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A "green" light or a cautious approach? CMA publishes its "Green Agreements Guidance"...

On 12 October 2023, the Competition and Markets Authority ("**CMA**") published its finalised guidelines on environmental sustainability agreements, which it has dubbed its 'Green Agreements Guidance' ("**Guidance**")¹. The CMA published a draft version of the Guidance in February (see our previous briefing [here](#)) which it has now finalised after a period of extensive consultation. The purpose of the Guidance is to assist businesses in determining when collaborations between actual or potential competitors relating to environmental sustainability will, and will not, be likely to breach the prohibition under Chapter I of the Competition Act 1998 ("**Chapter I prohibition**").

This briefing will discuss the key takeaways from the Guidance and what this will mean for companies looking to engage in sustainability initiatives in the UK going forwards.

What agreements are covered by the Guidance?

Consistent with the approach taken in the consultation draft, the CMA has identified two main categories of agreements that should be assessed under the Guidance:

- **Environmental sustainability agreements**

These are agreements between competitors² which are aimed at preventing, reducing or mitigating the adverse impact that economic activities have on the environment, or assisting with the transition towards environmental sustainability. This category covers agreements aimed at (e.g.,) improving air or water quality, conserving biodiversity and natural habitats, or promoting the sustainable use of raw materials.³

Any agreements aimed at broader social objectives (e.g., working conditions) are not included within the scope of environmental sustainability agreements.⁴

- **Climate change agreements**

These are a subset of environmental sustainability agreements and capture agreements which specifically contribute to combating climate change. The Guidance notes that, typically, this will involve reducing the negative externalities arising from greenhouse gas ("**GHG**") emissions (or, indeed, agreements aimed at reducing the source of GHG emission themselves).⁵

The Guidance does not clarify exactly when an environmental sustainability agreement should be treated as a climate change agreement (and vice versa) – the line between the two types of agreement is slightly blurred. This ambivalence was present in the previous draft of the Guidance. In recognition of this, the finalised Guidance has now introduced a third category of agreement, namely:

- **Mixed agreements**

These are agreements which generate both climate change and other environmental benefits and are, as such, a hybrid between environmental

¹ The Guidance is available at: https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf

² As the Guidance itself clarifies, references to "competitors" means actual and potential competitors.

³ An example would be an agreement between fashion manufacturers to stop using certain fabrics that contribute to microplastic pollution.

⁴ Instead, these should be assessed under the CMA's [Guidance on Horizontal Agreements](#).

⁵ An example would be an agreement between manufacturers to phase out a particular production process which involves the emission of carbon dioxide; or an agreement between delivery companies to switch to using electric vehicles.

sustainability agreements and climate change agreements.⁶

Relationship with the CMA's Horizontal Guidelines

It should be noted that the Guidance is intended to be read in conjunction with the CMA's published guidelines on the application of the Chapter I prohibition to horizontal agreements ("**Horizontal Guidelines**").⁷ Interestingly, the Guidelines note that parties may, when looking to determine whether an agreement is compliant with competition law, rely on either guidance document, whichever is the more favourable. This is a more permissive approach than the CMA initially signalled it would take in the consultation draft and it will afford parties with a greater degree of flexibility. In other words, they will not need to shoehorn a particular agreement into an assessment under the Guidance, just because it contains some environmental elements, when it would be more suitable to an assessment (or would be more favourably assessed) under the Horizontal Guidance (and vice versa). However, it should be noted that parties will not be able to pick and choose elements of both to try and claim their agreements are legally compliant.

What does the Guidance say?

Environmental sustainability agreements which are unlikely to infringe the Chapter I prohibition

The Guidance specifies that some forms of environmental sustainability agreements will not be captured by the Chapter I prohibition, either because they do not relate to the way that businesses compete or because they do not have an appreciably adverse effect on competition. These include:

1) Non-appreciable agreements

These are agreements which involve parties which have a very small combined market share of the relevant market(s). In such cases, provided that the agreement does not have a "by object" restriction of competition, it will not be deemed to have an appreciable restriction of competition and will thus fall outside the Chapter I prohibition. The CMA does not specify

what will constitute a "very small combined market share", but the CMA separately notes in its Horizontal Guidance that it will have regard to the European Commission's ("**Commission**") approach set out in its De Minimis Notice.⁸ Broadly, the market share thresholds specified therein are a cumulative market share of 10% for competitors and individual market shares of 15% for non-competitors.⁹



2) Agreements which do not affect the main parameters of competition

Agreements will fall under this category where their subject does not interfere with the material ways businesses compete with one another (i.e., relating to price, quantity, quality, choice or innovation of goods and services). The Guidance includes examples, such as: (i) agreements which concern a business' internal corporate conduct; (ii) joint campaigns to raise awareness about environmental sustainability issues; and (iii) joint lobbying for policy or legislative changes.

