



CMA PUBLISHES DRAFT GUIDANCE ON ENVIRONMENTAL SUSTAINABILITY AGREEMENTS AND COMPETITION LAW

The UK's Competition and Markets Authority (CMA) has published its long-awaited draft Guidance on the application of the Chapter 1 prohibition of anti-competitive agreements in the Competition Act 1998 to environmental sustainability agreements¹. The draft Guidance, when finalised, is intended to provide more certainty surrounding antitrust risk for businesses entering into agreements with positive environmental objectives.

¹ Draft guidance: Application of the Chapter 1 prohibition in the Competition Act 1998 to horizontal agreements (publishing.service.gov.uk) (CMA174)

“The draft Guidance applies to environmental sustainability agreements which broadly covers agreements between actual or potential competitors aimed at preventing, reducing, or mitigating the adverse impact of economic activities on environmental sustainability or assessing the impact of their activities on environmental sustainability.”

The draft Guidance:

- provides practical guidance for environmental sustainability agreements;
- invites parties to approach the CMA to discuss environmental sustainability agreements and seek informal advice;
- creates a protection from fines for environmental sustainability agreements where parties approach the CMA to discuss their agreement and the CMA does not raise any competition concerns (or where any concerns raised by the CMA have been addressed);
- indicates a more permissive approach to exemption for climate change agreements by taking account of the benefits for all UK consumers/customers, instead of only the consumers/customers in the relevant market, when balancing the harm to competition against the benefits resulting from the agreement.

Background

In recent years, the CMA has shown greater interest in the impact of competition law on environmental initiatives adopted by companies. The impact of competition law on environmental sustainability

agreements was explained in the guidance published by the CMA in January 2021² and following a consultation process, the CMA published further advice³ in March 2022 to the government. The advice explained how the UK’s environmental initiatives can be more effectively met by a greater understanding of competition law and consumer law. The CMA has committed to helping the UK’s transition to a net zero economy and promoting environmental sustainability, which it outlines in its Annual Plan⁴ for 2023/24 as part of its medium-term strategic priorities.

Application

The draft Guidance applies to environmental sustainability agreements which broadly covers agreements between actual or potential competitors aimed at preventing, reducing, or mitigating the adverse impact of economic activities on environmental sustainability or assessing the impact of their activities on environmental sustainability. Economic activity may have negative environmental consequences, including through pollution, reducing biodiversity, or contributing to climate change from greenhouse gas emissions.

Examples of environmental sustainability agreements include agreements aimed at improving air or water quality, conserving biodiversity or promoting the sustainable use of raw materials.

Under the draft Guidance climate change agreements, a sub-set of environmental sustainability agreements, cover agreements which contribute towards the UK’s binding climate change targets under UK or international law. These agreements typically reduce negative consequences of greenhouse gases, such as carbon dioxide and methane, arising from the production and consumption of goods and services. Examples of climate change agreements include: an agreement between manufacturers to phase out a particular production process which involves the emission of carbon dioxide; an agreement between delivery companies to switch to using electric vehicles; and an agreement not to provide support such as financing or insurance to fossil fuel producers.

By categorising climate change agreements in this way, the CMA aims to highlight the importance of sustainability and the threat of climate change. A more permissive approach is proposed to exemption

² <https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law>

³ <https://www.gov.uk/government/publications/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government>

⁴ CMA Annual Plan 2023 to 2024 - GOV.UK (www.gov.uk)

for climate change agreements by considering the benefits of an agreement to all UK consumers/ customers as well as those in the relevant market alone.

The draft Guidance discusses three types of agreements from a competition law perspective:

- Sustainability agreements which are unlikely to infringe the Chapter 1 prohibition;
- Sustainability agreements which could infringe the Chapter 1 prohibition (unless an exemption applies); and
- Sustainability agreements which are capable of an exemption on the basis that the benefits of the agreement outweigh the competitive harm.

