RESPONSE OF CLIFFORD CHANCE LLP TO THE COMPETITION AND MARKETS AUTHORITY'S CONSULTATION ON THE DRAFT HORIZONTAL GUIDELINES

1. EXECUTIVE SUMMARY

1.1 Clifford Chance welcomes the opportunity to respond to the consultation of the Competition and Markets Authority (**CMA**) on the draft guidelines on the applicability of the Chapter 1 prohibition in the Competition Act 1998 (**CA98**) to horizontal agreements (**Draft Guidance**). Our comments below are based on the substantial experience of our lawyers of advising on horizontal agreements for a diverse range of clients, and across a large number of jurisdictions. However, the comments below do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

1.2 Our comments on the Draft Guidance are outlined in the sections below and cover the following main points:

1.2.1 **Overview (Part 3 Draft Guidance):** We submit that the inclusion of clarifications on the application of Chapter 1 CA98 to agreements between parents and their controlled joint ventures is commendable and we recommend a number of amendments based on established case law in order to further clarify the wording. In addition, we consider that some of the factors listed in the Draft Guidance for the assessment of the existence of potential competition would benefit from further explanation, so that businesses do not mistakenly conclude that they might be considered to be potential competitors. Finally, we consider that the guidance on the test for distinguishing object agreements from those that are to be assessed by reference to effects should be amended to more accurately reflect Retained EU case law by, for instance, recognising that the concept of restriction of competition by object must be interpreted restrictively.

1.2.2 **R&D agreements (Part 4 Draft Guidance):** We have concerns that the requirement to identify three third parties that meet the criteria of Article 8(5) of the R&D Block Exemption Order (**R&D BEO**) may be excessively difficult to apply in practice and could lead innovators to carry out their R&D in other jurisdictions. Consequently, we recommend that the CMA carries out an impact assessment at an appropriate time and includes certain clarifications in the Draft Guidance on how to apply those criteria. We also suggest clarifications in respect of: (i) the centre of gravity test applied to R&D agreements; (ii) the joint application of the R&D BEO and Specialisation Block Exemption Order (**SBEO**) to the same cooperation; and (iii) certain definitions in the R&D BER.

1.2.3 **Production agreements (Part 5 Draft Guidance):** We recommend that the safe harbour for sub-contracting agreements is not only limited to horizontal subcontracting agreements but to all forms of cooperation in production. The Guidance should also clarify that information exchanges that are necessary for an agreement that benefits from the SBEO will also be covered by the SBEO.

1.2.4 **Purchasing agreements (Part 6 Draft Guidance):** We encourage the CMA to (i) consider increasing the market share thresholds below which competition concerns are deemed unlikely to arise in purchasing agreements, and (ii) further articulate the factors to determine whether an arrangement may or may not amount to a buyer cartel (as opposed to a joint purchasing agreement).

1.2.5 **Commercialisation agreements (Part 7 Draft Guidance):** We recommend certain clarifications on a number of points, including: (i) making it clear that bidding consortium agreements, even where they should be assessed as commercialisation agreements and not as production agreements, do not necessary lead to a by object restriction under Chapter 1 CA98; (ii) further guidance as to when reciprocal commercialisation agreements do not pose a risk of market partitioning, and (iii) examples and further guidance about the degree of information exchange that will normally be deemed necessary for the purposes of implementing a joint commercialisation agreement.

1.2.6 **Information exchange (Part 8 Draft Guidance):** We have concerns that the Draft Guidance moves away from a clear and objective standard for determining whether an information exchange is a by object infringement, in particular as regards the treatment of exchanges of current pricing information that do not, on their own, disclose any indications of a party's likely future commercial conduct. We have suggested a number of changes to the Draft Guidance to re-establish that clarity and objectivity. We also propose to (i) clarify that the exchange of raw data may be less commercially sensitive where each party is likely to adopt their own proprietary / non-public approach to processing the relevant data; and (ii) clarify the wording in the Draft Guidance concerning hub and spoke information exchanges.

