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ENVIRONMENTAL SUSTAINABILITY AND THE COMPETITION AND CONSUMER LAW REGIMES

THE CMA'S CALL FOR INPUTS

RESPONSE BY
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RESPONSE TO THE CMA'S CALL FOR INPUTS ON ENVIRONMENTAL SUSTAINABILITY AND THE COMPETITION AND CONSUMER LAW REGIMES

1. INTRODUCTION

1.1 Freshfields Bruckhaus Deringer LLP welcomes the CMA's Call for inputs document dated 29 September 2021 (***CFI***) on how the competition and consumer protection regimes can better support the UK's Net Zero and sustainability goals. We also welcome the CMA's other work in this area and its focus on "*supporting the transition to a low carbon economy*" as one of four main priority areas this year.[1]

1.2 We agree that developing a better understanding of the role of competition and consumer protection laws in supporting businesses engaged in environmental sustainability will be key to supporting vital public policy objectives. We therefore welcome the opportunity to contribute to the CMA's advice to the Government on how the UK can better use the tools available under competition and consumer law to achieve its Net Zero and sustainability goals.

1.3 Our comments are based on our extensive experience of representing clients in the full range of competition and consumer law enforcement in the UK, and throughout Europe, the US and Asia. We believe this experience gives us valuable insights into the issues faced by companies needing to make (often significant) changes to their business models in order to meet environmental targets within relatively short timeframes.

1.4 We set out below our response to the CFI. Please note that these comments do not necessarily represent the position of any of our clients or any individual partners in our firm.

1.5 We would be happy to discuss any of our comments in more detail and to contribute to further thinking or analysis on the issues.

2. COMPETITION LAW ENFORCEMENT

Q1 Are you aware of examples where the CA98 regime has constrained or frustrated actual or potential agreements or initiatives that could support the UK's Net Zero and sustainability goals? Please explain the issue faced and any solutions identified.

2.1 As legal advisers we see many examples of companies successfully implementing unilateral environmental sustainability initiatives, as well as examples of industry collaborations which are already possible within existing competition law frameworks. However, it is also clear that certain categories of initiatives, which have the potential to generate significant environmental sustainability benefits, are often perceived – in light of previous enforcement practice – to have a high competition law risk and are not being progressed as a result. In many cases, these initiatives seek to fill gaps where environmental

[1] Competition and Markets Authority Annual Plan 2021/22

regulatory standards fall short, meaning that collaborative industry-wide action is needed to drive genuine change.

2.2 In our previous paper submitted as part of the CMA's stakeholder engagement earlier this year[2], we highlighted:

(a) the important role to be played by business in achieving the UK's Net Zero and sustainability goals; and

(b) why competition laws can be perceived as a brake to sustainability collaborations.

2.3 We also provided examples of collaboration initiatives grouped in three broad areas that are currently perceived as being high risk, namely:

(a) agreeing/committing to mandatory standards that support (or correct the failings of) existing regulatory regimes, particularly where they may have some adverse effect on end-consumers in the short-term (e.g. higher prices and/or reduced choice);

(b) taking collective action and/or boycott to create and adhere to minimum international standards where there are no existing regulatory minimum standards in place for UK or European businesses, and where companies may not satisfy the market share thresholds for exemption; and

(c) information exchange between competitors that includes potentially strategic and/or forward-looking information.

2.4 Given levels of uncertainty about how competition law applies to these types of initiative and the approach authorities are likely to take, combined with the severe consequences that might flow from infringement, there is a real risk that businesses are deterred from pursuing such arrangements and are therefore hindered from taking action to support environmental objectives.

2.5 Legal uncertainty in the UK is also currently compounded by the risk of competition authorities globally taking divergent views about how they should use their tools to tackle these problems. This risk is particularly acute given the international nature of many environmental initiatives.

Q2 Are there changes to the CA98 regime that would help to achieve the UK's Net Zero and sustainability goals? If so, what changes should be made to the regime, and what would they achieve?

2.6 In our previous paper we set out our view that the CMA is already well-equipped to help companies overcome the legal uncertainty surrounding the types of environmental sustainability arrangements that are currently perceived as high risk, without the need for any changes to the law.

2.7 We proposed that the CMA should use existing tools to take the following steps:

[2] "Competition law and sustainability: helping companies engage in initiatives to achieve the transition to a low carbon economy", paper submitted by Freshfields to the CMA on 18 June 2021.

(a) publish clear guidance on enforcement priorities in cases involving environmental sustainability collaboration and when the CMA would be likely – and unlikely – to bring proceedings in this sphere;

(b) publish practical guidance on the application of the Competition Act 1998 (***CA98***) (especially sections 2 and 9(1)) to horizontal collaboration pursuing environmental sustainability initiatives, with categories and examples of when agreements fall outside the scope of section 2 or satisfy the section 9 exemption criteria;

(c) ensure that businesses have opportunities to consult with the CMA on specific proposals at an early stage and to receive guidance on them, for example, by the issuing of short-form opinions or comfort letters; and

(d) contribute to international discussions and debates on the topic so as to encourage, in so far as possible, consistent and converging approaches to the issues across the world.

Q3 To the extent not already covered by your responses to the previous questions, are you aware of examples of potential environmental sustainability initiatives which, in your view, would benefit from further CMA guidance or direct engagement with the CMA on the possible application of CA98? If so, please explain what further guidance would be necessary and why.

2.8 N/A

Q4 While the CMA is concerned primarily with public enforcement, we would also welcome any comments you may have in relation to private enforcement in this sphere. For instance, if you have suggested changes in response to previous questions, what impact, if any, do you think this could have on private actions?

