COMPETITION BRIEFING

Green agreements: competition law guidance on sustainability collaboration

In an effort to help businesses better understand how they can collaborate on sustainability goals without falling foul of UK competition law, on 12 October 2023, the Competition and Markets Authority (CMA) issued its green agreements guidance (*https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf*). The guidance uses practical examples and, overall, provides a useful analytical framework.

Environmental sustainability agreements (ESAs) are broadly defined in the guidance to cover a wide range of agreements between competitors that involve co-operation to achieve green outcomes; for example, agreements to improve air or water quality, conserve biodiversity and natural habitats, or promote the sustainable use of raw materials.

Climate change agreements, that is, agreements that contribute to combating climate change, are recognised as an ESA subset; for example, agreements between retail businesses to require or incentivise suppliers to reduce their greenhouse gas emissions or agreements to phase out a particular production process.

The guidance is intended to supplement the CMA's guidance on horizontal agreements and confirms that where both sets of guidance apply to the same agreement, the parties may rely on whichever is more favourable to them (*https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1178791/Horizontal_Guidance_FINAL.pdf, see feature article "Horizontal agreements: the new UK and EU regimes", this issue*).

Agreements unlikely to raise competition concerns

The guidance serves as a helpful reminder of the different types of agreements, in the context of ESAs, that do not generally raise concerns and are likely to fall outside the scope of Chapter I of the Competition Act 1998 (1998 Act), which prohibits anti-competitive arrangements between two or more businesses. Although the CMA does not make an explicit distinction, these agreements could broadly fall into two categories: those that are rarely, if ever, problematic; and those that are not, in principle, problematic but require a healthy dose of compliance care.

Agreements that are rarely, if ever, an issue include:

- Agreements where co-operation is required by law. However, businesses should be mindful as to whether the law merely encourages, rather than requires, co-operation.

- Non-appreciable agreements; that is, agreements between parties with a very small combined market share of the market that is affected by their agreement, provided that the agreement does not restrict competition by object.

- Agreements that do not affect the main parameters of competition at all. These include, for example, agreements on internal corporate conduct to eliminate single-use plastic in business premises that result from common forum discussions or reflect industry-wide guidelines, and joint lobbying for policy or legislative changes on issues such as carbon pricing, so long as the agreement does not involve the sharing of competitively sensitive information between competitors or attempts to exclude competitors.

- Agreements for joint activities that none of the parties could do individually. These include, for example, agreements where parties co-operate in early-stage scientific or technological research to reduce raw material consumption or to achieve some other type of environmental sustainability objective involving a joint research and development project.

- Agreements between shareholders. These include, for example, agreements between shareholders of a single business to vote for the promotion of corporate policies that pursue environmental sustainability, to vote against policies that do not pursue environmental sustainability, or to lobby jointly for other changes to corporate policy.

Agreements that are not generally problematic but where care is required include:

- Agreements to pool information about suppliers or customers; for example, agreements to pool objective, evidence-based information about the environmental sustainability credentials of suppliers or customers, including the use of environmentally sustainable production processes, so long as parties are not required to alter their purchasing behaviour or share competitively sensitive information on issues such as pricing and quantities.

- Agreements on the creation of industry standards; for example, on collaboration to develop environmental sustainability standards with the objective of making products or processes more sustainable, so long as the process for developing the standard is transparent and open and the implementation of the standard is optional, non-discriminatory and non-exclusive.

- Agreements to phase out or withdraw non-sustainable products or processes; for example, to phase out non-environmentally sustainable processes or to cease to procure or supply non-environmentally sustainable products, such as non-recyclable packaging, so long as it does not result in an appreciable increase in price or reduction in product quality or consumer choice and does not have the object of market sharing or harming competitors.

- Agreements to establish industry-wide environmental targets; for example, to establish a common framework to help businesses to set environmental targets or that involve industry-setting targets, such as targets to reduce carbon dioxide emissions or to gradually increase the amount of sustainable materials used in their products, so long as individual

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businesses remain free to decide on how they will meet the agreed milestones (*see box "Tips for businesses"*).

