Eversheds Sutherland (International) LLP

Response to the CMA'S consultation on the retained Horizontal Block Exemption Regulations

January 2022

CMA Consultation on the retained Horizontal Block Exemption Regulations

Introduction

Eversheds Sutherland (International) LLP welcomes the opportunity to comment on the CMA's consultation on the retained Horizontal Block Exemption Regulations. Our comments are based on the experience of our Competition, EU and Trade team in advising clients on all aspects of their horizontal agreements. The comments and observations set out in this response are ours alone and should not be attributed to any of our clients.

We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website.

CMA's consultation

Opening remarks

While we are providing our comments on the various questions in the CMA's consultation below, we would like to take the opportunity to emphasise in brief a few points which, in our view, are of central importance in the context of this consultation.

More specifically, we consider that the new regime on horizontal agreements should be more similar in structure to the verticals regime, that is, should comprise one consolidated block exemption regulation and an accompanying set of Horizontal Guidelines. In addition, in our view, the Horizontal Guidelines should take a flexible approach based on the nature of the cooperation itself, rather than address certain 'types' of agreement in a piecemeal way. That said, examples on specific categories of agreements would of course be welcome, especially if they include one positive and one negative example to contextualise each category of agreement.

Secondly, in our view, information exchange is one of the key areas which needs to be addressed in specific CMA guidance, in particular in relation to information exchange in a dual distribution context, and non-reciprocal and non-direct information exchange in the digital economy. Regarding dual distribution, it is our strong view that any concerns should properly be addressed in the Verticals Guidelines. However, if the CMA is minded to treat and assess information exchanged in a dual distribution relationship under the revised Horizontal Guidelines then it is essential that the CMA includes an explicit new chapter in the Horizontal Guidelines acknowledging this distinction.

General impact assessment questions

1. **Question 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.

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

1.1 Eversheds Sutherland (International) LLP is a global law firm. We provide professional legal services to clients active in a broad range of sectors. As such, the relevant sector is: (m) Professional, scientific and technical activities.

1.2 More broadly, we consider that this consultation is relevant to businesses operating in all of the sectors referred to above, given that horizontal agreements are not limited to a particular sector of activity.

2. **Question 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.

2.1 As mentioned above, we consider that horizontal agreements are ubiquitous and cannot be limited to a single sector or industry.

3. **Question 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).

3.1 We are a large business (250+ employees). Eversheds Sutherland (International) LLP is a global law firm providing legal services to clients worldwide.

4. **Question 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.

4.1 We advise businesses active across a wide range of sectors and industries in relation to their horizontal agreements, for instance R&D or production agreements, as well as other horizontal arrangements. Based on our experience, entry into horizontal agreements is not dependent on the size of the relevant businesses. Large enterprises and SMEs are equally interested in exploring lawful ways to cooperate in order to develop new products or solutions, optimise their supply chains and get their products more easily to consumers. Information exchanges in particular are a key consideration for most of our clients that wish to enter into horizontal cooperation arrangements in compliance with competition law. More recently, we are increasingly seeing businesses wishing to make their offerings and operations more sustainable; horizontal cooperation can be a powerful tool in this respect.

Specialisation BER

5. **Question S1**: We would welcome your responses to the following questions:

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

(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.

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

(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).

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

To the extent that the proposal extends the scope of the Specialisation BER and allows more arrangements to fall within its protected safe harbour, we consider it would be a positive development. There is also a benefit to consistency between the R&D BER and the Specialisation BER.

5.1 (a) We consider that the Specialisation BER has contributed to promoting competition in the UK and will be even more impactful following Brexit. The Specialisation BER has provided more flexibility to businesses, by allowing businesses active at the same level of the supply chain to focus their production where their competitive strengths lie and operate more efficiently. In addition, specialisation agreements are commonly used to provide new products or solutions, thereby giving rise to new markets.

5.2 (b) As above, specialisation agreements can generate significant efficiencies, in the form of better production, new or improved products and better prices. Absent horizontal cooperation between enterprises in the same/similar sectors, these benefits would be harder to achieve, as the parties (in some situations) might lack the critical scale required to innovate.

