

UK CMA Publishes Green Agreements Guidance

October 17, 2023

On October 12, 2023, the UK’s Competition and Markets Authority (“CMA”) [published](#) new [Green Agreements Guidance](#) on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements (“the **Guidance**”).

The Guidance is consistent with the [draft](#) that the CMA published on February 28, 2023 (the “**Consultation**”), but takes account of substantial feedback from various stakeholders. It supplements the [CMA Guidance on Horizontal Agreements](#), and is broadly consistent with the chapter on Sustainability Agreements in the [EU Guidelines on Horizontal Agreements](#) issued earlier this year.

The Guidance is welcomed since it provides legal certainty, and ensures that competition law does not impede legitimate industry collaboration on environmental and climate initiatives. In particular, the Guidance explains (a) which ‘environmental sustainability agreements’ are unlikely to restrict competition and therefore present no antitrust concerns; (b) which environmental sustainability agreements that restrict competition might nevertheless qualify for an exemption; and (c) the more permissive treatment that would be accorded to ‘climate change agreements’.

This alert memorandum sets out the key points of the Guidance, highlighting where it differs from the Consultation, as well as its implications.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

LONDON



Maurits Dolmans
+44 20 7614 2343
mdolmans@cgsh.com



Jackie Holland
+44 20 7614 2233
jaholland@cgsh.com



Henry Mostyn
+44 20 7614 2241
hmostyn@cgsh.com



Andreas Wildner
+44 20 7614 2248
awildner@cgsh.com

BRUSSELS



François-Charles Laprévôte
+ 32 22872184
fclaprevote@cgsh.com



Wanjie Lin
+32 2 287 2076
wlin@cgsh.com



Mari Koskela
+32 2 287 2379
mkoskela@cgsh.com

WASHINGTON D.C.



Bruce Hoffman
+ 1 202 974 1784
bhoffman@cgsh.com



Jessica Hollis
+ 1 202 974 1637
jhollis@cgsh.com



I. Scope of the Guidelines

The CMA's Guidance applies to:

- **'environmental sustainability agreements'**, *i.e.*, agreements between competitors aimed at preventing, reducing or mitigating the adverse impact that economic activities have on the environment, or assisting with the transition towards environmental sustainability;
- **'Climate change agreements'**, a sub-set of 'environmental sustainability agreements', which combat or mitigate climate change; and
- **'mixed agreements'**, which generate both climate-change and other environmental benefits, including in particular biodiversity.

The CMA has published [guidance](#) on other forms of horizontal agreements such as R&D agreements and purchasing agreements. The Consultation had stated that, in case of conflict, the guidance that relates to the 'centre of gravity' of the cooperation should be applied.¹ By contrast, the final Guidance states that parties may rely on either guidance, whichever is more favourable.

The Guidance's focus on Environmental Sustainability Agreements is narrower than Chapter 9 of the EU [Guidelines](#) on Horizontal Agreements, which also enables agreements pursuing other [UN Sustainable Development Goals](#). At the same time it is more permissive with respect to climate change agreements than the EU Guidelines, in that the CMA's Guidance allows consideration of the benefits of such agreements for the entire UK population, whereas the EU Guidelines only count the benefits for consumers of the affected products and services.²

This aspect of the Guidance is of key importance, given that the combatting, or mitigation, of climate change benefits the entire UK population, not just

buyers of the relevant product. As such, the CMA's permissive approach with respect to climate change agreements may go some way in addressing negative externalities (and consequent market failures) arising from the fact that firms' production costs do not reflect the costs to society of the greenhouse gas emissions caused by such production.³

II. Guidance on whether agreements are likely to restrict competition

Like the Consultation, the final Guidance explains that there are certain types of agreements which may not, or are unlikely to, restrict competition. These agreements fall broadly into two categories:

1. **Agreements which do not relate to the way businesses compete with each other**, such as agreements on internal corporate conduct on, for instance, limiting internal use of non-sustainable material; and
2. **Agreements which do not appreciably affect competition**, for example because: (i) the parties' combined market share is too small; (ii) they relate to engaging in joint activities the parties could not have engaged in individually; (iii) the cooperation is required by law; (iv) they relate to the pooling of information about the environmental sustainability credentials of a supplier or customer; (v) they relate to the creation of industry standards;⁴ (vi) they relate to the phasing-out of non-sustainable products or processes; or (vii) they involve the creation of industry-wide environmental targets.

The final Guidance includes the following additional examples of agreements that will be unlikely to infringe competition law:

- Agreements between shareholders of a single business to vote in support of corporate policies

creation of industry standards will be unlikely to restrict competition. Moreover, the final Guidance emphasises that, independently from the competition assessment, businesses need to ensure compliance with consumer-protection laws as regards environmental labelling in order to avoid misleading labelling or 'greenwashing'. In connection with this, businesses should ensure their environment-related claims are consistent with the 2021 [CMA guidance on making environmental claims on goods and services](#).

