EVERSHEDS SUTHERLAND

CMA CONSULTATION ON ENVIRONMENTAL SUSTAINABILITY AND THE COMPETITION AND CONSUMER LAW REGIMES

EVERSHEDS SUTHERLAND'S RESPONSE

Introduction

Eversheds Sutherland (International) LLP ("**Eversheds Sutherland**") welcomes the opportunity to comment on the CMA's consultation on environmental sustainability and the competition and consumer law regimes (the "**Consultation**"). Our comments are based on the experience of our Competition, EU and Trade team in advising on (i) the current UK merger control / public interest regime and similar screening regimes in other jurisdictions; (ii) market studies and investigations conducted by the CMA and other competition authorities in the UK; and (iii) anti-competitive conduct, regulatory compliance and litigation under the Competition Act 1998 and equivalent provisions in the EU treaties, as well as the experience of our Consumer Law team in advising businesses across various sectors.

Competition Law Enforcement

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 In our experience, there are circumstances in which businesses refrain from collaborating with their competitors in pursuit of sustainability goals due to the potential competition law issues that are perceived could arise under CA98, and the severe risks that could flow from overstepping the bounds of UK competition law. It is this perception of the risks of competition law applying that would helpfully be addressed by way intervention and change, as set out in our response to question 2 below.

2. **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.**

2.1 We call on the CMA and the government to provide greater and more specific intervention / encouragement to foster and support legitimate collaboration between competitors, in specific sectors, to achieve the UK's Net Zero. Such intervention / encouragement would not, in our view, require a change to competition law but could effectively be achieved by way of softer measures such as further guidance, more direct engagement with businesses and a flexible approach by the CMA to the use of its CA98 powers.

(i) *Guidance*

2.2 We note that the CMA has issued some preliminary guidance to help businesses achieve environmental sustainability goals whilst staying on the right side of competition law[1]. We welcome this development but as the guidance purports to set out only the current framework for the self-assessment of competition law risk and the key points that businesses and trade associations should consider, we are of the view that further guidance would be beneficial and would support businesses in their efforts to transition to a low carbon economy. Clear guidance would enable businesses to understand better when their sustainability initiatives do not restrict competition and, where they do, how to assess the efficiencies delivered against the restrictive effects.

2.3 First, we consider that the current guidance could helpfully be expanded to provide more information and examples of those types of sustainability agreements that would not be caught by UK competition law. The current guidance makes only passing reference to many

[1] https://www.gov.uk/government/news/sustainability-agreements-cma-issues-information-for-businesses

forms of collaboration for the achievement of sustainability goals not being likely to raise any competition law issues and cites "*grouping together to purchase common inputs or for research and development*". Whilst we would not favour an overly prescriptive approach to this, i.e. to avoid this becoming a checklist, we do consider that the CMA could provide more examples to enable businesses to understand better when their initiatives would not be caught by the UK competition rules. This move would be consistent with the approach being advocated by the European Commission and other national competition authorities such as the Netherlands Competition Authority (Autoriteit Consument en Markt, "**ACM**").

2.4 Executive Vice-President Vestager of the European Commission, in an effort not to discourage businesses from working together to make their products more sustainable, has noted that cooperation which involves "*companies setting joint standards for what counts as a green product, or pooling resources to speed up green innovation …[or] companies agreeing to cut dirty products*" could all be set up to fall in line with EU antitrust rules, commenting positively that "*many sustainability agreements just don't harm competition"*[2].

2.5 Further helpful examples of sustainability agreements which are considered not to be anticompetitive and therefore allowed are included in the ACM Revised Guidelines[3].

2.6 Second, we consider that further clarity on how to assess sustainability agreements that do restrict competition would provide greater confidence to companies to invest jointly in initiatives to drive the UK Net Zero agenda. The CMA could helpfully look to developments by the ACM and the European Commission in this regard.

2.7 The European Commission concluded in its policy brief in September 2021[4] that "*in order to encourage companies to jointly invest, identify solutions, produce, and distribute sustainable products, more guidance is needed on the circumstances in which such cooperation complies with antitrust rules*". We agree with this statement and would encourage the CMA at the very least to provide further guidance on those key principles where the Commission has indicated it will focus its antitrust policy developments. This would include, *inter alia* providing guidance on the following:

2.7.1 clarification on how sustainability benefits can be taken into account in the assessment under Section 9 Competition Act 1998 and when they can compensate consumers for the harm suffered. In this regard it would be useful to clarify that sustainability benefits can be assessed as qualitative efficiencies as well as related cost efficiencies that can be passed on to consumers;

