

## RESPONSE TO COMPETITION AND MARKETS AUTHORITY CONSULTATION

### Draft guidance on environmental sustainability agreements

#### 1. Introduction and general comments

- 1.1 This response represents the views of the law firm Allen & Overy LLP on the Competition and Markets Authority (CMA)'s consultation on its draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 (the **Chapter I Prohibition**) to environmental sustainability agreements (**Draft Guidance**), dated 28 February 2023.
- 1.2 We welcome the opportunity to respond to this consultation. We would be happy to discuss any of the points made in this response if the CMA would find it helpful to do so.
- 1.3 We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website.
- 1.4 Overall, we welcome the Draft Guidance. It will serve as a useful tool and practical starting point for many businesses that are looking to enter into sustainability-related collaborations.
- 1.5 However, we do note that for businesses active in the many sectors that are regulated by authorities with competition powers, the Draft Guidance is likely to be most effective if it includes a clear statement that it will be adopted not just by the CMA, but also by concurrent competition regulators.
- 1.6 There are also some aspects of the Draft Guidance where their scope could be expanded or clarified and also some additional guidance that we consider would be helpful.
- 1.7 We have set out these specific comments below. We have structured these comments by commenting on each chapter of the Draft Guidance in turn. In each instance we have considered the consultation questions set out at section 4 of the consultation document that the CMA published alongside the Draft Guidance (the **Consultation Document**).

#### 2. Chapter 1: Overview

- 2.1 We appreciate that the CMA's focus in the Draft Guidance is on environmental sustainability agreements and does not extend to agreements which pursue broader societal objectives. As the CMA is aware, the concept of 'sustainability' and sustainable development, as enumerated in the 2030 Agenda for Sustainable Development (adopted by all United Nations Member States in 2015) extends beyond environmental sustainability – the 17 UN Sustainable Development Goals (**SDGs**) are recognised as being "*integrated and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental*".<sup>1</sup> We therefore suggest that the CMA consider extending the scope of the Draft Guidance, at least by noting that, notwithstanding the focus of the Draft Guidance on environmental sustainability agreements, similar principles could apply to the analysis of a broader set of sustainability agreements, in line with the UN SDGs.
- 2.2 We welcome the CMA's approach to climate change agreements, as summarised in paragraph 1.11 of the Draft Guidance, and agree that this is justified by the sheer magnitude of the risk that climate change represents, the degree of public concern about it, and the binding national and international commitments that successive UK governments have entered into. We also welcome the CMA's acknowledgement in paragraph 2.11 of its Consultation Document that agreements which aim to conserve biodiversity are of critical importance. We note, however, that the CMA does not "*consider that agreements which aim to conserve biodiversity fall into the same category as climate change*".

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<sup>1</sup> <https://sdgs.un.org/goals> and <https://sdgs.un.org/2030agenda>

*agreements and they therefore will not benefit from the more permissive approach that will be taken for climate change agreements*". We suggest that the CMA revisits this position. In the context of biodiversity, the UK government is subject to statutory obligations under the Environment Act 2021, and is required to monitor and report on progress against the goals of the Kunming-Montreal Global Biodiversity Framework agreed at COP 15 in December 2022. In the UK and globally there is increasing recognition that *"achieving net-zero emissions by 2050 is only possible if we also act now to deliver a nature-positive society"*, due to the *"interconnected nature of the climate and biodiversity crises"*.<sup>2</sup> Recent announcements by the UK Government have echoed this sentiment.<sup>3</sup> We therefore encourage the CMA to reconsider, or at least keep under review, its position on biodiversity agreements.

2.3 We welcome the CMA's intention, noted in paragraph 1.14 of the Draft Guidance, to publish updated guidance from time to time. Paragraph 7.14 of the Draft Guidance suggests it may do this by updating the Draft Guidance itself or issuing *"supplementary guidance"*. We appreciate the need for iteration but would caution against the latter approach whereby multiple guidance materials would be produced and would need to be read alongside, or in reference to, the original Guidance. It would be much more user-friendly to revise the Guidance itself.

2.4 We note that footnote 3 of the Draft Guidance includes a cross-reference to footnote 8; we understand that this should refer to footnote 7.