¹ For a review of the Consultation, see [here](#).

² For an analysis of the EU antitrust guidelines for sustainability agreements, see [here](#).

³ Notably, while certain mechanisms such as the EU Emissions Trading System put some price on greenhouse gas emissions by certain entities, these are (at least for now) unlikely to represent the true environmental cost to society of such emissions.

⁴ Compared to the Consultation draft guidance, the final Guidance contains some additional points on the circumstances in which the

that pursue climate change or environmental sustainability agreements or against policies that do not, or to lobby jointly for corporate changes that pursue environmental sustainability objectives.

- A single shareholder indicating how it will vote regarding such policies.
- An agreement (or even a network of agreements) covering joint shareholders' conduct in relation to businesses that are competitors in a market provided that the joint action is designed to support, encourage or require the businesses to enter into environmental sustainability agreements that are unlikely to restrict competition. Information sharing between parties to a permissible environmental sustainability agreement will not raise competition concerns either, provided that it does not go beyond what is necessary and is proportionate to the agreement's objectives.

The Guidance makes clear that this analysis applies not only to agreements between businesses, but also to decisions of a trade association or NGO.

III. Guidance on how the exemption from the prohibition applies

Where environmental sustainability agreements have the object or effect of restricting competition, they will only be permissible if they benefit from an exemption from the Chapter I prohibition.

The Guidance helpfully lists some examples of agreements that may qualify for exemption. They include:

- collective withdrawal agreements only to purchase from suppliers that sell sustainable products;
- agreements jointly to buy sustainable inputs;
- agreements to phase out unsustainable or high-carbon-emitting production processes; and
- agreements not to provide products or services to customers that produce environmentally

damaging products or services. The latter includes “net zero” agreements not to provide support such as financing or insurance to fossil fuel projects.⁵

A. Environmental sustainability agreements generally

The Guidance discusses each of the four conditions of Section 9 of the Competition Act 1998 (the UK equivalent to Article 101(3) TFEU), as they apply to Environmental Sustainability Agreements:

1. **The agreement must result in objective benefits to production, distribution or technical or economic progress.** Like the Consultation, the final Guidance sets out examples of such benefits, including where they serve to overcome first mover disadvantages or coordination failures – where individual companies would not adopt beneficial action, like switching to sustainable input or ceasing unsustainable production, unless others in the sector do so too.

Examples of relevant benefits include: (a) eliminating or reducing harmful greenhouse gas emissions that arose from the production or consumption of particular goods or services; (b) improving product variety or quality, such as products with a reduced impact on the environment; (c) reducing production or distribution costs for sustainable products through combining resources to achieve economies of scale; (d) shortening the time to bring environmentally sustainable products to market; (e) improving production or distribution processes e.g. new cleaner technologies; and (f) increasing innovation e.g. more energy efficient processes.

2. **The agreement must be indispensable.** There must be no less restrictive alternative that would achieve equally effective and timely sustainability-related goals with a lesser amount of coordination.
3. **Consumers must receive a fair share of the benefit.** This means that the current or future

⁵ See, Maurits Dolmans, [If we can't do what we must, we must do what we can...](#) (December 6, 2022).

benefits passed on to UK consumers (and in the case of climate agreements, all UK citizens) must outweigh the harm they suffer as a result of the agreement. The final Guidance emphasises that only the benefits to *UK* consumers count. In other words, while benefits may arise outside the UK, the agreement will only qualify for an exemption if the benefits to *UK* consumers outweigh the competitive harm. Where this requirement is not obviously satisfied, some quantification of benefits may be required. The CMA provides some guidance on how to quantify benefits, but notes that the exercise may not be straightforward. Businesses may discuss their proposed approach for the cost–benefit analysis with the CMA under the open-door policy (see below).

4. **The agreement must not substantially eliminate competition.** The Consultation stated that this condition would be satisfied where “some” competition remained. The Guidance seems to be stricter, requiring “meaningful” competition. This would be the case where the agreement only affects certain products or competitors in the market, or where competitors may still compete on main parameters, such as price or quality. The CMA clarifies that elimination of competition for a limited period of time, where the impact is only temporary until that period elapses, is not an obstacle to satisfying this condition.

