Linklaters LLP Response to CMA Consultation

Guidance on Environmental Sustainability Agreements

1 Introduction and General Comments

(1) This submission is provided by Linklaters LLP in response to the consultation document issued by the Competition and Markets Authority ("**CMA**") on 28 February 2023, in relation to its draft Guidance on the application of the Chapter I prohibition in the Competition Act 1998 ("**Chapter I**") to agreements between competitors or potential competitors in relation to environmental sustainability agreements ("**Draft Guidance**").[1]

(2) We welcome the CMA's progressive and helpful contribution to the sustainability debate and the introduction of the Draft Guidance. Overall, Linklaters considers that the Draft Guidance provides welcome clarity on several key topics, which are of significant practical importance to businesses. The format and presentation of the Guidance, with the use of multiple examples to clarify boundaries is, in our view, also helpful.

(3) The Guidance includes several practical and concrete examples that will bring more certainty to businesses on applicable boundaries, empowering them to self-assess their conduct. This is supported by the CMA's open-door policy, which we agree will allow greater certainty in more nuanced cases. Of course, more detailed guidance in certain areas will be welcome and our submission includes some thoughts on where this could be provided in the current draft but with an appreciation that the guidance will evolve as examples of collaboration are brought to the CMA.

(4) In this regard, we are aware that the CMA has been in close touch with other international regulators on the topic of sustainability. We think that this international collaboration is extremely valuable given net zero initiatives are, for multinationals, often global and at least regional in scope and we would encourage the CMA to (continue to) work closely together with other regulators with the aim that this area of law develops with some level of consistency across jurisdictions.

(5) If the Draft Guidance were published in (largely) its current form, we believe it would significantly assist businesses to manage their antitrust risk exposure and open the door for more businesses to pursue joint environmental initiatives including at industry level.

(6) In terms of the relationship between the Draft Guidance and the CMA's Guidance on Horizontal Agreements, the CMA helpfully clarifies that the Draft Guidance is not intended to replace, but rather supplement the latter. It would, however, be helpful to have confirmation from the CMA that this Guidance is intended to replace any previous statements from the CMA on sustainability in their entirety – in particular, the content in its information sheet "Environmental sustainability agreements and competition law", 27 January 2021.

(7) The remainder of this submission follows the structure of the Draft Guidance. For each section we provide comments on the issues raised in Section 4 of the Consultation Document, namely we address the content, format and presentation of the Draft Guidance and how practical and helpful it is for businesses.

[1] The views expressed herein are those of the Linklaters lawyers who prepared this response and cannot be assumed to represent the views of any clients of Linklaters.

2 Scope and Definition of Environmental Sustainability Agreements and Climate Change Agreements

(8) In relation to the definition of environmental sustainability agreements, we note that these focus on environmental goals such as improving air or water quality, conserving biodiversity or promoting sustainable use of raw materials. Broader societal objectives such as improving working conditions are excluded.

(9) In our view, the broad intention as to the kinds of agreements proposed to be captured by the Environmental Sustainability Agreements and Climate Change Agreements categories respectively is clear. To ensure that the Draft Guidance is effective, these concepts should be broadly interpreted.

(10) We consider that it would be useful for there to be more examples of Climate Change Agreements outside the energy sector e.g. agreements where parties agree to manage supply chains to reduce deforestation. These would, in our view, satisfy the criteria of a Climate Change Agreement because there would be a demonstrable reduction of emissions.

(11) It would also be helpful for the CMA to confirm that it is not required that the parties to the agreement must reduce their *own* emissions in order to qualify. In the example above, the reduction of emissions would result from the parties' agreement inducing a change of behaviour in businesses at a different level in the supply chain. Similarly, it would be helpful to clarify whether agreements to reduce the use of raw materials (or promoting sustainable use of raw materials) are captured by climate agreements (similar to the Dutch ACM).

(12) The Draft Guidance is clear that at the present time, agreements which promote biodiversity will not benefit from the expansive approach adopted for Climate Change Agreements. We understand that the CMA's basis for this decision is that biodiversity has not (yet) been recognised as a threat of the same magnitude as climate change and that national and international commitments to promoting biodiversity are not (yet) as extensive as those relating to climate change and, specifically, emissions reduction.