Environmental sustainability agreements which are unlikely to infringe the prohibition

- **Agreements which do not affect the main parameters of competition**

Agreements which do not affect the main areas of competition between businesses, such as price, quantity, quality, choice or innovation, generally fall outside the prohibition. Examples of agreements which are unlikely to affect the main parameters of competition are:

- an agreement on the internal conduct of businesses, for example to eliminate the use of single-use plastic in their premises, or to moderate the use of heating and air-conditioning, or to limit printed materials;
- an agreement to pool funds to engage in activities to mitigate, adapt or compensate for the effects of greenhouse emissions generated in production, where the joint funds are used for training activities for people working in the industry;
- an agreement on the organisation of a joint campaign to raise awareness about environmental sustainability issues within the industry or among customers;

- joint lobbying for policy or legislative changes, such as on carbon pricing, where the arrangement involves influencing policy or legislative change, but not the sharing of competitively sensitive information between competitors nor an attempt to use lobbying as a means for seeking the exclusion of a competitor.

- **Agreements to do something jointly which none of the parties could do individually**

Where businesses engage in joint initiatives in circumstances where they would not have been able independently to carry out the initiative due to objective factors, for example because they do not have the technical capabilities, this is unlikely to raise competition concerns, unless the businesses could have used a form of cooperation that is less restrictive of competition.

- **Cooperation required by law**
- **Pooling information on suppliers or customers**

For example, the following agreements are unlikely to have an appreciable negative effect on competition:

- An agreement to pool information on suppliers which have environmentally sustainable value chains, use environmentally sustainable production processes or provide environmentally sustainable inputs, but without requiring the parties to purchase (or refrain from purchasing) from those suppliers and without sharing competitively sensitive information about prices or quantities purchased from those suppliers;
- An agreement to pool information about the environmental sustainability credentials of customers, for example customers which recycle and dispose appropriately, but without sharing competitively sensitive information about prices or quantities those customers purchase.

- **Creation of industry standards**

Where competitors collaborate to develop industry standards or codes of practice aimed at making products or processes more sustainable, this is unlikely to have an appreciable negative effect on competition, provided that:

- the participation criteria are transparent;
- no firm is obliged to participate in the standard against its wishes (but the standard may oblige those businesses who have committed to participate in the standard to comply with the standard and may provide for a mechanism to monitor compliance);
- any firm may participate in or benefit from the standards/codes of practice on reasonable and non-discriminatory terms;
- participating businesses may develop alternative standards and sell products that fall outside the standards or codes; and
- participating businesses are free to go beyond minimum sustainability targets set by the standard.

- **Phasing out/withdrawal of non-sustainable products or processes where it does not involve an appreciable increase in price for consumers/ customers or an appreciable reduction in product choice.**

- **Industry-wide efforts to tackle climate change**

The setting of non-binding targets for the whole industry on environmental sustainability objectives are unlikely to have an appreciable negative effect on competition.

Environmental sustainability agreements which could infringe the prohibition of anti-competitive agreements

- **Environmental sustainability agreements with the object of restricting competition**

Particular caution is needed for agreements which involve price fixing, market or customer

allocation, or limitations of output, quality or innovation.

• **Assessing the effects of environmental sustainability agreements**

Where an agreement does not qualify as a restriction of competition by object, it will only infringe the prohibition of anti-competitive agreements if it has an appreciable negative effect on competition and does not benefit from exemption.

Environmental sustainability agreements may lead to various types of restrictive effects, such as increased prices, reduced output, quality, variety or innovation, market allocation, or anti-competitive foreclosure of other competitors. In assessing the effects of an agreement, the factors below in particular are likely to be relevant:

- the extent to which the agreement covers the relevant market(s);
- whether the parties have market power;
- the extent to which the agreement constrains the parties' freedom of action;
- the ability for non-parties to participate;
- whether the agreement involves the exchange of competitively sensitive information that is not necessary for the performance of the agreement;
- whether the agreement is likely to lead to an appreciable increase in price or reduction in output, variety, quality or innovation.

Exemptions

Parties seeking to benefit from exemption must be able to demonstrate that their agreement meets each of the following four conditions:

- 1 the agreement must contribute to certain benefits, namely improving production or distribution or contribute to promoting technical or economic progress;

- 2 the agreement and any restrictions of competition within the agreement must be indispensable to the achievement of those benefits;
- 3 consumers must receive a fair share of the benefits; and
- 4 the agreement must not eliminate competition in respect of a substantial part of the products concerned.

