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CMA CALL FOR INPUTS ON ENVIRONMENTAL SUSTAINABILITY AND THE COMPETITION AND CONSUMER LAW REGIMES

RESPONSE OF ASHURST LLP

Introduction

Ashurst LLP welcomes the opportunity to respond to the call for inputs by the Competition and Markets Authority ("**CMA**") on its advice to the Secretary of State for Business, Energy and Industrial Strategy on environmental sustainability and the competition and consumer law regimes (the "**Call for Inputs**").

This response contains our own views, based on our experience of advising and representing clients in relation to competition law matters, and is not made on behalf of any of our clients. We have omitted questions to which we are not providing a response. We confirm that nothing in this response is confidential.

Businesses have a vital role to play in ensuring that the UK Government's Net Zero and sustainable goals are achieved. As competition law gives effect to economic policy and development, its application must be aligned with sustainability goals. As recognised by the CMA in its recent guidance on Environmental Sustainability Agreements and Competition Law,[1] many sustainability agreements are unlikely to restrict competition. However, independent observers have indicated that competition law is having a chilling effect on cooperation by market participants to fight climate change and promote sustainability initiatives.[2] It is therefore important that concerns about complying with competition law do not unduly restrict sustainability progress and that businesses are able to easily understand where collaboration is permissible and how sustainability benefits will be taken into account in cases concerning competition law enforcement and merger control in particular.

COMPETITION

1. COMPETITION LAW ENFORCEMENT

> *Question 2:*
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> *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?*

1.1 It is important that competition law does not operate as a barrier to the UK reaching its Net Zero and sustainability goals. Competition regulators globally are considering what amendments should be made to their competition law regimes. We consider there to be a number of options for changes that might be made to the CA98 regime:

(a) providing for the exclusion of sustainability initiatives from the scope of Chapter I of the CA98;

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1 https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law.

2 Simon Holmes, **Climate change, Sustainability and Competition Law in the UK**, University of Oxford CCLP(L)51, section 2.1 and footnote 4.

(b) creating a new block exemption;

(c) providing additional guidance on the application of Chapters I and II in the context of sustainability initiatives;

(d) adopting a revised statement on the CMA's enforcement priorities.

1.2 We have set out below our comments on each of these options, starting with what we believe would be the most effective.

Exclusion of Chapter I CA98

1.3 The UK Government has previously used its powers to exclude particular sectors from the Chapter I prohibition. This power has been used to allow businesses to coordinate their responses to crises, such as Covid-19, fuel supply and the Carbon Dioxide shortage. In doing so, the UK Government has set a precedent that competition law can be suspended in specific circumstances. The Government has also implemented an exclusion order in respect of individual agreements, in particular, in relation to the renewal of the sale of the broadcasting rights to the FA Premier League (which order came into effect on 7 November 2021).[3]

1.4 Under Schedule 3, paragraph 7 of the CA98, the relevant minister may exclude categories of agreements from the Chapter I prohibition where he/she is satisfied that there are "*exceptional and compelling reasons of public policy why the Chapter I prohibition ought not to apply*". Arguably, climate change is the most important issue of our time and would meet the test set out for an exclusion from the Chapter I prohibition.

1.5 We consider that there is therefore scope for the Government to make more active use of its powers to exclude certain categories of agreement (or even individual agreements) from the scope of the Chapter I prohibition where relevant sustainability criteria are satisfied. Clear guidance from the Government and/or the CMA would be required in relation to the types of agreements for which an exclusion order might be appropriate and the criteria that would need to be satisfied.

New block exemption

1.6 Another option would be to create a new block exemption which could cover defined categories of sustainability agreements. The most important category of agreements which should be covered by a block exemption are any agreements designed to tackle climate change issues.

1.7 The CMA could consider adopting an approach similar to that taken by the Netherlands' Authority for Consumers and Markets (the "**ACM**") in its draft sustainability agreement guidelines, which distinguishes between "environmental-damage" agreements and all other agreements. The block exemption could therefore cover these environmental-damage agreements. The ACM defines environmental-damage agreements as agreements which aim to tackle "*damage to the environment in the production and consumption of goods or services… which results, for example, from the emission of harmful air pollutants and greenhouse gases, and from the waste of raw materials*".[4] From a public policy perspective, exempting these agreements under a block exemption could be justified on the basis that: (i) many sustainability agreements are unlikely to affect competition and (ii) all consumers (including those which may be "harmed" by the agreement, for example, by paying higher

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[3] https://hansard.parliament.uk/commons/2021-11-08/debates/21110824000008/PremierLeagueDomesticBroadcastingAgreementsExclusionOrder.

