

# 2023 CONSULTATION ON DRAFT CMA GUIDANCE ON ENVIRONMENTAL SUSTAINABILITY AGREEMENTS

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## 1 BACKGROUND AND SUMMARY

- 1.1 We welcome the opportunity to participate in the public consultation which the Competition and Markets Authority ("**CMA**") has launched on its draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 ("**CA98**") (hereafter the "**Chapter I Prohibition**") to environmental sustainability agreements (the "**Draft Sustainability Guidance**").<sup>1</sup>
- 1.2 In summary, we welcome the steps which the CMA is taking to foster competition conditions in the UK which do not stand in the way of sustainability initiatives. In particular, the CMA's open door policy is a very positive development – the key to its success will be to give sufficient comfort to businesses in relation to the circumstances in which their approach to the CMA may or may not be publicised. In addition to considering our suggestions for further clarification below, we would also encourage the CMA to revisit its guidance in the medium term once it has gathered further experience of reviewing sustainability agreements via its open-door policy. For this purpose, as part of this response we have set out the range of levers currently at the CMA's disposal to play its role in the UK's sustainability journey, along with various policy issues these touch upon.
- 1.3 In this response, we provide comments on the Draft Sustainability Guidance regarding:
- (a) the CMA's policy in relation to sustainability and related agreements between competitors;
  - (b) standardisation considerations in a sustainability context;
  - (c) the agreements covered by the CMA's Draft Sustainability Guidance;
  - (d) the assessment for an exemption under section 9(1) of the Chapter I Prohibition (the "**Section 9 Exemption**");
  - (e) dealing with changes in externalities;
  - (f) transparency; and
  - (g) how the Draft Sustainability Guidance is intended to interact with other sources of guidance.
- 1.4 We then proceed to answering the CMA's consultation questions and cross-refer to our earlier comments where relevant.
- 1.5 We note that the CMA has previously launched a related consultation for its draft guidance on the application of the Chapter I Prohibition in the Competition Act 1998 to horizontal agreements (the "**Draft Horizontal Guidance**")<sup>2</sup> and have referred to the Draft Horizontal Guidance below where relevant.

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<sup>1</sup> See CMA consultation homepage: <https://www.gov.uk/government/consultations/draft-guidance-on-environmental-sustainability-agreements>.

<sup>2</sup> See CMA consultation homepage: <https://www.gov.uk/government/consultations/draft-guidance-on-horizontal-agreements>.

## 2 CMA'S POLICY IN RELATION TO SUSTAINABILITY AGREEMENTS BETWEEN COMPETITORS

### *Taking a step back – ways in which sustainability agreements can be encouraged under the UK competition regime*

2.1 There are several ways in which UK competition rules can encourage markets' achievement of sustainability goals:

- (a) **direct Government action** – for example, pursuant to its powers under the CA98, the Secretary of State could:
  - (i) should future circumstances warrant this course of action, issue secondary legislation in reliance on existing exclusions under Schedule 3 to the CA98 (section 3(1)(c) of the CA98). Recently, the Government used the public policy exclusion (paragraph 7 of Schedule 3) on a temporary basis to exclude certain NHS agreements during the Covid-19 pandemic and CO2 supply agreements. One could also envisage possibly relying on the compliance with legal requirements exclusion<sup>3</sup> (paragraph 5) or the avoidance of conflict with international obligations exclusion (paragraph 6 of Schedule 3);<sup>4</sup>
  - (ii) exclude certain categories of sustainability agreements from the application of the Chapter I Prohibition by amending Schedule 3 to the CA98 (section 3 CA98);
  - (iii) make an order for a block exemption to apply in relation to certain categories of sustainability agreements, further to the CMA's recommendation (section 6 CA98). Recently, the CMA and Government collaborated to ensure the block exemption of specialisation agreements and of research and development agreements.<sup>5</sup> A further example, which does not mirror any similar block exemption at EU level, is the block exemption for public transport ticketing schemes.<sup>6</sup>
- (b) **enforcement guidance**, via the clarification of competition rules – for example:
  - (i) explaining the circumstances when the CMA is likely to consider that certain sustainability agreements are caught under the "ancillary restraint" doctrine, meaning that such agreements fall entirely outside of the Chapter I Prohibition

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<sup>3</sup> To paraphrase an example provided by Whish and Bailey in their final report to the European Commission, this exclusion could become relevant if the UK Government were to issue regulations outside of the competition law regime, for example to introduce rules prohibiting the sourcing of timber from non-sustainable producers. See *Horizontal Guidelines on Delineation between purchasing agreements: by object and by effect restrictions* (2022), paragraph 2.24: [https://competition-policy.ec.europa.eu/system/files/2022-03/kd0722013enn\\_purchasing\\_agreements.pdf](https://competition-policy.ec.europa.eu/system/files/2022-03/kd0722013enn_purchasing_agreements.pdf).

<sup>4</sup> See, e.g., the Competition Act 1998 (Health Services for Patients in England) (Coronavirus) (Public Policy Exclusion) Order 2022/124 and the Competition Act 1998 (Carbon Dioxide) (Public Policy Exclusion) Order 2021/1169.

<sup>5</sup> See Government's dedicated consultation webpage: <https://www.gov.uk/government/consultations/draft-specialisation-and-research-and-development-agreements-block-exemption-orders-2022>.

