

# SLAUGHTER AND MAY

## Slaughter and May's Response to Competition and Markets Authority's 'Call for Inputs': Environmental Sustainability and the Competition and Consumer Law Regimes

### 1. Executive Summary

- 1.1 This document sets out Slaughter and May's response to the CMA's 'Call for Inputs' dated 29 September 2021 ("**CFI**").<sup>1</sup> This response has been informed by conversations with our clients representing a broad range of industries.<sup>2</sup>
- 1.2 We welcome the opportunity to respond to the CFI and we support the CMA's aim of gathering views from stakeholders on how the competition and consumer regimes could better support the UK's Net Zero and environmental sustainability goals ("**Environmental Goals**"). We agree with the CMA that regulation and government policy should be the primary means to achieve the UK's Environmental Goals, but that "*businesses can play an important role through a wide range of initiatives (including cooperation agreements and unilateral initiatives)*".<sup>3</sup> Mobilising the private sector will be essential to realising the UK's Environmental Goals, but this will only be achieved if the UK's legal and regulatory landscape is simple, clear and navigable.
- 1.3 As the main regulatory body for competition and consumer law in the UK, the CMA has an important role to play in ensuring that:
- (A) New and existing laws and regulations are clear and unambiguous.
  - (B) The private sector is provided with sufficient guidance to be able to easily navigate the regulatory landscape.
  - (C) Regulatory oversight is reasonable and proportionate and does not overburden the private sector, especially in nascent industries.
  - (D) The enforcement regime is fair and predictable while making allowances for the specific circumstances of businesses attempting to address significant and challenging environmental and sustainability objectives.
- 1.4 We consider that the CMA should take into account the factors listed above when advising the UK Government and performing its remit across competition law, merger control, consumer protection law and the markets regime. In addition, we have provided below responses to the specific questions posed in the CFI. Our response focuses predominantly on the competition law enforcement regime questions as we consider that this area currently poses the most uncertainty for businesses.

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<sup>1</sup> Slaughter and May is an international law firm headquartered in London.

<sup>2</sup> Including aviation, energy production, mining, engineering, packaging, telecoms, technology, pharmaceuticals, FMCG and asset management.

<sup>3</sup> Paragraph 8 of the CFI.

### 2. Competition Law Enforcement

#### Overview

- 2.1 Businesses across many industries are taking unilateral action to address environmental and sustainability challenges. Competition has a part to play in achieving the UK's Environmental Goals, especially where customers value greener and more sustainable alternatives.
- 2.2 However, in some instances unilateral action is not capable of delivering the changes required to achieve the UK's Environmental Goals, or will not deliver them fast enough to avoid significant environmental and social harm. Cooperation and collaboration is therefore necessary between businesses. This is especially the case where a paradigmatic shift is required by an industry to meet sustainability objectives, for example when the core product needs to fundamentally change but there is no commercially viable sustainable alternative available. It is not sufficient to wait for regulation to drive changes; businesses want to move faster and have ambitions to do so.
- 2.3 The actual or perceived risk of breaching competition law is restricting the willingness of businesses to cooperate to achieve their individual and industry-wide sustainability objectives, even where such cooperation may ultimately be compatible with competition law. Whether legally founded or not, competition law concerns slow down the speed of sustainability initiatives by putting in place an additional hurdle and reducing the willingness of businesses to participate. Ultimately, these risks can contribute to the failure of sustainability initiatives.
- 2.4 We welcome the fact the CMA has already published its guidance on 'Environmental sustainability agreements and competition law'.<sup>4</sup> However, we consider that further detailed guidance is required to assist businesses in assessing competition law risks for their sustainability projects, in particular regarding the weight to be given to sustainability benefits in light of the UK's Environmental Goals. Failure to provide guidance promptly will mean that the actual or perceived risk of breaching competition law will continue to restrict collaborations between businesses, slowing the attainment of the UK's Environmental Goals.

**Question 1: Are you aware of examples where the Competition Act 1998 regime ("CA98") 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.**

- 2.5 As the CMA is aware, concerns about climate change are having a significant impact on the UK economy, changing market dynamics and consumer behaviour. Despite the need to ensure that "*markets remain competitive and open to disruptive innovation*",<sup>5</sup> it is

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<sup>4</sup> CMA Guidance, [Environmental sustainability agreements and competition law](#), 27 January 2021.

