

## Response to the CMA's call for input on environmental sustainability and the competition and consumer law regimes

### Introduction

Dentons welcomes this opportunity to provide its views on how competition and consumer law can contribute towards the UK's sustainability and Net Zero goals.<sup>1</sup>

In recent years, the CMA has demonstrated its ability and ambition to modernise competition enforcement - the creation of the Digital Markets Unit and establishment of the digital markets regime are clear examples of this. The CMA should now apply the same level of ambition to sustainability. As we set out below, there are several ways the CMA can do this. Whichever route is adopted, clear leadership from the CMA is necessary to enable businesses and advisers confidently to progress the sustainability agenda and, in particular, Net Zero.

Dentons regularly advises clients on competition and consumer law issues, which often relate to sustainability initiatives. Our response to this consultation is therefore informed by our experience of advising clients on these issues and of discussing these issues with clients.

We would be pleased to discuss any part of our response further with the CMA.

### 1 Competition law enforcement questions

**Question 1: 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.**

- 1.1 We have advised a number of clients on potential projects or initiatives which have a sustainability focus, but which are or could be thought to be constrained by the CA98 regime.
- 1.2 In our experience, cooperation between competitors may be necessary in scenarios such as the following:
  - (a) Manufacturers establishing an industry scheme intended to increase the recycling of industrial plastics;
  - (b) Competitors in developing markets that support the UK's Net Zero ambitions – for example new renewable energy, hydrogen and carbon capture technologies, electric vehicle and battery manufacture – collaborating in relation to joint purchasing (to improve buyer power), joint bidding (for government funding, for example) and joint production (as facilities require high capital investment at high risk of technology or commercial failure); or
  - (c) Market participants (comprising all or the majority of the market) meeting to discuss industry-wide standard setting, the phase-out of certain products (e.g. palm oil, fossil fuels, non-recyclable packaging), or cost reduction measures associated with sustainability compliance.

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<sup>1</sup> This response focuses on environmental sustainability, consistent with the approach adopted by the CMA in its Call for Input on Environmental Sustainability and the Competition and Consumer Law Regimes (CMA148con, 29 September 2021) (CFI).

- 1.3 Whilst some of the above initiatives may be able to be justified under the current CA98 regime, this will depend on the specific facts of each case. Generally speaking, however, such scenarios might give rise to concerns under the CA98, limiting the speed at which the proposed arrangements take place, and/or their scope. These concerns could potentially include but are not limited to:
- (a) **Information exchange:** Concerns about sharing potentially competitively sensitive information between competitors could result in advantageous sustainability initiatives being scaled back, delayed or avoided.
  - (b) **Collective boycott:** Taking decisions in conjunction with competitors, such as phasing out the use of certain ingredients or products, or selecting or approving particular suppliers, could give rise to concerns over whether the arrangement may amount to a collective boycott, particularly if the participants involved account for a substantial part of the market (which may be essential to achieve green targets).
  - (c) **Price coordination:** Participation in industry-wide schemes might lead to increased commonality of input costs (e.g. where competitors agree to use a common recycling provider) and, depending on the significance of those costs and other relevant factors, a risk of price alignment to end-customers.
  - (d) **The applicability of an exemption:** Many sustainability agreements contemplated by companies will not benefit from exemption under a Retained Block Exemption Regulation<sup>2</sup> (for example because the parties' market shares exceed the relevant thresholds). Accordingly, many companies will seek to rely on an individual exemption (under section 9 CA98<sup>3</sup>), but it may not be clear whether all the criteria for individual exemption are met, particularly if the sustainability agreement results in higher costs or a reduction in choice or quality for end-consumers<sup>4</sup>.
- 1.4 The CMA's guidance on environmental sustainability agreements and competition law<sup>5</sup> provides a useful summary of the position under the existing regime, but does not introduce specific measures for companies engaging in sustainability initiatives. As such, it still leaves some important questions unanswered<sup>6</sup> and risks sustainability projects being constrained.

**Question 2: 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?**

- 1.5 We believe there are several changes which could be made to the current CA98 regime and the CMA's enforcement practice to help achieve the UK's Net Zero and sustainability goals:

<sup>2</sup> As defined by regulation 3(9) of the Competition (Amendment etc.) (EU Exit) Regulations 2019.

<sup>3</sup> To qualify for exemption under section 9(1) CA98 the agreement must: (i) contribute to improving production or distribution; or (ii) promote technical or economic progress (while allowing consumers a fair share of the resulting benefit); but not (iii) impose restrictions which are not indispensable to achieve these aims; or (iv) eliminate competition in a substantial part of the market.

