Response

CMA consultation on draft guidance on environmental sustainability agreements

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Response from the British Brands Group

1. Introduction

The British Brands Group (the Group) is a not-for-profit member organisation of companies of all sizes producing branded consumer goods. A confidential list of members accompanies this response.

Branded companies are catalysts for innovation as they compete on the basis of quality, range and reputation as well as on price. The sustainability of branded companies' products and processes is a central concern and pre-occupation as it matters to consumers, is an essential 'hygiene factor' on which to build a strong, relevant, contemporary reputation and is necessary for the health of the planet.

In 2021 research by YouGov of 2,000 UK adults, 52% inform their purchase decisions on a brands' eco-credentials, with 21% actively ceasing the purchase of a specific brand or product over environmental concerns. 65% of all consumers are swayed by sustainability issues at the till for household essentials, rising to 62% for food and drink categories[1].

The CMA's consultation therefore relates to a core economic activity for branded companies where significant competitive forces are at play. It is strongly welcomed, both for focusing on how competition policy may best contribute positively to the challenges facing our world and for exploring practical ways in which positive change may be encouraged and accelerated. Taken overall, members found the draft guidance helpful and relatively clear, though it has not been tested with a non-legal audience. Some further worked examples would help illustrate some areas and demonstrate what would and would not be acceptable.

In this response, we focus on the three key questions in the consultation document: is the content clear? Is the Guidance practical and helpful? And is the description of the agreements in Section 2 of the Guidance sufficiently clear?

2. Clarity

Taken overall, the Guidance is considered relatively clear, to the legal audience consulted, though there are some paragraphs where clarity could be enhanced. These are as follows…

Section 2

2.1 We appreciate that these paragraphs refer to competitors and potential competitors, to indicate that only horizontal agreements are the target of the Guidance, given that it will ultimately be merged into the CMA's horizontal guidelines. It would be worth making footnote 3 clearer to businesses by using the equivalent term 'agreements that are not between competitors or potential competitors' rather than the term 'vertical agreements' and also cross-referring to this footnote from para 2.1.

It would be helpful were the CMA to provide further guidance on the assessment of vertical environmental sustainability agreements. For example,

[1] https://www.thedrum.com/news/2021/07/21/half-uk-shoppers-influenced-brand-eco-credentials-claims-sustainability-survey

	is it intended that an equivalent section will in future be added to the VABEO Guidance?
2.1, 2.2 & 2.3	The examples given in these paragraphs are helpful. It would bring further clarity were it stated explicitly whether the examples are exhaustive or non-exhaustive. If the latter, it would be helpful to have some further examples of environmental sustainability agreements that fall inside the scope of the Guidance and societal objectives that would fall outside the scope of the Guidance.
2.3	Was an agreement to have a broader societal objective but feature environmental benefits, can this Guidance still apply? Should the answer be 'no', where would the line be drawn between those agreements which fall under the Guidance on sustainability and those that fall under the more general horizontal guidelines? How are companies to draw the distinction? Is it necessary to undertake a 'centre of gravity' analysis akin to that described in para 2.7?
Footnote 9	Negative externalities" are described as causing harm to unrelated third parties who are not sufficiently compensated. It would be helpful for it to be stated explicitly whether negative externalities always have to be attributed to third parties.

Section 3

3.13	How is it envisaged that competitors determine and agree whether a particular process is or is not environmentally sustainable? Is it anticipated that some form of endorsement and/or evidence from a third party would be required or would the competitors have the freedom to determine this for themselves, presumably with some verifying objective evidence in support? The latter approach would be less onerous on business.
3.13	Separately, in the same paragraph, how is it envisaged that price implications be assessed? For example, does the increase in price relate to the purchase price of an item or a wider lifetime price? E.g. an agreement between washing machine manufacturers may lead to a more sustainable but pricier machine but with much lower lifetime running costs for the consumer.
3.13	Finally, in relation to this paragraph, we suggest that it is made clearer that price is not the only competitive outcome to be considered. For example, product performance and/or quality could also be a consideration. If so, the second part of the section could be worded…. … this is unlikely to have an appreciable negative impact on competition where it does not involve, for example, an appreciable increase in price for consumers or an appreciable reduction in product choice, performance or quality. [blue text added]

Section 4

4.11	The example given relates to an agreement among purchasers only to purchase from suppliers of sustainable products. How is it envisaged that 'sustainable' is to be assessed in such circumstances? Is there an objective test that will need to be applied and, if yes, what is it?

