

**SUPPLEMENTAL OPINION ON POTENTIAL LIABILITY FOR  
CLIMATE-RELATED TRANSITION PLAN DISCLOSURES**

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**A. INTRODUCTION**

1. By an opinion dated 20 June 2025, we advised ClientEarth as to the potential liabilities of companies and directors that might arise under the law of England & Wales if a requirement that companies disclose a climate-related transition plan (“**CRTP**”) was introduced following a government consultation on that subject (the “**First Opinion**”).<sup>1</sup>
2. On 25 June 2025, the Government launched such a consultation, seeking views on “*implementation routes for transition plan requirements*” (the “**Consultation**”). The Consultation document provides greater clarity regarding the potential scope for future transition plan obligations. For example, the Government indicates that anticipated requirements will apply only to “*economically significant*” entities and will not concern small to medium-sized entities.<sup>2</sup> The Consultation also outlines four principal (potentially overlapping) broad options for a future framework, summarised as follows:
  - 2.1. **Comply or explain** - companies would not be required to disclose a standalone CRTP distinct from their annual reporting. However, those companies that chose not to disclose such a plan, or to disclose “*transition plan-related information*” pursuant to UK sustainability reporting requirements, would be required to explain their rationale for not doing so.<sup>3</sup>
  - 2.2. **Mandatory disclosure** – companies would be required to develop a CRTP and disclose CRTP-related information either as part of the company’s annual reporting, and / or as a standalone document.<sup>4</sup> A proposal of this nature was the subject of our First Opinion.
  - 2.3. **Alignment with net zero** - the Consultation invites views on whether there should be a requirement relating to the alignment of CRTPs with the UK’s target

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<sup>1</sup> <https://www.clientearth.org/latest/documents/opinion-on-the-potential-liability-for-climate-related-transition-plan-disclosures/> (last accessed 8 September 2025).

<sup>2</sup> Page 36 of the Consultation.

<sup>3</sup> Page 27 of the Consultation under “*Option 1: Require entities to explain why they have not disclosed a transition plan or transition plan-related information*”.

<sup>4</sup> Page 28 of the Consultation under “*Option 2: Require entities to develop and disclose transition plans*”.

of reaching net zero greenhouse gas emissions by 2050, “*with interim (5-10 year) targets aligned with 1.5°C pathways*”<sup>5</sup> (the “**Net Zero Objective**”).<sup>6</sup> The Government outlines three potential approaches: (i) requiring companies to disclose the extent to which a plan aligns with the Net Zero Objective; (ii) requiring companies to develop and disclose a plan that is aligned with the Net Zero Objective; or (iii) requiring companies to “*develop, disclose and implement*” (emphasis added) a plan aligned with the Net Zero Objective.<sup>7</sup>

- 2.4. **Implementation** – companies would not only be required to disclose a CRTP, but also to implement such a plan.<sup>8</sup>
3. The First Opinion focused solely on the legal implications of a potential requirement to disclose a CRTP – the second of those four options - rather than potential implications of a requirement to implement a CRTP or any requirement for alignment with specific climate objectives or commitments. The conclusions of our First Opinion may be summarised, as follows:
  - 3.1. A requirement that companies disclose a CRTP is not likely to result in a materially heightened liability risk for companies and directors overall, assuming that existing “safe harbour” provisions apply to CRTP disclosures.
  - 3.2. There is no compelling reason from a liability perspective to introduce any further or additional specific “safe harbour” regime in relation to CRTP disclosures, assuming that CRTP disclosures will fall within the existing safe harbour of section 463 Companies Act 2006 (“**CA 2006**”).
  - 3.3. In certain material respects, there are likely to be legal advantages for directors and companies as regards compliance with their obligations more generally flowing from compliance with a requirement to publish a CRTP.
  - 3.4. Further, there are steps that directors and companies can take to further reduce or mitigate the risk of liability in respect of CRTP disclosures.

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<sup>5</sup> In this section of the Consultation the Government refers to this Net Zero 2050 target somewhat interchangeably with the Paris Agreement temperature goal to “*hold the increase in the global average temperature to well below 2°C above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels.*” For the purposes of this Opinion, that distinction is not critical, but we do note that they are distinct but related concepts.