<sup>4</sup> See comments in this regard made by Dentons Europe in its Reply to the European Commission (EC) Consultation on Competition Policy Supporting the Green Deal (20 November 2020), in particular paragraph 21(iii), available at: [https://ec.europa.eu/competition-policy/green-gazette/conference-2021\\_en](https://ec.europa.eu/competition-policy/green-gazette/conference-2021_en)

<sup>5</sup> CMA's Guidance on Environmental Sustainability Agreements and Competition Law (27 January 2021), available at: <https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law>.

<sup>6</sup> For examples of such questions, see our comments at 1.5(a) of this response.

- (a) **Sustainability guidance:** The CMA could publish specific sustainability guidance (similar to the guidelines published, for example, by the Netherlands Authority for Consumers and Markets) to help parties and their advisers self-assess their proposed agreements and to formulate and implement their arrangements with greater ease, certainty and confidence.<sup>7</sup> Particular issues which would benefit from greater clarity include:
- (i) *Meaning of sustainability agreement:* a clear explanation of what qualifies as a legitimate horizontal cooperation agreement pursuing a sustainability goal, with examples of such agreements;<sup>8</sup>
  - (ii) *Individual exemption:* how to conduct a "fair share of the benefits" assessment under section 9 CA98, in particular:
    - (A) whether wider benefits can be taken into account beyond those accruing to direct consumers of the product or service in question (so-called "*out-of-market efficiencies*", such as improved air quality);
    - (B) how broad these benefits can be, i.e. considering not only short-term monetary factors (e.g. impact of product prices), but longer-term qualitative efficiencies (e.g. reduction in CO2 emissions)<sup>9</sup>; and
    - (C) how these benefits can be meaningfully quantified;
  - (iii) the CMA's approach to enforcement in relation to sustainability agreements, and whether these are to be treated differently to other horizontal agreements; and
  - (iv) in respect of any conduct which might be alleged to infringe the Chapter II prohibition, whether the pursuit of legitimate sustainability objectives could constitute an "objective justification" for such conduct.
- (b) **Short-form opinions or comfort letters:** The CMA previously operated a short-form opinion process, allowing parties to seek an opinion from the CMA on novel or unresolved competition law issues, the clarification of which would benefit a wider audience.<sup>10</sup> The CMA could introduce the option of providing non-binding opinions and/or guidance to parties that are contemplating entering into specific sustainability initiatives.<sup>11</sup> To encourage parties to come forward, the CMA could consider, for example:

<sup>7</sup> This proposed guidance could complement and build on the guidance on environmental sustainability issues which the CMA intends to include in the CMA Verticals Guidance (as set out in its Recommendation to BEIS (CAM145con, 3 November 2021).

<sup>8</sup> This was identified by the EC in its findings in its Evaluation of the Horizontal Block Exemption Regulations (5 May 2021), available at: [https://ec.europa.eu/competition-policy/system/files/2021-05/HBERs\\_evaluation\\_SWD\\_en.pdf](https://ec.europa.eu/competition-policy/system/files/2021-05/HBERs_evaluation_SWD_en.pdf).

<sup>9</sup> See page 68, *ibid*.

<sup>10</sup> Guidance on the CMA's approach to Short-form Opinions (CMA27, April 2014). This was withdrawn on 15 June 2021.

<sup>11</sup> The EC has recently stated that it is willing to give individual guidance to parties to sustainability agreements to help ensure their cooperation is lawful (Speech by EVP Margrethe Vestager to the Danish Competition and Consumer Authority for the 2021 Competition Day - "What is competition for?", available at: <https://ec.europa.eu/commission/commissioners/2019->

- (i) providing its opinion/guidance without the parties having to demonstrate that a specific scenario presents a novel or unresolved point of law about the application of the Chapter I prohibition in the CA98;
  - (ii) providing comfort that it will not take enforcement action whilst the specific initiative is being discussed with the CMA; and
  - (iii) allowing parties to opt-out of having the CMA opinion/guidance published.
- (c) **Sustainability "sandbox":** Similar to the FCA sandbox, a sustainability sandbox may offer companies the ability to test sustainable technologies, products, services or approaches in a controlled environment without fear of enforcement action. In such an environment, the effect on competition (and on sustainability) can be monitored and evaluated.<sup>12</sup> The FCA, as a concurrent competition regulator, may be well placed to assist the CMA in setting up such a scheme, following its successful regulatory and digital sandboxes (the second phase of which focused on products and services related to environmental, social and governance (**ESG**) data and disclosure<sup>13</sup>). A sustainability sandbox has the potential to deliver more effective competition in the interests of consumers by, for example:
- (i) reducing the time, and potentially the cost, of getting innovative ideas to market;
  - (ii) enabling more products or services to be tested and potentially introduced to the market; and
  - (iii) allowing the CMA to work with innovators to ensure that appropriate consumer protection and competition safeguards are built into their new products and services.<sup>14</sup>
- (d) **Legislation:** The CMA could recommend that the government either introduces new legislation or makes better use of existing legislation<sup>15</sup>. This could take several forms, such as:
- (i) **Sustainability Block Exemption:** As part of its policy tools, the CMA can recommend that the Secretary of State introduces a new block exemption for any category of agreements that is likely to be exempt from the Chapter I CA98 prohibition.<sup>16</sup> This could include a new Block Exemption specifically to cover sustainability agreements.

