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CMA call for inputs on environmental sustainability and the competition and consumer law regimes

Linklaters / Oxera response

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EXECUTIVE SUMMARY

(1) Linklaters LLP and Oxera welcome the opportunity to participate in the CMA's call for inputs as part of its advice to the Secretary of State for Business, Energy and Industrial Strategy ("**BEIS**") and government on how the competition and consumer protection regimes can better support the UK's Net Zero and sustainability goals (including climate adaptation).

(2) Ensuring that the UK, and businesses in the UK, can achieve Net Zero and sustainability objectives (particularly in line with the Glasgow Pact's goal to "keep 1.5°C alive") requires a supportive regulatory environment – and both competition and consumer law have an important role to play in facilitating this.

(3) As discussed in detail below, we consider that this requires, essentially: (i) measures to increase the confidence of businesses in undertaking sustainability initiatives (which may already be justifiable under current competition law – in particular, this would involve the publication of detailed, context-specific and example driven guidance that goes beyond stating general principles (as is now being issued by authorities in other jurisdictions); (ii) a reconsideration of how several key concepts of competition law – in particular, the relevance and quantification of environmental ('out of market') benefits and efficiencies for consumers are applied; and (iii) stronger consumer law protections (combined with meaningful enforcement to act as a deterrent) to both reward bona fide 'green' business initiatives and products and to penalise 'greenwashing' claims.

(4) Linklaters and Oxera have both previously contributed to a number of public consultations addressing similar issues on the role of competition law in achieving sustainability goals (and how to manage the associated challenges). Given that these issues are often similar across Europe, if not globally, the detailed views expressed and evidence cited in these consultation responses are highly pertinent to many of the questions posed by the CMA and, rather than replicate such content here, we refer the CMA to those submissions in addition to the below.[1]

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.

(5) As advisors, we increasingly see instances where companies have forgone beneficial projects because of perceived competition law risks which they considered could not be appropriately mitigated, despite our advice, and where those companies could not effectively pursue those projects alone. In other words, the CA98 created a barrier (even if only perceived) for companies to go forward with their sustainability initiatives.

(6) The following are notable examples of initiatives and agreements that we have recently seen across Europe which have been constrained or frustrated by competition law (even where they have taken place outside the UK, they have been subject to EU-based competition law

[1] In particular, see: (i) Linklaters' response to the European Commission's Consultation on the revised HBER and Horizontal Guidelines (2021), accessible here; (ii) Linklaters' response to the EU Consultation on the revised Climate, Energy and Environmental Aid Guidelines (2021), consultation accessible here; (iii) Linklaters' response to the Commission's Consultation on Competition Policy supporting the Green Deal (2020), accessible here; and (iv) Oxera's thoughts on the EU Consultation on the revised Climate, Energy and Environmental Aid Guidelines (2021), see Agenda (2021), New game, new rules: the draft guidelines for 'green' state aid measures accessible here.

frameworks (i.e., substantively comparable to the CA98 regime)). These are public examples, there are non-public examples which clients are not comfortable being referred to even in an anonymised way.

(7) The common theme in these cases is that, rather than competition law outright prohibiting conduct or agreements, ambiguity and wariness of infringement given the significant penalties that could result prevent businesses taking bolder collective action in the pursuit of Net Zero goals.

(a) **Development of carbon capture technologies**. This is an area where a "first-mover disadvantage" has been hindering the development of innovative technologies. Cooperation is required to ensure sufficient economies of scale for such technologies to be brought to market in a meaningful manner. The competition rules constrain industry participants from engaging in cooperation that would have required exchanging information, for instance, for the development of innovative carbon capture projects. The set-up of these initiatives has therefore been slowed down and companies have instead been seeking state funding to deploy these projects independently.

(b) **Oil and Gas Climate Initiative ("OGCI")**. This is an industry-led initiative to set out guiding principles for member companies to contribute towards achieving a low carbon future.[2] One of the envisaged initiatives was to fix common targets for the reduction of methane, effectively by using a common average non-binding target. While a fixed and binding target would have had far more effective results in driving lower emissions, many industry participants believed that setting such binding targets could have violated competition law. Some industry participants referred in this regard to the European Commission's investigation into the German car manufacturers as an example that certain cooperation to reduce emissions can effectively be regarded as being in violation of article 101 TFEU / Chapter I of the CA98 (see further on this in point (c) below).[3] Accordingly, the OGCI decided to take a non-binding and more conservative approach, rendering it potentially less likely that the final goal of methane reduction will be (quickly) achieved.