2. OVERVIEW OF THE ASSESSMENT OF HORIZONTAL AGREEMENTS

(a) Agreements between parents and joint ventures (paragraphs 3.8-3.10)

2.1 Uncertainties over the question of whether Chapter 1 CA98 applies to agreements between parents and their controlled joint ventures have led to businesses incurring substantial amounts of unnecessary compliance costs and foregone business opportunities. We therefore commend the CMA for including this long-overdue clarification. However, we query two points:

2.1.1 The statement that the CMA will "typically" not apply Chapter 1 CA98 to agreements and concerted practices between parents and controlled joint ventures, concerning their activity in the relevant market(s) where the joint venture is active, implies that it might sometimes do so. However, retained EU case law (which we submit should be footnoted in paragraph 3.8)[1] is clear that where a parent exercises decisive influence over its joint venture the two entities form part of the same undertaking, such that there is no scope at all for applying

[1] In particular, Judgment of 26 September 2013, *EI du Pont de Nemours and Company*, C-172/12 P, EU:C:2013:601, paragraph 47 and judgment of 14 September 2017, *LG Electronics Inc. and Koninklijke Philips Electronics NV*, C-588/15 P and C-622/15 P, EU:C:2017:679, paragraphs 71 and 76.

Chapter 1 CA98. If the CMA considers there to be some exception to this rule it should explain when such exceptions might apply. If it does not, it should remove the word "typically". In particular, we do not consider that the Court of Justice of the EU (**CJEU**) created any legal uncertainty on this point when it stated in Case C-179/12 *Dow Chemical Company*[2] that a joint venture and its parents could all be considered to form a single undertaking "*only for the purposes of establishing liability*". The context of that statement[3] makes it clear that the CJEU was clarifying that *parent companies* can only be considered to form part of the same undertaking for the purpose of attributing liability, as that would otherwise lead to paradoxical results.[4] It was not casting doubt on the proposition that a joint venture forms part of the same undertaking as its parent, for all purposes, including the intra-group exception.

2.1.2 Paragraph 3.9 states that the CMA will typically apply Chapter 1 CA98 to agreements "*between the parents and the joint venture outside the product and geographic scope of the activity of the joint venture*". This appears to us to be a reference to the *Sumal* judgment of the CJEU.[5] If so, that judgment should be footnoted. However, we do not consider that case law, which relates to the circumstances in which a subsidiary can be liable for an infringement committed by a parent, to be relevant in this context. In particular, <u>any</u> agreement that a joint venture enters into with a parent should be considered to be within the scope of its activities, by definition: if a JV agrees with a controlling parent to do something then it must be within the scope of its activities. The alternative is a formalistic approach by which a parent and joint venture might be found to have infringed EU competition law simply because they had omitted to formally amend the joint venture agreement to enlarge the scope of activities that are set out in the agreement. In our view that would be inconsistent with the focus of UK competition law on substance over form. Moreover, the *Sumal* judgment does not form part of the Retained EU case law, as it post-dates the end of the Brexit transition period. Consequently, we recommend omitting this statement from paragraph 3.9.

2.2 Also, the statement in paragraph 3.10 misleadingly implies – through the reference to parents being "*independent on all <u>other</u> markets*" (emphasis added) - that parent companies would themselves be considered to form part of the same undertaking as each other on the markets where the JV is active. We suggest amending this to reflect the judgment of the CJEU in Case C-179/12 *Dow Chemical Company*[6] which, as noted above, made it clear that parent companies remain independent of each other for the

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2 ECLI:EU:C:2013:605, paragraph 58.

3 In particular the appellant's arguments that are summarised at paragraph 34 of that judgment.

4 For example, it would mean that parent companies could legally cartelise activities that they carry on outside the joint venture.

5 Case C-882/19 *Sumal* ECLI:EU:C:2021:800.

6 ECLI:EU:C:2013:605, paragraph 58.

purposes of the intra-group exception in all circumstances, including those in which a parent retains activities in the same market as the JV.

(b) **Assessing potential competition (paragraphs 3.16-3.19)**

2.3 We recognise that the description of the list of factors that are relevant to the assessment of the existence of potential competition are drawn from Retained EU case law but consider that some of them would benefit from further explanation, so that businesses do not mistakenly conclude that they might be considered to be potential competitors. In particular:

2.3.1 the statement in paragraph 3.16 could usefully include the statement of the CJEU that a finding of potential competition also cannot be based on the "mere wish or desire" of an undertaking to enter the market;[7]