[4] Autoriteit Consument & Markt, **Guidelines: Sustainability Agreements – Opportunities within competition law**, Second version, paragraph 8, available at: https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf.

prices) would enjoy benefits as a result of the agreement (i.e. reducing pollution) and these benefits would outweigh the distortion of competition suffered by a narrow group of consumers as a result of the agreement.

1.8 As with other block exemptions, the Government and CMA could include a list of "hardcore" restrictions which would prevent an agreement from benefiting from the block exemption. Hardcore restrictions could include, for example, price-fixing, allocating customers and/or territories and limiting output or sales.

Guidance in respect of Chapter I and Chapter II

1.9 Regardless of the approach adopted by the Government, the CMA will need to issue clear guidance on the application of Chapters I and II of the CA98 in the context of sustainability. The current CMA guidance on Environmental Sustainability Agreements and Competition Law does not provide sufficient clarity or comfort to businesses which are considering how they can collaborate with other businesses to reach sustainability targets. Further guidance is needed particularly in relation to information exchange and the interpretation of section 9 of the CA98 in the context of sustainability agreements.

1.10 While the current guidance recognises that there is scope for efficiencies even if an agreement restricts competition, provided the benefits outweigh the potential consequences, it does not provide any details of how this would apply in practice. Instead, the guidance refers to the various block exemptions (for agreements of minor importance, joint purchasing, joint commercialisation and production, R&D or specialisation) and the general criteria for an individual exemption. Revised guidance should provide further detail on how to assess wider environmental or societal benefits beyond direct consumer welfare or the evidentiary burden for an efficiencies defence.

1.11 The CMA should also publish guidance on when a dominant business would not be considered to have abused their dominant position because its behaviour is objectively justified on the basis it is proportionate to tackle climate change issues.

Statement on the CMA's enforcement priorities

1.12 Drawing on its experience from the Covid-19 pandemic, the CMA could make a statement on its enforcement priorities to offer comfort to businesses which are considering collaborating with other businesses on sustainability issues. As suggested by Simon Holmes,[5] the CMA could make a statement, consistent with that made during Covid-19, that it would not take enforcement action where, for example, the measures taken by businesses:

(a) are appropriate and necessary;

(b) are clearly in the public interest;

(c) contribute to the benefit or wellbeing of the environment;

(d) deal with critical issues that arise as a result of climate change;

(e) last no longer than is necessary.

1.13 The CMA could also include a clear warning that its approach does not give businesses "a free pass" to engage in conduct which may harm consumers in other ways, as it did in its guidance during the Covid-19 crisis. This would ensure that an appropriate balance is struck between promoting engagement with sustainability initiatives and ensuring that competition on other factors is preserved.

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[5] Simon Holmes, **Climate change, Sustainability and Competition Law in the UK**, University of Oxford CCLP(L)51, section 8(a).

No fines

1.14 In its draft guidelines, the ACM proposes that it will not impose fines for sustainability agreements that are incompatible with competition rules if businesses have engaged with the ACM in advance or if the businesses followed the guidelines in good faith.[6] We suggest that the CMA consider adopting this approach in the UK as well. This would reduce the potentially "chilling" effect of competition law on sustainability progress.

Sustainability unit

1.15 Regardless of the approach taken, we suggest that the CMA establishes a sustainability unit within the CMA. This could follow the precedent set by the Digital Markets Unit and be created to provide informal advice on sustainability initiatives.

1.16 In addition, the sustainability unit could:

(a) Issue guidance/comfort letters: The CMA should consider issuing individual guidance letters in relation to sustainability initiatives that raise novel issues.

(b) Implement a sustainability sandbox: In line with the Hellenic Competition Commission's proposals, the CMA could implement a sustainability sandbox.[7] This would offer a mechanism for businesses to engage with the CMA on business proposals aimed at creating or enhancing the conditions for sustainable development and which require greater legal certainty in relation to competition law enforcement.

Question 4:

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?