<sup>5</sup> [Competition and Markets Authority Annual Plan 2020/21](#), March 2020.

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important to recognise that competition has also delivered negative outcomes for the environment, consumers and global citizens.

- 2.6 Indeed, the 2006 Stern Review described climate change as “*the greatest market failure the world has ever seen*”.<sup>6</sup> The scale of this market failure is evident from the fact that 15 years later climate change forecasts have worsened and competitive markets have not always delivered comprehensive solutions. In light of this, it is necessary to consider whether cooperation rather than competition between businesses could lead to greener outcomes, at least in certain circumstances.

### Commercial rationale limiting unilateral action

- 2.7 Our clients have highlighted the importance of sustainability objectives in their industries. Where possible, they are taking unilateral action to achieve sustainability objectives. Indeed, they want to compete and to gain a competitive advantage by providing more sustainable products and services than their competitors.
- 2.8 In some instances, there is a strong commercial rationale for businesses to increase the sustainability of their products and services (absent any legal or regulatory requirements). This may be the case where doing so reduces production costs or leads to only marginal cost implications. It may also be the case where there is a strong willingness from their customers to pay more for sustainable options. In these instances it is clear that competition between businesses has the potential to support the UK's Environmental Goals.
- 2.9 However, it is important to recognise that this is not always the case. Especially when adopting a more sustainable approach is not currently, and is not forecast to become, commercially viable. This may occur when there is no customer willingness to pay more for more sustainable alternatives (or indeed the full environmental cost of their current consumption) and, for example when:
- (A) A sustainability initiative would add additional costs without improving the core product, e.g. providing greater reporting on environmental costs.
  - (B) Significant capital expenditure is required, e.g. in research and development to invent new technologies, with no certainty of success or return on investment.
  - (C) Adopting a more sustainable approach would increase a company's costs and create a 'first mover disadvantage', e.g. where the company using more sustainable raw materials or production methods is undercut by rival companies that have not done the same.
- 2.10 In these instances, unless a more cooperative approach can be adopted it may threaten the achievement of sustainability goals.

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<sup>6</sup> [Stern Review Report on the Economics of Climate Change](#), Summary of Conclusions, page viii.

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### Examples of cooperation

- 2.11 Based on our discussions with our clients we have identified the following non-exhaustive list of scenarios where cooperation could help support the UK's Environmental Goals:
- (A) Joint R&D efforts to develop new sustainable technologies or processes that do not currently exist and would require significant capital expenditure to invent and develop.
  - (B) Agreements to adopt new sustainable technologies that already exist but which are commercially unproven. Such agreements would be particularly useful in removing any first mover cost disadvantage.
  - (C) Agreements to facilitate the transition to a circular economy by, for example, switching to using common materials and/or establishing necessary support services, e.g. waste collection and recycling services.
  - (D) Agreements aimed at improving product quality and production processes, the environmental performance of products, or phasing out of non-sustainable products where greener alternatives are available.<sup>7</sup>
  - (E) Cooperation between companies at the downstream level of a supply chain to incentivise suppliers to offer greener products/inputs.
  - (F) Agreements to adopt binding environmental targets for all industry players to ensure a level playing field. This would help ensure that businesses are not at a competitive disadvantage when adopting sustainable options.
  - (G) Agreements to standardise environmental labelling and reporting methodologies.
  - (H) Cooperation to maximise the efficiency of supply chains, e.g. collaboration between suppliers and customers to share shipping capacity.
- 2.12 Whether or not the above scenarios would unlawfully restrict competition would depend ultimately on the specific facts of each case. However, it is clear that many businesses will need comfort that their actions are lawful before they consider entering into collaborative initiatives with their competitors. The absence of clear guidance amplifies the perceived risk of breaching competition law. It also creates room for different businesses to adopt different interpretations of what is and is not lawful. When businesses are not aligned on what they can/cannot discuss and agree, it is difficult to reach the collaborative agreements required to achieve certain sustainability goals.
- 2.13 We understand that the CMA is interested in specific examples of where the CA98 regime has restricted actual or potential agreements or initiatives that could support the UK's Environmental Goals. However, we would encourage the CMA to consider that:

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<sup>7</sup> We note the CMA's [information sheet](#) on environmental sustainability agreements and competition law and the guidance on using standard-setting agreements.