<sup>6</sup> Pages 31-33 of the Consultation under heading “B3) Aligning transition plans to Net Zero by 2050”.

<sup>7</sup> Consultation pages 32-33.

<sup>8</sup> Pages 30 – 31 of the Consultation and Questions 15 and 16.

4. Those conclusions were made by reference to the disclosure requirements found in the International Financial Reporting Standards (“**IFRS**”) S2 standard on climate-related disclosures, and the Transition Plan Taskforce (“**TPT**”) “Disclosure Framework” which were treated as likely influences on the future UK approach. As confirmed at page 15 of the Consultation, the Government intends to use these standards and develop UK-specific sustainability reporting requirements, referred to as the “**UK SRS S2**”. Drafts of UK SRS S2 standards were the subject of a separate government consultation.<sup>9</sup> Furthermore, the Consultation seeks views as to whether the protection afforded by section 463 CA 2006 should apply to any future requirements. Our analysis in the First Opinion was predicated upon that protection applying.
5. We are now asked to advise ClientEarth by extending the analysis in our First Opinion to a consideration of the potential liabilities which might arise from the broad options outlined in the Consultation. This is therefore a supplemental opinion; it does not repeat the detailed analysis set out in our First Opinion, and continues to focus primarily on disclosure-based liabilities. Where possible, we comment on the potential liabilities which might arise from the substantive requirements proposed, but (as we explain) it is impossible to offer any full analysis of the liability risks that might arise from such options in the absence of further information as to the content of those proposed requirements. In that regard, we note that the Government is not seeking stakeholder views on the potential accountability mechanisms for any future requirements at this stage, deferring such considerations until after the Government has confirmed its preferred approach.<sup>10</sup>
6. A summary of our conclusions in this opinion is provided at Section F below.

## **B. COMPLY OR EXPLAIN**

7. The first option put forward in the Consultation is for the Government to adopt a “*comply or explain*” approach to CRTP disclosure. This would require companies that have not disclosed a CRTP, or not disclosed information relating to a CRTP in accordance with the UK SRS S2, to explain why they have not done so.

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<sup>9</sup> By consultation dated 25 June 2025, the Government sought views on the government’s draft UK Sustainability Reporting Standards, which are based on the IFRS S2 standards.

<https://www.gov.uk/government/consultations/exposure-drafts-uk-sustainability-reporting-standards> (last accessed 6 October 2025).

<sup>10</sup> Page 14 of the Consultation.

8. Our First Opinion addressed the potential liabilities that would arise from the introduction of a mandatory CRTP disclosure requirement, the conclusion of which was that, overall, such a requirement would not materially heighten the liability risk for companies or their directors compared with the current position. Under a “*comply or explain*” regime, for companies opting to comply (i.e. by publishing a CRTP), we consider that the liability risks would be as set out in the First Opinion. In that situation, in our opinion, the liability risk would be the same whether disclosure was made under a “*comply or explain*” regime or a mandatory disclosure regime.
9. Where companies chose to “*explain*”, in our view, such an explanation could at least in theory generate an additional area of disclosure-based legal risk by reason of the fact that any published explanation might well include statements of present fact, which if incorrect, could found liability on the primary bases set out in our First Opinion, namely, misrepresentation and s.90A of the Financial Services and Markets Act 2000. However, for the reasons explained below, we do not consider that, overall, the introduction of a requirement to explain a decision not to disclose a CRTP would materially heighten the liability risk for companies or their directors compared with the current position.
10. The starting point is that the relevant statements will explain why the entity has decided not to disclose a CRTP. In practice, the nature and content of such statements are likely to be different from the statements made in CRTPs. It is likely that such explanatory statements will refer to past events and therefore could, if inaccurate in some significant way, amount to potentially actionable misrepresentations.
11. On the other hand, such explanations are unlikely to include forward-looking statements of the sort described in our First Opinion (as are likely to feature in CRTPs and which give rise to associated implied representations of the kind potentially giving rise to liability)<sup>11</sup>. However, it is possible that some explanations will include forward-looking statements. Such explanations could include, for example, forward-looking statements as to the future of the entity’s business. However, such statements by their nature are likely to be statements of intention or opinion which are relatively unlikely to give rise to liability, which are relatively difficult to prove to be false, and which would be subject to the considerations set out in the First Opinion.
12. There would, moreover, be additional hurdles to liability in respect of representations made in an explanation as to why no CRTP is being disclosed. While the explanation