<sup>6</sup> See The Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001 (in force since 2001 and extended in 2005, 2011 and 2016, until 2026): <https://www.legislation.gov.uk/uksi/2001/319/made>. See also accompanying CMA guidance page: <https://www.gov.uk/government/publications/public-transport-ticketing-schemes-block-exemption-guidance-cma53>.

and do not need to meet the Section 9 Exemption criteria.<sup>7</sup> Such an approach would ultimately fall to be tested in the courts;

- (ii) clarifying when the CMA is likely to rely on the "de minimis" exception in relation to genuine sustainability agreements which do not contain "by object" restrictions;
- (iii) providing regulatory guidance to improve legal certainty for businesses self-assessing whether they can safely enter into a sustainability agreement with competitors, for instance on the basis of a Section 9 Exemption.

2.2 At this stage, the CMA has been exploring the provision of enforcement guidance. This is a welcome step in the right direction. As it gains more experience of reviewing sustainability agreements over the next few years, we would encourage the CMA to revisit its guidance, both in terms of providing further clarifications and bearing all the regulatory levers at its disposal, as environmental circumstances may warrant more extensive action (with possible recommendations to Government) in future.<sup>8</sup>

2.3 One particular area of concern for many businesses relates to the risk of litigation. Where the regulatory action taken does not include direct Government measures, there remains a risk that claimants may bring private actions on a stand-alone basis (including class actions), as a CMA decision not to prioritise enforcing against a particular type of agreement does not equate to a non-infringement finding. Related to this, the CMA's reference to adopting "a more permissive approach" to its assessment of climate change agreements is unhelpful – the objective of the CMA's enforcement guidance should be to clarify the CMA's understanding of the law, rather than to offer a more lenient view in some specific cases (which could then be disregarded in the courts). If the CMA and Government wish to provide meaningful comfort to UK undertakings in respect of sustainability initiatives, more direct measures ought to be considered in the medium term. In the meantime, we would encourage the CMA to be mindful of this issue when finalising the Draft Sustainability Guidance, and thereafter when drafting summaries of informal guidance for publication.

#### ***High level comments on the CMA's proposed enforcement guidance***

2.4 With regard to the CMA's proposed guidance, we wish to submit the following high level comments.

#### ***(a) Application of the "ancillary restraint" doctrine***

2.5 Paragraphs 3.40 of the CMA's Draft Horizontal Guidance and 4.9 of the Draft Sustainability Guidance open the door for the "ancillary restraint" doctrine to be relied on in some circumstances. We would welcome more guidance from the CMA as to the circumstances in which it may entertain ancillary restraint arguments in the context of sustainability initiatives. Paragraph 4.10 helpfully provides an example relating to certain joint purchasing groups. Can the CMA identify further categories of sustainability agreements which could fall entirely outside of the Chapter I Prohibition?

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<sup>7</sup> Following EU caselaw such as Case C-67/96 *Albany* ECLI:EU:C:1999:430, Case 309/99 *Wouters* ECLI:EU:C:2002:98 and Case C-519/04 P *Meca-Medina* ECLI:EU:C:2006:492.

<sup>8</sup> As Whish and Bailey stated in their final report for the European Commission on *Horizontal Guidelines on Delineation between purchasing agreements: by object and by effect restrictions* (2022), "sustainability objectives can often best be achieved through [...] governmental action" (paragraph 2.24).

- 2.6 As a minimum, we would recommend moving the paragraph 3.40 statement to section 3 of the Draft Sustainability Guidance (Environment sustainability agreements which are unlikely to infringe the Chapter I Prohibition), rather than leaving it under its current heading which covers "object" infringements. Alternatively, this paragraph could be cross-referenced at section 3 to avoid the risk that it goes unnoticed. A cross-reference to paragraph 3.40 of the Draft Horizontal Guidance also seems appropriate.

***(b) Application of the "de minimis" exception***

- 2.7 Throughout the Draft Sustainability Guidance, the CMA refers to the concept of "appreciability", but does not explicitly refer to the "de minimis" exception which is linked to this concept.
- 2.8 We would suggest adding some text to cover this exception within the Draft Sustainability Guidance, or at least a cross-reference to paragraphs 3.48 to 3.52 of the Draft Horizontal Guidance in order to address this.

***(c) Ensuring competition law is not an "unnecessary barrier to" environmental sustainability***

- 2.9 The CMA explains in the Draft Sustainability Guidance that one of the three ways in which it can promote environmental sustainability is to *"help ensure that competition law is not an unnecessary barrier to companies seeking to pursue environmental sustainability initiatives"*, and that the Draft Sustainability Guidance is about addressing this particular area.<sup>9</sup>
- 2.10 This is a positive step which we welcome. A key parameter to secure the policy's success is to provide sufficient comfort to businesses regarding how their information will be treated when they approach the CMA (we discuss this further in the sub-section below). In addition, as the CMA gains more experience of reviewing sustainability agreements, we would encourage the CMA to bear in mind the various regulatory levers which it could combine to secure the success of its policy. To assist the CMA with this endeavour, we have set out a table at Annex 1 below which summarises and compares the CMA's proposed approach with the Dutch Competition Authority's current approach (broadly considered to be a useful benchmark)..

***(d) Open-door approach, enforcement policy and related consequences***

- 2.11 We welcome the CMA's open-door policy approach and anticipate that this will encourage more discussions and sustainability initiatives from UK businesses. The CMA's description at paragraph 7.3 of the process by which it would provide informal guidance seems sensible – we have understood the CMA's proposal to be akin to preparing a short briefing paper under the merger control process. This would help ensure that the parties have done a sufficient amount of thinking before approaching the CMA so the CMA may conduct an informal assessment while keeping the process sufficiently nimble to work. In particular, we welcome the CMA's proposal at paragraph 7.5 not to involve third parties as part of that informal assessment. This could perhaps be supported by the transparency suggestions we make below at Section 7 to ensure customers can become aware of sustainability agreements which may be affecting their purchases, while businesses can also get more legal certainty regarding the risk of challenges before any meaningful impact is felt on the market.