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- (A) The default position of many businesses, following years of competition enforcement by the CMA and other regulators across the world, is that collaboration with competitors is high risk and should generally be avoided. This view is often ingrained in organisations through rigorous compliance training. In those circumstances, businesses are often more likely to dismiss the possibility of collaborating with competitors at the outset, rather than pursuing a potential collaboration to a point where it may be frustrated by the CA98 regime.
- (B) Many businesses and industries are also only at the start of their journey to Net Zero and environmental sustainability, and many are still looking to develop solutions on their own. They may not yet have reached the stage where they have exhausted unilateral options and need to collaborate with third parties to achieve further progress.

- 2.14 Even if the CMA does not receive a list of clear cut examples in response to this question, we would caution against concluding that there is no problem to fix. This simply reflects the fact that an anticipated problem has not yet fully materialised for the reasons provided above. There is a real need for the CMA to act now to provide detailed guidance to businesses and their advisers explaining the framework that should be applied to assess sustainability related collaborations.

**Question 2: Are there changes to the CA98 regime that would help to achieve the UK's Net Zero and sustainability goals? If so, what changes should be made to the regime, and what would they achieve?**

- 2.15 The fear of breaching competition law, whether legally founded or not, results in many businesses taking a cautious approach. This caution is exacerbated by the lack of clear guidance as to when cooperation to achieve sustainability objectives will and will not breach competition law, and on what type of breaches the CMA will focus its enforcement efforts. Our view is that the CMA must address this guidance deficit and provide businesses with the clarity and comfort they need to quickly and unambiguously decide whether or not it is lawful for them to enter into collaborative sustainability initiatives.

Block exemption

- 2.16 The CMA could consider implementing an additional block exemption that focuses solely on agreements that support the UK's Environmental Goals. The CMA must recognise that the scale of the challenges that those goals seek to overcome necessitates, in some instances, cooperation by all industry participants or by all significant market participants. Therefore, an additional environmental block exemption could incorporate higher market share thresholds than in the retained EU block exemptions, or perhaps even dispense with the market share thresholds altogether. In the absence of explicit thresholds, the CMA could develop alternative criteria to determine eligibility.

Guidance on arrangements that do not restrict competition

- 2.17 In many instances, cooperative sustainability agreements will not restrict competition. It would be helpful for the CMA to provide examples illustrating how sustainability objectives can be pursued safely using different types of cooperation agreements.

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- 2.18 In other instances, cooperative agreements could be deemed to fall outside of the scope of the CA98 regime where the restriction is limited and clearly either ancillary to, or objectively necessary for, the attainment of an agreement that materially contributes to achieving the UK's Environmental Goals. This should apply where the agreement could not be reached without the restriction, and the restriction (or harm caused by it) is limited and proportionate in the context of the agreement's positive contribution. Guidance is needed from the CMA confirming that this approach is acceptable.

### Balancing restrictions against benefits

- 2.19 Under the CA98 regime, an agreement that infringes the Chapter I prohibition may nonetheless benefit from an exemption if, broadly speaking, the resulting benefits outweigh the anti-competitive effects. This is provided, among other things, the agreement contributes to improving production or distribution, or to promoting technical or economic progress and allows consumers a fair share of the resulting benefit.<sup>8</sup> It is imperative that the CMA provides detailed guidance on the application of this existing framework to sustainability agreements. The guidance should aid businesses in determining whether the contribution of a restrictive agreement to obtaining the UK's Environmental Goals (i.e. the benefits) outweighs any restrictive effect on competition.
- 2.20 The application of the 'fair share' analysis advocated by the European Commission's guidelines for the equivalent provisions under the EU competition rules<sup>9</sup> provides that:
- (A) Only 'in market' benefits are counted – i.e. only the benefits accruing to the consumers in the market impacted by the relevant agreement should be taken into account. The underpinning logic is that these consumers are exposed to any negative effects due to the restriction of competition; and
  - (B) A fair share means that these consumers should be fully compensated for any negative effects, whether economically through price reductions or through other non-price factors such as quality improvements – i.e. the net effect of the agreement should be neutral for the consumers.
- 2.21 This application of the 'fair share' analysis is not fit for purpose given the nature of the market failure that the UK's Environmental Goals seek to address. Greenhouse gas emissions and other forms of environmental pollution are negative externalities. A market failure has arisen because the consumers that benefit from the consumption of goods and services do not pay for these negative externalities, i.e. the full environmental costs of their consumption. Instead these costs are imposed on society as a whole. This approach also assumes that the direct consumers are paying the full cost, and therefore any agreement that increases the cost of consumption can only be exempt if it proportionally increases the benefits to those consumers as well.
- 2.22 In its recently published Competition Policy Brief, the European Commission has indicated some willingness to take into account sustainability benefits that accrue for the

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<sup>8</sup> Section 9, Competition Act 1998.

