

## **Eversheds Sutherland (International) LLP**

### **Response to the Consultation on the CMA's Environmental Sustainability Agreements Guidance**

6 April 2023

**1. Introduction**

- 1.1 Eversheds Sutherland (International) LLP welcomes the opportunity to comment on the draft *Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements*, as published by the Competition and Markets Authority ("CMA") on 28 February 2023 (the "**Guidance**"). The comments and observations set out in this response are ours alone and should not be attributed to any of our clients.
- 1.2 Overall, we welcome the CMA's approach as set out in the Guidance and are pleased to see the CMA adopt a more permissive approach to the assessment in particular of climate change agreements. We support an approach which helps businesses assess more easily, and with greater clarity and certainty, how competition law may, or may not, apply to their environmental sustainability agreements. We agree that it is important that businesses do not abandon legitimate industry collaborations intended to achieve environmental sustainability goals for fear, sometimes wrongly, that their arrangements could breach competition law.
- 1.3 We have commented below on certain aspects of the Guidance where we consider that the CMA could provide additional guidance or clarification.
- 1.4 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 to the extent necessary.

**2. Section 1 – Overview**

- 2.1 Footnote 3 states that parties to a vertical agreement on environmental sustainability may want to consider the Guidance, to the extent that it covers issues that are relevant to the particular vertical agreement in addition to the CMA Guidance on the Vertical Agreements Block Exemption Order 2022. Reference is also made to footnote 8.
- 2.2 We consider that it is not clear what the CMA intends by way of these footnotes and would suggest that the question of how the Guidance may be relevant to the assessment of a vertical agreement be more clearly explained.

**3. Section 2 – Scope**

- 3.1 Paragraph 2.3 states that agreements which pursue broader societal objectives are outside the scope of the Guidance. We note that there may well be examples of environmental sustainability agreements that pursue both environmental and broader societal objectives. It would be helpful to understand how the CMA would assess arrangements where the objectives are mixed, falling both in and out of scope. For example, if the primary objectives of the agreement were to achieve environmental sustainability objectives but additional objectives were pursued, for example restrictions that seek to improve working conditions, what approach should be taken to the overall assessment of the agreement. It would also be helpful to understand if the CMA intends to extend this guidance at a later date, or issue a separate set of guidance, to cover agreements that pursue broader societal objectives, and / or whether the CMA considers that agreements with those aims are more likely to contravene competition law and / or benefit from exemption.
- 3.2 It would be helpful to understand whether agreements would need to directly link to specific climate change targets under domestic or international law to be considered a "climate change agreement" as defined in paragraph 2.4. For example, would a direct link need to be evidenced on the face of an agreement or will it be sufficient if an agreement broadly seeks to contribute towards the UK's net zero strategy e.g. by reducing emissions?

**4. Section 3 – Environmental sustainability agreements which are unlikely to infringe the Chapter I prohibition**

- 4.1 Paragraph 3.9 states that an agreement to pool information relating to the environmental sustainability credentials of suppliers is unlikely to have an appreciable negative effect on competition, so long as the parties are not required to purchase or refrain from purchasing

from those suppliers. In order to make the Guidance easier to apply, we consider it would be helpful for the CMA to link this paragraph with those parts of the Guidance that address the type of agreement under which competitors do agree not to purchase or to refrain from purchasing from certain suppliers, e.g. as referred to in paragraph 4.11. We think that some further internal signposting could help businesses piece different parts of the Guidance together.

4.2 It may be helpful for the CMA to provide further guidance as to the length of time which the CMA considers appropriate for "phasing out" products or processes. This could presumably vary, depending on the relevant products or processes.

4.3 It would be helpful if the CMA could provide further guidance on what level of price increase in the circumstances described in paragraph 3.13 would be considered to be "appreciable". The draft Guidance implies that the CMA accepts that a certain level of price increase would not have a negative impact on competition, but does not give guidance as to what that level might be. Any further consideration on this point would be helpful for businesses to understand as a matter of principle, what increase in price would be considered low enough so as to be unlikely to infringe competition law. Again, presumably this could vary depending on the nature and original price(s) of the relevant product(s).

5. **Section 4 - Environmental sustainability agreements which could infringe the Chapter I prohibition**

5.1 Paragraph 4.8 suggests that firms should not automatically assume that agreements which involve restrictions of competition by object are prohibited. As this is such a marked departure from the usual analysis, we consider it is essential for the Guidance to give examples of sustainability agreements which involve restrictions by object but which may still be exempted.

5.2 Paragraph 4.9 states that certain restrictions, which would otherwise be restrictions of competition by object, may be permitted, namely where the restriction is considered to be an "ancillary restraint." On the basis that the approach to ancillary restraints would be the same with regards to all horizontal agreements, it would be helpful for the wording in this paragraph to mirror the wording in paragraph 3.40 of the CMA's draft Guidance on horizontal agreements. We consider the wording in paragraph 3.40 to be easier to follow and to apply. The examples provided in paragraph 4.10 however are considered to be helpful and should be retained.

