilitating detection of deviation);
- Reduced rivalry between members of the purchasing group (for example, reduced incentives to grow organically or to innovate), and
- Reduction of the competitive constraint from rival buyers by:
    - deliberately raising non-members' costs (for example, by agreeing exclusive contracts with important suppliers making it more difficult for rivals to secure alternative sources of supply at competitive terms); and
    - deterring entry/expansion (for example, by limiting access to upstream suppliers through the existence of a parallel network of similar purchasing agreements). Potential/existing competitors who are unable to join any of the existing purchasing groups may be deterred from entering/expanding downstream if worse supply terms are available on a standalone basis creating a so-called 'waterbed effect' (for example, by negotiating down their own prices from suppliers who then, in turn, push up the prices of their rivals).

8.10 However, as acknowledged in the SFO, in general, joint purchasing agreements are unlikely to have an adverse effect on competition or cause consumer harm when the parties have no downstream market power and/or when they are not close competitors.

Form of the cooperation

8.11 The degree of integration on the buyers' side is not strictly relevant to a finding of by object restriction or an effects assessment. The HGL seem to give some weight to the form of the cooperation, but do not state how "integrated" the joint purchasing arrangement needs to be. If all the buyer parties agree to set up a purchasing alliance and commit to purchase all their requirements through the alliance, would this be lawful? In our view, the degree of integration on the buyer side is not relevant to assessing whether the joint purchasing arrangement is legitimate but it could be relevant from a compliance perspective, for example

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to manage the risk of spillover outside of the joint purchasing and to manage information flows.

Market share thresholds

8.12 The current market share thresholds of 15% in the upstream and downstream markets are too low. An analogy can be made between the effects of joint purchasing and mergers - joint purchasing involves less coordination than a full merger - if no anti-competitive effects would arise from a merger, it is unlikely that any would arise under a joint purchasing agreement (cf. OFT's comments in its SFO).

9. Commercialisation Agreements

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, e.g., the assessment of joint bidding and non-indispensable consortia?

(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.

(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.

9.2 See our comments above in relation to joint bidding agreements.

10. Standardisation Agreements

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.

10.1 Section 7 of the HGL deals with both (i) standardisation agreements, whose primary objective is the definition of technical or quality requirements with which current or future products, production processes, services or methods and (ii) standard terms and conditions of sale or purchase elaborated by a trade association or competing companies. For the most part this section is helpful in providing clarity on the application of competition law for both these forms of horizontal cooperation.

10.2 However, in respect of standardisation agreements, the HGL has mostly focused on ensuring that the standardisation procedure is open to all, with information sharing actively encouraged between participants, and that the process is carried out in a fair and unrestrictive manner. Further guidance would be welcome in relation to standardisation agreements in circumstances where intellectual property rights (IPR), and patents in particular, are important, especially relating to the processes around fair, reasonable and non-discriminatory (FRAND) licensing of standard-essential patents (SEPs).

10.3 In addition, further guidance in relation to pre-pool co-ordination (i.e. determining which market players should participate in the standardisation pool) would be welcome.

FRAND licensing of SEPs

10.4 In the case of a standard involving IPR, the HGL requires a clear and balanced IPR policy. Among other things, such a policy requires participants wishing to have their IPR included in the standard to provide an irrevocable commitment to license their essential IPR to all third parties on FRAND terms. This will have to be combined with good faith disclosure early in the standard-setting procedure of participants' IPR that might be essential for the standard (paragraphs 284 to 286 of the HGL).

10.5 However, paragraph 288 of the HGL indicates that "*compliance with Article 101 by the standard setting organisation does not require the standard-setting organisation to verify whether licensing terms of participants fulfil the FRAND commitment*", and there is no requirement for IPR holders to review the relevance of their declaration at the time of adoption of the final standard (or on an ongoing basis), nor to indicate which aspects of the standard are relevant to their particular SEPs. Furthermore, there is no requirement for essentiality claims to be scrutinised by the standard-setting organisation. The consequence of these factors is that a standardisation agreement that complies with the requirements of the HGL may nonetheless have anti-competitive consequences.

10.6 It is, of course, emphasised in paragraph 291 of the HGL "*that nothing in these Guidelines prejudices the possibility for parties to resolve their disputes about the level of FRAND royalty rates by having recourse to the competent civil or commercial courts*." and disputes about the validity, essentiality and infringement of SEPs can (and have) been brought before

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the relevant courts. However, such proceedings are costly and time-consuming and therefore detract from the efficiencies brought about by the standardisation procedure.

10.7 Issues around the licensing and enforcement of SEPs were raised in the *European Commission: Communication from the Commission to the Institutions on setting out the EU approach to standard essential patents*.[15] This Communication set out a number of measures that might assist with resolving the identified issues. Consideration of the proposals within that Communication to identify any aspects that should be included in any future version of the HGL and/or that should be taken into consideration from a competition law perspective when working with such standardisation agreements would be useful.

10.8 Of the measures suggested, the following would, in our view, be of most assistance in improving the situation and promoting the pro-competitive benefits of standards and SEPs, while not disproportionately raising the costs or burdens involved in standard-setting:

(a) increasing transparency of the SEP databases held by standard-setting organisations;

(b) more up-to-date and precise declarations - in particular it should be a requirement that rightholders review the relevance of their SEP declarations once the final standard has been adopted and identify at least which section of the standard is relevant to the SEP;

(c) the creation of patent pools and licensing platforms to facilitate SEP licensing should be encouraged - and clarification of the requirements to enable this to be done within the bounds of competition law would be helpful; and

(d) steps should be taken to make the enforcement environment for SEPs more predictable.

10.9 Finally, further guidance on the interplay between Article 101/Chapter I prohibition and 102/Chapter II prohibition in this context would be helpful. The HGL are stated to be "*without prejudice to the possible parallel application of Article 102 of the TFEU to horizontal co-operation agreements*" (paragraph 16) - and it is interesting that enforcement of the FRAND obligations of SEP holders have to date relied on arguments of abuse of dominance.

Pre-pool coordination for the standardisation procedure

10.10 Paragraph 281 of the HGL provides that, "*to ensure unrestricted participation, the rules of the standard-setting organisation would need to guarantee that all competitors in the market or markets affected by the standard can participate in the process leading to the selection of the standard*." However, pre-pool co-ordination (i.e. determining which market players should participate in the standardisation pool) is in practice vital to ensuring there is an effective standardisation procedure. Several participants could be involved in a patent pool. Each participant will have its own IP portfolio, business needs, target markets and business models. It can be difficult for a patent pool to align these different positions and, if the aims

[15] COM (2017) 712 final, 29 November 2017; see https://ec.europa.eu/docsroom/documents/26583/attachments/1/translations/en/renditions/native

of the patent pool are not aligned and/or the aims of the participants conflict, it could be difficult for the standardisation procedure to operate and set the appropriate standard in an efficient manner.

10.11 The potential need for a more limited pool is recognised in paragraph 295 HGL, and its footnote 2:

"*Also, if in the absence of a limitation on the number of participants it would not have been possible to adopt the standard, the agreement would not be likely to lead to any restrictive effect on competition under Article 101(1); [footnote 2: Or if the adoption of the standard would have been heavily delayed by an inefficient process, any initial restriction could be outweighed by efficiencies to be considered under Article 101(3)]*"

and in paragraph 316, citing Commission Decision in Case IV/31.458, *X/Open Group*, paragraph 45 and Commission Decision in Case 39.416, *Ship Classification*, paragraph 36:

"*Participation in standard-setting should normally be open to all competitors in the market or markets affected by the standard unless the parties demonstrate significant inefficiencies of such participation or recognised procedures are foreseen for the collective representation of interests*" (our emphasis).