(13) Whilst we understand the CMA's reasoning and agree that it would not be the place of an unelected regulator to originate policy rather than respond to Government initiatives, we do consider that there could be an argument for treating biodiversity agreements in the same way as Climate Change Agreements given that there are a number of UK government commitments to improving biodiversity (e.g. the UK's G7 Nature Compact of June 2021)[2] and that the growing consensus within the scientific community is that this is a significant threat that requires urgent action to address.

(14) On balance, we agree with the CMA's current position, but would ask the CMA to keep this stance under close review and actively consider bringing biodiversity agreements under the more expansive approach afforded to Climate Change Agreements within a relatively short timeframe, if the evidence and government policy allows.

3 Agreements which are unlikely to infringe the Chapter I prohibition

(15) Linklaters considers the provision of specific examples of agreements that do not affect the main parameters of competition, and therefore which will not usually infringe competition law, very helpful in reducing ambiguity for those wishing to enter into sustainability agreements. We have the following comments in relation to the specific examples:

(i) Paragraph 3.3.1 (internal corporate conduct): in practice, internal policy changes are often the result of discussions in common fora or industry-wide guidelines or initiatives. It would be helpful

[2] https://www.gov.uk/government/news/government-sets-out-commitments-to-biodiversity-and-sustainability-in-g7-nature-compact

if the Guidance could note that this is often the case and provide comfort that discussion about what internal corporate policies might cover will generally fall outside of the Chapter I prohibition, provided each firm independently sets its own policy and that no competitively sensitive information is shared in the context of the discussion. An example which may usefully be added to this section would be discussions between competitors about developing a common framework for Scope 3 reporting – ultimately this would be an internal corporate decision about what information is published, but based on a discussion with competitors about how certain parameters are calculated and reported.

(ii) Paragraphs 3.4-3.6 (agreements to do something jointly, which none of the parties could do individually): the examples given are helpful, but further examples in relation to late-stage projects or commercialisation efforts would also be useful to businesses.

(iii) Paragraphs 3.13-3.14 (phasing out / withdrawal of non-sustainable products): there may be circumstances where an agreement to phase out a particular technology or process in practice results in ceasing business with specific or all suppliers of a particular good or service. If a supplier is unable to switch quickly enough to a more sustainable alternative, it is possible that that supplier/s exit the market. It would be helpful to understand whether the CMA will consider this scenario to remain in a "no infringement" category or whether this would need individual exemption under s.9. In our view, this may cause harm to a competitor on the supplying market, but provided there are sufficient remaining competitors, competition itself may not be appreciably restricted.

(16) In relation to the standard-setting example (paragraph 3.11), we urge the CMA to leave open the possibility that a mandatory standard could fall outside the Chapter I prohibition. Voluntary standards, whilst easy to agree, are almost always going to have less impact on sustainability goals than mandatory standards. In practice, we are aware of a number of examples where take up of voluntary standards has been well below expected levels and the outcomes correspondingly disappointing.

(17) The European Commission has adopted a more generous approach to mandatory standards at Paragraph 57 of its draft Horizontal Guidelines including a "soft safe harbour". In our view, adopting the same approach as the European Commission on this point would benefit companies both by enabling them to be more confident about adopting mandatory (more effective) sustainability standards and by aligning this legal point across the EU and UK jurisdictions.

4 Agreements which could infringe the Chapter I prohibition

(18) We welcome the position taken in the Draft Guidance on "by object" restrictions. Our experience is that businesses are particularly reluctant to include provisions in an agreement that appear to be object restrictions even where these are necessary. This has, in our experience, resulted in potentially legitimate sustainability collaborations failing to proceed. The CMA's express statement in paragraph 4.8 that such agreements are in principle capable of benefitting from exemption and that parties should not automatically assume that they are prohibited, provides welcome comfort to businesses that the inclusion of object restrictions in an agreement is not fatal to competition law compliance. We would, however, expect that parties to an agreement with a by object restriction would almost invariably wish to seek comfort from the CMA using the open-door policy before proceeding.

(19) Paragraph 4.11 is particularly useful in delineating the scope of a collective boycott, clarifying that it is appropriate to deal with 'joint purchasing' as an 'effects' rather than 'object' analysis, owing to a distinction between horizontal and vertical collective boycotts (i.e., vertical "boycotts" do not eliminate competition within the same level in the supply chain, and so are less harmful).That said, in practice, the complexity of supply chains may mean that certain players are active at several levels of the

supply chain and are suppliers and/or competitors with respect to various products. Further guidance on how the CMA would approach this would be useful.

