Eversheds Sutherland (International) LLP

Response to the Consultation on the CMA's Draft Horizontal Guidance

8 March 2023

1. Introduction

1.1 Eversheds Sutherland (International) LLP welcomes the opportunity to comment on the draft Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements, as published by the Competition and Markets Authority ("**CMA**") on 25 January 2023 ("**Draft Horizontal Guidance**"). Our comments are based on our experience of advising clients in relation to various types of horizontal agreements in compliance with UK and EU competition law. The comments and observations set out in this response are ours alone and should not be attributed to any of our clients.

1.2 Overall, we support the CMA's approach in the Draft Horizontal Guidance, which seeks to strike a balance between ensuring consistency with EU competition law and taking advantage of the flexibility afforded by the UK's withdrawal from the EU to pursue different policy objectives.

1.3 We have commented below on certain chapters of the Draft Horizontal Guidance where we consider that the CMA could go further than it currently proposes. We consider the Draft Horizontal Guidance could provide greater clarity in order to afford more legal certainty for businesses to enable them to enter into the kind of horizontal agreements which are likely to result in innovation and deliver benefits to the UK economy.

1.4 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 to the extent necessary.

2. Layout and Structure

2.1 We consider the layout of certain chapters of the Draft Horizontal Guidance does not reflect the ways in which businesses and their advisers would logically digest the content. Its structure could be improved through the use of clear sign posting, which would aid in the application of the guidance by businesses and their advisers alike.

3. Research and Development ("R&D") Agreements

3.1 R&D agreements play a significant role in promoting innovation and increasing competition not only in the UK but globally with significant benefits for consumers. Furthermore, 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. We, therefore, consider it especially important to maintain a clear safe harbour for R&D efforts in the UK with clear guidance to ensure legal certainty.

3.2 In our opinion, it is not the conditions in the Competition Act 1998 (Research and Development Agreements Block Exemption) Order 2022 ("**R&D BEO Order**") (or its predecessor, the Retained R&D Block Exemption) which block SMEs and/or research institutes/academic bodies from entering into R&D agreements but rather the complexities in assessing whether the proposed agreements comply with competition law. In particular, the market assessment which is required creates significant barriers to new products and innovation.

3.3 We welcome the chapter on R&D agreements in the CMA's Draft Horizontal Guidance, which provides additional guidance on the application of, and the concepts in, the R&D BER Order. There are, however, certain areas where we consider improvements can be made, which we set out below.

Ability to carry out the R&D independently

3.4 Paragraph 4.17 of the Draft Horizontal Guidance states that "*if, on the basis of objective factors, the parties would not be able to carry out the necessary R&D independently, the R&D agreement will normally not have restrictive effects on competition*". It would be helpful if the CMA could clarify that this requirement relates to the R&D agreement as a

whole i.e. a party to the agreement may have access to skilled workers but not access to other resources which are required to carry out the necessary R&D.

Market Power Test for Innovation Markets

3.1 Articles 8(3) and 8(5) of the R&D BEO introduced a new threshold for determining market power for undertakings competing in innovation based on the existence of a minimum number of competing R&D efforts/third parties able to engage in the relevant R&D (three plus that of the parties to the R&D agreement ("**3 plus 1 rule**")).

3.2 We consider that the 3 plus 1 rule is likely in many situations to be extremely difficult to apply in practice, particularly for smaller businesses, for the following reasons:

3.2.1 Given the confidential nature of R&D efforts, the information needed to apply the 3 plus 1 rule is unlikely to be available;

3.2.2 It is likely to be very difficult for the parties to the R&D agreement to assess the level of competition at the very early stages of R&D efforts and to reliably apply the 3 plus 1 rule; and

3.2.3 It will be challenging to analyse markets which may not yet exist.

3.3 Paragraph 4.99 of the Draft Horizontal Guidance provides that "*the assessment of comparability of competing R&D efforts with those of the parties to the R&D agreement, must be made on the basis of reliable information…*". Footnote 162 contains examples of what "reliable information" could include, such as, a press release regarding a new R&D project and information in the trade press or at trade exhibitions. In reality, we consider that these types of information are unlikely to be available at the early stages of R&D initiatives.

3.4 Paragraph 4.104 of the Draft Horizonal Guidance recognises that "*there may be some situations in which there is a lack of publicly available information about R&D efforts in which parties are engaged, i.e. 'competing R&D efforts', which may mean that the parties cannot identify three 'competing R&D efforts'.*" In such cases, the CMA proposes an alternative requiring the parties to "*identify sufficient third parties (in addition to or instead of those who are already engaging in 'competing R&D efforts') who have the ability to engage independently in relevant similar R&D efforts (even if there is no evidence that they are currently doing so)*". Paragraph 4.105(d) sets out the factors the parties to the R&D agreement will need to consider and include: the availability of financial and human resources to the third party or parties, their IP rights, know-how or other relevant assets, and their previous R&D efforts. Paragraph 4.105(e) provides that the resources or expertise should be capable of being evidenced. In our view, however, this may not always be possible and there must be a significant risk, with the benefit of hindsight, of the information obtained being incorrect.

