The City of London Law Society

Open consultation on the CMA's draft guidance on Horizontal Agreements
Response from the City of London Law Society

1. Introduction and summary

1.1 The City of London Law Society ("**CLLS"**) welcomes the opportunity to comment on the Competition and Markets Authority's ("**CMA"**) draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements (the ***Guidance***).

1.2 The CLLS represents approximately 17,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. The Competition Law Committee (the "**Committee"**) comprises leading solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions, and regulatory and government bodies in relation to competition law matters. Members of the Committee represent both complainants and those companies under investigation by regulators.

1.3 The Committee members responsible for the preparation of this response are:

(a) **Alex Potter**, Freshfields Bruckhaus Deringer LLP

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1.4 Our comments are based on our members' significant experience and expertise in advising on the application of Chapter I in the Competition Act 1998 to a wide variety of horizontal agreements.

1.5 We welcome the Guidance as it will improve legal certainty across a broad range of horizontal agreements, particularly in light of the many economic, technological and social developments which have taken place since the current EU Horizontal Cooperation Guidelines were adopted in 2011. We also welcome the CMA's proposal to maintain broad alignment with the EU's new Horizontal Cooperation Guidelines ("**draft EU Guidelines**"), which we consider will make competition law compliance easier and more efficient for the many UK businesses that also operate in the European Union.[1]

1.6 We have confined our comments to those parts of the Guidance which we believe are most significant in terms of maximising legal certainty for businesses pursuing legitimate and often pro-competitive horizontal arrangements. While we broadly support the CMA's proposed approach, absence of comment from us on other parts does not necessarily mean that we agree with all the content of those other parts.

1.7 Our key suggestions are as follows:

1 In light of this laudable objective, we would encourage the CMA to consider delaying publication of its final Guidance until the final EU Guidelines are available, to ensure that such broad alignment is maintained with respect to aspects of the EU Guidelines with which the CMA wishes to ensure alignment that may have changed materially since the published draft.

(a) it would be helpful to have more clarity on whether the CMA foresees a different approach to that of the European Commission ("**Commission**") in respect of joint venture agreements set out in paragraph 3.9 of the Guidance, given the CMA's articulation that it "*may apply the Chapter I prohibition*" to such agreements, as opposed to the Commission, which "*will typically apply Article 101*" to the same categories of agreement (emphasis added). (**Section 2 below**);

(b) it would be helpful to have additional guidance on the important differences between agreements that restrict competition by object and those that have restrictive effects, with reference to case law (**Section 3 below**);

(c) it would be helpful to have 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. (**Section 4 below**); and

(d) it would be helpful to have more clarity and guidance on the evidence that is required to demonstrate that the new threshold under the Competition Act 1998 (Research and Development Agreements Block Exemption) Order 2022 ("**R&D BEO**") for parties competing in innovation is met (**Section 5 below**).

2. Joint Ventures[2]

2.1 We welcome the inclusion of paragraph 3.8 in the Guidance on agreements between joint ventures and their parent companies and the fact that such inclusion is largely consistent with the approach taken by the Commission in paragraph 13 of the draft EU Guidelines. However, it would be helpful to understand whether the CMA foresees a different approach to that of the Commission in respect of those arrangements set out in paragraph 3.9 of the Guidance, given the CMA's articulation that it, "*may apply the Chapter I prohibition*" to those agreements listed, as opposed to the Commission, which "*will typically apply Article 101*" to such agreements (emphasis added).

2.2 Moreover, the Guidance would benefit from including further explanation and/or clarification as to what the CMA's approach "may" be by way of illustrative examples. For example:

(a) would the CMA apply the Chapter I prohibition to a scenario where a parent company enters into agreements and / or exchanges information with several joint ventures over which it has decisive influence all of which are active in the same product market?

(b) what would be the approach of the CMA as regards agreements *between* such joint ventures active in the same product market (i.e. 'sister' companies each under the decisive influence of the same parent company)?

(c) what would be the approach of the CMA with regards to markets where the joint venture is expected to become active in the foreseeable future (i.e. where it takes time to generate sales, expand activities to additional products/geographies)?

2.3 Further, it would be helpful if the Guidance could:

[2] Guidance, para 3.8-3.10.