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<sup>9</sup> See paragraphs 1.4-1.5. See also Sarah Cardell, CMA CEO, Original script for speech delivered on 24 January 2023 to the Scottish Competition Forum, *Sustainability: Exploring the possible*, <https://www.gov.uk/government/speeches/sustainability-exploring-the-possible>.

- 2.12 One key element to secure the success of the CMA's open-door policy in practice is to ensure sufficient comfort is provided to businesses in relation to potential confidentiality concerns. In this regard, we would recommend that the CMA builds on paragraph 7.13 of the Draft Sustainability Guidance and provides further clarifications as to its proposed approach to confidentiality. For example:
- (a) how does the CMA propose to address conversations in relation to initiatives which are later abandoned or otherwise not implemented? The publication of information in relation to abandoned initiatives could deter businesses from engaging with the CMA in the first place;
  - (b) how much time would the CMA typically give the parties to provide confidentiality submissions? Would the CMA envisage involving its procedural officer in cases where the parties strongly oppose a particular draft CMA publication?
  - (c) might there be situations where the CMA would publish information without the parties' consent? If so, on what basis?
- 2.13 With regard to enforcement action, we welcome the CMA's statement at paragraph 1.13 that it will not take action in relation to sustainability agreements that clearly correspond to examples in the Draft Sustainability Guidance and that are consistent with its principles. We understand this to be regardless of whether the businesses in question have previously approached the CMA about their agreement or not, which is a sensible approach. We note that there is a slight difference of emphasis between paragraph 1.13 and paragraph 6.7 in the current draft and suggest reviewing them for consistency (e.g. with a reference to "not prioritis[ing]" versus not taking enforcement action). As far as the CMA's intention to publish updated guidance from time to time (paragraph 1.14), this is also a positive commitment which we support. In particular, it would be helpful if the CMA maintained a dedicated sustainability agreements page where businesses and their advisers could locate all relevant guidance, updates and any transparency tools adopted by the CMA.
- 2.14 With regard to the CMA's offer of an immunity from fines for businesses who have previously approached the CMA, we are of the view that this is too narrow and that the CMA risks being flooded with informal guidance requests including in relation to straightforward sustainability agreements, only to secure an immunity from fines. To prevent this, the CMA's immunity from fines should extend to companies who did not approach the CMA beforehand but are able to document their self-assessment and show that they implemented a sustainability agreement which was consistent with the CMA's Draft Sustainability Guidance.

### **3 STANDARDISATION CONSIDERATIONS**

- 3.1 Standardisation may bring strong sustainability benefits and should not necessarily be discouraged, provided any negative impacts on competition are limited to unsustainable parameters of competition, while letting other aspects of competition flourish. This might involve allowing businesses to jointly choose a particular technology or standard over another, to secure investment for adapting their production processes and to encourage consumer take-up across the market. While in some cases it might bring up accusations of boycotting for the losing technology makers, provided undertakings compete healthily in relation to other key competition parameters, these types of standardisation agreements may bring positive benefits overall.<sup>10</sup>

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<sup>10</sup> For example, in order to promote the take-up and use of electric vehicles, market participants may wish to jointly address the issue of inconsistent technology currently being used across UK charging stations or inconsistent maintenance levels of these stations throughout the network. In another context, agreeing product packaging standards among



- 3.2 But regardless of the CMA's policy position on this matter, we respectfully submit that the CMA's proposed approach in relation to standardisation agreements which have a sustainability remit needs further articulation and clarification to ensure businesses and their advisers can navigate this area of competition law with confidence.
- 3.3 Paragraph 9.1 of the Draft Horizontal Guidance draws a distinction between generic standardisation agreements and sustainability standards, and concludes that specific guidance on the latter will be provided in the Draft Sustainability Guidance. The Draft Sustainability Guidance contains a sub-section of two paragraphs at Section 3 headed "Creation of industry standards", and is then completed by a couple of examples later on in the Draft Sustainability Guidance.<sup>11</sup> Upon review, the following questions came to mind:
- (a) How should undertakings navigate between the Draft Horizontal Guidance and the Draft Sustainability Guidance when self-assessing in relation to sustainability standards? In particular, how should they reconcile paragraph 9.1 of the Draft Horizontal Guidance with paragraphs 1.13 and 2.7 of the Draft Sustainability Guidance?
  - (b) Will the distinction always be clear cut in practice? We anticipate that it will not be the case. Arguably, all standardisation agreements might have an inherent sustainability aspect, as the increase in interoperability may reduce the need to produce derivative products (e.g. with fewer types of connection technology for electronic device chargers, consumers can switch mobile phone providers without needing to buy a new charger, thereby limiting waste).<sup>12</sup> Seemingly "generic" standardisation agreements may well surface in future with sustainability as a key driver for the relevant standardisation endeavour;
  - (c) How is the CMA's approach between generic standardisation agreements meant to differ from its approach to sustainability standards – can points of difference and similarities be articulated further, and to the extent there is a difference in approach, is it justified in every case? For example, there is no mention in the Draft Sustainability Guidance equivalent to paragraph 9.14 of the Draft Horizontal Guidance, which specifies from the outset that: "*In the absence of market power, a standardisation agreement is not capable of producing restrictive effects on competition*". Shouldn't this also be the case for sustainability standards? To illustrate this further and assist the CMA, we have included below a table at Annex 2 summarising the safe harbour criteria set out in the Draft Sustainability Guidance and comparing it against the Draft Horizontal Guidance criteria. Separately, we note that in its draft HBER guidance, the European Commission outlines its own set of criteria.<sup>13</sup>
  - (d) Could the CMA articulate its policy position in relation to the different types of competition which may be encouraged or restricted in the context of sustainability

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competitors as well as with suppliers and recycling facility providers may be necessary to secure investment in manufacturing line upgrades and optimise interoperability for a more sustainable product life cycle.

