Linklaters

CMA Consultation on draft Guidance on Horizontal Agreements

Linklaters Response

8 March 2023

I. Introduction

(1) We welcome the opportunity to comment on the Competition and Markets Authority's ("**CMA**") consultation on the draft Guidance on horizontal agreements (the "Guidance").[1]

(2) In this position paper, we comment on the proposed new Guidance concerning (1) the extraterritorial application of Chapter I, (2) the applicability of Chapter I of the Competition Act 1998 ("**Chapter I**") to practices involving joint ventures and their parent companies, (3) bidding consortia, (4) information exchange, (5) efficiencies of data pooling, (6) research and development agreements, and (7) unenforceability of agreements. We also include (8) some minor proofing comments in **Annex 1**.

II. Extraterritorial application of Chapter I

(3) We note that while the Chapter I prohibition only applies to agreements implemented or intended to be implemented in the UK[2], the UK Government has committed to amending the Chapter I prohibition post-Brexit so that it can apply to agreements, concerted practices and decisions which are implemented outside of the UK, depending on whether there are (or likely to be) direct, substantial, and foreseeable effects within the UK.

(4) This will represent a shift from an "implementation approach"[3] to a "qualified effects"[4] approach. This will bring the CMA's analytical framework in line with the European Commission's approach, which considers whether a conduct would have an immediate and substantial effect in the EU to determine whether an agreement falls within the scope of Article 101 of the Treaty on the Functioning of the European Union ("**TFEU**").

(5) This represents a significant change, considering that the UK Government has historically taken a narrow view of the ability of states to exercise extraterritorial jurisdiction, adopting the position that jurisdiction should be based on territoriality and nationality. We understand that this change of doctrine on territorial scope is considered to be justified as a necessary means to ensure "*stronger and faster enforcement against illegal anti-competitive conduct*" in a context where globalisation has increased the ability of agreements implemented outside the UK to harm competition or consumers in the UK.

(6) We welcome the fact that this shift will help ensure consistency with case law precedents involving UK enforcement of Articles 101 and 102 TFEU, where UK courts applied the "qualified effects" doctrine for the award of private damages,[5] in discrepancy with the "implementation approach" applied to the enforcement of the Chapter I prohibition.

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1 The views expressed herein are those of the Linklaters lawyers who prepared this response and cannot be assumed to represent the views of any clients of Linklaters.

2 Section 2(3) of the Competition Act 1998 ("**CA98**")

3 **Implementation approach** is where an agreement could not infringe the Chapter I prohibition if it was implemented (or intended to be implemented) outside the UK - even if it produced effects in the UK.

4 **Qualified effects** approach is where the Chapter I prohibition will apply if the conduct has or is likely to have direct, substantial and foreseeable effects within the UK – even if the contract was not implemented (or intended to be implemented) in the UK.

5 In *Iiyama (UK) Ltd and others v Samsung Electronics Co Ltd and others v Samsung Electronics and others* [2018], the Court of Appeal ruled that a national court may, in a private enforcement action, award damages for conduct that violates Article 101 outside the EU, on the basis of the qualified effects test

(7) However, we note that this shift from an "implementation approach" to a "qualified effects" approach is not clearly reflected in paragraph 3.22 of the Guidance. We suggest that the Guidance be amended to reflect – or at least, account for – the incoming legislative changes, which we understand are expected later this year.

(8) Further, this significant policy shift raises substantial questions relating to how this change will be reflected in the law and in the CMA's policy stance, and we suggest the Guidance is a good opportunity to clarify the scope of these upcoming changes. Namely:

(a) In terms of the precise wording of the amendment, we would suggest that rather than introduce an additional limb to the legal test, the Government could merely remove the implementation requirement under section 2(3) CA98. This would retain the qualifications under section 2(1) CA98 which applies to conduct that "may affect trade" within the UK and which has as its object or effect the "*prevention, restriction of distortion of competition*" within the UK.

(b) We would also invite the CMA to clarify that its shift from an "implementation approach" to a "qualified effects" approach with respect to the Chapter I prohibition does not, in itself, entail that the CMA's investigatory powers under section 26 CA98 have extraterritorial reach. As the Competition Appeal Tribunal recently set out in its *Bayerische Motoren Werke AG judgment*, whist the Chapter I prohibition has a degree of extraterritorial application, the "*extent to which this can have a material bearing on the construction of section 26 […] verges on the minimal*", since investigation precedes any finding of infringement and "*there is no necessary correlation between the powers needed to investigate an infringement and the infringement itself*".[6] Such a clarification would be in line with the presumption articulated by the CAT against extraterritorial effect and the general rule (as stated by the Supreme Court) of interpreting a statute "so far as its language permits" with the principle of comity.[7]

(c) We note that the UK Government has also committed to strengthening and expanding the CMA's investigatory powers in Competition Act investigations.[8] We suggest that any augmentation of the section 26 powers should occur in that context, rather than in this Guidance, and should be subject to detailed consultation, in the usual manner of legislative reforms, taking account of principles of international law (such as comity, as detailed above).

(d) It would also be helpful if the CMA could clarify whether its adoption of a "qualified effects" doctrine for the Chapter I prohibition reflects a wider change in policy stance that will inform its approach to the Chapter II prohibition and merger control investigations. Of particular interest in relation to the Chapter II prohibition would be whether the prohibition could apply where the dominant position is (wholly or partly) in the UK or globally, but the abuse occurs in a related market outside the UK. In the context of merger control, we believe that adoption of the "qualified effects" doctrine, with its requirements of foreseeability, immediacy and substantiality, could clarify the CMA's extraterritorial application of merger control rules.

III. Applicability of Chapter I to agreements between joint ventures and their parent companies

(9) We welcome the inclusion of a new section in the Guidance on the applicability of the Chapter I prohibition to agreements and concerted practices involving joint ventures and their parents.

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6 *Bayerische Motoren Werke AG v Competition and Markets Authority* [2023] CAT 7, paragraph 74(4).

7 *Bayerische Motoren Werke AG v Competition and Markets Authority* [2023] CAT 7, paragraph 67, citing *R (KBR Inc) v Director of the Serious Fraud Office* [2021] UKSC at paragraph 21. We recognise the CMA is seeking permission to appeal this judgment.

8 Department for Business, Energy & industrial Strategy *Consultation outcome: Reforming competition and consumer policy: government response* (20 April 2022).

