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A‘green’ments Between Competitors: UK CMA Publishes Green Agreements Guidance

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The transition towards a net zero economy remains an important focus of the UK government’s internal and foreign policy. With the conclusion of COP28 (the 2023 United Nations Climate Change Conference), this client alert focuses on regulatory efforts in the UK to help companies develop and implement effective environmental policies – including through legitimate industry cooperation.

Specifically, the Competition and Markets Authority (CMA) recently published the final version of its Green Agreements Guidance (UK guidance). The UK guidance explains how businesses can comply with UK antitrust law when entering into certain environmental agreements with their competitors.

The publication of the UK guidance is part of a recent trend among antitrust authorities seeking to help promote sustainable initiatives by setting out their position on what constitutes legitimate business collaborations to combat the negative effects of climate change. While these guidelines generally pursue similar objectives, companies will have to be mindful of differences in scope and approach, especially when seeking to implement cross-border initiatives.

We have set out below the key features of the UK guidance and explain what they mean for businesses seeking to tackle environmental sustainability objectives through legitimate industry collaborations and/or bilateral agreements with their competitors.

What are the risks of making agreements with competitors?

Antitrust law prohibits businesses from entering into agreements which prevent, restrict or distort competition in the UK. Typically, therefore, agreements between competitors carry significant antitrust law risks, and businesses have shied away from cooperating with other companies in their sector to achieve sustainability objectives.

However, antitrust regulators are now recognising that in certain circumstances, cooperation between competitors may be necessary in order to achieve sustainability goals, with competition potentially undermining these efforts. Examples of where issues might arise include:

- **The first mover disadvantage**: where a business acting first on sustainability could suffer a competitive disadvantage – e.g., by switching to a more sustainable but more costly input, if its competitors do not do the same.
- **Lack of resources/capabilities**: where a business may **lack the resources and capabilities** to achieve an environmentally sustainable outcome, which could be achieved collectively – e.g., by pooling knowledge, resources, and/or research and development (R&D) capabilities.
- **Lack of scale**: where businesses individually possess the resources and capabilities to achieve more environmentally sustainable outcomes but acting collectively could **realise the benefits more quickly and on the scale demanded by the risks of climate change**.
- **Unhelpful duplication**: where businesses could pool their efforts to reduce duplication which would be detrimental to consumers. An example of this would be to set a common ‘sustainability label’ rather than each business deciding on an individual one, potentially confusing end consumers.

The UK guidance has the aim of ensuring that UK antitrust law promotes environmental sustainability and helps regulators meet their objective of accelerating the UK’s transition to a net zero economy.

Scope of the guidance: What are ‘green agreements’?

The UK guidance establishes a framework for cooperation among businesses in relation to ‘environmental sustainability agreements’, ‘climate change agreements’ and ‘mixed agreements’.

- **Environmental sustainability agreements (ESAs)** are agreements between competitors aimed at preventing, reducing or mitigating the adverse impact that economic activities have on environmental sustainability, or assisting with the transition towards environmental sustainability.
- **Climate change agreements** are a subset of ESAs, which contribute to combating climate change.
- **Mixed agreements** are ESAs that generate both climate change and other environmental benefits.

What environmental sustainability collaborations are unlikely to raise concerns under the guidance?

First, the UK guidance sets out that there are certain categories of agreements which the CMA considers unlikely to infringe antitrust rules. They include:

- **Agreements which do not affect price, quantity, quality, choice or innovation** – e.g., agreements to eliminate the use of single-use plastic on business premises.
- **Agreements to do something jointly which none of the parties could do individually** – e.g., joint R&D projects with an environmental sustainability objective, after which the parties will independently implement any solution in their own production processes.
- **Cooperation that is required, rather than encouraged, by law**.
- **Pooling information about suppliers or customers** – e.g., evidence-based information about the sustainability credentials of customers, but without sharing competitively sensitive information.
- **Creation of industry standards**, provided that the process for developing the standard is transparent, the standard is voluntary, and any business in the affected market can participate in the development of that standard and can implement the standard on reasonable and nondiscriminatory terms.
- **Collective withdrawal/phasing out of nonsustainable products or processes**, provided it does not involve an appreciable increase in price or reduction in product quality or choice for consumers.
- **Industrywide environmental targets** – i.e., nonbinding short- or long-term targets (e.g., for reduction of CO2 emissions) across a whole industry, provided that participating business are free to independently determine their own contribution and the way in which targets are realised.
- **Agreements between shareholders to vote in support of corporate policies that pursue environmental sustainability**.

