Draft guidance on environmental sustainability agreements

CMA Consultation

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BRC Comments

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About the BRC

The BRC is the trade association for UK retailers and our membership comprises over 170 major retailers - whether operating physical stores, multichannel or pureplay online - plus thousands of smaller, independent retailers through a number of smaller retail Trade Associations that are themselves members of BRC. Our members deliver an estimated £180bn of retail sales and employ just over 1.5 million colleagues. Our purpose is to make a positive difference to the retail industry and the customers it serves, today and in the future

Preliminary comments

1. The BRC appreciates that the consultation is essentially limited to whether the Guidance is clear in itself, including the examples, and whether there are better examples that could illustrate aspects of the Guidance. It is not about whether the Guidance and approach is useful in itself – though we would like to make it clear that we do believe it is.

2. On the key questions, we believe the Guidance is clear for those reasonably well versed in competition law - but we suggest some improvements for consideration below to make it clearer to people who are not experts in competition law who in this case should also be considered.

3. Overall, this Guidance stands alongside the comprehensive Guidance on Misleading Green Claims in the consumer protection area. We would wish to take this opportunity to commend the CMA for producing both sets of Guidance – and in particular for its open door policy in the competition guidance and commitment to provide advice if approached, including exemption from fines under certain conditions.

    - As an aside, we would like to see this approach extended to other areas of CMA activity, not least consumer protection issues where the CMA might like to consider starting with the allied issue of misleading green claims.

4. In both sets of Guidance, it is also important that innovation and competition are not

undermined through fear of taking useful action either because what could be interpreted as misleading is insufficiently clear; or the requirements of proof are not understood; or the potential for co-operation is just perceived as too complicated and requiring not just expensive implementation but expensive legal advice even before the initial stages of considering whether co-operation might be worthwhile.

5. To be fully useful, we believe the Guidance needs to address ***two audiences*** either in itself or through supplementary explanation.

    - First there are ***Competition lawyers*** who will need to be satisfied that the guidance is coherent when taken together with general competition guidance and other legal considerations. We would observe that competition lawyers – and would be experts – have rightly been versed never to go anywhere near co-operation among competitors either in preliminary discussion or in practice. This Guidance seeks in certain circumstances to change that approach and therefore needs to make that plain if those same lawyers are to go a bit beyond their comfort zone.

    - Second, there are ***environmental experts*** in many businesses and potential start-ups, not least in this area, that do not have the luxury of being able to afford competition lawyers on a day to day basis but which might benefit from a general understanding of what might and might not be possible before flexing out a full plan to take to a competition lawyer. In our view, this second audience is not completely served by the Guidance as it stands – but having attended briefings by CMA officials with explanatory slides directed more at competition laymen we believe that this audience could be served without too much work and difficulty possibly by a simple guide to the Guidance.

6. In an ideal world it would be possible to develop agreements without the need for such a competition law analysis. However, given the complexities and caveats we do not believe that is possible – and the Guidance should make it clear that such an approach is unlikely to work.

<u>General comments</u>

7. While there are sections that deal with wider co-operation across a sector, such as on standards, it would be useful if there were a specific section on co-operation within the context of a ***Trade Association*** or similar – be it the limits, of or opportunities for, co-operation generally in such a context or the limits or opportunities for active collaboration it may promote among its members.

8. It is important that the ***Guidance is precise*** about the limits of the areas covered. This is not easy given there are debates among experts as to what exactly does contribute to environmental sustainability and exactly what does or does not contribute to climate change.

9. The CMA is going to have to adjudicate ***potential differences of opinion*** – for which it may well require development of its own technical expertise. It is also going to have to

adjudicate where the margins lie between a real contribution and one that is claimed but is a by-product – and where the margins are between whether or not a proposal contributes or might contribute specifically to climate change and thus be entitled to consideration under the wider exemption.

