

Insights

THE CMA'S DRAFT SUSTAINABILITY GUIDANCE

THE LATEST AGENCY TO STEP INTO THE INTERNATIONAL GREEN COMPETITION POLICY DEBATE

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SUMMARY

The UK's Competition and Markets Authority ("CMA") has published its long-awaited draft guidance on sustainability agreements between competitors (the "Draft Guidance"). In doing so, it acknowledges that collaborations seeking to tackle climate change may warrant special treatment.

As with much of the guidance published by a number of other competition authorities, the CMA's focus is on collaboration agreements between competitors in relation to environmental sustainability measures. In this article, we look at not only the CMA's new Draft Guidance, but also at the other key policy developments in this area from the European Commission, Netherlands, Austria, Greece and Japan. We also look briefly at what is happening in Germany and the United States.

The current discussion around the links between sustainability and antitrust started in earnest only recently. At that time we identified that there were broadly three "camps" of opinion on how competition law should engage with sustainability:

- **The Reformers** - who believe that competition laws and standards must be adapted to incorporate sustainability benefits;
- **The Retainers/Restrainers** - who feel that the existing rules are sufficient to support genuinely beneficial green proposals and/or that competition agencies are not best placed to implement sustainability policies; and
- **The Reflectors** - who were looking at the agencies engaging and considering whether to jump into the debate.

While the discussion continues to be "new and EU" - with the Commission, certain national competition authorities and now the UK engaging and providing the most content for the debate -

the three camps remain a useful tool to analyse global opinion and developments. The EU/UK agencies are leading the way comprising both Reformers and Retainers/Restrainers, while the rest of the world - with the exception of Japan - remains in the Reflector camp (or are not following the debate at all just yet). We will refer back to these camps within this article.

THE CMA BECOMES A REFORMER?

The key takeaways from the CMA's Draft Guidance are:

1. **CMA as a Reformer:** Broadly speaking, the CMA's Draft Guidance is more Reformist than the Commission's broadly Retainer position. It recognises that agreements relating to climate change in particular might require special treatment. It also provides hypothetical scenarios to help businesses understand whether their proposed collaboration agreements would infringe competition law.
2. **Two forms of environmental agreement:** The CMA's Draft Guidance differentiates between two forms of environmental sustainability agreements between companies: (i) general environmental sustainability agreements, and (ii) climate change agreements (i.e. agreements which contribute towards the UK's climate change targets) for which the CMA is willing to adopt "*a more permissive approach*". The key difference between the treatment of these agreements is the approach to the "fair share to consumers" condition of the exemption to the cartel prohibition. The approach for general environmental sustainability agreements remains relatively orthodox - the consumers receiving a fair share of the agreement's benefit should be the consumers of the product/service to which the agreement relates. Only a proportion of the agreement's wider environmental benefits can be taken into account, reflecting the extent to which these consumers receive this benefit.

However, for climate change agreements it is a different story. Here, the fair share condition can be satisfied by considering "*the totality of the benefits to all UK consumers arising from the agreement, rather than apportioning those benefits between consumers within the market affected by the agreement*". This is in line with similar approaches in the Netherlands and Austria, and sits in contrast with the Commission's more orthodox position on fair share.

3. **Evidentiary burdens remain:** The CMA requires evidence that consumers would be willing to pay increased prices for products or services that are the subject of a sustainability agreement. The CMA's Draft Guidance highlights consumer surveys as an example of the type of evidence required. This is a potentially significant resource burden for businesses whose sustainability initiatives might result in higher prices.
4. **Codes of practice:** The Draft Guidance includes criteria outlining when the creation of industry standards or codes of practice would be unlikely to have an appreciable negative effect on competition. The criteria include transparent participation requirements, open participation on

non-discriminatory terms and the ability for participants to go beyond the minimum standards. The European Commission's "soft safe harbour" in its Draft Horizontal Guidelines, discussed below, includes similar criteria for standardisation agreements.

- 5. Some comfort on enforcement:** Businesses whose agreements "*clearly correspond to examples*" in the Draft Guidance and which are consistent with its principles are given an assurance that the CMA will not take enforcement action against them. Likewise, the CMA states that it will not fine businesses which "*implement an agreement which was discussed with the CMA in advance and where the CMA did not raise any competition concerns (or where any concerns that were raised by the CMA have been addressed)*". This is similar to the approach taken by the Netherlands Authority for Consumers and Markets ("ACM"), although the ACM goes further by promising not to issue fines where businesses follow its draft sustainability guidelines in good faith. The Commission has also introduced a comfort letter process for specific cooperation projects within its revised Informal Guidance Notice.

However, it is not yet known how the courts will treat the Draft Guidance in private actions brought by those claiming to have been harmed by an environmental agreement. For instance, the courts might work through the cartel prohibition exemption conditions - including the fair share principle - in a different manner to the CMA. The risk of divergence between the CMA's and the court's treatment of environmental agreements could increase uncertainty for the businesses involved.

THE EUROPEAN COMMISSION STANDS FIRM ON FAIR SHARE – RETAINING NOT REFORMING

The Commission published its Draft Horizontal Guidelines and Block Exemptions back in March 2022 - you can read our article '[European Commission publishes draft competitor collaboration block exemptions and guidance](#)'. The Draft Horizontal Guidelines include a chapter on sustainability agreements. The Commission consulted on the draft and has since extended the current Guidelines and Block Exemptions so it can continue its review until 30 June 2023.