Section 5

5.2(1) and 5.4	In outlining the benefits that an agreement must deliver in order to qualify for the exemption, it would be helpful for the section to make clearer that the list of potential benefits is not exhaustive.
5.4 - 5.6	In providing evidence of objective benefits and the elimination of harmful effects, is the CMA able to provide further guidance on how these benefits or potential harmful effects, whether existing or in the agreement, could be identified and assessed?
5.12	This paragraph appears to indicate that if there is sufficient consumer demand for a sustainable product at a price point that would be charged absent co-operation, the agreement is not indispensable, but if co-operation is needed to reduce prices in order to launch a product, indispensability may be claimed. What approach would the CMA take where a few early-adopters are willing to pay for a higher-priced version of the product, but most consumers are not? What would be the threshold of 'sufficient market coverage' to justify the co-operation? For example, a credible projection of a product reaching more than [x]% of UK consumers?
5.18	This paragraph appears to indicate (last sentence) that benefits can only be taken into account if the parties involved are able to evidence that consumers value the benefits (i.e. a subjective standard). However, paras 5.17, 5.19 and 5.23-5.25 appear to suggest that an objective standard should be applied (i.e. it can be a claimed benefit if it is measurable, whether or not consumers value it). It would be helpful if further clarity could be added here.
5.27	A proportion of businesses stated to comprise 'some, but not all' businesses within the market appears a little imprecise. Presumably the 'some' would need to comprise a non-substantial part of the market in order to reflect the legal test set out in 5.26.

Section 6

6.6	The first sentence says that the parties would need to demonstrate that the benefits 'are in line' with the existing legally binding requirements. Presumably, however, an agreement that 'is in line with **or exceeds**' [emphasis added] existing targets would also benefit from the approach.

Section 7

7.2	Members welcome in particular the CMA's open-door policy and the ability for companies to approach the CMA for informal guidance on their proposed initiatives. We believe this will provide a high level of clarity on whether or not a particular agreement falls inside or outside the exemption.

3. Additional guidance / examples

Overall, the guidance was considered clear and the examples helpful. It is suggested that more examples, in Section 4 (Environmental sustainability agreements which could infringe the Chapter I prohibition) in particular, would enhance understanding and bring greater clarity over what agreements would or would not be acceptable under the Guidance.

4. Distinguishing between Sustainability and Climate Change agreements

In paragraph 1.5, Footnote 4, the regulations quoted focus exclusively on emission reduction and removal. In paragraph 2.4 ('Climate change agreements'), the agreements covered are those that ….

> "contribute towards the UK's binding climate change targets under domestic or international law. Such agreements will *typically* reduce the negative externalities from greenhouse gases, such as carbon dioxide and methane, emitted from the production and consumption of goods and services. [italics added]

If the intention is to define 'Climate change agreements' as only those that would impact on emissions, it would be helpful to have that stated specifically. However, if they are to be defined more broadly, further examples would be helpful in making the definition clearer. We assume that the reference to 'negative externalities' covers agreements both to reduce emissions and also agreements to remove emissions, such as those connected to the establishment of carbon capture and storage clusters, or direct air capture projects. If so, it would be helpful to make that clear in the Guidance.

It would also be helpful to define the scope of such agreements. Do they need to focus exclusively on the reduction or elimination of emissions or only in part? For example, would an agreement to limit packaging that resulted in reduced weight and material use qualify if there was less transport (and therefore emissions) involved in supplying packaging to the processor and/or supplying the finished product to retailers and households? If yes, would they still qualify if there were additional benefits to arise from the agreement that delivered other benefits, such as increased use of recycled material or an increase in its quality and/or increased appeal to consumers that would encourage its adoption?

It is noted that paragraph 2.4 also refers to the better use of scarce natural resource. We assume that this is in order to demonstrate a link between the reduction in greenhouse gases and efficiency gains, so as to anchor the guidance within the scope of existing case law. However, this last sentence is potentially confusing as it could appear to broaden the scope of how 'climate change agreements' may be defined, for instance to include those that might reduce water usage. The sentence might merit some re-casting.

The definition of 'climate change agreements' will, we believe, be an area of the Guidance subjected to particular scrutiny by business so it is the main area where clarity would be of strongest value.

5. Conclusion

The Group warmly welcomes the draft Guidance and the proposed special provisions of competition policy to encourage agreements between competitors that deliver higher levels of sustainability and/or reduced climate change impact. Of all our comments, greater clarity of definition of what would constitute a 'climate change agreement' is the most significant.

The Group stands ready to discuss this response in greater detail, should this be helpful.

Annex – Membership list

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