- The Guidance might benefit from an indication of how the CMA would seek to resolve such differences of opinion – not least where a competitor might believe it has been discriminated against because it did not consider a similar proposal would have fallen within the definition.

10. Hitherto there has been a good understanding that there is a ban not just on agreeing to co-operate but even to discussing the potential areas for co-operation either formally or informally. To benefit from CMA advice on a potential plan will require ***advance work and discussion*** which might, especially if the plan is rejected, in other circumstances be regarded as unwise. Given the potential for exemptions for other reasons is not a novel concept, the CMA will have a clear understanding of ***what can be discussed at an early stage***. It would help if the guidance could spell this out in part because some of those who might wish to consider collaboration might well be unfamiliar with the caveats and either refrain or alternatively be encouraged by the Guidance to go further than they should.

11. The Guidance should be clear about the ***implications for other businesses*** that have not requested advice.

12. It is stated that it is intended to ***publish advice*** that has been given and thus how businesses have been provided with potential exemptions from fines. This is important. It is also important that this is precise and that commercial confidence is not used too widely to omit details – but if it is too precise might this undermine the benefits for the first movers? Lack of such publicity for undertakings with the CMA by businesses has sometimes left other businesses believing they are at a disadvantage by lack of knowledge of what has been agreed as a potential approach for themselves.

13. Following on from this provision of informal advice and exemption from fines, it is important not only that the parameters are clear but also whether ***other businesses that follow the same plan*** will be at a disadvantage because they have not sought advice.

14. There is also an issue over ***examples***. Clearly examples are just that – examples of a broader principle. However, at various places the Guidance indicates that a business that follows an example will be safe from enforcement. How closely does it need to follow the example? If it does something very similar but not exactly as per the example, does that mean it could potentially not benefit – or can it only benefit if it has received informal advice?

15. We believe there is an issue over ***lack of accepted definitions*** of certain concepts both here and in the misleading claims area. Even the definition of what is sustainable and the extent to which one needs to calculate the benefit and impact for it to be so can be open to interpretation. The CMA might benefit from making it clear in the Guidance how it will deal with such disputes – rather than leaving them to the courts or judicial

review or other challenges. The procedures need to operate relatively smoothly without dispute to be effective and useful.

16. For the benefit of fairness, the Guidance should make it clear that the CMA cannot exempt a business from a ***private prosecution***. However, it could make it clear that in such circumstances, as the competition regulator it would intervene on the side of any business that had sought and followed advice. Indeed, will there be a method by which other competitors will be able to challenge an agreement as going beyond the Guidance without the need for a private prosecution?

Some specific observations

Following on from these general comments, we would wish to comment on some specifics. The comments are made from the perspective of an interested observer rather than a competition expert. We believe that this perspective is important in the context of this particular Guidance because one aim must be to encourage businesses of all types to understand when it is possible for them to co-operate – and when it is not - well before they go to the extent of engaging a competition expert.

- 1.13 refers to ***'clearly correspond to examples'***. To some extent this is subjective. Given the special status of examples in the Guidance, it should explain a bit more how this might be assessed.

- 1.15 refers to the fact that ***fines will not be levied*** against parties that approach the CMA and implement the agreement faithfully. Does this exclude the same commitment to other parties that implement a similar agreement without approaching the CMA; does it exclude parties to the agreement that were not part of the original approach – or is it the agreement itself that is exempt? If these additional parties are added to the agreement, does it still stand or need to be reassessed? Given the CMA asks that the approach be made in the early stages, is there any requirement to approach the CMA again in the later stages to ensure that nothing has crept in that would give rise to concern? Is there any advice as to what can and cannot be discussed in the later stages?

- 2.2 provides some ***limited examples*** of areas that might be seen as environmental sustainability – we would suggest that the list might be lengthened either now or over time to ensure this is a living document.

- 2.4 Does ***the CMA have the technical skills to evaluate whether a proposal can achieve the outcome necessary to benefit –*** how will it indeed evaluate a proposal to ensure it fits the description advanced and the requirements if it is not to just take it on trust? While 2.5 provides three fairly broad examples, one suspects there may be many more complicated proposals – unless these are discouraged by the fairly generic examples here.