<sup>9</sup> Commission Notice - [Guidelines on the application of Article 81\(3\) of the Treaty](#) (Article 101(3) TFEU).

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benefit of society as a whole.<sup>10</sup> For example, if an agreement leads to a reduction in pollution to the significant benefit of society, the European Commission notes that a fair share can be apportioned to the harmed consumers and so they can be fully compensated for the harm. We encourage the CMA to adopt a broad approach to assessing 'out of market' benefits in order to be able to take into account wider benefits to society. It is likely that, in many cases, these wider benefits will materially outweigh the benefits and harms to the direct consumers.

- 2.23 While the European Commission has indicated some willingness to take into account benefits to the wider society, it appears unwilling to move away from its interpretation that the consumers of the relevant product must be fully compensated. This is a policy decision by the European Commission. It is not mandated by the relevant legislation (Article 101(3) TFEU), which like Section 9 CA98, only requires that such consumers receive a fair share of the benefit.
- 2.24 A less strict approach had been promoted by several respondents to the European Commission's consultation, i.e. that the relevant consumers need only receive a fair share of the benefits rather than being fully compensated. This approach appears to be supported by national competition authorities such as the Netherlands Authority for Consumers and Markets and the Hellenic Competition Commission.<sup>11</sup> We encourage the CMA to adopt this more flexible interpretation of the consumer-welfare test in line with these authorities. It is important to recognise that adopting this approach to the 'fair share' test does not require any legislative changes. Indeed, the Chapter I exemption does not state that consumers in the impacted market must be left no worse off.
- 2.25 We recognise the CMA may have reservations about how to quantify 'out of market' benefits. We consider that any requirement to quantify these benefits should be restricted to only those cases that are borderline. This is because requiring a detailed quantification exercise will reduce the likelihood of businesses seeking to rely on the Section 9 CA98 exemption and, where they do, reduce the speed at which agreements are reached and implemented. In many cases, it will be clear that a sustainability focused collaboration agreement will achieve significant benefits to society, so quantification should be unnecessary. Limiting quantification to borderline cases where the anticipated price increase (or other harm to consumers) is high and the expected societal benefits are uncertain or low will streamline the use of CA98 exemptions.
- 2.26 In order to assist quantification in borderline cases, the CMA should provide guidance as to how benefits should be measured. This could include the adoption of objective economic models or a set of agreed factors that form the basis of the assessment of the environmental effects of sustainability agreements. The CMA should also indicate what qualitative criteria will be relevant under this assessment, for example, whether weight

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<sup>10</sup> [Competition policy brief - 2021-01](#), September 2021.

<sup>11</sup> Netherlands Authority for Consumers and Markets Guidelines, [Sustainability agreements - Opportunities within competition law – second draft version](#), January 2021, and Hellenic Competition Commission, [Competition Law & Sustainability](#), September 2020.



should be given to the benefit of taking action immediately or more promptly than would otherwise be the case.

**Question 3: To the extent not already covered by your responses to the previous questions, are you aware of examples of potential environmental sustainability initiatives which, in your view, would benefit from further CMA guidance or direct engagement with the CMA on the possible application of CA98? If so, please explain what further guidance would be necessary and why.**

- 2.27 In our view, there is a strong need for the CMA to provide guidance on the characteristics of agreements that serve the UK's Environmental Goals without restricting competition, and also on how sustainability agreements that do restrict competition can fall outside the scope of CA98 regime. In this section, we have provided views on the different forms that guidance could take. These are not dealt with in order of importance or indeed preference, but according to the relative legal certainty each form of guidance provides. It is important to note, however, that we consider that these different options are not mutually exclusive. Indeed, the CMA should be doing everything in its power to assist businesses to achieve the UK's Environmental Goals and could adopt all of the suggestions in some form.