(10) As a matter of law, the Chapter I prohibition does not apply to agreements between undertakings which constitute a single economic unit.[9] It is also, in our view, clearly established that the concept of undertaking is to be interpreted in a uniform manner throughout UK competition law.[10] If this concept should be applied in a coherent manner across different fields of competition law, we do not see any basis for it to be applied differently depending on whether the Chapter I prohibition is being applied in order to (a) impute liability to a parent company for the unlawful conduct of a joint venture or (b) to determine the legality an agreement between the same parent and the joint venture.

(11) However, the new proposed wording does not state that the Chapter I prohibition "*does not apply to*" agreements between a joint venture and its parents, but merely notes only that "*the CMA will typically not apply*" the Chapter I prohibition to such agreements.

(12) This wording, and more specifically the word "*typically*", suggests that the CMA does not exclude the possibility that the Chapter I prohibition may apply. Indeed, the CMA only signals that it *would not* challenge relevant agreements or concerted practices (including information exchanges) if they concern activities in the markets where the joint venture is active.

(13) While it is a step in the right direction and useful for companies to know that the CMA does not intend to challenge such practices if they relate to the markets where the joint venture is active, the increment in legal certainty brought about by this clarification is limited. This is because in practice, the primary concern in relation to restrictive clauses in agreements between joint ventures and their parents is often whether such provisions are valid and enforceable.

(14) The absence of a clear statement in the Guidance on the applicability of Chapter I is therefore regrettable. We assume that the main reason for the CMA's hesitation is the CJEU ruling in the *Dow Chemical* case.[11] It is submitted, however, that this ruling, which concerned the imputability of unlawful conduct to parents, does not prevent the CMA from taking a firmer view.

(15) The CJEU's recent judgment in the *Sumal* case also supports an updated and "asymmetric" approach to the single economic unit concept. The CJEU emphasises in its ruling (at paragraph 47) that *"the same parent company may be part of several economic units"*.[12] This applies, according to the CJEU, to conglomerates. Similarly, nothing should prevent a joint venture from forming part of several economic units, i.e., in relation to each of the parent companies that exercise decisive influence over the joint venture. The fact that the parent companies are independent undertakings belonging to different economic units, and the applicability of Chapter I to agreements between the parents regarding how they conduct themselves in the market, is a different matter.

(16) We would therefore invite the CMA to change "*will typically not apply*" to "*will not apply*" at para. 38. of the Guidance.

(17) If the CMA nonetheless prefers to maintain more flexibility, we would still invite the CMA to expand its Guidance as follows:

a) We would invite the CMA to clarify that when determining whether an agreement concerns the market where the joint venture is active (and Chapter I will "typically not apply"), the CMA will have regard not only to areas where the joint venture has third-party sales but also to markets where the joint venture is expected to become active in the foreseeable future. In

[9] CJEU judgment in Case C-531/16, *Specializuotas transportas*, paras. 28-29. See also the judgment in *Provimi Ltd v Roche Products Ltd and other actions* [2003] EWHC 961 (Comm), paras 24(4) and 27. See also VABEO Guidance at 4.18, where the CMA states: "*The Chapter I prohibition does not apply to agreements between undertakings which form part of a single economic unit or entity*."

[10] General Court judgment in Case T-443/08 and Case T-455/08, *Freistaat Sachsen*, para. 117. See also the judgment in *BetterCare Group Ltd v Director General of Fair Trading* [2002] CAT 7, paragraph 30.

[11] CJEU judgment in Case C-179/12 P, *The Dow Chemical Company v. CMA*, para. 58.

[12] CJEU judgment in Case C-882/19, *Sumal v Mercedes-Benz*.

particular, in a situation where a joint venture is set up without the contribution of an existing business, it may take some time before the joint venture starts generating sales. Likewise, the joint-venture's business plan may foresee a gradual expansion of its activities to additional products or geographies. We would expect that agreements relating to such other products/geographies would still fall into the CMA's no-challenge zone.

b) It also would be helpful if the Guidance would elaborate on the consequences of a breach of the Chapter I prohibition at the moment when a joint venture is created as regards the legality and validity of subsequent agreements between the joint venture and its parents. We consider that there is no basis to apply the "fruits of the poisonous tree" doctrine which would imply that a potential breach of the Chapter I prohibition when setting up a joint venture would automatically affect the legality of subsequent agreements entered into by the parent companies and the joint venture. We consider that instead, the legality of any such subsequent agreement needs to be assessed separately.

IV. Bidding consortia

(18) We welcome the inclusion of a new sub-section in Guidance dedicated to bidding consortia. The proposed new guidance is valuable and is expected to significantly increase legal certainty for companies participating in such consortia.

(19) Our experience shows that when assessing consortia under Chapter I there are regularly a number of additional considerations coming into play which are not yet addressed in the Guidance. Companies participating in consortia would greatly benefit from specific guidance on these aspects. We therefore would invite the CMA to expand the Guidance to these topics which we set out below.

A. Centre of gravity of bidding consortia

(20) Many bidding consortia involve the joint production or provision of the contract goods or services. For example, this may be the case in many joint bids for large construction and civil engineering projects, where the core of the cooperation is joint planning, design and construction. According to the Guidance such integrated cooperation must, as a general rule, be assessed based on all the chapters pertaining to the different parts of the cooperation.

(21) The question whether a certain conduct qualifies as an object or effect restriction, in contrast, normally needs to be assessed only based on the guidance included in the chapter of the Guidance pertaining to the part of the cooperation which can be considered the "centre of gravity".

(22) If the centre of gravity of the agreement lies in the production activity, only Chapter 5 on production agreements will normally be relevant to determine whether a certain conduct shall be considered a restriction of competition by object or by effect. By contrast, if the agreement mainly or exclusively involves joint commercialisation, this assessment will normally be conducted based on the principles set out in Chapter 7.

(23) This clarification is helpful. However, we would welcome additional guidance as regards the interplay between the rules foreseen in Chapter 5 and Chapter 7 with regard to the assessment of bidding consortia. This could be done by way of an additional example which sets out more clearly the criteria that will determine whether the centre of gravity of a joint bid is rather the production or the commercialisation.

(24) The inclusion of the section on bidding consortia in Chapter 7 suggests that in the CMA's view, the centre of gravity of bidding consortia is typically the commercialisation. In our view this is however not necessarily the case.

B. Joint bids of suppliers with partially overlapping activities

(25) As regards the question whether companies shall be treated as competitors for the purpose of assessing consortia under Chapter I, paragraph 7.43 of the Guidance only discusses instances where the companies joining forces have complementary activities or where they are active in the same market but not in position to carry out the contract individually, e.g., due to the size of the contract.