- 2.5 To what extent is it necessary that an agreement to phase out a particular production process does ***not undermine a competitor*** who may need to rely on that production process

- 3.3/3.4 provide examples of ***influencing activity*** or specific types of co-operation. This might be a suitable place to talk about trade association activities specifically as requested above – though a separate section altogether might go further than these lobbying/pr type activities.

- 3.9 The Guidance could make it clear that the intention should be to share information objectively and accurately and ***not to effectively discriminate against a particular supplier*** for other reasons.

- 3.11 on ***standards*** is interesting. There could be scope for expanding this section to make clearer what the purpose of any standard can be and that those who sign up must follow the standard to claim any exemption; that the advice here is on competition concerns not consumer protection issues – for example in the book example the claim must relate to the book not to a general claim that the business abides by the standard if it does not fully do so. The section would benefit from being linked to greenwashing claims – or perhaps to a reference to the general guidance on standards and what is expected of their development and implementation and enforcement.

- 3.13 '***Appreciable***' is a somewhat subjective term which would mean different things to different people depending on their circumstances. Some sort of indication of how the CMA would interpret this would be preferred. A 10% increase in the price of something costing £1 might not be appreciable but a 10% increase of a necessity that requires repeat purchases that costs £100 might for many be different.

- 3.14 might benefit from clarification that this applies to businesses that agree to stop supplying a particular product ***for environmental reasons*** – assuming that is what is meant.

- 3.15- 3.17 is another area where an ***explanation of how such a decision could be reached*** might be valuable – perhaps through a trade association. Businesses might have some reservations about initiating a discussion on these lines with other businesses outside such a framework.

- 3.15-3.17 – ***Is the heading correct*** that this refers specifically to climate change agreements? Or is it environmental agreements in general?

- 4.11 is a typical area where a business might want the advice of a competition lawyer. The difference in this case of '***object' and 'effect***' seems relatively marginal if the purchasing decision has the effect of driving out of business a supplier to a competitor of those reaching agreement.

- 4.14 might also be particularly relevant to a trade association seeking to assist its members.

- 5.6 One can envisage ***disputes over claimed benefits*** well into the future. If the claimed benefit is 50/50 in an assessment of it being a benefit, how will a judgement be made? If it becomes clear the claimed benefit does not and will not materialise what will happen? While the CMA may not wish to address such concerns in this Guidance, it may need to develop some underpinning advice on its approach – and it may wish to indicate that it will do so here.

- 5.14 the ***'less restrictive manner'*** is likely to be very subjective and at the margin be on a balance of probabilities

- Section 5. References to ***what consumers think*** are always difficult – different consumers think differently. Is the average consumer definition appropriate here?

- Section 6. The main concern here is, as indicated above in the general comments, ***disputes over whether a particular proposal affects climate change or not*** given the state of the science and the potential for experts to disagree. If the CMA is to avoid excessive disputes it will need to adopt some rules of thumb ex ante not ex post. It might be wise to provide an indication of these.

- Section 7. We fully support the approach and hope the CMA is not overwhelmed and can develop the expertise at a technical level to assess proposals fairly. It might be appropriate to spell out what could happen under 7.9 where ***a party did not agree with the assessment or did not comply.***

- 7.10 The concept of ***'clearly correspond' to examples*** could either limit appetite for innovative approaches or lead to arguments over interpretation. We believe that it could be useful if the CMA were to indicate how 'clearly correspond' would be assessed – does it differ from 'exactly the same' for example? To the extent it does so differ, can the CMA indicate more in what respects it can differ while 'clearly corresponding'.

- Time moves on – and if the Guidance is to remain relevant it needs to be ***a living document*** that can be revised relatively often particularly in relation to 'examples' which play a more important role than is often the case in guidance.