(a) confirm whether paragraph 3.10 should be interpreted such that parent companies may be considered to be independent not only from each other but also from their joint venture entity in certain contexts;

(b) clarify whether the carve outs in paragraph 3.9 only apply where the agreements involve both parent companies, or whether the CMA may also apply the Chapter I prohibition to an agreement between one parent company and the joint venture and if so, in what contexts;

(c) provide examples of the type of agreements contemplated in paragraph 3.9, in particular, what an agreement between the parents and the JV *outside* the product and geographic scope of the activity of the joint venture would be (and how this may relate to circumstances in which the joint venture may be expected to become active in certain (product and/or geographic) markets in the foreseeable future); and

(d) 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.

3. Restrictions of competition by object and effect[3]

3.1 The Guidance distinguishes the two concepts of "*restrictions of competition by object*" and "*restrictive effects on competition*". Each of these concepts is then developed for each individual type of cooperation throughout the Guidance. While we welcome guidance on these two different forms of restriction of competition, the descriptions provided in the Guidance make the two concepts difficult to distinguish. This is particularly apparent when comparing the list of relevant criteria taken into account in paragraphs 3.33 and 3.34 (to assess whether an agreement has an anti-competitive object) to the very similar list in paragraph 3.38 (to assess whether an agreement has restrictive effects).

3.2 To assist businesses in distinguishing the important differences between agreements that restrict competition by object and those that have restrictive effects, we recommend that the Guidance clearly explains: (i) that agreements and practices identified as by object restrictions must be readily identifiable as intrinsically harmful to competition; and (ii) where the effects on competition are ambivalent and a more detailed analysis of market conditions etc. is necessary, the conduct must be assessed based on an effects test. In doing so, the Guidance should refer to the following established case law principles:

(a) the CJEU's emphasis in *Groupement des cartes bancaires* that the concept of restriction of competition by object must be interpreted restrictively. This concept has also been repeated in several more recent cases (including by the UK's Competition Appeal Tribunal);[4] and

(b) an agreement may be considered a restriction of competition by object only if it reveals a sufficient degree of harm to competition and its harmful nature is easily identifiable.[5]

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[3] Guidance, para 3.32-3.39

[4] Case C-67/13 P *Groupement des Cartes Bancaires v Commission* EU:C:2014:2204, para. 58; Case C-288/18 *Gazdasági Versenyhivatal v Budapest Bank Nyrt* EU:C:2020:265, para 54; Case C-306/20 SIA '*Visma Enterprise' v Konkurences padome* EU:C:2021:935 (***Visma Enterprise***), para 60; *BGL (Holdings) Limited v The Competition and Markets Authority (**BGL v CMA**)*, [2022] CAT 36, para. 203 *et seq*.

[5] Case E-3/16 *Ski Taxi v Norwegian Government*, para 61 and 66; BGL v CMA, para. 203.

3.3 In addition, the Guidance could also highlight the importance of the counterfactual as an assessment of realistic possibilities in the absence of the agreement at issue, as reflected in the more recent case law. [6]

4. Information exchange[7]

4.1 We note that Section 8 of the Guidance expands significantly on the current EU Horizontal Cooperation Guidelines and we welcome this further guidance on the CMA's approach and the case law on this important topic. We are not commenting exhaustively on this chapter but wish to highlight that we would welcome a clearer delineation in the Guidance between 'by object' and 'by effect' competition concerns.

4.2 In the assessment of information exchange under Chapter I, there is a risk that different competition concerns – and their related standard of proof – are conflated. As such, 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.

4.3 Paragraphs 8.18-8.26 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 businesses' self-assessment exercises if these sections could be consolidated or cross-refer to one another.

4.4 The competition concerns listed in the Guidance can be grouped into two different categories, each of which has a different framework for assessment under the Chapter I prohibition:

(a) information exchange which in itself may result in a collusive outcome; and

(b) information exchange which can support an anticompetitive agreement or concerted practice.

Information exchange which <u>in itself</u> may result in a collusive outcome

4.5 As noted in paragraph 8.73 of the Guidance, a standalone 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.

4.6 Such information must be sufficiently strategic 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. Otherwise, undertakings could circumvent the Chapter I prohibition by communicating their planned future conduct to competitors without formally reaching an "agreement".

4.7 The current EU Horizontal Cooperation Guidelines reasonably note that the "*exchange of information about intentions concerning future conduct is the most likely means to enable*

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6 Case C-307/18 *Generics (UK) Ltd v CMA* EU:C:2020:52, , para 120; Visma Enterprise, para 76

7 Guidance, section 8

companies to reach such a common understanding". We do not see the reason for not including this statement in the Guidance, as it provides helpful (and still valid) guidance. While it may in certain circumstances be possible that information about the recent conduct of a competitor is capable of influencing the (future) conduct of a competing recipient, this is relatively exceptional, and is less likely to justify the finding of a restriction by object for an exchange of information in and of itself.

