

**CMA Environmental Sustainability Draft Guidance –  
Debevoise & Plimpton Response****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.*

1. Generally, the guidance is fairly clear and, once finalised, will provide necessary clarity to businesses and their counsel on how competition rules apply to environmental sustainability agreements. The examples contained in the draft guidance are particularly useful (although, as noted below, we would encourage the inclusion of further examples and a more detailed analysis of how the four criteria for exemption would apply) and the CMA's "open-door policy" to discussing agreements with the parties and the associated protection that this may provide are welcomed.
2. However, there are a number of areas that we consider may benefit from greater clarity:
3. **Paragraph 2.5**
  - 3.1 We note the CMA's position that the 'exceptional nature' of the threat posed by climate change justifies distinguishing 'climate change agreements' from environmental sustainability agreements generally, and that there should be a more permissive approach adopted towards these agreements.
  - 3.2 However, while the examples provided in this paragraph are helpful, given the commercial significance and political sensitivities around including an agreement not to provide support such as financing or insurance to fossil fuel producers as an example of a collective climate change agreement, we believe it would be helpful to expand on that in section 5 or 6.
4. **Paragraphs 3.7 and 3.8**
  - 4.1 These two paragraphs deal with cooperation between competitors when that is required by law. Paragraph 3.7 states that where cooperation is "*made or done to comply with a legal requirement*" this is automatically excluded from the application of the Chapter I prohibition (although this does not apply if the law merely *encourages* cooperation). Paragraph 3.8 then says "*Where businesses agree that they must adhere to existing domestic or international legal requirements, this is also unlikely to raise competition concerns since businesses are expected to operate within the law*".
  - 4.2 That this is "*unlikely to raise competition concerns*" requires clarification as it does not appear to align with paragraph 3.7. If businesses adhere to domestic or international legal requirements, paragraph 3.7 confirms that this would not raise competition concerns and would automatically fall outside the scope of the prohibition. If paragraph 3.8 is intended to refer instead to encouraged cooperation with domestic or international law this needs to be made clearer.
5. **Paragraph 3.11**
  - 5.1 This paragraph provides guidance on collaboration between competitors to develop industry standards which is considered unlikely to infringe Chapter I so long as certain cumulative criteria are met, including participation being voluntary. We note the equivalent draft EU guidance goes somewhat further in recognising that competition should not be restricted by any sustainability standard (voluntary or mandatory) provided it is not likely to lead to a significant increase in price or reduction in output, product variety, quality or innovation. As

well as undermining the EU rules, the practical effect of this point of divergence is that many agreements will be pan-European and additional complexity will be created for businesses to make sure industry standards are not deemed to be anti-competitive in the UK while being compliant under the EU rules.

6. **Paragraph 3.11(iv)**

- 6.1 Paragraph 3.11 sets out that industry standards or codes of practice aimed at making products/processes more sustainable will be unlikely to have an appreciable negative effect provided that the cumulative requirements in (i) – (v) are met. The drafting of the fourth requirement that “*participating businesses are free to develop alternative standards and to sell products that fall outside of such standards or codes*” is confusing as it refers to developing alternative standards as well as selling products that fall outside of “such standards or codes” without confirming whether this refers to the alternative standards or the standards in question. We would suggest this is clarified, if necessary by splitting (iv) into two separate requirements.

7. **Paragraph 5.8**

- 7.1 Speed is recognised as a factor that would allow the parties to achieve the benefits more efficiently, and therefore serves to evidence indispensability. In the context of climate change, however, there is an argument that speed should be given a greater weighting in terms of its importance; i.e. there is a wider societal benefit to taking action quickly.

8. **Paragraph 5.12**

- 8.1 Section 5 sets out the conditions an agreement must meet to benefit from the exemption under section 9(1) of the Competition Act 1998. With regards to the requirement that the agreement and any restrictions of competition be indispensable to the achievement of benefits to production, distribution or technical or economic progress, paragraph 5.12 notes that where there is demand for a sustainable product, an agreement involving cooperation will not be indispensable to achieving sustainability benefits as consumers will in practice buy the product and businesses should compete to satisfy the demand. However, it is recognised that, for this to be the case, “*there need to be enough consumers willing to pay for the sustainable product*”. It would be useful to have further clarity as to what would be considered “enough consumers” here. Would this be based on a specific percentage of the market or on the number of consumers? We consider that examples, including thresholds if possible, would be helpful in order to provide guidance to businesses and their counsel on what constitutes “enough” here.

**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. **Paragraph 3.14**

- 9.1 Paragraph 3.14 provides a high-level example of where businesses agree to stop supplying a particular type of non-environmentally sustainable product. This example confirms that, provided customers still benefit from “significant choice” (either from the parties or from other businesses operating in the market), ceasing supply of that product is unlikely to infringe the prohibition. While we understand it will vary between markets, it would be useful to provide additional guidance on what would be considered ‘significant choice’ here. For example, would this require the exact product to still be available from other businesses operating in the market, or for one (or more) equivalent product(s) to be available from the parties or other businesses that is sufficiently environmentally sustainable?