However, the carve-out in paragraph 316 and Examples 7 and 8 within section 7 suggest that pre-pool coordination will only be legitimate in very limited circumstances.

10.12 Therefore, CMA guidance would be helpful on whether pre-pool coordination would always be anti-competitive. If not, examples of situations when pre-pool coordination is legitimate, or the type of coordination that would be legitimate, would be welcome (as would guidance on when it would be anti-competitive to carry out pre-pool coordination).

11. 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?

11.1 We have no comments.

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January 2022

ANNEX

Response to call for input on: Environmental Sustainability and the Competition and Consumer Law Regimes

This paper responds to the UK Competition and Markets Authority ("CMA") Call for Inputs[1] ("CFI") relating to competition law enforcement, merger control and consumer protection.

Section A: Competition Law Enforcement

1. Introduction

1.1 We appreciate the opportunity to respond to this consultation on how the UK competition regime can better support the UK's Net Zero and sustainability goals.

1.2 The timing is good. As is apparent from the COP26 meetings, the defining question for the "**decisive decade**" is how the various pledges and targets can be achieved in practice.[2]

1.3 We acknowledge that the CMA has begun work in this area, aligned with its strategic objective to support the UK's transition to a low carbon economy. This includes CMA guidance on misleading environmental claims on products sold to consumers, the market study into electric vehicle charging in the UK and the guidance on sustainability agreements and competition law.

1.4 We concur with the view that regulation and government policy are important means to achieve the UK's Net Zero and sustainability goals. But we strongly believe that the private sector must be allowed to play a proper role in developing more sustainable supply chains and more environmentally-friendly products and services. There are two reasons for this:

(a) Regulation has a number of imperfections. It is slow to materialize (perhaps too late) and can be reduced to a 'lowest common denominator' by political compromise. National rules will obviously have a limited reach (inadequate to address a global problem) and might only divert the problem elsewhere).[3]

(b) Unilateral action might preferred by antitrust regulators but may not be effective. There are already many internal and external drivers for an individual company to engage in sustainable business practices. Sustainability is a proven driver of growth and can protect companies from the direct impact of climate change on their operations, e.g. supply chain disruption, the need to change technology and litigation risk. But as companies commit to more ambitious targets and find themselves being

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[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1021364/CFI_-_sustainability_advice_.pdf

[2] *See* e.g. https://www.iisd.org/articles/global-climate-change-governance-search-effectiveness-and-universality

[3] See observations made in the context of the European added value assessment relating to "An EU legal framework to halt and reverse EU-driven global deforestation": "a risk of diverting non-certified production away from the EU market to others that do not require deforestation-free certification, could undermine the idea of a positive impact that this measure could have on FRC-producing and consuming countries around the world." https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654174/EPRS_STU(2020)654174_EN.pdf

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held to account (quite legitimately) by government, shareholders, consumers, employees and the finance community, there is a palpable realisation that they will need to act with competitors to achieve meaningful change on the scale and in the timeframe needed. Even large and highly efficient firms may lack sufficient scale to transform or create markets. Pioneers may fear isolation if they act first but are unable to recover their additional costs. We are aware that corporate sustainability teams may face challenges in persuading commercial colleagues to commit to more ambitious targets which impact bottom lines through higher costs or the loss of more profitable business in the short-term.

1.5 So the central theme underpinning this submission is that joint initiatives by industry peers must be allowed to fill the gap that regulation and unilateral action are unable to close.[4] Antitrust agencies have a role to play in facilitating this without needing to overhaul their toolbox or subvert the established consumer welfare standard.

1.6 The logic and efficiency of stimulating private sector solutions was recognized by the CMA's predecessor, the Office of Fair Trading ("OFT") more than a decade ago in its 2010 contribution to the OECD roundtable on Horizontal Agreements in the Environmental Context where the OFT acknowledged that "*agreements between firms may be particularly appealing to policy makers as they may help achieve policy goals without the requirement of government legislation or explicit regulation. Such agreements have the potential of allowing firms to pursue actions that secure beneficial environmental outcomes in as efficient a way as possible*".[5]

1.7 In response to **Question 25(a) of the CFI**, we are certainly aware of situations where competition law (not specifically the Competition Act 1998 ("CA98")) has played a part in frustrating potential initiatives that would have involved peer collaboration and supported the UK's Net Zero and sustainability goals.

1.8 In our experience it is the spectre of 'by object' categorisation which most often results in projects being unduly shelved. In fact, we actually think that the recent EU case law provides a solid basis for presuming that genuine sustainability projects should be assessed against an effects standard. Following Brexit, we think the CMA has an opportunity to make this clear. Annex 1 outlines the kinds of agreements and more specific scenarios in respect of which guidance would be particularly welcome. Two categories of conduct are quickly identifiable as candidates for clear characterisation as suitable for assessment against an effects standard: agreements that seek to bring about decisive change (e.g. mandatory standards) and arrangements that are designed to create new markets - such as offtake guarantees to ignite supplier investment in new infrastructure etc..

1.9 Naturally, we understand that the CMA must take care to ensure that sustainability does not become a cover for cartel conduct. Whilst sustainability can be an important differentiator in many industries, we do not see a risk of sustainability becoming a smokescreen for illegal

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[4] Plus, regulation may in any event necessitate industry collective action. Examples include impending national and EU legislation introducing mandatory supplier due diligence requirements - which may require joint auditing and information sharing between peers to work in practice.

[5] See "Horizontal Agreements in the Environmental Context" www.oecd.org/competition/cartels/49139867.pdf

behaviour because the existing rules are sufficiently robust to address this. This has been illustrated by recent enforcement directed at agreements designed to impede sustainable outcomes (which one might refer to as 'green blocking' rather than 'greenwashing' which is more concerned with exaggerating green credentials unilaterally). However, the legal boundaries are critical. That is why we encourage the CMA to explain the circumstances in which a joint agreement to phase out environmentally damaging products (and similar) should not be characterised as a hard-core collective boycott. The 'green blocking' cases where companies are alleged to have agreed to 'go no further' to achieve sustainable outcomes also underline the need for clear guidance on sustainability standard-setting. Indeed, in manufacturing, a tech standard will often be one that all seek to meet (to allow interoperability) whereas in relation to sustainability, recent cases suggest that this kind of coalescence could be problematic.

1.10 In response to **Question 25(b) of the CFI**, we think that new CA98 guidance on sustainability cooperation would be extremely helpful. In practice, some of the methodology (e.g. low commonality of cost/measuring appreciability) could have read-across to other ESG goals. We have suggested particular scenarios/cases studies in Annex 2.

1.11 In summary, this submission explains why it would be really helpful for business to have clear guidance on:

(a) **When sustainability agreements will not fall within Chapter I** or will qualify for an effects analysis and not have an appreciable effect on competition (see **Section 2** below).

(b) **When standards adopted in pursuit of sustainability goals will fall outside Chapter I**. Standards can be used to drive more environmentally accountable or ethical outcomes at various levels of the supply chain. The current EU guidance on when standardisation would fall outside Article 101(1) is helpful but tailored guidance is needed urgently because (i) current guidance seems more concerned with technological standards developed by the manufacturers (whereas environmental standards may actually be a collectively applied standard for suppliers to manufacturers) and (ii) decisive industry action is likely to require mandatory standardisation - e.g. moratoria to prevent environmental degradation; design requirements to improve recyclability (see **Section 3** below).