2.3.2 paragraph 3.20 suggests that a party may be found to have infringed the Chapter 1 CA98 prohibition purely on the basis of the perception of the other party to a cooperative arrangement. While we recognise that a perception of potential competition can act as a competitive constraint, if that perception is wrong – e.g., because the other party has no intention or ability to enter the market - it cannot serve as a basis for liability of the (non-)potential competitor. The guidelines should therefore clarify that the question of whether potential competition exists is an objective question to be determined on the basis of the facts, and that while the perception of one party may be a relevant fact in this regard, it will not, on its own, be determinative; and

2.3.3 paragraph 3.20 also states that the "*conclusion of an agreement between a number of undertakings operating at the same level in the production chain may also indicate that the undertakings are potential competitors*". This statement is taken out of context and does not, in isolation, offer meaningful guidance. We suggest rephrasing it to explain that, in certain circumstances, the very presence of an agreement between undertakings that operate at the same level of the production chain may indicate that they are potential competitors, where the agreement would have been unnecessary or lacking in purpose if they were not potential competitors.

(c) **Restrictions of competition by object (paragraphs 28-35)**

2.4 We consider that explanation of object restrictions could usefully be supplemented with the following additional clarifications from the Retained EU case law:

2.4.1 the concept of restriction of competition by object must be interpreted restrictively;[8]

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[7] Case C-307/18, *Generics (UK)*, EU:C:2020:52, paragraph 38.

[8] Case C-67/13, *Cartes Bancaires*, ECLI:EU:C:2014:2204, paragraphs 57 and Case C-228/18 *Budapest Bank,* ECLI:EU:C:2020:265, paragraph 54.

2.4.2 there should exist "sufficiently general and consistent experience" for the view to be taken that the harmfulness of an agreement justifies dispensing with any examination of the specific effects of that agreement on competition;[9] and

2.4.3 the presence of strong indications capable of demonstrating that an agreement has pro-competitive effects, or, at the very least, contradictory or ambivalent evidence, must be taken into account.[10]

3. R&D AGREEMENTS

3.1 We welcome the clarification that, for arrangements involving both R&D and subsequent production, where the subsequent production will only take place if the joint R&D is successful, "*it is possible to consider in general*" that the R&D is the relevant centre of gravity of the arrangements. In this regard, we would welcome the addition of a clarification that the same consideration applies to arrangements involving both R&D and subsequent joint commercialisation.

(a) Joint application of R&D BEO and SBEO (paragraph 3.5)

3.2 Paragraph 3.5 of the Draft Guidance indicates that "[t]*he centre of gravity test only applies to the relationship between the different Parts of these Guidance, not to the relationship between different block exemption orders. The scope of a block exemption order is defined by its own provisions*". In this regard, we would welcome a clearer statement that the R&D Block Exemption (**R&D BEO**) and the Specialisation Block Exemption Order (**SBEO**) can both be applied to the same overall cooperation.

(b) Definition of "exploitation of the results" (Article 5(2)(1) R&D BEO and paragraphs 4.45-4.52 of the Draft Guidance)

3.3 The Draft Guidance should clarify that the different forms of joint exploitation by the parties to an agreement can be combined (*e.g.,* combining production of the contract products by a third party and a joint distribution by the parties to the agreement).

(c) Agreements for new products and/or technologies and R&D clusters (paragraphs 4.89-4.105)

3.4 We recognise that the test for assessing whether third parties are able independently to engage in a competing R&D effort is less stringent than that previously proposed by the European Commission in its draft horizontal guidelines, as it need not be established that such engagement is also "likely". However, we remain concerned that the test will be excessively difficult to apply in practice, in particular because there will often be insufficient public information on the R&D capabilities of third parties (such information typically being a closely guarded business secret), and where such information is available, it may not be sufficiently reliable. This difficulty risks deterring some pro-competitive joint innovation in the UK. In particular, if the European Commission decides not to implement a similar test in its R&D Block

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[9] Case C-228/18 *Budapest Bank,* ECLI:EU:C:2020:265, paragraph 79.

[10] Case C-228/18 *Budapest Bank,* ECLI:EU:C:2020:265, paragraphs 82-83.

