6 April 2023

CMA consultation on draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements

Response from the In-house Competition Lawyers' Association UK

1. The In-house Lawyers Competition Law Association UK (**"ICLA UK"**) welcomes the opportunity to respond to the CMA's consultation on draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements between businesses operating at the same level of the supply chain (**"Guidance"**).

2. ICLA UK is an informal association of in-house competition lawyers in the UK comprising around 100 members. ICLA UK meets usually twice a year to discuss matters of common interest, as well as to share competition law knowledge. ICLA UK does not represent specific businesses, but rather is made up of individuals who are experts in competition law. As such this paper represents the views of the ICLA UK members and not the companies who employ them, and it does not necessarily represent the views of all its members.

3. ICLA UK is part of the wider In-house Competition Lawyers' Association of in-house competition lawyers across Europe and in South East Asia which currently numbers more than 450 members based in different countries around the globe.

4. ICLA UK fully supports the CMA's aim to ensure that businesses are not unnecessarily or erroneously deterred from lawfully collaborating due to fears relating to competition law compliance. The Guidance is a helpful and constructive document and a positive step to achieving this aim. As set out in its response to the CMA's Call for Inputs on environmental sustainability, ICLA UK encourages the CMA to take a leading role in progressing the thinking on competition law and sustainability internationally, particularly in those countries that have not yet addressed the issue of whether competition law serves as a blocker to legitimate sustainability agreements. Whilst international inconsistency remains, international businesses remain faced with significant legal uncertainty as to whether or not an agreement, that may be exempt, e.g. in the UK, may be held to infringe competitions laws elsewhere, e.g. in the US.

5. ICLA UK's response to the CMA Consultation is set out below.

Environmental sustainability agreements which are unlikely to infringe the prohibition

Cooperation required by law

6. Where cooperation is made or done to comply with a legal requirement we agree that it should be automatically excluded from the application of the Chapter I prohibition (paragraph 3.7). It would be helpful if the CMA could confirm that this exclusion would apply to both UK and international legal requirements. We suggest the following wording in the Guidance:

3.7 Cooperation between competitors which is made or done to comply with a legal requirement, whether in the UK or in another jurisdiction where the relevant businesses operate, is automatically excluded from the application of the Chapter I prohibition.

Creation of industry standards

7. We note that the safe harbour for standard setting (paragraph 3.11) is available for voluntary standards, but not where parties agree to abide by a standard (see footnote 19 and paragraph 5.11). Mandatory standards can often be critical to the success of a sustainability collaboration, particularly where substantial investments or losses are required to meet a standard. We would encourage the CMA to consider extending the proposed safe harbour to scenarios which otherwise meet the criteria in the Guidance, but where parties agree not to operate below the minimum standard adopted, provided that they remain free to adopt higher standards and the standard does not lead to a significant increase in price or to a significant reduction in the choice of products available on the market, as proposed by the European Commission's draft guidelines on horizontal cooperation (paragraph 572).

Industry-wide efforts to tackle climate change

8. ICLA UK agrees with the proposed approach to target-setting outlined at paragraphs 3.15 to 3.18 of the Guidance. We would also encourage the CMA to address the scenario in which targets set by an independent body, such as a scientific body, or a trade association are adopted on a voluntary and unilateral basis by firms. Provided that such a decision to adopt the target is taken unilaterally, it is our view that this would fall outside the scope of the Chapter I prohibition. Where adoption may be encouraged as best practice, e.g. by an industry body or a trade association, but firms nevertheless retain the discretion to adopt the target, as well as the commercial decisions required to meet the target, this is still unlikely to infringe the Chapter I prohibition. It would therefore be helpful if the example in paragraph 3.15 of the adoption of non-binding targets were extended to cover the setting of such targets by a trade association or scientific body. We suggest the following wording in the Guidance:

3.15 The setting of non-binding targets or ambitions for the whole industry with regard to environmental sustainability objectives are unlikely to have an appreciable negative effect on competition. Such an industry wide ambition might concern the reduction of carbon dioxide emissions, but where such 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 would include, for example, where an independent body recommends targets for financial institutions around the gradual reduction in financing –of carbon intensive activities (for example as a proportion of total lending), together with common metrics for the measurement of such financing, and where the financial institutions are invited to sign up to the targets, but this is done on a voluntary basis.

