

## **CALL FOR INPUTS - ENVIRONMENTAL SUSTAINABILITY AND THE UK COMPETITION AND CONSUMER LAW REGIMES**

### **RESPONSE BY GOWLING WLG (UK) LLP**

We welcome the opportunity to respond to the CMA's call for inputs, which we understand is intended to gather views from interested stakeholders in relation to how the UK competition and consumer law regimes can better support the UK's Net Zero and sustainability goals.

Our response focusses upon the UK competition law regime under the Competition Act 1998 ("CA98").

**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 We are unaware of specific 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. However, in our opinion, this does not mean that:
  - (a) the current CA98 regime is not constraining or frustrating actual or potential agreements or initiatives that could support the UK's Net Zero and sustainability goals; nor
  - (b) if left unchanged, the current CA98 regime will not constrain or frustrate actual or potential agreements or initiatives that could support the UK's Net Zero and sustainability goals in the future.
- 2 That we are unaware of specific examples may be attributable to businesses abandoning potential agreements or initiatives at an early stage in view of perceived competition law compliance risks.
- 3 For example, as the CMA will be aware, its current sustainability guidance "Environmental sustainability agreements and competition law" includes six separate statements that businesses should seek independent legal advice.<sup>1</sup>
- 4 For businesses, these repeated statements by a highly respected competition authority (with powers to fine businesses, disqualify individuals from acting as directors, and institute criminal proceedings against individuals) confirm that environmental sustainability agreements and initiatives necessarily may give rise to competition law compliance risks, and therefore require careful consideration.

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<sup>1</sup> See, "Environmental sustainability agreements and competition law", CMA, 27 January 2021, available at [www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law](https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law), which includes the following statements: (i) "We always recommend you seek independent legal advice to help you determine if your agreement could fall under an exemption or not"; (ii) "Seek independent legal advice, if you are unsure about any aspect of the law"; (iii) "If you think your market share in the relevant market is low, you should consider seeking independent legal advice"; (iv) "Businesses should seek independent legal advice if they think their agreement may benefit from an existing block exemption"; (v) "Businesses should seek independent legal advice on whether their agreement may qualify for an individual exemption"; and (vi) "If you are unsure of the legality of a sustainability agreement, you should seek independent legal advice".

- 5 However, even if businesses were to seek independent legal advice, in light of:
- (a) the range of open issues currently being considered by competition authorities in the context of sustainability and competition law, as confirmed by the existence of the CFI (as well as recent statements and publications issued by other competition authorities); and
  - (b) the current uncertainty facing businesses regarding the extent to which the CMA will seek to diverge from EU case law, decisional practice, and guidance following the UK's exit from the EU (an uncertainty which is furthered by the notable absence from the CMA's current sustainability guidance of EU decisional practice that could be considered particularly relevant, such as CECED),<sup>2</sup>

we anticipate that independent legal advice would address these open issues and uncertainties, with the consequence that recipients of this advice may still be minded to err on the side of caution (i.e. rather than risk entering into an agreement or initiative that could later be held to infringe UK competition law).<sup>3</sup>

- 6 As a result, potential environmental sustainability agreements or initiatives may be delayed or postponed, pending greater clarity as regards the relevant issues and associated competition law compliance risks. If this clarity is not forthcoming, these potential agreements or initiatives may simply not proceed.

**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?**

#### **Environmental sustainability guidance**

- 7 We believe that it would be extremely helpful for the CMA to provide more considered environmental sustainability guidance, so as to establish a clear framework to enable businesses to consider the potential application of UK competition law to environmental sustainability agreements and initiatives.
- 8 In particular, this more considered guidance should confirm (including by reference to EU case law, decisional practice, and guidance, as may be relevant):
- (a) the types of environmental sustainability agreements and initiatives that would generally be expected to fall outside of the application of UK competition law (e.g. on

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<sup>2</sup> See, Commission Decision 2000/475/EC of 24 January 1999 (CECED), OJ [2000] L187/47.

<sup>3</sup> For example, in CECED the European Commission (the "**Commission**") held that a "by object" restriction of competition was nevertheless capable of benefitting from individual exemption, such that the agreement was compatible with what is now Article 101 of the Treaty on the Functioning of the European Union. However, the CMA's current sustainability guidance does not make reference to CECED, and states that "*You must avoid these 'by object' restrictions in your sustainability agreements as they are almost always incompatible with competition rules*". We consider that this statement risks oversimplifying relevant aspects of the legal analysis, particularly in view of CECED, which may result in businesses abandoning potential agreements or initiatives that could ultimately have been compatible with section 2(1) of the CA98.

the basis that the agreements and initiatives in question are unlikely to restrict competition);