### 3. Chapter 2: Scope

3.1 Given the indication in footnotes 3 and 7 of the potential relevance of the approach in the Draft Guidance to vertical agreements (including that the Draft Guidance constitutes a "subsequent publication" for the purposes of the vertical agreements guidance, CMA166) it would be helpful to have further examples of the analysis of relevant vertical agreements. We recommend that at the very least the CMA should add a note to CMA166 to ensure that any business consulting that guidance are aware that they can cross refer to the horizontal guidance when considering vertical agreements on environmental sustainability. So that businesses do not miss this, the CMA should make clear, for example on the webpage hosting CMA166, that the Draft Guidance, once finalised, may also be relevant.

3.2 When describing the scope of climate change agreements in paragraph 2.4 of the Draft Guidance, it would be helpful to include explicit references to known examples of agreements that would fall within this scope.

<sup>2</sup> See 'COP27: Protecting biodiversity is protecting the Paris Agreement' (16 November 2022) <https://news.un.org/en/story/2022/11/1130677>, referencing a statement issued by Paris Agreement champions.

<sup>3</sup> The *Integrated Review Refresh 2023* affirmed that *"the UK's first thematic priority remains tackling climate change, environmental damage and biodiversity loss, given the urgency of making progress before 2030"*. The *2030 Strategic Framework for International Climate and Nature Action* sets out *"the integrated approach the UK will take to our international actions on climate change and nature loss, to maximise the benefits of tackling them together"*. It acknowledges that *"addressing nature loss is as urgent and critical as addressing climate change. The challenges and responses are intimately linked and must be tackled together, and public and political awareness and accountability for nature loss needs to be increased"*. The *UK International Climate Finance Strategy* addresses the *"urgency and scale"* of the *"climate and nature challenge"* – it states that *"climate change and nature loss are among the most pressing challenges that we face globally"* and displays a commitment to *"mobilise the trillions that are urgently needed from the private sector to meet our climate and nature goals"*. The *UK International Climate Finance Strategy* addresses the *"urgency and scale"* of the *"climate and nature challenge"* – it states that *"climate change and nature loss are among the most pressing challenges that we face globally"* and displays a commitment to *"mobilise the trillions that are urgently needed from the private sector to meet our climate and nature goals"*. The *Powering Up Britain* policy paper reiterates that *"there can be no solution to climate change without protecting and restoring nature"*, and the *Net Zero Growth Plan* states that *"protecting our natural environment and adapting to climate change... goes hand in hand with our net zero future and government will continue to take an integrated approach to ensure co-benefits are maximised"*.

#### **4. Chapter 3: Environmental sustainability agreements which are unlikely to infringe the prohibition**

4.1 In general, the examples included in this section are helpful, but there could be more and these could be sector-specific. In particular, financial services firms have been considering the potential challenges concerning industry-wide working groups and collaborations in relation to sustainability initiatives. They often have an eye to recent US enforcement warnings that suggest that a conservative approach may be adopted by enforcers.<sup>4</sup> Even situations where, in view of climate change commitments that they have signed up to, institutional investors seek unilaterally to influence the actions of their investment companies, appear to have drawn attention in the US.<sup>5</sup> The CMA has also received evidence that the UK insurance industry could accelerate the transition to Net Zero if firms received guidance on how they might adopt common approaches to writing certain types of risk in carbon-intensive industries.<sup>6</sup>

4.2 We welcome the guidance included at paragraph 3.11 of the Draft Guidance on the creation of industry standards. We note a significant degree of overlap with the ‘sustainability soft safe harbour’ included in draft European Commission guidelines on horizontal cooperation agreements.<sup>7</sup> The Draft Guidance suggests that the CMA will impose fewer conditions than the European Commission on industry standardisation agreements in order to consider them compatible with competition and, in particular, will not require businesses to have a monitoring system to verify compliance with standards. That would certainly be a welcome and sensible approach as it is not clear why a monitoring system should be necessary. However, the absence of specific clarification could result in businesses acting in an unduly over-cautious manner. It would therefore be helpful for the CMA to be explicit that it does not consider this particular additional condition necessary.

#### **5. Chapter 4: Environmental sustainability agreements which could infringe the Chapter 1 prohibition**

5.1 ‘By object’ restrictions often, understandably, raise a significant degree of caution among businesses. It is therefore helpful that the Draft Guidance indicates that in some instances, restrictions that in certain contexts would be regarded as a ‘by object’ restriction should be subject to an effects analysis, and the example given at paragraph 4.11 of the Draft Guidance is a useful one. It is also helpful that the Draft Guidance indicates, at paragraph 4.8, that ‘by object’ restrictions of competition can benefit from exemption in certain circumstances. It would be of greater practical use, however, if the Draft Guidance provided some examples of such restrictions that would benefit from exemption.