(c) **The wide range of sustainability-related benefits that are relevant** under s.9 CA98. It is key for business and their advisers to be able to identify relevant benefits and understand the kind of evidence or quantification that is needed (if indeed quantification is needed at all). We welcome the clarification in the recent EU Policy Brief[6] that qualitative benefits will be recognised, including improvements which do not necessarily mean a cost-saving for consumers, as well as more sustainable production processes which may not change the physical attributes of the product. Again this is not a new concept for the CMA. The OFT acknowledged in its 2010

[6] Competition Policy Brief 1/2021 - Policy in Support of Europe's Green Ambition Competition policy brief. 2021-01 September 2021 - Publications Office of the EU (europa.eu)

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OECD that 'rainforest friendly' coffee or biodegradability could provide benefits to buyers where consumers place a value on this.[7] See **Section 4**.

(d) **How to address 'out of market' benefits - especially those benefiting wider society**. This is obviously a critical area for many sustainability agreements which seek to address negative externalities. We welcome the explanation in the recent EU Policy Brief that the Commission may be prepared to take into account benefits to society as a whole in certain circumstance. We encourage the CMA to provide clarity in this area. In its 2010 submission, the OFT recognized some logic in taking such benefits into account. It noted that this would mean that the "*totality of benefits of an agreement to all customers are taken into account*" and that this would "*reduce the likelihood of competition policy being a block on potentially government sponsored initiatives and would ensure consistency with standard cost-benefit analysis*". In the context of its review of a UK-specific block exemption for certain public transport ticketing schemes, it seems that the OFT considered that "*in addition to the economic efficiencies, ticketing schemes can lead to indirect benefits for other consumers, such as road users by, for example, increasing the efficiency of services which results in reduced congestion, noise and air pollution*". The OFT explained that, "... *where environmental benefits coincide with, or form an integral part of, economic benefits, they are likely to be capable of meeting the exception criteria*". The need to take wider benefits into account is covered in more detail in **Section 5** below.

1.12 Finally, we applaud the CMA's ambition to play a global leadership role in this area.

(a) Given that government policies in this field are, and should be, fast-moving, they will frequently be introduced by flexible policy instruments rather than by legislative compulsion. Corporate action conforming to government policies, at least where these are clear and precise, should benefit from a state action defence even in the absence of actual compulsion. The extent of the defence, which need not necessarily be absolute, should at least be sufficient to ensure that no resulting coordination can be considered a 'by object' infringement. The CMA could lead the thinking in this area.

(b) There is a need for international leadership by the CMA, particularly because of the risk of a fragmented legal approach to a topic which is by its nature of wide geographic significance. It is not satisfactory to wait until there are cases and precedents before acting. Lack of certainty means that positive arrangements do not get started.

(c) CMA policies and procedures could make a major difference here:

(i) The CMA could explain clearly the basis on which it intends to prioritise (or not) cases with a sustainability angle. For example, businesses would welcome any comfort that the CMA can provide that it would not prioritise cases where: (a) the primary aim of the collaboration is to pursue environmental goals, which contribute to the public interest or align to the UK or international

[7] See footnote 4, p. 102.

governmental sustainability goals; (b) the collaboration is necessary to achieve material progress against those goals or achieve those public interest benefits; and (c) the collaboration is transparent and open to interested competitors. By reducing the enforcement risk of these initiatives, the guidance may limit the chilling effect that competition law may currently have on the types of potential activities described above.

(ii) The Greek Competition Commission has discussed the possibility of the creation of a 'sustainability sandbox', which would enable firms to notify business proposals for sustainable development. The CMA could explore this concept, just as the FCA created a regulatory sandbox[8]. This could allow the CMA to certify that there are no grounds for proceeding under the CA98. We think this would provide a useful basis for increasing the guidance available in this difficult but important area.

2. Clearer guidance is needed on when sustainability agreements will not fall within the Chapter I prohibition or have no appreciable effect on competition

No individual obligations on the parties to the agreement

2.1 Guidelines should clarify that, where there is no precise individual obligation placed on the parties, or where the parties are only loosely committed to contributing to the attainment of a sector-wide environmental target, the agreement is not caught by competition law. That is because of the discretion that is left to the parties as regards the means technically and economically available to attain the joint objective. It would however be useful to explain what is meant by "loosely" and what the nature of the target needs to be - e.g. a sectoral or regional aim which is wider than any relevant market?

2.2 Guidelines might reference and identify the key element of illustrative cases: *ACEA, JAMA/KAMA*[9] and *CEMEP*[10] where the Commission concluded that horizontal commitments agreed by a sector did not fall within Article 101.

An effects analysis is typically appropriate

2.3 Genuine sustainability agreement (such as those outlined in Annex 1) should not in our view qualify for a by object classification. It would be extremely useful for the CMA to provide business with some reassurance that their agreements will be looked at in their full context and that the 'by object' classification will only be applied in 'obvious' cases. Even with regard to EU jurisprudence, we think that there are often good reasons to adopt an effects analysis:

[8] https://www.fca.org.uk/firms/innovation/regulatory-sandbox
[9] Case COMP/37.634 JAMA and Case COMP/37.612 KAMA (1999), Commission Press Release IP/99/922, 1 December 1999
[10] CEMEP (2000), Commission Press Release IP/00/508, 23 May 2000.

(a) The notion of 'anticompetitive by object' must be interpreted restrictively and applied only to certain types of coordination between undertakings which reveals in itself a sufficient degree of harm to competition[11]

(b) Sustainability initiatives will have a plausible purpose other than the restriction of competition[12]

(c) Initiatives will have many aspects and be nuanced, meaning that there is often no reliable experience (reflected in EU case law) about its anticompetitive nature[13]

2.4 For the reasons above, we encourage the CMA to clarify that common sustainability commitments will not be viewed as by object and can therefore benefit more easily from s.9 exemption. For example, this may include scenarios where scientific consensus calls for certain action in order to meet the Paris Agreement goals, such as hypothetical commitments not to finance fossil fuels or agreements to buy only from suppliers who do not engage in deforestation.

2.5 We encourage the CMA to clarify that these kinds of agreement would not be viewed as hard-core or restrictive by object, but will instead be assessed holistically taking into account their purpose and effect, including wider benefits to society. We think that these kinds of agreements can be distinguished from more straightforward collective boycotts which are unequivocally about competitors agreeing on a course of conduct that will shield them from competition from the boycotted party. We do not think that the CMA would be departing from the case law if it were to recognise that joint purchasing in the sustainability context will be subject to an effects analysis.

An analysis may show that there is no appreciable increase in costs (or commonality of costs) and/or a low likelihood of any appreciable pass-on to consumers

2.6 Guidance is needed on when sustainability efforts will not have an appreciable effect on competition. Market share thresholds are unlikely to be helpful given that sustainability agreements usually require scale and therefore widespread take-up.

2.7 Instead, it would be helpful to focus on when an increase in cost would not be expected to raise concerns about a price increase whether because of its size or because highly competitive conditions in the upstream market mean that any price increase would be unlikely to be passed on to consumers.