[2024/vestager/announcements/speech-evp-margrethe-vestager-danish-competition-and-consumer-authority-2021-competition-day-what\\_en](https://vestager/announcements/speech-evp-margrethe-vestager-danish-competition-and-consumer-authority-2021-competition-day-what_en)).

<sup>12</sup> This has been considered by the EC, as well as EU NCAs, including most notably the Hellenic Competition Commission. See the EC's Competition Policy Brief (10 September 2021), available at: <https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF>.

<sup>13</sup> See <https://www.fca.org.uk/firms/innovation/digital-sandbox>.

<sup>14</sup> These are some of the benefits identified by the FCA in their Regulatory Sandbox Report (2015), available at: <https://www.fca.org.uk/publication/research/regulatory-sandbox.pdf>.

<sup>15</sup> For example, the Austrian Federal Competition Authority (BWB) recently took similar action by amending the Austrian Cartel Act, exempting cooperation between competitors if the agreement contributes to an ecologically sustainable or climate-neutral economy. See [https://www.parlament.gv.at/PAKT/VHG/XXVII/ME/ME\\_00114/index.shtml](https://www.parlament.gv.at/PAKT/VHG/XXVII/ME/ME_00114/index.shtml)

<sup>16</sup> Under section 6(1) CA98.

- (ii) **New Horizontal Guidelines:** The current EC Horizontal Guidelines do not make any reference to sustainability (and remain relevant in the UK in interpreting the relevant Retained Block Exemption Regulation (specifically, the R&D Block Exemption and the Specialisation Agreements Block Exemption)). The CMA should consider introducing specific guidance on sustainability agreements in any future UK Horizontal Guidelines<sup>17</sup>. The 2001 EC Horizontal Guidelines, which did include guidance on environmental agreements (and gave an example of such agreements), may be a useful starting point.<sup>18</sup>
- (iii) **Exclusion orders:** Under paragraph 7 of Schedule 3 CA98, the Secretary of State can issue an exclusion order for exceptional and compelling reasons of public policy. This power has been used increasingly in recent years, particularly to ensure the continued provision of essential services during the pandemic, petrol supply, carbon dioxide supply, and most recently Premier League broadcasting rights. Such a power could be used for sustainability agreements, even for a time-limited period whilst the transition to Net Zero is still in its preliminary stages, though our preferred approach would be for the CMA to issue sustainability guidance (see above), as such guidance could be more wide-ranging and flexible.

**Question 3: 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.**

1.6 Please refer to our response to Question 1 above.

**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?**

- 1.7 In our experience, the primary concerns of clients in this area relate to CMA enforcement, rather than stand-alone claims. Nevertheless, any steps the CMA takes to help achieve the UK's Net Zero and sustainability goals will be taken into account by would-be claimants and, depending on the approach adopted by the CMA, may increase, or reduce, the risk of private enforcement. For example, in the absence of any clear guidance from the CMA (as suggested at 1.5(a) above), private litigants may consider sustainability cooperation agreements to be a potential basis for a stand-alone action. Conversely, the likelihood of follow-on claims may be reduced if the CMA were to make it clear that sustainability agreements are not an area of enforcement priority (e.g. via a CMA comfort letter, as suggested at 1.5(b) above).

<sup>17</sup> This approach would be consistent with the CMA's proposal to introduce guidance on environmental sustainability in the CMA VABEO Guidance, see CMA145con (3 October 2021), paragraphs 7.16-7.18, available at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1030880/VABER\\_Final\\_RecommendationOctober2021\\_PVedit.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1030880/VABER_Final_RecommendationOctober2021_PVedit.pdf)

<sup>18</sup> Guidelines on the applicability of Article 81 of the EC Treaty [Article 101 TFEU] to horizontal co-operation agreements, OJ [2001] C 3/2, paragraphs 179-198.

## 2 Merger control regime questions

**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.**

- 2.1 In our experience, the merger control regime is less of a concern to clients than enforcement under the CA98, so far as sustainability initiatives are concerned.

