



Submission

Open consultation on CMA Draft Guidance on environmental sustainability agreements

Response from The Netherlands Authority for
Consumers and Markets

11 April 2023

Introduction

As part of its broader consultation of its draft guidance on Horizontal Agreements (CMA174), the Competition and Markets Authority ('CMA') published its draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements between actual or potential competitors ('Draft Sustainability Guidance') on 28 February 2023.¹ One element of the CMA's ambition to ensure that competition supports a resilient economy that can grow sustainably is helping to ensure that competition law is not an unnecessary barrier to companies seeking to pursue legitimate environmental sustainability initiatives. The Netherlands Authority for Consumers and Markets ('ACM') shares this concern and in this letter, ACM welcomes and expresses its support for the CMA's proposed Draft Sustainability Guidance.

With its guidance document, the CMA acknowledges the importance of sustainability in competition law and gives further clarity on when an agreement does not breach competition law. By using clear language and insightful examples in the document and by adopting an open-door policy for those who seek specific guidance, the CMA will provide much needed guidance to businesses that are faced with the challenge of moving towards a more sustainable economy. The CMA also provides undertakings with a clear incentive to put forward their initiatives by offering protection from fines to bona fide initiatives. By publishing the guidance cases, it not only contributes to enhancing legal certainty for businesses, but also enables other competition authorities to benefit from the CMA's case experience.

As a whole, the CMA guidance provides a sound basis for the assessment of environmental sustainability agreements. ACM especially commends the introduction by the CMA of a more lenient regime for climate change agreements, which is analogous to ACM's own regime for environmental damage agreements. Below, ACM makes a number of observations on points where it believes the CMA guidance could be further improved.

Suggestions for improvement

- 1. Scope of environmental sustainability agreements could be broader.** The scope of environmental sustainability agreements as defined by the CMA does not include agreements which pursue broader societal or social objectives, e.g., improving working conditions (par. 2.3 Draft Sustainability Guidance). ACM suggests adopting a broader definition in line with for instance the UN description of sustainable development, ACM's draft guidelines on sustainability agreements² and the draft guidelines on horizontal agreements of the European Commission³. This includes the protection of the environment, biodiversity, climate change, public health, animal welfare, fair trade, working conditions (such as child labour, liveable wages and the right to unionize), as well as human rights.⁴
- 2. Below legal standard.** The CMA explicitly excludes below legal standard competition from the application of the cartel prohibition. In our own sustainability draft guidelines and guidance practice, ACM likewise finds agreements that address below legal standard (also called illicit and therefore

¹ CMA, Open consultation Draft guidance on environmental sustainability agreements, visited: 4 April 2023, link: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139264/Draft_Sustainability_Guidance_document.pdf.

² ACM, Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law, visited 4 April 2023, link: <https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law>.

³ European Commission, Public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines, visited: 4 April 2023, link: https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en.

⁴ UN General Assembly, Resolution A/Res/66/288 of 27 July 2012, RIO + 20 ("an economically, socially and environmentally sustainable future for our planet and for present and future generations.").

unfair) competition constitute a category of agreements that we do not consider as infringing the cartel prohibition. Hence, we fully support the CMA's approach. However, whether this applies to any legal standard, domestic, in third countries or international (a point which we have yet to clarify in our own definitive Guidelines) is not entirely clear here due to the different wording in paragraphs 3.7 and 3.8. Also, the ACM does apply an indispensability (or objective necessity) and proportionality test in such cases. Our question here is whether this holds for the CMA as well.

3. **Ancillary restraints doctrine.** The ACM welcomes the guidance the CMA provides with regard to ancillary restraints, as based on its own practice the ACM believes there are definitely restrictions in sustainability agreements that could qualify as such. Given the limited experience with the concept of ancillary restraints and sustainability agreements so far, the ACM would highly welcome if the ancillary restraints approach to (environmental) sustainability agreements were to be pioneered by the CMA.
4. **Scope of climate change agreements could be broader.** The CMA proposes to apply a more lenient regime to climate change agreements, as a sub-set of environmental sustainability agreements. This is based on not requiring net benefits to consumers within the relevant market under the fair share requirement, but taking into account the totality of the benefits to all UK consumers arising from the agreement. In itself ACM supports the approach to climate change agreements adopted by the CMA. However:
 - a. **Definition.** The scope of the exemption for climate change agreements does not include the protection of biodiversity, which in the view of ACM is not any different from the justifications mentioned to exempt climate change agreements. The extinction of species is irreversible and can threaten entire ecosystems: hence, a special category of threat is involved, and public concern is high here as well. Moreover, the Rio Conventions clearly link climate change and biodiversity.⁵ ACM therefore suggests broadening the scope of this exemption to include biodiversity in addition to climate change;
 - b. **Global benefits.** The reference to UK consumers and society as a whole seems to imply that only the benefits that can be attributed to consumers within the UK can be taken into account. But it is not entirely clear how attribution would work in the case of global benefits. As a result, in the case of for example a reduction in CO₂-emissions - which is typically global in nature and from which the UK population and the rest of the world benefit equally – would only a share of the benefits proportionate to the UK population be taken into account, or can the global benefits be taken into account as the UK population also enjoys the global benefits? Because the Draft Sustainability Guidance acknowledges that climate change agreements seek to limit negative externalities both inside and outside the UK, and can have immeasurable long-term effects on the whole planet, ACM suggests taking into account the benefits of climate change agreements both inside and outside the UK (i.e., the global benefits).
5. **Protection from fines.** As regards the protection from fines, the CMA states in par. 7.12 of its Draft Sustainability Guidance that immunity is predicated upon the condition that the parties did not withhold relevant information from the CMA which would have made a material difference to its assessment. Also, parties are expected to make the adjustments required to bring the agreement in line with the competition rules. The ACM supports this approach.

However, par. 1.13 of the Draft Sustainability Guidance states that the CMA will not take enforcement action against environmental sustainability agreements, including climate change agreements, "that clearly correspond to examples used in this Guidance and are consistent with

⁵ 1992 United Nations Framework Convention on Climate Change 1771 UNTS 107; 1992 Convention on Biological Diversity 1760 UNTS 79.

the principles set out in this Guidance". As it is phrased currently, what appears to be a cumulative requirement might create unnecessary barriers. The ACM therefore suggests adding that the reassurance should also apply where the parties have followed the Draft Sustainability Guidance "in good faith", as is the case in the European Commission's informal guidance notice⁶ and ACM's draft guidance on sustainability agreements.

⁶ European Commission, Commission notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters), 3 October 2022, SWD(2022) 326 final, link: https://competition-policy.ec.europa.eu/system/files/2022-10/coronavirus_informal_guidance_notice_antitrust_2022.pdf.