10 November 2021

To: Competition & Markets Authority

Lawyers for Net Zero - Competition & Markets Authority Consultation Response

We are pleased to submit this response of Lawyers for Net Zero to the CMA's call for inputs to help inform advice the CMA will provide to the UK government on how competition and consumer regimes could better support the UK's Net Zero and environmental sustainability goals.

Lawyers for Net Zero is a non-profit organisation established to mobilise in-house lawyers to use their unique role in their organisations to support the delivery of rapid climate action. We have a fast-growing community of in-house legal 'Champions' who are focused on supporting their organisation to guard against greenwashing and achieve legitimate Net Zero.

We do this by providing our Net Zero Action Principles and inviting them to join Action Learning Groups. In-house lawyers (i.e., those who work within businesses, public and third sector bodies) have a central role in their organisations - they are trusted advisors to the board and a moral compass, focused on risk and compliance, horizon scanning to ensure the organisation stays ahead of government legislation and maintains its reputation.

This letter sets out the response of Lawyers for Net Zero. Whilst this has been informed by numerous off-the-record conversations with Champions and other stakeholders, our response does not necessarily reflect the views of our individual Champions nor are we suggesting that we are representing them.

As a significant convener of the in-house legal community, we trust that our observations will be considered by the CMA in its deliberations.

CMA's focus

The CMA's focus is "to promote competition for the benefit of consumers."

In our view it is essential that this role encompasses a broad definition of "benefit" in the context of the significant challenges posed by climate change. 'Consumers' are first and foremost individual members of society, and only purchase goods and services in that context. It follows that in framing what is best for consumers, it is necessary to consider all the potential benefits and detriments. Consumers require a stable

environment in which to live and act. The science of climate change is clear that the current rate of greenhouse gas output will fundamentally undermine that stability. Therefore, if certain market practices, which are seen as 'pro-competition' in the short term, but in fact work against the benefit of consumers (i.e., individual people who require a liveable planet) the CMA should be working creatively to ensure that there is a suitable balance between competition and what is good for individuals.

By way of example, the new 'Climate Change Resolution'[1] of the Law Society of England and Wales resolves amongst other things to provide guidance to solicitors on how, when approaching any matter arising in the course of legal practice, to take into account the likely impact of that matter upon the climate crisis in a way which is compatible with their professional duties and the administration of justice.

Similarly, it is our view that there should be a clearly defined principle that in exercising its statutory function the CMA be required to take into account the urgent need to move to a Net Zero economy. This is wholly consistent with the current Government's public commitment to delivering Net Zero.

Role in proactively encouraging increased collaboration

Some of our Champions have already made submissions to the CMA in response to the CFI either directly or through their external law firms but others have not. Some of our Champions are specialist competition lawyers, most are not. Nevertheless, all of them have a desire for collaboration to combat climate change, and currently the system is not set up to actively encourage Net Zero collaboration.

Business needs to be able to facilitate greater multi-party benchmarking, information exchange and collaboration without running into competition law issues. Individual companies are unlikely to act to take meaningful steps alone, because if they raise their costs or adjust their product range to reduce emissions, competitors will take advantage of that and capture market share – what economists call "first mover disadvantages", "free rider problems", "prisoners' dilemma's", and "market failures".

Everyone wins if we all take climate change mitigation to heart, but few will act fully in the public interest, unless most others do too. We need to enable businesses to feel more confident to collaborate, if and where reasonably necessary, to get to Net Zero. This is in the longer-term interest of producers and consumers alike. The CMA should combat greenwashing and schemes to hold back or delay measures to get to Net Zero but should not stand in the way when firms genuinely want to stop greenhouse gas emissions as soon as possible, in their own, their customers and society's long-term interest.

For the UK to achieve it's Net Zero and environmental sustainability goals, businesses need to be actively encouraged to confidently collaborate both within sectors and across different sectors without fear of being in breach of competition law and the CMA has the potential to play a major role in moving the dial.

For example:

- The existing system provides that if the combined market share of the businesses involved in a sustainability agreement is below a certain threshold, the agreement may benefit from special competition law allowances. But effective climate change mitigation may require cooperation of all or almost all firms in a sector. Clearly, the more businesses involved in any collaboration the more likely it is that any threshold will be exceeded. This works to hinder multi-party collaboration

[1] https://www.lawsociety.org.uk/topics/climate-change/creating-a-climate-conscious-approach-to-legal-practice#download-the-resolution

arrangements, but those large multi-party collaborations are the ones which are most likely to have the greatest impact on Net Zero achievements and should therefore be encouraged.

- Paragraph 28 states that the CMA views competition as "a process of rivalry between firms seeking to win customers' business over time by offering them a better deal" and then talks about possible exceptions in terms of "rivalry enhancing efficiencies" or "relevant customer benefits". There needs to not only be a third category of exception which is "relevant climate benefits" but we need to reframe the entire system and narrative so that "relevant climate benefits" take precedence over "rivalry enhancing efficiencies" or "relevant customer benefits" or are recognised as efficiencies or customer benefits.