5.3 (c) Not relevant.

5.4 (d) We do not consider that the UK market has any particular characteristics which would justify UK-specific rules in relation to specialisation agreements. In fact, our experience is that specialisation agreements are often concluded between enterprises active in different jurisdictions. The CMA should take into account such scenarios in its review and ensure that any new rules do not give rise to unnecessary inconsistencies between the UK and EU regimes, which would result in increased regulatory burdens and costs for businesses.

5.5 (e) We do agree with the points raised by stakeholders in the EU evaluation, namely that SMEs may be discouraged from entering into specialisation agreements under the current regime. However, our view is that the complexities around compliance with the Specialisation BER are not limited to a certain category of business. In fact, the main issue for businesses is that the assessment of whether the market share thresholds are

exceeded is quite complicated, in particular in relation to new technology markets. We would welcome more clarity on this issue which would assist all businesses in complying with the regime.

6. **Question 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?

(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? (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.)

6.1 (a) In general, we consider that the definitions in Article 1 of the Specialisation BER provide legal certainty at a basic level; however, it would be helpful to simplify these definitions to the extent possible, perhaps by offering specific examples of what each type of agreement is intended to cover. In our experience, non-legal professionals often find it challenging to comprehend the scope and boundaries of each notion.

6.2 (b) We consider the extension of the definition to include agreements concluded between more than two parties to be sensible. In our experience, it can sometimes be the case that more than two parties may wish to engage in this type of agreement, and they currently fall outside the scope of the Specialisation BER. We can see no reason on principle why this should be the case.

6.3 We consider it prudent to expand the exemption in the Specialisation BER to include subcontracting agreements with a view to expanding production.

7. **Question 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?

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

7.1 We consider that the conditions for the exemption are sufficiently clear in principle, but again would welcome further guidance for businesses that wish to enter into specialisation agreements.

8. **Question 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.

(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

8.1 (a) We consider that the market share threshold provided for in Article 3 of the Specialisation BER could be increased to allow more agreements to come under the 'safe harbour' of the BER. A combined market share of 20% is a considerably low threshold

(as even market shares in the range of 10-15% for each undertaking involved would suffice to meet it). The alternative, i.e. self-assessment, can be quite complicated for businesses and involves significant uncertainty.

8.2 In addition, determining a business' market share can be a quite complicated exercise, which requires a detailed market analysis that cannot always be easily undertaken by businesses (in particular SMEs). In this context, businesses quite often have to rely on 'best guess' market share estimates that are not precise.

8.3 As such, a higher market share threshold would at least provide legal certainty to businesses interested in engaging in horizontal cooperation in the form of specialisation agreements. In our experience, the current market share threshold can discourage businesses from entering into horizontal cooperation agreements.

8.4 (b) Article 5 does provide a helpful starting point for businesses. However, the exercise of determining a business' market share is quite complicated and the rules are not sufficient to provide meaningful guidance to enterprises.

9. **Question 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?

9.1 (a) In principle, we consider that the hardcore restrictions in Article 4 of the Specialisation BER are sufficiently clear for businesses. The prohibitions on price-fixing, limitation of output and market-sharing are common themes in the block exemption regulations and understood by businesses.

9.2 (b) and (c) In our opinion, it is not necessary to provide for any further hardcore or excluded restrictions.

10. **Question 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?

10.1 Moderate.

11. **Question 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?

11.1 Raising the market share threshold would have a positive impact on our clients who are interested in pursuing forms of horizontal cooperation with other businesses. The current market share threshold is often discouraging for businesses, as it can be met quite easily. In addition, determining whether the parties fall within the 'safe harbour' or will need to undertake a self-assessment is quite complicated. As such, raising the market share threshold might encourage more businesses to explore lawful ways to cooperate and innovate.

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

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

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

(ii) The Specialisation BER is replaced from 1 January 2023 by an equivalent UK block exemption. If you do consider that you would incur costs, it would help to understand whether these would be negligible, moderate or significant. If you are submitting a response to this Call for Input as an adviser, we would be grateful for any observations you can share on the likely costs for your clients in each relevant industry.