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<sup>11</sup> Paragraphs 87 – 123 of the First Opinion.

given could (in some scenarios) make it easier for a claimant to prove a potentially actionable misrepresentation if the explanation given was factually wrong, it seems to us unlikely that there would be many cases in which such a misrepresentation would give rise to recoverable loss and thus a cause of action that might actually be pursued. We think that, while not inconceivable, in practice it would be a relatively rare case where a party, such as an investor, in fact relied on a specific explanation as to why an entity has not complied with a requirement to produce a CRTP statement as a reason for acquiring or holding shares in a manner giving rise to loss which could form the basis for a claim. In any event, this would have to be proved by the claimant in any such claim. Furthermore, successful claims would in any event also be unlikely because, we assume, existing “safe harbour” provisions will apply so that most claims would require a dishonesty standard, as explained in the First Opinion.<sup>12</sup>

13. These points suggest to us that it is unlikely in practice that disclosures of explanations as to why CRTPs are not being disclosed would generally give rise to significant risks of additional liability compared with the current position.

### **C. MANDATORY DISCLOSURE**

14. As noted above, our First Opinion addressed the potential liabilities that would arise from the introduction of a mandatory disclosure requirement, concluding that, overall, it would not materially heighten the liability risk for companies or their directors compared with the current position (i.e. the absence of any such requirement).
15. However, a further point of comparison now arises - between mandatory disclosure and the intermediate “*comply or explain*” approach proffered by the Consultation, as regards companies that would elect to “*explain*” rather than “*comply*” (since for companies opting to comply, the liability risks would be as set out in the First Opinion). As to that, we have explained in Section B above how we think liabilities may generally arise where companies choose to explain and we have compared that to the current position where there is no such requirement. That analysis also highlights some likely general differences between the risks of liability arising from disclosure of explanations for the decision not to disclose a CRTP and such risks arising from disclosure of CRTPs. Such explanations are likely to involve more statements of present fact, but it is overall less likely that they will be relied on so as to give rise to recoverable loss. Such explanations are also likely to contain less information than a CRTP, and generally the more

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<sup>12</sup> Paragraphs 40 and 65 – 70 of the First Opinion.

information that is disclosed the greater the risk of errors and thus misstatements. However, in both situations safe harbours will in practice require proof of dishonesty. Therefore, while the risks under the two situations are different, we do not think that overall one is clearly greater than the other.

16. Therefore, on the basis of the above and also on the basis of the analysis and conclusions set out in our First Opinion, we conclude that mandating CRTP disclosure would not materially increase liability risk overall as compared with a “*comply or explain*” approach, or as compared with the current position.

#### **D. ALIGNMENT WITH NET ZERO**

17. The Consultation seeks views on whether there should be a requirement relating to the “*alignment*” of CRTPs with the Net Zero Objective. The Government sets out three potential approaches, outlined above at paragraph 2.3 and considered in turn below.
18. As a preliminary and overarching observation, the Consultation does not define the term “*alignment*”, nor does it cover how exactly one might determine whether or not a CRTP is aligned with the Net Zero Objective. This is particularly significant if alignment with the Net Zero Objective might require more than simply seeking to ensure that the entity itself achieves net zero in its Scope 1-3 emissions by 2050. In assessing the potential significance of any such requirement from a liability perspective, it is important to understand (i) what alignment actually means in this context, and (ii) how such alignment might credibly be assessed in fact in particular cases. We address those issues before considering the more specific proposals set out in the Consultation.