#### **6. Exemption for environmental sustainability agreements generally**

6.1 Chapter 5 of the Draft Guidance provides a helpful initial framework for the possible exemption of particular environmental sustainability agreements. We expect that when the UK Green Taxonomy (which the UK Government intends to consult on in autumn 2023) eventually comes into effect, it may serve, in some instances, as a reference point for the CMA’s assessment of whether an agreement gives rise to objective benefits for environmental sustainability. In the interim, businesses would benefit from any guidance that the CMA can provide on how it intends to determine whether an agreement gives rise to objective benefits for environmental sustainability.

#### **7. Chapter 6: Exemption for climate change agreements**

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<sup>4</sup> See for example correspondence between 19 State Attorneys-General and BlackRock Inc: <https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/BlackRock%20Letter.pdf>

<sup>5</sup> <https://judiciary.house.gov/media/in-the-news/republicans-launch-antitrust-investigation-into-climate-obsessed-corporate-cartel>

<sup>6</sup> See page 2 of Lloyds of London’s response of 14 November 2021 to the CMA’s previous Call for Inputs on its advice to BEIS in relation to how the competition and consumer protection regimes can better support the UK’s Net Zero and sustainability goals

<sup>7</sup> Paragraph 572 of the European Commission’s draft Horizontal Guidelines, published 1 March 2022.

- 7.1 For the reasons set out above in paragraphs 2.1 and 2.2, we are of the view that the approach outlined in Chapter 6 of the Draft Guidance should include not only climate change agreements but also biodiversity.
- 7.2 The example provided in paragraph 6.5 of the Draft Guidance is helpful. It would be even more helpful to have further worked examples of the application of this approach to climate change agreements. At the very least, it would be helpful for the CMA to pick up the other two examples of climate change agreements that it provides at paragraph 2.5 of the Draft Guidance, i.e. phasing out production processes which emit carbon dioxide and agreements not to provide financing/insurance to fossil fuel providers. Additionally, a range of examples across industries and sectors would be useful across all parts of the Draft Guidance.
- 7.3 It would also be helpful for the CMA to clarify whether it will take into account Scope 1, 2 and 3 emissions reductions when assessing objective benefits arising from climate change agreements.
- 8. Chapter 7: CMA's open-door policy, enforcement action and protection from fines**
- 8.1 We expect that businesses will consider it helpful that the CMA is open to providing informal assessment of particular agreements and in some instances, as indicated at paragraph 7.7 of the Draft Guidance, providing comfort to businesses that their agreement is compatible with competition law. It would be helpful for the CMA to set out more information on its expected process for informal advice, including the information and evidence needed and its approximate timelines. If that is not possible at the outset of its informal advice provision, it would be helpful for the CMA to provide updates on this in due course.
- 8.2 We welcome the CMA's proposal in paragraph 7.13 of the Draft Guidance to publish summaries of initiatives with an assessment of risks and solutions. This will greatly help businesses in carrying out their assessment of whether their environmental sustainability agreements are compliant with the rules, although we hope that the CMA will consider seriously confidentiality claims where companies make clear that aspects of an assessment are confidential.
- 8.3 We welcome the CMA's indication in paragraph 7.10 of the Draft Guidance that the CMA will not take enforcement action against agreements that correspond with the examples in the guidance and the principles in the guidance. This underscores the importance of the guidance including examples covering as broad a range of sectors/industries and types of arrangement as possible so that this encourages as much collaboration as possible without businesses fearing enforcement action in what it is a new and fast-moving area. Additionally, as noted above, in order for businesses in regulated sectors to feel comfort from this non-enforcement, it should be adopted by concurrent competition regulators.
- 8.4 Paragraph 7.12 of the Draft Guidance suggests some helpful protection from fines for parties that discuss an agreement with the CMA in advance and proceed after the CMA does not raise competition concerns. It would be helpful, however, for the CMA to confirm the form of enforcement action that it would otherwise seek (if it will seek any) in these circumstances, including whether it can rule out pursuing director disqualification, for additional comfort. Again, if this approach were clearly adopted by concurrent competition regulators it would provide materially more comfort for businesses in regulated sectors.