

Response to the CMA's consultation on draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements

Dentons welcomes this opportunity to provide its views on the draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements (CMA177) (**Draft Sustainability Guidance**).

We are pleased that the CMA has taken steps to provide specific guidance to businesses and practitioners on the issue of sustainability. We see this as important given the ongoing challenges faced by the UK - and the world - in addressing environmental sustainability, including climate change. We would encourage the CMA to take a leading role in the debate on competition law and sustainability agreements (including, but not limited to, agreements with environmental aims). We would also encourage the CMA to maintain an open and transparent dialogue with its international counterparts on this topic to ensure that global businesses are not disadvantaged by inconsistent approaches by the authorities.

Dentons regularly advises UK and international clients on horizontal agreements and practices affecting UK markets, including in relation to sustainability. This response to the CMA's consultation is informed by our experience of advising clients on such issues. We would also refer the CMA to our response to the consultation on the draft Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements (CMA174).

We would be pleased to discuss any part of this response with the CMA if helpful.

Our responses to the consultation questions (in Section 4 of the CMA consultation document CMA177con) are given below.

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.

1.1 In general, the Draft Sustainability Guidance is sufficiently clear. We have, however, identified a small number of places in the Guidance where specific changes to the text should be made to improve clarity, as follows:

- a) Paragraph 1.13 concerns enforcement and states that the CMA will not take enforcement action against agreements that *"clearly correspond to examples used in this Guidance and are consistent with the principles set out in this Guidance"*. The same statement is also made in paragraph 7.10.

The wording in paragraphs 1.13 and 7.10 is too narrow in scope and cannot be what is intended, as the examples in the Guidance are not exhaustive. The relevant wording should be revised to say: *"... and/or are consistent with the principles ..."*.

- b) Footnote 13 states: *"To the extent that businesses might distinguish themselves from competitors on the basis of these factors ..."*. It is not clear what "factors" the CMA is

Response to the CMA's consultation on draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements

referring to here, as this terminology is not used in paragraph 3.3 (to which footnote 13 relates). Presumably it is a reference to the different types of agreement/arrangement in paragraphs 3.3.1-3.3.4, but this should be made clear.

- c) Paragraph 5.16 cross-refers to paragraph 5.6. We think it would be useful to also refer here to paragraph 5.25.
- d) In paragraph 6.3 the link to benefits to all UK consumers can be made clearer by adding to the wording at the end of the third sentence to read: "*... that would combat or mitigate climate change (and benefit all UK consumers).*"
- e) In paragraph 7.12, the text should be expanded slightly to be more closely aligned with paragraphs 7.7-7.9:
 - a. The end of the first sentence should be revised to state: "*... have been addressed by the parties*"; and
 - b. The third sentence should state: "*We would also expect parties to make any further adjustments required at a later date to bring the agreement in line with the competition rules*".

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.

2.1 As a general point, it would be helpful if the guidance provided a number of worked examples, particularly at the end of sections 5 and 6, covering different types of environmental sustainability agreements/arrangements and explaining how the various exemption criteria are met/not met in each case. See, for example, the European Commission's approach in its draft Horizontal Guidelines, which contain a good number of examples (using the "situation"/"analysis" approach), including in relation to sustainability agreements, and the CMA's approach in its draft Horizontal Guidelines (CMA174). The suggested worked examples should also illustrate (where appropriate) quantification of environmental and competitive benefits and negative effects.

2.2 In addition, we have the following comments about specific examples (or lack of examples):

- a) Paragraphs 4.9-4.10 discuss ancillary restraints and give the example of an ancillary restraint in the context of a purchasing agreement. We think it would be helpful to give relevant examples of ancillary restraints in other contexts.
- b) Paragraph 5.20 is concerned with identifying the relevant consumers in related markets. The example given relates to airline routes. We would welcome the addition

Response to the CMA's consultation on draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements

of a further example which is more widely applicable, as well as clarification about the meaning of "substantial overlap" in this context.

