

CMA CONSULTATION ON DRAFT GUIDANCE ON APPLICATION OF CHAPTER I TO ENVIRONMENTAL SUSTAINABILITY AGREEMENTS

RESPONSE OF ASHURST LLP

1. Introduction

- 1.1 Ashurst LLP welcomes the opportunity to respond to the consultation by the Competition and Markets Authority ("**CMA**") on its draft guidance on the application of Chapter I to environmental sustainability agreements (28 February 2023) (the "**Draft Guidance**"). This response contains our own views, based on our experience of advising and representing clients in connection with competition law issues and investigations, and is not made on behalf of any of our clients.
- 1.2 We confirm that nothing in this response is confidential. We also confirm that we would be happy to be contacted by the CMA in relation to our responses.
- 1.3 We welcome the CMA's stated goal of ensuring that businesses are not unnecessarily or mistakenly deterred from collaborating to reach environmental goals due to concerns about infringing competition law. The Draft Guidance will offer businesses greater certainty. In particular, we welcome the CMA's decision to provide informal advice on proposed agreements which will encourage businesses to engage with the CMA at an early stage when considering collaborating on environmental initiatives. It will also provide greater certainty to businesses than self-assessment alone and the published summaries will provide helpful guidance.
- 1.4 Given the nature and scale of the global environmental crisis, we welcome the CMA's decision to take a more permissive approach to climate change agreements and to allow the benefits of climate change agreements to accrue to all consumers within the UK (rather than being limited to the consumers within the relevant market).

2. **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.**

- 2.1 As stated above, we welcome the Draft Guidance and the CMA's goal of reducing uncertainty for businesses. However, as explained further below, we would welcome further clarification on a number of elements of the Draft Guidance.

Benefits analysis

- 2.2 The Draft Guidance would benefit from a more detailed explanation of how the benefits analysis will apply to environmental sustainability and climate change agreements in practice. Specifically:
- a. In respect of environmental sustainability agreements, what impact will the guidance have on the CMA's approach to the section 9 exemption? As set out below, more detailed examples which include explanations of how the CMA will assess different types of agreements would offer businesses greater insight into how (and in what circumstances) the CMA's approach will be different from the traditional application of section 9.
 - b. It is unclear whether the more permissive approach the CMA are taking in respect of climate change agreements will make it easier to establish the relevant benefits in practice. A clearer explanation of how the CMA will approach the benefits analysis in practice would assist businesses with their self-assessments when considering entering into climate change agreements.
 - c. Similarly, the Draft Guidance does not set out how the benefits should be quantified. We would suggest that the CMA include a more definitive approach, including by providing examples in connection with different types of sustainability agreements in the guidance. For example, there are well-established carbon emissions accounting and reporting methodologies to which the CMA could refer.

Fair share to consumers

- 2.3 We consider there to be scope for expanding the relevant consumers who must receive a fair share of the benefits of the agreement.
- 2.4 The Draft Guidance states that the parties must be able to show that the benefits that result from the agreement are passed on to UK consumers and that those benefits outweigh the harm that UK consumers will suffer as a result of the agreement.
- a. In relation to environmental sustainability agreements, the Draft Guidance sets out that the relevant consumers will generally be the consumers in the relevant market (within the UK). Given the nature and scale of the global environmental crisis and the impact it will have on global business (including through supply chain impacts), we would suggest that the CMA

consider expanding the concept of relevant consumers to include consumers in the relevant market globally (and not just those in the relevant market in the UK).

- b. For climate change agreements, we welcome the CMA's decision to depart from the general approach and allow the "fair share to consumers" condition to be satisfied by taking into account the totality of the benefits to *all* UK consumers arising from the agreement. However, as noted above, we would suggest that the CMA consider expanding this to allow the benefits to consumers globally to be taken into account given the global nature and impact of climate change.
- c. In addition, we would suggest that the CMA consider whether it would be appropriate to apply the more permissive approach to other categories of environmental sustainability agreements, such as agreements to conserve biodiversity, given the fundamental importance of biodiversity and the significant adverse impacts of biodiversity loss.

2.5 The Draft Guidance follows a similar approach to the guidance provided by the Dutch Authority for Consumers and Markets ("**ACM**") in its guidance¹ (the "**Dutch Guidelines**") by introducing two categories of agreements which are assessed differently. The Dutch Guidelines distinguish between "environmental-damage agreements" and "other sustainability agreements". For environmental-damage agreements, the ACM states that benefits for others than the users (i.e., the rest of Dutch society) may be taken into account. Unlike the Draft Guidance, the Dutch Guidelines set out that users *do not need* to be fully compensated for the anti-competitive effects of an environmental-damage agreement which contributes to a policy objective that has been laid down in an international or national standard to which the Dutch government is bound. Given the wide consumer interest in the global environmental crisis and environmental sustainability, we consider it would be appropriate for the CMA to take a similar position in respect of climate change agreements so that these may be permitted even if users are not fully compensated .