5 Exemption for agreements under S.9 CA98

(20) Linklaters considers it a welcome change from the traditional approach, that, when assessing whether consumers receive a fair share of the benefits of an agreement to achieve environmental sustainability benefits, the Guidance recognises that the overall benefits of these agreements include future benefits and may extend beyond the consumers of the specific products in question. The inclusion of future benefits is particularly crucial, not only as the benefits of sustainability initiatives often materialise over a longer timeframe, but also given future generations are most vulnerable to the environmental harms caused by today's (in)action(s).

(21) Our main comments on this section relate to the quantification of benefits and the evidence base that the CMA would expect to see.

(22) To avoid unnecessary and prohibitive costs incurred by businesses carrying out a 'precise' quantification exercise, we welcome the CMA's confirmation in paragraph 5.23 of the Guidance that this will not be required in every case. The Guidance could provide more detailed examples, demonstrating the "clear" and "obvious" standard that the Guidance sets, a relevant example could be drawn from the ACM's consideration of the joint marketing initiative between Shell and TotalEnergies.[3] In the same vein, we welcome the CMA's preference for a proportionate approach, where it stipulates that businesses "should apply [quantification] techniques in a way commensurate with the size of the agreement's effects".

(23) Where it is not clear that the total benefit of an environmental sustainability agreement offsets the total harm, it is clearly right that an economic quantification exercise is required to enable benefits and harms to be compared. We would welcome some guidance from the CMA as to the types of evidence that its economics team would typically expect to see.

(24) We would suggest that the CMA could look to other areas of government practice, for example procurement procedures, where techniques for quantification of sustainability benefits are further developed than in the competition sphere. It is clearly desirable from the point of view of business as well as using public resources efficiently, that the competition community does not seek to "reinvent the wheel" in relation to quantification techniques.

(25) Whilst we do not suggest that the CMA sets out a prescriptive framework for quantification, we would suggest that the CMA could (i) confirm that where there is a standard government practice to quantification, evidence provided on this basis will be acceptable to the CMA (an example being the government approach to Greenhouse gas emissions values)[4]; and (ii) offer parties some "menu options" of techniques that they could consider using (for example if the CMA has a preferred approach to assessing consumer willingness to pay or shadow pricing).

(26) It would also be helpful if the Guidance provided worked examples that practically explain the CMA's expectations regarding quantification, prescribe the relevant evidential burdens, and demonstrate how businesses might best document how future benefits substantially offset competitive harms.

[3] https://www.acm.nl/system/files/documents/no-action-letter-agreement-shell-and-totalenergies-regarding-storage-of-co2-northsea.pdf.

[4] www.gov.uk/government/publications/valuing-greenhouse-gas-emissions-in-policy-appraisal/valuation-of-greenhouse-gas-emissions-for-policy-appraisal-and-evaluation

6 Open-door policy and enforcement

6.1 Informal guidance

(27) We welcome the CMA's suggested "open-door policy", aimed at encouraging businesses to approach the CMA, at an early stage, for informal guidance on their environmental sustainability initiatives. We hope that the CMA's proposal of a dedicated channel to deal with such queries will ensure efficiency of process and consistency in decisional practice.

(28) We encourage the CMA to provide clear comfort to businesses in situations where it does not think competition law is engaged or where it considers that the conditions for exemption appear to be met, as is anticipated in paragraph 7.7 of the Guidance. We anticipate that this would be in a similar form to comfort letters given by the Mergers Intelligence Committee (but would recommend that the CMA offers up a positive assertion that it appears there is no breach of the competition rules given the potential sanctions in this area). Parties will also appreciate the opportunity to engage in consultation with the CMA on potential adjustments to bring an agreement within the bounds of competition law, in situations where the CMA does identify an appreciable restriction on competition.

(29) However, we consider the Guidance could provide greater clarity on the documentation and information the CMA expects to receive from parties as part of its assessment process. For example, paragraph 7.3 notes that the CMA would typically expect businesses using the "open-door policy" to have undertaken a self-assessment in line with the Guidance (and understandably, to be asking targeted questions of the CMA as a result), but it is not clear the extent to which, or the manner in which, this self-assessment should be evidenced. Further, paragraph 7.4 anticipates parties providing "*any documentation relevant for the assessment of the agreement"* ahead of any initial discussions with the CMA, but lacks clarity or illustrative examples as to the types, content, format and volume of documentation the CMA would expect to be provided with.