<sup>11</sup> See paragraphs 3.11-3.12, 4.6, 4.14 and 5.11.

<sup>12</sup> In this regard, we note that at EU level the European Commission has used its legislative powers to introduce a Directive which will secure the USB-C charging interface as the common port for a range of electronic devices by the end of 2024. This will allow consumers to charge their devices with the same USB-C charger, regardless of the device brand. See Directive (EU) 2022/2380 of the European Parliament and of the Council of 23 November 2022 amending Directive 2014/53/EU on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment, OJ L 315, 7.12.2022, p. 30–43: <https://eur-lex.europa.eu/eli/dir/2022/2380/oj>.

<sup>13</sup> See text box under paragraph 572 of the European Commission's Draft HBER guidance, which outlines 7 conditions which ought to be met by sustainability standards in order to benefit from a safe harbour.

standards? For example, how does the CMA intend to consider situations where the introduction of a sustainability standard on a market restricts competition between products meeting the standard and products which do not, while encouraging competition between competitors who do comply with the standard on other parameters, such as price, after sales service, etc.? We would argue that a policy choice will need to be made between protecting all forms of competition (which may involve supporting unsustainable practices) or giving more emphasis to protecting competition that is sustainable. This question is also relevant to the CMA's last sentence at paragraph 5.8 in relation to the indispensability criteria for qualifying for a Section 9 Exemption,<sup>14</sup> as we can anticipate future tension between innovation and standardisation. In particular, green innovation may need to be assessed against the broader market context, including the green credentials of existing standards and the waste as well as costs that would be incurred by introducing duplication/ reducing interoperability in the relevant market(s).<sup>15</sup>

- 3.4 We would encourage the CMA to clarify its approach in relation to sustainability standardisation agreements, and would suggest consulting the detail set out in the European Commission's March 2022 draft HBER guidance under section 9.3.2 as part of this clarification exercise.<sup>16</sup>

#### **4 TYPES OF AGREEMENTS COVERED**

- 4.1 We welcome the CMA's introduction of guidance tailored for sustainability agreements, and particularly the CMA's clarifications under section 3 around "softer" types of competitor agreements either not being caught by the Chapter I Prohibition or not being sufficiently appreciable to raise competition concerns. This will reassure both clients and legal advisers that they can engage in discussions on that front and help make a difference.
- 4.2 As a small point to note, we would welcome further clarifications on the CMA's position in relation to the phasing out of unsustainable products, and in particular how paragraphs 3.14 and 4.11 of the Draft Sustainability Guidance relate to each other. In our view, there may be circumstances which justify unsustainable products being phased out of a market (e.g. products that are packaged using virgin plastic).

#### ***The scopes of application of the Draft Sustainability Guidance are too narrow***

- 4.3 While we welcome the above, we would also respectfully submit that the scopes for both sustainability agreements and climate change agreements are too narrow. The CMA's approach also appears to be inconsistent with similar initiatives in the EU and the Netherlands, for reasons which have not been fully articulated in the consultation papers.
- 4.4 In the European Commission's draft HBER guidance, sustainability agreements are defined at paragraph 541 as *"agreements between competitors that pursue one or more sustainability objectives"*. The Commission goes on to explain at paragraph 543 that *"[i]n broad terms, sustainable development refers to the ability of society to consume and use the available*

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<sup>14</sup> "This does not however, provide a generalised basis to justify moving away from competition on the development of greener technologies, supply chains or products".

<sup>15</sup> For example, the take up of electric vehicles and building of charging infrastructure around the UK may be stunted by the prospect of other technologies being developed, such as hydrogen vehicles. In addition, some may argue that investment in this area should be refocused on improving public transport links instead of promoting this type of innovation.

<sup>16</sup> See European Commission's consultation page: [https://competition-policy.ec.europa.eu/public-consultations/2022-hbers\\_en](https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en).



*resources today without compromising the ability of future generations to meet their own needs. It encompasses activities that support economic, environmental and social (including labour and human rights) development. The notion of sustainability objective therefore includes, but is not limited to, addressing climate change (for instance, through the reduction of greenhouse gas emissions), eliminating [sic, eliminating] pollution, limiting the use of natural resources, respecting human rights, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious [sic, nutritious] food, ensuring animal welfare, etc."*

- 4.5 Meanwhile, the Dutch Competition Authority relies on the similarly broader United Nations definition for its concept of "sustainability agreements".<sup>17</sup>

***Is the distinction between sustainability agreements and climate change agreements useful?***

- 4.6 As indicated at paragraph 6.1 of the Draft Sustainability Guidance, the main difference associated with distinguishing between sustainability agreements and climate change agreements relates to how the "fair share" of benefits condition for the Section 9 Exemption is considered. Specifically, a broader range of benefits can be taken into account when assessing climate change agreements.
- 4.7 While we can see that a distinction might make sense in a context where guidance covers a broad range of sustainability agreements (as in relation to the Dutch Competition Authority's guidance), the narrow scope of application proposed by the CMA does not seem to warrant a similar distinction. All types of sustainability agreements should be considered according to the CMA's "more permissive approach" – and as indicated at Section 2 above, we would recommend for the CMA to move away from this potentially unhelpful terminology. Please see Annex 1 for further detail on the differences in scope of application between the Dutch Competition Authority's guidelines and the CMA's Draft Sustainability Guidance.
- 4.8 We would also note that in the draft HBER guidance which the European Commission consulted on in March 2022,<sup>18</sup> the Commission used a wide definition for sustainability agreements and yet did not identify a need to introduce a distinction in approach between types of agreements. In addition, businesses are free to present evidence of benefits being shared with direct consumers, indirect consumers and with wider society (the Commission can then take a view on the strength of such evidence).<sup>19</sup>
- 4.9 We separately discuss in the section below the question of who is a consumer for the purpose of assessing whether sustainability agreements and climate change agreements allocate a "fair share" of benefits as part of the Section 9 Exemption criteria.