(c) Companies in the automotive sector also faces challenges following the European Commission's "circle of five" cartel investigation regarding whether German car manufacturers colluded to limit the development and roll-out of technologies to reduce passenger car emissions, which resulted in car manufacturers being fined €875 million for restricting competition in emissions cleaning for new diesel passenger cars. Commissioner Vestager described the decision as being "*about how legitimate technical cooperation went wrong*" – but what is still absent is a clear set of guidance for firms on where the line is drawn between legitimate and unacceptable conduct.

(8) As apparent from the examples cited above, the key issues with the rules governing anticompetitive agreements under competition law (including the CA98 Chapter I prohibition) are uncertainty, ambiguity and a reluctance amongst businesses to even consider, let alone launch, projects and collaborations that are *arguably* (and that is the crux of the issue) within the scope of what is permitted under the relevant regime. This is partly due to a lack of clear guidance on how sustainability projects and collaborations are treated, partly due to the very

[2] See: https://www.ogci.com/.

[3] See: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581.

significant consequences that can result from getting it wrong, and partly due to the fact that some green initiatives are not intended to be profitable so that any perceived risk of downside (with little to no economic upside) is seen as too great a risk to a project. All these factors hold true under the CA98 regime.

(9) Our experience is that many businesses want to work closely with other market participants (including competitors) when pursuing sustainability goals, with more than 9 out of 10 (or 93%) saying that collaboration is key to achieving progress on environmental and sustainability goals. 57% of respondents have not pursued sustainability projects because the legal risk was too high. This is in part due to recurring concerns about first-mover disadvantage.

(10) Even where we and our clients have engaged with the CMA (as well as other competition agencies across Europe) to enquire about how a specific sustainability project would be treated under the CA98 regime, the advice (mostly) given is to self-assess or only a low-level of comfort is provided that the CMA has no further questions at that time. On balance, many firms will decide not to proceed with an initiative rather than take on that enforcement risk.

(11) As such, measures providing greater clarity and certainty about the regulatory treatment of cooperation under CA98 of sustainability initiatives, such as guidelines or a "pre-approval process", would be key in "unblocking" such initiatives by giving businesses more confidence to pursue them.

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?

Confidence-building measures

(12) There is not necessarily a need for statutory reform of CA98. What is needed is clarity from the CMA, as well as authorities in other jurisdictions, on how it will approach sustainability goals within the framework of the competition regime. There are a number of potential solutions available – largely within the current legislative framework. In particular:

- the publication of detailed, context-specific and example driven guidance that goes beyond stating general principles (of which practitioners are already well aware) in respect of sustainability initiatives;
- the establishment of block exemptions that cover sustainability initiatives;
- greater availability of comfort letters which better enable business to have confidence in relying on them, and more generally having an open-door policy (potentially anonymous) that would help businesses discuss their concerns with the CMA;
- regulatory sandboxes; and
- more regular communications from the CMA on its activities in this area (such as number of comfort letters given, confidential discussions held), learnings and anonymised case studies, as well as publishing positive/non-applicability decisions.

(13) Of the above, perhaps the most important would be guidelines which follow a similar approach to the Guidelines issued by the Dutch Authority for Consumers and Markets

("**ACM**")[4]. Specifically, the guidelines helpfully work through agreements that would not restrict competition at all and how agreement might be justified by reference to consumer benefits, such as:

- agreements that incentivise undertakings to make a positive contribution to a sustainability objective without being binding on the individual undertakings;
- codes of conduct promoting environmentally conscious, climate conscious or socially responsible practices;
- agreements that are aimed at improving product quality, while, at the same time, certain products or products that are produced in a less sustainable manner are no longer sold; and
- initiatives where new products or markets are created through innovation, and where a joint initiative is needed for acquiring sufficient production resources including know-how, or for achieving sufficient scale.[5]

(14) There are several categories of co-operation agreement that can contribute to sustainability goals, which should be explored in the guidelines:

- binding commitments and agreements that incentivise participants to contribute to a sustainability objective;
- codes of conduct promoting environmental or climate-conscious practices, including joint standards and certification labels (e.g., about the use of raw materials or production methods);
- agreements aimed at improving product quality and replacing products that are produced in a less sustainable manner (e.g., reducing or phasing out packaging material or technologies where greener alternatives are available);
- agreements that concern initiatives where new products or markets are created, and where a joint initiative is needed to acquire enough production resources, including know-how, or to achieve sufficient scale; and
- agreements that participants, their suppliers and/or their distributors will respect sustainability laws including labour laws (e.g., on child labour and minimum wages), environmental rules (e.g., banning illegal logging) and fair-trade rules.