##### **I. What is alignment and how is it assessed?**

19. The task of a company or director in assessing alignment with the Net Zero Objective will be more straightforward if there are clear and authoritative benchmarks or standards against which that alignment can be assessed without excessive difficulty. Conversely, without such benchmarks or standards, that exercise will be more difficult.
20. We understand that there are already certain global, national, cross-sectoral and sectoral ‘pathways’, standards and benchmarks by which alignment with the Net Zero Objective could, in principle, be assessed. Indeed, the Consultation itself notes that some UK companies have publicly stated that “*their plans are aligned and have used existing tools and frameworks to underline this, including the Science Based Targets*

*initiative (SBTi), CDP, the Transition Pathway Initiative, the World Benchmarking Alliance and Transition Arc*".<sup>13</sup> Additionally, the TPT Disclosure Framework anticipates that such pathways and roadmaps may inform the "*Strategic Ambition*", targets and other elements of a CRTP and stipulates that an entity shall disclose whether and how its "*Strategic Ambition*" and each target disclosed aligns with those pathways.<sup>14</sup>

21. The Consultation acknowledges (in Question 17) that there may be steps the Government could take to help mitigate challenges associated with the alignment requirement in practice. The Consultation also seeks input (in Question 18) on the "*standards and methodologies [which] are effective and reliable for developing and monitoring climate-aligned targets and transition plans, in particular those that are aligned with net zero or 1.5°C pathways.*" We understand from ClientEarth that there are many such standards and methodologies, that they vary in credibility and the extent of their basis in science, that criteria exist for assessing their credibility, and that in many cases responses to the Consultation are likely to have provided comments on the appropriate standards and methodologies to which reference should be had.
22. In those circumstances, we assume for the purposes of this Opinion that there will be an available body of material providing a range of appropriate standards and methodologies with which alignment with the Net Zero Objective can credibly be assessed, the use of which will allow a company to assess its own CRTP against a standard or benchmark that it could be confident would ensure compliance with its statutory obligations in relation to its CRTP. We acknowledge, however, that the availability and utility of such material may vary in practice, and that the precise liability analysis is likely to differ depending on whether or not appropriate and authoritative standards and methodologies are available. As a result, and as developed below, the establishment, or identification, of the applicable standards or methodologies would likely assist companies and their directors in the task of assessing alignment. We note that in due course Government may have a role in identifying such authoritative standards and methodologies.

23. As to the concept of alignment itself:

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<sup>13</sup> Page 32 of the Consultation. The Consultation also cites a report published by CDP in 2023 which states that of the 23,000 companies reporting to CDP, 25% of companies said that they had a 1.5°C-aligned climate transition plan in place, and nearly 40% of reporting companies were disclosing data against at least two-thirds of the indicators needed to form a credible plan.

<sup>14</sup> See disclosure recommendations 1.1(c)(iii) and 4.3(i)(ix).

- 23.1. For the purposes of this opinion, we assume that the term “*alignment*” in the Consultation is to be understood in a relatively narrow sense – namely, that it is the overall objectives and targets of the CRTP which must be aligned with the Net Zero Objective, rather than every individual element, planned action or detail within it. Were the latter interpretation to be adopted, any such requirement would, in our view, risk becoming very difficult to apply in practice.
- 23.2. In our view, the clearest and most feasible basis for determining whether or not a CRTP is aligned with the Net Zero Objective would be by reference to specific metrics and targets for that company identified within the CRTP. If a company produces a CRTP in line with the TPT Disclosure Framework,<sup>15</sup> such a plan will include such metrics and targets concerning emissions reductions for the business.<sup>16</sup> We anticipate and assume that it will be possible for an entity to assess its alignment with the Net Zero Objective by conducting a comparison of the company-specific targets and metrics set out in the CRTP with the guidance provided by available general relevant standards and methodologies (as referred to above). We note, in particular, that the Consultation indicates that some companies are already drawing such comparisons in practice.
24. We proceed on the basis of these assumptions for the purposes of this supplemental opinion, although we note that any liability analysis for these purposes will ultimately depend on the choices made as to the precise substantive requirements upon companies, the availability of appropriate and authoritative general standards and methodologies which can be used with confidence by companies, and on what alignment entails in the final rules adopted. For example, if a company were permitted to produce a CRTP without incorporating clear metrics or specific targets, or if it were the case that every individual element of the CRTP had to align with the Net Zero Objective, it would probably be substantially harder to determine whether a CRTP was aligned with the Net Zero Objective or to ensure substantive compliance.<sup>17</sup> Similarly, the exercise of assessing alignment would be more difficult in the absence of an

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<sup>15</sup> For these purposes, we have assumed (as in the First Opinion at paragraph 5) that any requirement will be based on the content of that framework.

<sup>16</sup> See, for example, Section 4 of the TPT Disclosure Framework.