- Paragraph 30 states "The CMA may decide not to find a substantial lessening of competition (SLC) in a merger if the rivalry-enhancing efficiencies outweigh any anticompetitive effects. Benefits to the environment could therefore potentially be considered as rivalry-enhancing efficiencies in appropriate cases to the extent that they impact competition in the relevant market". We would seriously question this – it is too narrow to judge efforts to mitigate, reduce or adapt to climate change solely on whether or not they are "rivalry enhancing". Rather such efforts should be regarded as important steps in the right direction: to mitigate, reduce or adapt to climate change – which is in the interests of all consumers. Environmental efficiencies which a company identifies should not be done as a way to increase competition (that is a side benefit which should really only be temporary as others catch up) but rather a necessary action all companies must take. If we unnecessarily pit companies against each other in the race to Net Zero, we will all lose.

The CMA requests specific examples of whether companies have actually faced difficulties and whether changes to the regime would reduce these difficulties. Specific examples are outside our remit (some of our Champions have faced difficulties whilst others have not) but we did hear comments along the lines of "our business people have been so well trained in competition law that perhaps the creativity and innovation necessary to find ways to collaborate to tackle the climate crisis has been drummed out of them". They are even reluctant to engage in "best practice" benchmarking and information exchange on what can be done to reduce emissions, lower pollution, and preserve biodiversity. That is not a good result for retaining a liveable planet for all.

We need the CMA to find ways not just to remove obstacles but to positively encourage, incentivise and enable companies to collaborate in seeking to find solutions to tackle the climate crisis. If information relating to combatting the climate crisis is shared openly and widely then it is difficult to see how sharing it could be anti-competitive, but nevertheless industry pledges have raised worries about competition issues. However, similar to tackling Covid, if the political will is there, such competition issues could be solved on an industry-wide or even cross-sector basis using widespread collaboration, for example:

- The CMA could encourage companies to share their strategies to get to Net Zero or reduce their carbon footprint through publication or through facilitating industry specific training sessions by confirming that any such publication/training does not run contrary to competition law e.g. one company which found an innovative way to reduce emissions, could easily share such information with its peers.

- Discussions will be required as part of any production company's aim to achieve a closed loop system as part of efforts to achieve a Circular Economy. For example, a company which makes plastic bottles should be encouraged and enabled to speak openly to all its suppliers and industry

members about the technology needed to facilitate this. A closed loop system ultimately cannot be achieved by one company alone – by its very nature, it requires cooperation between parties.

- A pre-clearance system could be established whereby any form of arrangement would need to be evaluated for its climate impact, and such impact must be either positive or at worse neutral, before the parties may submit any application for an exemption from the CMA. In other words, any application to the CMA regarding an arrangement which has a negative effect on the climate will automatically be declined.

Practical implementation and flexible system

Collaboration is the key to tackling the climate crisis. Organisations definitely need the CMA to help them to progress in this ever-changing and dynamic space: the whole system will be evolving quickly and that means that the CMA will need a system which is practical to implement and which allows it to respond flexibly and nimbly to changes as they occur. We need simple guidance and principles which are made easy for everyone to understand. We very much welcome the CMA's green claims code which is a step in the right direction.

Here are just a couple of other suggestions:

- The CMA could issue guidelines explaining what cooperation is allowed under competition law and explaining that climate change mitigation will be recognized as "customer benefits" and "efficiencies". The CMA should encourage other competition authorities to take the same position, because many agreements will be cross-border.

- Comfort letters could be re-introduced in order to give comfort to groups of companies wanting to collaborate around climate change mitigation or adaptation strategies to facilitate such collaboration. A comfort letter would provide an expedited process for the CMA to facilitate early collaboration so that the group could share an idea publicly and ask for feedback or input.

- There could be pre-clearance given for collaboration hubs or umbrella organisations when facilitating collaboration and information sharing for the purposes of Net Zero and environmental sustainability. This has been raised as a worry on a number of industry wide pledges.

- There should be a specific unit set up within the CMA along the lines of the Digital Markets Unit to ensure that climate change is properly addressed in all decisions of the CMA going forward with the right team having the right expertise. If the CMA does not have the right expertise, doubtless industry would welcome the opportunity to step forward to provide that expertise. Or the CMA could cooperate with Government bodies that have relevant knowledge, like the Department for Environment, Food and Rural Affairs (Defra).

- If companies are fined for greenwashing, then their directors could be compelled to attend a training course on the dangers of greenwashing.

- For maximum impact, we suggest the CMA ensures there is adequate budget for robust enforcement mechanisms.

- Allow private actions, as they are an important means by which the people can hold government and business to account.

- Companies could reduce fines, for example when found greenwashing, by committing to invest further in climate action.

Next steps

Trade associations, by their very nature, offer a niche view for their own particular industry whereas we have Champions from across all different sectors and therefore can provide a wider view. Many of our Champions have key legal roles in important sectors of the economy and we are keen to start a dialogue with the CMA to support the development of the CMA's policy in this space.

One area in particular where lawyers can make a huge difference is with regard to the reference to the lack of a consistent set of definitions for key environmental terms in Paragraphs 52 and 53. We would be pleased to bring together our Champions and indeed others in the legal community to collaborate on formulating such definitions.

All the best
Lawyers for Net Zero