(30) We appreciate that the meaning of relevant documentation is heavily initiative-specific; however parties would benefit from some indication to aid their own cost-benefit analysis of the likely burden involved in an approach to the CMA. This is of particular importance for initiatives involving large volumes of information or a wide variety of actors, where agreeing a position and engagement strategy which all participants are comfortable with can be cumbersome. This can also be a sensitive topic where charities or not-for-profit organisations are involved where costs can be very limited. In such cases, the CMA may be able to provide an initial "go/no go" steer on the basis of very high-level information which may then assist the parties to seek funding to allow a more detailed self-assessment to be conducted.

(31) In our view it would also be helpful if the CMA could provide some indication of the time frame in which it would expect to reach a decision. Whilst this would, of course, be case specific, in our view the CMA could provide an indicative or target timeframe e.g. that it would aim to give parties a decision within 10 working days of having all the available information. Timelines would provide parties helpful clarity and ensure that any important initiatives were not unnecessarily on hold pending completion of the CMA process.

6.2 Enforcement and protection from fines

(32) The Guidance indicates that the CMA will not take enforcement action against environmental sustainability agreements that: (i) clearly correspond with the examples used in the Guidance; and (ii) are consistent with the principles set out in the Guidance (paragraph 7.10). Further, in paragraph 7.12 the Draft Guidance provides that the CMA will not issue fines against parties that implement an agreement which was discussed with the CMA and where the CMA did not raise any competition concerns (subject to being provided with all material information).

(33) In protecting against enforcement, our read of the Draft Guidance is that Parties can self-assess whether they clearly correspond with the given examples and are consistent with the broader principles in the Guidance. No consultation with the CMA is required. But CMA consultation would be required in order to benefit from protection from fines if the Parties' assessment is not correct.

(34) We suggest that given the examples given in the Draft Guidance are very specific, it is unlikely that many Parties will satisfy limb (i) of this test even if they satisfy limb (ii). The CMA might consider making this an "or" test rather than an "and" test to reflect this, particularly given the developing nature of the Draft Guidance. Further, given that protection from fines is effectively only given to parties who have consulted the CMA, our view is that many parties will be disincentivised from attempting to self-assess even clear-cut cases that clearly correspond with the examples used in the Guidance, without consulting the CMA. This may place considerable constraints on the CMA and its resources.

6.3 Publication of summaries of sustainability initiatives discussed

(35) As regards the CMA's proposal to publish initiatives outlined in paragraph 7.13, while there is a clear benefit in allowing transparency and decisional precedent for future practice, this must also be weighed against the risk of disincentivising parties from approaching the CMA.

(36) We welcome the CMA's intention to engage with parties to an initiative as regards confidentiality prior to publication of any assessment summaries. However, it is unclear from paragraph 7.13 as currently drafted whether there is any scope for such summaries to be (i) anonymised, and/or (ii) generalised or aggregated with other similar initiatives.

(37) Further, businesses would welcome the ability to engage flexibly and constructively with the CMA as to the level of detail published regarding, in particular, identified competition law risks. While the CMA's approach in the Guidance provides welcome clarity in respect of the UK, as the CMA is aware, many initiatives in this space are cross-border given the nature of the concerns they seek to address. Parties to such initiatives are particularly mindful of the wide range of enforcement approaches (which sit across a spectrum from liberal to conservative) taken by other regulators globally, and of other sources of potential risk (for e.g., State-led or private actor litigation in the United States) given public statements can (and have) been weaponised against companies.

(38) We appreciate that the CMA is eager to receive further examples of initiatives for consideration and, as practitioners, we would value further guidance. However, we anticipate there may be a chilling effect (as has occurred in other jurisdictions) on approaches to the CMA if businesses feel they are unable to maintain sufficient control over the public narrative regarding the scope and content of an initiative. We therefore encourage the CMA to signal a more expansive approach that goes beyond an ordinary course confidentiality representation process in order to ensure businesses have the confidence to approach the CMA for guidance.

7 Conclusion

(39) We reiterate our support for the Draft Guidance. We consider it represents a truly progressive approach and will contribute to the development of domestic and international law in this important area. In our view the ability to stay flexible and pragmatic, demonstrating that the door is open to business, is crucial, as is the CMA's role as an international leader in this area.

(40) We look forward to working with the CMA and other competition authorities further as this area of law evolves.

Linklaters LLP, 11 April 2023