## **5 ASSESSING THE EFFECTS AND APPLYING THE SECTION 9 EXEMPTION**

- 5.1 We note that the Draft Sustainability Guidance expressly provides that where an environmental sustainability agreement does not qualify as a restriction of competition by object, it will only

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<sup>17</sup> See paragraph 7 of the Dutch Competition Authority Guidelines on Sustainability Agreements: <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-opportunities-within-competition-law.pdf>.

<sup>18</sup> See European Commission's consultation page: [https://competition-policy.ec.europa.eu/public-consultations/2022-hbers\\_en](https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en).

<sup>19</sup> See paragraph 609 of the European Commission's draft HBER guidance.

infringe the Chapter I Prohibition if it has an appreciable negative effect on competition and that, even if it has such an effect, the agreement may still benefit from the Section 9 Exemption.

### ***Assessing the effects of environmental sustainability agreements***

- 5.2 The one point that we would highlight is that it is foreseeable that in a significant number of instances, environmental sustainability agreements may result in increased prices being paid by consumers, for example, an airline industry wide scheme to reduce emissions may result directly in the increase in prices of flights as the cost will be passed on to customers.
- 5.3 It does not seem unreasonable, in this case, for customers using such services to pay for the costs of reducing emissions as they are the ones choosing to travel in this manner. Costs should not be met by those not using the services and increased costs may encourage travellers to reduce journeys or use other modes of transport making the sustainability arrangement even more effective.
- 5.4 Perhaps the CMA could revise the last bullet at paragraph 4.14 to reflect that sometimes increased prices and/or a reduction in output may be justified in order to meet a sustainability objective. By way of further example, a reduction in the number of interfaces for electronic device chargers for better interoperability across device brands would result in harmonisation of standards ultimately good for sustainability. Could phone manufacturers then try to pass on some of the cost of having to switch to a new plug-in interface to customers, provided it is fully documented and time bound? See also Section 3 above in relation to possible encouragement of standardisation.

### ***Applying the Section 9 Exemption***

#### ***(a) Condition 1: efficiency gains***

- 5.5 As regards Condition 1 of the Section 9 Exemption, whilst many benefits resulting from environmental sustainability agreements are likely to result in "improving production or distribution or contribute to promoting technical or economic progress", care should be taken in the focus on innovation. Some sustainable endeavours may not involve technical progress as such, for example could have a return to grocery brown paper bags to replace plastic bags. It would not be reasonable for those taking the brown bag route being treated less favourably than those going the route of, for example, compostable bags based on new corn starch technology.
- 5.6 Perhaps the CMA could instead make the range of benefits mentioned under this first condition broader to include, for example, sustainability/ ecological benefits? Alternatively, perhaps the term "namely" might be replaced by "for example", so that the list of benefits is not seen as exhaustive.
- 5.7 Finally, in relation to efficiency gains (as for each of the conditions of the Section 9 Exemption), we should be grateful for the CMA to expand its explanations<sup>20</sup> as to what type of evidence would be satisfactory/ required. In providing further clarifications, the CMA may find considering the European Commission's and the Dutch Competition Authority's explanations in their respective guidance documents useful.<sup>21</sup>

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<sup>20</sup> We note the CMA's explanations provided at paragraphs 5.6, 5.23-5.25 and 6.6 of the Draft Sustainability Guidance.

<sup>21</sup> See, in particular, paragraphs 577-579 and 588-608 of the European Commission's draft HBER guidance and paragraphs 39-42 and 53-63 of the Dutch Competition Authority's Guidance on sustainability agreements.

**(b) Condition 2: necessity/ indispensability**

- 5.8 In relation to the second condition to the Section 9 Exemption, we would welcome the CMA's clarification at paragraph 5.11 in relation to whether or not economies of scale arising from standard harmonisation/ interoperability is likely to be a good enough reason to justify any restriction on competition in the example provided. Would all financial benefits have to be passed on to customers or if consumers are prepared to pay a higher price for certain goods, then would it be acceptable for agreements to be more restrictive than strictly "necessary"?
- 5.9 As to paragraph 5.12 of the Draft Sustainability Guidance dealing with insufficient market coverage, we should be grateful for the CMA's views in relation to a potential situation where there may be a number of different ways in which to achieve a particular sustainable objective – meaning that operators could compete with one another until one way "wins" – but leaving the market to decide on the "best" option would result in a significant waste of time, effort and importantly products acquired that would then be redundant. In addition, leaving the market to decide may also not result in the most sustainable solution. In such situations, would the CMA consider efforts to standardise at the outset a more efficient and effective means of achieving more sustainable means of operation?
- 5.10 Finally, in relation to this section, we welcome the CMA's express recognition that businesses may go further in their efforts to improve environmental sustainability than public policies and regulations in some justified circumstances.