2.8 Sustainability aims/targets are typically complemented by other joint initiatives, e.g., investment in suppliers/payment of incentives to farmers etc.. It would therefore be very helpful for the CMA to cover these sorts of arrangements and explain when such cooperation will not have an appreciable impact on competition because of, say, a low degree of

[11] European Court of Justice (Third Chamber), C-67/13 P - *CB v Commission ("Cartes Bancaires")*, 11 September 2014, EU:C:2014:2204, para. 58.
[12] European Court of Justice (Fourth Chamber), C-307/18, *Generics (UK) Ltd and Others v Competition and Markets Authority*, 30 January 2020, EU:C:2020:52, paras 87-90.
[13] European Court of Justice (Fifth Chamber), C-228/18, *Gazdasagi Versenyhivatal v Budapest Bank Nyrt. and Others ("Budapest Bank")*, 2 April 2020, EU:C:2020:265, para 76.

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commonality of costs[14] or why a consolidated fund should be considered for making these sorts of payments as opposed to direct payments from competitors to suppliers (if that were considered necessary by the CMA).

Legitimate public interest considerations may remove sustainability agreements from the scope of the Chapter I prohibition

2.9 Established European case law leaves no doubt that legitimate public interest considerations may exclude the application of Article 101 TFEU.

2.10 We appreciate the challenge of translating the *Wouters/Meca-Medina*[15] case law into guidance for a potentially indefinite variety of case scenarios, and the CMA would understandably refrain from a blanket exemption of all such agreements from Chapter I without further caveat, or limiting principles. But we think there is merit in exploring this further.

2.11 After all, Advocate General Mazak's opinion in *Pierre Fabre*[16] was that 'private voluntary measures' may fall outside the scope of Article 101(1) pursuant to the *Wouters* doctrine, provided the limitations imposed are appropriate in the light of a legitimate objective sought and do not go beyond what is necessary in accordance with the principle of proportionality. The Advocate General added that the legitimate objective sought must be of a public law nature and therefore be aimed at protecting a public good. However, it would seem reasonable for *Wouters* to be invoked where firms enter into agreements pursuant to a clearly articulated public policy.

2.12 As Samantha Mobley argued in her recent article[17], we think the CMA could consider the idea of giving guidance to business that agreements between competitors which further the UK's ten point climate change plan fall outside the Chapter I prohibition by virtue of the overall context and objective of such agreements.

2.13 In any event, even under a more restrictive interpretation, we do not think that a business organisation such as one under a UN charter whose remit is to combat climate change should be treated any less favourably that the Dutch bar or a 'mere' sporting organisation such as the IOC or International Skating Union.

2.14 Overall, we believe that the current consultation presents the CMA with an opportunity to make the connection between Wouters and sustainability goals at time when it does not need to coordinate its approach with EU Member States and the European Commission. At the very least, CMA should reference this body of case law in its guidance, even if only to indicate that it will be taken into account as an element of a case by case analysis.

[14] See for example the arguments contain in this Opinion: https://api.fairwear.org/wp-content/uploads/2016/06/OpiniontoFWF-TheApplicationofEUCompetitionLawtoFWFLivingWageStandardfinal1.pdf

[15] Case C-309/99 - Wouters and others, Judgment of 19 February 2002; Case C-519/04P - Meca-Medina and Majcen v Commission, Judgment of the Court of 18 July 2006.

[16] Case C-439/09 EU:C:2011:113, para 35 of his opinion.

[17] Samantha Mobley, "Can the UK Competition and Markets Authority Save the Planet?" https://www.linkedin.com/pulse/can-uk-competition-markets-authority-save-planet-samantha-mobley/

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3. Clearer guidance is needed on when standards adopted for sustainability goals will fall outside the Chapter I prohibition

3.1 Standards can certainly be used to drive more environmentally accountable or ethical outcomes at various levels of the supply chain. The 'safe harbour' in current EU guidance is of some use. However, it is more tailored to technology/manufacturing than, say, a standard for more sustainable production applied upstream. Consequently, guidance on how to assess both voluntary and mandatory standards in a sustainability context is really needed.

3.2 The OFT provides a good example of an effective sustainability-related standard in its response to the OECD. The hypothetical scenario describes a voluntary initiative to make yogurt pots from a recyclable plastic. Even though the manufacturers and importers represented 70 per cent of yogurt sales within the relevant market, and the OFT considered that it could amount to a de facto industry standard, its conclusion was that the agreement would not give rise to appreciable restrictive effects on competition.

3.3 It would be useful if the CMA could use a scenario like this to provide further clarity. In particular:

(a) More clarity is needed on where the boundary lies between a voluntary and a mandatory standard. We do not think it is correct to treat a popular standard which has been voluntarily adopted as a *de facto* binding industry standard. In any event, in the yoghurt scenario, how relevant is it that the standard is voluntary? Would a different conclusion have been reached, had it been mandatory (even though the effect is the same)? Is the role of the Member State in encouraging recycling but not mandating the standard relevant? It would also be helpful if the CMA could explain its approach to standards that are only mandatory for those willing to participate. Would this sort of arrangement be outside Article 101(1) subject to a market coverage threshold?

(b) The OFT does not conclude that the standard would fall outside of Article 101 entirely. Why is that and is it significant that the manufacturers would still be able to compete on "price, quality, nutritional content". This could be important if a standard related to commodities/non- differentiated products.

(c) Guidance should explain how the 'unrestricted participation', 'transparency' and access requirements (in paras 281 and 282 of the EU Horizontal Guidelines) should be met in markets with multiple levels - from farmer/processor to trader, retailer and end customer. That is particularly relevant in the sustainability context where standards may be developed by one level of the supply chain to be 'applied' to upstream firms without actually leading to any new product features, e.g. a standard which a company attaches to its purchases because they are grown or not grown in a certain way. The guidance should refer to the theory of harm, e.g. foreclosure or price increase/quality reduction etc. Intuitively, an agreement which is made or socialised across multiple levels in the market seems less likely to raise competition issues. That seems to be the case in the yoghurt example but the CMA should clarify whether this is a relevant factor.

4. A wide range of benefits are relevant under s.9 CA98, with no need for mathematical weighing

4.1 The Commission's current position on what qualifies as quality or innovation under the consumer welfare standard risks being insufficient to capture all relevant environmental and social benefits in that it tends to focus narrowly on what can be described as product functionality improvements.

4.2 The wording of s.9 CA98 does not warrant this restrictive reading. It looks at whether agreements contribute to "improving the production or distribution of goods or to promoting technical or economic progress". Therefore qualifying emission reductions as production-improving and biodiversity protection as contributing to economic progress needs no stretching of the letter of the law. Accordingly, many lawyers and economists have argued that the consumer welfare standard is "perfectly capable of integrating sustainability benefits.[18]

4.3 In any event, the Commission has in the past acknowledged a wide range of environmental benefits when carrying out competition law assessments[19] and we welcome the clarification in the EU Policy Brief that sustainability benefits can be assessed as qualitative efficiencies, which form part of the assessment under Article 101(3) TFEU. We consider that the CMA could take a similar approach and explicitly recognise the following as benefits:

(a) increased quality or longevity of a product which increases the value that consumers attributes to that product

(b) more sustainable methods - applied at any level of the supply chain from farming/production to distribution, collection and recycling - which consumers appreciate even though there is no direct or immediately noticeable product quality

4.4 The OFT itself recognised in its 2010 OECD response that 'rainforest friendly' coffee or biodegradability could provide benefits to buyers where consumers place a value on this.[20]

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[18] S. Holmes, Climate change, sustainability, and competition law, *Journal of Antitrust Enforcement*, Vol. 8, Issue 2, July 2020, pp. 354- 405, at pp. 362-365 and 372; M. Dolmans, Sustainable Competition Policy, *Competition Law and Policy Debate*, Vol. 5, Issue 4 and Vol. 6, Issue 1, March 2020; G. Murray, Antitrust and sustainability: globally warming up to be a hot topic?, Kluwer Competition Law Blog, 18 October 2019, http://competitionlawblog.kluwercompetitionlaw.com/2019/10/18/antitrust-and-sustainability-globally-warming-up-to-be-a- hot-topic/?print=print; M. Ristaniemi and M. Wasastjerna, Sustainability and competition: Unlocking the potential, in Sustainability and competition law, *Concurrences* no 4-2020, art. no 97390, pp. 26-65, at p. 53; C. A. Volpin, Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves), CPI *Antitrust Chronicle*, Summer 2020, 8; S. Delarue and M. Walker, United Kingdom, in S. Holmes, D. Middelschulte, M. Snoep (n 4); A. Miazad, Prosocial Antitrust, p. 22, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802194.