1.17 We understand that some of the changes proposed to the CA98 regime will have a potentially negative impact on private actions as a result of certain agreements either being outside competition law or not being pursued by the CMA, which will make it more challenging for claimants to bring actions against businesses which have collaborated on agreements relating to climate change and/or sustainability. However, we consider that this is justified by the need to tackle climate change.

1.18 In particular, in most cases sustainability initiatives will not restrict competition. If they do, but are nevertheless excluded from the application of competition law and/or satisfy exemption criteria and/or are not considered an enforcement priority, this would be consistent with balancing differing public policy initiatives. If a sustainability initiative did restrict competition and was not excluded, third parties would still be able to bring a private action for damages.

1.19 Amending the UK competition law regime to offer greater comfort to businesses that sustainability agreements will not infringe competition law should therefore have a minimal impact on competition and potential claimants, while bringing about potentially significant benefits for society as a whole.

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6 Autoriteit Consument & Markt, **Guidelines: Sustainability Agreements – Opportunities within competition law**, Second version, paragraph 72.

7 https://www.epant.gr/en/enimerosi/sandbox.html; Hellenic Competition Commission, **Staff Discussion Paper: Competition Law & Sustainability**, paragraph 114, available at: https://www.epant.gr/en/enimerosi/competition-law-sustainability.html.

2. MERGER CONTROL REGIME

Question 5:

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.

Question 7:

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.

Question 8:

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.

2.1 There are a number of ways in which sustainability and climate change issues could be taken into account in the assessment of mergers:

(a) as part of the substantive assessment (in particular, when considering quality and innovation efficiencies and relevant customer benefits);

(b) public interest interventions; and

(c) when looking at potential remedies.

Substantive assessment

2.2 As noted in the Call for Inputs, the CMA views "*competition as a process of rivalry between firms seeking to win customers' business over time by offering them a better deal*" including a rivalry to improve quality, enhance efficiency or introduce new and better products.[8] In our view, environmental and sustainability benefits should be taken into account when assessing the impact on competition in relation to quality and innovation. The CMA should therefore make clear in its guidance that more sustainable products may be seen as more innovative and of a higher quality as a result of the benefits they offer to society as a whole.

2.3 The CMA could also amend its guidance to require it to take into account the extent to which a merger may be expected to have a positive impact on the environment as a separate consideration during the substantive analysis.

Efficiencies

2.4 Rivalry-enhancing benefits may drive the CMA to find that a merger does not give rise to a substantial lessening of competition ("**SLC**"). The CMA might consider updating its guidance to provide that sustainability benefits may be taken into account as rivalry-enhancing efficiencies (such as enabling better innovation and research and development or moving to a more efficient and sustainable production process). Parties should also be able to refer to environmental efficiencies to compensate for restrictions on competition.

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[8] Paragraph 28.

2.5 In this context, we suggest that the CMA should be able to take into account efficiencies on markets other than the one in which the SLC has been identified. Unlike other rivalry-enhancing benefits, such as lower prices, environmental benefits cannot be assessed solely by reference to the market on which a potential SLC has been identified.

Relevant customer benefits

2.6 In its Merger Assessment Guidelines, the CMA notes that relevant customer benefits may include "*benefits in the form of environmental sustainability and supporting the transition to a low carbon economy*" in some circumstances.[9] The only example given is that a merger may result in lower energy costs and other benefits that customers "may value (such as a lower carbon footprint of the firm's products)". No further guidance is provided on the type of sustainability benefits which may be considered to be relevant customer benefits and when these would be sufficient to outweigh a SLC. The CMA might update its guidance to provide further guidance on this issue.

New sub-clause in section 22(2) of the Enterprise Act 2002

2.7 The CMA may currently take account of environmental factors as "relevant customer benefits" and the relevant customer benefits do not need to be attained on the same market as the SLC identified. However, the definition of "relevant customer" is limited to the parties' customers and their customers down the chain which precludes the CMA from taking into account the benefits for society as a whole.

2.8 We suggest that the CMA advise the Government to consider introducing a new sub-clause to section 22(2) of the Enterprise Act 2002 which provides the CMA the discretion not to make a Phase 2 reference where the climate change and sustainability benefits of a merger outweigh any identified SLC. This would remove the CMA's duty to refer a merger to Phase 2 in certain circumstances while ultimately retaining the CMA's discretion in each case. Any new sub-section would need to be supplemented with guidance from the CMA on when such a discretion may apply.