**Question 6: 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.**

- 2.2 We are not aware of any such 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.**

- 2.3 Whilst in our experience the merger control regime presents less of a barrier to sustainability goals than the CA98 prohibitions, more importance could be given to sustainability considerations in merger decisions. In particular:

- (a) **Efficiencies:** The CMA's Merger Assessment Guidelines makes brief reference to sustainability as a relevant customer benefit (**RCB**), which can be taken into account when assessing the efficiencies of a merger.<sup>19</sup> To take this further, environmental sustainability could be included in the statutory definition of RCB under section 30(1) Enterprise Act 2002. This should ensure that sustainability considerations are viewed in the same way as competition factors during an efficiencies assessment.<sup>20</sup> As the CMA recognises<sup>21</sup>, there is no established framework for "weighing up" competition and sustainability outcomes during an efficiencies assessment. Consideration should be given to whether such a framework could be implemented.
- (b) **Remedies:** Section 73(2) Enterprise Act 2002 empowers the CMA to accept UIL for the purpose of remedying, mitigating or preventing an SLC "or any adverse effect which has or may have resulted from it or may be expect to result from it" (emphasis added). If a transaction may result in an adverse environmental effect, the CMA should consider how this effect can be mitigated in its remedies package<sup>22</sup>.
- (c) **Public interest intervention:** The Secretary of State has the power to amend section 58 Enterprise Act 2002, which gives it the power to intervene in mergers on certain specified grounds. Indeed, this was amended during the financial crisis to introduce the new ground for intervention protecting the stability of the UK financial system.

<sup>19</sup> Merger Assessment Guidelines (CMA129, 18 March 2021), paragraphs 8.3(b) and 8.21.

<sup>20</sup> The CMA's Merger Assessment Guidelines (*ibid*) already notes at paragraph 8.22 that: "*The [Enterprise Act 2002] defines customers for the purpose of considering relevant customer benefits as being both direct and indirect customers of the merged entity and future customers. In this way the CMA is able to take into account a broader range of efficiencies and benefits from a merger to consumers and to society more generally.*"

<sup>21</sup> CFI, paragraph 37.

<sup>22</sup> For example, in *South East Water Ltd / Mid Kent Water Ltd* (reviewed by the Competition Commission in 2007), a remedies package was agreed which mitigated the adverse consequences of the merger, whilst allowing customers (and the environment) to benefit from the water resource benefit.



Given the urgency of the Net Zero agenda, in theory a new ground for intervention on the basis of sustainability could be introduced, allowing the government to review mergers if it was satisfied that the new ground was relevant to a particular merger. Similar grounds already exist in other competition regimes: for example, Article 10 of the Spanish Competition Law provides for government intervention on the grounds of "protection of the environment". However, it is difficult to identify mergers which would justify such intervention and we would not regard such an additional ground as a priority.

**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.**

2.4 We believe the response to this question is applicable to all aspects of competition law, not solely merger control. Generally, introducing an additional or alternative regulator could make the Phase I review process slower and more complex. As an alternative, to ensure that relevant sustainability factors are taken into account in its decision-making, the CMA could:

- (a) ensure that a number of the CMA Panel members and relevant staff have the requisite knowledge and expertise to advise the CMA on sustainability issues;
- (b) consult with appropriate external specialists (such as sustainability consultants or economists), particularly regarding the quantification of environmental benefits; and/or
- (c) create a cross-sector sustainability unit, comprising one or more specialists from the CMA and each sectoral regulator with concurrent competition powers. Given that sustainability is an issue for all regulated sectors, particularly energy, water and transport but also financial services and communications, this cross-sector group could share best practice, expertise and offer advice on the CMA's (and sectoral regulators') decisions, as well as perform a horizon-scanning function (see the response to Question 16 below).

**Question 9: 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.**

2.5 We are not aware of any such examples.

### 3 Consumer law questions

**Question 10: Does the current consumer protection law framework constrain or frustrate initiatives that might support the UK's Net Zero and sustainability goals?**

3.1 Businesses and consumers have a key role to play in the UK's transition to Net Zero and achievement of sustainability goals. One way to do this is for businesses to be able to market authentically sustainable products more confidently, to encourage consumers to purchase them. To foster changed consumer behaviour, clear governance of sustainable product claims is therefore essential.