Exemption Regulation, innovative businesses may decide that the EU is a more attractive forum for their R&D investments.[11]

3.5 Consequently, we consider that the CMA should undertake an assessment of the impact of Article 8(5) of the R&D BEO within 5 years of its commencement, with a view to advising the Government as to whether an amendment to the R&D BEO may be advisable. In the meantime, paragraph 4.105 should be expanded with further indications of factors that may be relied on by innovators to assess the relevant independent abilities of third parties, such as:

3.5.1 whether "second hand" market intelligence gleaned from third parties (e.g., common customers) who are unconnected to the party that is being assessed would be sufficiently reliable;

3.5.2 confirmation that the availability of the R&D BEO will not be questioned or withdrawn if the publicly available information relied on by the parties proves to be incorrect (e.g., because the relevant third party does not proceed to engage in relevant R&D efforts, or does not in fact have the resources or capabilities that were reported by a market research report);

3.5.3 whether the requirement that the third party must be able to carry out the relevant R&D individually[12] means that a third party will not be considered sufficiently capable if it would be required to license intellectual property from a separate third party in order to be able to carry out the R&D (and, if not, what factors relating to the nature of the intellectual property and its degree of availability are relevant in this respect).

(d) **Assessment of comparability of R&D efforts (paragraphs 4.99 and 4.105)**

3.6 Paragraph 4.101 states that competing R&D efforts may not be treated as comparable if they are at different stages in time (e.g., one that is six to eight years from market entry may not be comparable to one that is one year from market entry). However, it seems to us that, in those circumstances, the relevant third party must (if carrying out the R&D alone) necessarily be one that is able independently to engage in a relevant R&D effort for the purposes of Article 8(5)(b) of the R&D BEO, as paragraph 4.105(e) makes it clear that factors such as the stage and timing of the R&D effort are not relevant to the assessment under Article 8(5)(b). If that is correct, we suggest adding a footnote to paragraph 4.101 to that effect.

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[11] The current jurisdictional requirement under CA98 for an agreement to be implemented within the UK, as well as considerations of international comity, may make it difficult for the CMA to take enforcement action in such circumstances.

[12] Since the capability to do so "in cooperation" with third parties is only relevant for Article 8(5)(a) of the R&D BEO, not Article 8(5)(b).

(e) **Access to the final results of paid-for R&D (Articles 3(1) and 3(2) R&D BEO)**

3.7 It would be useful to obtain more guidance in the Draft Guidance on objective methods to safely determine that compensation for the purposes of Article 3(2) is not so high as to effectively impede access.

4. PRODUCTION AGREEMENTS

(b) **Safe harbour for horizontal subcontracting agreements (paragraph 5.32)**

4.1 We recommend that this safe harbour is not only limited to horizontal subcontracting agreements but to all forms of cooperation in production, thus also covering looser forms of cooperation which are not strictly qualified as subcontracting. In that regard, we note that the analysis of mobile infrastructure sharing agreements (paragraphs 5.131-5.143) of the Draft Guidance does not make any reference to the 20% safe harbour. The same applies to Example 5, relating to a swap agreement, where no reference is made to the safe harbour either. We consider there to be good reasons to treat all such forms of cooperation in production consistently, so as to provide additional uniformity and legal certainty to cooperation in production in general regardless of its specific form.

(c) **Exchanges of information in the context of production agreement (paragraph 5.52)**

4.2 Paragraph 5.52 of the Draft Guidance states that information exchanges in the context of a production agreement should be analysed under Part 8 of the Draft Guidance and that any negative effects arising from those exchanges of information need to be assessed in light of the overall effects of the production agreement. This would only apply to information exchanges in agreements which are out of the scope of the SBEO. Regarding information exchanges in agreements benefitting from the SBEO, we recommend including an explicit statement that those exchanges should be covered by the SBEO to the extent they are necessary to implement an arrangement which in turn benefits from the SBEO. Alternatively, we would at least suggest to refer to information exchanges explicitly as an example in paragraph 5.69 of the Draft Guidance, which states that other provisions included in specialisation agreements that constitute ancillary restraints would also benefit from the exemption foreseen in the SBEO as long as the conditions defined in case law are met.

5. PURCHASING AGREEMENTS

(b) **Market share threshold (paragraph 6.24)**

5.1 We would encourage the CMA to increase the 15% threshold below which market power is considered unlikely to exist to at least 20%, if not 25%, in line with the approach adopted with respect to other types of horizontal agreements, and indeed in other areas of competition law (notably, merger control).