- 9.2 As an example, if all the manufacturers of a non-environmentally-friendly product agreed to stop selling it and only sell an alternative, reusable product (for a similar price) would this still offer significant choice even though the original product is no longer available? Or would it require at least some other producers to continue selling a non-environmentally sustainable product to preserve choice? That would seem counter-intuitive. Some additional, specific examples on this point may be useful to understand how phasing out / withdrawal of products would operate in practice.
10. **Paragraph 4.14 (bullet 4)**
- 10.1 Paragraph 4.14 sets out the factors which are to be considered when assessing the effects of environmental sustainability agreements. Bullet 4 – “*The ability for non-parties to participate*” – uses the example of an “*agreement to introduce a new sustainability labelling system*” and whether other businesses are able to take advantage of the system on non-discriminatory terms. This example is similar to the logo example used in paragraph 3.12 to show a creation of an industry standard that is unlikely to have appreciable negative effects, however the effects analysis in 4.14 appears to be wider than the considerations set out in paragraph 3.11 (for example, market coverage and market power may be relevant considerations for the effects analysis in 4.14 but are not mentioned in paragraph 3.11). Using a different example to evidence this bullet may help avoid confusion and better illustrate the different analyses.
11. **Paragraphs 5.23 and 7.13:**
- 11.1 The guidance states that it may be necessary to quantify not only that consumers receive a fair share of the benefits but that those benefits are substantial enough to offset any harm caused. Given the difficulties in quantifying those benefits, the cross reference at Paragraph 5.25 to the “Technical Report on Sustainability and Competition” published jointly by the Hellenic Competition Commission and the Netherlands Authority for Consumers and Markets is helpful in that context. To further assist parties in quantifying the benefits of their proposed environmental sustainability agreements, it would be helpful if the published summaries of informal guidance (para. 7.13) could include examples of the evidence relied on (suitably anonymised or redacted if necessary for confidentiality / business secrets). In the guidance itself, further information as to the type (e.g. internal vs. third party) and amount of evidence that is required would certainly be helpful.
12. **Section 7:**
- 12.1 We welcome the CMA’s commitment to its “open-door policy” and find the information in this section very helpful. If possible, it would be useful if the CMA could provide further procedural guidance in this section as to factors such as the likely timescale for giving informal guidance, whether the parties can expect to receive comfort in writing that their proposed agreement or initiative is unlikely to infringe the Chapter I prohibition or that it can benefit from exemption, and whether and when the CMA may wish to discuss any request for guidance with other agencies, such as the European Commission.

**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)?*

**13. Paragraphs 2.3 and 2.7**

- 13.1 Paragraph 2.3 makes it clear that broader social objectives are outside the scope of the guidance. Paragraph 2.7 then says that “*where an environmental sustainability agreement concerns a type of cooperation described in other parts of the CMA’s Guidance on Horizontal Agreements, businesses should also have regard to that part of the guidance*”. Where there is conflict between the two sets of guidance, the “centre of gravity” of the cooperation will prevail. The draft guidance then footnotes the CMA’s guidance on centre of gravity contained in the draft Guidance on Horizontal Agreements.
- 13.2 Our experience as a firm makes us believe it is less usual to see a ‘pure’ environmental agreement. To the extent there are such agreements, they are often the more high-profile ones – such as the membership criteria to the UN Race to Zero followed by the Glasgow Financial Alliance for Net Zero – whereas the more everyday collective initiatives in this space are typically more mixed. That reflects the fact that the effects of climate change are felt most in developing nations where issues such as low wages, lack of a social safety net, food insecurity, poor water quality and sanitation, and gender inequality all exacerbate the negative impacts. Collective action therefore often focuses on the transition to sustainable production and supply chains, of which environmental sustainability is a major part but often not the ‘centre of gravity’.
- 13.3 However, the ‘centre of gravity’ guidance (in both documents) does not address the situation where an agreement contains both environmental sustainability objectives and wider social objectives. Given the focus on ESG at the moment, a number of initiatives are being developed (e.g. industry standards) that include both environmental and wider social objectives (such as working conditions). For these types of agreements, it is unclear how the guidance would apply and particularly how the ‘centre of gravity’ would work here. For example, would this mean that the whole agreement can no longer be treated as an environmental sustainability agreement? Providing further guidance and additional examples would be useful here.
- 13.4 As a comparison, the EU and Dutch guidance on sustainability agreements have a broader definition of “sustainability”. The Commission, for example, has committed to implement the UN’s sustainable development goals<sup>1</sup> and the notion of what amounts to a sustainability objective reflects that commitment (see section 9.1 of the draft Article 101 TFEU Guidelines<sup>2</sup>).
- 13.5 We believe there is a real likelihood that businesses will be cautious in relying on the guidance and will interpret it conservatively and so, in the event of conflict, will default to applying the other parts of the CMA’s guidance to the whole, thereby negating some of the benefits.
14. **Paragraph 3.3.2**
15. Para 3.3.2 sets out one of four examples of environmental sustainability agreements that are unlikely to infringe the prohibition. This example involves “*an agreement to pool funds to engage in activities to mitigate, adapt or compensate effects of greenhouse gas emissions*”. We consider that, given this agreement is focused on greenhouse gases, it seems at least possible that it could be classed as a ‘climate change agreement’. Further guidance on whether

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<sup>1</sup> The 2030 Agenda for Sustainable Development, adopted by all United Nations Member States in 2015 available here: [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RE\\_S\\_70\\_1\\_E.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RE_S_70_1_E.pdf)

<sup>2</sup> Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union [www.debevoise.com](https://www.debevoise.com) to horizontal co-operation agreements.

*“mitigating the effects of greenhouse gases”* would be sufficient to make it such an agreement and, if not, why not, would be useful here.

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