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

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

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

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

12.1 If the Specialisation BER lapses on its expiry, our clients will need to incur significant costs in order both to understand the new regime and comply with it. Firstly, businesses will be required to self-assess whether their agreements, both current and future, are compliant with competition rules. This will be the case in particular in the absence of a transitional period.

12.2 Secondly, in the absence of a 'safe harbour' for their agreements, many businesses may be forced to make amendments to planned agreements, as they will be unwilling to take the risk of non-compliance. This will result in additional costs, including legal expenses.

12.3 In addition, considering that the European Commission is intending to maintain the block exemption for specialisation agreements, the inconsistency between the two regimes will complicate relationships between UK-EU businesses and will result in increased regulatory burdens and costs for businesses.

12.4 By contrast, replacing the Specialisation BER with an equivalent UK block exemption regulation should not result in more legal costs (other than those already incurred by businesses).

R&D BER

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

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

(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.

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

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

13.1 (a) In general, the R&D BER has contributed to promoting competition in the UK and it is very important to maintain a 'safe harbour' for R&D efforts. Covid-19 was an important opportunity to note the importance of coordinated research and development of new pharmaceutical products; the R&D BER is of great importance for businesses in the sector. More generally, common R&D efforts allow the creation of new products and emergence of new markets, and this will need to be adequately 'captured' by UK competition rules.

13.2 (b) As above, R&D agreements can generate significant efficiencies which ultimately benefit consumers, in the form of new or improved products and better prices. R&D activity can require significant investments that not all businesses are willing or able to make on their own, in particular when the risk of failure is quite high.

13.3 (c) Not relevant.

13.4 (d) As noted in respect of specialisation agreements, the UK regime will need to address the issue of R&D agreements between UK-EU businesses and ensure legal certainty and consistency.

13.5 (e) In our opinion, it is not the conditions in the R&D BER which block SMEs, research institutes/academic bodies from entering into R&D agreements but rather the complexities of such agreements.

14. Question 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?

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

14.1 Our view is that the definitions in Article 1 of the R&D BER would benefit from further clarification. There is a lot of uncertainty (which was also raised by several stakeholders in the context of the EU consultation) around the boundaries between joint and paid-for R&D, or the notions of 'joint exploitation' and 'financing party'. The relevant product/technology market definitions are also not sufficiently clear for businesses.

14.2 In order to facilitate cooperation between businesses in an area where the risk of failure is quite high, the block exemption regulation must make is clear that the notion of 'R&D

agreement' covered by it also include R&D in its early stages, where it is far from clear whether the parties' cooperation will generate any tangible results.

15. Question 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?

15.1 (a) While we are not in principle opposed to the 'full access' condition, as currently stipulated in Article 3, we would welcome further clarity on what this means in practice for businesses involved in R&D, and what will be considered sufficient to comply with this requirement. For instance, does the 'full access' condition require the parties to transfer/license any IP rights to each other, or will other, more informal arrangements suffice?

15.2 (b) Similarly, in relation to the access to pre-existing know-how, further clarity on (i) when know-how might be indispensable for the purposes of exploitation of the R&D results and (ii) what the access requirement would comprise would be positive.

15.3 (c) We are not in principle opposed to these conditions; in fact, requiring the parties to R&D agreements to share IP rights and know-how between them help minimise any anti-competitive effects that R&D agreements could entail and ensures a fair balance of power between the parties.

15.4 (d) As noted above, we believe that the scope of the R&D BER should be extended to cover early-stage research and development.

15.5 (e) Please see our responses above.

16. Question 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.

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

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

16.1 (a) Our view is that the current market share threshold is not appropriate to cover all types of pro-competitive R&D agreements. Meeting the threshold can be quite easy, especially in situations where established firms cooperate to develop improved products. In such scenarios, cooperative efforts will be subject to self-assessment, and the entailing legal uncertainty, despite the fact that they might be beneficial for consumers. In our opinion, the market share threshold should be higher, thus allowing more businesses to benefit from the 'safe harbour' of the block exemption.