Public interest interventions

2.9 Currently, the Government can intervene in a merger where "specified" public interests are at stake: for example, to preserve media plurality or the stability of the UK financial system. The Government could consider introducing an analogous power which would allow it to intervene to clear a merger on sustainability grounds where the merger gives rise to competition concerns when it considers that the environmental benefits of the merger outweigh any potential restriction of competition from a public policy perspective.

2.10 The CMA might also propose that a cross-regulator working group (including the CMA, the Environment Agency and/or the Committee on Climate Change) puts together guidance for the Secretary of State on when it may be appropriate to exercise the power to intervene.

Guidance

2.11 The CMA's updated Merger Assessment Guidelines only refer to sustainability in the context of relevant customer benefits and the guidance on exceptions to the duty to refer[10] makes no reference to environmental or sustainability factors. Given the significance of environmental and sustainability benefits for society as a whole, the CMA should update its existing guidance to clearly set out the types of environmental benefits which may be taken

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[9] CMA, **Merger Assessment Guidelines (CMA129)**, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1011836/MAGs_for_publication_2021_--.pdf, para 8.21.

[10] CMA, **Mergers: Exceptions to the duty to refer**, 13 December 2018 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/898406/Mergers_Exceptions_to_the_duty_to_refer.pdf.

into account and how these factors would be weighed. In particular, as set out above, further guidance is needed on when and how environmental and sustainability factors/benefits will:

(a) be taken into account as efficiencies;

(b) outweigh a SLC, either as a relevant customer benefit or under a new separate sub-clause.

Sustainability unit

2.12 As set out in paragraph 1.15 above, we suggest that the CMA recommends the establishment of a sustainability unit within the CMA. As with the Digital Markets Unit, this would allow the CMA to establish specific expertise to allow it to quantify and weigh environmental benefits against other considerations. In determining its approach, we would also suggest that the CMA seek input from the Committee on Climate Change, the Environment Agency and non-profit organisations.

3. MARKETS REGIME

> *Question 15:*
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> *How should the CMA use its Markets powers to support the government's strategic priorities on environmental sustainability and Net Zero?*

3.1 In our view, the markets regime is not an appropriate mechanism for delivering the Government's Net Zero and sustainability goals. The markets regime should continue to focus on whether markets work effectively for consumers from a competition perspective. Any concerns that a particular market needs to take greater steps to support on delivering the Government's sustainability goals should be addressed through governmental policy.

3.2 The CMA would not be the appropriate body to assess whether a market was delivering on the Government's sustainability goals. This type of policy issue should be addressed by the Government.

> *Question 17:*
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> *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.*

3.3 As set out above, we do not believe the markets regime is an appropriate tool for delivering the Government's Net Zero and sustainability objectives. However, we note that the CMA refers to the Government consultation on Competition and Consumer Policy[11] and its proposed changes to the markets regime. In this regard, we reiterate our comments in response to the Government's consultation, which also apply in the context of market inquiries with a climate change or sustainability angle:

(a) Interim measures: we submit that there is a fundamental distinction between CA98 investigations (which involve an allegation of anti-competitive conduct) and market inquiries (which do not). Given there is no allegation of anti-competitive conduct in market inquiries, it would not be appropriate or proportionate for the CMA to have

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[11] Department for Business, Energy and Industrial Strategy, **Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers (CP 488)**, July 2021, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004096/CCS0721951242-001_Reforming_Competition_and_Consumer_Policy_Web_Accessible.pdf.

the power to impose interim measures before it has concluded that there are adverse effects on competition.

(b) Reviewing previous remedies: we welcome the Government's proposal to allow the CMA to review and revise previous remedies without undertaking a new market study. Given the significant cost and administrative burden on business involved in the market inquiry process, it is appropriate to enable the CMA to withdraw remedies without subjecting businesses to a second market investigation. However, we would not support a proposal to give the CMA the power to expand or supplement remedies without a further market study. This could have unintended consequences for the market and for individual businesses. We would have particular concerns if the engagement by the CMA with potentially affected market participants was not sufficient to enable the CMA and businesses to understand the potential implications of proposed remedies and/or for affected businesses to have an opportunity to seek to protect their legitimate interest.

Ashurst LLP

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