4.8 As such, we believe that the "Restrictions of competition by object"[8] section 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.*

4.9 Furthermore, we consider that the list at paragraph 8.29 is, in part, misleading and risks causing confusion and leading to erroneous application of the Chapter I prohibition. 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's judgment in *Infineon Technologies* (the Smart Card Chips cartel))[9] which concerned a hard-core cartel and in which many types of information was shared on an organised and recurring basis with the common aim, according to the Commission's decision, of limiting price competition.[10] The list in the Guidance, however, gives the impression that any sharing of such data, also in a non-cartel context, constitutes an object restriction.

4.10 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"* as set out at 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 is restrictive by object. For example, in the *Infineon Technologies* case, the information that was actually exchanged among the cartel members was price forecasts, utilisation rates and future capacities, which are clearly more competitively sensitive.[11]

Information exchange which <u>can support</u> an anticompetitive agreement or concerted practice

4.11 A second category of information exchange is information which can be used to increase the stability of an anticompetitive agreement or concerted practice. This is discussed in paragraphs 8.21 to 8.23, which describe how information exchange can increase the internal and external stability of an anticompetitive agreement by serving as a monitoring mechanism.

4.12 The Guidance already helpfully indicates that both exchanges of present and past data can constitute such a monitoring mechanism (either to detect "deviations" from collusive

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8 Guidance, para 8.73 *et seq*.
9 T-758/14 RENV *Infineon Technologies v Commission* EU:T:2016:727 (***Infineon Technologies***), see: paras 70, 85, 96 and 98.
10 Case AT.39574, *Smart Card Chips*, Commission Decision of 3.9.2014, para 317 *et seq*
11 *Smart Card Chips*, para 320

outcomes or to monitor entry). However, the Guidance could provide further clarity that such information exchanges will not be considered a restriction by object in and of themselves, and that in order for such exchanges to result in an infringement, the CMA would need to evidence that the exchange is ancillary to an anticompetitive agreement or concerted practice that is restrictive of competition 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 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 automatically inferred that the information would be used to support the stability of an anticompetitive agreement or concerted practice.

4.13 As such, we consider that the "Restrictions of competition by object"[12] section 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.

Description of non-private information and associated 'reliability' considerations

4.14 Information that is public is considered unlikely to be competitively sensitive, and the public availability of information has traditionally been a factor that businesses consider when assessing whether or not it is safe to exchange information. Paragraph 8.33(a) 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 likely to cause considerable confusion when read against the otherwise stated explanation of what constitutes 'genuinely public' information in paragraphs 8.31-8.32.

4.15 In particular, the Guidance suggests that information that is publicly available could be competitively sensitive depending on the relationship of the party (i.e., competitor-competitor vs. customer-competitor), and whether that information is viewed as reliable by the undertaking receiving the information. It is unclear why a reliability assessment is contemplated in this section of the Guidance, given 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) included at paragraphs 8.34-8.37 of the Guidance, which logically focuses on the differing costs for obtaining information across scenarios.

4.16 Moreover, the case law referenced in paragraph 8.33(a) does not appear to support this new principle of 'reliability'. For example, paragraphs 200 and 201 of the CAT's judgment in *Lexon v the CMA*,[13] merely discuss the economic context of the information exchange considered in that case, referring to customers' opportunities to 'play off' suppliers against each other given price competition and uncertainty in the market. In addition, paragraph 60 of *Tate & Lyle and Others v Commission* supports that the test for determining if information

[12] Guidance, para 8.73 *et seq*.
[13] *Lexon v CMA* [2022] CAT 5.

is 'genuinely public'- i.e. the costs involved in collecting the information, rather than the 'reliability' concept.[14]

4.17 Finally, creating a new quasi-category of non-private information also conflates the by object vs. by effect analysis and is likely to cause the UK and EU to have divergent approaches to information exchange.