**(c) Condition 3: users are allowed a "fair share" of the benefits**

- 5.11 As mentioned above, we should be grateful for a fuller steer from the CMA in relation to what type or types of evidence businesses are likely to be required to provide in order to demonstrate sustainability benefits under the Section 9 Exemption.
- 5.12 And in identifying the relevant consumer with which to satisfy this part of the Section 9 Exemption, we would welcome the CMA's views as to how to account for what remains a significant number of consumers for whom environmental sustainability matters are not important or a means to justify a higher price, whilst others, who may account for a minority of consumers of a particular product or service, may be willing to pay for a more ecologically sound product and treat environmental concerns as fundamental to their decision-making.
- 5.13 The question as to the appropriate definition of the relevant consumer may be seen at paragraph 5.18 of the Draft Sustainability Guidance, for example. The CMA notes that businesses may rely on customer surveys for evidence that consumers value benefits of longevity and sustainability of products. However, some customers may not value the broader environmental sustainability benefits, for example climate change deniers, or some consumers may care to a certain extent but not want it enough to welcome a change to their habits or an increase in price of certain products. We would suggest that businesses should be able to rely on independent reports setting out attributable benefits of an agreement instead, for example by firms of auditors. This would ensure that consumers' underlying views on environmental issues are adequately accounted for and would ensure that evidence is not adversely skewed. In this regard, we would point out that the European Commission's draft HBER guidance does envisage the possible reliance on various types of independent reports (though in the context of wider benefits).<sup>22</sup>

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<sup>22</sup> See paragraph 607 of the European Commission's draft HBER guidance.

- 5.14 As noted above, we would also welcome the CMA taking into account broader societal benefits not only in relation to climate change agreements but also in relation to environmental sustainability agreements. It is not clear why agreements although predominantly focused on sustainability objectives as opposed to focusing directly on national and international climate targets should not benefit from the same encouragement as surely all sustainability initiatives are of benefit to the wider community as a whole.
- 5.15 We suggest that this could also be reflected at paragraph 5.19, where a direct link to benefits within the same market will be required. It may not always be possible to establish such a direct link and there is a danger that this condition may get in the way of ecological measures that would have a positive overall environmental impact and also risk bringing artificial arguments with the CMA around market definition to make agreements fit with paragraph 5.19. Although paragraphs 5.20 and 5.21 do envisage taking account of benefits to consumers in related markets, we submit that the examples provided and scenarios described are currently too narrow.
- 5.16 Finally, please could the CMA review how it may deal with climate change agreements that, for example, go beyond the UK targets (given UK targets are relatively low), rather than just being "in line with" them? Would these agreements still benefit from the more generous treatment under the Section 9 Exemption?

**(d) Condition 4: no elimination of competition**

- 5.17 As the CMA will note, the condition that any agreement must not result in the elimination of competition is reliant to a large extent on the definition of the relevant market and how narrowly this is defined.
- 5.18 First, it may not be possible in certain circumstances to (a) define a relevant market where a product or service is new and perhaps based on an innovative concept and (b) accurately predict or assess whether a particular agreement to develop a certain standard, for example, could result in a loss of competition.
- 5.19 As regards the development of a particular standard for new technology or a new more environmentally sustainable product or method of manufacture, this may involve determining a "winner" or "loser" at the outset before a market for that technology or product exists. In addition, in carrying out the exercise and deciding on a standard, there will inevitably be some loss of inter-technology competition but more intra-technology competition. As previously noted in Section 3 above, we should be grateful if the CMA could provide some guidance as to how to whether the latter would be sufficient to offset the former.
- 5.20 Finally, as noted at Section 4 above, there may also be certain situations where the phasing out/ elimination of a particular product – whilst potentially resulting in the elimination of competition entirely – may nevertheless be justified on the basis that such products are extremely unsustainable. For example, would removing products such as plastic/ Styrofoam cups from the market for single use packaging (assuming this is a market) involve an elimination of competition which the CMA would find to fail to meet condition 4?

**(e) General remarks on conditions**

- 5.21 We would invite the CMA to emphasise in the Draft Sustainability Guidance that the effects of a sustainability initiative may not always be as straightforward as to lead to significant price increases or clear-cut eliminations of competition. In practice, it is likely that joint sustainability agreements may lead to:

- (a) lower price increases than would have arisen in the absence of collaboration; and
  - (b) some lessening of competition as certain unsustainable low price options are phased out from the relevant market in order to secure the lower price increases.
- 5.22 More guidance on the above would be useful, along with further detail as to the weighing up exercise which businesses ought to conduct before deciding whether a proposed sustainability initiative is safe to implement from a competition perspective.
- 5.23 It appears that businesses are in practice going to need to carry out a detailed impact assessment of their sustainability agreements at pre-implementation stage in support of requests to their board/ decision makers for approval. In light of this, we would suggest that the CMA introduces a transparency database for any agreements assessed by the CMA that are implemented (as is currently done in the context for subsidy control matters). In the absence of legislative measures supporting this, such a database would need to operate on a voluntary basis. Businesses may be incentivised to submit to this part of the process as a means to limit their potential exposure to judicial challenges. The CMA could further incentivise this by signalling to third parties that the CMA would typically only entertain complaints raised within a specific timeframe from publication of the relevant information on its database. Please see also Section 7 below where we discuss transparency requirements for environmental sustainability agreements more generally.

## **6 DEALING WITH CHANGES IN EXTERNALITIES**

- 6.1 It is not apparent from the Draft Sustainability Guidance how the CMA's assessment could and would respond to any changing legislation or national and/or international policy directions.
- 6.2 Although the CMA notes that it will review the Draft Sustainability Guidance at regular intervals, there does not seem to be any provision to deal, for example with the potential for an existing agreement (and one which the CMA has approved) is impacted by an external factor.
- 6.3 Will the CMA require the parties to the agreement to notify the CMA of any such implications arising from new legislation, for example, and where necessary update their agreement or will the CMA highlight changing parameters that it considers may substantively impact existing agreements/ arrangements between competitors?
- 6.4 It would be helpful for this to be expressly dealt with in the final guidance document to avoid any unnecessary confusion.