3.5 We would suggest that to assist this process of assessing competing R&D efforts that small businesses particularly would benefit from access to some informal guidance from the CMA.

Access to Final Results and Pre-existing Knowhow

3.6 We welcome the new sections on 'access to the final results' and 'access to pre-existing knowhow'. In our view, requiring the parties to R&D agreements to share IP rights and knowhow between them help minimise any anti-competitive effects that R&D agreements could entail and should ensure a fair balance of power between the parties. However, as stated in our response to the CMA's consultation on the retained Horizontal Block Exemption Regulations, we would welcome further clarity in the Draft Horizontal Guidance on the following:

3.6.1 In relation to 'access to the final results, it would be helpful if the CMA could provide further clarity, by way of examples, on what this requirement means in practice for businesses involved in R&D, and what the CMA will consider 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?

3.6.2 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.

Restrictions

3.7 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 more practical examples.

Efficiencies

3.8 We consider that 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, in our view, the Draft Horizontal Guidance needs to address this more explicitly.

4. Production Agreements

4.1 We consider overall that the chapter covering production agreements is helpful and we have limited points for further clarification:

4.1.1 Paragraph 5.32: it would be helpful for the Draft Horizontal Guidance to confirm if the 20% market share applies to any "*relevant market*" as referred to in paragraphs 5.83 and 5.84 concerning the market share threshold under the SABEO, or specifically the relevant market directly concerned by the production agreement itself.

4.1.2 Paragraph 5.36: Further detail as to what constitutes a dynamic market should be provided, citing real-life examples for ease of understanding.

4.1.3 Footnote 214: further explanation by way of examples would be helpful to provide greater clarity on when the level of variable costs in common would be considered high.

5. Purchasing Agreements

5.1 We consider that the guidance on purchasing agreements is generally helpful but have highlighted below where further clarity could be provided:

5.1.1 Overall, the distinction between a buyer cartel and a legitimate joint purchasing arrangement is not clear, and appears to rest largely on the form of the agreement. In particular:

5.1.1.1 Paragraph 6.3 sets out that joint purchasing can be carried out through various forms, including formal structures such as jointly controlled companies, through to contractual arrangements or looser forms of cooperation (such as one purchaser or negotiator representing a group of purchasers), the range of which are defined as "joint purchasing arrangements".

5.1.1.2 Paragraph 6.8 then goes on to provide that joint purchasing arrangements normally do not amount to a restriction of competition by object if they truly concern joint purchasing i.e. "*if the joint purchasing arrangement involves a common organisation acting on behalf of its members*". Whilst the definition of joint purchasing arrangements in paragraph 6.3 includes informal

arrangements, paragraph 6.8 appears to say that only more formal structures whereby an organisation negotiates on purchasers' behalf would not be a restriction by object. This cannot be the intended meaning of paragraph 6.8, as it should be the case that informal associations of purchasers may also be capable of constituting a joint purchasing arrangement which is not a restriction by object.

5.1.1.3 Paragraph 6.11 also describes a buyer cartel as existing where "*purchasers coordinate their behaviour among themselves in view of the individual interaction with the supplier*"; but paragraph 6.2 allows for the situation in which a joint purchasing arrangement is limited to "*jointly negotiating the purchase price…while leaving the actual purchases to its individual members*".

5.1.1.4 Paragraph 6.12 states that a buyer cartel may exist where the purchasers exchange information about purchase prices "*outside any genuine joint purchasing arrangement that interacts with suppliers on behalf of its members collectively*"; but paragraphs 6.36-6.37 make clear that the exchange of such information may be required to implement a joint purchasing arrangement, and again, such a joint purchasing arrangement may be constituted on a less formal basis than a distinct organisation interacting with suppliers on behalf of the members.

5.1.1.5 It would be helpful for the CMA to list more factors that would characterise an agreement as a joint purchasing arrangement rather than a buyer cartel at paragraph 6.13. As drafted, we do not consider that there is a sufficiently clear distinction between buyer cartels and joint purchasing agreements.

5.1.2 Paragraph 6.18 notes that restrictive effects will be considered with regard to whether or not the parties to a joint purchasing arrangement have market power on the selling market or markets. Market power is defined at paragraph 6.24. Where there are multiple downstream relevant selling markets (for example where the purchased product is an input for a number of different products produced by the parties to the purchasing arrangement), it is unclear whether the 15% aggregate market share threshold in respect of the downstream market should be interpreted as requiring an examination of each downstream market.