Accounting for environmental benefits / efficiencies

(15) The CMA's Merger Assessment Guidelines ("**MAGs**") acknowledge environmental benefits as relevant consumer benefits: "*What constitutes higher quality, greater choice or greater innovation will depend on the facts of individual cases. It might be, for example, that benefits in the form of environmental sustainability and supporting the transition to a low carbon economy are relevant customer benefits in some circumstances*".[6] We understand the same principle applies to efficiencies following from agreements but confirmation and guidance from the CMA on this point would be valuable.

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[4] ACM, (2021) 'Second draft version: guidelines on sustainability agreements – opportunities within competition law' ("**GSA**"). See: https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law.

[5] ACM, (2021), GSA, p. 9.

[6] CMA (2021) 'Merger Assessment Guidelines (CMA129), updated 18 March 2021' ("**MAGs**"), para 8.21.

(16) In terms of *quantifying* environmental efficiencies from agreements, it would be particularly useful for the CMA to provide guidance on a number of aspects. The below relate to how to balance the environmental benefits of an agreement with a potential reduction of competition. There are a number of economic tools available to effectively 'convert' environmental effects into monetary terms.[7] We will not address all of these methods here but it is important to stress that future guidance should include two key elements to ensure that there is more clarity on the appropriate applications of these methods.

(17) ***The shadow prices framework***. This framework allows for the monetisation of environmental benefits, such as a reduction in greenhouse gas emissions. Shadow prices are prices that are not actually observed in the market, but inferred so as to reflect the value that society ascribes to a particular product. In the context of environmental economics, there exist many different methods for estimating appropriate shadow prices (e.g., for the reduction of greenhouse gas emissions), and such shadow prices have already been used by other competition authorities.[8] The exact value of a shadow price could, for instance, be determined as the price that is required to meet the targets set by the Paris Agreement (by one estimate is currently at £40 to £100 per tonne of CO2 emission)[9] or the Glasgow Pact.[10] Given that there are a number of studies that consider how to determine the shadow price, the CMA would need to provide guidance on which one they consider the most appropriate (potentially in collaboration with other relevant authorities or government departments active in the area in order to ensure a consistent regulatory approach / approach across Government).

(18) ***Best practices for designing consumer 'willingness to pay' surveys***. The CMA has helpfully published its 'Good practice in the design and presentation of customer survey evidence in merger cases' guidance.[11] This provides assistance and guidance on how to design a reliable consumer survey. However, when it comes to assessing consumer willingness to pay, there are a few other aspects that need attention.

(i) Willingness to pay for a greener product (as opposed to a less green or non-green product) can be used as a proxy for the environmental benefits following from an agreement that results in a greener product. To minimise the social bias and strategic bias that respondents may have with regular direct questioning about how much they would be willing to pay for a product, one can use conjoint analysis. This has been briefly discussed in the above-mentioned Good practice guidance, but has not been developed and would benefit from further consideration in future guidance. Sharing

[7] For a good overview of these methods, see the study commissioned by the Netherlands Authority for Consumers and Markets (ACM) and the Hellenic Competition Commission (HCC) (2021), 'Technical Report on Sustainability and Competition'. See: https://www.acm.nl/en/publications/technical-report-sustainability-and-competition.

[8] ACM (2014) 'Notice on the agreement to close down coal power plants'. See: https://www.acm.nl/sites/default/files/old_publication/publicaties/12082_acm-analysis-of-closing-down-5-coal-power-plants-as-part-of-ser-energieakkoord.pdf.

[9] Piano (2018), 'Eindrapportage Expertnetwerk Schaduwprijzen'. See https://www.pianoo.nl/sites/default/files/media/documents/Expertnetwerk-Schaduwprijzen-eindrapportage-november2018.pdf, p. 14. This study is referred to in the ACM draft guidance on sustainability agreements. See also LSE (2019), 'How to price carbon to reach net-zero emissions in the UK' https://www.lse.ac.uk/granthaminstitute/publication/how-to-price-carbon-to-reach-net-zero-emissions-in-the-uk/.

