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CMA PUBLISHES ITS SUSTAINABILITY GUIDANCE

On 12 October 2023, the CMA published the finalised version of its guidance on the application of competition rules to agreements relating to environmental sustainability between competitors (Guidance). The Guidance reflects the CMA's increasing focus on environmental issues. In its Annual Plan 2023/2024, the CMA stated that one of its main areas of focus for this period is promoting environmental sustainability and helping the UK accelerate its transition to a net zero economy.

The Guidance provides valuable insights into the intersection of competition enforcement and climate-conscious collaboration. In general, the Guidance aligns with the approach of the European Commission (Commission) as regards 'sustainability agreements' in its Horizontal Guidelines. However, the CMA is willing to take a "*more permissive approach*" in the assessment of benefits arising from environmental sustainability agreements (ESAs) which contribute to combating climate change.

ESAs falling outside of the Chapter I Prohibition

The Guidance differs in a number of aspects from the draft guidance published by the CMA in February 2023. For example, the Guidance provides more detail when describing the types of ESAs likely to fall outside the remit of Chapter I of the Competition Act 1998 (Chapter I Prohibition):

- **agreements which do not affect the main parameters of competition:** e.g., internal policy changes such as the use of single-use plastic in business premises, which may result from discussions in a common forum without exchange of sensitive information;
- **agreements for joint action where collaboration is a necessity for achieving sustainability benefits:** e.g., the establishment of joint sustainability R&D projects;
- **agreements permitting cooperation explicitly required by law:** e.g., where cooperation is required rather than merely encouraged, the Chapter I Prohibition will not apply;
- **agreements pooling objective, evidence-based information on suppliers or customers:** e.g., environmental sustainability credentials of suppliers, provided that parties are not restricted from purchasing from certain suppliers;
- **agreements creating industry standards providing they do not facilitate / amount to 'greenwashing':** e.g., where parties collaborate under a transparent and open process to develop environmental sustainability standards / codes of practice, for which implementation is voluntary and open to all businesses on reasonable and non-discriminatory terms;
- **agreements to phase out non-sustainable products / processes:** e.g., collaboration to stop using non-recyclable packaging, providing it will not result in increased prices, reduced product quality or choice for consumers, and provided it does not have the object of eliminating or harming a particular competitor or market sharing; and
- **agreements setting industry-wide environmental targets:** e.g., setting of non-binding targets to gradually increase the extent to which sustainable materials are used in clothing products within the fashion industry.

The Guidance includes two new categories of ESAs which are unlikely to infringe the Chapter I Prohibition:

- **non-appreciable agreements:** e.g., an agreement between parties which have a very small combined market share, providing it does not have the object of restricting competition; and
- **agreements between shareholders concerning the promotion of corporate policies pursuing environmental sustainability:** e.g., an agreement between shareholders to vote against corporate policies that do not pursue climate change.

The Guidance also explains that where an agreement does not raise competition concerns, information shared directly or indirectly between the parties to that agreement will also not raise competition concerns

provided that the information sharing does not go beyond what is objectively necessary to implement the agreement and is proportionate to its objectives.

ESAs at risk of being caught by the Chapter I Prohibition

The Guidance remains substantively unchanged from the draft guidance regarding the assessment of ESAs which could infringe the Chapter I Prohibition, where an agreement has the object or effect of restricting competition (see our previous article). Examples of ESAs which could have the object of restricting competition include agreements that set the price at which products meeting an agreed environmental standard are sold, or which limit the ability of competitors to innovate to meet or exceed a sustainability goal (even if it would achieve that goal more quickly). Examples of ESAs which might have anti-competitive effects could include agreements between competing purchasers to only purchase from suppliers that sell sustainable products (see below).

The Guidance now provides greater clarity on the types of restriction that may be considered anti-competitive by object but for which (in certain contexts) the restriction of competition may be permissible. This includes circumstances where the restriction is an ancillary restraint to a wider ESA which is itself not in breach of the Chapter I Prohibition or benefits from an exemption, so long as the restriction is strictly necessary (and proportionate) to the objectives of that wider environmental sustainability. The CMA also notes that there are restrictions that in certain contexts would be regarded as a restriction by object but in other contexts would fall to be considered as restrictions by effect. The Guidance provides the example of a collective withdrawal where a group of competing purchasers agree only to purchase from upstream suppliers that sell sustainable products. The CMA notes that this may be distinguished from a horizontal collective boycott, where the object is to harm or eliminate a competitor that is operating at the same level of the market, and so should therefore be subject to an effects analysis.