When could environmental sustainability collaborations raise antitrust concerns?

Notwithstanding the above, the UK guidance is clear that not all sustainability agreements will be compliant with antitrust law, and companies have to keep the usual antitrust risks in mind. This means that, for example, agreements involving price fixing, market sharing, customer allocation, or limits on output, quality, or innovation will continue to be prohibited.

In addition, agreements that, in practice, have **the effect** of restricting competition will have to be analysed on a case-by-case basis against the four criteria below:

1. **The agreement must have objective and verifiable benefits. Examples include:**
    - Reduction of greenhouse gas emissions.
    - New or improved products which have a reduced environmental impact.
    - Introduction of cleaner technologies.

- Reduction of production or distribution costs for sustainable products through achieving economies of scale.

2. **An agreement between competitors must be indispensable to achieve those benefits.** If there is a less restrictive, but equally effective, alternative, the initiative will not be covered by the UK guidance.
3. **Consumers must receive a 'fair share' of the benefits of the agreement**. This means that the benefits of the agreement to UK consumers must outweigh the harm they suffer as a result of the reduced competition between the parties to the agreement. The benefits to consumers can be direct (e.g., higher-quality products) or indirect (e.g., not contributing to deforestation by buying the product).
4. **If all other criteria are satisfied, the agreement also must not substantially eliminate competition**. This condition will be satisfied where competition price, quality, and innovation remains, and/or where competition is reduced for a limited period of time only.

The criteria above apply specifically to ESAs. However, the UK guidance adopts a slightly more permissive approach to **climate change** agreements because of the exceptional nature of the harm posed by this threat. While for ESAs, only benefits to the consumers that purchase the product are relevant to the application of the 'fair share' test, benefits to all UK consumers can be taken into account in the case of climate change agreements. For example, parties to an agreement between delivery companies to switch to electric vehicles to combat the effects of climate change can take into account the broad benefits that accrue to all UK consumers through a reduction in CO2 emissions when weighing this against the potential harm of such an agreement (e.g., higher prices to consumers ordering takeout or receiving delivery services).

This greater flexibility for the assessment of climate change agreements also is replicated by other authorities – including those in the Netherlands and Austria. In contrast, the European Union (EU) guidelines published in July 2023 do not draw this distinction, and only benefits to consumers in the relevant market who are negatively impacted by the agreement can be taken into account. While it is encouraging to see the CMA go further than the EU in its support for climate change agreements, for businesses, this unfortunately means that there is no 'one-size- fits-all' approach.

What does this mean for businesses?

The UK guidance is a helpful step in providing greater legal certainty to businesses, and it provides them with the opportunity to explore collaborative means of engaging in environmental sustainability efforts and implementing effective environmental initiatives without the risk of falling foul of antitrust law. This will be particularly relevant in the context of industry collaboration that is required or encouraged by other sector-specific rules, such as rules that encourage emissions pooling (see also the EU's recent proposal to introduce a pooling system which would allow beverage companies to form pools to achieve their 're-use targets' on a collective rather than an individual basis), or rules that require producers to join an extended producer responsibility scheme for handling waste.

Businesses operating in the UK that want to engage in collaborations with their competitors will need to determine whether their agreement is an ESA, climate change agreement or mixed agreement and adapt the proposal in line with the principles set out in the UK guidance. In doing so, they will have to remain mindful of the general principles of competition law and avoid engaging in otherwise anticompetitive behaviour (e.g., by exchanging commercially sensitive information with their competitors). Businesses that wish to implement cross-border environmental initiatives covering a larger number of jurisdictions also will have to ensure that their proposals comply with all applicable guidance. Whilst some regulators (like the UK, Austrian and Dutch competition authorities) treat climate change agreements more favourably than other ESAs, others (such as the European Commission) make no such distinction and largely preserve the current status quo.

To gain additional comfort, businesses also can approach the CMA, as well as other European regulators, with their proposed initiatives and seek informal feedback. The CMA has stated in this context that it does not intend to prioritise enforcement action against agreements which correspond clearly to the principles and examples set out in the UK guidance.

If you have any questions, please reach out to Cooley's antitrust & competition team.

Cooley trainee Olivia Anderson also contributed to this alert.

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