[19] The Commission relied on a reduction in air pollution and energy use, as well as the prospect of the development of lead-free materials. Philips-Osram (Commission Decision of 21 December 1994 (IV/34.252 - Philips-Osram) OJ [1994] L 378/37, paras 25-27); and see EACEM, XXVIIIth Report on Competition Policy (1998), p 15; it acknowledged a reduction in the use of raw materials and the volume of waste products, together with the environmental benefits of eliminating the transport of a particular hazardous substance. Exxon/Shell (OJ 1992 L37/16, para 38. Commission Decision of 18 May 1994 (IV/33.640 - Exxon/Shell) OJ [1994] L 144/20, paras 76-68 and 71). In Ford/Volkswagen, the development of a product with reduced or eliminated environmentally hazardous materials, low emissions and fuel consumption, and increased recyclability was viewed as beneficial. Commission Decision of 23 December 1992 (IV/33.814 - Ford Volkswagen) OJ[1993], OJ L 20/14, para. 26.

[20] See Horizontal Agreements in the Environmental Context (oecd.org), p. 97.

That said, we do not consider consumer willingness to be the only or best test of 'benefits' for the following reasons:

(a) Willingness to pay studies take no account of long-term improvements/efficiencies. The introduction of more sustainable practices and technologies frequently comes with more or less temporary cost increases that, especially where the sustainability gain is substantial, businesses may be forced to pass on to consumers until the initial investment has paid itself off.

(b) Even where there is a degree of willingness to pay, cooperation may still be necessary to get the market as a whole to move to more sustainable production/consumption - and in the time scale needed in the light of the growing climate crisis.

As a result, rather than focus exclusively on the stated preferences of current consumers, the CMA should adopt a more long-term approach. At the very least, the CMA should adapt the 'willingness test' to include cases where the parties anticipate and project that consumers will value the improvements in the future. At times, it may be necessary to assess the genuine interest of consumers by taking into account behavioral biases, such as the irrationality of preferring small immediate benefits (such as a small reduction in the price) above much larger but later benefits, such as no depletion of a certain resource.

Also, the CMA should accept evidence that consumers appreciate the sustainability of a product in several forms (such as attitudinal surveys, voting patterns etc.) especially because "appreciation" may not translate (at least not in the short term) into a willingness to pay a higher price.

The 'net effect'/'no worse off' standard is inappropriate

4.5 The debate in this area, at least at EU level, is further clouded by para 85 of the Article 101(3) Guidelines which says that "the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement".

4.6 We are not aware of any legal requirement for a net benefit. The Horizontal Guidelines reference *Consten v Grundig*[21], but adopt a very wide interpretation. The Court of Justice only stated in that judgment that the improvement within the meaning of the first condition of Article 101(3) must show appreciable objective advantages of such a character to compensate for the disadvantages which they cause in the field of competition. The Court did not specify that there must be net advantages at the level of consumers, nor that the consumers in each affected market must be assessed in isolation.

4.7 We also highlight that the text of Article 101.3 / s.9 CA98 refers to the need for a "fair share" for consumers not that consumers are "no worse off". In any event, the latter may be the incorrect standard for assessing agreements that have widespread environmental effects such as to reduce noxious emissions. Whereas the "no worse off standard" is concerned with ensuring that private firms pass on enough of a benefit to consumers that are suffering the harm of reduced competition caused by their agreement, this concern does not arise in

[21] Consten v Grundig [1966] ECLI:EU:C:1966:41

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relation to environmental benefits which are by their nature enjoyed by all citizens and cannot be artificially reserved to collaborating firms.

4.8 While there may be instances where putting an economic value on a benefit may be useful in carrying out a proportionality analysis, this should not restrict the application of Article 101(3)/s.9 CA98. The Commission has itself acknowledged that Article 101(3) balancing is "not restricted to a mathematical exercise of clearly identified price/profits"[22] and it would be extremely useful for this to be reflected in the CMA guidance.

5. Updated guidance is needed on the markets in which the efficiencies may be realised (for self-assessment)

5.1 Environmental agreements are clearly intended to have significant widespread positive effects. The lack of clarity (and even logic) about which markets/consumers can be taken into consideration is preventing companies from pursuing laudable goals.

Narrow approach to 'out of market' efficiencies needs to be updated

5.2 The EU Exemption Guidelines explain in paragraph 43 that the assessment of efficiencies flowing from restrictive agreements must be made in the relevant markets to which the agreement relates. It goes on to say that "[n]negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market. However, where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same".

5.3 This appears to be an unduly narrow approach in the light of the EU jurisprudence:

(a) The Court of First Instance pointed out in *Compagnie Générale Maritime* that: "[f]or the purposes of examining the merits of the Commission's findings as to the various requirements of Article 85(3) of the Treaty and Article 5 of Regulation No 1017/68, regard should naturally be had to the advantages arising from the agreement in question, not only for the relevant market, ..., but also, in appropriate cases, for every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement. Both Article 5 of Regulation No 1017/68 and Article 85(3) of the Treaty envisage exemption in favour of, amongst others, agreements which contribute to promoting technical or economic progress, without requiring a specific link with the relevant market".[23]

(b) In *Mastercard*, the Court acknowledged that "the appreciable objective advantages to which the first condition of Article 81(3) EC relates may arise not only for the

[22] Comments made by Maria Jaspers at: https://www.ucl.ac.uk/laws/events/2019/oct/conference-sustainability-and-competition-policy-bridging-two-worlds-enable-fairer

[23] Compagnie générale maritime and Others v Commission of the European Communities [2002] ECLI:EU:T:2002:50

relevant market but also for every other market on which the agreement in question might have beneficial effects".[24]

(c) This of course fits with the approach in *Groupement Cartes Bancaires*, where the Court noted that "[i]n order to assess whether coordination between undertakings is by nature harmful to the proper functioning of normal competition, it is necessary, ..., to take into consideration all relevant aspects - having regard, in particular, to the nature of the services at issue, as well as the real conditions of the functioning and structure of the markets - of the economic or legal context in which that coordination takes place, it being immaterial whether or not such an aspect relates to the relevant market.".[25]

5.4 It makes sense to take this wider view of relevant consumers/benefits given that Article 101(3) /s.9 CA98 not only relates to improvements in the production or distribution of goods but may equally concern agreements relating much more generally to technical or economic progress where there may be no easily identifiable group of purchasers.

5.5 Environmental benefits fall within the first condition and these often benefit society as a whole not just a narrow group of purchasers. The Commission has recognized this—the clearest example being its *CECED*[26] decision where it explicitly acknowledged that it was taking into account the 'collective environmental benefits' of the agreement: the 'environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers'.