16.2 (b) While R&D is by its nature related to dynamic, fast-paced markets, where the boundaries between competing and non-competing undertakings may be blurring, we consider that, on balance, the distinction should remain to continue to provide legal certainty to businesses in clear-cut scenarios.

16.3 (c) The terms of Article 7 of the block exemption regulation should be made clearer, in order to allow businesses to undertake a market share analysis, where necessary, and determine whether they are covered by the BER.

17. Question 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?

17.1 (a) In principle, the logic of the hardcore restrictions is sufficiently clear. Businesses are familiar with the fact that restrictions such as price-fixing or output limitations are hardcore restrictions of competition. The inclusion of exceptions recognises the particular features of R&D agreements and should be an integral part of any revised block exemption.

17.2 (b) We do not consider it appropriate to include any further hardcore restrictions, in addition to those set out in Article 5 of the R&D BER.

17.3 (c) In relation to excluded restrictions, these are again in principle acceptable for businesses, since they not only protect the competitive process but also the weaker party in a cooperative venture. We would welcome some further clarity on this issue, in the form of practical examples.

17.4 (d) Please refer to our response above.

17.5 (e) No further restrictions should be included in the R&D BER.

18. Question 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?

18.1 Not relevant.

19. Question 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?

19.1 We would not support lowering the market share threshold, as this would create additional uncertainty for businesses.

19.2 A higher market share threshold, on the other hand, would have a positive impact on businesses wishing to engage in R&D. Research and development agreements are a crucial element of innovative efforts and should be encouraged by competition policy. In this context, it appears to us that an increase in the applicable market share threshold would encourage more businesses to pursue research and development with a view to developing new products and solutions. The current market shares are quite low and create uncertainty for businesses, in particular since the relevant markets are often difficult to define. The current list of hardcore and excluded restrictions affords adequate protection to the parties and ensures that any anti-competitive effects are minimised.

20. Question 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:

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

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

(ii) The R&D BER is replaced from 1 January 2023 by an equivalent UK block exemption. If you do consider that you would incur costs, it would help to understand whether these would be negligible, moderate or significant. If you are submitting a response to this Call for Input as an adviser, we would be grateful for any observations you can share on the likely costs for your clients in each relevant industry.

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

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

(ii) The R&D BER is replaced from 1 January 2023 by an equivalent UK block exemption. If you do consider that you would incur costs, it would help to understand whether these would be negligible, moderate or significant. If you are submitting a response to this Call for Input as an adviser, we would be grateful for any observations you can share on the likely costs for your clients in each relevant industry.

20.1 If the R&D BER lapses on its expiry, we expect that businesses will incur significant costs in order to understand and comply with the applicable regime. The need to self-assess their agreements will discourage businesses from engaging in R&D efforts in the first place, given how substantial the risk of fines is. If this option is pursued, a transitional period would be needed for businesses to adjust to the new regime and modify their agreements where needed.

20.2 In addition, even if businesses decide to conclude R&D agreements, they will need to take into consideration the additional costs (including legal expenses) that the lack of a 'safe harbour' entails. This will put UK businesses at a disadvantage compared to their

EU counterparts – and is expected to result in more uncertainty in relation to agreements between UK-EU businesses.

Horizontal Guidelines

21. Question 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.

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

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

(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.

(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.

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

21.1 (a) As a general point, the current regime is, to a certain extent, counter-intuitive, given that the relevant rules can be found in various separate legal instruments, namely the R&D BER, the Specialisation BER and the Horizontal Guidelines. We consider it more appropriate for the revised regime to be more similar to the structure of the regime on vertical agreements, which includes one regulation and one set of guidelines. This will make it easier for businesses to refer to one consolidated document in order to assess their compliance with competition rules. It would also make it easier to make the internal structure of the HBER/Horizontal Guidelines clearer and more coherent.

21.2 In terms of the internal logic of the Horizontal Guidelines themselves, we consider that the Horizontal Guidelines should take a flexible approach based on the nature of the cooperation itself, i.e. its centre of gravity, rather than address certain 'types' of agreement in a piecemeal way. The assessment of the centre of gravity should also obviously take into account the nature of the activity that is the starting point for the contact and cooperation between the relevant competitors.