2.9 Although the CMA is primarily responsible for public enforcement of UK competition law, private enforcement of competition laws is an increasing reality for many companies. Businesses will therefore be concerned that any environmental sustainability agreement found to infringe Chapter I CA98 may result in the imposition of fines following a CMA infringement decision, and/or expose them to damages to those who can establish that they have suffered loss in consequence of the infringement. Given that environmental sustainability agreements may increase prices or reduce choice for customers and final consumers (at least in the short run), private actions for damages are clearly a potential risk.

2.10 The CMA must consequently be mindful of the possibility of both public and private enforcement, the close connection between such proceedings, how its actions impact on private enforcement in the UK and the acute importance of legal certainty in this sphere. Without clarity as to when environmental sustainability agreements are likely to be compatible with the Chapter I prohibition, private enforcement of the rules might be encouraged.

2.11 In addition to setting out enforcement priorities and taking measures to provide specific guidance to companies in individual cases, we highlight again here the

acute importance of the CMA providing clear and practical guidance on the application of the CA98 to sustainability agreements, particularly:

(a) how public policy objectives (especially environmental sustainability ones) are to be subsumed within the competition analysis of agreements; and

(b) the criteria companies should use to self-assess whether a sustainability arrangement restricts competition within the meaning of section 2 CA98 and/or produces offsetting benefits cognisable under section 9 CA98.

3. MERGER CONTROL REGIME

Q5 If, and how, does the current merger control framework constrain or frustrate initiatives or transactions that might support the UK's Net Zero and sustainability goals? If possible, please provide examples.

3.1 The UK's current merger control framework could better support the UK's Net Zero and sustainability goals by establishing a clear economic framework for assessing sustainability-related efficiencies, and by providing clear and detailed guidance on the CMA's framework for assessment.

3.2 As sustainability has risen up in the boardroom agenda, it has played an increasingly important role in companies' investment and acquisition strategies. However, under the current merger control framework and in view of the CMA's decisional practice to date, external legal advisers are unlikely to take into account, or at least give much weight to, sustainability-related efficiencies when advising clients on the prospect of a transaction securing merger control clearance, meaning that "green" transactions may be abandoned at the outset.

3.3 We explore below how the CMA could build on the current merger control framework in a way that would allow sustainability considerations to play a more prominent role within the existing framework, thereby furthering the CMA's strategic objective of "*supporting the transition to a low carbon economy*".[3]

Merger efficiencies – rivalry-enhancing efficiencies and relevant customer benefits

3.4 Merger efficiencies fall into two categories: rivalry-enhancing efficiencies and relevant customer benefits.

3.5 In its CFI, the CMA suggests that environmental benefits could be considered as rivalry-enhancing efficiencies in appropriate cases to the extent that they impact competition in the relevant market.[4]

3.6 The CMA's Mergers Assessment Guidelines (***MAGs***)[5] also recognise that reduced carbon emissions can be considered a "*relevant customer benefit*"

[3] CMA Annual Plan 2021/22

[4] CFI, para 30

[5] CMA Merger Assessment Guidelines, 18 March 2021

which may outweigh a substantial lessening of competition (***SLC***) and be taken into account when the CMA decides whether to refer a merger for a Phase 2 investigation and/or when it is considering remedy options.

3.7 We welcome both of these developments and agree that it makes most sense to assess merger-specific sustainable outcomes through the lenses of rivalry-enhancing efficiencies and relevant customer benefits. However, given the very low number of mergers which have been determined on the basis of rivalry-enhancing efficiencies or cleared on the basis of relevant customer benefits, we suggest more could be done to assist parties seeking to claim environmental benefits as part of a merger assessment.

The current frameworks for considering efficiencies

3.8 Merging firms wishing to claim that a transaction gives rise to rivalry-enhancing efficiencies must produce verifiable evidence that such efficiencies will:

(a) enhance rivalry;

(b) be timely, likely and sufficient to prevent an SLC arising;

(c) be merger specific; and

(d) benefit customers in the UK.[6]

3.9 Similarly, merging firms wishing to claim relevant customer benefits must produce "*detailed and verifiable evidence*"[7] that benefits will in fact emerge within a reasonable period and would be unlikely to accrue without the merger. The CMA also suggests that such evidence should be collected and presented at the earliest opportunity during the pre-notification period.

3.10 The bar for proving either type of efficiency is clearly high. The CMA itself recognises "*many efficiency claims by merger firms are not accepted ... because the evidence supporting those claims is difficult to verify and substantiate*"[8]. These difficulties are compounded in the case of sustainability-related efficiencies as companies are often insufficiently clear on how long-term benefits to society as a whole should be quantified and evidenced. This was also identified by the CMA in the CFI as one of its main challenges.[9]

Adapting the current frameworks for sustainability-related efficiencies

3.11 When considering sustainability-related efficiencies, the current frameworks for assessing rivalry-enhancing efficiencies and relevant customer benefits should be adapted in two important respects: firstly, the CMA should adopt longer time horizons when considering the benefits that may accrue from sustainability-related efficiencies; and secondly, with regard to relevant customer benefits

[6] MAGs, para 8.8

[7] CMA Mergers: Exceptions to the duty to refer, 13 December 2018, para 77

[8] MAGs, para 8.6

[9] CFI, para 36

specifically, the CMA should – so far as legally possible – look beyond benefits to UK customers.

An assessment of sustainability-related efficiencies should be made over an appropriate timeframe

3.12 The ordinary rule for rivalry-enhancing efficiencies is that they must be realised (and the resultant rivalry-enhancing effects felt) within the same timeframe as the CMA has adopted for the rest of its analysis.[10] Given that Net Zero is a long-term goal, and that sustainability outcomes will not necessarily accrue in the short term, we believe that – provided they can be adequately evidenced – it is appropriate for the CMA to consider sustainability-related efficiencies over a comparatively longer timeframe than other aspects of its analysis (e.g. potential entry and expansion), particularly for joint projects that involve significant upfront capital expenditure.