- (b) the types of environmental sustainability agreements and initiatives that would generally be expected to be caught by the application of UK competition law, but could be capable of benefitting from exemption, or otherwise being objectively justified where a business holds a dominant position, including explaining how the CMA will consider and assess:
    - (i) cost efficiencies, and efficiencies of a qualitative nature (including providing examples of the types of qualitative efficiencies that the CMA would generally consider to be relevant);
    - (ii) efficiencies resulting from agreements or initiatives which are achieved on separate markets (e.g. markets other than those affected by the relevant restrictions); and
    - (iii) the indispensability of the relevant restrictions to the attainment of efficiencies.
- 9 It would assist businesses if this more considered guidance was refreshed at appropriate intervals, so as to include timely updates in the context of relevant developments at an EU level, as well as within the UK.
- 10 For example, in the context of the Commission's infringement decision in Car Emissions,<sup>4</sup> we understand that:
- (a) the Commission provided guidance to the parties regarding to the types of discussions competitors may have, including in relation to setting standards; and
  - (b) this guidance will be made public with the non-confidential version of the Commission decision, so as to assist other businesses.<sup>5</sup>
- 11 Assuming that this guidance is published by the Commission, we consider it would be helpful for the CMA to confirm its endorsement of this, and to refresh the available environmental sustainability guidance accordingly. Alternatively, if the CMA does not endorse the Commission's guidance, it would be preferable for the CMA to confirm its position, as well as the reasons for this.
- 12 In terms of relevant developments within the UK, having regard to the CMA's recommendation to the Secretary of State in relation to the Vertical Agreements Block Exemption, we note that:

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<sup>4</sup> See, AT.40178 Car Emissions.

<sup>5</sup> See, "EU fines German car cartel €875M over clean emissions technology", Politico, 8 June 2021, available at: [www.politico.eu/article/eu-fines-german-car-cartel-e875m-over-exhaust-gases-emissions](https://www.politico.eu/article/eu-fines-german-car-cartel-e875m-over-exhaust-gases-emissions)

*"...the CMA is minded to provide guidance on environmental sustainability issues in the context of the CMA Verticals Guidance, in particular in relation to the criteria for admission to selective distribution systems".<sup>6</sup>*

- 13 Assuming that this guidance is provided by the CMA (i.e. within the Verticals Guidance), we consider that the available environmental sustainability guidance should be refreshed to include this (or at least to refer to the relevant aspects of the Verticals Guidance).

#### **Proactively inviting businesses to engage**

- 14 The CMA acknowledged within its most recent annual report that:

*"[i]t is important that competition law does not become an unnecessary obstacle to sustainable development, and that businesses are not deterred from taking part in lawful environmental initiatives for fear they may breach competition law".<sup>7</sup>*

- 15 We consider that the CMA has a central role to play in this regard, including in relation to offering businesses clear opportunities to engage with the CMA, so as to seek to ensure that viable environmental sustainability agreements and initiatives have every opportunity to succeed.

- 16 In this context, we note that the CMA has discontinued its Short-form Opinion ("Sfo") trial, and will no longer provide Sfos.<sup>8</sup> Given the novel issues that may be expected to arise in the context of environmental sustainability agreements and initiatives, we would encourage the CMA to proactively invite parties to engage with it on these issues.

- 17 We also consider that it would be helpful for the CMA to establish a means by which to provide formal guidance to prospective participants in environmental sustainability agreements and initiatives, with this guidance subsequently being:

- (a) publicised in a non-confidential form, so as to enable other parties to consider this in the context of their arrangements; and
- (b) included within the available environmental sustainability guidance (i.e. as a result of this guidance being refreshed at appropriate intervals).

- 18 As the CMA is aware, the Commission is already publicly inviting parties to engage with it in relation to environmental sustainability agreements and initiatives.<sup>9</sup> In so doing, the Commission is positioning itself as supporting businesses and innovation.

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<sup>6</sup> See, "UK competition law: Vertical Agreements Block Exemption Regulation - CMA's recommendation", CMA, 3 October 2021, paragraph 7.18, available at: [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>7</sup> See, "Competition and Markets Authority Annual Report and Accounts 2020/21", available at [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)

<sup>8</sup> See, [www.gov.uk/government/publications/guidance-on-the-cmas-approach-to-short-form-opinions](https://www.gov.uk/government/publications/guidance-on-the-cmas-approach-to-short-form-opinions)

<sup>9</sup> See, for example, "Competition Policy Brief 1/2021 - Policy in Support of Europe's Green Ambition", DG COMP, 10 September 2021, available at: [op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF](https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF), which provides that "...the Commission remains ready to consider

- 19 With the CMA supporting the UK's transition to a low carbon economy,<sup>10</sup> we consider that the CMA should also be issuing (and repeating) similar public invitations, and focussing its communications upon positioning the CMA as actively supporting businesses' efforts to engage in the innovative environmental sustainability agreements and initiatives required to achieve this transition.

**Gowling WLG (UK) LLP**

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*requests for individual guidance letters in relation to sustainability initiatives that raise novel issues. In addition, where the public interest so requires, pursuant to Article 10 of Regulation 1/2003, the Commission will also consider adopting decisions finding that the competition rules are not applicable to sustainability initiatives"; and Executive Vice-President Vestager's keynote speech at the 25th IBA Competition Conference, delivered by Inge Bernaerts, Director, DG COMP, 10 September 2021, available at: [ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal_en): "...[t]o decide if a sustainability agreement is legal, we need to carefully weigh the benefits it brings against the harm it could do to consumers. That's why the best form of guidance for business comes from our decisions in individual cases – like our car emissions cartel case in July, which gave some important pointers on what is and isn't allowed. It's also why we want to encourage companies to ask us for our assessment of specific agreements. And in the right cases, we're ready to give individual guidance – or even take a formal decision that an agreement is legal".*

<sup>10</sup> See, "Competition and Markets Authority Annual Plan 2021 to 2022", available at: [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)