(26) The Guidance does not address the scenario of bidding consortia formed by undertakings with partially overlapping capabilities. One could for instance imagine a scenario where the fulfilment of the contract requires capabilities in relation to the product / service markets A, B and C and where undertaking X (active in markets A and B) forms a consortium with undertaking Y (active in markets B and C) in order to meet the tender requirements.

(27) The guidance provided under paragraph 7.43 of the Guidance suggests that such cooperation would not constitute a restriction of competition, given that neither of the two undertakings is able to compete for the contract individually. It would be helpful if the Guidance would explicitly confirm that point or alternatively set out the parameters against which, in the CMA's view, consortia should be assessed in such circumstances.

(28) Does it e.g., make a difference – using the example above – whether there are other undertakings that are only active in market A or market B that X and Y could team up with instead? Does it depend on the proportion of the contract value relating to products or services in respect of which an overlap between the activities of the consortium members arises (product/service market B in the example above)?

(29) Likewise, the Guidance does not address a situation where a company that could bid individually teams up with a partner with overlapping capabilities that could not bid individually. Such cooperation can be in the interest of the customer if it allows e.g. to deliver the project at a lower price. Given that such cooperation would not result in a reduction of the overall number of bids, Linklaters submits that it would not amount to a restriction of competition, and we would be grateful if the CMA could confirm this point in the Guidance.

C. Factors determining whether an undertaking qualifies as competitor

(30) Generally, it would be helpful if the Guidance would recognize more explicitly that the question of whether a consortium partner is an actual or potential competitor needs to be assessed case by case for each individual tender or contract.

(31) We submit that an undertaking should only be treated as a competitor (or potential competitor) with regard to a specific tender if there is a realistic chance that such undertaking will actually participate in the tender and submit a bid. This is a question of ability but also a question of incentives. In our view, the discussion in paragraph 7.44 of the parameters determining whether an undertaking qualifies as a competitor, is too narrow, since it only focuses on the undertaking's ability to perform a contract individually.

(32) The participation in a tender can, depending on the type and the size of the project, require a very significant amount of resources. If so, undertakings will normally only participate in a tender if they see a sufficiently high prospect of winning the tender. If they see only a purely theoretical chance of success (e.g., because of an insufficient track record or because the customer has a strong preference for suppliers established in a certain geography) undertakings will normally not have an incentive to participate in a tender.

(33) If this is the case, an undertaking should therefore, in our view, not be treated as a competitor, even if it has the capabilities to carry out the contract individually. Such approach would in our view also be consistent with the parameters set out in paragraph 3.16 of the Guidance to be taken into consideration to determine when an undertaking shall be treated as a potential competitor. It would be very helpful if the Guidance would confirm this point.

(34) In addition, we would invite the CMA to extend the parameters mentioned in paragraph 7.44 against which the ability of an undertaking to fulfil a contract shall be measured, to include the ability to assume the risk associated with a given project. If the risk associated with a project is beyond the acceptable maximum risk level, as defined in the risk policy of an undertaking, such undertaking will be disqualified from individually participating in the tender, irrespective of its technical capabilities, and should therefore in our view not be treated as a competitor. In that case, teaming up with a partner may bring down the risk to a level allowing participation in the tender.

D. Distinction between object and effects restrictions

(35) In particular, when the projects at stake are very large and complex, it can be very challenging for an undertaking to determine whether a potential consortium partner would be able to, and have the incentives to, participate in a tender individually. In such situation, it can be very difficult for an undertaking to assess the legality of a potential cooperation in practice.

(36) Against this background, it is all the more important to provide undertakings with the necessary guidance allowing them to determine, based on the facts available to them, whether or under what circumstances a contemplated cooperation could potentially constitute an object restriction and therefore involve an increased risk.

(37) At paragraph 7.46 of the Guidance, reference is made to the general explanations relating to the distinction between object and by effect restrictions for commercialisation agreements at paragraphs 7.6 to 7.22 of the Guidance. However, given that fixing an overall price is an integral and necessary part of the vast majority of joint bids, the reference in paragraph 7.46 risks being understood as suggesting that any bidding consortia (involving competing undertakings) with a centre of gravity falling into Chapter 7 would constitute an object restriction. Only bidding consortia with a centre of gravity falling into Chapter 5 (joint production) would escape this classification. It is submitted that making such a sharp distinction between bidding consortia having a centre of gravity falling into either Chapter 5 or Chapter 7 would not be appropriate, and that the general guidance for commercialisation agreements to which reference is made in paragraph 7.46 of the Guidance is not suitable for bidding consortia.

(38) We therefore would invite the CMA to provide more specific guidance on how object restrictions shall be delineated from effect restrictions, when looking at bidding consortia involving partners that could also bid individually or when looking at a situation where a consortium partner can at least not exclude that its bidding partner could also bid individually.

(39) At paragraph 7.37 of the Guidance, the CMA draws a general distinction between bidding consortia and collusive tendering which is helpful. The CMA however also acknowledges that the distinction between bid rigging and legitimate forms of joint bidding is not always straightforward and that it can, in particular, be challenging in cases involving sub-contracting.

(40) In this respect, it would be helpful if the CMA could expand its guidance and elaborate on the parameters that in its view will determine whether a cooperation constitutes bid rigging (i.e., an object restriction) or whether it constitutes a legitimate form of joint bidding which would at most constitute an effect restriction.

(41) One general distinction criterium for the CMA appears to be that bid rigging will typically not involve a joint participation in a tender but instead a coordination of individual bids, and also involves an element of secrecy (paragraph 7.39 of the Guidance).

(42) In our view, similar principles should apply in this respect, irrespective of whether the cooperating undertakings are active on the purchasing or supply side. If one imagines a hypothetical scenario where two different consortia would exchange products / services with each other (instead of providing/receiving a monetary remuneration), it would not be plausible to apply different criteria depending on whether the consortia act on the supply or purchasing side.

(43) We therefore submit that the general principles developed in Chapter 6 of the Guidance in relation to the distinction between object and effect restriction in relation to purchasing agreements, should equally apply in relation to joint bidding. For example, in paragraph 6.8 it is mentioned that joint purchasing normally does not amount to a restriction by object if it involves collective negotiation and conclusion of the agreement.[13] An analogous principle should, in our view, be applied to bidding consortia. This would be in line with the general idea, as reflected in the 2011 HGL and the CMA's Article 81(3) Guidelines, that the integration of resources and activities is a plausible source of efficiencies, and recent case-law, which indicates that agreements that are driven by genuine pro-competitive aims should not be deemed anti-competitive by object.[14] Indeed, bidding consortia are hugely important in many sectors and an overly conservative treatment under Chapter I risks having a chilling effect on companies' willingness to enter into such agreements and therefore cause significant harm to competition and consumer welfare.