2.7.2 that sustainability benefits do not necessarily need to take the form of a direct or immediately noticeable product quality improvement or cost saving. As long as the users of the product concerned appreciate the sustainability benefits related to the way the products are produced or distributed, and are ready to pay a higher price for this reason alone, such benefits could be taken into account in the assessment;

2.7.3 that benefits achieved on separate markets can possibly be taken into account, and at the very least, that this would be possible where the group of consumers affected by the restriction and the group of benefiting consumers are substantially the same. We note that in a merger control context, recent cases have shown that it is possible to look to future customers when assessing benefits and on that basis it would appear that there is scope for applying this approach also to sustainability agreements; and

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2 https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal_en

3 https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf

4 https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF

2.7.4 instances where companies need to get together in order to override a first mover disadvantage and nudge consumers towards using more expensive sustainable products, instead of cheaper but polluting ones.

2.8 The CMA could also helpfully, in any such guidance, provide greater clarity on the scope of information that can be shared in the context of sustainability agreements particularly as the sharing of certain information between competitors can lead to more sustainable and responsible resourcing.

2.9 We consider therefore that the CMA should, at the very least, provide further guidance specifically on those areas that are likely to give rise to the greatest degree of uncertainty in order to avoid competition law becoming a barrier to legitimate industry collaboration to achieve sustainability goals.

(ii) Direct engagement / comfort letters

2.10 In addition to guidance, we consider that an effective process for engaging directly with the CMA in order for businesses to seek formal or informal guidance on environmental sustainability initiatives would be helpful. In our experience, it is uncommon for businesses to approach the CMA for such guidance, and the CMA is not in the habit of issuing comfort letters.

2.11 We would therefore encourage the CMA to express a clear intent to facilitate this type of dialogue, and assurance that companies would not need to fear enforcement action and fines, where they have sought to engage with the CMA in good faith. We consider this could go a long way to encouraging firms to come forward with examples to the CMA, rather than abandoning projects for fear that competition law may prevent the collaboration or because the real or perceived risks of enforcement are too high.

2.12 In this regard we would therefore welcome more transparency and clearer guidance on the CMA's approach. Furthermore, the CMA could consider putting a mechanism in place to allow the outcome of such discussions to be made publicly available in order to build up over time helpful precedent, albeit non-binding. This could be done on an anonymous basis, for example, through periodic notices or policy updates. This would give companies and advisers the opportunity to stay up-to-date with evolving CMA policies and plan sustainability initiatives accordingly without constant recourse to the CMA.

(iii) Focussed exemptions to address the climate crisis

2.13 The CMA's response to the COVID-19 pandemic has shown its willingness to be flexible and to offer time and scope limited exemptions in circumstances of crisis. We would suggest that the CMA consider adopting and using its ability to react swiftly and flexibly to the climate crisis in similar ways. The approach taken by the CMA in response to COVID-19 gave many companies confidence and reassurance to proceed with collaborations that had not happened until that point and therefore created a pathway to fast and efficient collaborative initiatives to address the crisis.

(iv) A broader approach to what sustainability agreements should be covered

2.14 We note that the CMA's focus, and our comments above, address only environmental sustainability agreements. We would ask the CMA to give equal consideration to other forms of collaboration in respect of sustainability goals, such as modern slavery or competitors sharing information in respect of the use of illegally deforested areas entering the supply chain, where there are considerable efficiencies to be gained from industry collaboration but where businesses fear, in the same way, the potential adverse impact of competition rules. Guidance and encouragement from government for industry to pursue these types of sustainability initiatives would allow for a better allocation of resources and a more efficient pathway to achieving net zero.

3. **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?**

3.1 We do not consider that specific rules are needed in relation to private enforcement in this sphere.

Merger Control Regime

4. **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.**

4.1 The current framework in which the CMA assesses Relevant Consumer Benefits ("**RCBs**") is narrow and does not permit a swift resolution of cases in which RCBs are claimed. This is evidenced by there being only a very small number of cases in which the CMA has accepted RCBs as an exception to the duty to refer. The CMA notes that quantifying a rivalry-enhancing efficiency or RCB on sustainability grounds could be very challenging (as discussed in paragraph 36 of the consultation), and this means that there is a real risk that deals in which there is a strong sustainability rationale, but which may result in a substantial lessening of competition ("**SLC**"), are referred to Phase 2 – which in turn results in difficulties and concerns around time, cost and predictability. This risks a chilling effect on deals that would otherwise deliver sustainability benefits. To counter this, we would encourage the CMA to publish revised guidance on how it would approach the assessment of RCBs at Phase 1.

