11 April 2023

To

Competition and Markets Authority (CMA)

The Cabot 25 Cabot Square, London E14 4QZ, United Kingdom

Att.: sustainabilityhbersreview@cma.gov.uk

Ref. Public consultation on the draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements

Dear Sir/Madam,

We have great pleasure in enclosing a submission on behalf of both the Cartels Working Group and the Sustainability Working Group of the Antitrust Section of the International Bar Association in response to the public consultation process initiated by the Competition and Markets Authority (the "CMA") on the draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements ("Draft Guidance").

The Co-chairs and representatives of the Antitrust Section would be delighted to discuss the enclosed submission in more detail with the representatives of the CMA should you deem appropriate.

Yours sincerely,

[✂] Co-chair [✂] Co-chair

IBA ANTITRUST SECTION CARTEL WORKING GROUP AND SUSTAINABILITY WORKING GROUP COMMENTS TO THE UK COMPETITION AND MARKETS AUTHORITY ON THE ON THE DRAFT GUIDANCE ON THE APPLICATION OF THE CHAPTER I PROHIBITION IN THE COMPETITION ACT 1998 TO ENVIRONMENTAL SUSTAINABILITY AGREEMENTS

I. INTRODUCTION

The IBA is the world's leading international organization of legal practitioners, bar associations and law societies. As the "global voice of the legal profession", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, and it has considerable expertise in providing assistance to the global legal community. Further information on the IBA is available at http://ibanet.org.

The IBA's Antitrust Section includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy. The comments set out in this document have been prepared by both the Cartels Working Group and the Sustainability Working Group of the IBA's Antitrust Section.

The Working Groups welcome the opportunity to comment on the public consultation on the Draft Guidance, which seeks to ensure that competition law is not an unnecessary barrier to companies seeking to pursue environmental sustainability initiatives.

This document provides comments on the consultation questions posed by the CMA and some additional aspects to be considered for the effective contribution of competition policy for sustainability, taking into consideration that industry collaboration is key to address climate change and the need to provide further certainty on the types of collaboration to protect or enhance environmental sustainability may, or may not, be permitted under competition law.

II. SCOPE OF RESPONSE

Q4.1. 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 Working Groups commend the CMA's initiative, particularly in the current context, where there is consensus as to not only the importance of the issue for intergenerational welfare, but also its sheer urgency. Recent events around the globe have time and time again evidenced that, if governments do not act swiftly to address sustainability and tackle climate change, they will soon be dealing with a problem of undeniably large – and potentially irreversible – proportions.

Seeing the CMA act so boldly in such a context is a development that the Working Groups welcome tremendously. It is of the upmost importance for competition policy to not stand in the way of industry transformation towards carbon reduction and more sustainable practices generally, and it is our opinion that the CMA has really made a push in that direction.

Generally, the Working Groups consider that the Draft Guidance is very clear in providing guidelines for companies to assess whether or not sustainability and climate change agreements may be permissible under the Chapter I prohibitions of anticompetitive agreements. Throughout this submission, the Working Groups will focus on pointing out the few areas where in their

view further clarity can usefully be added to the Draft Guidance.

The Working Groups also commend the Draft Guidance's efforts in providing clear standards for the cooperation agreements, but the Working Groups take this opportunity to emphasize the importance of making it as easy as possible for companies to assess the legality of arrangements that are potentially subject to both the EU and UK antitrust laws. In this sense, it would be helpful if the wording of the Draft Guidance could be the same on all points where the approach is the same by both enforcers. This would also help clarify what are the points of difference that have to be taken into account by the undertakings when considering entering into a sustainability agreement.

