**JOINT WORKING PARTY OF THE BARS AND LAW SOCIETIES OF THE UNITED KINGDOM ("JWP")**[1]

**RESPONSE TO THE COMPETITION AND MARKETS AUTHORITY ("CMA") CONSULTATION ON THE DRAFT HORIZONTAL GUIDANCE**

**8 MARCH 2023**

## 1. Introduction

1.1 The JWP welcomes the CMA's consultation on its draft Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements ("**Draft Horizontal Guidance**"). Overall, the JWP supports 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 while at the same time providing clarity for businesses and legal advisors.

1.2 The JWP has 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 more flexibility and 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.

## 2. Research and Development ("R&D") Agreements

2.1 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.

2.2 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.

2.3 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.

*Market Power Test for Innovation Markets*

2.1 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**")).

[1] The members of the Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law comprise barristers, advocates and solicitors from all three UK jurisdictions; the membership includes both those in private practice and in-house. The JWP is co-chaired by George Peretz QC of Monckton Chambers (GPeretz@Mockton.com; tel 020 7405 7211) and Brian Sher, partner, CMS Cameron McKenna Nabarro Olswang LLP (brian.sher@cmscmno.com; tel 020 7524 6453).

2.2 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:

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

2.2.2 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

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

2.3 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.

2.4 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.

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

*Access to Final Results and Pre-existing Knowhow*

2.6 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, we would welcome further clarity in the Draft Horizontal Guidelines on the following:

2.6.1 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?

2.6.2 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*

2.7 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*

2.8 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.

## 3. **Production Agreements**

3.1 We note the consistency of the CMA's Draft Horizontal Guidance with the EU's draft horizontal guidelines, but consider that the CMA should take the opportunity to provide more clarity than this currently offers. In particular, we would welcome further clarity in the Draft Horizontal Guidance on the following:

3.1.1 That market power for the purposes of paragraph 5.17(a) means the aggregate market power of the parties;

3.1.2 Whether sufficient market power to raise the price of a key component (paragraph 5.19) means sufficient market power to raise it by a level that would satisfy the SSNIP test;

3.1.3 What evidence the CMA considers would be sufficient to demonstrate that the parties would not, absent the ability to set prices jointly, be sufficiently incentivised to enter into a production agreement (paragraph 5.21(b)) and whether the test of "ability" to launch a product in the absence of a production agreement (paragraph 5.28(a)) is one of practical possibility or sufficient incentivisation;

3.1.4 Whether the reference at paragraph 5.25 to one of the parties being "an important competitive force" is to be read as them being such a force in the market as a whole, or on any other undertaking active on that market. There may be situations, for example, where Party B is an important competitive force as regards Party A, where an agreement between Party A and Party B could therefore have anti-competitive effects, notwithstanding that Party B is not an important competitive force vis-à-vis the market in general, perhaps due to geographic location or where both parties are perceived as competing heavily for a particular "slice" of the market, such as volume sales or high added-value sales;

3.1.5 Whether the CMA will apply a presumption that an agreement falling within paragraph 5.28 will be presumed not to have restrictive effects;

3.1.6 Whether the CMA will apply a presumption that an aggregate market share of 20% or less will mean that the parties do not have market power (paragraph 5.32);

3.1.7 When the CMA considers that paragraph 5.41 is likely to apply (which refers to a pure production agreement being able to eliminate competition in and of itself "in some industries where production is the main economic activity"); and

3.1.8 With reference to paragraph 5.79, which notes that the decisive question for whether parties are potential competitors "*is whether each party independently has the means to [carry out certain production activities]*", whether by "*the means to do so*" the CMA means the practical means to do so (i.e. production facilities and required inputs) or more expansively the means to access such facilities and inputs (for example, the ability if it wished to borrow money in order to finance the purchase of such facilities and inputs, on realistic terms).

3.2 We note that paragraph 5.54 on necessary information exchange does not refer to arrangements put in place within the parties to isolate commercially sensitive information to those for whom it is "need to know" for the purposes of the production agreement (i.e. "Chinese Walls"). It would be helpful if the CMA could confirm that it will judge what information exchange is "necessary" by reference <u>both</u> to the transfer from Party A to Party B and to what Party B then does with that information? The same issue arises as regards paragraph 5.137. By contrast, such guidance does appear at paragraph 6.36 in the section on Purchasing Agreements.

3.3 Please also refer to the <u>Appendix</u> which contains some potential typographical errors.

4. **Purchasing Agreements**

4.1 We consider that the guidance on purchasing agreements is generally quite clear but would welcome further clarity in the Draft Horizontal Guidance on the following:

4.1.1 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) should the 15% aggregate market share threshold in respect of the downstream market be interpreted as requiring an examination of each downstream market?

4.1.2 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?

4.1.3 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.

4.1.4 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? Would that be treated differently? Example 2 appears to proceed on the basis that this is relevant for the analysis.

5. **Information Exchange**

5.1 The section on information exchange in the Draft Horizontal Guidance is closely aligned with that in the Draft Revised EC Horizontal Guidelines.

5.2 Changes made to the current EC Horizontal Guidelines (from 2 January 2011) reflect the rise of digital information (e.g. the exchange of raw vs processed data, and the implications of the use of algorithms).

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

5.3.1 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*".

5.3.2 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).

5.3.3 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.

**On behalf of the JWP**[2]

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2 The authors would like to thank members of JWP for their contributions and Annabel Borg for her assistance in the preparation of this submission.

## APPENDIX

## POTENTIAL TYPOGRAPHICAL ERRORS

1. The following may constitute typographical errors in section 5 on Production Agreements.

1.1 Paragraph 5.35 notes that "*A combined market share of the parties of slightly more than 20% may occur in a market with a moderate concentration*". A combined market share of the parties of slightly more than 20% (or indeed significantly more than 20%) "may occur" in *any* market. We assume the CMA means to say here that it "*may constitute market power*" in a market with a moderate concentration (subject to our comments on what is meant by moderate above);

1.2 Paragraph 5.36 notes that "dynamic markets are typically those which are growing and/or evolving and in which competition revolves around bringing new and innovative products to market" (our emphasis added). Should this be "and/or"? A market may be quickly growing and evolving (for example, because a drop in regulatory or technological barriers makes it more attractive to new entrants) irrespective of whether there is scope for new and innovative products. There is also no reference here to markets with low barriers to entry. We would consider both of those instances to indicate a market being "dynamic" for the purposes of this guidance.

1.3 Paragraph 5.62 says that the definition in the Competition Act 1998 (Specialisation Agreements Block Exemption) Order 2022 ("**SABEO**") of "joint production market" "does not require the parties to be already active on the same product market". However, the definition in Article 3(2)(c) of SABEO, quoted at paragraph 5.61, says a joint production agreement is one which is "entered into between two or more undertakings which are already active on the same product market". Should the text at paragraph 5.62 be to the same "geographic market" instead?