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# *It's Not Always Easy Being Green:* UK CMA Draft Guidance on Horizontal Agreements and sustainability

## (as well as some considerations worth taking into account when engaging in sustainability discussions)

| 21 March 2023

UK CMA Draft Guidance on Horizontal Agreements largely shadows EU approach but much-anticipated Draft Sustainability Guidance signals greater openness towards collaborative efforts to fight climate change

On 25 January 2023, the UK Competition and Markets Authority (CMA) opened a consultation on its Draft Guidance on Horizontal Agreements, which considers the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements (the equivalent of Article 101 TFEU). The Draft also provides guidance on the application of the Research and Development Block Exemption Order 2022 and the Specialisation Agreements Block Exemption Order 2022, which came into force on 1 January 2023. This was followed on 28 February 2023 by a second, much-anticipated additional consultation on the CMA's Draft Sustainability Guidance detailing how the Chapter I prohibition will apply to environmental sustainability agreements. The deadline for responses to this second consultation is 11 April 2023. Once finalised, the sustainability guidance will be integrated into the broader guidance on horizontal agreements.

**REPLACING THE EXISTING EU HORIZONTAL GUIDELINES**

The opening of the CMA's consultations follows the European Commission's consultation on the EU horizontals regime, which was launched in March 2022 with the publication of its Draft Horizontal Guidelines and revised drafts of the block exemption regulations concerning R&D agreements and specialisation agreements (see VBB on Competition Law, Vol. 2022, No. 3). The final versions of these drafts are expected to be adopted by the Commission in the first half of 2023.

Once the final versions of the CMA's Guidance and the Commission's Guidelines are adopted, they will replace the existing EU Horizontal Guidelines, which have been in place since 2011. This means that businesses with agreements in the UK and the EU will need to be mindful of the application of the different sets of guidelines and how they may impact strategic decision-making within their organisation.

Overall, the proposed UK and the EU approaches share many common enforcement priorities, in particular aiming to ensure that the updated horizontal guidelines and block exemptions are responsive to the most relevant modern economic and societal developments, namely digitisation and sustainability. In general, the CMA has followed the Commission's proposed approach in its revised EU Horizontal Guidelines, noting that it has been 'mindful' of the EU's approach and considerate of feedback received from respondents that divergences between the two regimes could become costly for businesses from a compliance perspective.

In other words, it's business as usual. However, when it comes to sustainability agreements that aim to reduce greenhouse gas emissions, there are some differences, leaving a question as to just how much comfort businesses can take from a more permissive UK approach to these types of agreements where they may be subject to both UK and EU regimes.

## KEY AREAS OF ALIGNMENT

As noted above, there are several areas of alignment throughout both drafts, which should provide a certain level of confidence for businesses facing the reality of navigating between UK and EU competition law rules. For example, new guidance in the EU Draft on mobile infrastructure sharing agreements, bidding consortia and the distinction between joint purchasing and buyer cartels are also included in the UK Draft. Although not an exhaustive list, some additional points of alignment are highlighted below.

- **Competitor definitions:** 'Actual' and 'potential' competitors are defined in the same way in both Drafts.

- **Relevant markets:** The CMA's Guidance on Market Definition has regard to the Commission's Market Definition Notice when considering market definition issues.

- **Thresholds and market shares:** Market share thresholds and the calculation of markets shares are aligned across both Drafts.

- **Duration of exemption and grace periods:** The duration of the exemption and the grace period afforded when the combined market shares of the parties to an agreement that previously fell within the defined threshold subsequently exceeds it are applied uniformly across both Drafts.

- **R&D poles and clusters**: Under the EU R&D block exemption, the draft EU Guidelines define R&D poles as '*R&D efforts directed primarily toward a specific aim or objective that arises out of an R&D agreement*'. This approach is mirrored in the UK Guidance but is referred to as "R&D clusters". Concerned as to the potential impact of R&D agreements on competition in innovation, both Drafts require that three competing R&D efforts exist at the time an R&D agreement is entered into for an exemption to apply. This – highly controversial – requirement has delayed the adoption of the final EU Guidelines. Should it be dropped in the EU's final version because the Commission accepts that it is unworkable, the CMA would have to decide whether it will insist on maintaining the requirement in the UK block exemption.

- **Joint ventures, parents and decisive influence:** Added clarity in the EU Guidelines regarding the relationship between joint ventures and their parent companies is also reflected in the UK's Draft, suggesting that the Chapter I prohibition will typically not apply to agreements and concerted practices between parent(s) and their joint venture concerning their activity in the relevant market(s) where the joint venture is active when it is evidenced that the parents exercised decisive influence over the joint venture.

- **Information Exchange:** The additional guidance provided by the EU on the use of algorithms and ways to manage – and limit – how data is accessed and used is reflected in the UK's Draft.