- 3.2 The provisions most relevant to sustainability claims in the current consumer law regime have a broad application that we have found to constrain several clients' ability to pursue sustainability initiatives. Particularly, we found clients are discouraged from marketing sustainable products due to a fear of consumer claims and regulatory action; the practicalities of verifying claims; and the clarity of legal triggers.
- 3.3 All environmental claims about consumer products in the UK are subject to the fairness tests in the Consumer Protection from Unfair Trading Regulations 2008. Under these regulations, a commercial practice is unfair, and therefore prohibited, if it amounts to conduct towards consumers that is below a level that may be expected in accordance with honest market practice or good faith (i.e. misleading actions or omissions, aggressive behaviour and/or specific banned practices). Therefore, the current framework does provide some routes to tackle consumer harm and contribute to an industry (both business and consumer behaviour) shift that supports the transition to Net Zero.<sup>23</sup> However, it does not require businesses to offer green products or services to consumers, nor set specific rules or standards for offering these products.
- 3.4 The CMA's guidance and Green Claims Code<sup>24</sup> provides helpful advice in relation to environmental claims, including having to ensure environmental claims:
- (a) are truthful and accurate;
  - (b) are clear and unambiguous;
  - (c) do not omit or hide important information;
  - (d) compare goods or services in a fair and meaningful way;
  - (e) consider the full life cycle of the product; and
  - (f) are substantiated.
- 3.5 In our experience, there are gaps in this guidance that constrain clients' ability to make sustainability claims and consumers' ability to authenticate them, including:
- (a) **Definition of environmental terms:** There is a gap in the CMA's guidance in relation to the specific meaning of environmental terms. Currently, the guidance advises businesses to use words and phrases in line with their ordinary meaning and the way consumers are likely to understand them – key words should be defined by the business if the consumer is unlikely to understand them and scientific or technical language should be completely avoided unless it is 'easily' understood by the average consumer.<sup>25</sup> There is no common taxonomy for environmental terms in the consumer protection law regime.
  - (b) **Substantiation:** If a misleading action is investigated, the trigger for enforcement relies on whether or not the business can sufficiently substantiate the claim with robust, credible, relevant and up to date evidence that supports them and is easily

<sup>23</sup> CFI, paragraph 49.

<sup>24</sup> Guidance on Environmental Claims on Goods and Services (CMA146, 20 September 2021), available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1018820/Guidance\\_for\\_businesses\\_on\\_making\\_environmental\\_claims\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1018820/Guidance_for_businesses_on_making_environmental_claims_.pdf)

<sup>25</sup> *Ibid*, paragraphs 3.51 – 3.54.



accessible to consumers.<sup>26</sup> In our experience, environmental claims that do not relate to a specific standard are difficult to substantiate. The current legal framework does not prescribe standardised routes for substantiating environmental claims and we have found this discourages businesses from making such claims. The absence of specific rules or standards for environmental claims constrains businesses' ability to pursue certain sustainability initiatives.

- (c) **Environmental information requirements:** The current requirement to avoid omissions of information under consumer protection law does not constitute a positive requirement to disclose verified environmental information.
- (d) **Enforcement:** By its nature as guidance, the CMA's advice on green claims is currently unenforceable. Therefore, it has limited scope for impact on businesses' behaviour.

- 3.6 By way of example, based on complaints made to the Local Authority Trading Standards in the UK in 2019, and similar complaints made in the EU, we found while advising a retail client that the following green claims are particularly sensitive to consumers and regulatory action: Vegan; Vegetarian; Organic; Biodegradable; Free-range; Natural; Ecological (including "eco"); Environmentally and eco-friendly; Recycled; Green / sustainable; Low or zero emissions; Rainforest Alliance; FSC (Forest Stewardship Council); MSC (Marine Stewardship Council); and Fairtrade.
- 3.7 These are common claims used by businesses, yet because there is no standard that defines or prescribes substantiation routes for many of these terms in the UK consumer protection law regime, they are subject to consumer and regulatory scrutiny. The more information required to justify a green claim and the more subjective the claim, the more information a business needs to provide to discharge its duty to exercise reasonable care not to mislead consumers. Practically, this becomes more difficult for claims unrelated to specific schemes and so there is a higher risk of businesses not making the claim at all to avoid the risk of regulatory enforcement or consumer action.

**Question 11: What changes to business-to-business protections are required, to address the current issues of supply chain transparency?**

- 3.8 Under the Business Protection from Misleading Marketing Regulations 2008, misleading advertising is prohibited for those advertising products to other businesses. The gaps we have identified in the regime for business-to-consumer practices also apply to business-to-business practices.
- 3.9 A requirement for businesses to adhere to a common standard for sustainable claims may also enable downstream businesses to verify claims more easily from other businesses in the supply chain. While an end-supplier's legal risk is limited where it has no control over a third party's claim, the risk of consumer claims still extends to manufacturers and those further up the supply chain. Where one business manufactures or supplies products to another, both businesses may be liable for claims and may have to substantiate them.<sup>27</sup>
- 3.10 The current obligation on a company to take reasonable precautions and exercise due diligence is a positive one. UK case law suggests a duty exists on a company to carry out random sampling of products and that it will be insufficient for a company to merely direct

<sup>26</sup> *Ibid*, paragraphs 3.125 and 3.138.

