THE CMA PUBLISHES DRAFT GUIDANCE ON ENVIRONMENTAL SUSTAINABILITY AGREEMENTS

On 28 February 2023, the Competition and Markets Authority (**"CMA"**) published its long-awaited draft guidance on the application of UK antitrust law to sustainability agreements (the **"Guidance"**). The Guidance aims to provide reassurance and certainty to businesses who are keen to work together to pursue sustainability goals, by ensuring they are not '*unnecessarily or erroneously deterred from collaborating lawfully due to fears about competition law compliance*'.

The Guidance reflects the CMA's increasing focus on environmental issues: in its draft 2023/2024 Annual Plan, the CMA stated that one of its main areas of focus for this period is promoting environmental sustainability and helping the UK accelerate its transition to a net zero economy. This focus is also reflected in the CMA's consumer law activities in a sustainability-related context, for example in its ongoing 'green-washing' investigations into potentially misleading environmental claims.

The Guidance, and the CMA's wider focus on environmental issues, comes in a context of increasing regulatory awareness of the need for competition law to promote and support sustainability goals (as well as broader Environmental, Sustainability and Governance (ESG) policy). Competition authorities, including the European Commission, the Dutch Authority for Consumers & Markets, the Hellenic Competition Commission and the Austrian Federal Competition Authority, have issued draft guidance in relation to the application of antitrust rules to sustainability agreements in recent years.

The Guidance

The Guidance is based around the concept of 'environmental sustainability agreements' (**"ESAs"**), and the application of UK competition law to such agreements, in particular the prohibition on anti-competitive agreements under Chapter I of the Competition Act 1998 (the **"Chapter I Prohibition"**).

What are ESAs?

The Guidance defines ESAs as '*agreements or concerted practices between competitors and potential competitors which are aimed at preventing, reducing or mitigating the adverse impact that economic activities have on environmental sustainability or assessing the impact of their activities on environmental sustainability.*'[1]

The Guidance also identifies 'climate change agreements' as a special sub-set of ESAs, namely those that contribute towards the UK's binding climate change targets under domestic or international law.[2] Such agreements will typically reduce greenhouse gas emissions, with the Guidance giving several examples including an agreement between delivery companies to switch to using electric vehicles.[3]

Which ESAs could infringe the Chapter I Prohibition?

The Guidance sets out types of ESAs which are unlikely to infringe the Chapter I Prohibition, including ESAs which:

- achieve something jointly which none of the parties could do individually (e.g. cooperation between parties in early stage scientific or technological research they could not conduct otherwise because they do not have the technical capabilities);
- establish industry-wide efforts to tackle climate change (e.g. a common framework for carbon reduction target setting which specifies which emissions and business activities are within scope of the framework and the duration of the targets);
- create industry standards (e.g. a logo certifying certain sustainable processes are used to produce a product), provided this standard complies with certain criteria set out in the guidance;
- phase out the use of non-sustainable products or processes (e.g. a particular type of packaging or product), so long as this does not increase prices to an appreciable extent or mean customers no longer have significant choice;
- pool information about the environmental sustainability credentials of suppliers or customers (e.g. lists of customers who recycle and dispose of products appropriately) provided that competitively sensitive information is not shared.

In contrast ESAs with the 'object' of restricting competition or which could have an appreciably adverse

[1] Para. 2.1 of the Guidance.

[2] Para. 2.4 of the Guidance.

[3] Para. 2.5 of the Guidance.

effect on competition could risk infringing the Chapter I Prohibition unless they can benefit from an exemption from this prohibition. Examples of ESAs which could have the object of restricting competition include agreements that set the price at which products meeting an agreed environmental standard are sold, or which limit the ability to of competitors to innovate to meet or exceed a sustainability goal (even if it would achieve that goal more quickly). Examples of ESAs which have anti-competitive effects could include agreements between competing purchasers to only purchase from suppliers that sell sustainable products.

Exemptions for ESAs that might otherwise restrict competition

In order for an ESA that has the object of restricting competition or may give rise to restrictive effects on competition to be exempt from the Chapter I Prohibition, it must fulfil four cumulative conditions:

1. the ESA must contribute to certain benefits, namely improving production or distribution or contribute to promoting technical or economic progress;
2. the ESA and any restrictions of competition within the ESA must be indispensable to the achievement of those benefits;
3. consumers must receive a fair share of the benefits; and
4. the ESA must not eliminate competition in respect of a substantial part of the products concerned.