The key points from the Draft Horizontal Guidelines' sustainability chapter are:

- 1. Remaining a Retainer:** The inclusion of a dedicated chapter on sustainability agreements, which goes beyond the CMA's focus on environmental agreements to consider other objectives such as human rights, is a helpful development for businesses that are interested in this area. However, the draft chapter's contents suggest that the Commission has not shifted from its position that competition law is not the appropriate vehicle for implementing wide-ranging policy changes. The Commission remains firmly with the Retainer camp.
- 2. No shift in fair share stance:** The Commission has largely stuck to its orthodox application of the fair share principle. Although the Draft Horizontal Guidelines note that negative effects on one

market could be balanced by sustainability benefits on a separate market, there would need to be a substantial overlap in consumers across these two markets for the Article 101(3) exemption to apply. Benefits felt in different geographies - or in future years - would not be taken into account.

3. **Standardisation soft safe harbour:** A new “soft safe harbour” for standardisation agreements indicates when agreements should not risk infringing the Article 101(1) prohibition, provided that there are no “by object restrictions” and that seven conditions are met. These conditions are broadly similar to the CMA’s criteria for sustainability standardisation agreements, although the Commission’s requirement that the standardisation should not lead to significant price increases or reductions in choice does not appear in the CMA’s Draft Guidance.
4. **Evidentiary burdens remain (again):** Similar to the CMA’s Draft Guidance, for the Article 101(3) exemption to apply to agreements that result in price increases the businesses involved would need to demonstrate that consumers are willing to pay higher prices for the more sustainable product - this would need to be evidenced, typically through consumer surveys. Businesses would also need to prove that they cannot achieve their sustainability goals alone and instead require collaboration with competitors - again, this would need to be evidenced and justified.
5. **A useful steer from scenarios:** The Draft Horizontal Guidelines include a number of hypothetical case studies. Such examples - including agreements that benefit from the soft safe harbour, and that restrict competition but satisfy the Article 101(3) exemption - are likely to be valuable for businesses whose sustainability collaborations will have an effect within the EU.

Given the amount of time that the Commission is taking to consider its position on the Draft Horizontal Guidelines and Block Exemptions, there could be changes to the final version of the sustainability chapter. However, recent comments by senior DG Comp officials suggest that it is unlikely that there will be any material shift away from the substantive positions, in particular in the Commission’s application of the fair share principle.

NETHERLANDS LEADS THE WAY

The ACM has been a frontrunner in reforming the approach to addressing competition law concerns associated with sustainability collaboration agreements. Its draft guidelines on sustainability agreements were published in 2021, and included an approach to the fair share principle that might have inspired the CMA. The ACM has implemented its guidelines for a few sustainability initiatives, including an agreement between major energy companies relating to carbon capture and storage, and between garden centres relating to the use of illegal pesticides.

AUSTRIA LEGISLATES

In 2022, Austria's Federal Competition Authority ("FCA") published guidelines on sustainability and competitor collaborations. The FCA developed these guidelines after the Austrian legislature amended the Cartel Act to state explicitly that sustainability can be part of the competitive assessment of an agreement. The FCA's guidelines include advice for businesses on how it will assess their contributions to such a greener economy.

Austria is not the first country to include sustainability within its competition law - Hungary's current cartel prohibition has included this since the mid-1990s.

GREECE OPENS ITS SANDBOX

In October 2022, the Hellenic Competition Commission ("HCC") launched its "sandbox" for sustainable development and competition. Businesses can use the sandbox to suggest initiatives that contribute to sustainable development in Greece. The sandbox is supervised by the HCC, which assesses the proposals' effects on both competition and sustainable development. If the HCC considers that a proposal will not significantly impede competition, the businesses in question will be free to implement their proposals.

JAPAN LOOKS BEYOND COMPETITOR COLLABORATIONS

The Japan Fair Trade Commission ("JFTC") recently published sustainability guidelines. These include detailed guidance on voluntary standards, business alliances, restraints on the business activities of trading partners, abuse of a superior bargaining position and M&A transactions. This is a broader spectrum of competition law than is covered in most other jurisdictions' sustainability guidelines. Furthermore, the guidelines include a significant number of hypothetical case studies that should help those doing business in Japan.

GERMANY SEES NO NEED FOR CHANGE

The German Bundeskartellamt ("BKA") has not produced sustainability guidance akin to that outlined above. The BKA's president, Andreas Mundt, has argued that competition law in its current guise is sufficient to allow genuine sustainability co-operation agreements - placing the BKA squarely within the Retainer/Restrainer camp. However, the BKA has been reviewing sustainability cooperation agreements for their compliance with competition law, and in 2022 provided comments on financial models for an animal welfare alliance and for dairy producers.

WAITING FOR THE UNITED STATES? DON'T EXPECT ANY MOVES SOON

Although the current antitrust policies of the US Federal Trade Commission ("FTC") and the Antitrust Division of the US Department of Justice ("DoJ") have been characterised as "progressive" in many ways, those policy moves to date have not extended to sustainability. Apart from FTC Chair

Lina Khan's comment at the 2023 ABA Antitrust Section Spring Meeting that the issue is not a focus of her agency, there have been no official sustainability policy announcements from the US antitrust agencies. This stands in contrast to the EU and UK positions, and the inaction remains despite President Biden's executive order requiring the heads of principal agencies (including the DoJ) to develop and implement sustainability plans that demonstrate how their agencies are contributing to the United States' green ambitions.

Whether the large majority of global jurisdictions within the Reflector camp stay put or move in some way may depend on whether the US agencies engage and take a stand one way or the other.

WANT TO KNOW MORE ABOUT COMPETITION LAW?

If you would like to discuss how competition law might affect your business' sustainability objectives and initiatives, please get in touch with the authors.

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