3.13 For the same reasons, what amounts to "*a reasonable period*" for a sustainability-related relevant customer benefit to accrue should be comparatively longer than it would be for other types of relevant customer benefits. Again, this would still need to remain subject to the requirement that such benefits need to be adequately evidenced.

An assessment of sustainability-related efficiencies should not be limited to benefits accruing in the UK

3.14 We question whether in the context of sustainability-related efficiencies (and relevant customer benefits in particular), it is appropriate to require that the efficiencies benefit customers in the UK. Net Zero is a global challenge which requires global solutions. International companies with the resources available to bring about significant sustainability-related efficiencies are unlikely to think about sustainability along narrow geographic lines when pursuing sustainability-related initiatives or "green" transactions.

3.15 We recognise that the CMA may be constrained to some extent by the legal framework but note that section 30(4) of the Enterprise Act 2002 (***EA02***) (which defines "*relevant customers*") does not have a geographical limitation. Section 30(1) EA02 requires that the benefit must be in the form of "*lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom*" but it does not require all "*relevant customers*" to be located in the UK. We believe that the CMA should take as expansive a view as possible so that benefits for society more broadly can be considered, beyond immediate and direct UK-based customers. This is particularly the case for "*relevant merger situations*"[11] which have only a limited nexus to the UK.

<u>The need for guidance on verifiability</u>

3.16 As recognised in the MAGs, the CMA does not often accept efficiency claims due to the difficulties for merger parties in substantiating and verifying

[10] MAGs, para. 8.12

[11] EA02 s. 23

efficiencies.[12] Successfully demonstrating sustainability-related efficiencies would be particularly challenging given the lack of established economic tools and frameworks to quantify and assess the claimed efficiencies.[13] We therefore urge the CMA to review its current approach to analysing efficiencies and consider taking a more permissive approach with respect to sustainability-related transactions.

3.17 There is also significant work needed to establish an appropriate economic framework to capture sustainability-related efficiencies. Further consideration and consultation should take place in order to develop a suitable framework and tools for these purposes.

3.18 By way of overarching observations, however:

(a) We note that some sustainability objectives lend themselves more easily to quantification than others, and some have already been subject to quantification by other regulators and schemes. For example, under the EU's emissions trading system, it is now common for businesses operating in the internal market to buy (and trade) emission certificates for every ton of carbon dioxide they emit. This has, in effect, put a price tag on emissions within the EU. Accordingly, where parties can prove that the merged entity can reduce greenhouse gas emissions by a specific amount, this can already be presented in monetary terms and therefore as a quantifiable efficiency resulting directly from the merger.

(b) For other sustainability-related efficiencies, sustainability reporting initiatives could provide an initial reference point in the effort to design a framework for the quantification and auditing of sustainability outputs. As both a management and accountability tool, sustainability reporting is the practice of measuring, disclosing and being accountable to internal and external stakeholders for organisational performance towards the goal of sustainable development. It involves reporting on how an organisation considers sustainability issues in its operations and on its environmental impact. There already are several sets of guidelines (or voluntary standards) for sustainability reporting in the private sector. For example, Global Reporting Initiative, an independent international organisation of sustainability reporting (GRI), International Integrated Reporting Council and Sustainability Accounting Standards Board. The use of objectives, targets and indicators similar to those already employed in performance reporting could help to make merger-specific efficiencies more easily quantifiable. This could include factors such as

[12] MAGs, para 8.6

[13] In respect of sustainability-related efficiencies specifically, we note that there are initiatives under way, such as the working group announced by the European Commission's Chief Competition Economist which is considering how "green efficiencies" may be incorporated into merger analysis (Mlex, 18 November 2020 "*Green merger efficiencies to be looked at by EU 'discussion group'*"; Mlex 20 September 2020 "*EU working on tools to analyze green efficiencies in mergers*"). However, there is significant work needed to establish an appropriate economic framework to capture merger-specific sustainability outcomes.

the merged entity's intensity of energy consumption and its contribution to the international commitment on climate-related expending.

(c) The CMA should recognise that in the absence of any quantitative data, substantiations will have to remain qualitative in nature in some cases. For sustainability efficiencies that are more difficult to quantify, merging parties may inevitably need to focus on identifying the nature of the benefits as much as possible. In such cases, although perhaps more challenging to substantiate and verify, the CMA should be amenable to the parties' descriptive assessment, for example, regarding the likelihood of, and reasons for, claimed efficiencies actually materialising and not dismiss such efficiencies on the basis that they cannot be readily quantified.

Q6 More specifically, are you aware of any examples of cases reviewed under the current merger regime where environmental factors have not been able to be fully taken into account? Please provide details.

3.19 The overall framework does not generally prevent environmental factors from being taken fully into account, other than by restricting the assessment of efficiency-related benefits to customers and markets in the UK (see above).

3.20 Instead, it is the application of the framework that constrains initiatives and transactions that might support the UK's environmental goals. As noted above, the low likelihood of securing merger clearance on the basis of sustainability-related efficiencies as well as the lack of clarity regarding how such efficiencies would be weighed against a potential lessening of competition mean that environmental considerations do not generally form part of external legal advisers' assessments of the prospects of a transaction securing clearance, or of the arguments available to the merger parties in favour of clearance.

Q7 Do you consider that the CMA's merger control regime could better contribute to protecting the environment and support the UK's Net Zero and sustainability goals? If so, please explain how.

3.21 In order to achieve the UK's Net Zero and sustainability goals, considerable effort in the form of investment, innovation and transformation on the part of business across a range of industries is required. Public sector initiatives alone will not be sufficient to meet the UK's ambitions. This is reflected in the UK Government's Net Zero Strategy, which aims to leverage "*up to £90 billion of private investment by 2030",* including a greater focus on "*investing in sustainable clean energy in the UK".*[14]

3.22 The UK merger control regime can play an important role in helping the UK meet its sustainability goals by establishing an effective and transparent analytical framework for considering sustainability-related efficiencies and attaching greater weight to merger-specific sustainability-related efficiencies.

