

United Kingdom

ANTI-COMPETITIVE PRACTICES

Consultation—draft guidance on environmental sustainability agreements—definitions—treatment of climate change agreements—informal guidance—integration within revised guidelines on horizontal agreements

☞ Climate change agreements; Competition and Markets Authority; Competition policy; Concerted practices; Guidelines; Sustainability

Sustainability and competition law: CMA publishes new draft guidance for environmental sustainability agreements

Between 28 February and 11 April 2023, the United Kingdom (UK)'s Competition and Markets Authority (CMA) publicly consulted on draft guidance on the application of Chapter I of the Competition Act 1998 to environmental sustainability agreements (the Draft Guidance).¹

Background

There has been extensive debate as to whether competition law unnecessarily prevents or discourages businesses from pursuing genuine climate action. However, in recent years, businesses and industry associations have become increasingly vocal about the “chilling effect” of competition rules on legitimate collaboration that would allow them to deliver sustainability benefits—for example, by overcoming so-called “first-mover disadvantages” (i.e., where acting alone would make a business less competitive than its rivals) and/or resource and capability constraints.

The CMA considers that collaboration between businesses may be necessary to protect or enhance environmental sustainability,² and has published the Draft Guidance to offer greater certainty on the types of collaboration that could be permitted under UK competition rules.

The Draft Guidance follows a wider consultation on draft guidelines on horizontal agreements, which closed on 8 March 2023.³ The CMA has indicated that it will integrate the final version of the Draft Guidance into its broader guidelines on horizontal agreements, which (once finalised) will replace the EU's guidelines on horizontal cooperation agreements in the UK.⁴

The Chapter I Prohibition

Chapter I of the Competition Act 1998 prohibits agreements or concerted practices between undertakings which may affect trade in the UK, and which have as their object or effect the prevention, restriction, or distortion of competition within the UK (the Chapter I Prohibition). However, certain practices can be exempt if they meet the criteria described in s.9(1) of the Competition Act 1998 (the Chapter I Exemption). These criteria include that the agreement contributes to improving production or distribution, or promoting technical or economic progress, while allowing consumers a “fair share” of the resulting benefit.⁵

The Draft Guidance

If finalised, the Draft Guidance will apply to “environmental sustainability agreements” which are broadly defined as agreements or concerted practices aimed at assessing, preventing, reducing, and/or mitigating the adverse

¹ Competition and Markets Authority, “Draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements”, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139264/Draft_Sustainability_Guidance_document_.pdf.

² Draft Guidance, paras 1.5 to 1.9.

³ Competition and Markets Authority, “Draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements”, consultation, document, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1131038/Con_doc_for_HGL.pdf.

⁴ European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114\(04\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN).

⁵ Competition Act 1998 ss.9(1)(a).

impact of economic activities on environmental sustainability.⁶ These may include, for example, agreements aimed at improving air or water quality, conserving biodiversity, or promoting the sustainable use of raw materials, but exclude agreements that pursue broader societal objectives such as improving working conditions.⁷

A subset of environmental sustainability agreements (defined as “climate change agreements”) would benefit from a more permissive application of the Chapter I Exemption, reducing the likelihood that they are found to infringe the Chapter I Prohibition.⁸ The Draft Guidance defines climate change agreements as environmental sustainability agreements which contribute towards the UK’s binding climate change targets under domestic or international law. This would include agreements that reduce the negative externalities from greenhouse gas emissions, whose effects are typically global and are realised over several years, such as an agreement not to provide financing or insurance to fossil fuel producers. The Draft Guidance also refers to an agreement between delivery companies to switch to electric vehicles, which would benefit all UK consumers through reduced carbon dioxide emissions, as an example of a climate change agreement.