(c) **Distinction between buyer cartels and purchasing agreements (paragraph 6.9)**

5.2 We welcome the additional clarifications introduced in the Draft Guidance as regards the distinction between buyer cartels and joint purchasing agreements. We note that the Draft Guidance now includes a description of whether a practice may amount to a buyer cartel, and therefore to an object infringement; as well as a non-exhaustive list of

relevant factors for this assessment. It would be helpful, however, if the latter factors were further articulated to distinguish systematically between the key elements of joint purchasing, including the meaning of 'purchasing' and purchasing 'jointly', as well as the different types of buyer groups that might exist, as recommended by the report on this topic that was prepared by independent experts for the European Commission.[13]

6. COMMERCIALISATION AGREEMENTS

(a) Non-exclusive commercialisation agreements (paragraphs 7.13-7.15)

6.1 The CMA rightly recognises in paragraph 7.15 of the Draft Guidance that the risk of output limitations is more limited in case of non-exclusive commercialisation agreements, provided that the agreement will not lead to a coordination of the supply policy of the parties. However, this same reference is missing as regards to price fixing in paragraph 7.13 of the Draft Guidance, which merely states that the assessment that commercialisation agreements including joint pricing are likely to restrict competition by object does not change if the agreement is non-exclusive (i.e., where the parties will keep on competing in the relevant market for other bids or contracts) "*as long as it can be concluded that the agreement will lead to a coordination of prices charged by the parties to all or part of their customers*".

6.2 We submit that the Guidance should expressly clarify that the risk that a joint commercialisation agreement that include joint pricing will lead to price coordination between the parties in respect of products sold outside the commercialisation arrangement is more limited in case of non-exclusive commercialisation agreements (as is the case for output limitations). This could be particularly the case, for instance, where only a small percentage of the parties' total sales are affected by the commercialisation agreement, since customers that purchase the jointly commercialised products can freely purchase products from the parties that are not subject to joint commercialisation and/or provided that certain safeguards are adopted (e.g., information barriers). In these circumstances, the fact that joint pricing may affect "part of" the customers of the parties should not necessarily imply that the agreement is anticompetitive by object. In this respect, we encourage the CMA to use instead the wording of paragraph 235 of the previous version of the European Commission's Horizontal Guidelines, which stated that non-exclusive commercialisation agreements generally lead to the coordination of the pricing policy of competing players "*as long as it can be concluded that the agreement will lead to an overall coordination of the prices charged by the parties*".

(b) Exchange of sensitive commercial information (paragraph 7.23)

6.3 Paragraph 7.23 of the Draft Guidance expressly recognises that for most commercialisation agreements, some degree of information exchange is required in order to implement the agreement. It might usefully be clarified here that, in line with the ancillary restraints doctrine, information exchanges will not be considered to have

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[13] Whish-Bailey, *Horizontal Guidance on purchasing agreements: Delineation between by object and by effect restrictions*, available at: https://competition-policy.ec.europa.eu/system/files/2022-03/kd0722013enn_purchasing_agreements.pdf paragraphs 5.5-5.16.

anticompetitive effects if they are necessary to implement a joint commercialisation arrangement that is not itself anticompetitive, and do not result in any restrictions of competition between the parties outside the agreement.

(c) **Market share threshold safe harbour (paragraph 7.25**)

6.4 We submit that the threshold in this safe harbour should be 20%, as it is the case for other cooperation agreements.

(d) **Circumstances in which bidding consortium agreements are object infringements (paragraphs 7.46)**

6.5 Paragraph 7.46 of the Draft Guidance states that where parties to the bidding consortium agreement could each compete individually in the tender, or if there are more parties to a bidding consortium agreement than is necessary to compete in the tender, the joint bidding "may restrict competition by object or by effect, depending on the content of the agreement and the specific circumstances of the case" and then refers to paragraphs 7.11-7.26 of the Draft Guidance. However, those paragraphs do not provide meaningful guidance on this specific issue. In particular, paragraph 7.13 suggests that, because a bidding consortium will inevitably submit a joint bid (and therefore a single pricing offer), it will always be considered to be an object infringement if the consortium members could compete individually for the tender (see also our comment at 6.2 above). This also implies that factors such as the size of the tender, the parties' market shares, the fact that they are only competitors in respect of part of the tender, or the fact that they remain competitors in respect of all other sales volumes outside the tendered products or services, are irrelevant. We therefore submit that the section of the Draft Guidance dealing with bidding consortium agreements should include guidance on the specific issue of the circumstances in which such agreements amount to object restrictions.

