

Response to consultation

COMPETITION & MARKETS AUTHORITY CONSULTATION ON DRAFT GUIDANCE ON THE APPLICATION OF THE CHAPTER I PROHIBITION IN THE COMPETITION ACT 1998 TO ENVIRONMENTAL SUSTAINABILITY AGREEMENTS

About the Investment Association

The Investment Association (IA) champions UK investment management, a world-leading industry which helps millions of households save for the future while supporting businesses and economic growth in the UK and abroad. Our 250 members range from smaller, specialist UK firms to European and global investment managers with a UK base. Collectively, they manage £10 trillion for savers and institutions, such as pension schemes and insurance companies, in the UK and beyond. 46% of this is for overseas clients.

Executive summary

1. The investment management industry plays an important role in the economy, helping millions of individuals and families to achieve their life goals by helping them grow and receive an income from their investments. The investment industry's purpose is to generate sustainable value and to meet its clients' investment objectives. To achieve these objectives, investment managers help to allocate capital across the economy, putting it to work where it can be most productive and produce most value. To create long-term value for clients, investment managers oversee and manage the assets they invest in to encourage, develop and support behaviour that will lead to sustainable returns.
2. In recent years, several initiatives have been launched to allow the financial sector to support the net zero commitments which have been made by governments as signatories of the Paris Agreement. In the case of the investment management industry, the Glasgow Financial Alliance for Net Zero (GFANZ) serves as a convening group to ensure coordination and cohesion between industry-led initiatives including the Net Zero Asset Managers initiative and the Net-Zero Asset Owners Alliance. We welcome any initiative which provides greater clarity on the legal basis on which such initiatives can operate.
3. To date, investment managers with more than £7trn of assets under management in the UK have made the Net Zero Asset Managers commitment. Central to the initiative is a commitment to work in partnership with asset owner clients on decarbonisation goals, setting an interim target for the proportion of investments to be managed in line with the attainment of net zero emissions by 2050 or sooner, and a process to review interim targets at least every five years, with a view to increasing the proportion of assets which are managed in line with a net zero ambition.

The Investment Association

Camomile Court, 23 Camomile Street, London, EC3A 7LL
www.theia.org

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4. In addition to these initiatives, and in support of the above goals, many investment managers are members of other initiatives which seek to develop best practice, share resources, or use collective influence to encourage sustainability disclosures from the companies (and other assets) in which they invest. The initiatives include, but are not limited to, CDP, Climate Action 100+, and Principles for Responsible Investment.
5. The CMA draft guidance appears to have been produced with sectors other than financial and professional services as the principal intended audience. The guidance refers variously to agreements between manufacturers, delivery companies, supply chains, purchasing, products, and customers. While some of these considerations will be relevant to the day-to-day operations of an investment manager, they are not generally the primary focus of our members when considering how to manage and minimise their environmental impact.
6. We note that the CMA holds concurrent competition powers with the FCA. The FCA has published a discussion paper which states it is exploring whether further clarification of competition rules to encourage collaborative engagement on sustainability outcomes would be beneficial. It would be helpful if both the CMA and FCA could state how their concurrent competition powers are being exercised on this issue, in particular as it applies to financial services industry. If the CMA guidance is intended for use by FCA regulated firms then it may be necessary to revise the guidance to better reflect the nature of the business they conduct and the agreements they may have undertaken.
7. For the investment management industry, environmental sustainability agreements – and particularly those relating to climate change – are typically international by their nature. Some of the discussion about the extent to which such agreements are consistent with competition law has taken place outside of the UK. We would encourage the CMA to use whatever international channels are available to it to seek to build consensus on this topic in other major economies.
8. Some confusion exists around whether the proposed guidance is creating a new, more permissive regime with exemptions from existing competition law for climate change agreements. Some have inferred that such agreements had, until now, contravened UK competition law. The guidance should make clear that it is providing clarity on activity that was already permissible and not using the guidance to create new rules.
9. The consultation document states that while agreements which aim to conserve biodiversity are also of critical importance, they are not in the same category as climate change agreements and will not benefit from the more permissive approach for climate change agreements. There may be legitimate reasons for not extending the permissive approach to biodiversity agreements, but the draft guidance does not currently provide sufficient clarity as to the thresholds the CMA applies to determine the magnitude of risk, public concern, and the significance of international commitments on biodiversity.
10. We would encourage the CMA to favour maximum transparency on decisions taken on environmental sustainability agreements and guidance that has been issued to individual companies on specific environmental agreements. In addition to reducing the burden on the CMA's open-door policy from multiple enquiries relating to the same initiatives, this would also help to reduce the risk of hearsay where third parties (including those organising the environmental agreements) may inaccurately report that the CMA has already been approached to discuss an agreement and did not raise any competition concerns.

Consultation questions

Question 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.

