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Consultation Response

CMA Draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements (CMA177con)

Which? welcomes the CMA's publication of this draft guidance. We agree that environmental sustainability is a major public concern - three-quarters of UK consumers have told us that they are somewhat or very concerned about climate change[1] - and it is important that competition law does not inhibit the achievement of sustainability goals. However, it is also crucial that in seeking to ensure this does not happen, we do not allow a harmful weakening of competition law that creates detriment for consumers.

We believe the CMA has largely managed to strike the right balance between promoting beneficial sustainability agreements and not allowing such agreements to undermine competition and harm consumers. We agree with the CMA's fundamental decisions on the scope of the guidance and the decision to create a more permissive regime for climate change agreements only.

Our response, including recommendations, to specific parts of the guidance is set out below.

The scope of the guidance

We agree with the CMA's decisions to restrict this guidance to exemptions for environmental sustainability agreements and to place wider sustainability agreements out of scope, for example anything that would satisfy the UN's description of sustainable development such as animal welfare, fair trade or working conditions.

Environmental sustainability agreements unlikely to infringe the prohibition

We are generally supportive of the seven examples given of types of environmental sustainability agreements that are unlikely to infringe the prohibition. However, we have concerns about agreements to pool information about the environmental sustainability credentials of suppliers or customers and industry-wide efforts to tackle climate change.

With regard to information pooling, the guidance states that agreements that do not include sharing sensitive information about prices or purchase quantities are unlikely to have an appreciable negative effect on competition. We believe a more cautious approach should be

[1] Which (2022) *Consumer Insight Tracker*. 43% told us they were somewhat concerned and 33% said they were very concerned about climate change.

adopted here as we think it possible that competitively important information could be inferred from such pooled information about suppliers or customers, and in which case this information sharing could give rise to infringement by effect. For example, consider a national market that consists of numerous local markets. It may be possible to infer in which local markets a business is most active from the pooling of customer information, and over time this might facilitate tacit collusion.

With regard to industry-wide efforts to tackle climate change, compared to public regulatory initiatives to determine sustainability standards and labelling, such private agreements between competitors can run the risk of greenwashing. See, for example, the so-called 'Chicken of Tomorrow' case in the Netherlands in which improved animal welfare standards were not implemented as intended, but consumers were still left paying higher prices.[2] The CMA will need to be mindful of this and should consider whether such agreements require a monitoring system for verifying compliance with standards and ensuring consumers do not pay unjustifiably higher prices.

Conditions for exemption for sustainability agreements generally

The guidance appears largely clear to us with regards to how environmental sustainability agreements can meet the conditions for exemption and we have no comments relating to conditions 1, 2 or 4. However, we have some concerns with the assessment of condition 3, that consumers receive a fair share of the benefit.

First, the challenges inherent in valuing environmental costs and benefits make it very difficult to determine whether consumers receive a fair share. Optimal valuation methods are not yet established and remain the subject of much research. For example, HM Treasury is currently reviewing the valuation of biodiversity and intends to publish supplementary new Green Book guidance in the future. A particular challenge can be that indirect benefits measured using stated preference methodologies risk producing very high valuations when compared to those estimated using revealed preference methodologies.

Second, we think that consideration needs to be given to the distribution of direct and indirect benefits across consumers. It would not be desirable to have an outcome in which an agreement leads to net benefits for consumers, but where disadvantaged groups of consumers do not receive a fair share of the benefits. We feel there may be an increased risk of this in situations where the fair share test is met because of the presence of indirect benefits estimated using stated preference methods. For example, consider a scenario for an essential good in which the agreement leads to a substantial environmental improvement, but also causes an increase in price. The increased price will be experienced by all those who consume the good, but disproportionately so by those on lower incomes, for whom essential goods and services make up a greater share of their expenditure. Conversely, the estimated indirect

[2] Discussed in BEUC (2020) How Competition Policy Can Contribute to the European Green Deal: BEUC's Response to Public Consultation, BEUC-X-2020-113

benefits may be greater for those on higher incomes because a measure derived from willingness to pay techniques is likely to be correlated with ability to pay.

Both of these issues lead us to believe that a cautious approach will be needed when assessing whether the condition that consumers receive a fair share of the benefit is satisfied and it would be helpful if the CMA could provide further guidance on how businesses should deal with these challenges.

A more permissive regime for climate change agreements

Which? is supportive of the CMA's decision to create a more permissive approach for climate change agreements that will allow businesses to consider the pass through of collective benefits, ie the societal benefits that occur to all UK consumers irrespective of whether they have consumed the product. Overall, we agree with the reasoning set out in paragraphs 1.11 and 6.4 as to why climate change agreements are distinct from other environmental sustainability agreements and hence merit differential treatment.

We have considered whether the other types of environmental sustainability agreements should also be allowed to include these societal benefits since they also involve externalities that impact wider society. However, we believe that in such cases the correct response is to address this through regulation and not through competition law.

Notwithstanding this, we would welcome clarification that when considering climate change agreements the collective benefits that can be considered are only those relating to climate change, such as the benefit from carbon dioxide or methane reductions, and not the totality of societal benefits. In the example given in the guidance in which delivery companies agree to switch to electric vehicles, consumers benefit through a reduction in carbon dioxide emissions that is beneficial for climate change, but they would also receive health benefits from reduced air pollution. This dual collective benefit is likely to be common, especially for agreements involving transport companies. Given the challenges that are inherent in valuing these benefits (as outlined above), we believe that only collective benefits relating to climate change should be included.

About Which?

Which? is the UK's consumer champion. As an organisation we're not for profit - a powerful force for good, here to make life simpler, fairer and safer for everyone. We're the independent consumer voice that provides impartial advice, investigates, holds businesses to account and works with policymakers to make change happen. We fund our work mainly through member subscriptions, we're not influenced by third parties and we buy all the products that we test.

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