6.6 Our view is that, in the absence of bid rigging (and, in particular where there is no hidden or tacit collusion and the customer is fully aware of the joint bidding), joint bidding consortia involving actual or potential competitors should be assessed by reference to their effects. However, the Draft Guidance also lacks any clear explanation of how an effects analysis should be carried out. Indeed, it implies (in paragraph 7.45) that any joint bidding that leads to an actual or potential reduction in the number of possible bidders is anticompetitive. If that is the CMA's intention, we disagree. In particular, if there will remain a large number of other bidders for a tender, the formation of a bidding consortium between two parties with small market shares is unlikely to have any material impact on the degree of overall competition for the tender, or its outcome. Again, we submit that the Draft Guidance should include specific guidance on how an effects analysis should be carried out for bidding consortium agreements, taking into account the above considerations.

(e) **Assessment of bidding consortia under the Section 9 exemption (paragraph 7.50)**

6.7 According to paragraph 7.50 of the Draft Guidance, the Section 9 criteria will be fulfilled if the bidding consortium agreement (i) allows the parties to submit a more competitive offer compared to the bids that they would have submitted separately; and (ii) the benefits arising from the agreement for the consumers and the contracting entity outweigh the restrictions to competition. However, a more competitive coordinated bid

already benefits consumers/the contracting entity to a greater degree than a series of less competitive uncoordinated bids. Hence, the fact that the bid would be more competitive should suffice to prove that the benefits outweigh the restrictions to competition, such that the section 9 exemption applies, to the extent that the agreement does not include restrictions that are not indispensable for the bid to be more competitive.

7. INFORMATION EXCHANGE – PART 6 DRAFT GUIDELINES

(a) Raw, unprocessed data (paragraph 8.41)

7.1 Paragraph 8.41 states that "*Depending on the circumstances, the exchange of raw data may be less commercially sensitive than an exchange of data that was already processed into meaningful information. Similarly, raw data may be less commercially sensitive than aggregated data, while it may allow undertakings to obtain more efficiencies by exchanging it*." It seems to us that if the act of converting raw data into processed data is relatively straightforward or standardised then this distinction will not be relevant and could create false comfort for parties to an information cooperation. We therefore suggest clarifying that the exchange of raw data may be less commercially sensitive where each party is likely to adopt their own proprietary / non-public approach to processing the relevant data.

(b) Definition of information exchanges as object infringements

7.2 The Draft Guidance departs from the approach in the European Commission's 2011 Horizontal Guidelines, which define 'by object' information exchanges as those which involve individualised data regarding intended future prices or quantities. This test has the substantial advantage of being relatively clear, objective and straightforward to apply. While we recognise there has been UK and Retained EU case law which needs to be reflected in the revised Guidance, our view is that this can be done by refining the existing test (see 7.7 below).

7.3 The Draft Guidance, however, appear to abandon this approach, or at least to obscure much of its clarity and objectivity. In particular, paragraph 8.73 now takes the concept of "commercially sensitive information" (**CSI**), and the examples of CSI that are listed in paragraph 8.29, as the foundation for the definition of a by object information exchange. A number of those examples concern exchanges of information relating to an undertaking's <u>current</u> pricing, "state", production capacities and demand, and consequently give the impression that the CMA intends now to treat all exchanges of CSI relating to current pricing or quantities as by-object infringements.

7.4 We consider the list of out-of-context statements from case law of the UK and EU Courts in paragraph 8.29 to be misleading. In particular, all of the cases that are the sources for the list in paragraph 8.29 involved (or also involved) disclosures or receipt of information regarding a party's intended future market conduct. Consequently, none of those cases supports the proposition that an exchange of current information, <u>on its own</u>, should be treated as a by object infringement.

7.5 Moreover, treating exchanges of current data as by object infringements does not meet the requirements set out by the applicable case law (see 2.4 above), i.e., that the concept of restriction of competition by object must be interpreted restrictively, can be applied

only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition, that there should exist "*sufficiently general and consistent experience*" to justify treatment as an object restriction and that the existence of pro-competitive efficiencies must be taken into account. Indeed, the exchange of information on current hotel occupancy rates, revenues and pricing was for over a decade used in the European Commission's 2011 Guidelines as an example of an arrangement that did not amount to an object restriction.