11. The draft guidance appears to have been produced with sectors other than financial and professional services as the principal intended audience. We note that the CMA holds concurrent competition powers with the FCA. In February, the FCA published a discussion paper on ESG governance, incentives, and competence in regulated firms. The discussion paper, which includes an article on collaborative investor engagement to influence positive systemic sustainability outcomes, notes “anecdotal concerns from investors about barriers to collaborating with others because of fears of falling foul of Market Abuse Regulations or competition rules” and states the FCA is “exploring whether further clarification to encourage collaborative engagement on sustainability outcomes would be helpful.”¹
12. It is possible a formal or informal agreement exists – or is being developed – between the CMA and the FCA, consistent with the memorandum of understanding between the two organisations, on how competition law will be applied for FCA regulated firms entering environmental sustainability agreements. It would be helpful for firms if the existence of any such agreement was stated clearly by both organisations. If the CMA guidance is intended for use by FCA regulated firms then it may be necessary to revise the guidance to better reflect the nature of the business they conduct and the agreements they may have undertaken. We say more on this subject in answer to question 2.
13. For the investment management industry, environmental sustainability agreements – and particularly those relating to climate change – are typically international by their nature. Much of the discussion about the extent to which such agreements are consistent with competition law has taken place outside of the UK. As such, while we welcome the initiative of the CMA in producing this guidance, we note that its content is unlikely to provide clarity to the extent it is necessary for many companies in the investment management industry who operate across jurisdictions. It is possible, even likely, that no changes to the guidance would wholly address this challenge, so we would encourage the CMA to use whatever international channels and organisations are available to it to seek to build consensus on this topic in other major economies. We recognise that producing this guidance may be a useful first step in beginning that dialogue.
14. Some confusion has been reported to us from within the investment management industry as to whether the proposed guidance gives the impression that it is creating a new, more permissive regime with exemptions from existing competition law for climate change agreements. Readers may infer that such agreements had, until now, contravened UK competition law and, for those operating internationally, it may lead to a conclusion that unless such a permissive regime exists elsewhere then such climate change agreements remain in contravention of competition laws in other jurisdictions. Of course, the CMA’s remit and the Competition Act 1998 do not extend to other jurisdictions, but we would encourage the CMA to be mindful of the international example it sets when publishing such guidance. To the extent possible, the guidance should make clear that it is providing clarity on activity that was already permissible and not using the guidance to create new rules.

Question 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.

15. As noted in paragraph 11, the examples used in this guidance do not typically seem to relate to investment management or the wider financial and professional services sectors. The guidance refers

¹ FCA, ‘DP23/1: Finance for positive sustainable change’, Feb 2023, [bit.ly/42krZP8](https://www.fca.org.uk/publications/discussion-papers/DP23-1-Finance-for-positive-sustainable-change).

variously to agreements between manufacturers, delivery companies, supply chains, purchasing, products, and customers. While some of these considerations will be relevant to the day-to-day operations of an investment manager, they are not generally the primary focus of our members when considering how to manage and minimise their environmental impact. For investment managers, climate impact will come through the companies and other assets in which they invest. We recognise that this guidance will be beneficial to companies in other economic sectors, including the companies in our members' investment portfolios. Greater clarity on the application of competition law for those (investee) companies will allow the time of senior management to be properly dedicated to the strategy and delivery of improving the company's environmental performance, rather than the potential distraction of seeking to mitigate negative competition law outcomes from active participation in environmental sustainability agreements. Ultimately, this will benefit the end investors in those companies – among them savers and institutional investors – by creating long-term value through the proper consideration of the risks and opportunities presented by climate change.

16. The investment industry's purpose is to generate sustainable value and to meet its clients' investment objectives. These clients are individual retail savers and institutions like pension funds, insurers, charities and governments. Investment objectives are usually financial, for instance having enough money to live on in retirement, but can also include non-financial elements, such as to invest in companies, governments or projects that deliver social or environmental benefits or that "do no harm".
17. To achieve these objectives, investment managers help to allocate capital across the economy, putting it to work where it can be most productive and produce most value across a range of different assets including listed equities, corporate debt, private markets, real estate and infrastructure. This allocation of capital plays an essential role in supporting the economy. To create long-term value for clients, investment managers oversee and manage the assets they invest in to encourage, develop and support behaviour that will lead to sustainable returns.
18. Stewardship has been a core feature of the UK's investment landscape for decades, with institutional investors seeking to ensure that companies are well run and well governed and taking account of their key stakeholders, with the goal of generating sustainable returns for their clients. Initially this role focused on governance issues, but it has broadened to consider the full range of material risks to investments, including environmental and social factors.
19. To date, investment managers with more than £7trn of assets under management in the UK have made the Net Zero Asset Managers commitment. Central to the initiative is a commitment to work in partnership with asset owner clients on decarbonisation goals, setting an interim target for the proportion of investments to be managed in line with the attainment of net zero emissions by 2050 or sooner, and a process to review interim targets at least every five years, with a view to increasing the proportion of assets which are managed in line with a net zero ambition.²
20. A commitment of this nature can be supported by membership of other initiatives which seek to develop best practice, share resources, or use collective influence to encourage sustainability disclosures from the companies (and other assets) in which they invest. The guidance as it is currently drafted does not reflect the nature of these commitments or how collective engagement with investee companies, alongside engagement with clients on investment objectives, can support the role of investment managers as responsible allocators and managers of capital. As noted above, if the CMA guidance is intended for use by FCA regulated firms then it may be necessary to revise the guidance to better reflect the nature of the business they conduct and the agreements they may have undertaken.
21. As mentioned, to transition towards a sustainable economy, investments of substantial funds will be required for the development of projects, infrastructure, and technology. In this regard, the role of financial markets will be of utmost importance to direct capital towards the required areas. One way in

² Net Zero Asset Managers initiative, 'Net Zero Asset Managers Commitment', Dec 2021, bit.ly/3LtsP6g.

which the relevant goal can be achieved is through the establishment of legal and risk management standards for markets related to environmental, social and governance (ESG) activities, such as voluntary carbon markets.