9. ICLA UK also believes that the setting up of a pilot project to test business and supply chain capabilities as well as consumer behaviours in relation to a wholesale change of a production or distribution model to a more environmentally sustainable alternative is unlikely to have an appreciable negative effect on competition, provided competition in the supply of the product itself remains. Such an industry wide ambition to change a production or distribution model may be impossible for one business to carry out alone. A pilot project could enable the industry as a whole to conduct a feasibility study enabling the roll out of a new, radical, and more environmentally sustainable production or distribution method.

10. For example, in FMCG emissions from packaging are a large part of businesses' carbon footprint and finding truly circular packaging solutions is therefore an essential for the sector to achieve net zero. One solution may be to move to refillable glass and plastic containers which will be both more environmentally friendly and cheaper than new packaging for every purchase. This however requires mass consumer behaviour change, extensive nationwide infrastructure, and coordination of retailers, wholesalers, producers, logistics providers, warehousers as well as new washing and sorting facilities and may be impossible for one business to undertake alone. A pilot project in a UK town involving a majority of FCMG businesses could be essential to test and learn on the logistics, consumer behaviour, finance flows and washing and refilling capabilities, in order to facilitate an eventual nationwide roll out. A pilot that (i) is open to all, (ii) is voluntary, (iii) shares centralised (but not individual producer) costs, (iv) does not involve cooperation or competitively sensitive information on the products being sold, (v) requires participants to commit a minimum percentage of their packaging volume to the refill pilot, and (vi) does not commit the participants to scaling up later, is unlikely to infringe the Chapter I prohibition. Only in the instance where a proposed pilot project requires cooperation on the supply of the products using the refillable packaging which could potentially restrict competition, should a full analysis of the effect on competition be required.

11. It would be helpful therefore also to include pilot projects and this FMCG example in the section on Industry-wide efforts to tackle climate change. The wording set out in paragraphs 9 and 10 above may be suitable language for the CMA to consider.

Environmental sustainability agreements with the 'object' of restricting competition

12. The Guidance gives the example of an agreement only to purchase from suppliers that sell sustainable products, where the intention is not to eliminate a competitor at the same level of the supply chain, as an agreement which could be regarded as a form of collective boycott, but may nevertheless fall to be considered as a restriction by effect (paragraph 4.11). We understand that this principle could also apply to an agreement to only supply goods or services to a purchaser that produces sustainable products, or to limit the supply of goods and services to a producer of higher emitting products or services, given the absence of any intention to eliminate a competitor operating at the same line of the supply chain. If that is correct, we suggest the Guidance is amended to clarify this point. We suggest the following wording in the Guidance:

4.11 There are also certain types of restriction that in certain contexts would be regarded as a restriction by object but in other contexts would fall to be considered as restrictions by effect. An example of this is an environmental sustainability agreement that involves a group of competing purchasers agreeing only to purchase from suppliers that sell sustainable products. Such an agreement would be unlikely to restrict competition by object despite it involving conduct that could be regarded as a form of collective boycott. The same is true of an environmental sustainability agreement that involves a group of competing suppliers agreeing only to supply to purchaser that produces sustainable products, or to limit the supply of goods and services to a producer of higher emitting products or services. ~~This type~~ These types of agreement can be distinguished from an agreement involving a horizontal collective boycott which has been held in past cases to restrict competition by object. In the case of the horizontal collective boycott, the intention is to eliminate a competitor that is operating at the same level of the market as the participants in the boycott whereas in the case of the purchasing or the supply agreements it is to eliminate unsustainable products or services from the supply chain. Such ~~purchasing~~ vertical

agreements should therefore typically be the subject of an effects analysis (see further 4.12-4.14 below), unless the agreement is covered by legal requirements (see paragraphs 3.7-3.8 above).