### Informal guidance

- 2.28 We welcome the general flexibility that the CMA and other competition authorities have shown in response to the COVID-19 pandemic, particularly where there has been a need for businesses to obtain case-specific guidance when responding quickly to a crisis.
- 2.29 Although the full effects of global warming are not yet being felt, it is essential that we treat global warming as a climate crisis nonetheless. In this context, and given the fundamental and systemic changes that are required to tackle the climate crisis and to achieve the UK's Environmental Goals, we consider there is a real need for a mechanism through which businesses could quickly obtain informal guidance. This could take the form of short meetings where businesses could consult with the CMA on specific proposals at an early stage. This would have the benefit of enabling businesses to determine if there is any scope to proceed with collaboration initiatives before making material investments (whether time, resources or funds). The clear benefit to the CMA of this approach is that it would enable it to take an active role in shaping collaborations at the outset, thereby limiting the risk of them harming competition, as opposed to being reactive to problematic collaborations at a later stage.

### Guidance/Guidelines

- 2.30 As previously noted, we consider the CMA's Guidance on '*Environmental sustainability agreements and competition law*' to be a helpful first step. However, it is our view that more detailed guidance is required to assist businesses in assessing sustainability related competition law risks. In particular, it would be helpful to understand how the CMA proposes to interpret UK competition law and policy in light of the UK's Environmental Goals.
- 2.31 In particular, there is an urgent need for the CMA to provide guidance on the characteristics of agreements and collaborations that will help to achieve the UK's



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Environmental Goals without restricting competition, and also on how sustainability agreements/collaborations that do restrict competition can fall outside of the scope of the CA98 regime. For these purposes, we encourage the CMA to provide non-exhaustive examples of how it would assess certain types of cooperation agreements that support the UK's Environmental Goals. Those examples could include some of the scenarios we have listed at paragraph 2.11 above.

### Communication on enforcement priorities

- 2.32 There is an urgent need for businesses across all industries to act to achieve the UK's Environmental Goals. Businesses need to make decisions quickly and may not always fully appreciate the competition law implications of these decisions, especially in the absence of clear guidance. This is especially the case when businesses are seeking to work together to achieve aims that are overwhelmingly positive for society. It is therefore important for the CMA to publicly recognise that there is a difference between: (i) businesses accidentally breaching the law when pursuing positive societal aims; and (ii) businesses knowingly or recklessly breaching competition law or indeed using sustainability as a smokescreen for anti-competitive aims.
- 2.33 We consider that the CMA should focus its enforcement priorities on the second category of agreements. This is especially the case as not only would such agreements lead to consumer harm by being anti-competitive, they may also lead to wider societal harm by misleading consumers on the environmental credentials of any related goods or services.
- 2.34 With regard to the first category of agreements, we consider that the CMA should adopt a similar policy to that outlined by the Netherlands Authority for Consumers and Markets in paragraph 72 of its Draft Sustainability Guidelines.<sup>12</sup> Specifically, where any CMA guidance has been followed in good faith as much as possible, but the CMA later finds that an agreement is incompatible with UK competition law, the CMA should work with the relevant businesses to agree any adjustments necessary to achieve compatibility. In these cases, the CMA should not impose fines, in recognition of the fact that the businesses involved were seeking to benefit rather than harm UK society. This approach should also apply to agreements that have been discussed with the CMA in advance (e.g. through an informal guidance process), if the CMA did not at that stage identify any risks.

**Question 4: While the CMA is concerned primarily with public enforcement, we would also welcome any comments you may have in relation to private enforcement in this sphere. For instance, if you have suggested changes in response to previous questions, what impact, if any, do you think this could have on private actions?**

- 2.35 Private actions typically follow-on from public enforcement. As explained above, we consider that the CMA should prioritise ensuring that its enforcement regime is fair and predictable.

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<sup>12</sup> Netherlands Authority for Consumers and Markets Guidelines, [Sustainability agreements - Opportunities within competition law – second draft version](#), January 2021.