The Working Groups consider that the CMA acknowledges the *"scale of the challenge"*, and that industry collaboration is likely to be necessary to meet the UK's binding international commitments. However, paragraphs 1.5. and 1.11 should also acknowledge the "urgency" required in this matter. The Working Groups suggest the inclusion of the following in the abovementioned paragraphs:

- § 1.5.: (…) Given the scale **and the urgency of** the challenge (…)
- § 1.11.: (…) This more permissive approach to climate change agreements is justified by the fact that climate change represents a special category of threat **that demands an urgent attention** (…)

On paragraph 1.8. of the Draft Guidance, the Working Groups consider that it would be helpful to set out other forms of first mover disadvantage (in addition to irrecoverable costs), including, for example, imperfect consumer understanding/appreciation where a supplier is deterred from switching to a more sustainable product/process because consumers would not immediately understand/value it. The fact that the commercial risk profile of a project might also be unacceptable to any company acting alone is another first mover disadvantage that could be included under paragraph 1.8.

The Working Groups also recommend the inclusion of an additional bullet point in this paragraph to indicate situations where the clear reason for collaboration to enhance

sustainability is to achieve outcomes more quickly than it would otherwise be possible. That is particularly pertinent to climate change and the need to avoid the "tipping points" which the CMA refers to on paragraph 6.4. The theme of urgency (i.e. the objective benefits of achieving sustainability goals more quickly) already appears in the Draft Guidance on paragraphs 4.6, 5.8, 5.10, 5.12 and 5.13). The Working Groups suggest the following wording:

> "*where firms may individually possess the resources and capabilities to achieve more environmentally sustainable outcomes but could realise the benefits more quickly, on the scale demanded by the risks of climate change*".

Finally, in relation to enforcement action, the Working Groups believe that the protection against enforcement should not be restricted to agreements which "*clearly correspond to the examples used in this Guidance*" – of which there is a limited number. Instead, the reassurance should apply to agreements which are "*consistent with the principles set out in the Guidance*" or where the parties have followed the Guidance "*in good faith*".

Q4.2. 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.

The Draft Guidance provides a comprehensive overview of potential concerns and permissible possibilities of actions for competitors cooperation, with examples of practical situations and best practices, which is very welcome. The Working Groups also commend the CMA for its initiative to establish the open-door policy for businesses considering entering into an environmental sustainability agreement.

Specifically in relation to the open-door policy, the Working Groups suggest that consultation with the parties to propose adjustments to render an agreement compliant with environmental sustainability initiatives. Otherwise, approaching CMA for informal guidance could be seen as a mandatory step for companies engaging in such initiatives, which would increase the costs of both the CMA and of private companies.

It would also be helpful to provide more procedural clarity about how these informal consultations would occur. For example, what timetable should the parties expect? How and whom should the parties approach within the CMA? What types of documents or other information should the parties expect to provide the CMA for the purposes of the consultation? How will the CMA formalize its opinion? The Working Groups consider that it would be appropriate for the procedure to be something along the lines of the existing procedure whereby parties that do not wish to notify a given transaction for merger review submit a short briefing paper to the CMA articulating why no competition concerns arise. The CMA's issuance of an opinion indicating either that it has no further questions and will not investigate the matter, or flagging what needs to be addressed by the parties for that to occur, would provide parties to the collaboration with valuable feedback on risks and approach.

In this sense, in relation to timetable, the Working Groups consider that it would be helpful for the enforcer to provide further clarity on how long the process would likely take – from initial contact to conclusions, and whether the CMA contemplates a one-off meeting or an iterative procedure.

Also on procedural measures, it would be important for the Draft Guidance to clarify whether businesses can approach the CMA in complete confidentiality. It would be very helpful if there were an option for external lawyers to approach the CMA on a no-names basis and/or to present the initiative on a hypothetical basis. The Working Groups respectfully consider that this would significantly increase the likelihood of an initial approach by companies interested in carrying a sustainability agreement with competitors.

Additionally, the Draft Guidance could also provide further details on the possibility of potential interaction with other agencies, given the likely cross-border effects of many sustainability initiatives. The Working Groups consider that the value of the CMA's open-door policy would be vastly enhanced (and therefore more attractive) if it could be used to bring other competition authorities to comment on common subjects – e.g., to provide joint guidance in some way. The Working Groups appreciate that the CMA could never guarantee this outcome for a number of reasons, but it would be appreciated if the CMA could at least signal its willingness to go down this route in appropriate circumstances.