Exemptions for ESAs

In line with the approach taken by the Commission, the CMA highlights that ESAs restricting competition may be exempt from the rules if the purported benefits outweigh the alleged harm, determined by reference to four cumulative conditions being met. Namely, that the ESA: (i) contributes to objective benefits (e.g., in production, distribution or technical progress); (ii) only involves restrictions of competition that are indispensable to the achievement of those benefits; (iii) results in consumers receiving a fair share of such benefits; and (iv) does not substantially eliminate competition.

Concerning the third 'fair share of benefits' condition, both the CMA and the Commission state that such benefits could be direct, indirect or collective, depending upon whether consumers appreciate the impact of their sustainable consumption on others, and it is for the parties to decide which type of benefits they wish to put forward. However, the CMA is willing to apply this condition in a more "*permissive approach*" when assessing the benefits arising from climate change agreements. This is explored in more detail below.

Divergence between the CMA and the Commission

When assessing whether consumers receive a fair share of benefits under an agreement, the relevant consumers are generally those of the products / services to which the agreement relates (i.e., consumers within the relevant market) and the restrictive effects suffered by such consumers are offset by the benefits they receive.

The Guidance explains that the CMA is willing to adopt a more expansive approach to defining consumers where the relevant agreement falls within the sub-set of 'climate change agreements' (defined as "*agreements which contribute to combating climate change*"), given the "*exceptional nature of the harms posed by climate change*". When assessing consumer benefits of a climate change agreement, **the Guidance permits the totality of the benefits accruing to all UK consumers arising from the agreement to be taken into account**, rather than only those accruing to 'in-market' consumers (or those in a related market). The CMA justifies its approach by highlighting that "*in the context of climate-change agreements, there is a concern that having regard only to the climate-change benefits accruing to the consumers in the relevant market would have perverse and harmful effects […]*".

The Guidance notes that 'mixed agreements' - those which may generate both 'climate change benefits' and 'other environment benefits' – require a unique assessment of each type of (green) benefit. For instance, purported climate change benefits arising from an agreement between businesses to eliminate deforestation from their supply chains (i.e., carbon storage) are to be assessed under the "*permissive approach*" to climate change agreements. Whereas any other environmental benefits (such as increased biodiversity resulting from an agreement to eliminate deforestation) are to be assessed by means of a general application of the 'fair share' condition.

Conversely, the Commission's Horizontal Guidelines resist any such broader assessment of consumer benefits (see our previous analysis). The Commission maintains that, in order to rely on collective societal benefits for an exemption to antitrust rules under EU law, there must be a substantial overlap between the consumers of the relevant goods or services affected by a sustainability agreement and any other beneficiaries. This stricter approach is also being adopted by other European competition agencies and as a result there is likely to be divergence between the approach taken by the CMA and elsewhere in Europe. For example, the Dutch Authority for Consumers & Markets (ACM), one of the first to prepare sustainability guidelines, originally held that sustainability benefits to 'society as a whole' should be taken into account under the 'fair share' assessment. However, due to concerns regarding the impact that such collaborations

may have on inter-state trade within the EU, the ACM recently dropped its (more permissive) approach in favour of the narrower approach of the Commission.

CMA's open-door policy and enforcement action

Helpfully, the CMA has affirmed an 'open-door' policy whereby businesses considering entering into an ESA can approach the CMA for informal guidance on their proposed agreement. The Guidance explains that, if the CMA were to conclude in the future that an ESA discussed under the open door-policy did in fact infringe the Chapter I Prohibition, there would be protection from fines and director disqualifications provided that the parties did not withhold relevant information that would have made a material difference to the CMA's assessment. While this is encouraging, businesses should stay alive to the reality that any such "*protection from fines*" afforded by the CMA does not preclude against the possibility of fines from regulators in other jurisdictions where the ESA has potential effects nor against private actions for damages.

Conclusion

The evolving landscape of ESAs will be closely monitored by businesses, policymakers and consumers alike. The Guidance serves as a positive contribution from the CMA, which should give businesses courage to explore collaboration to help drive sustainability and climate change transitions within their sectors. However, the divergence between the CMA and the Commission on the 'fair share' principle could see international cooperation between businesses suffer as a result of their conflicting approaches. In practice, businesses should ensure that any ESAs that potentially restrict competition in both the UK and the EU meet the conditions for exemptions in all relevant jurisdictions.

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