4.18 As such, we consider that paragraph 8.33(a) should be removed.

5. Research and Development Agreements[15]

5.1 We note the various stakeholder feedback on the Commission's proposal to introduce a new test in the EU Research and Development Block Exemption Regulation that applies to undertakings competing in innovation.[16] According to this proposed test, such agreements would only be block exempted where there are at least three other independent comparable R&D efforts (the "**EU 3 plus 1 rule**"). We support the concerns raised by stakeholders that the EU 3 plus 1 rule is difficult to apply by way of self-assessment and creates material uncertainty for businesses. Specifically, businesses cannot be expected to have sufficient knowledge about their rivals' R&D activities, which are often highly confidential, to determine whether the 3 plus 1 rule is met and hence whether their proposed R&D agreement falls within the block exemption.

5.2 We also note that the R&D BEO entered into force on 1 January 2023. The R&D BEO takes a more flexible approach than the EU 3 plus 1 rule – i.e. the exemption in the R&D BEO applies if there are three or more of the following (provided that other conditions are also met): (i) competing R&D efforts in addition and comparable with those of the parties to the R&D agreement; or (ii) third parties that are able to independently engage in a comparable R&D effort (the "**UK 3 plus 1 rule**"). This recognises the fact that there "*may be some situations in which there is a lack of publicly available about research and development efforts […] which may mean that the parties cannot identify three 'competing R&D efforts'.*"[17]

5.3 The Guidance sets out relevant considerations when assessing whether there are third parties that are able to independently engage in a comparable R&D effort under limb (ii). These are:

(a) the availability of financial and human resources to the third party;

(b) the third party's intellectual property rights, know-how or other relevant assets;

(c) the third party's previous R&D efforts; and

(d) the ability of the third party to exploit directly or indirectly possible results of their R&D efforts in the United Kingdom.[18]

5.4 While we welcome this more flexible approach, it still creates a significant element of uncertainty for businesses seeking to self-assess, as it requires them to reach a view of their rivals' *ability* to engage in a comparable R&D effort based on the considerations above. As is the case for limb (i) of the UK 3 plus 1 rule, the types of information required to evidence

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14 T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* EU:T:2001:185.
15 Guidance, section 4
16 See, for example: https://competition-policy.ec.europa.eu/system/files/2022-10/HBERs-review_summary_of_stakeholder_workshop_research_and_development_agreements_20220913.pdf.
17 Guidance, para 4.104
18 Guidance, para 4.99 and 4.105

the considerations above are not always publicly available (or reliable), and may be difficult to gather given their sensitivity – particularly for private companies and for businesses in sectors where, for example, patent applications do not provide a guide to R&D activity. Therefore, it may be difficult for businesses to assess the true competitive dynamics for a particular R&D effort and to reach a conclusion on whether the UK 3 plus 1 rule applies based on the evidence available to them. This may have a chilling effect on pro-competitive R&D agreements where the parties compete in innovation but are unable to confirm how many other companies are also competing, as businesses may be deterred from entering into such agreements.

5.5 To help create more certainty for businesses on the application of the UK 3 plus 1 rule, we recommend that the Guidance provides further worked examples demonstrating the types of evidence that would be acceptable to the CMA to demonstrate that limb (ii) of the UK 3 plus 1 rule applies.[19] For example, could limb (ii) be met by demonstrating that a third party active in the same relevant sector as the parties to the potential R&D agreement has recently announced strong financial results or a recent round of public funding for new R&D efforts in the UK? Or would other criteria also need to be met to show a third party's ability to engage in a competing effort with more certainty? We note that the relevant considerations listed above are "*not cumulative requirements, such that if one or more cannot be shown, it does not prevent the block exemption provided by the R&D BEO applying.*" However, further examples of: (a) how much evidence; and (b) the type of evidence that is required to show the UK 3 plus 1 test is met would help provide businesses with the necessary clarity for self-assessing R&D agreements where they compete in innovation.

6. Conclusion

6.1 We welcome the opportunity to comment on the Guidance, which reflects considerable changes in the business environment since the current guidance was adopted. We would also welcome continued dialogue with the CMA as its policies, practice and experience develop and would be very happy to discuss any of the points raised in this response.

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8 March 2023

[19] The worked examples in the Guidance assume that the UK 3 plus 1 rule either applies or does not apply in for each situation considered and do not provide any further explanation of that important part of the assessment. For example, Example 1 where "*there are no other companies that are currently developing the same or a substitutable electronic component, or that are able and likely independently to engage in R&D efforts to develop the same or a substitutable component*" and Example 2 where "*there are two other independent research and development efforts developing a process for the production of the API of the blockbuster medicine.*"