Finally, the Working Groups encourage the CMA and its Sustainability Task Force to continue the helpful dialogue in relation to sustainability cooperation, for example, through regular blogposts/ newsletters from the CMA as it develops its thinking and experience. Regular debate, including through roundtables to which ESG Directors or industry associations are invited, would be helpful to a range of stakeholders and to the improvement and development of the discussions around this matter.

Q4.3. 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?

The Working Group's comments in relation to this question are divided according to the sections below.

I. <u>Environmental sustainability agreements which could infringe the Chapter I prohibition</u>

With respect to paragraph 4.10, the Working Groups consider it very helpful to explore the applicability of the ancillary restraints doctrine in relation to environmental sustainability agreements. However, it would be more useful to have examples of an ancillary restraint in a concrete sustainability context. The Working Groups suggest that a good example would be the joint and short-term setting of price in order to spark upstream investment in more sustainable processes or to drive demand. Ideally, the Draft Guidance would indicate requirements that a given sustainability agreement would need to meet in order for this to be permissible (e.g., the agreement clearly sets out concrete benefits designed to compensate the effects of the short-term price setting scheme, etc.).

The Working Groups view as extremely helpful the clarification in the Draft Guidance that an agreement between a group of competing purchasers to only purchase from suppliers that sell sustainable products would qualify for an 'effects analysis'. The Working Groups encourage the

CMA to supplement this paragraph with the guidance contained in paragraph 333 of the EU draft Horizontal Guidelines which explains that the effects analysis should take into account "*whether the suppliers concerned have customers other that those that are party to the joint purchasing arrangement (including customers in other markets) or can easily decide to start also producing sustainable products*".[1] In other words, it would be helpful for CMA to flag which types of circumstances would be relevant for determining that collective agreements excluding a supplier which does not sell sustainable products from the purchasing market is compatible with competition law.

In relation to paragraph 4.14, the Working Groups suggest the inclusion of a final bullet on appreciable increases in price or reductions in output, product variety, quality or innovation. It would be useful if the Guidance could expand on how to assess these issues and in which situations such results would be permitted. For instance, it is unclear whether a sustainability cooperation that leads to a relatively small increment in the cost of an intermediate product or of some input which represents a very small part of final retail price would be permitted. Guidance on how restrictive these effects would be considered to be if they are limited to the short-term would also be appreciated.

Similarly, additional guidance would be appreciated with respect to the first bullet point in the abovementioned paragraph in relation to the market coverage of the agreement. The Working Groups consider that further development and detailed information would be helpful for cooperating undertakings to have a reliable reference as to when the market coverage of a part of the relevant market is small enough to restrain competition or when it is not.

II. <u>Environmental sustainability agreements which are unlikely to infringe the Chapter I prohibition</u>

The Working Groups commend the CMA's efforts in providing an extensive analysis of the aspects of environmental sustainability agreements that are unlikely to infringe the Chapter I prohibition. The comments provided below are essentially directed to suggesting clarification of

[1] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paragraph 333, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022XC0419(03) .

some provisions that may cause uncertainty to undertakings and additional guidance that could be included to enhance transparency, predictability and legal certainty on the topics covered in this type of agreement.

In the section "Agreements which do not affect the main parameters of competition", the Working Groups consider that paragraph 3.3.1 seems not to be a helpful example of permitted sustainability cooperation because it does not involve competitor collaboration, but rather a conduct carried on within the same corporate group. The Working Groups suggest that this example be replaced with a situation that entails competitor collaboration (e.g., a commitment between competitors to encourage the reduction of single-use plastic in their business).

In paragraph 3.3.2, the Working Groups suggest the addition of further guidance at the end of the last sentence, which would read as: "*This could include, for example, where the joint funds are used for training activities for people working in the industry* ***or to compensate or incentivise the use of more sustainable, but more costly practices and processes***".

In relation to the section "Cooperation required by law", the Working Groups suggest that the Draft Guidance should expand the automatic exclusion from the application of the Chapter I prohibition to agreements to respect national or international laws which apply to doing business anywhere. The contrary approach could hamper multi-jurisdiction initiatives, which should be welcomed in a globalised economy where climate change impacts are felt beyond national borders. An explanation about whether and how the CMA may cooperate with other competition authorities would also be welcomed.