21.3 That said, examples on specific categories of agreements would of course be welcome, especially if they include one positive and one negative example to contextualise each category of agreement. It should be explicit in any examples included in the Horizontal Guidelines that the examples are illustrative only and not comprehensive and not intended to be limiting.

21.4 From an external coherence viewpoint, any revised rules in relation to horizontal agreements will need to be consistent with:

21.4.1 the revised block exemption for vertical agreements (the UK VABEO), in particular in relation to dual distribution (and information exchanges in this context). When the revised block exemptions come into force, it must be crystal-clear to businesses what exactly is permitted or not;

21.4.2 any new rules or guidance on sustainability agreements;

21.4.3 the block exemption in relation to technology transfer;

21.4.4 the UK merger control regime. The current regime is, for the most part, clear in relation to what qualifies as a merger and what constitutes horizontal cooperation. However, there are still areas of improvement, where a situation is not clear-cut. For instance, it is not always easy to assess whether and at what point in time a merger arises; in such a situation, it may be difficult for businesses to assess whether their arrangements may qualify for review by the CMA or not. An important area of overlap between merger control and horizontal cooperation is information exchanges between parties to transactions. While the extent to which information exchanges might be acceptable might be different in these two scenarios, any new rules should in principle seek to create as much consistency as possible, to make it easier for businesses to comply.

21.5 (b) We consider that further guidance in relation to infrastructure sharing, collective bargaining, industry alliances, industry-wide cooperation agreements, and insolvency restructuring agreements would be a welcome development, as long as it is clearly expressed to be illustrative only, and one positive and one negative example is given; the danger otherwise is that the additional guidance becomes a straightjacket that just adds to confusion over permitted and non-permitted cooperation.

21.5.1 In relation to infrastructure sharing, the current regime is based on a case-by-case analysis, which depends to a significant extent on the number of operators as well as the technical and legal form of cooperation between the parties. In some cases, a network sharing arrangement may be treated as a merger[1], while in other cases Article 101 comes into play[2]. Operators wishing to share infrastructure would benefit from clearer guidance on (i) what practices are permitted, (ii) what the relevant market share thresholds would be and (iii) what the assessment criteria of their arrangements should be.

21.5.2 Regarding collective bargaining, we note that the issue of collective bargaining by self-employed is also being explored by the European Commission. The current regime[3] does not provide sufficient protection to such instances of collective bargaining. It would be helpful for parties to these relationships, in particular in grey areas (e.g. ride-sharing apps), to be able to rely on clear

1 ME/5556/12, Anticipated joint venture between Vodafone Limited And Telefónica UK Limited.
2 Network sharing–Czech Republic (AT.40305) (ongoing case).
3 Mainly shaped by Albany (case C-67/96) and KNV Kunsten (case C-413/13).

guidance on whether their collective bargaining is permitted and what conditions they need to meet in order to be exempt from competition law.

21.5.3 Industry alliances and industry-wide cooperation agreements would also benefit from clearer guidance, in relation to information exchanges that may be necessary for them to achieve their objectives. Regarding joint buying agreements, this is an area requiring further guidance, especially in relation to information sharing and cooperation between the joint buyers (not just the extent to which they have market power in respect of their common suppliers).

21.5.4 Insolvency restructuring agreements may be relevant to competition law both from a merger control and from an Article 101/Chapter I perspective. Parties to such negotiations and agreements would welcome further clarity regarding information exchanges that may be required in this context.

21.6 (c) As above, we consider that further guidance for businesses in relation to data pooling, data sharing and network sharing will be particularly useful. In our view, the Horizontal Guidelines do not always easily fit nor can they be easily applied to a digital economy. Therefore, some permissive guidance that can be easily applied to a digital economy would be helpful.

21.7 (d) Both the European Commission and various national competition authorities (most notably, the Netherlands and Greece) have recognised the importance of providing further clarity in relation to the application of competition law to sustainability agreements. We would be in favour of a standalone chapter in the revised Horizontal Guidelines setting out the relevant principles and high level considerations applicable to the assessment of cooperation agreements pursuing sustainability objectives. This should note that sustainability agreements may take many forms and are generally not problematic from a competition perspective. The CMA should then include specific examples and guidance on sustainability agreements throughout the remainder of the other chapters (e.g. the chapter on information sharing; the chapter on commercialisation etc) of the revised Horizontal Guidelines.