(44) If the customer is aware that a bid is submitted by a consortium including several suppliers, the underlying bidding consortium agreement should therefore as a matter of principle not constitute an object restriction (see paragraph 6.13 of the Guidance). It would be helpful if the CMA could confirm this view and, in particular, clarify whether the disclosure of the identity of the participating suppliers would be relevant for the qualification of a bidding cooperation agreement as an object or effect restriction.[15]

E. Ancillary exclusivity arrangements

(45) Engaging in bidding consortia is often associated with considerable costs and efforts. An undertaking participating in consortia will therefore often have a legitimate interest to ensure that their consortia partners are fully committed, and that they will not free ride on the contribution of other consortia partners by participating in additional consortia for the same project.

(46) As the CMA itself recognizes at paragraph 7.39 of the Guidance, the participation of one undertaking in more than one bid / consortium for a given contract also involves a risk of collusion.

(47) In practice, consortia agreements will therefore often foresee that members participate on an exclusive basis, so that they cannot participate in other competing bids submitted for the same contract.

(48) The Guidance currently does not address exclusivity clauses regarding joint bidding, and it would be very helpful if the CMA could confirm that such exclusivity arrangements are permitted or, alternatively, specify the parameters that would be relevant to assess their legality under Chapter I.

(49) It is worth noting that in relation to purchasing agreements, the Guidance states at paragraph 6.19 that a clause imposed for parties to a joint purchasing arrangement, preventing them from participating in other competing purchasing arrangements, constitutes a permitted ancillary restraint to the extent that the participation in a competing buying group could jeopardise the purchasing arrangement. In our view the same should hold true for exclusivity clauses in joint bidding arrangements and we would be grateful if the CMA could confirm this point.

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[13] In this respect, we note a certain inconsistency between paragraphs 6.8 - -6.10 that state that buyer cartels aim at coordinating purchasers' individual competitive behaviours and paragraph 6.13(a) which foresees that a legitimate purchasing cooperation may bind the individual purchasers.

[14] *Gascoigne Halman Limited v Agents' Mutual Limited [2019] EWCA Civ 24, judgment of 24 January 2019; Achilles Information Limited v Network Rail Infrastructure Limited [2019] CAT 20, judgment of 19 July 2019.* See also: CJEU judgments in Case C-67/13 P, *Groupement des Cartes Bancaires (CB) v CMA*; and in Case C-228/18, *Budapest Bank*.

[15] On a related note, the CMA explains at paragraph 6.13(a) that when a joint purchasing agreement is clearly disclosed to the supplier this indicates that the conduct is not a buyer cartel, but at the same time in footnote 255, the CMA states that secrecy is not a requirement for finding a buyer cartel. We suggest to review the text for increased consistency.

V. INFORMATION EXCHANGE

A. Introduction

(50) We welcome the CMA's willingness to provide greater clarity in the Guidance on the application of the Chapter I prohibition to information exchange.

(51) Nonetheless, we see various areas where the Guidance could be further refined as follows:

- **Object vs effect delineation**: when following the assessment of information exchange under Chapter I put forward in the Guidance, there is a risk that different competition concerns – and their related tests and standards of proof – are conflated. To help undertakings in their self-assessment, the Guidance should provide further guidance on the requirements for an infringement to be found for each type of competition concern, and a step-by-step guide (or checklist) for ruling out each potential concern.
- **The link between reduction of competitive uncertainty and potential collusive outcomes:** the Guidance decouples the reduction of competitive uncertainty from the risk of collusive outcomes based on flawed reasoning.
- **Non-private information**: the description of non-private information (including as regards its 'reliability') contained in the Guidance risks causing considerable confusion for undertakings seeking to determine whether information is 'genuinely public' as part of their self-assessment, and so should be removed.
- **Imprecise, inaccurate or misleading information**: the cumulative (cf. alternate) nature of the test for determining whether information is competitively sensitive requires clarification insofar as it relates to imprecise, inaccurate or misleading information. Consideration of 'reliability' with respect to imprecise information should be removed, as it is without logical basis.

B. A clearer delineation between by object vs by effect competition concerns

(52) In the assessment of information exchange under Chapter I, there is a risk that different competition concerns – and their related tests and standards of proof – are conflated.

(53) In that regard, the Guidance could provide more detailed guidance on the types of information exchange that may lead to particular competition concerns and the standard that will be applied when assessing those competition concerns.

(54) Paragraphs 8.18 – 8.23 of the Guidance already outline the main competition concerns related to information exchange, and paragraphs 8.73 – 8.78 and 8.79 – 8.84 explain the concepts of restriction of competition by object and restrictive effects on competition, respectively. However, it would be helpful for undertakings' self-assessment exercises if these sections could be consolidated or cross-refer to one another.

(i) Information exchange which *in itself* may result in a collusive outcome

(55) As noted in paragraph 8.73 of the Guidance, a restriction of competition by object may be found where the information exchanged is commercially sensitive and the exchange is capable of removing uncertainty between participants as regards the timing, extent, and details of the modifications to be adopted by the undertakings concerned in their conduct on the market.

(56) Such information must be sufficiently strategic to the extent that it is capable of influencing the conduct on the market of an actual or potential competitor. The reason why such information exchanges can, in and of themselves, reasonably be considered restrictions *by object* is at the heart of the concept of a concerted practice. Indeed, otherwise, undertakings could circumvent Chapter I by communicating their planned future conduct to competitors without formally reaching an "agreement".

(57) In view of the above, we believe paragraphs 8.18 – 8.23 could be adjusted by providing further guidance on the types of information exchange that are likely to lead to a collusive outcome *in itself* (i.e. information, in particular concerning future conduct, which is capable of influencing the future conduct on the market of an actual or potential competitor) and clarifying that such information exchanges may be considered restrictions *by object*.

(58) Furthermore, we consider that the list in paragraph 8.29 is, in part, misleading and risks causing confusion and may lead to erroneous interpretations of Chapter I. It should therefore be removed or at least amended. The list is said to refer to examples of information that have been considered particularly sensitive and the exchange of which was qualified as a by object restriction. However, the list relies very heavily on a single case (the General Court in *Infineon Technologies*[16]) which concerned a hard-core cartel and in which many types of information were shared on an organised and recurring basis with the common aim, according to the European Commission's decision, of limiting price competition.[17] The list however gives the impression that any sharing of such data, also in a non-cartel context, constitutes a by object restriction.