[10] The UK Department for Environment, Food & Rural Affairs proposed in December 2007 a shadow price of £25 to £40 per tonne of CO2 emission. DEFRA (2007) 'The social cost of carbon and the shadow price of carbon: what they are and how to use them in economic appraisals in the UK'. See: https://www.gov.uk/government/publications/shadow-price-of-carbon-economic-appraisal-in-the-uk.

[11] CMA (2018), 'Good practice in the design and presentation of customer survey evidence in merger cases'. See: https://www.gov.uk/government/publications/mergers-consumer-survey-evidence-design-and-presentation/good-practice-in-the-design-and-presentation-of-customer-survey-evidence-in-merger-cases.

the experience that the CMA already has with conjoint analysis in the context of the Amazon/Deliveroo merger case would be particularly valuable here.

(ii) Another point to be considered when designing a 'willingness to pay' service is the impact of behavioural biases, such as the endowment effect and loss aversion. Due to this, the willingness to pay (e.g., What is the maximum you would be willing to pay in order to reduce CO2 emission in your city by x%) is often smaller than the willingness to accept (e.g., What is the maximum you would be willing to accept for an increase in CO2 emissions in your city by x%?).[12] Hence, the way in which questions are presented (known as choice architecture) can affect the outcome of respondents' choices.

(19) Once environmental benefits are quantified, they need to be balanced against the potential effects of the reduction in competition. On this balancing exercise, the following three issues would benefit from more considered guidance from the CMA:

- **Out of market efficiencies**. The MAGs indicate that it will ***only*** provide credit for those efficiencies which benefit *customers in the UK*.[13] The CMA has taken the same position as the European Commission when it comes to out-of-market efficiencies[14]. Even though environmental benefits can also have clear benefits to non-consumers of the product in question, these benefits are not taken into account when quantifying and balancing the environmental benefits of an agreement or merger. If competition law is to facilitate businesses' pursuit of environmentally beneficial cooperation, it would be advisable to allow for so called out-of-market efficiencies. This can be done for either the full range of sustainability agreements or, if preferred, for only specific categories of agreements. As an example, the ACM has published in its second draft guidelines that, "*with regard to environmental-damage agreements, it should be possible […], to take into account benefits for others than merely those of the users*".[15] It seems likely that, when accounting for wider benefits (e.g., following from a reduction of CO2 emissions) that flow through to the society, this may significantly impact the outcome of the assessment.

  It seems that the CMA already has the discretion to consider out-of-market efficiencies—at least in merger cases, as is discussed in para 69 of the Mergers: Exceptions to the duty to refer (2018).[16] This discretion has – to our understanding – hardly ever been exercised in practice. It is worth considering whether this instrument can be used in the context of green agreements as well.

- **Discount factor**. To quantify the total sustainability effects of an agreement or merger, future effects would need to be estimated and then discounted back using

[12] Oxera Agenda (2017), 'The science of misbehaving: Richard Thaler wins the Nobel Prize'. See https://www.oxera.com/insights/agenda/articles/the-science-of-misbehaving-richard-thaler-wins-the-nobel-prize/.

[13] CMA, MAGs, para. 8.20.

[14] European Commission, (2004) 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings', para. 79. See: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN.

[15] ACM (2021), GSA, para. 48. See: https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law.

[16] Para 69: "*In addition, the CMA may conclude that the merger gives rise to a realistic prospect of a SLC in one market, but also gives rise to efficiencies in a different market. Moreover, the merger may give rise to an adverse effect on one set of customers but not on another set of customers. The CMA has the discretion not to refer a merger for a Phase 2 investigation, or not to accept remedies following a Phase 2 investigation, if the efficiencies arising from the merger result in relevant customer benefits which outweigh the SLC caused by the merger.*"

an appropriate discount rate. Given that environmental effect may only realise in the future and not directly, they will be getting lower net present values than effects that materialise immediately or in the short run (such as a price increase). If the CMA wants to stimulate sustainability agreements or mergers, one could apply a different discount rate for projects that affect the environment. For instance, the discount rate for environmental impacts could be lower than the normal discount rate used in business/project appraisal, to ensure that adequate weight is placed on the longer term and potential losses in the worst-case scenario. The appropriate discount rate is still up for debate and further research. For instance, the UK government, as part of its 2020 review of the Green Book (which sets out HM Treasury guidance on how to appraise and evaluate policies, projects and programmes) has commissioned an expert review into whether the social discount rate ("**SDR**") should be adjusted for projects that affect the environment.[17] Economics literature also offers various views on how to estimate the discount rate for environmental effects.[18] If there is more clarity on such an SDR, it would be helpful if the CMA would provide clarity of whether she would accept such a discount rate being applied in competition (both antitrust and mergers) cases.