3) Cooperation which is required by law

If sustainability collaboration between actual or potential competitors is explicitly required by legislation, and not merely recommended, then it will be outside the scope of the Chapter I prohibition. This is consistent with the broader

⁶ The CMA provides the example of an agreement between book publishers to use only recycled paper, which may have both climate change and wider environmental benefits, such as avoiding deforestation and preserving biodiversity.

⁷ The Competition & Markets Authority. *Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements* ("**Horizontal Guidelines**"). August 2023. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1178791/Horizontal_Guidance_FINAL.pdf

⁸ European Commission. *Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the*

Functioning of the European Union (2014), OJ C 291, ("**De Minimis Notice**"). Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830\(01\)&rid=1](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&rid=1)

⁹ It is worth noting that the CMA has its own equivalent to the European Commission's De Minimis Notice, which sets out turnover thresholds which will denote agreements which are either small or of minor importance. See further The Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262) (as amended by The Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93)) and the Competition (Amendment etc.) (EU Exit) Regulations 2020).

approach to collaborations in the CMA's Horizontal Guidance.

4) Pooling information about suppliers or customers

An agreement which relates to the joint pooling of evidence-based information about environmental sustainability credentials¹⁰ and which does not involve the sharing of competitively sensitive information ("**CSI**") (e.g., prices, purchase volumes) will be unlikely to breach the competition laws.

5) Creation of industry standards and targets

Where competitors agree to create joint industry standards and targets, this will likely fall outside of the Chapter I prohibition provided that the adoption of the same will not unfairly prejudice or harm other companies. To ensure this, there are certain criteria which must be met, including that any industry standards/targets: (i) are subject to a transparent process of negotiation/debate before being adopted; (ii) can be adopted voluntarily; (iii) can be implemented on reasonable and non-discriminatory terms; and (iv) can be subject to independent determination by businesses as to the level of contribution and the way in which they are realised (i.e., including exceeding the minimum threshold).¹¹

Environmental sustainability agreements which are unlikely to infringe the Chapter I prohibition

Unsurprisingly, the Guidance confirms that any environmental sustainability agreement which contains a "by object"¹² infringement of competition will be likely to be a breach of the competition rules. There is no exhaustive list of "by object" infringements, but those agreements which typically fall under this category include price fixing, the artificial partitioning of markets, customer sharing and/or intentional limitations in quality and/or innovation. It is possible that an environmental sustainability agreement containing a "by object" infringement could benefit from an individual exemption, but it will be extremely difficult to satisfactorily show that the criteria are satisfied.

More widely, any environmental sustainability agreement which has an appreciably negative effect on competition will likely breach the Chapter I prohibition unless the agreement:

1) Can meet the criteria for an individual exemption

Unlike "by object" infringements, any agreement which could have an appreciably negative effect on competition is more likely to meet the criteria for an individual exemption, but it will still need to be shown that the criteria are met.

2) Constitutes an ancillary restraint

Ancillary restraints are restrictions (even a "by object" infringement) which is a necessary and proportionate measure to include in an agreement which pursues a wider, pro-competitive goal (including one that relates to environmental sustainability). Such a restraint will only be "ancillary" where the wider agreement would be impossible to achieve without it. The fact that the agreement in question would be more difficult and/or less profitable absent the restriction would not satisfy this test.



Environmental sustainability agreements that can benefit from an individual exemption

As alluded to above, agreements which might otherwise be anti-competitive may benefit from what is known as an individual exemption. For any agreement to benefit from an individual exemption it must satisfy the criteria set out under section 9(1) of the Competition Act 1998.¹³ Whilst the criteria

¹⁰ Information regarding sustainability credentials could include (e.g.,) whether such suppliers have environmentally sustainable value chains, use environmentally sustainable production processes and/or rely on environmentally sustainable inputs.