(59) This concern is particularly acute with regard to the newly added points (g) and (h) in the list of paragraph 8.29: "*exchange with competitors of publicly available current / past pricing data where the context of the disclosure provided valuable reassurance as to future conduct*" and "*exchange with competitors of elements of a potential entrant's launch plans*". These two points are based exclusively on a single CAT case (*Lexon v CMA*[18]). In that case, the CMA found (and the CAT upheld) that a by object infringement had taken place based on the congruence of a number of exchanges, most of which were neither based on publicly available information nor related to potential entrants' launch plans. Instead, most elements of the identified anticompetitive conduct related to more "classic" hardcore anticompetitive information exchanges, relating to non-public information on e.g., pricing and supply volumes.

(60) Points (g) and (h) of the list in paragraph 8.9 currently read as if information exchanges regarding publicly available data (which are in principle lawful) and general discussions on launch plans (which potential market entrants also often advertise publicly) may constitute stand-alone by object restrictions, even if they take place within the confines of healthy competition and entirely outside the context of "*coordination and communication in the market*".[19] This does not comport with the principle stipulated by the Court of Justice in *Budapest Bank* that a by object restriction must entail in itself "*a sufficient degree of harm to competition for it to be considered that it is not necessary to assess its effects*".[20] Points (g) and (h) of the list in paragraph 8.29 allow wide discretion for determining whether certain conduct falls under them. They are also not backed by the necessary "*sufficiently reliable and robust experience*" which the Court of Justice considered in *Budapest Bank* to be required for a type of conduct to be characterized as restrictive of competition by object.[21]

(61) Moreover, the list contains several examples of current information, e.g. an "undertaking's pricing" and its "current capacity". It is not clear how sharing such information can remove uncertainties as regards *"timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market"* in the meaning of paragraph 8.73. Data about current prices and current production capacities is widely available in many fiercely competitive markets. In addition, it is doubtful whether the cases referred to in the footnotes actually support the view that sharing such information restricts competition by object. For example, in the *Infineon Technologies* case (the Smart Card Chips

[16] General Court judgment in Case T-758/14 RENV, *Infineon Technologies v CMA*.

[17] Commission decision in Case AT.39574, *Smart Card Chips*.

[18] *Lexon v CMA* [2021] CAT 5.

[19] *Lexon v CMA* [2021] CAT 5, para. 153.

[20] Court of Justice judgment in Case C-228/18, *Gazdasági Versenyhivatal v Budapest Bank Nyrt (Budapest Bank)*, EU:C:2020:265, para. 37.

[21] *Budapest Bank*, para. 76.

cartel), the information that was actually exchanged among the cartel members was price forecasts, utilisation rates and future capacities.

(ii) Information exchange which can *support* an anticompetitive agreement or concerted practice

(62) A second category of information exchange is information which can be used to increase the stability of an anticompetitive agreement or concerted practice. These are discussed in paragraphs 8.21 – 8.23, considering information which could increase internal and external stability of an anticompetitive agreement. The Guidance already helpfully indicate that both exchanges of present and past data can constitute such a monitoring mechanism (either to detect "deviations" from collusive outcomes or to monitor entry).

(63) However, the Guidance could provide further guidance by making clear that such information exchanges will not be considered a restriction *by object*, and that in order for such exchanges to result in an infringement, the CMA would need to show evidence that it is ancillary to an anticompetitive agreement or concerted practice that is restrictive by object. It follows logically that, if the general concern is that such information exchanges can increase the stability of an anticompetitive agreement or concerted practice, there must be an anticompetitive agreement or concerted practice already in place for the exchange to be harmful. Alternatively, it must at least be established that a collusive outcome is more likely than not to occur *as a result of* the information exchange. But the result of that analysis depends on market power and other market characteristics, not on the intrinsic harmfulness of the conduct as such, and should therefore form part of an analysis of anti-competitive effects. This is particularly the case where there is a legitimate rationale for the exchange of such information, such that it cannot be inferred that the information would be used to support the stability of an anticompetitive agreement or concerted practice.

(64) As such, we consider that paragraphs 8.18 – 8.23 should be adjusted by providing further guidance on the types of information exchange that may support an anticompetitive agreement or concerted practice, and the additional elements that would need to be shown to find an infringement in such cases.

(iii) Information exchange which can lead to anticompetitive foreclosure

(65) A third category of information exchange is information which, when pooled together and not available to all undertakings, could be used to foreclose competition. In relation to this category, we are concerned that the CMA in some places seems to assume that foreclosure effects are likely to arise from data pooling. We have devoted the next section to this particular issue.

C. Link between competitive uncertainty and risk of collusive outcomes

(66) The potential for information exchanges to result in a stable collusive understanding is an important element in the establishment of a restriction by object. In particular, the legal and economic context in which an information exchange occurs must be taken into account in considering whether an exchange can appropriately be considered to amount to a restriction by object.

(67) At 8.18-8.19, the Guidance unhelpfully appears to decouple the reduction of competitive uncertainty with the risk of collusive outcomes. The example provided at 8.19 provides no support for the position that exchanges may restrict competition even where they cannot lead to a stable collusive outcome, as it conflates the stability of collusion with the stability of price itself.

(68) Firstly, the statement appears to be at odds with the facts in *Lexon,* where the Court found that *"Lexon's commercial interest was in stable market prices and did not wish to be seen as a "maverick" in the market"*.[22]

[22] See *Lexon*, para. 154(5).

(69) Secondly, and more importantly, price stability is of limited relevance in establishing a stable collusive understanding. For example, in *Bananas*, the European Commission found evidence of a stable collusive understanding between undertakings in a market where the market price fluctuated on a weekly basis based on factors outside the control of the colluding undertakings. In that case, the fluctuation of market price did not negate the possibility of a stable collusive understanding being reached. However, given the weekly product cycles, the General Court did require there to be evidence that the exchanges were frequent enough to reach a stable collusive understanding.[23]

D. Removal of description of non-private information and associated 'reliability' considerations

(70) Undertakings value clarity in guidance on the determination of whether information is public and therefore unlikely to be considered competitively sensitive, or not. Paragraph 8.33 of the Guidance appears to introduce a new category of information which is not 'private' or 'confidential' in nature, but which is nevertheless not 'genuinely public'. This is apt to cause considerable confusion when read against the otherwise stated explanation of what constitutes 'genuinely public' information in paragraphs 8.31-8.32.

