Antitrust and Sustainability: EU, UK and US Take Divergent Enforcement Approaches

11 / 10 / 23

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Aurora Luoma
Partner / London
44.20.7519.7255
aurora.luoma@skadden.com

Giorgio Motta
Partner / Brussels
32.2.639.0314
giorgio.motta@skadden.com

Boris Bershteyn
Partner / New York
1.212.735.3834
boris.bershteyn@skadden.com

Professional support lawyer **Elizabeth Malik** contributed to this newsletter.

One Manhattan West
New York, NY 10001
1.212.735.3000

On October 12, 2023, the UK's Competition and Markets Authority (CMA) issued its final Green Agreements Guidance (Guidance). The Guidance is designed to help businesses seeking to collaborate on environmental sustainability initiatives by providing greater clarity on when UK competition rules prohibiting anticompetitive agreements will apply to those types of agreements and, in particular, the circumstances in which an otherwise potentially anticompetitive agreement may be exempt from competition rules on the basis of the sustainability benefits it brings.[1]

The application of the "fair share of benefits to consumers" condition when evaluating whether the benefits of a sustainability agreement are such that it may be exempt from competition rules has been one of the most widely debated aspects of the exemption criteria. As previewed in February in its draft guidance, the CMA takes a notably flexible approach regarding so-called climate change agreements; the Guidance specifies that for such agreements, it may consider the totality of the benefits accruing to the entire UK population from the agreement, rather than (as per the traditional approach to evaluating such agreements) limiting eligible benefits to those accruing to consumers of the products or services affected by the agreement.

This approach contrasts with the position taken in the EU. The European Commission (EC) decided against expanding the exemption criteria for sustainability agreements in the same way in its final guidance on sustainability agreements, which was adopted on July 1, 2023, as part of the Horizontal Agreements Guidelines. Further, outside Europe, some competition authorities are taking a more conservative approach. In the US, for example, Republican state attorneys general and members of Congress have targeted banks, asset managers and insurance companies participating in industry climate coalitions for their commitments to reduce fossil fuel exposure and transition to net zero.

These divergent approaches raise some interesting questions as to whether companies can demonstrate that certain types of sustainability agreements are pro-competitive and should be exempt from the application of competition rules. As essentially a global issue, the varying approaches in different jurisdictions may block the impact of the more flexible approach in the UK.

Key Points To Consider Under the CMA Guidance

Scope

The Guidance applies to collaboration aimed at achieving environmental sustainability benefits, such as improving air or water quality, conserving biodiversity and natural habitats, or promoting the sustainable use of raw materials.

Collaboration Which is Unlikely to Infringe Competition Law

In line with traditional competition law thinking, a number of initiatives are likely to fall outside of the scope of UK competition law where they do not involve sharing of sensitive information or aligning on market conduct.

[1] The final version largely follows the draft Guidance issued on February 28, 2023, although it has been expanded with further clarifications, detail and examples in certain areas. (See "Supporting Net Zero: UK CMA Consults on Draft Sustainability Guidance", March 10, 2023).

The CMA provides extensive examples of the types of environmental sustainability agreements that are unlikely to give rise to competition concerns, including those:

- Where the parties have a very small combined market share of the affected market and the agreement does not restrict competition by object.
- That do not relate to competing businesses.
- That none of the parties could carry out individually.
- Pooling non-sensitive information about suppliers or customers (provided parties are not required to purchase or refrain from purchasing from them).
- Creating industry standards or targets.
- Phasing out sustainable products or processes (if no appreciable increase in price, quality or choice).

Since the draft was published, the CMA has also included agreements between shareholders to vote for pro-environmental corporate policies. Finally, the CMA clarifies that where collaboration does not raise concerns, information exchanged does not raise concerns provided that it does not go beyond what is necessary and proportionate.

Collaboration Which Could Infringe Competition Law

In line with the expected, particular caution is needed for collaboration which involves price fixing, market or customer allocation, limitations of output, or limitations of quality or innovation, as these typically restrict competition by object and so are assumed by their very nature to be harmful to competition.

The CMA also explains that there are circumstances in which collective withdrawals, which are regarded as a restriction by object in some contexts, may be considered as restrictions by effect in the case of an environmental sustainability agreement (which would then need to be assessed to determine whether the agreement has an appreciable negative effect on competition).

Collaboration That May Benefit From an Exemption

An agreement that restricts competition by object or by effect may still be lawful if it meets the criteria for an exemption. The onus is on the parties to demonstrate that consumers receive a fair share of the benefits that result from the agreement and that the benefits outweigh the competitive harm.