## VARIATIONS IN APPROACH TO SUSTAINABILITY

As expected in a post-Brexit age, the different policy priorities of each regulator are asserted, i.e. the precedence of the UK economy versus the resilience of the internal market, the commitment to The UK's Net Zero Strategy versus the commitment to the European Green Deal. In addition, the CMA is making moves to differentiate itself by using buzz words ('dynamic competition'), imposing obligations to provide information (the UK version of information requests), and offering an open-door policy to businesses seeking guidance on sustainability agreements. On this latter point, the CMA is offering assurance that it will not act against any sustainability agreements that are consistent with its Guidance and will not issue fines against parties that implement agreements informally discussed with the CMA in advance, where the CMA's competition concerns (if any) were addressed. It is also noteworthy that, in the context of sustainability agreements, the CMA confirms that future – and not only current – benefits will be considered relevant to its assessment. This is an interesting distinction in the context of sustainability agreements as the CMA recognises that it may take some time for the benefits to materialise.

There are a handful of other important differences to note.

- **Broader interpretation of the relevant consumers benefitting from an environmental sustainability agreement**: The CMA confirms that it will take a more liberal assessment of who the relevant consumers are when assessing which consumers receive a fair share of the benefits of an agreement. The UK Guidance indicates that there may be circumstances when the CMA considers it appropriate to also take account of consumers in a separate but related market, rather than only those consumers present on the market directly concerned by the agreement. In other words, where there is substantial overlap between the two, the CMA may be willing to take both into account.
- **Special exemption for climate change agreements:** For those agreements that contribute to reducing greenhouse gas emissions, the CMA goes further than the Commission and outlines a broader interpretation: the benefit to 'consumers' concerned in climate change agreements will include all UK consumers, taking account of the totality of the benefits arising from the agreement rather than only those on a specific market.
- **Precedence of sustainability principles:** It also appears that the CMA is ready to apply its more permissive approach even if such agreements are not purely sustainability-related – a 'centre of gravity' will suffice. For example, where there is a conflict between the Sustainability Guidance and other parts of the CMA's Horizontal Guidance, the CMA indicates that the Sustainability Guidance should prevail. This contrasts with the Commission's stated approach, which outlines that a sustainability agreement that concerns another type of horizontal agreement covered in its guidelines should be governed by the principles applicable to that category of agreement, while taking into account the specific sustainability objective pursued. However, in practice, there may be little difference in the outcomes reached under the two approaches.

With its Draft Sustainability Guidance, the CMA appears to step away from the EU's more careful approach and appears to be more aligned with the approach promoted by the Dutch and Austrian competition authorities. The changes outlined above will be welcomed by businesses and we would expect the CMA to constructively engage with parties who have considered its guidance carefully. At the same time, it may be difficult for parties to rely on the guidance and gain comfort by way of self-assessment that a collaboration agreement does not create competition law risks. Moreover, difficulties are to be expected in determining whether a particular agreement is part of a broader sustainability agreement or qualifies as a climate change agreement, and which standards apply. The CMA has certainly aimed to produce some sensible guidance for businesses, and while its proposed approach diverges from the Commission as outlined above, it will be necessary to await the issuance of the final packages from both regulators to confirm just how these differences will apply in practice.

## High level considerations to keep in mind when engaging in sustainability-related discussions with peers:

- There is greater acceptance that industry collaboration may be required to achieve genuine sustainability goals. That said, this is a developing area of competition law compliance and the dividing line between heavily punished "greenwash" cartels and initiatives which are on balance compatible with competition law is far from clear.
- Keep discussions at a high level to define the scope and potential benefits, and indicate already at the initial stages that the parties will seek competition law support before engaging further.
- Only discuss parameters of competition strictly relevant to the initiative. Do not disclose, let alone co-ordinate, future plans related to price, output, innovation and quality.
- Initiatives relating to upstream markets (absent a naked group boycott) usually represent a lower competition compliance risk. When discussing initiatives affecting competition downstream, it is highly advisable to keep all initial discussions at a very high level and proceed only after careful competition law analysis.
- Remember that extra care is needed when most industry leaders are involved given the collective market power such initiatives will be yielding.
- Consider engaging with competition authorities as sustainability initiatives become more concrete, as getting their green light would be advisable for initiatives requiring some restrictions of competition to achieve valuable sustainability gains.
- Never compromise on solid compliance practices including:
    - Usual competition compliance best practices applicable when meeting competitors, attending trade association meetings and, more generally, with respect to sensitive information exchange.
    - Always have a clear agenda and limit all discussions to items listed – ideally keep minutes of such discussions.
    - The description of initiatives to be discussed should briefly explain why industry collaboration is necessary to achieve sustainability targets or, at least, achieve such targets appreciably faster.
    - Legitimate lobbying activities and other discussions, especially concerning future legislative measures should never be used to co-ordinate market conduct (in response to current or future developments).
    - Any public statements and key internal communications should be reviewed by competition counsel. Language matters!

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