ClientEarth

April 2023

CMA Draft guidance on the application of the Chapter 1 Prohibition in the UK Competition Act 1998 to Environmental sustainability agreements (28 February 2023)

ClientEarth and Simon Holmes' contribution to the public consultation

1. Top lines

- We very much welcome the tremendous development in the CMA's approach to the urgent need to integrate sustainability considerations into modern competition law. In particular, the approach taken by the CMA will help businesses which are ready and willing to work together to achieve the UK's net zero targets and fight climate change. In this the CMA has joined the ranks of the leading national competition authorities such as the Dutch and Austrians.

- Our detailed comments on the draft are set out below but the key issues which we would urge the CMA to consider further are:

    - extending its "more permissive approach" to other systemic existential threats such as biodiversity loss, and the degradation of ecosystems – ideally now but, at the very least, committing to reviewing this in the near future;

    - extending the benefits taken into account when assessing the "fair share to consumers" to consumers worldwide consistent with the CMA's (rightful) recognition that climate change has devastating affects "outside of the UK and immeasurable long-term effects on the whole planet".

2. Specific comments

- **Paragraph 1.5** – Amend line one to refer not just to the "scale" of the challenge but also to the "urgency" of the challenge.

- **Paragraph 1.8, 2nd bullet** – A reference could be made here to achieving the outcomes "more quickly"- consistent with paragraphs 4.6, 5.8, 5.10, 5.12 and 5.13. An additional bullet point could be added to reflect this: e.g. "where firms may individually possess the resources and capabilities to achieve more sustainable outcomes but could achieve them more quickly collectively".

- **Paragraph 1.11** – All the points made here are relevant to the need to apply the "more permissive approach" to agreements to fight biodiversity loss, and ecosystems degradation. Biodiversity loss is an existential threat comparable to climate change. [See, for example Emile P Torres, Bulletin of the Atomic Scientists, April 2016, "Its 90 seconds to midnight". Since then recognition of the risk that biodiversity loss poses has only grown; see, for example, the "Economics of biodiversity: the Dasgupta Review", 2021].

  The CMA has suggested that it has little evidence of agreements to fight loss of biodiversity. We appreciate that but do not see this as a reason to exclude any such agreements from the "more permissive approach". If there are few such agreements today then their inclusion will make little difference today (and certainly do no harm). More importantly, their inclusion will not only future proof the guidelines for when such agreements do emerge (as we must hope they must), but recognition that they will receive the "more permissive approach" should encourage such (welcome) agreements.

- **Paragraph 1.11** – After the reference to "the sheer magnitude of the risk that climate change represents" we suggest adding "the need for urgent action".

- **Paragraph 1.13 (and 7.10)** – There is a risk that the reference to examples here limits the comfort which this is intended to provide. We do not think this is intentional and could be remedied in either of two ways. Option 1 would be to delete the words "clearly correspond to examples used in this guidance and". Option 2 would be to replace "and" at the end of the third line with "or".

- **Paragraph 1.14 (and 7.14)** – If (contrary to our suggestion above), the CMA does not extend the "more permissive approach" to agreements to combat biodiversity loss (and ecosystem degradation) now, we

would strongly recommend that a reference was made here to the CMA committing to reviewing this. This would be consistent with the rapidly growing recognition (and growing public concern) that biodiversity loss also represents an existential or "special category" of threat in a similar way to climate change (as recognised in paragraphs 1.11 and 6.4). This would not commit the CMA to change the guidance but would be consistent with the CMA's ambition and leadership in this area.

- **Paragraph 2.4** – We would suggest that in the 6th line the reference was changed from "production and consumption "to "production or consumption".

- **Paragraph 2.5** – We are delighted to see that the CMA has included the example of "an agreement not to provide support such as the financing or insurance to fossil fuel producers".

- **Paragraph 3.4** – In the 7th line "or" rather than "and" would be more accurate.

- **Paragraph 3.7** – For greater clarity, the words "to cooperate" could be added in the second line after "legal requirement".

- **Paragraph 3.8**:
    - Reference could be made to "legal standards and requirements" rather than just "legal requirements". This would be consistent with the reference to "standard" in paragraph 45 of the draft guidelines of the ACM.

    - We see no reason why this should be limited to "domestic" or "international" requirements. Businesses should comply with whatever law applies in the areas where they do business so long as that law has been properly enacted. An agreement to comply with such laws should not be caught by competition law and we see no reason to discriminate against foreign laws.