The application of the exemption criteria in a sustainability context has been widely discussed in recent years because the relevant "consumers" are generally considered to be the consumers of the product or service to which the agreement relates, whereas the overall benefits generated by sustainability collaboration are likely to extend to society as a whole.

For most types of environmental sustainability agreements, the Guidance confirms the traditional approach that it will only be appropriate to take account of the proportion of the wider environmental benefits that are enjoyed by consumers of the product covered by the agreement. Where two markets are related, benefits achieved on separate markets may also be taken into account.

However, the CMA also confirms its broader interpretation of the exemption criteria for climate change agreements (*i.e.*, agreements which contribute to combatting climate change), which takes into account the totality of the benefits accruing to *all* UK consumers.

The Guidance provides several examples of agreements that may benefit from this more favourable approach, such as an agreement between:

- Manufacturers to phase out a particular production process which involves the emission of carbon dioxide or to phase out the sourcing of a particular input, the production of which causes greenhouse gas emissions.
- Delivery companies to switch to using electric vehicles.
- Financial service providers not to provide support such as financing or insurance to fossil fuel projects.

The CMA's clarification of its approach towards businesses withdrawing from polluting activities is important for the financial sector. Last year, the UN-backed Race to Zero campaign said it would require members to exit all unabated fossil fuels and specified that there be "no new coal projects" financed. Many member firms of the Glasgow Financial Alliance for Net Zero (GFANZ) raised antitrust concerns, which led to GFANZ ultimately dropping the requirement for its members to align with the Race to Zero criteria.

The CMA's Guidance also clarifies, in a new section, that where an environmental sustainability agreement generates both climate change benefits and other environmental benefits, the climate change benefits that arise from the agreement should be assessed using the more permissive approach and any other environmental benefits should be assessed using the general approach.

CMA's Open Door and Enforcement Policy

The Guidance continues to encourage parties to approach the CMA for informal advice at an early stage regarding the application of the Guidance to specific proposals, and intends to publish non-confidential summaries of its individual assessments unless there are exceptional circumstances. The CMA also maintains its policy of not expecting to take enforcement action against certain environmental sustainability agreements.

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EU-UK Divergence

Overall, the UK and the EU approaches are broadly consistent. There are, however, two notable differences:

- The CMA focuses exclusively on environmental sustainability, whereas the EC also pursues wider social objectives such as working conditions and human rights.
- The CMA introduces a more permissive approach with regard to the exemption for climate change agreements, whereas the EC recognises only the benefits accruing to consumers in the relevant market (and, where appropriate, in a related market).

US Antitrust Perspective on Sustainability

US antitrust laws provide no exemption or "safe harbor" for climate-related activities, and collaborations could give rise to antitrust risk even when their objectives are consistent with scientific and public policy priorities. Indeed, some of the sustainability collaborations that may benefit from the CMA Guidance's flexible approach have encountered criticism in the United States for their purported anticompetitive effects.

Over the past year, Republican state attorneys general and members of Congress have targeted major banks, asset managers and insurance companies participating in net zero alliances, alleging that these initiatives could be restricting the supply of capital and underwriting services to carbon-intensive sectors, allegedly in violation of competition laws. In particular, participating financial services and insurance providers have been scrutinized for their purported commitments under industry alliances to independently phase out unabated fossil fuel projects, integrate independently determined, company-specific decarbonization-related risk criteria into risk management frameworks, and implement guidelines for their portfolios' most carbon-intensive activities, including commitments by insurers to support personal motor vehicle clients in their efforts to transition to electric vehicles and other forms of low- or zero-emission transportation. Democratic state attorneys general and members of Congress, meanwhile, have pushed back on these efforts, arguing that collaborations can be important to addressing climate-related market and financial risks.

Navigating Divergent Enforcement Approaches

There is no consensus between different authorities on how to assess sustainability initiatives. For example, the CMA states that an agreement between financial service providers not to provide insurance to fossil fuel projects can benefit from the broader exemption criteria. As such, the agreement is more likely to have an overall positive impact in the UK, even where it gives rise to a restriction of competition. It may be more challenging for the parties to make the same case in the EU, which recognises a more limited set of benefits, as well as in the US, which may even view the agreement as a "climate cartel".

While the CMA's Guidance brings helpful clarity and flexibility to companies seeking to work together on environmental sustainability projects, those operating internationally need to carefully consider the evolving patchwork of approaches when planning industry-led initiatives, leaving a question as to just how much comfort such businesses can take from a more favourable approach in the UK.