Within the legal framework of the Chapter I Prohibition, the Draft Guidance distinguishes between three categories of environmental sustainability agreements:

1. *Agreements that are unlikely to infringe the Chapter I Prohibition,*⁹ either because they do not relate to the way businesses compete or because they have no appreciable effect on competition. Examples include joint campaigns to raise awareness of environmental sustainability issues, and establishing a common framework for setting environmental sustainability targets.¹⁰
2. *Agreements that could infringe the Chapter I Prohibition.*¹¹ The Draft Guidance states that agreements which, for example, include or have the effect of price fixing, market or customer allocation, or limitations of output, quality, or innovation are likely to fall within the scope of Chapter I of the Competition Act 1998.¹² However, such agreements would not infringe the Chapter I Prohibition if they benefit from the Chapter I Exemption.
3. *Agreements that can benefit from the Chapter I Exemption but would otherwise infringe the Chapter I Prohibition.*¹³ The Draft Guidance provides that parties must be able to demonstrate that their environmental sustainability agreements meet the Chapter I Exemption criteria, and offers detailed guidance on how to do so.¹⁴ For climate change agreements, the Draft Guidance states that the CMA would interpret a “fair share” of the benefit to consumers more broadly, given the unique threat that climate change represents.¹⁵ In particular, the CMA would take into account the totality of the benefits to all UK consumers arising from the climate change agreement, rather than following its general approach of taking into account only benefits that accrue to consumers within the markets affected by the agreement.

⁶ Draft Guidance, para.2.1.

⁷ Draft Guidance, paras 2.2 and 2.3.

⁸ Draft Guidance, para.2.4.

⁹ Draft Guidance, Section 3.

¹⁰ See Section 3 of the Draft Guidance for additional examples.

¹¹ Draft Guidance, Section 4.

¹² See Section 4 of the Draft Guidance for additional examples.

¹³ Draft Guidance, Sections 5 and 6.

¹⁴ Draft Guidance, Section 5.

¹⁵ Draft Guidance, Section 6.

The Draft Guidance states that the CMA would not take enforcement action against environmental sustainability agreements that clearly correspond to the principles and examples set out in the Draft Guidance.¹⁶ It also establishes an “open-door policy”, whereby parties would be encouraged to approach the CMA for informal guidance on actual or contemplated environmental sustainability agreements.¹⁷ Where the CMA does not raise competition concerns in response to an initiative that was discussed with the CMA, the Draft Guidance also provides that the CMA would not issue fines (provided that the parties did not withhold material information that would have made a difference to the CMA’s assessment).

Conclusion

The CMA has publicly committed to taking action to accelerate the UK’s transition to a net zero economy and to promote environmental sustainability.¹⁸ The Draft Guidance is intended to help achieve that commitment, in particular by ensuring that competition law is not an unnecessary barrier to companies seeking to pursue environmental sustainability initiatives.

If enacted, the CMA’s guidelines towards environmental sustainability agreements would be more permissive than the current guidelines on horizontal co-operation agreements in the UK, in particular towards climate change agreements.¹⁹ However, it remains to be seen whether businesses would respond with new plans to collaborate on environmental sustainability initiatives, how great those benefits would be, and whether other competition authorities (such as the European Commission) will follow suit.

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MERGERS

Merger control—HSR pre-merger reporting thresholds—2023 update—changes to HSR filing fees

📄 Fees; Merger notices; National competition authorities; United States

Federal Trade Commission announces increased HSR thresholds for 2023

On 23 January 2023, the Federal Trade Commission (FTC) announced the annual adjustment of the thresholds that trigger pre-merger reporting obligations under the Hart-Scott-Rodino (HSR) Act. The new thresholds apply to transactions closing on 27 February 2023 and will remain in effect until the 2024 adjustment.

The HSR Act requires parties to notify the FTC and the Department of Justice (DOJ) before acquisitions of voting securities, assets, or non-corporate interests involving United States (US) commerce where the value exceeds certain dollar-based size thresholds. If the transaction is reportable, the parties cannot close until after a mandatory waiting period (typically 30 days). The waiting period allows the agencies to review the proposed transaction and determine whether the transaction raises antitrust issues that require further investigation. While either agency can investigate, only one will do so, and the investigation may extend past the initial waiting period. The investigating agency will ultimately decide whether to challenge the transaction.

¹⁶ Draft Guidance, para.7.10.

¹⁷ Draft Guidance, para.7.11.

¹⁸ Competition and Markets Authority, Corporate report “CMA Annual Plan 2023 to 2024” (23 March 2023), available at: <https://www.gov.uk/government/publications/cma-annual-plan-2023-to-2024/cma-annual-plan-2023-to-2024>.

¹⁹ EC, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.