[14] See UK's path to net zero set out in landmark strategy - GOV.UK (www.gov.uk)

3.23 There will also be circumstances where the potential anticompetitive effects of a transaction could be offset by sustainability-related efficiencies, or where the resulting sustainability-related efficiencies nevertheless justify clearing a transaction. For merger enforcement to better contribute to protecting the environment and the UK's Net Zero target, the CMA should avoid discouraging companies from proceeding with such transactions. Given the significant costs and managerial time involved for parties subject to merger control review (as well as the deal planning and implementation that goes beforehand), companies may be deterred from considering "green" transactions which qualify for review, unless they consider that: (1) the CMA will take due account of any sustainability-related efficiencies; and (2) will do so in a way that is both transparent and predictable.

Increased recognition of sustainability and green benefits as efficiencies

3.24 The CFI suggests that benefits to the environment could potentially be considered as rivalry-enhancing efficiencies in certain circumstances. As the MAGs note, however, efficiency claims are often not accepted by the CMA due to the difficulties in verifying and substantiating claims made by the merger parties.[15] This underlines the pressing need for a clear framework for assessing sustainability-related efficiency claims. Further, given the CMA's focus on "*supporting the transition to a low carbon economy*" as one of its four main priority areas this year as well as the importance of the UK meeting its Net Zero ambitions more generally, the CMA should ensure that in practice where merger parties do successfully establish sustainability-related efficiencies, these are genuinely taken into account by the CMA to the extent that they may be capable of altering the outcome of a merger control review.

3.25 Similarly, while the CMA's acknowledgement that outcomes such as a reduction in carbon emissions could qualify as a relevant customer benefit is a welcome development, as the CMA itself notes, it is rare for a merger to be cleared on the basis of relevant customer benefits.[16] To this end, the CMA could develop a more welcoming approach to sustainability-related efficiencies to not discourage mergers that would bring about demonstrable environmental benefits from going ahead.

Greater predictability and transparency

3.26 If sustainability-related efficiencies are to be a genuine consideration for the CMA capable of altering the outcome of a merger control investigation, it is also essential that companies contemplating potential "green" transactions are able to assess with a sufficient degree of certainty how any sustainability-related efficiencies likely to arise from a proposed transaction would be assessed by the CMA. As noted in the response to Question 5, absent guidance from the CMA on how it will take into account "green" efficiencies, parties may simply abandon "green" transactions which otherwise hang in the balance, rather than take the risk.

[15] MAGs, para. 8.6

[16] MAGs, paras 8.25-8.27

Q8 Do you consider that the CMA is an appropriate body to assess environmental sustainability factors in relation to merger control, for example, where it is a basis on which firms compete? Do you consider there would be a benefit in having an additional or alternative body or regulator being available to provide advice on such matters? Please explain the reasons for your response.

3.27 The CMA can and should consult with appropriate authorities and Government departments as it does for transactions involving regulated industries or transactions involving public interest considerations. Given the technical nature of any efficiency-related claims and the increasing importance of sustainability as a driver in companies' investment and acquisition strategies, we suggest it would also make sense for the CMA to invest in developing in-house expertise.

Q9 To the extent not already covered by your responses to previous questions, are you aware of examples of potential environmental sustainability initiatives which, in your view, would benefit from further CMA guidance and/or direct engagement with CMA on the possible application of the merger regime? If so, please explain what further guidance would be necessary and why.

3.28 N/A

4. CONSUMER PROTECTION LAW

Summary

4.1 The CFI proposes that the consumer protection framework could be further strengthened to support sustainable consumer consumption and assist with meeting the Government's Net Zero and sustainability goals. The CMA considers that such improvements relate to: (i) environmental information requirements; (ii) obsolescence; and (iii) over-consumption.

4.2 While we support the broader sustainability goals outlined in the CFI, in preparing this response, one of the important areas we have focused on is the protection against and the prevention of consumer harm. We consider that unless real care is taken, there is a risk that certain of the potential steps outlined in the CFI could be seen as an extension of the current consumer protection regime beyond the prevention of consumer harm.

4.3 The CFI also seeks views on further transparency-based solutions and mandating the provision of information. We note that, in certain circumstances, environmental impact information will already be considered "*material*" information (i.e. information which the average consumer needs to make an informed transactional decision) and so will already need to be disclosed to the consumer by law – this has been shown by action the CMA has already taken in this area. However, it is not true that this information is material for every product and in every circumstance and so we do not consider that the proposed blanket amendments to information requirements would be appropriate under the umbrella of consumer protection law. Where such information is material, consumer protection law already provides for this under the existing framework. Or, if there are specific examples of situations where the CMA believes that such information should be disclosed, the Government should consult on specific new regulation.

4.4 Finally, in circumstances where the CMA is seeking to improve the quality and consistency of environmental information available to consumers through, for example, the introduction of a common glossary of environmental information or enhanced supply chain transparency, greater consideration needs to be given to address the current practical challenges involved in these areas.

Q10 Does the current consumer protection law framework constrain or frustrate initiatives that might support the UK's Net Zero and sustainability goals?

4.5 While we acknowledge some of the practical difficulties set out in pages 18-20 of the CFI (which we address below), we do not consider that the existing consumer protection law framework constrains or frustrates initiatives that might support the UK's Net Zero and sustainability goals. Rather, it is clear that the current framework is already being used to support sustainable consumer consumption and the transition to Net Zero, in circumstances where there is consumer harm.

4.6 The CFI itself acknowledges that under the current consumer protection law framework[17] there are a number of ways in which consumer protection law can be applied to tackle consumer harm, and shift business and consumer behaviour to support the transition to Net Zero.