<sup>17</sup> We note, in particular, that the exposure draft of UK SRS S2 requires disclosure of targets but only where the company has actually set those targets, or where it is otherwise required to do so by law – see paragraphs 14(a) and 33. While the exposure draft envisages a requirement to disclose certain climate-related metrics, it is proposed that UK SRS S2 will be implemented on a voluntary basis (page 20 of the Consultation). Depending on the precise framework adopted, this might leave open the possibility that a company might disclose a CRTP without metrics and targets.



authoritative set of general standards and methodologies against which comparisons could be drawn.

## II. Requirement to disclose the extent of alignment

25. The Government's first proposed option in relation to alignment would require companies to disclose a CRTP and to state the extent to which that CRTP is aligned with the Net Zero Objective. The imposition of such an obligation could in principle give rise to liability where the statement as to the degree of alignment is false or inaccurate, but, approached on the basis set out above, we do not think that such a requirement is likely to generate significantly heightened legal risk.
26. One scenario is where a CRTP contains company-specific metrics and targets relating to the Net Zero Objective that fall short of aligning with the Net Zero Objective (e.g. because the emissions reductions envisaged are obviously not consistent with relevant standards and methodologies). In that scenario, an outright statement that the CRTP is wholly aligned with the Net Zero Objective would be clearly false from the face of the CRTP to anyone reading it in full. It is therefore improbable that a board would make such a statement, particularly if relevant standards and methodologies have been taken into account in the formulation of the plan and the board have taken appropriate advice.
27. It is notable, however, that the Consultation envisages that entities may need to disclose "how aligned" their transition plan is with the Net Zero Objective (emphasis added).<sup>18</sup> The difficulty of determining compliance with a requirement for entities "*to disclose how aligned their transition plan is with net zero by 2050*" may be greater in the scenario where a CRTP does not clearly demonstrate outright alignment or misalignment with the Net Zero Objective. In that situation, for example, the company might make a statement that the CRTP is 'largely', 'significantly' or 'materially' so aligned according to a stated standard or methodology, and may (following TPT guidance) disclose the limitations or dependences that hinder a greater degree of alignment. In such cases, both assessing and proving whether or not such a statement, containing an element of subjective evaluation, is false may be practically challenging. That would be the case, even assuming, as we do, a requirement to include clear company-specific metrics and targets in a CRTP and the availability of authoritative general standards and methodologies for comparison. On those assumptions, in some cases, the extent of the alignment of the plan's targets with the Net Zero Objective might be evident on the face

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<sup>18</sup> Consultation page 32.

of the plan, rendering any general assessment of the extent of the alignment in a statement of that sort of secondary importance to anyone reading the plan (since the reader could readily make their own reliable assessment), which would weaken any potential allegation that an investor relied on such general statement. However, that might not be so in all cases, particularly perhaps in more complex businesses.

28. Therefore, whilst additional liability might potentially arise in some cases in relation to a company's statement as to the degree of alignment of its CRTP with the Net Zero Objective, in our view, this could not be described as giving rise to a generally clearly materially heightened risk of liability, for the following reasons: (1) it seems to us relatively unlikely generally that companies would in fact make such statements falsely, partly due the availability of the option of declaring and explaining any alignment gap and also the (assumed) ready ability to compare the company-specific targets and metrics in the CRTP with available general standards, the use of which would also be disclosed; (2) the practical difficulty in many cases (particularly those where such ready comparison was not in fact possible) in proving that such a statement was wrong in this context; and (3) for the reasons set out in the First Opinion, liability attaching to such statements, even if held to be objectively incorrect, will usually be assessed against a dishonesty standard, so that liability will arise only if the relevant company or director knew the statement was wrong or was reckless as to whether it was wrong or right - in other words, a disclosure made on the mistaken but honest belief in a certain degree of alignment should not incur liability.

### III. Requirement to produce a CRTP that is aligned

29. The Government's second proposed option would require companies to produce a CRTP that is aligned with the Net Zero Objective.
30. The Consultation does not identify the nature of that proposed obligation. In theory, legislation could impose a strict obligation. However, we would expect that either such a requirement will not be imposed, or it would be mitigated, in that companies would be permitted to identify dependencies within a CRTP on which its targets were premised, such as future developments on which the targets contained in the CRTP would depend, allowing companies to explain that achieving the Net Zero Objective as targeted in their CRTP is premised on significant future changes in policy, available technology and/or prevailing economic conditions, thereby minimising exposure to legal risk.