21.8 We take this view because we consider that the application of the competition rules to sustainability should be expressly singled out given the importance of the subject matter and a permissive approach adopted. However, our concern with an approach whereby all aspects are solely dealt with in one chapter of the revised Horizontal Guidelines is that it could be quite limiting (as a matter of fact and/or perception) and could risk stultifying the development of principles in this regard. Sustainability agreements may take various shapes and forms, and may evolve over time, and it would seem preferable to us that the revised Horizontal Guidelines recognise this by focussing on a principles based approach, with specific examples in the relevant chapters. This should enable clients and their advisers to be able to self-assess with confidence, in particular, as the scope of these types of agreement evolve (i.e. to "future proof" the guidelines).

21.9 (e) Please see our responses above.

21.10 (f) Please see our responses above.

22. Question 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.

22.1 As legal advisers, information exchange is one of the most frequent areas on which we are called to assist our clients in all sectors. Clients are keen to obtain and use all possible market data and information to drive their competitive activity, and significant quantities of data, information and analysis is widely available. Clients are anxious to avoid crossing the line on how they obtain and use such information especially in view of aggressive enforcement activity and genuinely novel issues arising in the digital economy.

22.2 The two critical issues that the CMA must address in the revised Horizontal Guidelines are:

22.2.1 information exchange in a dual distribution context; and

22.2.2 non-reciprocal and non-direct information exchange in the digital economy.

Dual distribution

22.3 It is our strong view that, to the extent that the CMA has concerns about information exchange in a dual-distribution context, guidance on these concerns should properly be set out in the Verticals Guidelines because the centre of gravity of a dual distribution relationship is the vertical element. It is inherent into any vertical agreement that the parties to the agreement exchange information and this fundamentally distinguishes information exchanged between competitors in a purely horizontal setting. However, if the CMA is minded to treat and assess information exchanged in a dual distribution relationship under the revised Horizontal Guidelines then it is essential that the CMA includes an explicit new chapter in the Horizontal Guidelines acknowledging this distinction. We consider it to be unreasonable for a supplier to have to treat information from its distributors as equivalent to true third-party competitor information, as information sharing across the whole (dual) network could improve consumer insights, respond to changes in customer demand and drive innovation, resulting in stronger, more effective inter-brand competition.

22.4 It would be helpful to see commentary setting out:

22.4.1 the types of information a distributor may continue to freely share with the supplier and the supplier may freely use internally, as legitimate in the context of the (vertical) distribution relationship, for example, historic, current and forecast volume and sales figures, (including potentially costs, quantities and capacities) notwithstanding the dual relationship;

22.4.2 specific guidance on promotional calendars and marketing plans and the extent to which these may be coordinated between the supplier and the distributors in a dual distribution context to generate strong inter-brand competition; and

22.4.3 examples of the types of information barriers, and the degree and nature of the separation of information required for the protection of competitively sensitive information received from the distributor that should not be shared with the supplier's direct sales channel; and confirmation that any information barriers should be proportionate to the size of the relevant supplier's business.

22.5 We note also that dual distribution is not just an issue that arises due to the growth in e-commerce but is also common in off-line retail where a supplier may sell its products

directly to larger retail customers, but use distributors to sell to smaller, high street retailers.

Non-reciprocal and non-direct information exchange in the digital economy

22.6 With the huge growth in the digital economy there has been a corresponding increase in the amount and availability of competitive data and information. There has also been a growth in third party service providers offering various data gathering services to suppliers enabling rapid insight and the ability to adjust competitive behaviour to meet small changes in the market or consumer behaviour. It will be helpful for the CMA to set out principles-based guidance on this kind of non-reciprocal non-direct information exchange bearing in mind the need not to be too restrictive given the rapid pace in development. The revised Horizontal Guidelines should cover data pooling, data sharing, data scraping, algorithmic coordination, etc.

