DLA Piper's Response to the CMA's Consultation on

the Draft Guidance on Environmental Sustainability Agreements (CMA 177)

1. Key Considerations

1.1. DLA Piper applauds the CMA for taking the initiative and demonstrating itself as one of the thought leaders on the issue of how to ensure competition law concerns do not dissuade companies from entering into legitimate cooperations with other industry players that will bring about environmental benefits. Given the significant challenges facing humankind in seeking to achieve Net Zero targets the CMA's draft guidance on the application of UK antitrust law to sustainability agreements (the "**Guidance**") is a positive step forward in the right direction.

1.2. DLA appreciates the effort made by the CMA to ensure the Guidance is clear and is aware that clients particularly appreciate the various practical examples of the types of cooperations that would be legitimate.

1.3. DLA and its clients particularly welcome the CMA's clear willingness to engage with businesses in a constructive way through the "open-door policy" on proposed environmental sustainability agreements ("**ESAs**"), and climate change agreements ("**CCAs**").

1.4. DLA has a couple of key points in relation to the scope of the Guidance where it would urge the CMA to reconsider and amend:

1.4.1.1. We believe the CMA is unduly limiting the scope of the more permissive exemption criteria currently afforded only to CCAs and believe it should also extend to agreements that have as object the protection of existing biodiversity or preventing biodiversity loss ("**biodiversity agreements**"). We believe the current distinction within ESAs is artificial and risks leading to perverse outcomes. See further below.

1.4.1.2. The CMA should clarify and broaden the scope of applicable 'consumers' for the purposes of the exemption criteria to the Chapter I Prohibition, for ESAs generally and climate change agreements in particular. See further below.

1.4.1.3. The CMA refers to its "open door policy", terminology which we understand is aimed at encouraging businesses to come forward and discuss their proposals with the CMA. However, it would be helpful if it is clear that the final output of this process is some form of written confirmation that the parties have submitted their proposal to the CMA, and that based on the information provided (and subject to any recommended modifications being implemented) the proposal is deemed to fall within the exemption criteria set out in the Guidance. For the Parties, their shareholders, lenders, and potential purchasers of a participating business, it would be extremely helpful if there was a form of comfort letter that can be shared, and which may include more details than the redacted summary the CMA may publish.

1.4.1.4. While we can sympathise with the CMA's unwillingness to commit itself to any mandatory timetable, it would be very useful if the CMA could provide a non-binding indication of the likely time it would take to receive a comfort letter from the moment the CMA has received all relevant information.

2. The scope of agreements able to benefit from the more permissive exemption criteria

2.1. We applaud the CMA's more expansive approach adopted in relation to the interpretation of the 'fair share to consumers' condition of the exemption to the Chapter I Prohibition.

2.2. However, we believe the CMA is being unduly limiting and strongly urge the CMA to consider allowing this approach to also apply to other agreements beyond CCAs, in particular biodiversity agreements. As currently drafted, the Guidance does not clearly justify this distinction in approach as between CCAs and biodiversity agreements, specifically:

2.2.1.1. The harms posed by biodiversity loss or damage are increasingly considered to of similar urgency and threat to our planet as climate change. Biodiversity agreements also seek to address negative externalities that would otherwise have "*devastating effects inside the UK and outside of the UK and immeasurable long-term effects on the whole planet*".

2.2.1.2. Clear scientific and legal targets are being developed for biodiversity, just as with climate change. The UK Government has accepted this as a policy objective and as such the CMA should not seek to differentiate between climate change and biodiversity cooperations.

2.2.1.3. It is equally the case for biodiversity agreements that, in considering the case for exemption from the Chapter I Prohibition, having regard only to benefits accruing to customers in the directly relevant market(s) subject to the agreement would have perverse and harmful effects. For example, an agreement between food manufacturers to purchase only from farmers with a land management programme that protects biodiversity, which would in principle benefit all humans and while it might lead to higher costs in the short term, in the longer term creates a more resilient supply chain benefiting the food manufacturers and their direct customers. If biodiversity agreements are not included in the more permissible exemption regime, this would mean it would only be exempt if it can be demonstrated that direct consumers would benefit, while in fact it should be possible to take into account the benefit to society as a whole.

2.3. We note the more permissive approach taken by the Dutch Competition Authority ("ACM") which is willing to exempt with a broader approach to the 'fair share' criteria all 'environmental damage agreements' – defined as those that seek to reduce environmental damage (i.e. damage to the environment in the production and consumption of goods and services) through the more efficient usage of scarce natural resources, and which help to comply with an international or national standard, or realise a concrete policy goal.

2.4. At a minimum, we would urge the CMA to keep biodiversity agreements under review and where, for example, it publishes summaries of exempt agreements include references to biodiversity if the cooperation also included this, to encourage companies to also cooperate in this area.

3. **The CMA's proposed scope of 'consumers' for the purpose of the exemption criteria**

3.1. The Guidance defines relevant 'consumers' for the purpose of applying the third exemption criterion i.e., that consumers must receive a fair share of the benefits. We submit that this definition is still unnecessarily narrow:

3.1.1.1. The current example in the Guidance (paragraph 5.20) to illustrate the notion of consumers in 'related markets' seems overly narrow and risks confusing businesses. A more generic illustrative example would be more instructive of how the concept of 'related market' is intended to operate. For example, packaging companies could cooperate to produce more environmentally friendly packaging for supermarkets. This packaging may cost more for the supermarkets (and, potentially, end-customers of the supermarkets) but could also lead to ultimate benefits both for supermarkets and customers not only in the market to which the

agreement relates but in related, downstream markets, as well as society as a whole, with reduced landfill.