(71) In particular, the explanation for the potentially competitively sensitive nature of non-private information in paragraph 8.33(a) is couched in terms of the 'reliability' of that information, as influenced by the relationship between the parties (i.e., competitor-competitor vs. customer-competitor) to the relevant exchange. It is wholly unclear why a reliability assessment is contemplated in this section of the Guidance, given that the test for determining whether information is 'genuinely public' is otherwise squarely described as relating to the costs involved in collecting the information. This discussion of 'reliability' is also entirely divorced from the practical example (which we consider is otherwise useful guidance for undertakings) included at paragraphs 8.34-8.37 of the Guidance, which logically focuses on the differing costs for obtaining information across scenarios.

(72) Example 1 (at page 173) highlights the risks of creating a new category of non-public, non-private information, and how it conflates the by object vs. by effect analysis. The analysis section of Example 1 concludes that the information exchange *would* constitute a restriction by object, while the equivalent example in the EU draft horizontal guidance[24] reaches the conclusion that it *would not likely* constitute a restriction by object. The root of this divergent outcome is reference to the "reliability" requirement at paragraphs 8.34-8.37, with the finding of an object restriction hinging on whether the data was "published or shared in a manner which might allow consumers to benefit". However, like its EU counterpart, and despite finding an object restriction, the analysis in the UK Example 1 still goes on to consider the effects of such information sharing.

(73) We consider that paragraph 8.33 should be removed.

E. Clarification of position regarding imprecise, inaccurate or misleading information

(74) The Guidance is internally inconsistent as to the cumulative (*cf.* alternate) nature of the test for determining whether information is competitively sensitive. Despite paragraph 8.27 of the Guidance stating that the Chapter I prohibition applies if an exchange of information is "*likely to reduce competitive uncertainty in a market **and** is capable of influencing the competitive strategy of other undertakings*", paragraph 8.44 (and as applied in paragraphs 8.45-8.46) of the Guidance, which relate to imprecise, inaccurate or misleading information, re-frames this test in the alternate (by using '*and/or*').

(75) Paragraph 8.45 of the Guidance states that "*in some circumstances even an imprecise or inaccurate statement or assurance can be sufficient to reduce uncertainty on the market and/or influence the conduct*

[23] See *Do*le, T-588/08, para. 373, where the GC found that *"[that] the existence of a single pre-pricing communication between Dole and its competitors for each year from 2000 to 2002 would be sufficient to establish collusive conduct […] would have to be rejected in the light of the specific object of the coordination complained of and of the nature of the market which was organised in weekly cycles".*

[24] See para 6.4 of the EU draft horizontal guidance.

on the market of recipient undertaking". *Lexon v CMA* is cited, however the identified passages of the judgment plainly do not support this conclusion. In respect of imprecise information, the CAT commented that: "*The fact that they did not provide specific details does not mean that they carried no weight in affecting King's likely conduct*".[25] In respect of deliberately false or misleading information, the CAT considered that such information could be "*commercially valuable*".[26] In neither instance does the CAT suggest that imprecise or inaccurate information was likely to reduce uncertainty on the market, and only in the former was there an indication that such information could (potentially, impliedly dependent on other factors) influence the recipient's conduct.

(76) In respect of imprecise information, the Guidance at paragraph 8.45 also incorporates a 'reliability' assessment (cross-referencing paragraph 8.33). It suggests that vague or imprecise information received directly from a competitor may be regarded as more reliable than that from other sources and so could be capable of influencing competitive strategy despite its nature. The logical and legal basis for this position is absent. If the substantive content of the relevant information is vague or imprecise, it will remain vague or imprecise regardless of the identity of the discloser and recipient. If such information is insufficiently specific to be likely to reduce competitive uncertainty in a market and be capable of influencing the competitive strategy of other undertakings, it will remain so regardless of how 'reliable' it is.

(77) We suggest that (i) paragraphs 8.44-8.46 should be amended to clarify the cumulative nature of the test for determining competitive sensitivity of information, and (ii) discussion of the reliability of imprecise information be removed.

VI. DATA POOLING

A. More detailed and ambitious guidance on efficiencies and data pooling

(78) As a result of the rapid digitalisation of markets, vast amounts of data are collected from goods and services which are offered to consumers. As the new Guidance notes, the use of big data analytics and machine learning techniques can play an increasingly important role in this context. The Guidance at paragraph 8.4(d) also helpfully notes the benefits to consumers that can arise out of information sharing which allows algorithms to work more effectively. However, we believe that the Guidance could provide more effective guidance to undertakings to self-assess when the *pooling* of data could be considered pro-competitive (or at least competitively neutral).

(79) Unlocking digital Competition: Report of the Digital Competition Expert Panel noted that data sharing can be pro-competitive. The Panel received evidence that increased data sharing would promote competition and in turn improve market outcomes for consumers, and it recommended that pro-competitive policies relating to data sharing be implemented by a digital markets unit.[27] In particular, the Panel noted that data mobility could help with overcoming network effects, and in turn give consumers new choices and make switching easier.[28] While the recommendations of the Panel related to the incoming Digital Markets Unit ("**DMU**"), its findings and the evidence it received on the pro-competitive efficiencies arising from data sharing are pertinent more broadly, including in a horizontal agreements context.

(80) Similarly, the National Data Strategy highlighted the importance of "*encouraging better coordination, access to and sharing of data of appropriate quality between organisations in the public, private and third sectors*" and that its "*first mission is to create an environment where data is appropriately usable, accessible and available across the economy – fuelling growth in organisations large and small*." This is

[25] *Lexon v CMA* [2021] CAT 5 at para. 94(2).

[26] *Lexon v CMA* [2021] CAT 5 at paras.159-160.

[27] *Unlocking digital Competition: Report of the Digital Competition Expert Panel* (March 2019) at paras. 2.17, 2.49, 2.60 – 2.62, 2.79 – 2.99, 2.102.

[28] *Unlocking digital Competition: Report of the Digital Competition Expert Panel* (March 2019) at para. 2.17.

needed to address the issue of data concentration and interoperability, which are a "*critical factor to suboptimal competition and innovation in digital markets*".[29]

(81) However, the current version of the Guidance does not mirror the recommendations of the Panel or the National Data Strategy. To avoid a chilling effect on innovation which depends on effective data analytics, and to ensure consistency with the overall aims of the DMU and the National Data Strategy, the guidance on data pooling should thus be expanded and further refined, and a clear pathway for undertakings to enter into data pooling arrangements should be set out.