¹¹ This final criterion is significant, as it links to the European Commission's decision to fine manufacturers of diesel engines for entering into a cartel to (simply put) only meet minimum standards (and no more) vis-à-vis emissions targets. See our briefing on this [here](#).

¹² The term "by object" infringements refers to any forms of collusion between parties which are regarded as inherently restrictive of competition. Regulators like the CMA have recognised the concept of "by object" agreements based on the rationale that some types of infringements are so likely to constitute a breach of the applicable competition laws that authorities should not need to expend significant public resources and time in proving this is the case.

¹³ This is the UK's equivalent to the test under Article 101(3) of the Treaty on the Functioning of the European Union ("**TFEU**").

themselves are fixed – i.e., the same test is applied for any type of horizontal or vertical agreement – the Guidance explains the particular factors that can be taken into account (when determining if the criteria are met) for environmental sustainability agreements specifically.



For an environmental sustainability agreement to benefit from an individual exemption, any anti-competitive elements must:

1) Either contribute to certain benefits in terms of production and/or distribution, or else promote technical or economic progress

The Guidance notes that these benefits may include:

- eliminating or reducing the harmful environmental effects arising from the production or consumption of particular goods or services that the market has failed to address (e.g., plastic waste);
- improving product variety or quality (e.g., creating new or improved products which have a reduced impact on the environment);
- shortening the time it takes to bring environmentally sustainable products to the market; and/or
- improving production or distribution processes (e.g., the introduction of new cleaner technologies).

The CMA notes that any benefits of an agreement need to be substantiated and cannot simply be assumed. As such, they need to be objective, concrete and verifiable.

2) Be indispensable to achieving these benefits

Parties must be able to show that their agreement is no more restrictive of competition than is indispensable (or reasonably necessary) to achieve the pro-competitive benefits. In practice, this means that, in the absence of the agreement, the parties would not otherwise be able to achieve the same level of benefits or else that these benefits would not be achieved as quickly. In any event, any restrictions must go no further than what is indispensable.

One way to assess indispensability is customer demand. For instance, if there is a more sustainable raw material that can be sourced in the production process, but doing so will incur higher costs that will need to be passed on to customers, companies may legitimately argue that cooperation on this is necessary to avoid any one party bearing these costs in adopting the use of this new material (the so-called "first mover disadvantage"). Conversely, if there is sufficient customer demand for (e.g.,) more eco-friendly packaging, notwithstanding the higher product costs this will result in, competitors cannot claim that a joint agreement to adopt this packaging is indispensable to achieve economies of scale (as customers would still buy the product at the higher price).

3) Provide consumers with a fair share of the resulting benefits

Any agreement must ultimately afford more in benefits to consumers than they suffer from the anti-competitive harms. Consumers may benefit directly (e.g., through lower prices, higher product quality) or indirectly (e.g., where they place value on the higher environmental credentials of the products they purchase). In the latter case, these indirect benefits will need to be corroborated with evidence that this is genuinely the case (e.g., customer surveys).

Importantly, the identity of the relevant consumers that receive these benefits must be those to whom the products and/or services in the agreement directly relate (i.e., they must be in the relevant market(s)). When two or more markets are inter-related, the benefits seen on separate markets can be taken into account, but the consumers must still be the same (or else substantially overlap).

4) Not substantially eliminate competition

Finally, the agreement must not eliminate competition in respect of a substantial part of the relevant products and/or services market(s) in question. The CMA notes that, in practice, this means that the remaining competition (post-implementation of the agreement) must be "meaningful", which can be satisfied, for instance, if the players on any given market can still actively compete on key parameters (e.g., price and/or quality).

Special exemption factors for climate change agreements

Whilst climate change agreements will need to be assessed under the same individual exemption criteria outlined above, there are two factors relating to these agreements that will make it easier for parties to argue that they should benefit from an individual exemption:

- The objective benefits that parties can take into account may, for climate change agreements, relate to agreements that occur outside the UK. The rationale for this is, according to the CMA, that any agreement to (e.g.,) reduce GHG emissions can be presumed to benefit UK consumers, as this type of benefit transcends traditional market definitions, particularly in terms of their geographic scope.
- In terms of the consumers that can be considered to receive a "fair share" of the resulting benefits, the CMA has accepted stakeholder representations that a more permissive approach should be taken. What this means is that the CMA will take into account any benefits that arise from climate change agreements to any and all UK consumers affected, not just those in the directly affected markets.