3.1.1.2. The Guidance restricts the interpretation of 'consumers' only to *UK* consumers. Given that climate is not defined by national boundaries, this seems neither logical nor is it consistent with other statements in the Guidance. For example, the Guidance makes clear (correctly) that the "*negative effects* [of greenhouse gas emissions] *(and so the benefits of reducing them) typically are global in nature*" (emphasis added). The Guidance also acknowledges that "*climate change agreements seek to limit negative externalities of a type that are likely to have devastating effects inside the UK and outside of the UK and immeasurable long - term effects on the whole planet once certain tipping points are reached*" (emphasis added). In this context, it seems wholly appropriate that parties to relevant agreements should be able to bring forward, and the CMA should take into account, evidence to show the benefits of the proposed arrangement to all consumers including those outside the UK. This is particularly the case given that the broader exemption afforded to climate change agreements in the Guidance is partly justified by reference to the UK's international commitments on climate change (which clearly apply on a broader than UK basis). Furthermore, in many instances companies manufacture consumer products that are intended for both the UK and Irish market in one location and to one standard, and it seems unnecessarily distortive that a climate change agreement related to production improvements might be exempt by the CMA if production is based in UK and therefore the majority of the beneficial impact is in the UK, but potentially not if production improvements are made in Ireland, while UK customers may be adversely impacted.

4. Publication

4.1. We agree with the CMA's position that in most cases it would be extremely helpfully for all advisers and companies to be aware of practical examples which have been granted clearance under the Guidance.

4.2. We expect that in most instances the parties to a legitimate environmental cooperation will have no objection to the publication of a summary which does not include confidential information, and which promotes legal certainty as to the legality of said cooperation for all involved in it.

4.3. However, we are also aware that there may be instances where parties seek the CMA's guidance before an initiative is publicly launched or it is intended to give them a first mover competitive advantage, where there may be a significant resistance to any publication. We therefore welcome the CMA not making it a pre-condition to obtaining clearance that there has to be publication.

5. Additional suggested amendments to the Guidance

5.1. Set out below are various smaller textual amendments which we believe would clarify the scope of the Guidance and provide greater certainty for all who would seek to apply the Guidance.

5.2. Paragraphs 1.13. and 7.10. There is a risk that the statement that the CMA will not take action against agreements "that clearly correspond to examples used in this Guidance and are consistent with the principles set out in this Guidance" limits the comfort that the CMA intended to provide. It should be made clearer that the CMA will not be taking action with any agreement that is clearly consistent with the Guidance's principles (irrespective of whether they correspond to the precise examples the Guidance contains). This could be remedied simply

by amending the relevant wording as follows: “that clearly correspond to examples used in this Guidance or are consistent with the principles set out in this Guidance”.

5.3. Paragraph 2.1. As the Guidance covers information sharing and industry codes, we suggest the second sentence includes the wording in red: “[…] between competitors and potential competitors which are aimed at identification of issues, preventing, reducing or mitigating the adverse impact that economic activities have…”

5.4. Paragraph 2.4. To ensure that climate change agreements are appropriately defined, we would suggest the following amendment to the definition: “Such agreements will typically reduce the negative externalities from greenhouse gases, such as carbon dioxide and methane, emitted from the production and / or consumption of goods and services.”

5.5. Paragraph 3.4. The final sentence of this paragraph should be amended as indicated in red: “In such cases, there is no restriction of actual or potential competition that would have existed in the absence of the agreement.”

5.6. Paragraph 3.7. The first sentence of this paragraph should be amended as indicated in red: “Cooperation between competitors which is made or done to comply with a UK or other international legal requirement to cooperate is automatically excluded from the application of the Chapter I prohibition”. For example, the *EU Directive on Corporate Sustainability Due Diligence (CSDD)* (article 8(3)f) requires companies to collaborate, “particularly where no other action is suitable or effective” to increase supply chain sustainability.

5.7. Paragraph 3.8. Consistent with the approach taken by the ACM, the exemption from the Chapter I Prohibition relating to compliance with laws should not be limited solely to “domestic” (i.e., UK) or “international” regimes. Businesses are obliged to comply with whatever law applies in all jurisdictions where they are active, including foreign national laws. We would suggest amending the wording as follows: “Where businesses agree that they must adhere to existing domestic or international legal standards and requirements, this is also unlikely to raise competition concerns since businesses are expected to operate within the law.”

5.8. Paragraph 3.16. It would be useful to explicitly acknowledge that it includes cooperation to meet scope 3 sustainability targets.

5.9. Paragraph 4.9. The penultimate sentence of this paragraph should be amended as indicated in red: “In order to be considered an ancillary restraint, it is necessary to examine whether the agreement would be impossible to carry out in the particular legal and economic context absent the restriction in question.”

5.10. Paragraph 5.4. For consistency with the other examples given in this paragraph (and to reflect the broader categories of benefit to which ESAs might give rise), we would propose that the third bullet point should be amended as follows: “[…] reducing production or distribution costs (for example, combining resources to create economies of scale in relation to a new, more environmentally sustainable input, enabling the parties to produce or distribute their products more cheaply)”.

5.11. Paragraph 5.8. For clarity we would suggest adding the word in red: “In practice this means that an agreement or restriction is likely to be considered indispensable, or reasonably necessary, to achieve the relevant benefit if the parties can demonstrate…”

5.12. Paragraph 7.12. We understand the CMA’s desire to ensure it has all the relevant information provided to it in order to properly assess a particular agreement before giving it protection from fines, however given the importance of this protection for the companies who legitimately will want to rely on this protection, and the fact that some cooperation may include

numerous companies and different departments within those companies, we would propose the following wording is added: “this is on the condition that the parties did not deliberately or negligently withhold information from the CMA which would have made a material difference to its assessment.”.

Partner DLA Piper UK

LLP 3 April 2023