4.7 For example, in a "sweep" of sustainability claims on websites led by the CMA and the Netherlands Authority for Consumers and Markets (***ACM***), they found that 42% of the claims they examined across various business sectors including garments, cosmetics and household equipment were exaggerated, false or deceptive, and could therefore amount to an unfair commercial practice under the Unfair Commercial Practices Directive (implemented in the UK by the Consumer Protection from Unfair Trading Regulations 2008, as amended (the ***CPRs***), which remain part of UK law despite the UK's exit from the European Union). The CMA stated that the results of the sweep would be used to inform the CMA's ongoing investigations into misleading environmental claims.[18] Such misconduct can be addressed through the CMA's and other regulators' existing regulatory toolkit (e.g. by means of the existing advertising standards regime, or via action by civil or criminal enforcement of the CPRs by the CMA or by local authority Trading Standards Services). If there are gaps in enforcement, that does not necessarily mean that new powers are required; this may, for example, be more of a question of resourcing and/or capacity.

4.8 The CFI does not make reference to the Green Claims Code, but this is also an important existing tool in the CMA's (and other regulators') armoury to support the transition to Net Zero – and despite only being introduced in September 2021, it is already being used to do so. For example, recently the Advertising Standards Authority (***ASA***) ruled that a claim that products featured in an advertisement were "good for the planet" was misleading as it was ambiguous, unqualified and unclear what the basis of the claim was.[19]

4.9 Following the publication of the Green Claims Code, a full review of misleading environmental and sustainability claims made by businesses by the CMA is expected early in 2022. We understand that the CMA will prioritise industry sectors where consumers appear most concerned about misleading claims, such as textiles and fashion, travel and transport, food and beverages, and beauty and cleaning products. It appears therefore that the CMA itself accepts that its current powers to tackle practices where environmental claims/omissions are likely to lead to consumer harm are sufficient.

[17] The CPRs the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, the Consumer Rights Act 2015, and the Business Protection from Misleading Marketing Regulations 2008.

[18] CMA press release, 28 January 2021, "Global sweep finds 40% of firms' green claims could be misleading" (available here).

[19] See, for example, the ASA Ruling on Alpro (UK) t/a Alpro published on 20 October 2021 (available here).

Environmental impact information

4.10 We address here the CFI comments on environmental impact information.

Glossary of key environmental terms

4.11 The CFI notes that one of the practical difficulties faced by consumers and businesses is a lack of a consistent set of definitions for key environmental terms.

4.12 As part of the responses to the CMA's consultation on Making Environmental Claims guidance (***Consultation on Green Claims Code***), a common theme was the need for a common glossary of terms to ensure consistency. The CMA considers that "*introducing standardised definitions into consumer protection law would improve the comparability of products and enable consumers to make better decisions on which products to choose. It would also create a level playing field for businesses*."[20]

4.13 There are obvious benefits to a common glossary of key environmental terms. However, a key consideration, and one which is repeated across responses to the Consultation on the Green Claims Code, is the need for consistency with other regulatory regimes and pre-existing standards. The need for consistency has been recognised globally in a financial context by the G20 who recently published an input paper for the G20 Sustainable Finance Working Group on "Improving Compatibility of Approaches to Identify, Verify and Align Investments to Sustainability Goals".[21]

4.14 Work in relation to developing a common language or standard definitions for environmental terms is already underway. For example:

(a) In Europe:

(i) Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (***Taxonomy Regulation***) aims to increase consistency in the classification of environmentally sustainable economic activities. Accordingly, the Taxonomy Regulation sets out four overarching conditions that an activity must meet to be deemed environmentally sustainable. Delegated legislation, such as the recently adopted EU Taxonomy Climate Delegated Act, sets out in detail the scientific metrics for determining whether those conditions are met.

(ii) The EU is developing a harmonised methodology for calculating the environmental footprint of products, namely the Product Environmental Footprint and the corresponding Product Environmental Footprint Category Rules. The European

[20] CFI, para 53

[21] United Nations - Department of Economic and Social Affairs and International Platform on Sustainable Finance, September 2021, "Improving Compatibility of Approaches to Identify, Verify and Align Investments to Sustainability Goals" (available here).

Commission is currently monitoring their implementation in a transition phase ahead of the possible adoption of related policies and legislation.

(b) In the UK:

(i) In November 2020, the Government announced its intention to implement a green taxonomy.[22] It is intended to be a framework defining which investments can be classified as environmentally sustainable. The UK is taking the scientific metrics in the Taxonomy Regulation as its basis, and the recently established Green Technical Advisory Group is to review those metrics and ensure they are right for the UK market. The FCA recently published a discussion paper on sustainability disclosure requirements which notes that future "Sustainability Disclosure Requirements" will look to use the sustainability criteria of the UK taxonomy as it is developed.[23]

(ii) The introduction of the Extended Producer Responsibility scheme is likely to include definitions for environmental terms such as recyclability.

(iii) The Department of Business, Energy and Industrial Strategy (***BEIS***) has launched an enquiry and is seeking evidence on developing a transparent framework to communicate the carbon content of energy products to consumers.

(iv) The ASA is partnering with BEIS on this enquiry. The ASA will also commence an enquiry into waste claims (e.g. "recyclable"/"recycling", "biodegradable"/ "compostable" and "plastic alternative" claims) in 2022. We note that Rule 11 of the CAP Code and Rule 9 of the BCAP Code already deal with environmental claims and the ASA has issued decisions in the past touching on how to interpret certain environmental terms such as "bio-degradable".[24]

4.15 It is clear that any glossary of key terms must be consistent and aligned with other existing or anticipated taxonomies in order to be workable for both consumers and businesses. Any significant divergences between taxonomies would place a disproportionate burden on businesses, and, importantly, undermine the CMA's stated purpose of providing consumers with clear, consistent and easily comparable information.

4.16 We also note that a common concern that emerged from responses to the CMA's Consultation on the Green Claims Code was that businesses may be

[22] HM Treasury, 9 November 2020 "Chancellor sets out ambition for future of UK financial services" (available here).