5.1.3 Further, paragraph 6.18 notes only that joint purchasing arrangements are *less likely* to give rise to competition concerns when the parties do not have market power. Although we note that this tracks the wording in the Commission's current Guidelines on horizontal cooperation agreements, and we agree with the position, it would be helpful for the CMA to indicate in what circumstances joint purchasing arrangements could give rise to competition concerns without such market power.

5.1.4 Paragraphs 6.26 and 6.30 refer to a "*significant degree of buying power*" and "*significant degree of market power*" respectively. Should these be interpreted differently to having "*market power*" at the purchasing level? Should the reference to "*a large proportion of purchases*" in paragraph 6.27 be construed by reference to the 15% threshold in paragraph 6.24?

5.1.5 Paragraph 6.27 refers to small suppliers. Does this refer to small suppliers in terms of revenue or production volumes, or in market share? If the former, what would be considered a small business?

5.1.6 Is the reference at paragraph 6.33 to a joint purchasing arrangement that fixes the purchasing volumes of its members to be read as referring to a situation where the arrangement in question is exclusive (i.e. the volumes set by the arrangement are therefore all of the volumes that may be obtained by the

members)? We assume that the CMA would not view a collusive outcome as arising in this way where the joint purchasing arrangement sets volumes that will be purchased under it but members remain free to purchase additional volumes independently of the arrangement. However, this should be made clear in the CMA's final Horizontal Guidance.

5.1.7 Is the reference to temporary stops in paragraph 6.38 which refers to alliance members selecting products individually for their own shops, to be read as a contrast to a situation where the alliance members collectively agree to cease purchasing the same product? Example 2 appears to proceed on the basis that this is relevant for the analysis. However, we do not consider that this should be treated differently to a situation where the alliance members agree to temporarily stop purchasing the same product, as this may be the only practical way to achieve sufficient traction in the negotiations with the supplier, or the alliance may only be purchasing one or a limited range of products from the supplier on behalf of its members. Again, this should be made clarified in the CMA's final Horizontal Guidance.

6. Commercialisation Agreements

6.1 We are supportive of the CMA's approach in the Draft Horizontal Guidance to largely remain consistent with the EU Commission's draft guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (the "**Draft EU Horizontal Guidelines**"). However, we consider that the CMA's Draft Horizontal Guidance should be amended to clarify the points set out below.

6.1.1 There is no reference to whether or not the specific rules on commercialisation agreements apply to agricultural products, something directly addressed in the Draft EU Horizontal Guidelines. The Draft EU Horizontal Guidelines specify that the commercialisation rules do not apply to: the commercialisation of agricultural products through recognised Producer Organisations and Associations of Producer Organisations; to certain commercialisation agreements that do not concern prices of joint sales and are concluded among farmers and their associations; or to the commercialisation of raw milk. It would be helpful for the CMA to confirm in its final Horizontal Guidance its position on this and, to the extent its position diverges from that of the EU, to make that clear so that businesses understand how they should apply the different sets of rules where appropriate;

6.1.2 The Draft EU Horizontal Guidelines notes that bidding consortium agreements "*do not*" give rise to competition concerns when they allow undertakings to participate in contracts that they would not be able to undertake individually. Conversely, the CMA's Draft Horizontal Guidance specifies that such concerns are "*not normally likely to*" arise. This allows for a scenario where certain bidding consortium agreements may be considered to be prohibited under UK competition law, but would not be prohibited under EU competition law. This may create confusion and difficulty for businesses operating within the UK and EU. We would recommend alignment to the EU's position.

6.1.3 Whilst the inclusion of examples in respect of commercialisation agreements is helpful, notwithstanding separate CMA guidance on no-poaching agreements, we would recommend including an example on non-poaching clauses in the context of outsourcing agreements. The CMA may wish to use the example on non-poaching clauses, which is set out in the Draft EU Horizontal Guidelines.

7. Information Exchange

7.1 The section on information exchange in the Draft Horizontal Guidance is closely aligned with that in the Draft EU Horizontal Guidelines.

7.2 Changes made to the current EU Horizontal Guidelines reflect the rise of digital information (e.g. the exchange of raw vs processed data, and the implications of the use of algorithms). However, given the rise of the digital economy and the increasing importance of digital

information, we consider that the Draft Horizontal Guidance would benefit from a separate and easily identifiable section on digital information exchange, focusing for example on the implications of rising technologies such as algorithms, AI and machine learning.

