

# **Draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements**

Consultation document

**28 February 2023**

CMA177con



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# 1. Introduction

- 1.1 The Competition and Markets Authority (CMA) is consulting on draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements between actual or potential competitors ('Draft Sustainability Guidance').
- 1.2 The CMA is keen to ensure that businesses are not unnecessarily or mistakenly deterred from lawfully cooperating or collaborating to promote environmental sustainability, out of fear of breaching competition rules. This is important for environmental sustainability generally, and particularly important for climate change where industry collaboration is likely to be necessary to meet the UK's binding international commitments and legislative obligations to achieve a net zero economy, and to play an essential part in delivering the UK's net zero ambitions.<sup>1</sup>
- 1.3 The CMA has made a public commitment to promoting environmental sustainability and helping to accelerate the transition to a net zero economy<sup>2</sup> and there are three ways in which the CMA can achieve this.
- 1.4 First, we can help ensure that markets for sustainable products or services develop in competitive ways. Second, we can help consumers make informed choices about the climate impact of the goods and services they use. Third, we can help ensure that competition law is not an unnecessary barrier to companies seeking to pursue environmental sustainability initiatives.<sup>3</sup>
- 1.5 This Draft Sustainability Guidance is about this third area of focus.
- 1.6 The CMA is inviting comments on the Draft Sustainability Guidance **by 5pm on 11 April 2023**.

# 2. Background

- 2.1 Competitors may wish to cooperate with one another in order to achieve more environmentally sustainable outcomes. For instance, competitors may want to

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<sup>1</sup> The UK's Net Zero Strategy was published in October 2021 and sets out the UK's ambitions "to lead the world in ending our contribution to climate change". The Climate Change (2050 Target Amendment) Order 2019, SI 2019/1056 amended the existing legally binding target (s1 Climate Change Act 2008) to require the UK to bring all greenhouse gas emissions to net zero (a 100% reduction from 1990 levels) by 2050.

<sup>2</sup> See the CMA's draft Annual Plan 2023/24, which was published for consultation on 15 December 2022: [Annual Plan consultation 2023 to 2024 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk). Helping accelerate the UK's transition to a net zero economy and promoting environmental sustainability are included among the CMA's proposed medium term (3 year) strategic priorities.

<sup>3</sup> [Sustainability - Exploring the possible - GOV.UK \(www.gov.uk\)](https://www.gov.uk).

work together to reduce their carbon footprint or to improve the environmental standards of their products.

- 2.2 The Competition Act 1998 (CA98) prohibits anticompetitive agreements between ‘undertakings’ (that is, broadly speaking, between businesses). This prohibition is known as the Chapter I prohibition.<sup>4</sup> The Chapter I prohibition applies to agreements and concerted practices between undertakings, and to decisions by associations of undertakings (e.g. trade associations), which have as their object or effect the prevention, restriction, or distortion of competition within the UK.
- 2.3 There are many situations where agreements that restrict competition can, on balance, be beneficial to consumers. For this reason, the CA98 provides that agreements can be exempted from the Chapter I prohibition if they meet certain conditions relating to the benefits they produce.
- 2.4 Section 9(1) CA98 sets out the conditions that must be met for an agreement to benefit from individual exemption from the Chapter I prohibition. Broadly, the agreement must contribute to clear benefits. Second, the restrictions on competition that it provides for must be no more than the minimum that is necessary to enable consumers to gain these benefits. Third, it must provide a fair share of the resulting benefits to consumers. Fourth, the agreement must not give the parties to the agreement the opportunity to eliminate competition from a substantial part of the relevant market.<sup>5</sup>
- 2.5 The Draft Sustainability Guidance is intended to be finalised and integrated into the CMA’s broader guidance on the application of the Chapter I prohibition to horizontal agreements, when finalised itself.<sup>6</sup>

### *Summary of guidance*

- 2.6 The Draft Sustainability Guidance applies to ‘environmental sustainability agreements’, a term which is intended to capture agreements or concerted practices between actual or potential competitors which are aimed at preventing, reducing or mitigating the adverse impact that economic activities have on

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<sup>4</sup> Section 2 of CA98.

<sup>5</sup> The cumulative conditions in section 9(1) CA98 that must be met in full are that the agreement:

(a) contributes to:

- (i) improving production or distribution, or
- (ii) promoting technical or economic progress,

while allowing consumers a fair share of the resulting benefit; and

(b) does not:

- (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
- (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

<sup>6</sup> The [CMA’s Draft Guidance on Horizontal Agreements](#) (CMA174)

environmental sustainability or assessing the impact of their activities on environmental sustainability (see Section 2 of the Draft Sustainability Guidance).