[23] Financial Conduct Authority, November 2021 "Sustainability Disclosure Requirements (SDR) and investments labels", p.14 (available here).

[24] See, for example, the ASA Ruling on Ancol Pet Products Ltd published on 20 November 2019 (available here).

disincentivised from innovating if they are too restricted in how they can frame their environmental claims.

Positive disclosure obligations

4.17 The CFI raises the possibility of creating specific obligations to ensure that environmental information is disclosed to consumers, or amending the definition of "material information" under consumer protection law to include specified aspects of environmental information, such as the carbon footprint of the product concerned.

4.18 The provision of environmental information is already mandatory under the existing consumer protection regime in circumstances where that information is material to the average consumer. However, there are circumstances in which such information is not material to the average consumer and no consumer harm is caused by its omission. Imposing a positive obligation to disclose environmental information in every case is disproportionate and unnecessary.

4.19 Further, there is some evidence to suggest that consumers can struggle to understand information placed on products regarding their environmental impact.

(a) A literature review of research[25] on the relationship between packaging and recycling found that where consumers do not understand the labels, they merely increase complexity without remedying the issue of insufficient recycling knowledge.

(b) The CMA's literature review[26] conducted for its Consultation on the Green Claims Code also found that barriers such as time constraints may prevent consumers from using the information provided properly.

4.20 This also highlights the importance of a universal glossary of key environmental terms that are easily understood to the consumer, as noted above.

4.21 Additionally, there exists a risk that mandating information may backfire if it results in information overload in the context of environmental information. The literature review by the CMA (referred to above) notes that:

(a) In the ACM's response to a European Commission consultation on an initiative to empower consumers for the green transition,[27] the ACM said that while transparency and information requirements are an important building block, too much information could lead to a reduced quality of consumers' decisions.

[25] B. Nemat, M. Razzaghi, K. Bolton and K. Rousta (2019) "The Role of Food Packaging Design in Consumer Recycling Behavior—A Literature Review".

[26] CMA (2021) "Making environmental claims: a literature review", paragraph 51.

[27] ACM (2020), "Reaction of ACM to the consultation of the European Commission's legislative initiative 'Empowering consumers for the Green Transition" (available here).

(b) An OECD paper[28] flagged that governments should be wary of exacerbating the issue of information overload when setting mandatory information requirements for businesses. The concern is that consumers may simply end up ignoring the information provided.

(c) In a book on sustainability in the fashion sector, one study[29] found that "*more information about sustainable fashion provided by companies does not necessary lead to a higher knowledge of consumers. Around 30 % of fashion consumers do not even read the information provided on product labels*".[30]

Q11 What changes to business-to-business protections are required, to address the current issues of supply chain transparency?

4.22 The CFI raises the possibility of creating specific obligations on third parties higher up the supply chain to facilitate the provision of accurate environmental information to consumers by organisations that interface with consumers. One of the key practical difficulties that arises from this, however, is how those who deal with consumers directly can substantiate and verify such disclosures. The CFI considers that currently businesses do not have the necessary access to information in order to make such disclosures. While there are obligations on consumer-facing traders not to mislead the consumers, there is no positive obligation on businesses to provide environmental information throughout the supply chain. The CFI suggests that improved supply chain transparency would likely have a positive effect on businesses, who may be incentivised to improve environmental performance, and consumers, who, armed with more environmental information, may be able to make more informed, better decisions.

4.23 It is clear that further consideration ought to be given as to how further enhanced supply chain would work in practice and as to how to overcome the difficulties that arise – in particular for products that include components or ingredients sourced from multiple different suppliers around the world. For example:

(a) How expansive would the obligation be? Presumably any environmental claim made by the end-trader would need to be substantiated with information or confirmations from those in their supply chain. This could potentially create an onerous requirement on businesses within the supply chain to provide information on a wide range of environmental claims.

(b) How would the information to be provided be assessed and measured, e.g. by reference to the common glossary and/or methodology?

(c) What level of verification is required from the recipient of such disclosures? Even if businesses further down the supply chain are obliged to provide information, retailers and distributors must

[28] OECD (2018), "Improving online disclosures with behavioural insights" (available here)

[29] J. Strähle (2017) "Green Fashion Retail", pages 51, 60-61

[30] Ibid., paragraph 94.

presumably still assess and verify that information to avoid misleading the consumer. Small companies are likely to struggle to do so as they are unlikely to possess the necessary insight, technical skills and knowledge or resources. It is unclear whether it is realistic to expect that even large retailers – let alone small high street traders, corner shops and neighbourhood pubs – will be able to process the vast amount of information provided for the products they sell. Businesses may face an additional barrier in verifying information if access to proprietary data or other trade secret information concerning the product is needed, for example in the case of electric vehicles.

(d) In relation to products with international supply chains, would it be the responsibility of the importer to stand behind the information in relation to the products imported? What effect would such additional requirements for the UK market have on competition and trade?

(e) How would mandatory information requirements operate where the supply chain is not direct from supplier to consumer? Such non-linear supply chains are increasingly common – for example, many consumers use price or product comparison websites.

4.24 Further, if specific obligations on businesses to provide environmental information to consumers were created and imposed, we think it would be important to ensure that businesses can rely on a due diligence defence, for example similar to that which already exists under Regulation 17 of the CPRs, which stipulates that where the breach of the obligation was due to, for example, reliance on information supplied by another person, or a cause beyond their control, the business has a defence where they took all reasonable precautions and exercised all due diligence to avoid the breach. As the CFI accepts, often businesses struggle to obtain environmental impact information from those further up the supply chain. We consider that a due diligence defence would help to allay some concerns in this regard.

Q12 What other opportunities are there to develop the consumer protection law framework to help to achieve the UK's Net Zero and sustainability goals?

Q13 To what extent should the consumer protection law framework be prescriptive, for example, by mandating provision of particular forms of information, or by prohibiting particular types of conduct, in order to help to achieve the UK's Net Zero and sustainability goals?