## **7 IMPROVING TRANSPARENCY AS A KEY TOOL**

- 7.1 We are very supportive of the CMA's proposals described at paragraphs 3.9 and 3.10 of the Draft Sustainability Guidance for arrangements to pool certain supplier and/or customer information relating to their environmental sustainability credentials. We agree that increased transparency will incentivise businesses to take pro-active steps to tackle climate change and other environmental challenges and to compete with one other as to who can demonstrate the best credentials. For businesses at different levels of the supply chain, and for customers, the availability of information in one single place which can easily be compared will also help them make more informed choices.
- 7.2 We would welcome the CMA's suggestions as to how such a register may operate in practice. For example, if the CMA has something like a comparison website in mind, then we would agree that this could be a good idea. One suggestion, however, is that any register or comparison

type site should be run independently from the businesses it compares, to avoid any risk of conflict of interest.

- 7.3 In this regard, we also note that the CMA expects to publish a summary of all environmental sustainability and climate change initiatives notified to it on its website with a short assessment of risks and solutions (bearing in mind confidentiality considerations). Subject to our comments at Section 2 above relating to providing further comfort on potential confidentiality concerns, we agree that the publication of implemented initiatives would be extremely helpful. Please see our related suggestion at paragraph 5.23 above.
- 7.4 In addition to those agreements examined by the CMA and implemented by the parties, the CMA could also encourage businesses to publicise the existence and main provisions of any sustainability agreements currently in force on the CMA's database. The database could include a filter column specifying whether the agreement in question has been reviewed by the CMA or self-assessed by the parties. This could also be associated with the CMA signalling to third parties that the CMA would typically only entertain complaints raised within a specific timeframe from publication of the relevant information on its database (in this regard, self-assessed agreements could be subject to a longer period than agreements reviewed by the CMA). The CMA could also extend its offer of immunity from fines or other leniency terms to any agreement which has been publicised on its database (should the CMA later determine that a particular agreement publicised in this way infringed competition rules). This transparency would enable consumers and business customers to make more informed choices and ensure they are getting a fair share of the benefits of any agreement by consulting the database. While these different levels of voluntary levers may involve some degree of additional administrative burden for businesses and the CMA, they also have the potential to bring efficiencies via better transparency.

## 8 INTERACTION WITH OTHER SOURCES OF GUIDANCE

- 8.1 The status of certain sources of underlying guidance referred to in the Draft Sustainability Guidance in a post-Brexit context is not always clear and clarifications would therefore be welcome, particularly in relation to reference to retained EU law, EU case law and EU Commission guidance.<sup>23</sup>

## 9 ANSWERING THE CMA'S CONSULTATION QUESTIONS

- 9.1 In addition to our comments above, we set out in this section, our responses to the particular questions posed by the CMA in the consultation document, to the extent that these have not been covered earlier in this note.

***Question 1: Are the content, format and presentation of the Draft Sustainability Guidance sufficiently clear? If there are particular parts of the Draft Sustainability Guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.***

- 9.2 Subject to our requests for clarifications at Sections 2 to 6 and 8 above, we consider the Draft Sustainability Guidance is largely clear in terms of content, format and presentation. Please see Sections 2 to 6 and 8 above for specific clarification requests.

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We are conscious, for example, of the Retained EU Law (Revocation and Reform) Bill's current journey through Parliament, which may influence the UK courts' and the CMA's consideration of legal instruments and caselaw originating from EU law going forward. See: <https://bills.parliament.uk/bills/3340>.



***Question 2: We are keen to ensure that the Draft Sustainability Guidance is as practical and helpful to business as possible. If you think that there are situations where additional guidance would be helpful or where the examples we have used could be made clearer or more specific, please let us know.***

- 9.3 Subject to our requests for clarifications at Sections 2 to 6 and 8 above, in general the Draft Sustainability Guidance is practical and will prove useful to businesses in determining whether or not the nature and content of their environmental sustainability agreement is likely to comply with competition rules.
- 9.4 Please see Sections 2 to 6 and 8 above where we have set out various examples where we consider clarifications would be helpful.

***Question 3: We are also keen to ensure that the description of the agreements in Section 2 of the Draft Sustainability Guidance is sufficiently clear so that businesses are in no doubt as to whether their agreement is covered by the Guidance.***

***a) Are there any changes that you feel would improve the description of environmental sustainability agreements?***

***b) Are there any changes that you feel would improve the description of climate change agreements (including in footnote 4)?***

- 9.5 Please see Section 4 above where we discuss our views on the descriptions of environmental sustainability agreements and climate change agreements and provide suggestions as to how these could be improved. Overall, given the narrow scope of application of the Draft Sustainability Guidance, it is not clear why there should be a distinction in treatment of the two types of agreement.