7.6 The CMA's Draft Guidance tweaks the hotel data example (example 1 in the Information Exchange part of the Guidance) so that, on the basis of the same facts, it is now considered to be an object restriction, primarily because the exchange "*reduces or removes the degree of uncertainty as to the operation of the market in question, including as to each other's prices, affording the participants with the opportunity to determine their conduct on the market in question with the result that competition between undertakings is restricted*". We have a number of concerns regarding this revised example:

7.6.1 First, it does not elaborate the mechanism by which the receipt of information on current pricing reduces the hotels' uncertainty about rivals' intended future conduct. That is inconsistent with the fundamental test set out in paragraph 8.73 of the Draft Guidance which states that the exchange of CSI will only amount to an object restriction if it 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"* (emphasis added). The example does not explain how the information would allow recipients to ascertain likely future modifications to a rival's conduct, or how it meets the test for "*usefulness […]to the recipient undertakings in setting their competitive strategy*" that is indicated in paragraph 8.29 of the Draft Guidance.

7.6.2 Second, the reasoning that is provided – that the exchange "*affords participants with the opportunity to determine their conduct on the market*" - appears to us to be meaningless. The test should be whether it affords participants the opportunity to determine the intended, future market conduct of other participants and, as noted above, the example should explain how that opportunity arises. In particular, it should explain the significance of the concentrated, stable, oligopolistic nature of the market and indicate whether such an information exchange would be viewed as an object restriction in a market structure where concentration and coordinated effects are not present.

7.7 While the Draft Guidance does correctly state in paragraph 8.73 that exchanges of CSI will only be considered to be by object restrictions where they are "*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*", our view is that they need to take better advantage of this opportunity to elaborate a clear and unambiguous framework or set of principles that can be used to make sense of the case law in this area, in particular with regard to exchanges of current data. In our view, this could be achieved by explaining the following:

7.7.1 The key concept for distinguishing between by object and by effect exchanges of information is whether the information discloses a party's intended future

market conduct - such as future pricing (including costs that form a decisive element of such pricing), future production/sales volumes, or future product characteristics in respect of which competition takes place – or reduces uncertainty in respect of such conduct.

7.7.2 Information on existing pricing, production volumes or sales will not usually disclose or reduce uncertainty in relation to a party's intended future market conduct, unless it is combined with other information that does. A useful case to cite in this respect would be the Retained EU judgment in *HSBC*[14], in which the EU General Court held that the disclosure of confidential information relating to a trader's portfolio and trades did not have the object of restricting competition because it was neither precise nor detailed, such that it was not possible to read into that conversation the explanation of a 'strategy'.

7.7.3 In contrast, CSI relating to existing volumes of spare capacity and capacity utilisation rates can give indications of a party's likely future conduct, as limited spare capacity will often lead a business to maintain or increase its prices in the future.[15]

7.7.4 Similarly, disclosures of a party's proprietary information that it uses when setting its future pricing or production volumes, such as forecasts of demand in the market, may reduce uncertainty regarding its future conduct.[16] In this respect, however, it is important that the Guidance sets out principles to help market participants distinguish between by object information exchanges and discussions of "market colour" (e.g., regarding the general state of the market, including as to actual or possible developments, news, events and trends) that fall to be assessed by reference to their effects.[17] This is of particular relevance for markets in which undertakings often have customers or counterparties that are also their competitors (e.g., certain financial markets).

7.8 If, however, the CMA does retain the list of examples in paragraph 8.29 of the Draft Guidance, we have the following specific comments on that list (in addition to the general comments above):

7.8.1 point (e) should refer instead to exchanges of "projections of future sales", as opposed to exchanges of the sales themselves;

7.8.2 the reference in point (f) to "current state" could give the misleading impression that disclosures by an undertaking relating to its general financial state are by

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[14] Case T-105/17, ECLI:EU:T:2019:675, paragraphs 186-195.

[15] Case T-758/14 RENV, *Infineon Technologies* ECLI:EU:T:2020:307, paragraphs 85 and 96.

[16] Case T-588/08, *Dole Food Company* ECLI:EU:T:2013:130.

[17] See, for example, Statement of Good Practice of the FICC Markets Standards Board for "Information & Confidentiality for the Fixed Income and Commodities markets", available at https://fmsb.com/wp-content/uploads/2019/10/Information-Confidentiality-SGP_V6.4-FINAL.pdf. See also in this regard Case T-105/17, *HSBC*, ECLI:EU:T:2019:675, paragraph 193.

object infringements. However, the case cited[18] related to a disclosure that an undertaking was experiencing financial difficulties *within a particular market* and the GC was careful to clarify that the highly concentrated nature of the market was relevant to its finding that such a disclosure was capable of influencing the conduct of the recipient competitor.