- 2.3 Paragraphs 3.4 to 3.6 discuss agreements to do something jointly which none of the parties could do individually, which should be assessed on the basis of objective factors. It would be helpful for businesses to understand the extent to which the sharing of risk would or would not be considered such an objective factor. For example, a company might be unwilling to do something unless others agree that they will also do it and share the risk (financial, reputational, commercial etc), even though each company could do it alone from a technical feasibility perspective. If it is a company's ability to do something that is relevant in this context, not risk appetite, it would be an important distinction for businesses to understand.
- 2.4 The CMA lists the relevant factors for an effects-based analysis in paragraph 4.14. The factors include market coverage of the agreement. Given our expectation that many environmental sustainability initiatives will have large market coverage, we would ask the CMA to provide further guidance on this point, indicating that large market coverage is not necessarily a block to exemption, but may, for example, result in wider benefits to consumers. With respect to market power, it might be helpful to cross-refer to the CMA's Horizontal Guidance and the market share thresholds for different types of agreements, below which undertakings are unlikely to be regarded as having market power.
- 2.5 Paragraphs 5.17 and 5.18 discuss direct benefits and indirect benefits respectively. In paragraph 5.21, the CMA refers to these types of benefits, but also refers to "collective benefits", although does not explicitly state what the latter are, or give a specific example of them (as it does for direct benefits and indirect benefits). Is the term "collective benefits" a reference to benefits to all UK consumers (discussed in Section 6 of the Draft Sustainability Guidance)? Further clarification is needed here.
- 2.6 We are concerned that quantification of environmental benefits could act as a barrier to legitimate business collaboration if the evidential burden is set too high. The CMA recognises (at paragraph 5.24) that quantification may not always be straightforward or precise. We encourage the CMA to engage with internal and external competition economists (to the extent that it has not done so already) to ensure that as much guidance as possible is provided to businesses and that parameters are set to prevent unnecessary and disproportionate use of resources (in terms of e.g. cost, management, and time). (See also our comment at paragraph 2.1 above.)
- 2.7 Section 7 of the Draft Sustainability Guidance is of real practical importance to businesses. The guidance in this section should be as clear as possible to encourage businesses to approach the CMA and put in place environmental sustainability initiatives that may otherwise not happen because of fear of breaching competition law. Section 7 should be expanded to cover the following points:
 - a) Concurrency – there is no mention in the Draft Sustainability Guidance and, in particular, Section 7, about the role played by the sector regulators that have

Response to the CMA's consultation on draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements

competition law powers. It should be made clear, for example, whether the regulators have the same open-door policy, and, if they do not, the involvement of a regulator in any CMA informal assessment.

- b) Informal guidance – paragraph 7.7 provides that the CMA may provide "comfort" (i.e. informal guidance) "where we feel comfortable". Whilst we understand that the CMA has a certain amount of discretion, there is a need to motivate businesses to approach the CMA. With this in mind, it would be helpful to elaborate on the general circumstances in which the CMA would feel able to give informal guidance. This could include, for example, the type, quality and amount of information that the CMA expects to receive from the parties.

On a related point, how much work does the CMA expect the parties to do in terms of an *"initial self-assessment of their agreement following the principles set out in this Guidance"* before they can request informal guidance (noting, for example, that the principles cover the quantification of benefits)?

- c) Necessary adjustments/monitoring – what are the obligations on the parties following receipt of informal guidance? According to paragraph 7.8, the CMA expects parties to make necessary adjustments to their agreements/arrangements to ensure compliance with competition law. Section 7 is silent on the process for implementing any such adjustments, including, for example, the timeframe for implementation and any oversight role of the CMA (in relation to necessary adjustments, but also in terms of any ongoing monitoring of the relevant agreement/arrangement (suggested in paragraph 7.9 of the Draft Sustainability Guidance)).
- d) Protection from fines – the CMA states (at paragraphs 1.15 and 7.12) that it will not impose fines on businesses that receive favourable informal guidance and this may act as a sufficient incentive to businesses to approach the CMA and implement environmental sustainability initiatives. This incentive is likely to be increased if the CMA were to commit not to take any type of enforcement action in relation to the specific initiative, including for example director disqualification (where the CMA's practice is to consider this in all cartel cases).

The CMA states (in paragraphs 1.13 and 7.10) that it will not take enforcement action against relevant agreements that clearly correspond to the examples or principles in the Draft Sustainability Guidance (without there being an express requirement to obtain favourable informal guidance). Ordinarily, "enforcement action" includes imposing fines on parties. How does this statement fit with the statement in paragraphs 1.15 and 7.12?

- e) Private enforcement – the risk of private enforcement action against businesses is not addressed in the Draft Sustainability Guidance. There would be nothing to prevent a claimant seeking damages against companies in relation to a sustainability agreement (including climate change agreements) which, for example, increased

Response to the CMA's consultation on draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements

prices for a particular product. The Draft Sustainability Guidance is not binding on a court. It would be helpful, therefore, for the CMA to set out how it sees its role in this context and whether it would, for example, seek to intervene in appropriate cases and resist any disclosure requests.