Problematic or potentially problematic agreements

ESAs are likely to restrict competition if they affect the parameters of competition and are likely to result in an increase in price or a reduction in choice, quality or output. However, there are different levels of risk to consider.

Going too far. Agreements that are assessed to have as their object the restriction of competition are assumed to be harmful by their very nature and therefore do not require an examination of their effects. In the context of ESAs, these are so-called "green cartels"; that is, agreements that are potentially inspired by sustainability goals, but whose purpose is to drastically reduce or eliminate one or more critical parameters of competition, including innovation. This would include, for example, an agreement between competitors on the price at which they will sell products meeting an agreed environmental sustainability standard.

Difficult to demonstrate in practice. A restriction of competition by object may be permitted if it constitutes an ancillary restraint to a wider, otherwise compliant, ESA. However, the restriction must be necessary and proportionate to the objectives of that ESA. An example would be a group of competitors that agrees to jointly purchase inputs with a low-carbon footprint from large suppliers and negotiates jointly for volume discounts to feed into lower prices for downstream customers, with the aim of encouraging the production and purchase of alternative products with a lower carbon footprint. To make the co-operation effective, the purchasing group may impose a restriction on its members joining any other purchasing group. In practice, the ancillary nature of the restriction could prove difficult to demonstrate.

Tips for businesses

With a non-problematic environmental sustainability agreement (ESA), information that is shared directly or indirectly between the parties will not raise competition concerns provided that the information sharing does not go beyond what is objectively necessary and proportionate to the objectives of the ESA.

Extra care is needed when collaborating on industry standards. Participation should be voluntary and non-discriminatory if avoiding a complex assessment is desirable. Group boycotts remain a risk even when the broader ESA does not appear to raise concerns (*see "Balancing pro- and anti-competitive effects" in the main text*).

Businesses can take a number of steps to ensure compliance, including:

- Creating a vigilant compliance environment to foster issue spotting.
- Raising awareness around the competition law risks that apply to the relevant dimensions of sustainability collaboration.
- Using learnings and guidance related to all forms of traditional collaborations, including the horizontal guidelines.
- Ensuring that competition counsel is part of the initiative from inception to launch, should the initiative be deemed unlikely to raise competition concerns.
- Taking control of internal and external communications around any sustainability initiatives to ensure that the narrative is on message and meets compliance standards.

When businesses are interacting with competitors, they should keep the following points in mind:

- Legitimate business justification should always be at the forefront of the business's mind.
- The starting point should always be to achieve objectives without dictating competitively significant terms.
- The exchange of competitively sensitive information should be avoided. If absolutely necessary, the business must establish safeguards to anonymize and aggregate data.

* Best practices for document creation and control should be implemented.

Balancing pro- and anti-competitive effects

Agreements that do not represent restrictions of competition by object but may have an appreciable negative effect on competition require a careful balancing act. An example would be where a group of competing purchasers agree only to purchase from upstream suppliers that sell sustainable products. This type of vertical agreement has the aim of removing unsustainable products from the supply chain without harming the parties' competitors. The guidance points out that this is different to a horizontal collective boycott where the object is to harm or eliminate a competitor that is operating at the same level of the market, therefore, such an agreement should be subject to an effects analysis. Assessing the magnitude of the potential appreciable

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effect requires taking account of multiple factors, including: market coverage, market power, freedom of action of the parties, the ability of non-parties to participate, the exchange of competitively sensitive information, and an appreciable increase in price or reduction in output, quality, product variety or innovation.

General exemption

Even if an ESA has an appreciable negative effect, it may still be lawful if the parties to the agreement are able to demonstrate that the benefits of the agreement outweigh the harm to competition by meeting the usual four criteria for an individual exemption under section 9(1) of the 1998 Act; that is:

- The agreement contributes to benefits to production, distribution, or technical or economic progress.
- Any restrictions of competition are indispensable to the achievement of the identified benefits.
- Consumers receive a fair share of the benefits.
- The agreement does not substantially eliminate competition in respect of the products concerned.