(c) **Hub and spoke information exchanges (paragraph 8.57)**

7.9 Paragraph 8.57 of the Draft Guidance states that an anticompetitive information exchange can take place through various different types of third parties, including customers. This creates a significant risk that the Guidance itself will have anticompetitive effects. In particular, we have on a number of occasions encountered employees of businesses operating in procurement roles who have had the mistaken impression that competition law prevents them from disclosing one supplier's pricing offer to another, with a view to securing a lower price from the other. Indeed, there is a suggestion that this may have been the case for an employee of one of the parties in the recent CAT judgment in *BT vs. DAF Trucks Limited*.[19] As this is the very essence of the competitive process, it is vital that the Guidance does not facilitate or perpetuate such misapprehensions.

7.10 Consequently, we submit that the CMA should remove the reference to “customers" in paragraph 8.57. Failing that, the revised Guidance should recognise that:

7.10.1 anticompetitive information exchanges through a customer will be extremely rare (if indeed they ever happen at all), as customers have every incentive not to facilitate collusion between their suppliers; and

7.10.2 for that reason, disclosure by a customer of one supplier's prices to another will not typically be considered to infringe competition law unless there is compelling evidence that the customer had actual (not just constructive) awareness of anticompetitive collusion between its suppliers and knowingly intended to contribute to it.

7.11 A similar concern arises in relation to the test expressed in paragraph 8.60, whereby an undertaking may commit an infringement if it "could reasonably have foreseen" that a third party would share its commercial information with its competitor. Again, it is normal (and indeed beneficial) commercial conduct for a purchaser to negotiate with a supplier by disclosing pricing offers of other suppliers, so it will always be the case that those other suppliers could reasonably foresee that happening. Here too, the Guidance should clarify that, in the context of price negotiations with customers, it is not enough that the passing on of a pricing offer by a customer is reasonably foreseeable and that the supplier must also intend to contribute to some wider anticompetitive collusion with its competitor(s), relating to <u>other</u> customers.

7.12 Paragraph 8.60 also gives rise to two additional concerns:

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[18] Case T-758/14 RENV, *Infineon Technologies* ECLI:EU:T:2020:307, paragraph 70.

[19] [2023] CAT 6, paragraph 70.

7.12.1 it states that a discloser of information through a third party would meet the conditions for liability under Chapter 1 if it " *expressly or tacitly agreed with the third party provider sharing that information with its competitors"*. This fails to recognise that there will be no infringement if the putative third party recipient is not pursuing any anticompetitive objective to which the discloser can contribute, either because it rejects receipt of the information,[20] or is unaware (and could not reasonably have foreseen) that its competitor intended for the third party to pass on the information to it; and

7.12.2 the final sentence does not accurately reflect the CJEU's judgment in *VM Remonts*.[21] In particular, that judgment set out the two tests for attributing liability to a discloser – the first involving intention or agreement for the third party to pass on the information and the second involving reasonable foreseeability of pass-on – and clarified that the first of these tests will not be met if the third party passes on that information to a competitor without informing the discloser. The second "reasonable foreseeability" test, however, could still be met, contrary to what is implied in paragraph 8.60.

7.13 In our view, the Draft Guidance should take the opportunity to set out the clearer and more useful elaboration of the test for a hub-and-spoke infringement that has been developed by the case law of the UK courts, whereby it is necessary to establish that:[22]

7.13.1 retailer A discloses to supplier B its future pricing intentions;

7.13.2 A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is, or may be, one);

7.13.3 B does, in fact, pass that information to C;

7.13.4 C may be taken to know the circumstances in which the information was disclosed by A to B; and

7.13.5 C does, in fact, use the information in determining its own future pricing intentions (the last of these being subject to a presumption, in line with the case law on concerted practices).

Clifford Chance LLP
March 2023

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[20] As noted in paragraph 434 of the Draft Guidance, a unilateral disclosure of information does not amount to an infringement if rejected by the recipient.

[21] Case C-542/14, *VM Remonts,* ECLI:EU:C:2016:578, paragraphs 30 and 31.

[22] *Tesco vs. OFT* [2012] CAT 31, paragraphs 57-86 and 350-354.