5.6 This is consistent with the recognition in paragraph 85 of the Commission's 2004 Exemption Guidelines that "society as a whole benefits where the efficiencies lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources".

5.7 As a result, we call for recognition that efficiencies impacting other markets and indeed the common good/society as a whole can be considered. We appreciate that competition authorities like the CMA may prefer some limiting principles. In *Star Alliance*, the Commission took into account 'out of market efficiencies' which it said was justified by the facts of that case such as its finding of a 'considerable commonality' between consumers on different markets.[27]

5.8 However, we would argue that consumers do not need to be "substantially" the same (as is clear from the Commission's approach in *CECED*). Instead, we think that an overlap should suffice. It should not be necessary for the 'group of customers affected by the restriction and benefiting from the efficiency gains to be 'substantially the same' so long as they at least overlap - i.e. those affected by the restriction only need to be a subset of those enjoying the benefits.

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[24] MasterCard, Inc. and Others v European Commission [2012] ECLI:EU:T:2012:260
[25] Groupement des cartes bancaires (CB) v European Commission [2014] ECLI:EU:C:2014:2204
[26] Commission decision of 24 January 1999, (Case IV.F.1/36.718 CECED) OJ [2000] L 187/47, p. 47-54
[27] https://ec.europa.eu/competition/antitrust/cases/dec_docs/39595/39595_3012_4.pdf (para 58 and footnote 43)

5.9 It seems to us that this is the proposal in the EU Policy Brief. The Brief is, however, unclear in when the wider societal benefits that can be attributed to the affected consumers will be regarded as sufficient. We think that, when it comes to environmental benefits affecting the atmosphere, there is a strong case for this condition to be fulfilled. Although currently on appeal, the recent Hague District Court judgment[28] requiring an energy company to cut its "global" emissions (on the basis that they had an impact on the human rights of Dutch coastal communities due to the threat of rising sea waters) also suggests that a link might be made between global initiatives and local communities. The various COP26 pledges by national governments but relating, in practice, to overseas forests and manufacturing processes also show that interconnectedness.

5.10 We encourage the CMA to act boldly at the outset of this decade of action. A more conservative approach would be to explain in guidance that out of market benefits resulting from agreements between competitors which further the UK's ten point climate change plan will be considered as part of the s.9 assessment.

5.11 We note that Austrian competition[29] law now makes it clear that customers are deemed to have received a "fair share" if the benefits resulting from the improvement of the production or distribution of goods or the promotion of technical or economic progress, "make an essential contribution to an ecologically sustainable and climate neutral economy".

5.12 The CMA could also take a pragmatic approach and recognize that, where the wider benefits are so large compared to, say, a small increase in price etc., there will again be a compelling case for exemption without the need for a full-blown mathematical exercise. See Example 4 in the ACM guidelines which describe a category of agreements that will only lead to a limited price increase or a limited reduction in choices for buyers, while, at the same time, allowing users to reap large benefits in return.[30]

6. Evaluating quantitative benefits

6.1 It is clear - e.g. from the [Article] 81(3) Guidelines that an assessment of qualitative efficiencies "necessarily requires a value judgment".[31] Similarly, the ACCC's comprehensive case practice in this field show that sustainability efficiencies can be captured effectively without putting numbers to them.[32]

6.2 At the same time, where possible, quantification can provide greater certainty in self-assessment. The comprehensive joint ACM/HCC technical paper,[33] provides guidance and inspiration.

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[28] The Hague District Court, *Milieudefensie et al. v Royal Dutch Shell plc*, NL:RBDHA:2021:5339 (26 May 2021), available here.
[29] Section 2(1) of the Austrian Cartel Act which is equivalent to Section 9 CA '98 and Article 101(3) TFEU.
[30] https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf
[31] Guidelines on the application ofArticle 81(3) of the Treaty, OJ C 101, 27.4.2004, pp. 97-118, at para. 103
[32] See, e.g., the 2020 Battery Stewardship Council Final Determination, paras. 4.13-14 (https://www.accc.gov.au/system/files/public-registers/documents/Final%20Determination%20-%2004.09.20%20-%20PR%20-%20AA1000476%20-%20 BSC_0.pdf) and the 2008 Sydney Waste Management Group of Councils Authorisation Determination, paras. 6.51-54 (https://www.accc.gov.au/system/files/public-registers/documents/D08%2B110060.pdf).
[33] https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf

6.3 It would be very useful if the CMA could also explain when and how benefits of environmental agreements can be expressed in monetary terms. We note that the ACM refers to "environmental prices" or "shadow prices" which are values that indicate the harm of, among other things, polluting emissions and greenhouse gas emissions.

6.4 The Commission's 2004 Exemption Guidelines confirm that future benefits are relevant (albeit with some discounting for the fact that these benefits are in the future). This is certainly appropriate as the need to consider future generations (future 'consumers') is central to the very concept of sustainability. However, when discounting for future benefits, the CMA should also consider future costs which may be increasing.

7. More explicit guidance is needed on when the indispensability criterion is met

7.1 Guidance would be useful on when the CMA is satisfied that a sustainability agreement does not impose on the parties restrictions that are unrelated or unnecessary to the fulfilment of its objective benefits.

7.2 The European Commission has been through this thought process in relation to sustainability benefits. In *CECED*[34] the Commission was satisfied that industry-wide targets, information campaigns and ecolabels would not have been a viable way of achieving the same objectives as the restrictions under consideration. It would be useful if the CMA could share its thinking in relation to this and other justifications. This could include:

(a) where a restriction is needed in order to overcome a first-mover disadvantage (e.g. by avoiding free riding on investments to set up an eco-label)

(b) where individual action would be feasible in spite of limited scale, but co-operation would be imperative to deliver meaningful environmental or social results in an acceptable timeframe.

(c) where individual businesses - even with strong buying power - lack the necessary leverage to induce systemic changes required in the supply chain.

7.3 Many competitor co-operations will involve short-term scale-ups, meaning that they may not be indispensable once penetration of the sustainable technology, practice or product itself has been attained. The CMA could helpfully provide guidance on when sustainability agreements would have to be restricted to the relevant transitory periods in order to satisfy this criterion.

Section B: Merger Control Regime

8. Introduction

8.1 We agree with the CMA's preliminary views regarding the relationship between sustainability and the assessment of mergers. Sustainability is recognised as a parameter of competition and it ought to play an important role in the CMA's assessment of whether a merger may result in a substantial lessening of competition ("**SLC**"), as well as in the assessment of efficiencies. The current regime, however, provides no or inadequate guidance on how sustainability is to

[34] Commission decision of 24 January 1999, (Case IV.F.1/36.718 CECED) OJ [2000] L 187/47.

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be assessed in these instances and we provide below our comments on the role we expect the CMA to take on to address this.

8.2 Moreover, above and beyond the CMA's preliminary views set out in the CFI, we note that the CMA should also take sustainability into account when assessing remedies, with factors relating to sustainability harms of benefits being considered in the assessment of the proposed undertakings[35]. Further still, we agree with Simon Holmes' suggestion that the Enterprise Act 2002 should be amended to include "sustainability and climate change" as "specified considerations" under section 58 to provide the UK Government with the legal possibility to intervene where a merger raises sustainability concerns.[36]

Sustainability should be treated as a parameter of competition in its own right - and be part of the competitive assessment

8.3 In the context of a substantive assessment, the CMA can certainly consider sustainability when defining the relevant market and analysing how consumers differentiate green(er) products from other products. An example at EU level is *Aleris/Novelis*[37], where the EC considered that lightweight aluminium used for the production of fuel-efficient vehicles with reduced emissions could be considered to form a separate product market.[38] This would afford consumers increased protection on the narrower market of environmentally friendly aluminium. With consumer choices moving towards environmentally friendly products and/or technologies, as well as regulatory requirements increasingly emphasizing environmental qualities of products and technologies, we expect this tendency to increase.