- **Distribution of effects with different consumer groups**. Environmental effects and the costs associated with achieving or avoiding those effects are likely to affect different groups in distinct ways. For example, increasing prices for energy used for heating is likely to have a larger impact on low-income groups because these costs tend to constitute a greater proportion of their income. Similarly, environmental harm may affect different groups differently, e.g., air pollution affects individuals living in densely populated areas more than individuals in rural areas. In general, the challenge when considering different groups is that the same amount of additional income/costs would have varying and uneven effects; this is paralleled for pollution, which also would affect different groups in different ways.

(20) Achieving distributional goals therefore raises questions about the distributional effects of the costs and benefits on how to achieve them. There are discussions on how to account for different distributional effects in the public policy literature: for example, the HM Treasury's Green Book provides guidance on how to assess distributional effects when an intended policy is likely to have significant redistributive effects; in particular, it provides examples on how redistributional effects can be weighted according to the income level of different groups.[19] The Dutch Centraal Planbureau ("**CPB**") published a suggestion on how welfare

[17] HM Treasury (2020), 'Green Book Supplementary Document: Social discount rates for Cost-Benefit Analysis: A Report for HM Treasury', see: https://www.gov.uk/government/publications/green-book-supplementary-document-social-discount-rates-for-cost-benefit-analysis-a-report-for-hm-treasury.

[18] Giglio et al. (2015), for example, suggest that the term structure of the discount rate for climate change abatement investments should be upward-sloping – i.e., higher rates for a longer horizon – but with the risk-free rate as the upper bound. Giglio, S., Maggiori, M., Stroebel, J. and Weber, A. (2015), 'Climate change and long-run discount rates: Evidence from real estate', Working paper, National Bureau of Economic Research see: https://academic.oup.com/rfs/article/34/8/3527/6187965. See also Oxera (2020), 'A formula for success: reviewing the social discount rate', Agenda in focus, see: https://www.oxera.com/insights/agenda/articles/a-formula-for-success-reviewing-the-social-discount-rate/.

[19] See 2.19 and 2.20 as well as, for collateral effects, 4.15 to 4.19 and in particular Annex A3 in HM Treasury (2020) 'The Green Book – Central Government Guidance on Appraisal and Evaluation'. See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/938046/The_Green_Book_2020.pdf.

weighting can be accounted for in a cost-benefit analysis.[20] Hence, there is guidance on how to implement different weightings for different groups but there is no guidance on what weights to use for which groups. These are key but challenging policy questions and the CMA should request that the Secretary of State provide guidance on how different groups (or the effects on different groups) should be weighted in order to calculate an overall welfare effect.

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.

(21) In addition to the above practical examples of potential environmental sustainability initiatives that would benefit from further CMA guidance include, in particular, cases where firms would benefit from each other's sustainability efforts. In such cases, there is a 'positive environmental spillover' between firms that does not get properly accounted for absent coordination, and private and social objectives can be aligned.

(22) Key issues may also include, for instance, positive social spill-overs from a common cost saving, improved industry reputation, firm altruism and genuine 'corporate purpose', reduced existential threat, and the avoidance of less effective and costly industry-wide government intervention.[21]

(23) To provide one concrete but hypothetical example: the airline industry may want to jointly invest in developing sustainable alternatives to kerosene, in order to improve the overall reputation of flying and maintain demand, but each individual airline may not have sufficient incentive to do this on its own—as it is not projected to fully internalise this common benefit of improved industry reputation.

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?

(24) We do not have further views in relation to private enforcement.

[20] See Thomas van der Pol, Frits Bos, Gerbert Romijn (2017) 'Distributionally Weighted Cost-Benefit Analysis: From Theory to Practice', CPB Discussion Paper 364. See: https://www.cpb.nl/sites/default/files/omnidownload/CPB-Discussion-Paper-364-Distributionally-weighted-cost-benefit-analysis.pdf.

[21] For a discussion of these, see Oxera (2021), 'When to give the green light to green agreements', *Agenda*, September.

MERGER CONTROL REGIME

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.

(25) We consider one of the key issues to be that the current merger control framework does not properly allow for sustainability to be taken into account when assessing a transaction.