5.3 Paragraph 4.11 states that an environmental sustainability agreement that involves a group of competing purchasers agreeing only to purchase from suppliers that sell sustainable products would be unlikely to restrict competition by object despite it involving conduct that could be regarded as a form of collective boycott. However, paragraph 4.11 subsequently states that such an agreement could be distinguished from an agreement involving a horizontal collective boycott. Reference to "collective boycott" in both scenarios is confusing, and we would suggest that the CMA use a different term to describe the latter scenario.

5.4 Paragraph 4.14 states that the market coverage of an agreement is one of the relevant factors to be taken into account when addressing the effects of an environmental sustainability agreement. In our view, environmental sustainability initiatives often cover a significant part of the market. Therefore, it would be helpful for the CMA to recognise that agreements which have an extensive market coverage should not be precluded from satisfying the exemption criteria.

5.5 Paragraph 4.14 provides in the 5<sup>th</sup> bullet point that, when addressing the effects of an environmental sustainability agreement, the sharing of competitively sensitive information between parties which is not necessary for the performance of the agreement should be taken into account. Whilst the paragraph could cross-refer to the chapter in the Guidance on horizontal agreements on information exchange, it would be helpful in this context for the Guidance to provide examples of types of agreements where it may be necessary for competitively sensitive information to be shared, as well as examples of the type of information which could be shared without infringing the Chapter I prohibition. In particular, it would be useful for the CMA to address the approach it would take to business cases

5,6,7,8 and 10 in the ICC Task Force on Competition and Sustainability's white paper *When Chilling Contributes to Warming How Competition Policy Acts As a Barrier to Climate Action*.<sup>1</sup>

**6. Section 5 – Exemption for environmental sustainability agreements generally**

- 6.1 Whilst we appreciate that the quantification of environmental benefits may not be an area in which the CMA has extensive experience, with regards to paragraph 5.25, we consider it would nonetheless be helpful if the CMA could provide further guidance on what it considers to be appropriate techniques and methodologies for the quantification of benefits at the very least to point parties to techniques it recognises as being established and acceptable. This would be particularly helpful for less well resourced parties and where reference to certain approaches could ensure these are more readily accessed. It may also allow for more consistency in approach. We would suggest that this could be updated as the CMA develops its experience over time.

**7. Section 7 – CMA's open-door policy, enforcement action and protection from fines**

- 7.1 At paragraph 7.10, the Guidance states that "The CMA will not take enforcement action against environmental sustainability agreements, including climate change agreements, that clearly correspond to examples used in this Guidance *and* are consistent with the principles set out in this Guidance." Given that the list of examples provided is non-exhaustive and illustrative only, it would be helpful for the CMA to replace *and* with *or* such that protection would equally apply where the parties have in good faith sought to comply with the principles in the Guidance in circumstances where they do not correspond to any of the examples included. It would also be helpful if the CMA could include further examples.
- 7.2 We welcome the CMA's proposed open-door policy. We believe that in engaging in dialogue with firms and offering informal guidance, the CMA will help provide firms with greater comfort when entering into environmental sustainability agreements. It would, nonetheless, be helpful for the CMA to ensure that the process is streamlined and efficient so as to avoid prohibitive costs which could deter the voluntary sector or SMEs from approaching the CMA. We encourage the CMA to consider producing a short-form template to standardise the information which would be necessary to commence a review. We would also welcome a statement in the Guidance that the CMA would seek to respond to requests for informal guidance in a timely manner in order to avoid the risk of unreasonable delay.
- 7.3 It would be helpful to understand whether, in carrying out an informal assessment, the CMA intends to reach out to third-parties to understand the effect of an agreement and verify the parties' submissions. There could clearly be some risk for the parties here given the likely confidential nature of the proposed arrangement.
- 7.4 **Additional comments**
- 7.5 It would be helpful if the CMA could clarify whether the Guidance will be adopted by sectoral regulators, and, if so, whether the open-door policy will equally apply to sectoral regulators.
- 7.6 We commend the CMA for its detailed guidance and extensive use of examples. However, we suggest that the CMA provide further guidance on its approach to the business cases set out in the ICC Task Force on Competition and Sustainability's white paper *When Chilling Contributes to Warming How Competition Policy Acts As a Barrier to Climate Action*, in particular business case 4, which relates to sponsoring upstream sustainability, and business cases 5,6,7,8 and 10, which relate to information sharing. We further note that the examples used by the CMA are very product focussed and could helpfully include a broader set of examples, e.g. including from regulated sectors.
- 7.7 Additionally, the Guidance makes very limited references to trade associations. On the basis that trade associations may often play a role in environmental sustainability initiatives, we

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<sup>1</sup> ICC Task Force on Competition and Sustainability, [\*When Chilling Contributes to Warming How Competition Policy Acts As a Barrier to Climate Action\*](#), Part 2.

suggest that the CMA include further examples to provide greater certainty to trade associations.

- 7.8 Finally, we would encourage the CMA to continue advocating internationally for a more harmonised approach given many environmental sustainability agreements will be international or global in reach presenting real challenges to businesses who have to face the risk of different approaches by different authorities.

**EVERSHEDS SUTHERLAND (INTERNATIONAL) LLP**

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