(82) The Guidance offers little in the way of positive reinforcement for data pooling initiatives and, as regards foreclosure, even takes a stricter line than the previous EU guidance. For example, we note that the current Guidance has amended the statement in the 2011 EU Horizontal Guidelines that *"this type of foreclosure is only possible if the information concerned is very strategic for competition and covers a significant part of the relevant market"* to read *"this type of foreclosure is possible if the data shared is of strategic importance, represents a large part of the market and third parties' access is prevented"*. This seems to suggest that the CMA will pursue a stricter and more conservative line on data pooling – which appears to be a move away from what is recommended by the Panel, and from the approach of the DMU.

(83) More worrying still is the statement at paragraph 8.66 that:

"The terms on which access is given to exchanged information is relevant to the assessment of possible foreclosure effects. Information or data may constitute a valuable competitive asset if access to it is necessary to compete effectively in the market. An example of such information might be a data pool between lending institutions relating to the credit history of loan applicants. Assuming it does not reduce strategic uncertainty, the exchange of such information may be permissible only if the information is made accessible in a non-discriminatory manner, to all undertakings active in the relevant market".

(84) There are multiple issues with this statement:

(i) First, the statement is made in the abstract, and seems to implicitly assume a scenario where the undertakings forming the data pool have market power. It fails to consider whether other undertakings active in the relevant market have the ability to form similar competing pools of data. There may be good reasons to support competition between pools of data, for example to allow for the emergence of competing or complementary standards for the exchange of data.

(ii) Second, the statement assumes that competitors which are not granted access to the pool would be placed at a disadvantage and ignores the necessary assessment of whether the information at hand is sufficiently essential or strategic that it is capable of leading to anticompetitive foreclosure. Although it may be useful for innovation, pooled data is often not a critical asset in order to compete in a market. In that regard, the Guidance provides little guidance as to when data will be considered sufficiently strategic that it may lead to foreclosure of competitors.

(iii) Third, it does not consider whether there may be legitimate reasons for not granting access to *all undertakings active in the relevant market*. For example, the purpose of forming the pool may be for smaller competitors to compete with the first party data pools of larger competitors. Indeed, this is one of the concerns raised in the National Data Strategy, which notes that: "*smaller companies often do not have the same access to data as tech giants, potentially limiting their participation and innovation in digital markets*".[30]

(iv) This point becomes even more important in light of the upcoming DMU. If firms with Strategic Market Status were to be entitled to receive access to data pools set up by smaller rivals, this

[29] *National Data Strategy* at 6.1, citing the *Digital Competition Expert Panel* and the *CMA's market study into online platforms and digital advertising.*

[30] *National Data Strategy* at 3.

would risk eliminating the very pro-competitive purpose of such a data pool and indeed the objective of the DMU to make targeted pro-competitive interventions (for example, to support interoperability).

(v) Finally, the case law which is cited in footnote 372 of the Guidance explicitly recognises that the object of the credit information exchange systems at hand in that case was not to restrict competition, and that therefore the national court had to establish an anticompetitive *effect*.[31] The non-discriminatory access which is subsequently referred to in that judgment cannot therefore be regarded as a legal requirement for all data pools, but only a factor which is liable to influence the effects of the such arrangements.

(85) The Guidance should therefore be revised to reflect the fact that the assessment of whether foreclosure is likely to result from a data pooling will be made on the basis of *effects*. In that regard, when drafting the guidelines, the CMA should consider the many potentially pro-competitive scenarios involving pooling of data (and not just the negative examples). Absent (collective) market power, data pools are unlikely to lead to anticompetitive foreclosure, even if access to the data pools is not open to all.

(86) Inspiration can be taken here from the Guidance section on standardisation agreements, which states that: *"In the absence of market power, a standardisation agreement is not capable of producing restrictive effects on competition".* Moreover, even for those standardisation agreements which risk creating market power, in relation to the factors of assessment (including open and FRAND[32] access), the Guidance states that *"A standardisation agreement that does not fulfil any or all of the principles set out in this Part cannot be presumed to involve a restriction of competition within the meaning of the Chapter I prohibition. However, it will necessitate a self-assessment to establish whether the agreement falls under the Chapter I prohibition and, if so, if the conditions for exemption under Section 9(1) CA98 are fulfilled."*

(87) We see no reason why, where the data pooling is not collusive or likely to lead to collusion, the assessment of the possible foreclosure effects of data pooling should substantially differ from the framework set out above for standardisation. As such, we consider that paragraphs 8.24 – 8.26 could be improved by clarifying (in a similar vein as the standardisation section) that: (i) in the absence of market power, data pools are unlikely to lead to anticompetitive foreclosure and (ii) where (combined) market power may be created by the data pool, by clarifying the factors which are likely to affect the assessment of possible foreclosure effects.

B. Illustrative example of step-by-step assessment

(88) To illustrate why it would be helpful to set out the framework of assessment for different competition concerns discussed in Sections 4.2 and 4.3 of this response, we consider the example of a group of advertisers (with a combined market share not exceeding 20% in advertising or related advertised product markets) which seeks to combine (anonymised) first party advertising data in a data cooperative, in order to better target users. Such a data pool may for example help advertisers reduce their dependency on gatekeeper platforms.

- **Step 1 – confirm that data pooling is not collusive in itself:** The first question in setting up such an advertising pool should be whether any of the information that would be exchanged is so sensitive that it could lead to a collusive outcome. The undertakings should therefore ensure that the pool does not include any information which is so strategic that it is capable of influencing the conduct on the market of an actual or potential competitor, in particular, information relating to future conduct (e.g., pricing intentions or product launches), either on the market for advertising

[31] CJEU judgment in Case C-238/05, *Asnef-Equifax*, para. 48.

[32] Fair, reasonable and non-discriminatory.

or the related advertised product markets. Including such information in the pool (without safeguards) may increase the risk of a *by object* infringement.

- **Step 2 – confirm that data pooling is not likely to lead to collusion:** A secondary question is whether the information shared could support the stability of an anticompetitive agreement or concerted practice. In relation to this concern, if (past/present) information is shared in the pool which could theoretically support the stability of a collusive agreement or concerted practice, absent any evidence of any underlying anticompetitive plan, the undertakings may find comfort that an infringement is unlikely if market characteristics are such that a collusive outcome is unlikely to be stable even after the information has been exchanged (e.g., if the market is highly fragmented, demand is unstable and/or products are not homogenous).[33]
- **Step 3 – confirm that the data pooling is not likely to lead to anticompetitive foreclosure:** The final question is whether the information shared could result in the foreclosure of competitors outside of the pool who do not receive access to the pool. In this example, given that the combined market share of the undertakings to the arrangement is less than 20% in any relevant market, the data pool would be unlikely to produce restrictive effects on competition through anticompetitive foreclosure. This could be supported by evidence that it is open to competitors to set up similarly effective data pools. Any residual risk of anticompetitive effects could then be further reduced by ensuring fair access to the data pool.