31. Moreover, as perhaps foreshadowed in the Consultation, it would be open to the Government not to impose a strict obligation, but rather to require companies to use “*best efforts*” or “*reasonable efforts*”<sup>19</sup> to produce a CRTP aligned with the Net Zero Objective and/or to exercise “*best efforts*” or “*reasonable efforts*” to implement it or “*deliver[...] on commitments set out in the transition plan*”.
32. Framing the obligation in this manner would serve to mitigate the risk of liability by introducing an obligation which is less than an absolute obligation. The degree to which introducing these standards would impact the likelihood of liability would depend on the precise standard employed. As to that:
- 32.1. English Courts have generally viewed an obligation to exercise “best efforts” as imposing a more demanding obligation than “reasonable efforts.”<sup>20</sup>
- 32.2. A “best efforts” obligation has been interpreted by the Courts as requiring a person to take every reasonable step within their power to achieve the relevant objective. A person will breach that obligation where either they have not been genuine in their efforts to achieve the relevant objective, or, even if genuinely so acting, have failed to do everything that they reasonably could have in the circumstances.<sup>21</sup>
- 32.3. By contrast, a “reasonable efforts” obligation sets a lower standard, allowing a person to weigh their obligations against relevant commercial considerations and act in a way that remains consistent with their own commercial interests.<sup>22</sup>
- 32.4. Plainly, an obligation to use “reasonable” efforts to produce a CRTP aligned with the Net Zero Objective will present a lower legal risk to companies and directors than a more stringent “best” efforts obligation.

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<sup>19</sup> Page 33 of the Consultation - although this may be referring to an obligation to implement, rather than an obligation to align – two distinct areas.

<sup>20</sup> Judicial commentary on the meaning of these terms (and the terms “best endeavours” and “reasonable endeavours”) appears predominantly in the context of the interpretation of contractual clauses. The Courts have accepted that “best efforts” means the same thing as “best endeavours” for these purposes: *Barclay v Tuck* [2018] EWHC 1125 (QB) at [102]. See also Lewison, “*The Interpretation of Contracts*” (8<sup>th</sup> Ed; 2024) at [16.46] – [16.65].

<sup>21</sup> *Kea Investments Ltd v Eric John Watson & Ors* [2020] EWHC 2599 (Ch) at [40] – [43] (in the context of ‘best endeavours’).

<sup>22</sup> *Minerva (Wandsworth) Ltd v Greenland Ram (London) Ltd* [2017] EWHC 1457 at [255].

33. It is important to note that those are not the only two possible formulations and the nature and effect of any qualifier, and therefore the scale of the legal risk presented, will depend upon on the precise wording ultimately used. It is also possible that the application of these terms to particular factual scenarios will of itself give rise to legal uncertainty and litigation risk. Overall, however, when viewed in the round, we consider that the introduction of such a standard would result in reduced risk to companies and directors when compared to the imposition of an unqualified obligation.
34. In the absence of further clarity as to the precise nature of the obligation, and given that the Consultation does not identify any proposed sanctions or enforcement mechanisms for failure to produce an aligned plan, it is not possible to go further in our assessment of the potential legal risks that might arise from a substantive requirement to develop and publish a CRTP that is aligned with the Net Zero Objective at this time.

IV. Requirement to “develop, disclose and implement” a plan aligned with the Net Zero Objective

35. The third proposed option covers aspects of other proposals considered elsewhere in this opinion. The implications of a requirement to develop and disclose a plan aligned with the Net Zero Objective is addressed above at paragraphs 29 to 34. The implications of a requirement to implement CRTPs generally are discussed immediately below.

**E. IMPLEMENTATION REQUIREMENT**

36. The Consultation also invites views on mandatory CRTP implementation.<sup>23</sup> The Government leaves open the question as to what standard might be applied to such a requirement, for example, whether companies would face a strict obligation to implement, or, more likely it would seem, be required only to use “best efforts”, “reasonable efforts”, or something else.<sup>24</sup> Furthermore, the Consultation deliberately does not consider questions of enforcement of that obligation.
37. Our analysis in the First Opinion and in this Opinion is primarily focused on disclosure-related liabilities and does not concern liability that would arise out of an implementation requirement. We do not therefore address implementation in detail in this opinion, as it is beyond the scope of our existing analysis and it also raises questions as to the

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<sup>23</sup> Pages 30 – 31 and Questions 15 and 16 of the Consultation.