Application to mixed agreements

As noted above, the Guidance has acknowledged a new category of agreement which contains elements of both environmental sustainability agreements and climate change agreements. When it comes to determining whether these mixed agreements benefit from an individual exemption, the CMA confirms that parties may take into account the special exemption factors available for climate change agreements insofar as the particular elements of their agreement would be classified as such. For those elements of parties' agreements that would be deemed to be environmental sustainability

agreements, these will not benefit from the more permissive exemption factors.

Whilst this clarification is helpful, it is likely, in practice, to make it more difficult for parties to assess whether their agreements are compliant. Separating out aspects of particular agreements into these two categories, and assessing the same under the more or less permissive exemption factors respectively, is not likely to be an easy exercise.



The CMA's position on enforcement and its open-door policy

The CMA has confirmed that, where agreements meet the principles and factors it elucidates in the Guidance, they are unlikely to be in breach of the Chapter I prohibition and the CMA is therefore unlikely to take enforcement action against them. This is encouraging but, as has been noted, there are a number of areas where the Guidance is still ambiguous.

In acknowledgement of this, the CMA confirms that it will operate an open-door policy whereby any parties that are considering entering into an environmental sustainability agreement can contact the CMA for informal guidance. The review the CMA conducts will be light touch and proportionate to the size, complexity and likely impact of the agreement in question. However, the key benefit of engaging with the CMA in this manner is that, for any agreement which the CMA has (albeit informally) indicated is unlikely to pose an issue under the applicable competition laws, the CMA will not take enforcement action against the relevant parties in the form of fines or director disqualification orders even if the agreement ultimately turns out to have an anti-competitive impact. This is contingent on the relevant parties not withholding any material information when the CMA conducts its review.

Comment

The debate over the extent to which traditional antitrust laws should be relaxed in order to make it easier for companies to achieve decarbonisation targets has been a thorny issue for regulators in recent years. Indeed, many regulators have been divided as to how permissive or otherwise to be when assessing sustainability agreements under the applicable competition laws. The lack of legal certainty this has resulted in will mean that the Guidance will be welcomed by stakeholders. It is an important step towards one of the CMA's stated policy goals to ensure that competition law does not act as a barrier to companies seeking to pursue sustainability agreements.

With that said, there are still ambiguities in the CMA's Guidance that, as this area develops further, will likely need to be resolved. The artificial and uncertain separation of environmental sustainability agreements and climate change agreements, for instance, will likely make self-assessments challenging in practice. For this reason, it is equally likely that parties will avail themselves of the CMA's open door policy to seek informal guidance rather than take the risk that a particular agreement may fall foul of the Chapter I prohibition. The CMA may well find itself needing to address its own ambiguities directly sooner rather than later.

More broadly, it is very interesting that the CMA has adopted a more lenient approach to climate change agreements, particularly in its willingness to consider benefits accruing to (UK) society as a whole rather than just those consumers in the product markets directly affected by particular agreements. This is something which the Commission, in its own guidelines on sustainability agreements,¹⁴ has refused to do. Indeed, the Commission's intransigence on this front has resulted in national regulators in Europe like the Dutch Authority for Consumers and Markets ("**ACM**"), which had previously committed to an equivalent position to the CMA's, abandoning this in order to avoid a clash with the Commission's own guidelines. Though the UK is free to adopt a more

permissive approach, the likelihood that sustainability agreements entered in the UK will have an impact on the EU is a high one. As a result, it may be that parties will ultimately bear the additional challenge of reconciling the CMA's and the Commission's differing positions on this issue. This will make the issue of ensuring that environmental sustainability agreements are compliant with all relevant competition laws all the more complex.

Ultimately, this is an evolving legal area in many parts of the world. Time will tell whether the CMA's Guidance will enable companies to confidently pursue sustainable collaborations or whether a cautious approach will remain.

Contact us

Should you have any queries or wish to discuss any matter in this briefing, please do not hesitate to contact us.



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¹⁴ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2022/C 164/01).