8.4 While UK merger control lacks a direct equivalent of Article 2 (1) b EUMR (the "development of technical and economic progress provided that it is to the consumers' advantage and does not form an obstacle to competition"), we do not think this prevents the CMA from properly building relevant sustainability issues into the competitive analysis.

8.5 **Non-price competition**: The CMA's Merger Assessment Guidelines[39] acknowledge that the range of possible non-price aspects of competition that firms may use to win customers is wide, and that terms such as 'quality' should be interpreted broadly and include "the sustainability of a product or service". Many of the effects of mergers most relevant to sustainability in general, and climate change in particular, are likely to fall within this concept. For example, if a merger is likely to lead to the production of more sustainable products (e.g. less polluting products or goods which are manufactured using fewer natural resources) then those goods can be seen as being more innovative and of a higher quality.

8.6 **Rivalry-enhancing efficiencies**: the CFI explains that "benefits to the environment could ... potentially be considered as rivalry-enhancing efficiencies in appropriate cases to the extent

[35] Sustainability and Competition Law, Report of the International Developments and Comments Task Force, 11 August 2021
[36] cclp working paper cclpl51.pdf (ox.ac.uk)
[37] M.9076 - *Aleris/Novelis* (decision not yet published), EC press release IP/19/5949.
[38] Similarly, in the EC, decision of 5 May 2015, M.7292 - *DEMB/Mondelez/Charger OPCO*, the Commission considered whether non-conventional including organic-grown coffee would form a separate market from conventional coffee. The Commission has also considered whether standard or non-standard (certified and/or traceable) cocoa beans would form separate product markets (M.7510 - *Olam/ADM Cocoa Business* (decision of 10 June 2015).
[39] Merger Assessment Guidelines (CMA129) (publishing.service.gov.uk)

that they impact competition in the relevant market". We welcome this guidance which should be added to paragraph 8.3 of the MAGs with some examples, e.g. if the merged entity can produce products using fewer natural resources that should be seen a clear 'efficiency'.

8.7 **Relevant customer benefits**: We endorse the CMA's March 2021 Merger Assessment Guidelines where it specifically recognized that reduced carbon emissions as potentially relevant to an efficiencies analysis[40]. However, we believe that the approach taken in these Guidelines is too narrow: reducing carbon emissions is crucial but it is only one of the many important sustainability factors that ought to be taken into account.

8.8 We also acknowledge that account can be taken of benefits to consumers in markets other than where the SLC is found. This is, of course, particularly helpful in the context of environmental benefits (since it would not just be the buyers of goods in a particular market that benefit from cleaner air if production results in less pollution and the emission of fewer greenhouse gases). However, we think that the scale and pace of the climate crisis means that the CMA should not focus exclusively on "UK customers". The CMA has an opportunity to position itself as a global regulator that it is able to take into account out-of- jurisdiction sustainability benefits. Paragraph 8.23 of the MAGs hints at the possibility of this, clarifying that the definition of customers under the s.30(4) of the Enterprise Act 2002 for the purpose of considering 'relevant customer benefits' enables the CMA to "take into account a broader range of efficiencies and benefits from a merger to consumers and to **society more generally**". [emphasis added]. In our view, the CMA should clarify that out of market/jurisdiction benefits can be taken into consideration in order to capture benefits that arise to society more generally - i.e. the assessment will not in practice be limited to the parties' customers and their downstream customers (which is a possible interpretation of the s.30(4) EA02 definition).

8.9 Finally, it is acknowledged that a deal's impact on the environment and sustainability can be hard to quantify. It may therefore be difficult to assess whether the claimed efficiencies are likely to materialise, and are substantial enough to counterbalance potential consumer harm. A reduction of CO_2 emissions may materialise (with a reasonably degree of certainty) but may not be certain. Similarly, it will take time before any similar efficiency can occur, and this will by definition add uncertainty to the merger review. As such, we encourage the CMA to take into account the appropriate (longer) timeframe for efficiency assessments relating to sustainability.

8.10 When it comes to weighing up the different factors under consideration (competition, efficiencies, sustainability benefits etc.), the CMA is the appropriate body to make such assessments. No other body is as well qualified to assess mergers and it is experienced in weighing up different factors in different industries. Not only can it draw on the increasingly wide range of skills within the CMA itself, it can seek advice from other bodies- both within the public and private sector. The CMA could also engage outside consultants (in the same

[40] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970322/MAGs_for_publication_2021_.pdf.

way as it sometimes seeks consultants in other areas-notably in economics or for consumer surveys etc.).

Remedies

8.11 Sustainability considerations may be relevant when considering remedies whether in cases where sustainability issues are an element of the theory of harm, or where a proposed undertaking addresses other aspects of the substantive assessment of the deal but have a negative impact on sustainability. In this context, the CMA would be well placed and may well consider more appropriate behavioural remedies, in addition to divestitures. Where necessary, the CMA could liaise with other public bodies or local authorities, though we would recommend that the consultations are scoped very carefully so as to avoid unnecessary delays to deal timetable.

Public interest

8.12 We agree with the suggestion made that the Enterprise Act 2002 should be amended to include "sustainability and climate change" as "specified considerations" under section 58.[41] This would provide the UK Government with the legal possibility to intervene where a merger raises sustainability concerns which at the moment are not arguably caught by the relevant provisions. This would allow the Government to take the final decision on whether the CMA ought to conduct a detailed investigation, and decide whether to block or clear the transaction (on the advice of the CMA).

Section C: Consumer Protection Law

8.13 We are of the view that the current framework constrains and frustrates initiatives that might support the UK's goals as the law has not been drafted with this in mind. There is naturally some ambiguity as to what would be classified a material piece of information or a material omission with respect to a product or service's sustainability or impact on the environment. We can draw parallels here with the digital services sector and the ambiguity that has arisen in respect of applying the framework to the consumer-facing services provided by providers of digital services/digital content and their associated liability.

8.14 With that in mind, to the extent that the CMA's response to the CFI will be a proposal for new regulation similar to, e.g. energy or food labelling, requiring companies to comply with additional information requirements in respect of products and services, whilst we agree that supplementing the framework in this way would address one of the key concerns of the lack of consumer awareness, we would flag that clear, in-depth guidance with comprehensive definitions will be crucial for its success.

8.15 In terms of addressing current issues of supply chain transparency, a key requirement in our view will be to allay concerns regarding the sharing of information between competitors within the supply chain. Supply chain members need to feel confident that they can disclose

[41] cclp_working_paper_cclpl51.pdf (ox.ac.uk)

potentially sensitive information regarding their processes without sharing any of their trade secrets.

8.16 The CMA has clear opportunity to develop the consumer protection law framework to help achieve the UK's Net Zero and sustainability goals. Development in line with the EU proposals would be welcome, for example, the sustainable products initiative and its proposed expansion. Any development should be supplemented with clear, in-depth guidance explaining how to apply the changes in practice, e.g. as with the Green Claims Code. We hope that any developments would include:

- clear definitions for key terms;
- a practical means for measuring the carbon footprint of a product;
- a practical means for measuring the expected lifetime of a product;
- a universal labelling system for proper disposal of a product (aligned with home recycling); and / or
- an accreditation to guide consumers as to the sustainability / environmental impact of a brand / product / service (e.g. a "green sticker").