<sup>27</sup> *Ibid*, paragraphs 3.136- 3.137.

their suppliers to comply with a specific standard and assume the supplier has done so. If the law required compliance with a prescribed standard for sustainability claims, the burden on downstream companies to conduct due diligence on their suppliers would arguably lessen.

**Question 12: What other opportunities are there to develop the consumer protection law framework to help to achieve the UK's Net Zero and sustainability goals?**

3.11 There are a number of opportunities to develop the consumer protection law framework, including:

- (a) **Taxonomy:** The development of an environmental claims taxonomy applicable to the consumer sector and sub-sectors would benefit businesses and regulators by making it easier to verify sustainability claims. It may also increase the ability of consumers to trust sustainability claims and therefore reduce the risk of consumer claims against businesses. The taxonomy could follow the approach of analogous regimes, such as:
  - (i) *Sustainable Finance Taxonomy*<sup>28</sup>: In April 2021, the EC published the Sustainable Finance Taxonomy, which sets out an EU-wide classification of environmentally sustainable economic activities for the sustainable finance sector and beyond.
  - (ii) *French environmental claims guide*: The Directorate in charge of competition, consumer and fraud protection (the “DGCCRF”, an administrative body within the Ministry of Economy in France) published guidance in 2012, updated in 2020, which provides practical advice on the use of terms such as “organic”, “biodegradable”, “sustainable”, “recyclable”, “natural”, “without substance X”, etc. It provides specific recommendations in relation to the use of each term. Further, advertising regulation in France has set out that logos of associations, foundations, NGOs or other environmental symbols or signs may only be used if: (i) their origin is clearly indicated; (ii) there is no risk of confusion as to their meaning; and (iii) the association/foundation/NGO has allowed the advertiser to use them.
- (b) **Requirement for disclosure of environmental information:** Businesses could be required to provide consumers with information relating to the environmental properties of a product in their promotional materials and packaging and/or be required to meet certain sustainable production or material thresholds.
- (c) **Legal sanctions for greenwashing:** Introduce specific legal sanctions for misleading sustainability claim offences. For example, France amended its consumer code in April 2021 to include specific legal sanctions for greenwashing. The code penalises listed companies for misleading green advertising. Sanctions include a public statement on the company's website to correct the misleading claim, a potential fine of up to 80% of the misleading campaign's cost and a cease and desist order.

**Question 13: To what extent should the consumer protection law framework be prescriptive, for example, by mandating provision of particular forms of information, or by prohibiting**

<sup>28</sup> Regulation (EU) 2020/852 (Taxonomy) on the establishment of a framework to facilitate sustainable investment.

**particular types of conduct, in order to help to achieve the UK's Net Zero and sustainability goals?**

- 3.12 Based on our reasoning in 3.5 above, our experience suggests it is necessary for the new regime to prescribe (a) a taxonomy of sustainability terms, (b) substantiation standards, (c) environmental information requirements, and (d) legal sanctions specific to sustainability claims.
- 3.13 In our view, a prescriptive framework of this kind would result in businesses becoming less afraid to make justified environmental claims, increase consumer confidence and trust in environmental claims, encourage consumers to make more sustainable purchases and ultimately achieve a more sustainable consumer sector that positively contributes to the UK's Net Zero and sustainability goals.

**Question 14: How far should the consumer protection law framework go to address: (a) the planned obsolescence of products; and/or (b) commercial practices which promote over-consumption?**

- 3.14 We would support a regime that discourages traders from carrying out commercial practices that promote over-consumption. We would also support a regime that phases out products that do not meet certain sustainability standards, to contribute to the UK's Net Zero and sustainability goals.
- 3.15 In our experience, current environmental regulatory regimes that address the *producer* have been highly effective in realising industry behavioural change. Examples of such regimes include:
- (a) **Renewable energy:** Energy supply companies have been under an obligation to increase the mix of renewable energy in electricity supplied to customers since the Non-Fossil Fuel Obligation introduced in the 1990s. Critically, the Renewables Obligation Order from 2001 put in place a phased increase of obligated renewable energy provision. This regime delivered in two key ways. In addition to recognising that the transition towards obsolescence for damaging technologies must be phased, it also provided the price support for more costly, lower-carbon alternatives. The Renewables Obligation Certificates that evidenced a kWh of renewable generation created a balancing revenue stream for developing technologies. As the sector has evolved, we have moved into the Renewable Energy Directive<sup>29</sup> and the UK Energy Act 2013. These regimes continue to incorporate mechanisms to disincentivise the use of fossil fuels by placing obligations on UK suppliers to source prescribed proportions of the energy they supply from renewable sources and to participate in low-carbon projects through schemes such as the 'contracts for difference' scheme. Going beyond the current UK regime, the EC's 2021 proposal<sup>30</sup> for a revision of the Renewable Energy Directive intends to align the legislation with the EU's more ambitious climate-related goals, which is likely to bring with it more onerous requirements for businesses. This sophistication of market management could not be achieved at consumer level.