In the section "Pooling information about suppliers or customers", the Working Groups suggest that it should also cover "*an agreement to pool information about* ***and provide a rating on*** *the environmental sustainability credentials of suppliers*". The Working Group's expectation is that customers will often seek to help suppliers improve their sustainability footprint and use some form of rating system to help chart progress. This could be done without any obligation to purchase or refrain from purchasing from suppliers in any category, focusing instead on incentives to improve their sustainability footprint.

On the "Creation of industry standards", although the Working Groups commend the CMA acknowledgement that the cooperation among competitors to develop industry standards are unlikely to have an appreciable negative effect on competition, they respectfully consider that mandatory standards (where participants agree to be bound by the standard) are often critical for successful sustainable collaborations. This is especially the case where investments in adherence to the standard are substantial, which is often the case for major industry co-operations. Voluntary industry standards are relatively easy to agree on, but each company can reject them at any time; implementation can be piecemeal and outcomes may be less effective.

The Working Groups believe that the Draft Guidance could provide a more robust approach towards this subject, following for example the approach of the European Commission in its draft Horizontal Guidelines [see paragraph 57], which provides a 'soft safe harbour' for mandatory standards provided certain conditions are met (including no significant increase in price).[2] Likewise, the Draft Guidance could also describe the analysis to be undertaken if there were an appreciable impact on cost/price. The Draft Guidance could mention the expected benefits of the joint act and how it would be determined whether the restrictive effects are offset.

In the section "Phasing out / withdraw of non-sustainable products or processes", the Draft Guidance explains that "[w]*here competitors agree to phase out particular non-environmentally sustainable processes or cease supplying certain non-environmentally sustainable products and agree to replace them with more sustainable alternatives, this is unlikely to have an appreciable negative impact on competition where it does not involve an appreciable increase in price for consumers or an appreciable reduction in product choice.*". The Working Groups consider that it is very useful for the Draft Guidance to address this important area, but would like to highlight a few points where further clarification on paragraph 3.13 would be welcomed.

First, this 'safe harbour' is potentially at odds with the stricter approach outlined on paragraph 3.12 relating to sustainability standards. That is because paragraph 3.12 (and footnote 19) indicate that a mandatory standard (which was concerned with phasing-out certain products)

[2] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, section 2, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022XC0419(03)

would require assessment, whereas an outright ban could meet the terms of paragraph 3.13 (provided no appreciable impact on price/choice). This appears contradictory and may suggest that a potentially higher threshold applies to standard setting which will typically have a number of pro-competitive characteristics relative to outright bans, e.g., transparency/non-discriminatory access.

Secondly, the Working Groups believe that the following phrase should be deleted from paragraph 3.13: "*and agree to replace them with more sustainable alternatives*". This is because this requirement is not always relevant for the competition analysis (given the lack of appreciable impact on price) and may be difficult for parties to a collaboration to explore without sharing confidential information.

The Working Groups also consider that it would be very helpful if the CMA could elaborate on when a ban on non-sustainable processes / products would be unlikely to have an appreciable impact on price (for example where the increase in cost represents only a small proportion of total cost / end price). Further clarity on who are the consumers (e.g., intermediate purchasers or end-users) referred to paragraph 3.13 is also welcomed.

In the last section of Chapter 3, "Industry-wide efforts to tackle climate change", paragraph 3.15 explains that non-binding targets for the whole industry would be unlikely to have an appreciable negative effect on competition. The Draft Guidance explains that this will be the case where the targets are not binding on the participating businesses which remain free to determine their own contribution and the way in which the targets are realised.

This guidance conflates questions as to which aspect is relevant for the conclusion that such targets would be unlikely to have an appreciable negative effect on competition: (i) the low degree of competitor coordination, as the target is non-binding, or (ii) the fact that those companies will continue to compete in realising / exceeding targets. This is an important issue as non-binding targets may not sufficiently address the first mover disadvantages mentioned above.