- **Paragraph 3.11** – In our view one aspect of paragraphs 3.11, 5.11 and footnote 19 could be clarified. There is welcome recognition in point (ii) of paragraph 3.11 that, if a firm chooses to commit to a particular standard, then it can be obliged to comply with it. We recognise that, if a firm is effectively compelled to participate in a standard (e.g. by virtue of membership of a trade organisation that as a matter of law or commercial reality is essential to operating in the business in question) then that needs to be examined under Section 9 (because it could have an appreciable effect on competition). However, as written, it is not clear how point (iv) of paragraph 3.11 fits with this. In particular, if a firm chooses to participate in a standard, and can be obliged to comply with it (as per point (ii) of paragraph 3.11), how can it work to, or sell, products, that meet an alternate lower standard? (as point (iv) would appear to suggest?)

- **Paragraph 3.13** – In line 2, we suggest adding the words "procuring or" before the word "supplying".

- **Paragraph 3.13** – We suggest that in lines 3 and 4, the words "and agree to replace them with more sustainable alternatives" are deleted. We feel they are unnecessary and risk having an unintended limiting effect. The key point relates to getting rid of the "non-environmentally sustainable products".

- **Paragraph 3.15** – We see no reason why this paragraph should be limited to "non-binding" targets or ambitions. It could also apply to "binding" targets or ambitions for the industry (e.g. to reduce emissions

by X% by year Y and other types of sector-specific binding targets) so long as it is up to each participating business to determine unilaterally how it achieves that target or ambition within its own business.

- **Paragraph 4.9** – We would suggest amending the words in lines 8 and 9 to read "examine whether the agreement would be impossible to carry out in practice absent the restriction in question having regard to its objectives and legal and economic context". This would seem consistent with the reference to "effective" in line 6 in the e.g. in paragraph 4.10 (and with the reference to *Cartes Bancaires* in footnote 21).

- **Paragraph 4.14** – In the last bullet point, reference is made to whether the agreement is likely to lead to an "appreciable" increase in price etc. It would be helpful if a reference were made here to one factor for assessing "appreciability" being the corresponding benefits. This would be consistent with paragraph 5.23 which recognises that it is not necessary to quantify benefits precisely where the benefits are of a sufficient scale to offset (e.g.) a limited price increase. A given price increase may be appreciable if the benefits are small but not appreciable in the context of significant benefits.

- **Paragraph 5.4** – In the third bullet, we suggest the words "production and distribution costs" are changed to "production or distribution costs". This would be consistent with "or" in bullets 1,2, and 4.

- **Paragraph 5.4** – We suggest a further bullet point is added referring to achieving the above benefits more quickly.

- **Paragraph 5.6** – We suggest that, just as timeframe may be relevant to consideration of benefits, it may also be relevant to consideration of environmental harms as these may increase over time – particularly in view of the increased risk of irreversible tipping points (a point recognised in paragraph 6.4).

- **Paragraph 5.11** – See comment at 3.11 above. Surely this should refer to the situation where parties are compelled to effectively comply with a standard (rather than choosing to do so?).

- **Paragraph 5.23** – Greater legal certainty would be provided if reference were made here to agreements with limited market share. This would also align the CMA guidelines with the draft ACM guidelines (paragraph 54).

- **Paragraph 6.1** – As per our key points above and comment at paragraph 1.11, we consider that the "more permissive approach" should also apply in the case of agreements to combat the existential threat posed by biodiversity loss, and ecosystems degradation.

- **Paragraph 6.4** – We see no logic to restricting the benefits to "UK consumers" given the CMA's clear acknowledgment that "climate change agreements seek to limit negative externalities of a type that are likely to have devastating effects inside the UK and outside of the UK and immeasurable long-term effects on the whole planet once certain tipping points are reached" (emphasis added). See also the reference in the definition of climate change agreements in paragraph 2.4 which says that the "negative effects (and so the benefits of reducing them) typically are global in nature" (emphasis added).

- **Paragraph 7.10** – See comment above at paragraph 1.13.

- **Paragraph 7.14** – See comment at paragraph 1.14 above re-updating the guidelines to extend the "more permissive approach" to agreements fighting biodiversity loss and ecosystems degradation. We suggest an express reference is made to this here.

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