### 3. Merger Control

**Question 5: If, and how, does the current merger control framework constrain or frustrate initiatives or transactions that might support the UK's Net Zero and sustainability goals? If possible, please provide examples.**

- 3.1 In our view, the current merger control regime should do more to integrate environmental and sustainability factors into its merger assessments. Instead of establishing a new test for transactions with sustainability elements, we believe these factors are best considered under the existing efficiencies and relevant customer benefits framework.
- 3.2 However, we believe that businesses are currently unlikely to put forward detailed sustainability arguments as, to-date, the CMA has not typically placed weight on efficiencies or relevant customer benefit arguments in its assessment. The CMA should build on the discussion already provided in the CFI and provide a clear steer, in the form of detailed guidance, on the types of sustainability efficiencies and benefits the CMA will take into account and how it will do so.
- 3.3 In this regard, we encourage the CMA to interpret the concept of consumer benefit broadly so as to consider a merger's impact on wider environmental protection concerns.

**Question 6: More specifically, are you aware of any examples of cases reviewed under the current merger regime where environmental factors have not been able to be fully taken into account? Please provide details.**

- 3.4 We are not aware of any cases reviewed under the current merger regime where environmental factors have been taken into account in any meaningful manner. As stated in the response to Question 5 above, we believe that the provision of further guidance will increase the probability that these issues are raised in the future. Please see our response to Question 7 for further details.

**Question 7: Do you consider that the CMA's merger control regime could better contribute to protecting the environment and support the UK's Net Zero and sustainability goals? If so, please explain how.**

- 3.5 In our view, the CMA's merger control regime could better contribute to protecting the environment and achieving the UK's Environmental Goals. As noted above, one way the CMA could do this is by taking into account the positive and negative impacts of a merger on the UK's Environmental Goals in its assessment. For example, if a merger gives rise to an SLC but nevertheless has the potential to contribute significantly to the UK's Environmental Goals (e.g. by leading to the closure of older more polluting factories), then the CMA should take these environmental benefits into account when reaching its decision. For this to be effective, it is essential that the CMA gives adequate weight to environmental benefits such as merger efficiencies and relevant customer benefits.
- 3.6 We welcome the CMA's guidance on this issue in its Merger Assessment Guidelines,<sup>13</sup> which note that "*benefits in the form of environmental sustainability and supporting the*

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<sup>13</sup> CMA [Merger Assessment Guidelines](#), March 2021, at paragraph 8.21.

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*transition to a low carbon economy are relevant customer benefits in some circumstances"*, but consider that further, more specific guidance is required setting out:

- (A) The type of environmental benefits the CMA would be willing to take into account in its analysis.
- (B) What evidence the CMA would expect from merging parties on the benefits (e.g. should the benefits be quantified and, if so, on what basis).
- (C) How the CMA would assess the benefits in terms of weighing them against any SLC.
- (D) Over what timeframe the CMA would be willing to assess benefits (especially if environmental benefits take longer to materialise than traditional transaction synergies).

- 3.7 In more general terms, the CMA should encourage transactions that contribute to the achievement of the UK's Environmental Goals and ensure that the CMA's messaging and assessment criteria do not prevent firms from pursuing transactions that lead to improved sustainability outcomes post-merger.

**Question 8: Do you consider that the CMA is an appropriate body to assess environmental sustainability factors in relation to merger control, for example, where it is a basis on which firms compete? Do you consider there would be a benefit in having an additional or alternative body or regulator being available to provide advice on such matters? Please explain the reasons for your response.**

- 3.8 In our view, the CMA remains the appropriate body to assess environmental sustainability factors in relation to merger control. We do not foresee any benefit of creating a new alternative body or regulator to provide advice on such matters. The CMA has a proven track record of developing its own in-house expertise and tools to assess mergers. We consider that the CMA can leverage its existing expertise to assess environmental factors. If the CMA identifies gaps in its environmental knowledge then, instead of establishing a new regulatory body, we consider that the CMA should fill these gaps by hiring relevant specialists. We encourage the CMA to seek out the appropriate personnel from relevant bodies within industry, government and academia.
- 3.9 Our key concern with the proposal to establish an additional or alternative body or regulator is the added complexity that it would add to the UK's already complicated regulatory landscape. Establishing a new body or regulator would not only take time (which would further delay the achievement of the UK's Environmental Goals) but would also create significant uncertainty in the business community. In comparison, incorporating environmental expertise within the CMA's mergers unit is unlikely to cause significant disruption. It would also increase the likelihood of consistent decision-making across UK mergers, rather than having two potentially divergent regulators.