The Guidance is helpful in setting out the CMA's thinking about two features of this cumulative test in particular, namely the scope of relevant 'benefits' and the definition of 'consumers'. In both cases, the CMA has adopted a broad definition (although the broad 'consumers' definition will apply only in the context of 'climate change agreements') – potentially therefore increasing the scope for ESAs to be considered exempt from the Chapter I Prohibition.

'Benefits'

The Guidance notes that in the context of environmental sustainability, it is not uncommon for benefits to be non-monetary in nature and / or to materialise in future over a relatively long period of time. The CMA will therefore consider both non-monetary and future benefits as relevant to its assessment of ESAs (alongside current and / or monetary benefits). Helpfully, the Guidance suggests a number of economic methodologies that can assist in the quantification of such benefits, and the CMA has also said it is happy to discuss the approach to quantification with parties as part of its broader 'open-door' policy of providing more general informal guidance to parties considering ESAs (see below).

'Consumers'

In general, when assessing whether consumers receive a fair share of the benefits of an agreement, the relevant 'consumers' for these purposes are the consumers of the products or services to which the agreement relates (e.g., the consumers within the relevant market). The cost to these consumers of the restrictive effects of the agreement must generally be offset by the benefits they receive. In certain circumstances where there are two related markets, benefits achieved on separate markets can be taken into account, provided that the consumers affected by the restriction and receiving the benefit are substantially the same or substantially overlap (an approach also noted by the EC in its recent draft guidelines). Where there are wider benefits flowing from an ESA (received for example by society as a whole), the Guidance states that only those benefits that can be apportioned to the consumers of the product in question (and, where appropriate, in related markets) should be taken into account for the purposes of the assessment.

Importantly, climate change agreements benefit from a more expansive approach to the definition of consumers. Specifically, the Guidance would **allow the totality of the benefits accruing to all UK consumers arising from the agreement** to be taken into account, rather than only those accruing to 'in-market' consumers (or those in a related market). The CMA has reiterated that the exceptional nature of the threat of climate change, and the related policy decisions of successive UK governments, justifies this exceptional approach. The CEO of the CMA has also cited the UK's decision to leave the European Union as an opportunity to "go further than we have before in providing reassurance and clarity on our approach." The Guidance certainly reflects a more radical approach than that proposed by, for example, the EC, which in its draft guidelines does not draw any distinction between ESAs and climate change agreements, and maintains that in order to rely on collective societal benefits for an exemption to antitrust rules under EU law, there must still be a substantial overlap between the consumers of the relevant goods or services affected by a sustainability agreement and any other beneficiaries. Although it is worth noting that the Dutch Authority for Consumers and Markets ("**ACM**") has also drawn a distinction between sustainability agreements and a subset of 'environmental damage agreements' which reduce environmental damage. The ACM similarly concluded that the efficiency gains from 'environmental damage agreements' justified a different interpretation of the 'fair share' condition under Dutch law meaning that consumers do not need to be compensated fully (as they do for other agreements which could restrict competition) when these agreements help comply with an international or national standard or help realise a concrete policy goal.

Informal guidance and fining restrictions

In addition to clarification of the CMA's substantive approach to ESAs set out above, the Guidance also contains details of the CMA's procedural approach to ESAs. The CMA encourages businesses considering entering into an ESA to approach the CMA for informal guidance, for example to seek clarity or comfort on how the guidance will be applied in specific circumstances. The Guidance also suggests that, as part of this informal guidance, the

CMA could indicate how the parties to a potential agreement could amend their proposal to (for example) bring it within the exemption criteria. The Guidance also explains that the CMA will not:

- take enforcement action against ESAs that clearly correspond to the examples in the finalised guidance (and are consistent with the principles contained within it); or
- issue fines against parties to an ESA that was discussed with the CMA in advance and where any competition concerns (if any) were addressed by the parties (so long as they did not withhold any relevant information from the CMA during its assessment that would have made a material difference to the analysis).

Next steps

The CMA is consulting on the Guidance; the consultation closes at 5pm on 11 April 2023.

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