Mandating particular forms of information

4.25 We refer to our response above at paragraphs 4.18 to 4.21 regarding positive obligations to disclose environmental information. As explained in those paragraphs, we consider that imposing a positive obligation to disclose such information in every case would be disproportionate and unnecessary.

4.26 The CFI also refers to "*further opportunities to modify consumer protection legislation to ensure that consumers can make informed decisions about, for example, the likely life of a product they are thinking about purchasing. It is already arguable that information about the repairability and durability of a*

product is 'material information' for the purposes of consumer protection law, and that this information should be provided to consumers prior to purchase. Those requirements could, however, be clarified and strengthened".[31]

4.27 However, no detail is provided as to what is envisaged here, and we do not see why existing consumer protection legislation needs to be modified when it already operates to ensure that consumers are making informed decisions in cases where environmental information is material to their purchasing decision. Specifically, we do not agree that information about the repairability and durability of a product should, in all circumstances, be provided to consumers prior to purchase. Again, imposing a positive obligation to disclose such information in every case is disproportionate and unnecessary.

Prohibiting particular types of conduct

4.28 Marketing practices such as those referred to in paragraph 68 of the CFI – follow-up emails, social norming practices, and multi-buy offers – when lawfully and legitimately implemented / utilised, do not cause consumer harm and should not, therefore, amount to a breach of consumer protection law. Legislation already controls misleading marketing and other nefarious practices.

Q14 How far should the consumer protection law framework go to address: (i) the planned obsolescence of products; and/or (ii) commercial practices which promote over-consumption

Commercial practices which promote over-consumption

4.29 Further to our comments at paragraph 4.28 above, we make the following points.

4.30 The average consumer, as defined in law, is reasonably well informed and reasonably observant and circumspect. They are aware of the need to be careful when purchasing goods and services. This definition is a bedrock of UK consumer protection law, and the CFI does not indicate any intention to rewrite it.

4.31 Although the CFI does not put forward any specific proposal in relation to over-consumption, it is suggested that certain forms of marketing should no longer be considered legitimate. We do not accept that the CMA has demonstrated that "dark patterns" affect the transactional decision making of the average consumer who is, by definition, reasonably well informed and reasonably observant and circumspect. Any proposals seeking to legislate on the basis of traders exploiting behavioural biases or "dark patterns" are inherently problematic. How would behavioural techniques be defined and enforced – i.e. what is permissible and what is manipulative? Some sort of causal link would need to be established between the technique and consumer behaviour, and then proven to cause detriment. This would require specific evidence to be presented (i.e. specific to the product and market and not merely having regard to experimental psychology, which often has no salience beyond the particular context in which an "experiment" was conducted). It is apparent, as has been

[31] CFI, para 64

accepted by the CMA in their consultation on Reforming Competition and Consumer Policy, that more research in this area is required.

4.32 In the CFI, the CMA appears to imply a correlation between "*dark patterns which can 'nudge' people in to buying the wrong things*"[32] and over-consumption. It is apparent that further research in this area is required before the CMA seeks to legislate on the basis of its own understanding of consumer behaviour. We would also query whether it is appropriate for a single agency to attempt to regulate consumption patterns across the consumer market through the use of consumer protection legislation (or indeed at all), particularly in circumstances where the question of what is the "*wrong thing*" for a consumer to buy is wholly subjective.

4.33 We do not consider that consumer protection law is the appropriate tool to combat consumer spending where legitimate marketing practices are being used and where the product in question is a legal one. If the Government is determined to intervene in the market in this manner, more thought would need to be given to how over-consumption should be defined and how the practices identified in the CFI actually cause consumer harm. This is particularly so given that some practices listed in the CFI can benefit consumers, particularly those on lower incomes – for example the convenience and cost savings that a multi-buy can bring.

[32] CFI, para 66

5. MARKETS REGIME

Q15 How should the CMA use its Markets powers to support the government's strategic priorities on environmental sustainability and Net Zero?

Q16 How can the CMA identify markets that may be particularly relevant and important in supporting the UK's strategic goals on environmental sustainability and Net Zero? Are you aware of specific examples?

5.1 We agree with the CMA that the markets regime provides a broad and flexible mechanism to support wider sustainability goals and has the potential to be a valuable tool to support the Government's strategic priorities on environmental sustainability and Net Zero. The flexibility of the markets regime makes it particularly useful in this respect, given the broad discretion the CMA has in deciding which markets to assess under its markets functions.

5.2 In addition, we consider the CMA could utilise the existing statutory framework to take into account sustainability considerations more clearly and concretely. In particular, the existing statutory framework enables the CMA to build sustainability considerations into its assessment of: (i) whether there is an adverse effect on competition (***AEC***) in a market; (ii) whether action should be taken, and if so what action should be taken, to remedy any AEC; and (iii) whether there are relevant consumer benefits that would be lost by taking any, or certain, remedial action. We recommend that the CMA supplements its existing guidance in these areas.

Case selection

5.3 The markets regime provides a valuable tool to support wider sustainability goals. Indeed, the CMA can take into account the Government's strategic priorities on environmental sustainability and Net Zero when deciding which markets to investigate.

5.4 In the CFI, the CMA notes that its markets functions "*enable it to examine new or emerging markets which are evolving at pace, which is particularly relevant to emerging markets that are arising to support the UK's sustainability agenda*"[33]. We note that the UK's strategic goals on environmental sustainability and Net Zero require all sectors of the economy to commit to sustainability, including more established markets. Therefore, sustainability considerations should play a role when the CMA is considering whether to exercise its markets functions in both established and emerging markets.