(26) This can frustrate sustainability initiatives. For example, a transaction may harm competition but nevertheless have a positive effect on the environment. Or, on the other hand, there may be no substantial lessening of competition but the transaction may give rise to negative environmental effects. The merger analysis should account for environmental efficiencies resulting from the deal, however this can be very challenging. The current framework does not provide for environmental benefits to be quantified in a way which makes them easily comparable with other factors, such as price (see discussion in relation to better accounting for out of market benefits in paragraph (15) above). The result of this is that parties may be discouraged from entering into a transaction that would be, overall, when accounting for the environmental benefits, beneficial for consumers or, even if they do proceed, the CMA may oppose the transaction (either blocking it or requiring remedies that nullify the environmental efficiencies).

(27) A further example of how the current framework can constrain sustainability initiatives is where, as a result of a transaction, consumers have less choice of environmentally friendly products and/or technologies. This may occur where, for example, following a merger, the merged entity lowers prices which, in turn, may lead to producers being forced to lower their sustainability standards or lay aside sustainable (but costly) initiatives.

(28) Another example is a 'sustainability killer acquisition' scenario, where an established market player with a less 'green' business model acquires a smaller business selling a more sustainable product. The acquirer may remove a green option from the market (thereby reducing consumer choice and potentially leading to higher prices for the 'green' product option), Alternatively, the acquirer could integrate the smaller brand's production processes into their own, reducing the environmental quality of the final product.

(29) The considerations and recommendations that are described above in relation to the CA98 regime, are also applicable and relevant for the merger control regime. However, for discounting the effects of the merger, there is one additional consideration when it comes to merger control. Specifically, the usual timeframe of two or three years to assess merger efficiencies may be too short for the environmental benefits to fully materialise. The CMA could, therefore, provide guidance as to the timeframe applied to merger control when the merger has clear environmental efficiencies playing a role.

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.

(30) We are not aware of any such examples in the UK.

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.

(31) As has been discussed we consider one of the key ways in which the CMA's merger control regime could better contribute to the UK's sustainability goals is by creating a framework which provides sufficient certainty for businesses to pursue opportunities and projects.

(32) In our experience, and that of many of our clients' businesses often adopt a particularly cautious approach when considering sustainability projects due to the legal uncertainty around collaborating with other market participants on common goals (especially competitors).

(33) As discussed in paragraph (13) the CMA should reconsider the definition of consumer benefits. It should be widely defined to take into account a range of consumers. Importantly, this should include future consumers. For example, a merger which will result in cleaner air will provide a benefit for future generations and this should be taken into account as part of the assessment.

(34) The ACM's guidelines and recent legal memo *What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?* is a step in the right direction and similar guidance from the CMA in relation to both antitrust and mergers assessment would be hugely valuable.

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.

(35) The CMA should consider evidence (including, if need be, by commissioning research / working with parties to commission research in the same way it currently arranges for surveys to be carried out etc) from external bodies and public authorities that have expert and specialist capabilities, and which are better positioned to carry out the analysis and provide relevant input.

(36) As in other questions, there is a broader issue about how environmental and competition values can be compared and offset, and this may require government guidance or direct regulation. In addition to the points above, for example, the EU's carbon emissions permit scheme or the Taxonomy Regulation, which sets out an EU-wide classification system to identify those economic activities which are considered "environmentally sustainable", and to provide technical benchmarks against which dealmakers and authorities can more clearly measure the impact of sustainability projects.

(37) Guidance should also cover situations where the environmental benefit may outweigh the competition concerns. Clear guidance would allow deals to be assessed under the current regime, provide certainty and negate the need for government intervention. For example, the German government decided to approve *Milba/Zollern* – which had been blocked by the FCO – on the basis that its environment policy objectives outweighed the competition concerns.

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.

(38) Nothing further in addition to the above.

CONSUMER PROTECTION LAW

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

(39) We do not consider that the current consumer protection law framework frustrates or constrains sustainability initiatives – on the contrary, the issue is that the current regime does not go far enough in driving such pro-sustainability initiatives. In contrast to the issues associated with the competition law regime, where more guidance and clarity on how sustainability projects can be undertaken within the existing rules, the consumer law framework should arguably be expanded to encourage and stimulate pro-sustainability initiatives.

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

(40) We agree, in principle, that ensuring consumers have more – and better quality – information available to them on the environmental impact of products throughout their full life-cycles could be a significant prompt for consumers to avoid more environmentally damaging products (and, in turn, incentivise businesses to provide more environmentally friendly alternatives).