4.2 Furthermore, given that sustainability can be a parameter of competition and a merger between two businesses competing on sustainability grounds could result in an SLC, it would be helpful in our view for the CMA to supplement its Merger Assessment Guidelines with more detail about how the CMA would look at sustainability in this context. In particular, it would be helpful to see more clarity on the types of issues that would be a concern for the CMA, and conversely examples of factors that would not be a concern. Updating the Merger Assessment Guidelines in this fashion would assist businesses and their advisers by providing greater transparency and predictability about how these aspects of the merger control regime are likely to operate in practice.

5. **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.**

5.1 We are not aware of any such examples.

6. **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.**

6.1 We would support extending the existing public interest intervention regime to cover expressly the objective of achieving the UK's Net Zero target. This could be achieved by the Secretary of State having this consideration inserted into section 58 of the Enterprise Act 2002 (the "**EA02**") by means of an order approved by both Houses of Parliament in line with Paragraph 16.6 of the Guidance on the CMA's jurisdiction and procedure. Upon issuance of a Public Interest Intervention Notice ("**PIIN**"), the CMA would seek views, submissions and evidence from a broad range of individuals and entities (for example other government departments and the new unit we propose in response to Question 7 below), before providing advice to the Secretary of State. As with the current regime, the Secretary of State would then make a decision on the outcome of the case in the light of the CMA's advice – even if the CMA were to find a realistic prospect of an SLC, section 45(6) EA02 allows the Secretary of State to decide not to make a reference to Phase 2 on the basis of one or more public interest considerations.

7. **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.**

7.1 We are not in favour of a separate regulator. However, we would be in favour of the CMA engaging with subject matter experts (including the creation of a unit within Government, staffed by experts in the field) which would offer the CMA independent advice in relation to sustainability matters. This should promote swifter assessment of sustainability-based RCBs at Phase 1, by enabling the CMA to have access to expertise that would facilitate the review of both qualitative and quantitative evidence supporting a claim of RCBs and provide scope for the CMA to be comfortable with the evidence presented. Access to independent expertise would also assist the CMA in its substantive assessment of whether a merger may result in a substantial lessening of competition on sustainability grounds. In our view it would also be important for merger parties to have access to the expertise in this unit, so that assessment of sustainability matters in a Phase 1 context (whether that be the substantive assessment whether a SLC arises, or an assessment of rival enhancing efficiencies or RCBs) can be achieved in a transparent and efficient manner.

8. **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.**

8.1 We are not aware of any such examples.

Consumer Protection Law

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

9.1 As a general observation, the ability for consumers to exercise a 14x day right to cancel goods purchased "off-premises" or "at distance" (and commercial decisions of businesses offering free returns) is likely to be having an adverse impact on the UK's Net Zero and sustainability goals in circumstances where the logistical infrastructures for returns is not relying on sustainable energy sources (e.g. diesel/petrol vehicles). To address this potential frustration, a wider, more holistic approach would need to be adopted across different sectors (in circumstances where this fundamental consumer right remains unchanged).

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

10.1 To address the issues of supply chain transparency, it would appear sensible to introduce clear and positive obligations on businesses to provide certain environmental information at all levels of the supply chain (to align with the approach begin imposed at "B2C" level). We would recommend consideration around introducing new regulatory changes on a gradual/phased basis, with grace periods being made available to allow businesses to review and engage with their supply chains in a meaningful way.

10.2 It is however important to note that practical difficulties may arise with such an approach, in particular in relation to cross-border supply in circumstances where the regulatory framework imposed on UK businesses is too onerous, adversely impacting the commercial attractiveness of doing business in the UK and/or with UK based traders. This is something that would need careful consideration when developing new regulatory rules and policy. Alignment and co-operation with other states may assist in this regard, with a view to agreeing a consistent approach to promote fuller engagement across international supply.

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

11.1 In the same way that the CMA has identified the need for a consistent set of definitions of environmental terms (at paras 52-53), we think any obligations introduced to the consumer law framework should be clear and unambiguous (with detailed, sector specific guidance being published to provide support to businesses).

11.2 Much in the same way as the food sector has developed a uniform "Healthy Choices Guidelines" to classify nutritional value on a red, amber, green basis, a similar approach could be considered for the purposes of certain types of goods, services and digital content (or indeed in relation to the environmental impact of delivery/returns) from a Net Zero and sustainability perspective. Additionally, businesses could be encouraged to consider offering "eco" options for delivery, which we note is already offered by some grocery businesses.