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**Question 9: To the extent not already covered by your responses to previous questions, are you aware of examples of potential environmental sustainability initiatives which, in your view, would benefit from further CMA guidance and/or direct engagement with CMA on the possible application of the merger regime? If so, please explain what further guidance would be necessary and why.**

3.10 N/A.

### **4. Consumer Protection**

4.1 We fully support the objective of moving towards more sustainable consumption of goods and services. There may be instances where strengthening consumer protection law is necessary to facilitate this shift. However, we consider that the main drive of this shift will be increased customer engagement creating demand for more sustainable products and businesses competing to satisfy this demand. Imposing a greater regulatory burden on businesses and adding additional cost and complexity may hinder businesses' ability to satisfy this demand, thereby slowing the pace at which more sustainable options become available.

4.2 With this in mind, the CMA should ensure that it consults all stakeholders, including business and environmental experts, before implementing specific changes to consumer protection laws. This will ensure that any changes have the maximum chance of supporting the consumers to shift to more sustainable options.

4.3 We do not have any further comments in response to the CMA's specific questions on consumer protection.

### **5. Markets Regime**

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

5.1 We support the CMA using its Markets powers to draw the attention of the UK Government to markets that are not functioning due to competition concerns and/or a lack of investment/state support, especially where this is having a detrimental effect on the UK's ability to achieve its Environmental Goals.

5.2 Notwithstanding the above, it is imperative that the CMA uses its Market powers with efficiency and transparency, adopting a 'light touch' approach to avoid imposing onerous investigations on businesses, especially in nascent markets. In particular, we encourage the CMA to adopt a proportionate approach when conducting market studies and market investigations, especially when collecting information. We consider that this is likely to be most important for nascent 'green' markets where market participants may not have the capacity to both respond to the CMA's information requests and run their businesses.

5.3 We also encourage the CMA to provide transparency over the extent to which the UK's Environmental Goals will be taken into account when reaching conclusions in its market studies and market investigations. While we support the CMA taking into account environmental factors, we caution the CMA against initiating market studies based on

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environmental factors in the absence of any clear competition or consumer protection concerns.

- 5.4 Although it is important for the CMA to contribute to obtaining the UK's Environmental Goals, this should not come at the expense of the CMA's independence and impartiality as a regulator. The CMA must continue to take an evidence-based approach to its investigations and reach decisions on an independent and impartial basis. This will ensure that, even if the CMA takes environmental considerations into account, it is not seen as a political act. This will ensure that the CMA continues to be viewed and treated as a credible enforcer by the international business community.

**Question 16: How can the CMA identify markets that may be particularly relevant and important in supporting the UK's strategic goals on environmental sustainability and Net Zero? Are you aware of specific examples?**

- 5.5 We welcome the approach that the CMA has shown to-date in identifying markets that are relevant and important to the pursuit of the UK's Environmental Goals. We broadly agree with the focus on nascent markets at the forefront of innovation to ensure competition. In particular, we note the recent market study into electric vehicle charging as indicative of this approach.<sup>14</sup> In our view, this type of market is reflective of those that may be of particular relevance and importance in supporting the UK's Environmental Goals.
- 5.6 However, we would encourage the CMA to provide greater transparency on how the UK's Environmental Goals will be incorporated into the criteria used by the CMA to open market studies and investigations. This transparency would allow for greater feedback from stakeholders in identifying potentially relevant markets.

**Question 17: Are there changes to the Markets regime, other than those highlighted above, which would better allow it to support Net Zero and environmental sustainability objectives? Please be as concrete as possible in your answers.**

- 5.7 N/A.

## 6. Other Considerations

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

- 6.1 N/A

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

- 6.2 It is essential that the UK Government provides sufficient financial support to aid businesses pursuing the UK's Environmental Goals. This is particularly the case when significant investments are required to achieve these goals, whether to transition to

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<sup>14</sup>CMA [Electric vehicle charging market study: final report](#), July 2021.

existing environmentally friendly technologies that are not yet commercially viable, or to develop new sustainable technologies. For example, we understand that sustainable aviation fuel is an area where UK Government financial support could play a key role in stimulating production and lowering the cost.

- 6.3 Under the UK's proposed new subsidy control regime, the CMA will establish a Subsidy Advice Unit which will monitor and report on how the regime works as a whole, as well as provide advice to public authorities on certain types of subsidies. We believe this will provide the CMA with an opportunity to shape how the regime works in practice and would therefore encourage the CMA to foster the use of appropriate state support to achieve the UK's Environmental Goals.