The guidance confirms that benefits can include current as well as future benefits. Furthermore, in certain circumstances, benefits that are taken into account can accrue to direct consumers as well as affected consumers in separate yet related markets, provided that there is a substantial overlap between the two groups of consumers.

Special exemption for climate change agreements

Significantly, where an exemption could apply to climate change agreements, the CMA takes a more permissive approach, broadening substantially the benefits criteria to include all UK consumers, not just direct and indirect users of the relevant products or services. However, in this case, businesses would need to demonstrate that the benefits conform to, or exceed, existing legally binding requirements or well-established national or international targets, including the broader climate change goals set out in the Paris Agreement.

Mixed agreements

The guidance introduces a new category of mixed agreements, which generate both climate change benefits and other environmental benefits, such as biodiversity. In these cases, if businesses are presenting quantitative evidence on the agreement's anti-competitive effects and benefits, they will have to demonstrate where those benefits outweigh any negative effects in both categories; that is, using the more permissive approach to assess climate change benefits and the general approach to assess the fair share condition for consumers of any other environmental benefits. This could be challenging to put into practice as, for example, an agreement between businesses to eliminate deforestation in their supply chains would require these two separate assessments.

An open door?

The guidance confirms an open-door policy so that businesses, trade associations and non-governmental organisations can approach the CMA for informal guidance before entering into any proposed agreement, as well as protection from fines or director disqualifications where the CMA did not raise any competition concerns at the time of the informal discussions, or where any concerns were satisfactorily addressed.

However, consulting with competition authorities is not an intuitive option for businesses, even when legal certainty is desirable. Regulator involvement introduces a powerful stakeholder into the process which will likely have an impact on the nature of the agreement in question, as well as potentially result in additional costs and delays. In practice, it is rather difficult to clearly identify the particular initiatives to bring to the attention of a regulator, as well as the right moment in the lifecycle of a complex and fast-evolving project to have these discussions.

EU divergence and alignment

Businesses must be aware of competition laws in other jurisdictions, as their sustainability agreements may have effects beyond the UK. For example, on 1 June 2023, the European Commission (the Commission) published updated horizontal guidelines, which address the assessment of sustainability agreements under EU competition law (*https://competition-policy.ec.europa.eu/system/files/2023-07/2023_revised_horizontal_guidelines_en.pdf*). Notably, "sustainability" has a broader scope in the EU guidelines than in the CMA's guidance, as it includes topics such as human rights, animal welfare and working conditions, which the CMA confirms are outside the scope of its guidance.

Much of the guidance developed for the UK applies equally under the EU guidelines. This includes the nature of agreements that usually do not raise competition law concerns, the importance of standard risk-mitigation measures in collaborative projects, the importance of staying away from green cartels, and the need to balance the harmful effects of an agreement that could be considered to restrict competition against the credible benefits that the agreement is expected to generate.

However, the EU guidelines take a narrower view of relevant consumer benefits than the CMA guidelines in the case of climate change agreements. Collective benefits will be relevant for an exemption under Article 101(3) of the Treaty on the Functioning of the European Union (Article 101(3)) only if there is a substantial overlap between the consumers in the relevant market and any other beneficiaries outside the relevant market. This means, for example, that emission reductions benefitting society at large would, in principle, not be taken into account in an Article 101(3) assessment.

How this difference in the assessment of societal benefits of climate change agreements will play out in practice remains to be seen. If parties decide to consult with the authorities and approach both the CMA and the Commission, the guidance they receive might not be materially different in practice.

Ensuring compliance

Businesses can take comfort in the fact that the CMA and other European regulators understand the challenges associated with sustainability collaborations and are willing to engage in potentially fruitful discussions. In the meantime, businesses should keep any sustainability agreements under continuous review to ensure compliance in all relevant jurisdictions.

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