11.3 Other opportunities may involve introducing financial sanctions on businesses that do not conform to any sustainability obligations that are introduced as putting financial penalties in place is likely to incentivise businesses to prioritise sustainability. However we would note that this should be considered carefully as businesses may end up passing these types of costs on to consumers through increasing prices, and care would be needed to ensure that small and medium sized businesses are not adversely impacted so as to undermine their ability to remain competitive in the market.

11.4 Additionally, reporting requirements could be introduced requiring businesses to publish reports on their progress in relation to a set criteria of sustainability goals (akin to the modern slavery requirements). Consumers may, as a result, make different purchasing decisions and form negative opinions of any businesses that fail to comply with the reporting requirement or are performing poorly in terms of sustainability (e.g. it has been reported by a sustainability and consumer behaviour study carried out by Deloitte this year that nearly 1 in 3 consumers stopped purchasing from brands because they had sustainability concerns about them). As reputation is important to businesses, this could also be an effective incentivisation tool but we appreciate that this type of requirement would place additional pressures on enforcement agencies.

12. **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?**

12.1 Parts of the current consumer protection law, in particular, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, are already quite prescriptive and in our experience, businesses often find that the prescriptive nature makes the legislation difficult to navigate and comply with. Therefore, introducing further prescriptive measures into the consumer law framework could add to the difficulties businesses already face and could potentially be counter-productive.

12.2 Regulating on a sector-by-sector basis (on the assumption that some sectors pose greater sustainability challenges than others) may be an attractive approach.

13. **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?**

13.1 **Obsolescence:** As already identified (at paras 64-65), providing information about the repairability and durability of products seems to be a helpful first step and any measure to further empower consumers to make more informed decisions is welcomed, but we agree that purely informational remedies may not go far enough in affecting real change. However we think that a balance should be struck between ensuring businesses have sustainability responsibilities and not placing onerous and overly restrictive obligations on businesses.

13.2 In our opinion, a good example of a measure designed to support sustainability whilst not providing restrictive obligations on businesses is the introduction of the Ecodesign for

Energy-Related Products and Energy Information Regulations 2021 (the 'Regulations'). The Regulations provide that manufacturers selling certain goods must make spare parts available to consumers within 2 years of an appliance going on sale and up to 7-10 years after production of the appliance has been discontinued.

13.3 **Over-consumption:** The government has recently proposed reforms to consumer law to prevent exploitation of consumer behaviour in the form of making consumers aware of businesses using behavioural tools to influence their purchasing decisions. This type of regulation in our view appears to be proportionate and may assist in reducing the promotion of over-consumption but arguably, attempting to regulate further than these types of measures by, for example, introducing marketing limitations (i.e. limiting promotional offers) to reduce over-consumption could stifle competition and negatively impact businesses. It would seem evident that further research is needed to more fully understand the practices being adopted by businesses, to ensure an informed response can be developed.

Markets Regime

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

14.1 The current end-to-end process for market studies and investigations can be very slow at around 3 years. In our response to the Government's Consultation on Reforming Competition and Consumer Policy we expressed our support for introducing measures to reduce the overall timetable – in our view, shortening the time period for market studies and investigations is particularly important with respect to sustainability initiatives, given the fact that such initiatives have a tendency to involve fast-paced markets and innovative products. As a result, regulators must have the ability to act fast to stay on top of the issues and prevent distortions in those markets. With this in mind it was encouraging to see the CMA complete its market study into electric vehicle charging within 8 months, having started the process on 2 December 2020 and having published its final report on 23 July 2021. However, it is equally important that efforts to speed up the timetable for market studies and investigations does not have a negative impact on selecting appropriate remedies. In our view it is important for the CMA to be forward-looking when considering remedies, so that it does not impose short-term remedies at the conclusion of market investigations which could inadvertently inhibit sustainability initiatives in the future.

15. **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?**

15.1 We are not aware of any specific examples.

16. **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.**

16.1 Please see our response to Question 14 above – in our view the timetable for market studies and investigations should be shortened in order to keep pace with rapidly-evolving markets, but at the same time the CMA should avoid imposing remedies which inadvertently inhibit sustainability benefits that could arise in the future.

Other Considerations

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

17.1 It is important to note that sustainability initiatives are likely to involve fast-moving markets and rapid developments in technology, and so regularly updated, good-quality guidance and clear engagement with businesses and advisers is essential if regulators are to remain on top of the issues and avoid the emergence of highly dominant companies.

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

18.1 We are not aware of any specific examples.

Eversheds Sutherland (International) LLP
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