<sup>29</sup> Directive 2018/2001/EU on the promotion of the use of energy from renewable sources.

<sup>30</sup> [https://ec.europa.eu/info/files/amendment-renewable-energy-directive-implement-ambition-new-2030-climate-target\\_en](https://ec.europa.eu/info/files/amendment-renewable-energy-directive-implement-ambition-new-2030-climate-target_en)

- (b) **Landfill waste disposal:** The Landfill Directive<sup>31</sup>, implemented through the UK Environmental Permitting regime,<sup>32</sup> requires producers to dispose of certain waste in designated landfills and sets specific targets for the reduction of biodegradable household waste sent to landfills. Specifically, the UK introduced a ban on landfilling of food waste in part to avoid over supply but also to encourage more sustainable use of the waste. This was challenging to implement and was in fact delayed, but it resulted in creative approaches from large retailers including on-site anaerobic digestion power generation by the large grocers. Again, focusing on the suppliers rather than the consumers delivered behavioural change.
- (c) **Hydrofluorocarbons (HFCs):** Due to the high emission levels and global warming potential of fluorinated greenhouse gases, such as HFCs (a gas commonly used in refrigeration, air conditioning and heat pump equipment), the EU F Gas Regulation<sup>33</sup> was put in place in 2015 to initiate a phase-out. Importantly, the EU F Gas Regulation:
  - (i) places an obligation on manufacturers to meet allocated quotas for the HFCs they supply in the EU;
  - (ii) introduces specific product bans for products that carried a particularly high emissions risk; and
  - (iii) requires detailed information recording by companies storing and supplying certain gases.

3.16 Businesses might claim consumers drive demand and hence true behavioural change should occur at the consumer level. However, these regulatory regimes – which provide direct, focused and enforceable objectives – illustrate that it is effective and practical to use the supplier as the tool for an industry behavioural shift, rather than the consumer.

## 4 Markets regime questions

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

- 4.1 The CMA's recent market study on electric vehicle charging (**EV Market Study**) is a good example of how the CMA has sought to use its markets powers to support Net Zero. Support is demonstrated in particular by:
  - (a) the speed with which the CMA completed the EV Market Study, publishing the Final Report in July, well before the statutory deadline (of 1 December 2021); and
  - (b) the CMA launching a CA98 case into long-term exclusivity agreements at motorway service areas.
- 4.2 The CMA has made eight key recommendations directed towards government, energy regulators, local authorities and the industry. The potential problem is that the bodies concerned may not take the recommended actions, or may not act sufficiently quickly, with the result that sustainability, investment, competition and consumers may be adversely

<sup>31</sup> Directive 99/31/EC of 26 April 1999 on the landfill of waste.

<sup>32</sup> Environmental Permitting (England and Wales) Regulations 2010, Schedule 10.

<sup>33</sup> Regulation (EU) No 517/2014 of the European Parliament and of the Council of 16 April 2014 on fluorinated greenhouse gases.

affected in the meantime. The timeframe for taking the recommended actions is largely outside the CMA's control.

- 4.3 The CMA has stated that it will continue to oversee progress in the EV charging sector, given the importance of the sector and the problems it has identified, which could impact the government's plans to ban sales of new petrol and diesel cars by 2030 and its wider commitment to make the UK net zero by 2050. We would urge the CMA to actively oversee the implementation of its recommendations, to be as transparent as possible in its oversight role and to take action (including, for example, launching a market investigation) if and when appropriate at the earliest opportunity.<sup>34</sup> As Andrea Coscelli states in the CMA's press release: "*There needs to be action now*".<sup>35</sup>
- 4.4 Our suggestions at 2.4 above regarding expertise are equally applicable to the markets regime and we would encourage the CMA to consider how appropriate experts could inform the CMA's use of its markets powers.
- 4.5 As discussed below at 5.3, the CMA's *Prioritisation Principles*<sup>36</sup> should also be updated to include a specific reference to sustainability. This would help to strengthen the markets regime because, in determining whether to undertake markets work (by reference to the Principles), the CMA Board would need to factor sustainability into its decision-making.