(89) We believe it would be helpful to include in the Guidance a similar example (i.e., a data-pooling arrangement which is not likely to lead to competitive concerns), which considers and rules out each potential competition concern in turn.

C. Interplay between info exchange under Chapter 8 of the Guidance versus or under sector-specific (mandatory) data sharing guidelines

(90) It would also be helpful for the Guidance to more specifically address the interplay with the Guidance and separate legislative proposals that facilitate or even mandate data sharing between (potential) competitors in specific sectors.

(91) In particular, the Guidance does not discuss the treatment of data sharing arrangements that take place in the context of the upcoming DMU. Nor does it address how the Guidance will apply in the context of the Data Sharing Governance Framework, which sets out the government's ambitions to improve data use in the government and the importance of sharing data to deliver better services and outcomes for businesses and people, and the principles that should be followed to help organisations make data sharing more efficient.[34]

(92) The Guidance also does not address how the Guidance will interact with Open Banking, which requires banks and building societies to make transaction data available through a common set of routines, protocols, and tools for building software application, or the similar (and wider reaching) Open Finance system that is currently being considered.

(93) Given the variety in types and use cases of data, it may make sense for the CMA to also issue guidance on data sharing or pooling arrangements in specific sectors. Again, more specific guidance on how to assess a potential data sharing or pooling arrangement with the aim to comply with both such sector-specific rules and the Guidance would certainly improve legal certainty for businesses.

[33] There may be some circumstances where coordination may be difficult to sustain before the exchange, but the exchange may sufficiently alter market conditions such that coordination becomes possible after the exchange.

[34] *Guidance: Data Sharing Governance Framework* (23 May 2022).

VII. Research and development agreements

(94) We note that the CMA mentions in the introduction with respect to the application of the Specialisation and Research and Development Block Exemption Orders ("**SABEO and R&D BEO**")[35] that the Guidance aim to "*make it easier for businesses to cooperate in ways which are economically desirable, including in the pursuit of environmental sustainability objectives*". The CMA also mentions in its consultation description for the R&D BEO that the purpose of the R&D BEO "*is to ensure that businesses are not prevented or disincentivised from entering into agreements that the [CMA] considers to be beneficial and not anticompetitive*." We fully support these statements. However, we are concerned that the new conditions introduced with respect to research and development ("**R&D**") agreements might impede these objectives.

(95) More specifically, the benefit of the safe harbour is now conditioned upon the existence of "*three or more"* competing R&D efforts in addition to and comparable with those of the parties to the R&D agreement" or third parties that are able to engage in a R&D effort (the so called "**3 plus 1-rule**") (see Article 8(5) of the R&D BEO).

(96) While the CMA provides a definition for the concept of "*competing R&D efforts*", we would welcome further clarifications based on concrete examples enabling undertakings to better assess the 3 plus 1-rule. More specifically, the information to be gathered on the "*competing R&D efforts*" appears to be very extensive and likely very difficult to gather given their sensitivity (see Article 9(3) of the R&D BEO). For instance, the information on the size, the stage and the timing of the R&D efforts or the financial and human resources involved are strictly confidential by their very nature. Although some undertakings may publicly announce their R&D initiatives, the available information would likely be very limited and optimistic so that it might not be entirely reliable. Finally, when undertakings are not able to identify such competing R&D efforts, the prudent approach might be to drop the R&D cooperation. Thus, the R&D BEO and the Guidance do not provide the intended legal certainty and might discourage undertakings to carry out pro-competitive and efficient R&D initiatives.

(97) In addition, we welcome the slight broadening of the "*potential competitor*" concept. However, we encourage the CMA to provide further guidance on this concept including in the context of dual distribution when customers may also be competitors.

VIII. Unenforceability of agreements

(98) Paragraph 3.24 of the Guidance states that "*An agreement which is prohibited by the Chapter I prohibition will be void and unenforceable.*" The fact that an agreement found to infringe the Chapter I prohibition is void is established competition law and uncontested. But such an agreement is not by default unenforceable in its entirety. As noted in the Guidance itself (footnote 4): "*If only certain provisions in a horizontal agreement are prohibited under Chapter I and they are capable of being severed from the rest of the agreement, then the remainder of the agreement may be enforceable. The ordinary rules of severance will apply.*" The addition of "unenforceability" in paragraph 3.24 of the Guidance is therefore both internally contradictory as well as in contradiction with Chapter I itself, which in paragraph 4 states that "*Any agreement or decision which is prohibited by subsection (1) is void*", without any mention of unenforceability. Almost identical language is used in Article 101(2) TFEU.

(99) Furthermore, if the phrase "*and unenforceable*" in paragraph 3.24 of the Guidance were to be retained, it would risk generating significant and unnecessary administrative burdens in the UK economy. The ability to sever offending provisions from an agreement, while leaving the validity of the rest of the agreement intact, is crucial in preserving legal certainty.

[35] The Competition Act 1998 (Specialisation Agreements Block Exemption) Order 2022 (SI 2022/1272) and the Competition Act 1998 (Research & Development Agreements Block Exemption) Order 2022 (SI 2022/1271).

(100) We would therefore strongly recommend that the phrase "*and unenforceable*" be deleted from paragraph 3.24 of the Guidance.

Linklaters LLP – 8 March 2023

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Annex 1

I. Miscellaneous proofing comments

(1) There are few minor errors throughout the Guidance which we suggest be corrected. These are as follows:

(a) **Example 2 at Part 4.** This refers to "R&D agreements between actual and potential competitors", but should instead read "R&D agreements between actual or potential competitors".

(b) **Paragraph 5.131.** This section provides guidance on mobile infrastructure sharing agreements, and states that "This section applies to the extent that such agreements do not fall within the scope of the SABEO." However, it is not clear what "within the scope of the SABEO" means, since the SABEO provides for restrictions to be excluded or prohibited (as hardcore restrictions) depending on the nature of the restriction. Does it mean from the section applies where the agreement does not benefit from the exemption in the SABEO? Or does it mean the section applies where the agreement is not a hardcore restriction under the SABEO? If the former, we suggest "do not fall within the scope of the SABEO" be amended to read "are not exempted under the SABEO." Such wording would be consistent with that of paragraph 5.31 and 5.105.

(c) **Paragraph 7.38.** There is a minor typo in the last sentence, where a "to" should be added, as follows: "The aim of all these practices is to create the impression that the procedure is genuinely competitive while acting in a way that restricts competition."