



19 April 2023

Competition and Markets Authority

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By email: sustainabilityhbersreview@cma.gov.uk

Re: IATA response to CMA consultation on Draft Sustainability Guidance

The International Air Transport Association ("IATA") appreciates the opportunity to provide input on the Competition and Markets Authority's ("CMA") *Draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements* published ("the guidance") on 28 February 2023.

Introduction

First and foremost, IATA and its member airlines remain committed to finding solutions to address climate change and to ensuring the environmental sustainability of the airline industry. We support this initiative to ensure that competition law and policy supports a resilient aviation industry that can grow sustainably.

As a general comment to the guidance as currently drafted, IATA believes that purely national guidance will not provide sufficient safeguards to airlines or other businesses that operate in a global industry and where every collaboration necessarily affects more than one geographic market. While we understand that the CMA Guidance has to be restricted to the UK, it would be strongly appreciated if the CMA were to join efforts with other regulatory authorities to develop further-reaching guidance. Airlines, similar to other global industries, would benefit from global guidelines which would create the necessary standards needed for further collaboration.

Global Issue

Similarly, IATA considers that the requirement to be met, in order to benefit from the exemption in relation to climate change agreements for out of market efficiencies, to accrue only to UK consumers is too limited considering that reducing emissions of greenhouse gases is a global issue. In IATA's view such global *collective benefits* should count towards meeting the test of exemption.

For instance, considering that the reliance on fossil fuels is a global problem, we consider that agreements to increase the access and use of sustainable aviation fuel should take into account not only the share of benefits that arises in the UK or those enjoyed by UK consumers but also the global collective benefits. At an extreme, it would be problematic if the CMA did not allow agreements that mostly produce climate change benefits outside the UK.



IATA is of the firm opinion that national guidance may not be sufficient for the purpose it aims to achieve. A harmonized approach together with EU, US and other regulatory authorities is particularly important to address the competition law issue in a globalised world.

Legal Certainty

Another general comment relates to legal certainty. The CMA draft guidance states that it will neither take enforcement action nor issue fines against agreements that meet the requirements of the guidance, where the agreement was discussed with the CMA in advance and where the CMA did not raise any competition concerns (cf. 1.13, 1.15, 6.7, 7.10, 7.12). This seems self-evident and it would be rather questionable if the CMA would consider in such cases even the possibility of enforcement action against such behaviour where companies did exactly as instructed. In order to encourage companies to approach the CMA for guidance, the CMA should offer options and assurances that go beyond these declarations.

IATA also recognises and welcomes the importance of providing guidance in the area of co-operation, but we would also encourage the CMA to consider issuing similar guidance in relation to merger control (including joint ventures). In particular, guidance on how to define and quantify sustainability efficiencies would be very helpful to the aviation industry. Similarly, effective guidance around abuse of market power would be welcome. IATA notes in this respect that the German Federal Ministry for Economic Affairs and Climate Action has commissioned and published a study on sustainability and competition.¹

Specific Comments

IATA welcomes the statements at 3.3.2.-3.3.4, 3.15, 5.13 which are all useful provisions, both for individual airlines and for IATA. However, at para 3.4, the requirement that *"businesses [...] would not [...] have been able independently to carry out the initiative on the basis of objective factors, for example because they do not have the technical capabilities"* is quite narrow. For example, we note that the EU appears to be more permissive on these matters.

R&D agreements (cf. 3.3 and 3.3.2) are generally not anti-competitive when they are concluded by undertakings with complementary skills or complementary resources (e.g. financial resources) that would not otherwise have been able to conduct the R&D on their own. It is also necessary to make a distinction between joint R&D and paid-for R&D here so as to fit cases when a party (such as a group of airlines) finances the R&D but does not carry out any of the R&D activities itself. This scenario of paid-for R&D – depending on its nature – should be clarified as being presumed not harming the competition on the market.

With regards to provisions 3.9 and 3.13, given that fuel is an important operational cost of airlines and Sustainable Aviation Fuels (SAF) will be of increasing significance in the coming years, IATA would like to address the market situation in the current aviation sector (this

¹ https://www.bmwk.de/Redaktion/DE/Publikationen/Studien/studie-wettbewerb-und-nachhaltigkeit.pdf?__blob=publicationFile&v=4



applies particularly to cargo carriers). Whilst we agree with the principles articulated, we caution against situations where there may be exploitation by certain participants within the value chain. Airlines are currently facing a “sandwich” situation with powerful customers on one side (i.e. large customers in a consolidated market) and concentrated suppliers on the other side (e.g. SAF is currently provided by a few big consortiums). Consequently, a rebalance of negotiation power in joint purchase and/or in imposing related obligations (cf. 3.9 and 3.13) should also be taken into consideration. Indeed, without a viable solution for airlines, no concrete progress can realistically be made. Therefore, the guidelines have to ensure a fair balance particularly where airlines are facing legally binding SAF mandates that also might make airlines even more dependent on the few major suppliers and might lead to a market distortion.

In relation to provision 5.20, IATA would welcome more clarity on the specific example provided about airline collaboration. We understand the example is used to demonstrate the policy for related markets where the benefits accruing to consumers in one market may offset harms suffered by consumers in the other. IATA would like to discuss further what the CMA has in mind as the forms of co-operation, specifically *“where two airlines cooperate to achieve a particular sustainability benefit on a certain airline route and this leads to higher prices for UK airline passengers”*.

Conclusion

IATA thanks you for the opportunity to comment on the guidance on behalf of our member airlines and reiterate our request for clear, fair and more global guidelines. These would serve as a win-win for all relevant stakeholders. We remain available to further discuss our submission with the CMA.

For more information please contact:

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