B. Climate change agreements

Like the Consultation, the Guidance adopt an even more tolerant approach to climate change agreements. While the same four exemption conditions apply to such agreements as to environmental sustainability agreements generally, the CMA considers that the assessment of the “fair share of benefits to consumers” may be more permissive. Specifically:

⁶ This exemption afforded to climate change agreements goes further than the Draft EU Guidelines, which permit the accounting for only that share of the total benefits that is experienced by EU consumers who pay, rather than all EU consumers. By contrast, the CMA considers that climate change agreements merit an exception due to “*the sheer magnitude of the risk that climate change represents (including the need for urgent action), the degree of public concern about it, and the binding national and international commitments*” as well as “*the immeasurable long-*

- the benefits accruing to all UK consumers (effectively, all UK citizens) may be taken into account, regardless of whether they also buy products or services in the relevant market affected by the agreement;⁶ and
- with regard to agreements resulting in a reduction of greenhouse gas emissions outside the UK, a benefit to UK consumers can be presumed.⁷

However, applicants must still demonstrate that the benefits meet or exceed existing legally-binding requirements or well-established targets, including the goals set out in the Paris Agreement.

In case of mixed agreements, for instance agreements to protect biodiversity and combat climate change, climate change benefits should be quantified using the permissive approach applicable to climate change agreements whereas other environmental benefits should be assessed under the general approach.

IV. Enforcement and open door policy

Like the Consultation, the Guidance provides that the CMA will be operating an open-door policy: a business considering entering into an environmental sustainability agreement may request informal guidance from the CMA where there is uncertainty (e.g., because specific questions or concerns are not covered by the Guidance or where they seek clarity as to the application of the Guidance to specific circumstances).

The Guidance details the process of requesting informal guidance (e.g., who to contact and when), including that the CMA would normally expect requests for such clarification to come from the parties themselves. That said, it is also willing to accept requests from representative bodies (e.g., trade associations, NGOs or nominated representatives). The Guidance notes that the open-door process is a light-touch review that is proportionate to the size, complexity and likely impact of the agreement.

term effects [...] once certain tipping points are reached”. The CMA’s approach is inspired by the Dutch Competition Authority’s guidelines, which allowed for this approach in respect of all agreements aimed at tackling environmental damage, because the reduction of negative externalities benefits the society as a whole.

⁷ See paragraph 5.5 of the Guidance.

Where the agreement concerns a regulated sector, the CMA will also consult the relevant sector regulator.

In line with the previous Consultation, the Guidance confirms that the CMA does not expect to take enforcement action where (a) agreements correspond clearly to the principles set out in the Guidance, and/or (b) the CMA has provided informal guidance under the open-door policy (and raised no concerns, or only concerns that were subsequently addressed). Moreover, where advance guidance was sought but the CMA subsequently concluded that further investigation was necessary and found that an agreement infringed the Chapter I prohibition, the CMA will not issue fines against the parties nor seek disqualification of any directors, provided that no material information was withheld when approaching the CMA under the open-door policy. The Guidance notes that, even where the CMA provides informal guidance, parties are expected to keep their agreements under review, and reassess compliance where the basis on which guidance was provided no longer applies (e.g., after a material change to the structure of the market).

V. Conclusion

The CMA Guidance is an important step in delivering clarity to businesses seeking to adapt to the need to address environmental concerns. In particular, the specific guidance on climate change agreements, adopting a more permissive than the Guidelines of the European Commission, marks a welcome step forward.

The range of examples is informative, including agreements on joint shareholder activism, and agreements not to provide support (including finance and insurance) to fossil fuel projects. The CMA willingness to engage in open door discussions to provide informal guidance to businesses is also welcome.

At the same time, there are areas where change may be warranted in the future through legislative change if necessary, e.g., the Guidance approach of only considering benefits to UK consumers, even where the agreement addresses a worldwide issue such as the

climate crisis. Another question is whether the permissive approach to measuring consumer benefit should be limited to climate change agreements or extended to other environmental benefits (e.g., prevention of biodiversity loss). The CMA noted that it would keep this issue under review.⁸ More generally, the CMA intends to publish updated Guidance from time to time to reflect experience of applying the Guidance in practice.⁹

Another question is whether similar principles could apply to sustainability agreements beyond the field of the environment and climate, as the EU Guidelines recognize. The CMA provides no guidance, but the analysis and principles could apply more broadly, to all agreements that help eliminate market failures, collective action failures, and first mover disadvantages with a view to pursuing other sustainable development goals.

In light of the increasing recognition throughout Europe of the role that sustainability agreements may perform in addressing some of the key problems faced globally, the debate now shifts to the US where the legitimacy of environmental sustainability agreements, especially net-zero agreements, continues to be fiercely debated.¹⁰

...

CLEARY GOTTlieb

⁸ Guidance, fn. 16.

⁹ Guidance, para 1.15.

¹⁰ For a discussion of the US debate, see M. Dolmans, W. Lin and J. Hollis, [Sustainability and Net Zero Climate Agreements – A Transatlantic Antitrust Perspective](#) (October 9, 2022).