8.17 However, it will be important to balance any additional obligations on traders with the commercial impact for businesses so there is a level playing-field for traders - and to ensure that any new regime is proportionate and does not provide a financial barrier to compliance for smaller market players.

8.18 It is important to highlight the success of self-regulation as part of the framework e.g. the ASA's advertising codes, where reputational damage incentivises compliance. Companies generally comply with the advertising rules as a result.

8.19 From a practical perspective, the framework itself should only be prescriptive to the extent that standards or requirements are synonymous with, e.g. EU standards, in order to facilitate compliance by multi- jurisdictional companies. Imposing different requirements to those prescribed by the EU Commission would impose an unreasonable burden on companies providing services or products to consumers in multiple jurisdictions.

8.20 Regarding practice around planned obsolescence of products; and/or promotion of over-consumption, to the extent the CMA considers addressing these, the CMA should provide clear, in-depth guidance, which can be practically applied. We hope that any updates to the framework in respect of obsolescence will cover repairing products, the longevity of external vs. internal products, battery life and spare parts. To tackle over-consumption, we would like to highlight the approach recently taken by the government in respect of the advertising of foods with high levels of fat, sugar or salt, e.g. restrictions on when and how the products can be advertised. Additional (proportionate) restrictions could apply to disposable products, fast fashion items or low quality items.

Baker McKenzie
(SJM/GXM/MIXG)
November 2021

Annex

Sample Cooperation Where Guidance Is Needed

1. Sustainability agreements where there is no impact on competition

1.1 A binding commitment to meet sectoral targets which do not mandate how individual companies meet that target

1.2 Agreements between competitors where they commit to respect laws and agree to demand legal compliance from suppliers and other business partners

1.3 Information exchange on anonymously provided business partner compliance with ESG rules/laws, including systems to conduct due diligence and monitoring of third parties, e.g. joint mapping of harvesting locations and deforestation incidents

1.4 Sharing of good practices, systems and tools to risk assess, control or monitor business activities from a sustainability perspective

2. Sustainability agreements which may have only de minimis impact

2.1 Joint commitments to ensure living wages for workers

2.2 Joint incentives for suppliers/producers to switch to use more sustainable farming methods or to confine agriculture to certain areas (e.g. already cleared land)

3. Agreements which develop new markets

3.1 Agreements which help create new markets by jointly creating resources and demand, e.g. collective demand for the development of a product mature enough and facilities which are large enough for scaled production

3.2 Collective commitments to buy, e.g. to create necessary demand for farmers to start planting more diverse crops and to develop technological expertise

3.3 Joint infrastructure funding to unlock the development of collection and sorting infrastructures— industry- owned/-run or operated by third parties—like in the example of the Australian Consumer and Competition Commission's recent *Battery Stewardship Council*[42] which involves a fixed levy which is passed on to consumers in order to drive collection/recycling and innovation in these activities

4. Examples of legitimate environmental aims which deserve an effects analysis

4.1 Binding minimum environmental standards which go beyond national laws/regulations

4.2 Restrictions which result in a temporary or permanent moratorium, e.g., fishing, halting deforestation

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[42] ACCC, Voluntary battery stewardship scheme granted authorisation, 4 September 2020, https://www.accc.gov.au/media-release/voluntary-battery-stewardship-scheme-granted-authorisation; *see also* https://globalcompetitionreview.com/sustainability/sustainability-and-antitrust-in-australia-outlier-or-blueprint

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Annex

Sample Case Study Issues

We set out below a number of hypothetical sustainability agreements/objectives in respect of which clearer guidance on the non-applicability of the Chapter I prohibition or the availability of s.9 exemption would be useful so that businesses are not deterred from entering into agreements that have positive consumer benefits.

1. Binding targets which leave scope for competition as to how they are reached

1.1 The largest five firms in the industry agree that they will all:

(a) reduce their global emissions by 30%

(b) reduce the global use of a polluting input by 20 %

(c) ensure that at least 40 % of global volumes purchased meet or exceed a certain environmental standard.

1.2 Although the percentages are binding, the companies can decide how to meet those levels (including where in the world they adjust their manufacturing/purchases in order to meet the threshold).

2. Unilateral/voluntary commitments

2.1 In order to join a particular trade association, members need to commit to a particular minimum standard. Members decide unilaterally whether or not they wish to join the association.

2.2 Would this be assessed as a joint arrangement between those that had signed up, or a series of unilateral commitments?

3. No agreement on a parameter of competition

3.1 A trade association's members are all Buyers who together account for 90% of the market. They agree that, in the event that they discover that a supplier does not meet any standard applied unilaterally by the Buyer, the delisting will apply to the supplier's entire corporate group as regards the product in question (or potentially more) and not just the company/division selling to the Buyer.

4. Non-appreciable impact on price

4.1 While an environmental agreement is forecast to increase the wholesale price of an input, this 'premium' is calculated to be very modest at around less than 1% of the total cost of the end product as sold to consumers. Is there a de minimis level at which the price concerns will be less? Or what considerations should apply when addressing this on a case by case basis? Is commonality of cost relevant?

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4.2 Competing buyers accounting for 90% of a market identify certain suppliers to whom they wish to pay financial incentives/compensation so as to bring about greener manufacturing processes. In which circumstances, if any, could this raise competition issues? Consider: choice of recipient; impact on end price etc. Which factors would be relevant and why, e.g. commonality of cost etc.? Are there any circumstances in which the CMA would prefer such payments to be made via a third party administered fund? If so, why?

5. Information exchange

5.1 A trade association with members accounting for 90% of the market establishes a database of suppliers that have failed to meet a certain standard (regardless of whether that standard exceeds legal requirements etc.) or who have been involved in deforestation incidents. The database does not include any sensitive information.

6. Benefits

6.1 Competitors reach an agreement on a more environmentally-friendly manufacturing/farming process or on how to improve working conditions. However, the product is unchanged by the process improvement. Can that agreement be said to generate a qualitative efficiency?

6.2 An agreement produces environmental benefits (reduced CO2 emissions/less traffic noise) for consumers who do not buy the products covered by the agreement. In which situations, if any, will those benefits be relevant to an exemption analysis? Would it make a different if the consumers that bought the products also experienced the same environmental benefits?[43]

[43] See the OFT submission to the OECD roundtable discussion here: http://www.oecd.org/competition/cartels/49139867.pdf In particular, see p.104 where the OFT reasons that: ".. .where environmental benefits coincide with, or form an integral part of, economic benefits, they are likely to be capable of meeting the exception criteria. In the public transport ticketing review, we considered that while the ticketing agreements under consideration were likely to create economic benefits for passengers and transport operators (for example, better quality bus services and improved transport networks for the former and increased patronage and greater certainty as to revenue and lower administrative costs for the latter), the wording of section 9(1) of the UK Competition Act 1998 (equivalent in substance to Article 101(3) for material purposes) was wide enough to allow the OFT to take account of benefits for other road users and consumers . The main thrust of the analysis under section 9(1) relates to the economic efficiencies that are directly or indirectly passed on to consumers and that wider benefits to society would not normally be sufficient on their own for section 9(1) to apply. However, we considered that in addition to the economic efficiencies ticketing schemes can lead to indirect benefits for other consumers, such as road users by, for example, increasing the efficiency of services which results in reduced congestion, noise and air pollution".