- 2.7 The Draft Sustainability Guidance covers three broad situations within the legal framework for the prohibition on anti-competitive agreements, known as the 'Chapter I prohibition':
- First, environmental sustainability agreements which are unlikely to infringe the Chapter I prohibition (see Section 3 of the Draft Sustainability Guidance).
  - Second, environmental sustainability agreements which could infringe the Chapter I prohibition (unless they benefit from 'exemption' as described below) (see Section 4 of the Draft Sustainability Guidance).
  - Third, environmental sustainability agreements which are capable of exemption (see Section 5 and 6 of the Draft Sustainability Guidance). We consider how environmental sustainability agreements which would otherwise infringe the Chapter I prohibition may nonetheless be permitted because they meet the conditions for exemption under section 9(1) of the Competition Act 1998 on the basis that the benefits of the agreement outweigh the competitive harm.
- 2.8 A more permissive approach is taken in the Draft Sustainability Guidance to the application of the exemption criteria in respect of climate change agreements. These agreements are a sub-set of environmental sustainability agreements and are defined as agreements which contribute towards the UK's binding climate change targets under domestic or international law (see Section 2 of the Draft Sustainability Guidance).
- 2.9 This more permissive approach to climate change agreements reflects the fact that climate change represents a special category of threat: the sheer magnitude of the risk that climate change represents, the degree of public concern about it, and the binding national and international commitments that successive UK governments have entered into, set it apart. Additionally, by reducing negative externalities which contribute towards climate change, climate change agreements merit this more permissive approach.
- 2.10 The Draft Sustainability Guidance:
- Provides practical guidance for all environmental sustainability agreements with case studies as examples.

- Invites parties to approach the CMA to discuss all environmental sustainability agreements and seek informal advice ('open-door policy' – see Section 7 of the Draft Sustainability Guidance).
- Creates a protection from fines for all 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 that were raised by the CMA have been addressed) (see Section 7 of the Draft Sustainability Guidance).
- Sets out a more permissive approach to exemption for climate change agreements by taking account of the benefits to all UK consumers, instead of only the consumers in the relevant market, when balancing the harm to competition against the benefits that result from the agreement (see Section 6 of the Draft Sustainability Guidance).

2.11 While we recognise that agreements which aim to conserve biodiversity are also of critical importance, we do not consider that they fall into the same category as climate change agreements and they therefore will not benefit from the more permissive approach that will be taken for climate change agreements. However, the CMA will discuss such agreements under its open-door policy.

### **3. Scope of the consultation**

- 3.1 This consultation seeks the views of interested parties on the Draft Sustainability Guidance which is published separately on the consultation page.
- 3.2 After the consultation initiated by this consultation document, the CMA will prepare its final guidance taking into account the feedback received as part of this consultation.



## 4. Consultation questions

- 4.1 Are the content, format and presentation of the Draft Sustainability Guidance sufficiently clear? If there are particular parts of the Draft Sustainability Guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.
- 4.2 We are keen to ensure that the Draft Sustainability Guidance is as practical and helpful to business as possible. If you think that there are situations where additional guidance would be helpful or where the examples we have used could be made clearer or more specific, please let us know.
- 4.3 We are also keen to ensure that the description of the agreements in Section 2 of the Draft Sustainability Guidance is sufficiently clear so that businesses are in no doubt as to whether their agreement is covered by the Guidance.
- a) Are there any changes that you feel would improve the description of environmental sustainability agreements?
  - b) Are there any changes that you feel would improve the description of climate change agreements (including in footnote 4)?

## 5. Consultation process

### How to respond

- 5.1 We are publishing this consultation on the CMA webpages and drawing it to the attention of a range of stakeholders to invite comments on the Draft Sustainability Guidance.
- 5.2 We encourage you to respond to the consultation in writing (by email) using the contact details provided in paragraph 5.5 below. Please provide supporting evidence or examples for your views where possible.
- 5.3 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.
- 5.4 In accordance with our policy of openness and transparency, we will publish non-confidential versions of responses on our webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide at the same time a non-confidential version for publication on our webpages which omits that material and which explains why you regard it as sensitive.

### Duration

- 5.5 The consultation will run from 28 February 2023 to 11 April 2023. Responses should be submitted by email **by 5pm on 11 April 2023** and should be sent to: [sustainabilityhbersreview@cma.gov.uk](mailto:sustainabilityhbersreview@cma.gov.uk).

### Compliance with government consultation principles

- 5.6 In preparing this consultation, the CMA has taken into account the published [government consultation principles](#), which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders.

### Statement about how we use information and personal data that is supplied in consultation responses

- 5.7 Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the General Data Protection Regulation 2016 (GDPR) and the Data Protection Act 2018. 'Personal data' is information which relates to a living

individual who may be identifiable from it.

- 5.8 We are processing this personal data for the purposes of our work. This processing is necessary for the performance of our functions and is carried out in the public interest, in order to take consultation responses into account.
- 5.9 For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long we retain personal data, see our [Privacy Notice](#).
- 5.10 Our use of all information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.
- 5.11 Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, if you have made any representations about the confidentiality of any information contained in your response, we will take such representations into consideration. We will also be mindful of our responsibilities under the data protection legislation referred to above and under Part 9 of the Enterprise Act 2002.
- 5.12 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

### Next steps

- 5.13 After the consultation, the CMA will prepare the final version of the guidance. As noted above, the CMA currently intends to integrate the Sustainability Guidance into our guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements.
- 5.14 The CMA will publish the final version of the guidance on its webpages at <http://www.gov.uk/cma>. The CMA will also publish the responses received during the consultation. These documents will be available on our webpages and respondents will be notified when they are available.