Condition 1: benefits to production, distribution or technical or economic progress

The parties to the agreement must be able to demonstrate objective benefits from the agreement. For example, these benefits can include:

- reducing or eliminating the harmful effects from particular goods or services, such as greenhouse gas emissions;
- improving product quality or variety (such as products with a reduced impact on the environment);
- reducing production and distribution costs (for example, by creating economies of scale);
- improving production or distribution processes (such as new cleaner technologies);
- increasing innovation (for example, developing new, more energy-efficient processes).

To demonstrate these benefits, the parties must be able to substantiate them in an "objective, concrete and verifiable" manner, such as providing detailed plans and timeframes. The CMA recognises that many sustainable benefits materialise over time and has regard to future benefits.

Condition 2: indispensability

The parties must be able to demonstrate that the agreement is no more restrictive than is necessary to achieve the benefits. Thus, there must be no less restrictive, but equally effective, alternative.

For example, where the parties to a standard agree not to operate outside it, they would have to show what benefits would result from the restriction that would not have

happened if they had established a standard which was only voluntary.

In addition, the CMA considers situations where there are already regulations or policies in place that address the environmental harm which an agreement seeks to surpass. In that scenario, the parties must explain the shortfalls of the existing public policies and regulations and to what extent the cooperation is indispensable to generate the claimed benefits.

Condition 3: fair share of benefit for consumers

The benefits must be allocated fairly to UK consumers or customers and outweigh the competitive harm. This would typically be analysed by reference to the consumers or customers in the relevant market. But this condition recognises that wider consideration may be required to identify the benefits. For example, benefits can include future benefits and benefits which affect indirect consumers or customers. Besides direct benefits such as improved product quality, variety or lower prices, indirect benefits include those such as the environmental benefit of a consumer or customer purchasing a product which is sustainably sourced. The key consideration is that the benefit must outweigh the harm, which must be "substantial and demonstrable" by the parties to the agreement.

As described below, a more permissive approach is taken in climate change agreements in assessing consumer/customer benefits, as the benefits of such agreements as a whole are generally wider in scope.

Condition 4: no elimination of competition

The final condition is that the agreement must not eliminate competition entirely in respect of a substantial part of the products in question, and so there must be some remaining competition in the market.

Climate change agreements

The conditions set out above apply broadly to climate change agreements, however condition 3 (fair share of benefit for consumers/customers) is construed with a



more permissive approach, based on the “exceptional nature” of the threat of climate change. The CMA believes it appropriate to depart from the general approach and consider the totality of benefits to all UK consumers/customers arising from an agreement, rather than only those consumers/customers within a specific market who are affected by an agreement. For example, an agreement between delivery companies to switch to electric vehicles would benefit all UK consumers through a reduction in carbon dioxide emissions. This approach positions the CMA towards the more liberal end of the current spectrum of approaches by competition authorities.

The parties must demonstrate that the benefits are compliant with existing legally binding requirements or well established national or international targets, as well as the overarching premise that the benefit must outweigh the harm.

The CMA will not prioritise enforcement action against parties to climate change agreements that meet the requirements set out in the draft Guidance.

Conclusion

The CMA invites businesses to approach it informally at an early stage for guidance on environmental sustainability agreements or concerns about whether their practices are compatible with UK competition law. Businesses wishing to contact the CMA should first undertake a self-assessment of their agreement using the principles set out in the draft Guidance and highlight specific areas requiring input from the CMA. The CMA will indicate any options, risks, concerns, or solutions available to the parties. To aid similar initiatives, the CMA intends to publish a summary of its findings with an assessment of risks and solutions subject to confidentiality considerations.

Once finalised, the CMA's Guidance will create greater legal certainty for businesses on their competition law obligations regarding their sustainability initiatives. The position of environmental sustainability agreements under competition law is likely to evolve over the coming years as competition authorities gain greater experience. It may well be that different competition authorities will continue to take different views in their respective jurisdictions, depending on their particular perspectives.

If you would like more information on the CMA's draft guidance, please contact:



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