23. Question 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.

23.1 We consider that, on balance, the Horizontal Guidelines on R&D agreements provide a welcome degree of legal certainty. There are, however, certain areas where improvements can be made:

23.1.1 calculation of market shares: R&D is by nature directly related to nascent markets and innovation, where the tradition notion of a 'relevant market' is not always relevant. The Guidelines do recognise this and attempt to provide guidance to businesses on how to calculate their market shares. Nonetheless, a detailed analysis is still required, and businesses would be supported if the Guidelines provided further practical examples;

23.1.2 conditions of Article 101(3): showing efficiency gains that are passed-on to consumers might be challenging in early-stage R&D, where it is still uncertain whether the R&D will be successful. In this kind of scenario, a forward-looking approach in relation to efficiencies is required and the Horizontal Guidelines need to address this more explicitly.

24. Question 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.

24.1 The Horizontal Guidelines are in principle sufficient to provide guidance to businesses engaging in production agreements. However, there are a few key areas where further clarity would be welcome:

24.1.1 spill-over effects: the possibility of spill-over effects in adjacent markets is mentioned in passing in the Horizontal Guidelines. Businesses require additional guidance as to the nature and likelihood of such effects and their relevance in the competitive analysis;

24.1.2 as above, the guidance on Article 101(3) could be more extensive in order to address the specific situation of benefits deriving from production agreements and how these will be assessed.

25. Question 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.

25.1 In our experience, the great majority of joint purchasing arrangements are aimed at creating buyer power against large suppliers with the intention of securing lower prices to benefit consumers. We consider, therefore, that they should be assessed as restrictions by effect and such restrictions are only likely to arise in circumstances where the buyers have a significant combined market share on the purchasing market. As such, the 15% market share threshold does appear to be lower than required to provide businesses with legal certainty.

25.2 Some further clarity on the Article 101(3) conditions would be welcome, especially in relation to information sharing and cooperation between the joint buyers (not just the extent to which they have market power in respect of their common suppliers).

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

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

(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.

26.1 (a) We agree with the view expressed in the context of the European Commission's consultation that further guidance is required in relation to joint bidding and consortia. A joint bidding arrangement can indeed allow parties that would otherwise be unable to bid to jointly participate in a tender procedure. This can generate efficiencies and create more competition in the tender market. That said, close cooperation in relation to bid opportunities might, in certain cases, give rise to potential anti-competitive effects and facilitate collusion. As such, businesses would benefit from a clearer indication of the limits of lawful behaviour when engaging in such forms of cooperation.

26.2 (b) We consider that the 15% market share threshold should be increased, to provide businesses with more legal certainty.

26.3 (c) No opinion

27. Question 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.

27.1 (a) The Horizontal Guidelines currently provide that where participation in standard-setting is unrestricted and the procedure for adopting the standard in question is transparent, standardisation agreements which contain no obligation to comply with the standard and provide access to the standard on fair, reasonable and non-discriminatory terms will normally not restrict competition within the meaning of Article 101(1). However, these principles are often difficult to apply in practice, in particular where standards are de facto being set by a single standard-setting organisation.

27.2 (b) The provisions in the Horizontal Guidelines that describe the role of FRAND terms are, in our view, not sufficient to address the complexity of licensing terms in the context of standard-setting, and in particular standard-essential patents. The terms 'fair', 'reasonable' and 'non-discriminatory' are by their very nature quite vague. The relatively recent cases in relation to FRAND terms[4] show that this concept is inherently unclear and depends on a case-by-case analysis. There are quite different approaches to determining what FRAND means in each case (e.g. ex ante/ex post comparison, comparable standards) and we are of the view that the Horizontal Guidelines should provide a detailed guide to businesses in order to identify both the relevant benchmark and the method of comparison that is appropriate. The importance of FRAND terms is not limited to Article 101 TFEU but is also quite relevant to the concept of abuse of dominance. Accordingly, we believe that, from a competition policy perspective in general, further clarity on this concept is necessary.

28. Question 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?

28.1 Significant.

4 E.g. Unwired Planet v Huawei [2017] EWHC 2988.

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