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UK Proposes Guidance to Shield Competitor Agreements on Climate Change

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The UK's Competition Markets Authority (CMA) has issued a **proposed rule**, subject to public comment through April 11, 2023, that would provide guidance on the application of UK competition law to agreements between or among competitors relating to "environmental sustainability agreements." Recognizing that the Competition Act of 1998 already contains an exemption for competitor agreements where pro-competitive benefits outweigh anti-competitive effects, the goal of the Guidance would be to establish an analytical framework under the Act that would constitute a "more permissive approach" to competitor agreements aimed at combating or mitigating climate change.

Although the Guidance refers both to "climate change" and "environmental sustainability agreements," the latter phrase is intended to be broader than the former and would include agreements that are not directly related to climate. Environmental sustainability agreements are described in the Guidance as "agreements or concerted practices between competitors and potential competitors which are aimed at preventing, reducing or mitigating the adverse impact that economic activities have on environmental sustainability or assessing the impact of their activities on environmental sustainability."

The CMA's more permissive approach to climate change reflects "the fact that climate change represents a special category of threat: the sheer magnitude of the risk that climate change represents, the degree of public concern about it, and the binding national and international commitments that successive UK governments have entered into, set it apart. Additionally, by reducing negative externalities which contribute towards climate change, climate change agreements merit this more permissive approach."

The CMA's goal is to ensure that "businesses are not unnecessarily or erroneously deterred from lawfully collaborating in this space due to fears about competition law compliance. This is particularly important for climate change because industry collaboration is likely to be

necessary to meet the UK's binding international commitments and legislative obligations to achieve a net zero economy, and to play an essential part in delivering the UK's net zero ambitions."

The proposed Guidance covers three broad "legal situations":

- First, environmental sustainability agreements that are unlikely to be anticompetitive. CMA cites as examples agreements that do not focus on the nexus of competition between firms, such as competitor agreements to reduce internal consumption of plastics or to jointly fund greenhouse gas mitigation efforts. Industry standard-making also be may be included in this category.
- Second, environmental sustainability agreements that *could* be anticompetitive. Such agreements would include sustainability agreements where the "object" of the agreement is to reduce competition by fixing prices, dividing or allocating markets or limiting output.
- Third, environmental sustainability agreements that otherwise likely would be anticompetitive but which qualify for the exemption because their benefits outweigh their anti-competitive effects. Parties must demonstrate that their agreement meets each of the following four conditions:

    1. "the agreement must contribute to certain **benefits**, namely improving production or distribution or contribute to promoting technical or economic progress";
    2. "the agreement and any restrictions of competition within the agreement must be **indispensable** to the achievement of those benefits";
    3. "**consumers must receive a fair share of the benefits**"; and
    4. "the agreement **must not eliminate competition** in respect of a substantial part of the products concerned."

See **Draft Guidance, § 5.2** (emphasis in original).

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 the principles set out in this Guidance."

Taking the Temperature: The Guidance does not apply to biodiversity-specific concerns notwithstanding the increasing attention being paid by regulators and companies globally to that issue: "While we recognise that agreements which aim to conserve biodiversity are also of critical importance, we do not consider that they fall into the same category as climate change agreements and they therefore will not benefit from the more permissive approach that will be taken for climate change agreements." Nonetheless, the CMA's proposed guidance has the potential to help resolve the significant uncertainty prevalent in the market about the extent to which industry climate collaborations raise antitrust concerns. In the U.S., such concerns have led certain financial institutions to threaten to withdraw from the Glasgow Financial Alliance for Net Zero and Vanguard to withdraw from the Net Zero Asset Managers Initiative. Likewise, certain elected officials, raising antitrust concerns, have sought documents and other information from certain of these organizations. However, in our view, such collaborations, if used lawfully and appropriately, are important mechanisms for companies to benchmark their own climate-related efforts, develop best practices and

even pool resources to facilitate the transition to a net-zero economy, and assess the anticompetitive impact of being a first-mover in adopting a particular sustainability initiative.