7.3 More generally, given the length of the chapter we consider that the information exchange section of the Draft Horizontal Guidance could benefit from further clarity in terms of structure, in order to make it easier to navigate and identify key subsections. In particular, it would be useful to include "sign-posting" throughout the text so that key ideas are more readily identifiable – for example, in the subsection on "*Main competition concerns related to information exchange*", each key risk could be summarised by a 1-2 word introductory phrase (such as "*Artificial transparency*"). We consider that the structure of paragraph 8.29, which lists categories of sensitive information, is a clear and helpful way of setting out the guidance and we would welcome seeing this structure used elsewhere in the Draft Horizontal Guidance.

7.4 The Introduction to "Assessment under the Chapter I prohibition" contains a number of key principles that, in our view, are useful for practitioners and so might benefit from their own distinct sub-headings. In particular, (i) the presumption (set out in paragraph 8.14) that undertakings take account of information exchanged with competitors; and (ii) the implications arising from regulatory requirements (set out in paragraph 8.16) are important considerations and it would be helpful for these to be drawn out more clearly in the Draft Horizontal Guidance.

7.5 The increased complexity of scenarios in which information exchange will take place makes clear guidance and, in particular, illustrative examples important.

7.5.1 In paragraphs 8.47-8.50, the Draft Horizontal Guidance discusses whether the information exchanged concerns the past, the present or the future. We consider that this section would benefit from additional clarification on the timeframes for which the various categories of information will be considered historic – for example, paragraph 8.49 the Draft Horizontal Guidance states that "*information can safely be considered as historic if it is several times older than the average length of the pricing cycles or the contracts in the industry if the latter are indicative of price re-negotiations.*" It would be helpful to have further clarity on the multipliers that should be used when considering "several times older" (such as twice as old, three times as old etc) and the extent that this may vary depending on the characteristics of different market, perhaps through worked examples. Similarly, in footnote 309 there is a reference to caselaw of the European Commission where data less than one year old has been considered "recent" – it would be helpful to clarify the extent to which this assessment should continue to be relied upon in a UK context, for example the categories of data and the markets where this time period would be applicable. To the extent that the one year time period would **not** be applicable to a certain category of data or particular market, it would be helpful to draw this out.

7.5.2 In Paragraph 8.51 *seq*., the Draft Horizontal Guidance discusses unilateral disclosure of sensitive information which, if accepted, may constitute a concerted practice. Such unilateral disclosure may occur in various circumstances (e.g. posts on website, electronic messages, shared algorithms, etc.). Further examples would be helpful to understand what constitutes acceptance by the recipient of such information and when such recipient is "*presumed to take account of such information and adapt its market accordingly*".

7.5.3 With regard to unilateral public announcements, for example, according to paragraph 8.56, "undertakings that continuously publicise information without apparent benefit for consumers […] may - in the absence of another plausible explanation - be engaged in an infringement of the Chapter I prohibition." Again, it is unclear what constitutes "acceptance" on the part of the recipient of such information or how a recipient should make clear that they do not wish to receive such information (in order to rebut the presumption of coordinated action).

7.5.4 More clarity would also be desirable in the section on indirect information exchange: when does a hub-and-spoke agreement amount to an unlawful

(indirect) information exchange and in what circumstances does information exchange via online platforms raise concerns (which according to the Draft Horizontal Guidance may also perform 'hub' functions in a 'hub and spoke' scenario)? Again, further examples and illustrations would be of help.

8. Standardisation Agreements

8.1 We consider that the guidance on standardisation agreements is generally helpful but have highlighted below where further clarity could be provided:

8.1.1 The link between paragraph 9.5 of the Draft Horizontal Guidance, setting out three examples of how standard development between competitors give rise to restrictive effects on competition, and the example given at paragraph 9.12 as to what would constitute a restriction by object in, is unclear. For example, in what circumstances would the reduction or elimination of price competition be an object infringement? More guidance would therefore be helpful on what conduct would fall in the object category. In addition, paragraph 9.5 of the Draft Horizontal Guidance is not clear as to whether it is saying that competition issues only arise where the standard development involves competitors – the text seems to suggest this. Further clarification on this point would be helpful including, for example, in circumstances where the parties are potential rather than actual competitors.

8.1.2 Paragraph 9.40 does not provide helpful guidance on what level of market shares are likely to be problematic and says only that market shares should be taken into account. This is particularly unclear where the standard will lead to a new market and how that should be factored into the assessment.

8.1.3 We would also encourage the CMA to clarify whether the Draft Horizontal Guidance applies to technical standards as well as more broadly, to social or other non-technical standards. In the interests of clarity, we would suggest that Example 2 (page 194) should be titled "*Non-binding and transparent…*", rather than "*Binding and transparent…*" – in line with the corresponding example in the Draft EU Horizontal Guidelines (paragraph 514, Draft EU Horizontal Guidelines).

8.1.4 We would encourage the CMA to consider providing further practical examples of how the guidance applies to, for instance: government encouraged standardisation, or the standardisation of product packaging (to the extent such issues are not intended to be covered by separate guidance).