CMA Consultation: Draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements

ShareAction Response

I am pleased to respond to the CPA's draft guidance on environmental sustainability agreements on behalf of ShareAction, a registered charity established to promote transparency and responsible investment practices throughout the financial services sector. We are a member organisation and count amongst our members well-known NGOs and charitable foundations, as well as over 26,000 individual supporters. One aspect of our strategy to embed high standards of stewardship involves working closely with asset managers and asset owners on how they can engage with investee companies across a range of environmental and social factors. We are frequently made aware of concerns that existing competition law is a barrier (or perceived barrier) to investors acting collaboratively on stewardship activities. These concerns are have a potentially inhibitive effect on investors wanting to engage seriously on stewardship, and it is with these concerns in mind that we make this submission.

We are pleased that the CMA is taking this issue seriously. It is part of a wider trend as policymakers and regulators in different countries seek to address the relationship between competition law and collaboration on sustainability. Furthermore, we welcome the CMA's commitment to supporting the net zero transition in its 2023/24 annual plan, and this guidance is an important part of that ambition. We are particularly supportive of the 'open door' policy under which the CMA will discuss any potential concerns with parties planning any form of sustainability agreement, to assess whether it is likely to fall foul of the Chapter I prohibition in the Competition Act.

We are primarily concerned with collaborative initiatives by investors on sustainability issues relating to their investee companies. The recent backlash against ESG in the US has raised fears further afield that competition laws designed to protect consumers could be used against collective initiatives taken in the public interest. These concerns have been raised in the context of the Glasgow Financial Alliance for Net Zero (GFANZ), and threaten to undermine confidence in such collaborative actions. There are potentially also wider concerns about the application of competition law to any form of investor collaboration, even if not as structured as initiatives like GFANZ. We have a particular interest in the implications of competition law for stewardship agreements, whereby investors might agree to take a common position on engagement with investee companies.

There are clearly specific concerns relating to such investor initiatives, and we are conscious that the current guidance is generally focussed on sustainability agreements between companies in the 'real' economy (e.g. agreements to phase out particular production processes etc.), with little specific mention of investor collaboration. We believe there are several improvements and additions that could be made to the current guidance in order to better reflect the particular circumstances faced by agreements between investors.

Finally, whilst we welcome the guidance overall, we believe the CMA should consider how it might extend to collaborative action on social factors as well. Whilst we recognise the CMA's position that it should not become too embroiled in questions of political priorities, there is a growing expectation that investors take account of social factors such as working conditions in their stewardship. One example of such factors being taken into account by investors has arisen during our work on population health. The financial case for investors to engage on social issues like health is increasingly evident, yet the same concerns from investors in relation to collaborative engagement

are frequently raised. As part of our Long-Term Investors in People's Health campaign, we are aware of at least one non-UK domiciled asset manager who declined to sign a collaborative letter to a consumer goods company about their population health impacts because of anti-trust concerns. Health outcomes are financially material for both companies and investors, and pension beneficiaries and retail investors increasingly expect their asset managers to act on health. Health, as well as broader social objectives have a clear impact on consumer welfare, and should be covered by the CMA's guidance.

Recommendations

1. **Provide detailed, specific scenario examples relating to collaboration between investors in stewardship.**

   The Guidance provides helpful examples of the kind of agreements it may affect, but these are generally limited to collaborations between companies in the 'real' economy. This is the case for both section 3 (dealing with agreements unlikely to infringe the Chapter I prohibition) and section 4 (dealing with agreements that may infringe the prohibition). The kinds of examples given specifically relate to horizontal agreements on things like phasing out certain production processes or agreeing to only purchase from certain suppliers meeting specific sustainability criteria.

   As useful as these are, there are no illustrative case studies of investors collaborating on stewardship activities relating to their investee companies. This could entail collective engagement to pressure companies to improve their net zero strategies, or agreements between investors on voting and escalation policies on their stock holdings. These actions could have a material effect on market prices by affecting the value of shares, and may also involve dealing with market-sensitive inside information. There are already a number of disclosure and other requirements when it comes to such actions, and the CMA should explicitly refer to potential investor collaboration scenarios to explain how they would be treated under the Competition Act.

2. **Extension of the specific exemption for climate change agreements to sustainability agreements more broadly**

   We would like the CMA to be clearer about the circumstances under which parties to a sustainability agreement can take into account the total benefits of that agreement for all UK consumers, and not just the narrow pool within a particular market. We welcome the specific exemption for climate change agreements that allows for this more permissive approach, but believe it should apply to sustainability agreements more broadly.

3. **Clarification on how investors involved in collaboration should demonstrate the benefits of their actions for consumers**

   Under the 'fair share' condition for exemption under section 9(1) of the Competition Act, the guidance makes clear that any benefit to consumers must be 'substantial and demonstrable'. There is a need for clarity on exactly how this would apply to investors collaborating on stewardship relating to sustainability.

   The mechanism by which investor stewardship feeds through to clear and tangible outcomes in the real economy (and therefore to benefits for consumers) can be less direct than it is for

agreements between companies themselves. As set out in recommendation 2, we are of the view that the 'totality of the benefits to all UK consumers' condition should apply to all sustainability agreements, not just those related to climate change. However, whichever class of consumers the test is applied to, demonstrating the benefits of the agreement will often be a more complex exercise for investors than it is for corporates entering into collaborative sustainability agreements. This is not because those benefits do not exist in the case of investor collaboration, but because it will usually be difficult to access the data and commercial information which would make the extent of those benefits explicit.

There should therefore be clarity on how investors are required to articulate the benefits they expect to follow from a particular agreement so that the CMA can assess whether the 'fair share' test is fulfilled.

4. Publication of guidance to build an archive of precedents for parties to refer to

The value of this guidance will lie in the confidence it gives to parties seeking to enter into sustainability agreements. Whilst the guidance itself is a welcome clarification of the CMA's position, and the hypothetical examples included provide important further assurances (which would be improved by investor-specific examples – see point 1 above), ideally parties will be able to learn from how it is applied in practice. In this regard, publication of the CMA's specific advice/feedback to parties under the 'open door' policy could be a valuable way of building precedents and allowing parties to come to a judgement about whether their agreement will be covered by the exemptions set out.

5. Consider extending the guidance to broader responsible investment priorities

We recognise the CMA's desire not to become embroiled in political questions when it comes to which issues commercial undertakings should focus on. However, the publication of this guidance is already an explicit acknowledgement that the CMA has a role to play under its consumer protection remit to remove barriers to engagement on sustainability generally, and climate change in particular. There is a strong case that this same principle should apply to a broader range of issues as well, particularly social factors around working conditions, public health and racial and gender equality. These factors also have direct and indirect effects on consumer welfare, and the CMA should consider issuing guidance for agreements pertaining to these factors as well.

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