22. Carbon pricing is a cost-efficient way to support an economy-wide transition to net zero. The voluntary carbon market allows organisations not covered by a compliance scheme to purchase voluntary carbon credits as part of credible transition plans, channelling private finance towards nature-based solutions and green innovations. Organisations should prioritise emission reductions, but also act beyond their value chain by supporting projects aimed at reducing or capturing carbon, thereby directing more financial resources towards these initiatives. Despite the standardisation of essential terms, the participants in these carbon markets can still customise their trades.
23. It would be useful for the CMA to clarify whether the establishment of legal and risk management standards of the type described above, e.g., in the form of ISDA Agreements³, would fall under the standards provided in section 3.11 of the consultation document (Creation of Industry Standards) and thus be unlikely to have an appreciable negative effect on competition.
24. The consultation document (CMA177con) states that while agreements which aim to conserve biodiversity are also of critical importance, they are not in the same category as climate change agreements and will therefore not benefit from the more permissive approach that will be taken for climate change agreements. We note, however, that the criteria given in the guidance for considering climate change to be a “special category of threat” could equally be said to apply to biodiversity loss.
25. As with climate change, there are binding international and national commitments on biodiversity in the form of the Convention on Biological Diversity (and its supplementary agreements) and the Environment Act 2021. At the recent COP15 biodiversity conference in Montreal, the UN Secretary General described the magnitude of the risk posed by biodiversity loss by saying, “with our bottomless appetite for unchecked and unequal economic growth, humanity has become a weapon of mass extinction... And ultimately, we are committing suicide by proxy. Because the loss of nature and biodiversity comes with a steep human cost.”⁴ In November 2021, the Office for National Statistics published data from its Opinions and Lifestyle Survey on public attitudes in Great Britain to the environment and the impact of climate change. This survey found that 75% of respondents were very worried or somewhat worried about the impact of climate change. A similar question found that 63% of people felt very negative or somewhat negative when thinking about the future of the environment.⁵
26. There may be legitimate reasons for not extending the permissive approach that will be taken for climate change agreements to biodiversity agreements, but the draft guidance does not currently provide sufficient clarity as to the thresholds the CMA applies to determine the magnitude of risk, public concern, and the significance of international commitments. We would also note that some biodiversity agreements, such as the Finance for Biodiversity Pledge, will have inevitable climate change benefits while not explicitly stating such an objective.⁶
27. The guidance states that agreements which pursue broader societal objectives (such as improving working conditions) are outside of its scope, with a footnote clarifying that some societal agreements may be covered by the CMA’s guidance on the application of the Chapter I prohibition to horizontal agreements (CMA174). Noting the potential for confusion stated above (paragraph 14) for non-climate change agreements falling outside of the more permissive approach, we would encourage the CMA to take care to make clear that agreements which pursue broader societal objectives may be considered compliant with competition law. On the finalisation of the guidance on horizontal agreements,

³ ISDA, 2022 ISDA Verified Carbon Credit Transactions Definitions, [bit.ly/3KeAV0A](https://www.isda.org/2022-verified-carbon-credit-transactions-definitions)

⁴ UN, ‘Secretary-General’s remarks at the UN Biodiversity Conference — COP15’, Dec 2022, [bit.ly/3mTuFDk](https://www.un.org/press/en/2022/sgsm16486.docid).

⁵ ONS, ‘Opinions and Lifestyle Survey’, Nov 2021, [bit.ly/3FrbltK](https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/mentalhealth/articles/opinionsandlifestylesurvey/2021).

⁶ Finance for Biodiversity, ‘Finance for Biodiversity Pledge’, Dec 2022, [bit.ly/3mSlfgt](https://www.financeforbiodiversity.org/).

consideration should be given to providing greater context on agreements with societal objectives in this guidance. To the extent possible, this information should be provided in the main body of the guidance rather than in footnotes.

Question 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.

Question 3a. Are there any changes that you feel would improve the description of environmental sustainability agreements?

28. We note that the draft states that the CMA intends to periodically publish updates reflecting knowledge built up as the guidance is applied and new sustainability initiatives that are brought to the CMA's attention. We would encourage the CMA to favour maximum transparency on decisions taken on environmental sustainability agreements and guidance that has been issued to individual companies on specific environmental agreements. In addition to reducing the burden on the CMA's open-door policy from multiple enquiries relating to the same initiatives, this would also help to reduce the risk of hearsay where third parties (including those organising the environmental agreements) may inaccurately report that the CMA has already been approached to discuss an agreement and did not raise any competition concerns.