Consultation on the Draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements

28 February 2023

Deadline 11 April 2023 5pm

Dr Claudio Lombardi

University of Aberdeen

1. **Are the content, format and presentation of the Draft Sustainability Guidance sufficiently clear? If there are particular parts of the Draft Sustainability Guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.**

The content, format and presentation of the Draft Sustainability Guidance (hereinafter also referred to as the Guidance) is generally clear. However, it is important to consider the following issues to ensure greater clarity and accuracy in the Guidance. These issues include:
a. The language used in the Guidance regarding the likelihood of certain agreements infringing Chapter I may be unclear. While the word "unlikely" (in "unlikely to infringe the prohibition") suggests the creation of a rebuttable presumption, Section 7.10 appears to suggest that there is an automatic exclusion of liability or 'safe harbour' for environmental sustainability agreements, including climate change agreements, that correspond to examples used in the Guidance and are consistent with the principles set out in the Guidance. Greater clarity is necessary regarding the level of scrutiny that the CMA will apply to such agreements and the extent to which they may be subject to enforcement action.

b. Sections 1.15 and 7.12 of the Draft Sustainability Guidance state that the CMA will not issue fines against parties that implement an agreement that was discussed with the CMA in advance and where the CMA did not raise any competition concerns or where any concerns that were raised by the CMA have been addressed. However, this could be problematic if the agreement was discussed with the CMA in the course of a different but connected antitrust proceeding, as the CMA may not address it and create a misunderstanding with the enterprises. The Guidance should clarify the circumstances under which prior discussions with the CMA will be sufficient to establish that an agreement does not raise competition concerns.

c. The exemptions in Section 5 of the Draft Sustainability Guidance provide examples of when the benefits of an agreement may outweigh the harm, but they do not provide a metric to determine the extent of these benefits. It would be helpful for the Guidance to provide more guidance on how to assess the benefits of an agreement and weigh them against any potential harm.

d. It is important for the Guidance to clarify that it must be established what the causal link is between an agreement and the claimed efficiencies. This will help to ensure that any claimed efficiencies are properly assessed and that any potential harm is appropriately balanced against the benefits of the agreement. The Guidance should provide more assistance on how to establish the causal link between an agreement and the claimed efficiencies.

2. **We are keen to ensure that the Draft Sustainability Guidance is as practical and helpful to business as possible. If you think that there are situations where additional guidance would be helpful or where the examples we have used could be made clearer or more specific, please let us know.**
    a. To make the Draft Sustainability Guidance more practical and helpful to businesses, additional guidance on the distinction between sustainability agreements and climate change agreements would be helpful. While the guidance does provide some examples of climate change agreements, more specific examples could be provided to help businesses understand the different types of agreements and how they may be affected by competition law.
    b. The Guidance could also include and provide more clarity on how decisions made by associations of associations of undertakings are included to the same competition law considerations. The Guidance could provide additional examples of situations where an association of undertakings may engage in anticompetitive/sustainable conduct, and how to ensure compliance with competition law in such situations.
    c. Another area where additional guidance may be helpful is the role of management consulting companies in developing and implementing sustainability agreements. The Guidance could provide more specific direction on the role of management consulting companies in the development and implementation of sustainability agreements, including how to ensure that such agreements comply with competition law.
3. **We are also keen to ensure that the description of the agreements in Section 2 of the Draft Sustainability Guidance is sufficiently clear so that businesses are in no doubt as to whether their agreement is covered by the Guidance.**
    a. **Are there any changes that you feel would improve the description of environmental sustainability agreements?**

To improve the clarity of the Draft Sustainability Guidance with respect to the description of environmental sustainability agreements, there are several changes that could be made.

i. There is an overlap between environmental sustainability agreements and climate change agreements in the example given at 2.1 as part of the definition of negative externalities.

ii. It would be helpful to include a few examples of vertical agreements in the description of environmental sustainability agreements, to provide further clarity on the types of agreements that are covered. This would help businesses to identify whether their specific agreement falls under the Guidance.

iii. It may be beneficial to define negative externalities independently from the definition of environmental sustainability agreements. This would allow for a clearer understanding of each concept, and would help businesses to identify which category their agreement falls under.

iv. The definition of sustainability should be more closely tied to the proof required to demonstrate compliance with the Guidance. This would help businesses to understand what evidence they need to provide in order to demonstrate that their agreement meets the sustainability criteria set out in the Guidance. Overall, by incorporating these changes into the description of environmental sustainability agreements in the Guidance, businesses will have a better understanding of the scope and requirements of the Guidance, and will be better equipped to ensure compliance.

b. Are there any changes that you feel would improve the description of climate change agreements (including in footnote 4)?

i. The current definition of climate change agreements as agreements which contribute towards the UK's binding climate change targets under domestic or international law could be better tied to the definition of negative externalities. This would provide a clearer understanding of the link between climate change agreements and the negative externalities they aim to address, which could help businesses to identify whether their agreement falls under this category.

ii. It may be worth revisiting some of the examples of climate change agreements provided in the Guidance, such as "an agreement not to provide support such as financing or insurance to fossil fuel producers." While these examples are helpful in illustrating the concept of climate change agreements, they could also be used to extort or intimidate businesses due to the severe consequences that non-compliance could imply. Therefore, it may be useful to provide additional guidance on how to prevent such abuses.

iii. The current example of "an agreement between manufacturers to phase out a particular production process which involves the emission of carbon dioxide" may be too generic and could be interpreted in many different ways. Providing more specific and concrete examples of such agreements would make it easier for businesses to identify whether their agreement falls under this category.

iv. Establishing metrics to determine the benefits of the agreement would also help determining to what extent price effects can be outweigh.
This may also help with the assessment of agreements that have the potential to worsen emissions but have positive price effects.