Assessment of whether there is an AEC

5.5 In assessing whether or not an AEC has arisen, the CMA is able to consider, among other factors, possible countervailing factors such as efficiencies, which

[33] CFI, para 77

may remove or mitigate the competitive harm of the features which are harming competition in the relevant market.[34]

5.6 The examples of countervailing factors provided by the CMA in its guidance currently focus on economic factors; indeed, there is no explicit reference to sustainability.[35] We consider that the CMA should take into account sustainability-related countervailing factors when assessing whether there is an AEC in a market.

Assessment of remedies

5.7 If the CMA finds an AEC after a market investigation, it may choose to impose a remedy.[36] When assessing different remedy options, the CMA must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the AEC and any detrimental effects resulting from the AEC.[37] The CMA guidance states that its practicality assessment will include an assessment of the extent to which different options are likely to be effective in achieving their aims, and its reasonableness assessment will include a proportionality assessment.[38]

5.8 This proportionality assessment provides the CMA with flexibility to factor in sustainability considerations, including: (i) whether current sustainability benefits and efficiencies mean that no remedies would be appropriate; and (ii) whether certain remedy options are preferable in light of their sustainability benefits and efficiencies. We consider that the CMA should supplement its guidance to explain how sustainability considerations can play an important role in the CMA's assessment of remedies following the identification of an AEC.

Assessment of relevant customer benefits

5.9 When considering whether and what remedies to impose following a market investigation, the CMA may also have regard to the effect of any remedy on any relevant customer benefits of the relevant feature of the market.[39] Relevant customer benefits include "*higher quality or greater choice of goods or service*" and "*greater innovation in relation to such goods or services*".[40]

5.10 As with countervailing factors, the CMA's guidance does not expressly set out how relevant customer benefits can include environmental benefits.[41] As explained in Section 3 above, there are wide-ranging customer benefits from

[34] Guidelines for market investigations: Their role, procedures, assessment and remedies, CC3 (***CC3***), para 94(c)

[35] CC3, paras 173-176

[36] EA02 s. 134(4)

[37] EA02 s. 134(6)

[38] CC3, para. 334-342

[39] EA02 s. 134(7)

[40] EA02 s. 134(8)(a)

[41] CC3, paras. 360-366

businesses engaging in more sustainable practices and the CMA should take these into account in its assessment of relevant customer benefits (and supplement its guidance accordingly). For example:

(a) The provenance of products and their supply chains are inherent elements of the quality of those products – choices of production methods, the location of production and sourcing of raw materials can all enhance sustainability and consequently improve the quality of the final product, benefiting the customer.[42]

(b) Collaboration between market players which may otherwise constitute an AEC may also bring customer benefits in the form of innovation aimed at achieving Net Zero. Particular weight should be placed on innovation benefits as a counter to any AEC in the context of sustainability, as significant investment and know-how sharing is often required to develop green technologies.

(c) The CMA may also wish to take into account wider benefits which indirectly affect consumers, such as improved air quality as a result of businesses becoming less polluting. One of the main drivers of the Government's Net Zero strategy is avoiding the "*devastating impact [of climate change] on human lives*", in order to "*protect lives and livelihoods, while maximising the co-benefits for people, society, the environment, and the economy*."[43] It would therefore be pertinent for the CMA to consider sustainability efforts as a "customer benefit", because they will help to achieve these important outcomes.

5.11 Widening the CMA's interpretation of "customer benefit" to include sustainability benefits is vital in order to support the Government's sustainability and Net Zero strategic priorities.

Q17 Are there changes to the Markets regime, other than those highlighted above, which would better allow it to support Net Zero and environmental sustainability objectives? Please be as concrete as possible in your answers.

5.12 The Government's ongoing consultation on reforming competition and consumer policy includes a number of proposals in relation to the markets regime. Our response to that consultation set out our views on these proposals, some of which are also relevant in relation to enabling the markets regime to support sustainability objectives more effectively.

5.13 In particular:

(a) We welcome the Government's interest in reforming the regime in order to make the process more efficient. Any market inquiry will typically create a "cloud" of regulatory risk around the entirety of a sector. Given the potential duration of a full market investigation in particular, such concerns can endure for a potentially very long period of time, leading

[42] CFI, para 8

[43] HM Government, Net Zero Strategy: Build Back Greener, October 2021, pages 38 and 39.

to potential hold-up of innovation, investment and procompetitive transactions. This can be particularly problematic where businesses are undertaking significant innovation and investment to support Net Zero.

(b) We consider more transparency is required throughout the process. The CMA should be subject to transparency obligations to consult and engage with affected parties throughout the process of any inquiry, through a combination of publicity and direct engagement. For example, there should be more opportunities for business to engage with the case team and have access to decision makers throughout the process. This would enable businesses to engage in a more productive discussion on sustainability considerations during the process.

6. OTHER CONSIDERATIONS

Q18 What other considerations should the CMA take into account in responding to the Secretary of State's request for advice?

Q19 How should the CMA apply its wider policy tool to support the UK's Net Zero and sustainability goals?

6.1 The UK's Net Zero and sustainability goals present a significant challenge for companies active across multiple sectors of the UK economy. The CMA has an important role to play in assisting companies which are needing to make major changes to their business models by minimising areas of legal uncertainty in relation to the application of competition and consumer laws to sustainability initiatives and the way the CMA intends to exercise its tools.

6.2 As set out in our response, the current legal framework enables the CMA to take sustainability considerations into account across a broad range of its tools. The CMA is well placed to give more prominence to sustainability considerations in its case selection, decision-making and through clearer guidance for business.

6.3 We also support the CMA in its initiatives to promote international dialogue (and, where possible, convergence) on these issues. It is important to avoid undesirable outcomes such as "environmental forum shopping" which might leave companies exposed to varying risks across jurisdictions, with potential chilling effects on cross-border sustainability projects.

6.4 We would welcome the opportunity to continue to be involved in these discussions and contribute further suggestions over the coming months as the CMA finalises its advice to the Government.

Freshfields Bruckhaus Deringer LLP
11 November 2021