In other words, the Working Groups suggest that the CMA should clarify what is the operative element here – i.e. is it the fact that it is non-binding, or can binding targets also fall outside of the rules where they are sectoral averages, or where those signing up are not bound in terms of how they realise them and can also exceed them?

Finally, paragraph 3.18 explains that "*the establishment of a common framework for target setting*" is likely to be permissible – but that it may "*allow*" unilateral setting, disclosure, and reporting of the participants' targets. The Working Groups suggest that the Draft Guidance should explain precisely what can be joint and what must be unilateral for the avoidance of doubt, with a cross reference to paragraph 3.15, clarifying whether the fact that the framework is non-binding is the key issue.

III. Exemption for environmental sustainability agreements generally

Section 5 of the Draft Guidance covers agreements which fall within the scope of the Chapter I prohibition and restrict competition appreciably but are capable of exemption under section 9(1) of the Competition Act 1998 because the benefits of the agreement outweigh the competitive harm.

In relation to benefits to production, distribution or technical or economic progress, the Working Groups respectfully suggest that the fourth bullet point in paragraph 5.4 should also indicate as a benefit of sustainability agreements that they can improve production or distribution processes faster than they would occur if said agreements did not exist.

In terms of timing, the Working Groups commend the Draft Guidance acknowledgment in paragraph 5.6 that the benefits arising from sustainability agreements may materialise only in the future. The Working Groups suggest that the timeframe for benefit should also be relevant for assessing environmental harm in a counterfactual analysis – in the same way that benefits may need to be discounted over a long period, the expected harm may need to be increased over that period.

On the indispensability condition, the Working Groups consider that it would be useful for the Draft Guidance to further explain in paragraph 5.11 how companies can provide persuasive evidence that a voluntary standard has or would have failed.

In this respect, the Working Groups consider that there is an apparent inconsistency between paragraph 5.12 and 5.18 of the Draft Guidance. Paragraph 5.12 states that, in situations where there are "enough consumers willing to pay for the sustainable product", the indispensability requirement for agreements to benefit from an exemption would not be met. Conversely, paragraph 5.18 states that one way for companies to prove that a given sustainability agreement meets the requirement that consumers receive a fair share of the benefit is to provide evidence of willingness to pay. It would be important for the CMA to address this apparent inconsistency in the Draft Guidance, by clarifying the differences between the concept of "willingness to pay" employed in paragraphs 5.12 and 5.18.

In relation to substantial and demonstrable benefits, the Working Groups consider that it would be helpful if the Draft Guidance explains when it is not necessary to quantify the benefits precisely (for example, where it is clear that the benefits are of a sufficient scale to offset, or more than offset, the harm to competition). The IBA Antitrust Committee suggests that further examples on these situations would provide more clarity to the public when consulting the Draft Guidance.

As to when it is necessary to demonstrate the benefits arising from the agreements, the Working Groups consider that the Draft Guidance could provide more clarity on methods and approaches that would be accepted by the CMA for quantifying such benefits. For example, this could follow the methods exemplified by the Dutch and Greek competition authorities in their guidelines on sustainability agreements[3], as mentioned on footnote 37.

[3] The Authority for Consumers & Markets Guidelines on sustainability agreements is available at https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf and the Hellenic Competition Commission' Technical Report on Sustainability and Competition is available at https://www.epant.gr/en/enimerosi/publications/research-publications/item/1284-technical-report-on-sustainability-and-competition.html

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

The Working Groups commend the CMA approach towards a more flexible positioning in assessing who are the relevant consumers affected by climate change agreements, aiming at decreasing the "first mover disadvantage" fear, and encouraging players to contribute towards the UK's binding climate change targets. However, the Working Groups consider that it does not seem reasonable to restrict the assessment of benefits to UK consumers, since such agreements may result in important benefits to consumers outside of UK as well.

III. CONCLUSION

The Working Groups appreciate the opportunity provided by the CMA to comment on the Draft Guidance and commend the agency's efforts in providing companies and also the other global competition law authorities with clear guidance regarding sustainability agreements.

The Working Groups would be pleased to respond to any questions that the CMA may have regarding these comments; or provide additional comments or information that may assist the CMA.

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