2.6 In Austria, the Cartel Act has been amended so that "*consumers are granted a fair share of the benefit resulting from the improved production of goods, its distribution or the promotion of technical or economic progress if the agreement significantly contributes to an ecologically sustainable or climate-neutral economy.*" This extends the general exemption from the cartel prohibition to allow efficiencies that contribute to an ecologically sustainable or climate-neutral economy (including out of market efficiencies) to be taken into account. We would

¹ Authority for Consumers and Markets, Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law, 26 January 2021, available at: <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf>.

suggest that the CMA consider adopting a similar approach for climate change agreements and/or environmental sustainability agreements more broadly.

Concurrent regulators

- 2.7 To offer greater certainty to businesses, we would welcome clarification on whether concurrent regulators will also apply the Draft Guidance. A consistent approach across the concurrent regulators is required in order to minimise the potential chilling effect of competition law on sustainability agreements.
3. **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.**
- 3.1 As businesses will need to rely on the existing section 9 exemption for environmental sustainability agreements, businesses may continue to take a cautious approach to self-assessing which could deter them from entering into such agreements. For this reason, it is important that the guidance is clear and sufficiently detailed to allow businesses confidently to conclude that their agreements do not infringe competition law.
- 3.2 We would therefore suggest that the Draft Guidance would benefit from additional and more detailed examples of environmental sustainability agreements which: (i) are unlikely to infringe the Chapter I prohibition, (ii) could infringe the Chapter I prohibition, and (iii) would nevertheless benefit from the Section 9 exemption. The examples included in the Draft Guidance are brief and high level, which may not enable businesses to understand how more complex agreements will be assessed. We would therefore recommend that the CMA include additional examples and more detailed explanations of how the CMA will assess these agreements. For example, in the Dutch Guidelines the ACM sets out its assessment of the particular sustainability agreement.² As part of more detailed examples, it would be helpful to understand the weight that should be attributed to each of the factors set out in paragraph 4.14. Such examples would provide greater clarity to businesses seeking to self-assess and might reduce the administrative burden on the CMA in assessing agreements.
- 3.3 We would also suggest that the CMA consider providing examples in relation to specific market sectors (such as financial services) where the environmental benefits are less direct and the self-assessment may be less straightforward.
4. **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**

² For example, see the example on page 9 of the Dutch Guidelines.

businesses are in no doubt as to whether their agreement is covered by the Guidance.

Overall comments

- 4.1 To help eliminate the risk of confusion for businesses when self-assessing, the guidance should clearly distinguish between environmental sustainability and climate change agreements. We would therefore welcome a visual illustration, such as a flowchart, which businesses could use to determine into which category their agreement falls.
- 4.2 It would also be helpful for the guidance clearly to set out how the CMA will approach agreements which pursue several sustainability objectives where some (but not all) would meet the requirements for being considered a climate change agreement. In such cases, would the "centre of gravity" principle apply?

a) Are there any changes that you feel would improve the description of environmental sustainability agreements?

The guidance provides examples of agreements which are considered to be environmental sustainability agreements; however, it does not include a clear definition of "environmental sustainability". While we understand that it may be difficult to provide such a definition, additional guidance would be beneficial for businesses. For example, the Dutch Guidelines do not expressly define "sustainability" or "sustainable development", but they instead refer to the UN description in 2012 UN Resolution 66/288, which describes sustainable development as the development towards "*an economically, socially and environmentally sustainable future for our planet and for present and future generations*".

- 4.3 We would welcome additional and more specific examples of agreements which the CMA considers to be environmental sustainability agreements.

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

- 4.4 We note that footnote 4 only refers to domestic UK legislation. As climate change agreements are defined by reference to the "UK's binding climate change targets under domestic and international law", we would suggest that footnote 11 is amended to: (i) refer to footnote 8 which refers to the UK's commitments under the Paris Agreement; (ii) note that footnote 4 is not an exhaustive list of the UK's commitments; and (iii) note that the UK's binding commitments may evolve over time. In addition, we would suggest that the CMA consider whether to refer to any other international obligations.

- 4.5 We would also welcome additional and more specific examples of agreements which the CMA considers to be climate change agreements. This would be of particular assistance when assessing agreements which may have a more indirect link to the UK's binding climate change targets.

Ashurst LLP

April 2023