- f) Publication – we agree that publication of a summary of each environmental sustainability initiative (together with an assessment of risks and solutions) is important in terms of educating businesses and incentivising them to take similar initiatives, although it is important to recognise that each case will turn on its facts. We also appreciate, however, that publication would not be appropriate in all cases and that there is a balance to be made. The CMA would also appear to recognise this, as paragraph 7.13 provides that it "*would typically expect, giving due regard to any confidentiality concerns (and after consultation with the parties), to publish a summary ...*". In our view, the guidance should go further and explicitly state that in some cases publication would not happen (or outline the minimum amount of information that would be publishable in each case, depending on the CMA's intention), to ensure that publication is not seen as a barrier by businesses.
- g) Commitment – we think the CMA should include a positive obligation in paragraph 7.14 to keep the Sustainability Guidance under review, given that environmental sustainability and climate change is (by necessity) a fast-changing area and future developments may mean that the guidance becomes outdated and therefore of limited use to businesses and practitioners. Such an obligation would help demonstrate the CMA's commitment to promoting environmental sustainability and cement its role as a leading participant in the ongoing international debate.

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?

- 3.1 The definition of environmental sustainability agreements (in paragraph 2.1) refers to agreements or concerted practices between competitors. It should be made clear here (or in another appropriate place in the Draft Sustainability Guidance) that such agreements/practices can take the form of trade association decisions, recommendations, or other measures. This is important, as trade associations may well be a fertile forum for discussion about environmental sustainability initiatives.
- 3.2 The definitions provided in paragraphs 2.1 and 2.4 would benefit from expanded guidance on their scope, to aid interpretation. For example, how closely and/or directly connected to improving environmental sustainability and/or climate change does an agreement or concerted practice need to be? For example, would companies providing services in the wind

Response to the CMA's consultation on draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements

turbine supply chain be able to take advantage of the Draft Sustainability Guidance on the basis that more effective collaboration between providers of e.g., subsea surveys, yard services, maintenance and repair etc, would indirectly contribute to a more efficient or expanded offshore wind sector in the UK? There will be other examples where the benefit to the environment may be indirect, yet nevertheless important.

- 3.3 We think it would be beneficial to include (in paragraph 2.2) specific examples of types of environmental sustainability agreements, for example agreements in relation to the recycling of materials, waste collection and disposal, restriction of non-Greenhouse Gas air pollutants, restriction of hazardous (polluting) chemicals, improvements to soil health, security of supply of water (for example, irrigation systems / water reservoirs).

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

- 3.4 Paragraph 2.5 lists possible examples of climate change agreements. It would be useful to include additional examples, such as those related to electric vehicles, heat pumps, home insulation, green technologies (e.g. battery storage), carbon capture and storage, renewables agreements (e.g. offshore wind) etc and less obvious examples that reduce greenhouse gases, such as changes to feedstock in the supply chain.
- 3.5 Specific examples in relation to sector cooperation on the sourcing and co-ordination of scarce technology and skills which are essential for reducing emissions in accordance with the timescales of the UK's legally binding targets would also be helpful (e.g. for building retrofit, such as refrigeration equipment, removal of gas boilers and installation of heat pumps or improvements to the logistics network, such as the purchase of heavy goods EVs).
- 3.6 Some examples where bio-diversity is linked to the impact on climate change would be useful and might include:
- preventing deforestation particularly linked to supply of commodity crops such as palm, soy, leather, cocoa, tea, coffee, rubber;
 - increased focus on regenerative agriculture in farming standards to improve soil health and reduce emissions from fertilisers and pesticides; and
 - increased focus on plant-based protein both in changes of animal feed and as ingredients in the food industry.
- 3.7 It would be helpful to state if actions leading to reductions in emissions associated with products consumed in the UK but produced overseas were included (they are not part of UK legally binding targets). For example, most clothing sold in the UK will be sourced from countries like China, Bangladesh, and India, and firms are likely to need to cooperate in agreements on renewable energy sourcing for suppliers in those regions.

Response to the CMA's consultation on draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements

- 3.8 Finally, it would be helpful to include an example focused on carbon labelling for food products and how the guidance would differ for a 'carbon only' label vs a wider eco-label which considers other environmental and social (labour/animal welfare) factors.

Dentons UK & Middle East LLP (RJOH)
11 April 2023