(41) However, practically, accessing and assessing the necessary information from throughout the fully supply chain is likely to be extremely challenging for many firms. This is likely to be especially the case if they have international supply chains which may involve many different providers in many different jurisdictions (many of which the UK business may not even have a direct relationship with). Depending on how the rules are structured, this may place a disproportionate burden on small- and medium-sized firms that source products from abroad but which do not have the organisational resources of larger firms available to ensure compliance.

(42) It is unclear how the reforms would ensure that foreign manufacturers and providers would then be subject to UK information provision requirements, particularly if they are not direct suppliers to the UK business. In such circumstances, those businesses providing products to UK consumers may not be able to comply with the informational requirements.

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?

(43) More effective enforcement: in addition to the proposals in relation to information, obsolescence and over-consumption made by the CMA, it is also important to ensure a reformed consumer law framework is effectively enforced to ensure there is a deterrent for non-compliance.

(44) Enforcement must involve more than a "rap on the knuckles" in order to change firms' conduct and strategies. However, the CMA currently has no power to make businesses stop illegal practices, and must go to court in order to obtain a binding remedy. Even when the CMA wins in court, no civil fines are available to it – severely limiting the deterrence value of enforcement. Although we do not consider that the Government's proposed approach of enabling the CMA to impose fines of up to 10% of global turnover for breaches of consumer protection law is either necessary or proportionate,[22] more limited civil fining powers for the CMA would in our view be appropriate and consistent with international consumer law norms.

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

Provision of environmental information

(45) Although the CMA has noted that, in some instances, information about a product or service's environmental impact may be deemed 'material information', relatively few products / services are likely to clearly fall within this scope and, given that there is no available guidance as to which products / services would do so, it would likely be challenging to enforce a case on the basis that such 'material information' had been omitted. The CMA has already given guidance on 'greenwashing claims' and advised that it will be undertaking a review of such claims in 2022 – the outcomes of such a review will have a significant bearing on whether material omissions or misleading claims can be effectively enforced against.

(46) In principle, ensuring the provision of clear information on environmental impact is an important means for consumers to take informed decisions about products. The use of clear and consistent standards or definitions of key environmental terms would also help prevent businesses misleading consumers by misrepresenting the environmental impact of products. This goes beyond the environmental impact of specific products, given that consumers often focus on what they know about the company and the brand and use that as a proxy for the product. This means that the CMA may need to either ensure for itself (or advise Government to this effect) that consumer law is supported by and aligned with requirements for, for example, investor disclosures provided by listed companies or auditing standards for reporting climate action. For example, many firms have made laudable pledges to reduce their carbon emissions. However, such commitments are often far in the future, do not require action to be taken until a much later date, and are not necessarily effectively audited. Nevertheless, such claims can strongly affect how consumers perceive brands and their consumption habits – and, potentially, may mislead consumers into believing they are purchasing greener products or services than is actually the case.

(47) Some form of generally recognised measurements of environmental impact that are applied across products and which consumers can factor into their decision-making process (in the same way they seek to objectively compare price or quality) could be hugely valuable. Ratings, such as the energy efficiency ratings used for white goods, are an excellent example of how this information can be used practically by consumers (although applying a

[22] Department for Business, Energy & Industrial Strategy (2021), 'Reforming Competition and Consumer Policy'. See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004096/CCS0721951242-001_Reforming_Competition_and_Consumer_Policy_Web_Accessible.pdf.

universal set of such ratings across consumer products would be of little use given the environmental impact would vary significant by product category – and setting ratings within categories would be even hugely challenging).

(48) However, a prescriptive approach specifying what the requirements for particular terms may not be effective. If the system is widely recognised and understandable for consumers, they may be able to use it to compare and assess products. However, where a given product does not satisfy a particular definition, firms may well market it using similar but different 'green sounding' language – and consumers may not appreciate the difference. This may advocate for a broader, more principles-based approach that firms cannot so easily sidestep – but, as is currently the case, this is likely to be harder to enforce as substantive infringements would be less categorical.

(49) It is also questionable whether it is possible to accurately account for the environmental impact across the life cycle of a product, particularly if that impact would vary based on how the consumer uses and disposes of it. It would require broad assumptions about, for example, the length of use, method of disposal, and the availability, practicality and use of recycling or reconditioning.

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?

Obsolescence

(50) Extending the life of products (or, indeed, the frequency with which services may be required) is, as the CMA argues, an important part of reducing consumer's environmental impact. The CMA is also right that purely informational remedies are unlikely to make a significant difference – the CMA cites the Apple iPhone case (regarding the battery health of phones), but this is an example of a situation in which the popularity and role of Apple products limits the use for consumers of better information on battery health – many, if not most, will continue to buy iPhones.