Exemption for climate change agreements

13. ICLA UK welcomes the recognition of the elimination of a first mover disadvantage as a relevant benefit in the Guidance. For example, we note the Guidance gives the example (paragraph 6.3) of businesses agreeing to switch own energy use to lower emitting sources, to overcome the first mover disadvantage of higher costs in the short term. We assume this principle could also apply to removing first mover disadvantages in respect of the supply of goods or services which may be less profitable in the short term and explicit recognition of this in the Guidance would help businesses self-assess their activities better. We suggest the following wording in the Guidance:

    6.3 In the context of climate change agreements, there is a concern that having regard only to benefits accruing to the consumers in the relevant market would have perverse and harmful effects. If, for example, an individual business is minded to switch to energy use that will reduce carbon emissions, such as abandoning fossil fuels, which will be more costly in the short term (giving an immediate competitive disadvantage), it might be reluctant to do so unless its competitors in the same market do so too. Its fear of the 'first mover disadvantage' might therefore constrain it from switching to energy sources that would combat or mitigate climate change. It is only if that business can coordinate such a switch of energy use with its competitors, that this constraining factor is removed and the business is willing to make the (beneficial) switch. The same is true in respect of businesses agreeing to supply lower emitting but more costly or less profitable goods or services, provided they do not fix the price to customers. Such coordination between competitors is to be encouraged.

14. ICLA UK would welcome additional guidance on assessing what amounts to an appreciable impact on price. While we note the challenges of specifying examples in the abstract, some relevant factors may include the degree of commonality of costs and the impact on end consumers versus purchasers of intermediate goods or services.

15. ICLA UK welcomes the CMA's recognition of the urgency and importance of measures to tackle climate change, through the more permissive approach proposed for Climate Change Agreements. However, we note that there is growing consensus internationally over the need for collaboration to address other negative externalities, e.g. through bio-diversity preservation agreements, the benefits of which can be closely intertwined with climate change mitigation or measures to address the social impacts of climate change, e.g. collaboration to facilitate a Just Transition. We understand that the CMA's current policy position is to limit its more permissive approach to the measurement of benefits for Climate Change agreements due to the clear scientific and legislative consensus in respect of the benefits of climate change related cooperation. We also understand that where another environmental sustainability agreement, such as a bio-diversity preservation agreement or one to facilitate a Just Transition also has clear climate change mitigation benefits, those benefits can be assessed under the more permissive approach for Climate Change Agreements. However, given the pace of evolution of both scientific consensus and the legislative landscape in relation to sustainability more broadly, we urge the CMA not to rule out adopting a more permissive approach to the assessment of initiatives where there is sufficiently strong scientific or legislative basis to support the need for collaboration in these areas.

Approach to enforcement

16. We assume that concurrent regulators will adopt a consistent position with the CMA in the assessment of relevant sustainability agreements to the extent they fall within the scope of the Guidance, but businesses would welcome explicit confirmation of this point in the Guidance, to ensure that businesses in regulated sectors can rely on the Guidance with certainty.

17. ICLA UK welcomes the CMA's open-door policy, which will provide businesses a much-needed route for informal guidance on sustainability initiatives. To ensure this tool is effective and achieves its aim of "ensuring businesses are not unnecessarily or erroneously deterred from lawfully collaborating in this space", it is important that this additional guidance can be obtained in a timely manner and with a proportionate approach to information required from the businesses concerned to facilitate the CMA's assessment. While we recognise the need for businesses to have first conducted an initial self-assessment of the initiative under the Guidance, we assume the intention is for the CMA to offer an expedited route to indicative guidance, which would not amount to a full filing with significant supporting evidence, including economic evidence, at the stage of seeking information guidance. Any clarity the Guidance can provide as to timelines and information requirements for the open-door policy will be welcomed.

18. Paragraphs 1.13 and 7.10 note that the CMA will not take enforcement action against agreements that clearly correspond to the examples used in the Guidance and are consistent with the principles set out within it. Given the necessarily limited number of examples available at this stage, we would also welcome explicit clarification in the Guidance that protection against enforcement will be available where companies have self-assessed agreements under the Guidance in good faith and concluded that the facts are consistent with the principles set out in the Guidance, even if they do not correspond to a specific example. We suggest the following wording in the Guidance:

    1.13/7.10 Enforcement action: the CMA will not take enforcement action against environmental sustainability agreements, including climate change agreements, that clearly correspond to examples used in this Guidance ~~and~~ or are consistent with the principles set out in this Guidance.