

## Consultation on Draft Guidance on environmental sustainability agreements - Bates Wells' comments

Dear Sir/Madam,

On behalf of Bates Wells, I set out below some comments on the Draft Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements (the **Guidance**). These comments are provided roughly in line with the CMA's questions regarding overall clarity, practicality, and helpfulness for business.

I write as a lawyer who has seen a significant increase in competition law advisory work over the past 5 years in relation to environmental and sustainability initiatives between both competing and non-competing undertakings, representative associations of undertakings (not economically active in the markets they represent), charitable trusts with environmental and sustainability objectives, social enterprises and not-for-profits engaged in a similar way. My impression is that there is a great deal of external misunderstanding and confusion about what is and is not permitted under competition law (including amongst non-competition lawyers).

The CMA's approach to this area and the Guidance are now very welcome steps towards a better understanding of what can (and cannot) be pursued in compliance with competition law.

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### Commercially sensitive information exchange

Regarding agreements which on the face of it do not raise competition law issues (Type 1), more consideration and coverage of information exchange in the Guidance would be helpful, particularly in relation to information which is collated by a non-competing undertaking (such as a representative, sectoral body or a non-economic organisation acting as e.g. a data analyst and publisher). In relation to climate change type agreements, the possibility of reverse engineering of data and the resulting risk of disclosure of commercially sensitive information such as individual outputs and customer location can be difficult to overcome in concentrated markets. This is a particular concern and merits more guidance.

### Restrictions within standard-setting

Regarding agreements which could fall foul of competition law (Type 2), the commentary regarding restrictions within standard setting is not clear, particularly when read in conjunction with the section on agreements which might benefit from exemption (Type 3) due to indispensability. Restrictions on deviations from standards with an environmental sustainability purpose might often be indispensable to achieving that purpose although I note the commentary regarding industry-wide efforts to tackle climate change in that regard.

### More guidance for accreditation and standard-setting bodies

Generally, and in connection with the above comments, more guidance for accreditation and standard-setting bodies would be helpful (as distinct from representative bodies/trade associations). I note the references to the CMA

Guidance on the Vertical Agreements Block Exemption Order 2022 in this regard, however cross-reference to this publication as per the footnotes might not be helpful for such organisations and lead to confusion.

### Climate Change Agreements

The CMA's more permissive approach to climate change agreements regarding the identity of consumers is very welcome. The one example in Section 6 is also helpful but more are needed.

The wording in this section could give the false impression that undertakings need to make their case for exemption and apply to the CMA for such an exemption. Plus, whilst the section refers to appropriate reference points regarding quantification of resulting benefits, there is a risk of a possible

disjunct between undertakings' understanding of environmental benefits in their proposed climate change agreements and the potential effects on competition. Despite the reference to the "relative size" of an agreement's effects, that might not be well understood within a purpose-led organisation. More practical guidance and examples would also be welcome here.

#### Clarity generally

The Guidance is relatively clear although examples for Type 1 agreements could be confused with Type 3 agreements. Combined references to "businesses", "firms" and "undertakings" are confusing for non-lawyers and could be streamlined. In due course, a flow diagram regarding the assessment of environmental sustainability agreements could be helpful for undertakings.

Yours faithfully



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