(51) In this context, further consideration should be given to providing consumers with a greater 'right to repair', particularly with respect to technology products, and ensuring they are able to have them fully repaired by third parties of their choice (thereby reducing unnecessary waste and challenging built-in obsolescence for products).

MARKETS REGIME

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

(52) The CMA's focus should be on ensuring effective competition in key markets, especially nascent ones (the EV charging market study is a good example of where the CMA has done this, with positive outcomes for a market which is particularly important for the Net Zero challenge). The CMA's priority for such markets should be undertaking relatively quick reviews with a view to addressing potential issues and facilitating change while these markets are still developing.

(53) Sustainability and competition are not always in conflict. Yet, in its assessment of markets, the CMA should consider that, often, having "the greenest" tech can be a competitive advantage and in many markets it is sufficient for market forces to do the work. However, there are places where there are, among other disincentives, the first mover disadvantage, high sunk costs or a lack of consumer response. It would help if the CMA vocalised its view where competition is insufficient and considered if remedies may be appropriate to deal with such issues which are hindering a 'green transition' within a market (including by making recommendations to Government for policy changes).

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?

(54) The CMA should liaise closely with government departments (such as BEIS, the Department for Environment, Food and Rural Affairs, the Department for Transport, or the Department for Levelling Up, Housing and Communities) which have particular responsibilities related to Net Zero projects and consider whether they are experiencing obstacles that may indicate potential issues. Even where such issues have not reached the stage or severity where the CMA may normally launch a market study in other markets, there may be value in the CMA conducting initial work to prompt changes, such as hosting working groups, sending letters or inviting market feedback.

(55) In addition to the above, there are a number of sources the CMA can use to identify which markets are particularly important for environmental considerations and reaching Net Zero, including those referenced within or related to those sectors set out in the Government's Net Zero Strategy: Build Back Greener and Heat and Buildings Strategy.

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.

(56) The use of shorter focussed studies like the EV Charging Study and publication of advisory letters to parties should be prioritised to provide rapid signals to the market in the sustainability area.

OTHER CONSIDERATIONS

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

(57) The CMA should also consider, in its advice to the Secretary of State, the important role of the new UK subsidies control regime, as set out in the Subsidy Control Bill 2021 (not yet in force), in advancing the UK's Net Zero and sustainability goals. In particular, we have the following three suggestions for increasing the certainty, efficiency and efficacy of this new regime:

(58) First, while we note that this new regime already includes special principles for subsidies in relation to energy and environment (i.e., Schedule 2 of the Subsidy Control Bill), these principles are broadly drafted. Having additional guidelines on the application of such principles would improve the regime by providing greater certainty and helping awarding

authorities and businesses alike to know where they stand – and, therefore, have greater confidence in relying on such principles.

(59) Second, whilst the mechanism for Streamlined Subsidies has not been announced yet, including clean energy / environmental subsidy categories would be a pragmatic step to facilitate the easy delivery (with maximum legal certainty) of low-level subsidies in supposedly uncontroversial situations that would advance the UK's Net Zero and sustainability goals. According to European Commission statistics, most EU State aid is awarded on the basis of block exemptions, which achieve the same effect of Streamlined Subsidies, so not having an equivalent provision in the UK to facilitate uncontroversial subsidies for clean energy / environmental initiatives seems like a missed opportunity.

(60) Finally, while subsidies can act as a welcome catalyst in advancing advance the UK's Net Zero and sustainability goals, large amounts of subsidies are still being granted to activities that have a negative net impact on the environment, such as construction and agriculture. Subsidies in these two sectors, amongst others, would not be reviewed against the special energy and environment principles, but against the 'normal' principles set out in Schedule 1 of the Subsidy Control Bill. These 'normal' principles do not mention the UK's Net Zero and sustainability goals at all, despite it being widely accepted that change is necessary in all economic sectors if the UK is to achieve Net Zero. Therefore, not having any mention of environmental considerations in the principles guiding the use of public funds (outside of subsidies directly subsidies in relation to energy and environment) seems like another missed opportunity.

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

(61) As discussed above, it is critical that the CMA provides clear and useful guidance for businesses in order for them to have the confidence and incentive to carry out sustainability projects and collaborations that may otherwise be considered too risky from a regulatory perspective.