**Question 16: 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?**

- 4.6 The CMA should continue its usual information gathering practices to identify specific markets. We would encourage the CMA to issue public Calls For Information, as well as pro-actively engage with market participants including:
  - (a) environmental groups, experts and industry groups;
  - (b) government departments and bodies (such as DEFRA, BEIS, Ofgem and the Environment Agency<sup>37</sup>);
  - (c) any new cross-sectoral sustainability unit (as suggested at 2.4(c) above)<sup>38</sup>;
  - (d) international agencies and networks (such as NCAs, the OECD and the ICN); and
  - (e) consumer groups and NGOs (such as Which?).

<sup>34</sup> Depending on the outcome of the CMA's enforcement action relating to motorway EV charging points (see 4.1(b) above), there is an opportunity for the CMA's findings in this case to have wider application for the sector as a whole.

<sup>35</sup> CMA Press Release (23 July 2021), available at: <https://www.gov.uk/government/news/further-action-needed-on-ev-charging-to-meet-net-zero>.

<sup>36</sup> Prioritisation principles for the CMA (CMA16, April 2014), available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/885956/prioritisation\\_principles\\_accessible\\_v.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/885956/prioritisation_principles_accessible_v.pdf).

<sup>37</sup> For example, according to recent legal commentary, the Austrian Federal Competition Authority is consulting with the Federal Ministry for Climate Protection to issue guidance on the newly-revised Austrian Cartel Act exemption (see footnote 15 above).

<sup>38</sup> The CMA has taken a similar approach to cross-sectoral units in forming the Digital Regulation Cooperation Forum (DRCF) with the FCA, Ofcom and the ICO, to manage their approach to digital regulation.

This will encourage a wide variety of stakeholders to come forward with candidate markets for review.

- 4.7 Specific examples of relevant and important markets could include: heat pumps; renewable energy providers; electric vehicles (as distinct from charging infrastructure); green mobility, including mobility as a service (i.e. where customers pay for use) and digital mobility platforms, such as apps.

**Question 17: 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.**

- 4.8 We are not aware of any such changes.

## 5 Other considerations

**Question 18: What other considerations should the CMA take into account in responding to the Secretary of State's request for advice?**

- 5.1 The CMA should consider how to embed support for Net Zero goals into its guiding principles and objectives, in particular the following:
- (a) **Prioritisation principles**<sup>39</sup> particularly the factors of "impact" and "strategic significance" could be expanded to include sustainability. For example, the impact on consumer welfare already considers "*non-financial detriment such as the avoidance of physical harm or emotional distress*". This could be explicitly expanded to include avoidance of environmental harm and benefits from greater sustainability. Doing so would help indicate that the CMA will encourage companies to try to achieve greater sustainability;
  - (b) **Vision, values and strategy**<sup>40</sup> which guides the CMA's actions, could be updated to reflect the strategic importance of the Net Zero goals;
  - (c) **Strategic assessments**<sup>41</sup> which inform the priorities for the CMA's discretionary work, should identify sustainability and Net Zero as an issue of strategic priority; and
  - (d) **Annual plans** which should continue to include supporting the transition to a low carbon economy as a key theme.<sup>42</sup>

<sup>39</sup> Prioritisation principles for the CMA (CMA16, April 2014), available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/885956/prioritisation\\_principles\\_accessible\\_v.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/885956/prioritisation_principles_accessible_v.pdf).

<sup>40</sup> Vision, values and strategy (CMA13, January 2014), available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/274059/CMA13\\_Vision\\_and\\_Values\\_Strategy\\_document.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/274059/CMA13_Vision_and_Values_Strategy_document.pdf).

<sup>41</sup> CMA Strategic Assessment (CMA35, November 2014), available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/378855/Strategic\\_Assessment.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/378855/Strategic_Assessment.pdf).

<sup>42</sup> CMA Annual Plan 2021/22 (CMA137), available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/972070/CMA\\_Annual\\_Plan\\_2021\\_to\\_2022\\_---.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972070/CMA_Annual_Plan_2021_to_2022_---.pdf)



**Question 19: How should the CMA apply its wider policy tools to support the UK's Net Zero and sustainability goals?**

- 5.2 Whilst wider policy tools, such as advisory letters and warning letters, may have some value in progressing the UK's sustainability agenda, they should not be the primary tool. The CMA should instead pro-actively provide guidance and clarify and update its policies to support sustainability initiatives before they happen - to help enable them to happen - rather than take a more reactive role.

**Dentons UK and Middle East LLP**  
**10 November 2021**