## Annex 1

### Comparison between the CMA and Dutch Competition Authority's policy approaches to sustainability agreements

Areas of focus	Levers	CMA's Draft Sustainability Guidance	Dutch Competition Authority's Guidelines on Sustainability Agreements
<b>Scope of guidelines</b>	Types of agreements covered	Environmental sustainability agreements  Excludes agreements which pursue broader societal objectives	Sustainability agreements  Broader scope – covers the protection of the environment, biodiversity, climate, public health, animal welfare, fair trade, working conditions and human rights
<b>Exceptions to Chapter I Prohibition or national equivalent</b>	Ancillary restraint doctrine	Mentioned as potentially available	Mentioned as potentially available
	"De minimis" exception	Yes	Yes
<b>Safe harbours</b>	Presumption regarding specified categories of sustainability agreements which are unlikely to raise concerns	Yes	Yes – broadly similar  Additional category of note: sustainability agreements solely aimed at promoting product quality, product diversity, innovation or market introductions of new products (provided no exclusion of market participants/ products)
	Market share threshold for appreciability	No – to be assessed on a case by case basis	No – but see adjustment to general exemption criteria below involving market share threshold
	"[M]ore permissive approach" for an identified sub-category of sustainability agreements, in the	Yes – for "climate change agreements" – agreements which contribute towards the UK's binding climate change targets under domestic or international law	Yes, broader scope – for "environmental damage agreements" which help comply with an international or national standard or help realise a "concrete policy goal" to prevent such damage

Areas of focus	Levers	CMA's Draft Sustainability Guidance	Dutch Competition Authority's Guidelines on Sustainability Agreements
	form of making exemption criteria easier to meet	When calculating the "fair share" of benefits for consumers, parties are allowed to take account of benefits to all UK consumers (not just in relevant market(s))	"Fair share" of benefits condition interpreted so that no need to establish full compensation of relevant consumers and can take account of benefits to broader society
<b>Adjustments to general exemption criteria</b>	Adjustments in tailored guidance on how to apply the general exemption criteria in the context of sustainability agreements	<p>Yes</p> <p><u>Benefits</u>: Can have regard to future benefits</p> <p><u>Indispensability</u>: Allows for agreements to go further than sustainability legislation provided shortfalls explained</p> <p><u>"Fair share" for consumers</u>: For the quantification of fair share, allows for broad brush assessment in cases where total benefits clearly offset any competition harm</p> <p><u>No elimination of competition</u>: only limited comfort provided regarding the phasing out of unsustainable products</p>	<p>Yes</p> <p><u>Benefits</u>: Can have regard to long-term benefits. No quantitative assessment required in relation to less appreciable types of sustainability agreements –where combined market share does not exceed 30% (qualitative assessment sufficient)</p> <p><u>"Fair share" for consumers</u>: Allows for broad brush assessment in similar cases to the CMA's position. Also broader interpretation of relevant consumers – e.g. can include future users</p> <p><u>No elimination of competition</u>: comfort given that so long as the market participants involved continue to compete on key parameters, there may still be sufficient room for competition, even in the case of market-wide sustainability agreements (more clearly allows the phasing out of unsustainable products)</p>
<b>Enforcement approach</b>	Open-door policy	Yes	Yes
	Enforcement action policy	<p>Yes</p> <p>Adjustments to agreements preferred to formal enforcement regarding agreements where parties previously asked the CMA in good faith</p>	Yes – broader. The Authority will prefer the negotiation of adjustments to agreements over formal enforcement action

Areas of focus	Levers	CMA's Draft Sustainability Guidance	Dutch Competition Authority's Guidelines on Sustainability Agreements
		No enforcement against agreements that clearly correspond to examples and principles in the Draft Sustainability Guidance	
	Immunity from fines	Yes – limited to parties that implement agreements which were discussed with the CMA and where the CMA raised no competition concerns (or concerns raised had been addressed)	Yes – broader, also applies to sustainability agreements which have been published and where the Authority's guidelines were applied in good faith  No fine if parties adjust their agreements at Authority's request
<b>Additional levers</b>	Transparency measures	Yes – some. Publication of summary of initiatives with an assessment of risks and solutions	Yes – more extensive. As well as case guidance, businesses encouraged to publish their sustainability agreements as a way of securing immunity from fines

## Annex 2

### Comparison between the standardisation safe harbours in the CMA's Draft Sustainability Guidance and its Draft Horizontal Guidance

Criteria to meet for standard to be likely to fall outside of the Chapter I Prohibition (safe harbour)	Draft Sustainability Guidance (paragraph 3.11)	Draft Horizontal Guidance (paragraphs 9.17-9.29)
<b>Participation in standard development is unrestricted</b>		✓
The participation criteria are transparent	✓	
All market competitors affected can participate in the standard selection process		✓
Standard development organisations have objective and non-discriminatory procedures for allocating voting rights and objective criteria for selecting the technology to be included in the standard		✓
<b>Procedure for adopting the standard is transparent</b>		✓
Standard development organisation has procedures which allow stakeholders to effectively inform themselves of upcoming, ongoing and finalised standardisation work in good time at each stage of the development of the standard		✓
<b>Standardisation agreement contains no obligation to comply with the standard</b>		✓
No firm is obliged to participate in the standard if it does not wish to do so (albeit the standard may oblige those businesses who have committed to participate in the standard to comply with the standard and may provide for a monitoring mechanism)	✓	
Participating businesses are free to develop alternative standards and to sell products that fall outside of such standards or codes	✓	
Participating businesses are free to go beyond minimum sustainability targets set by the standard	✓	
<b>Standardisation agreement provides access to the standard on FRAND terms</b>	✓	✓
Where the standard involves IP rights, the standard development organisation has developed a clear and balanced IPR policy, adapted to the particular industry and the needs of		✓

Criteria to meet for standard to be likely to fall outside of the Chapter I Prohibition (safe harbour)	Draft Sustainability Guidance (paragraph 3.11)	Draft Horizontal Guidance (paragraphs 9.17-9.29)
the organisation, thereby increasing the likelihood of effective access to the standards for its implementers		
The IPR policy requires participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR on FRAND terms		✓
The IPR policy requires good faith disclosure, by participants, of their IPR that might be essential for the implementation of the standard under development		✓