<sup>24</sup> Page 33 of the Consultation. See the discussion above concerning the implications of such requirements.

regulatory, liability and enforcement architecture that would apply to such a requirement, which are primarily questions of design in the context of what would be a new legal regime.

38. In any event, the degree of legal risk that might arise out of the imposition of such a requirement cannot be addressed in any meaningful way in the absence of more detailed proposals addressing such a requirement in the round. That legal risk would depend on at least the following issues:

38.1. The nature of the obligation. Plainly an obligation to use 'reasonable efforts' would give rise to lower legal risk than a strict implementation obligation or an obligation to use 'best efforts' (as explained above).

38.2. The elements of the CRTP to which that obligation would apply. For example, an obligation to implement every single granular detail of a CRTP would give rise to greater legal risk as compared to an obligation to implement only its key elements or some other form of obligation to implement only at a broader level. This is a crucial issue it seems to us.

38.3. Any rules imposed concerning a duty on the company to update its CRTP. It remains to be seen how companies might be required, or permitted, to update their CRTPs, such that potential liability for failure to implement could be reduced by adjusting the ambition or precise content of a plan in response to changed circumstances on an ad hoc or periodic basis.

38.4. The sanction that would be applied for breaching that obligation. For the purposes of this supplemental opinion, we assume that a system of fines (or some regulatory response) is most likely to apply, since it would (in the absence of a discernible impact on the company's business or its share price) be inherently difficult to identify loss arising out of a breach of that obligation, and any loss might well not correlate with the seriousness of the failure to implement, rendering compensation claims by private parties an inappropriate remedy.

38.5. The method of enforcement. In our preliminary view, if enforcement is in some form left to shareholders (rather than a public authority or regulator), the risk of an enforcement action being brought is likely to be heightened given the greater number of potential claimants (and generally enforcement would also be inconsistent, depending perhaps less on the seriousness of the breach and more

on the attitude of the specific company's shareholders, which might range from indifference to activist concern). By contrast, enforcement by a public authority or regulator is likely to result in lesser risk due to the fact that regulators presently reserve enforcement action for the largest companies or the most egregious breaches, meaning the overall risk of an action being brought is lower than under private enforcement methods.

39. Ultimately, these matters are design choices, and the liability implications of particular approaches can only be determined by reference to specific proposals once available. Such analysis is beyond the scope of this Opinion, which focuses primarily on liability for disclosure.

## **F. CONCLUSION**

40. In summary, with respect to the Government's proposals in the Consultation our conclusions are as follows:

40.1. A "*comply or explain*" approach to CRTP disclosure is not likely to introduce a generally materially heightened liability risk for companies and directors.

40.2. Whilst the introduction of a mandatory CRTP disclosure requirement may give rise to additional liability risk relative to a "*comply or explain*" framework for companies that would choose to explain rather than comply, any such increase would not be material overall.

40.3. A requirement that companies disclose the extent to which their CRTP is aligned with the Net Zero Objective is not likely to introduce a generally materially heightened liability risk for companies and directors (assuming that it is alignment of the overall objectives of the CRTP that is required and that CRTPs will be required to comply with the TPT Disclosure Framework and so will have to include company-specific metrics and targets concerning emissions reductions for the business and assuming also that authoritative and clear general standards and methodologies will be available which can be used to assess compliance).

40.4. At this stage, it is not possible to conduct any meaningful legal analysis as to the legal risk that might arise from the proposals to require companies either to produce and disclose a CRTP that is aligned with the Net Zero Objective or to

implement a CRTP. The Consultation does not provide sufficient detail regarding the scope of those proposed obligations, nor does it identify proposed sanctions or enforcement mechanisms, making it impossible to evaluate comprehensively the range of potential legal implications. In any event, such analysis is beyond the scope of the potential liability of companies and their directors for misleading disclosures, which is the primary subject of our Opinions on this topic.

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