

THE CMA'S OPEN-DOOR POLICY ON GREEN AGREEMENTS:

**DON'T ALL RUSH
IN! WHAT DO WE
KNOW FOLLOWING
THE FIRST HALF
YEAR OF THE CMA'S
GREEN AGREEMENTS
GUIDANCE**



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With the CMA's formal Green Agreements Guidance (the "Green Guidance"¹) having been in effect for more than six months, we now have early indications of the UK competition regulator's approach, in practice, to assessing collaboration between competitors seeking to achieve green goals. The CMA has issued informal guidance on two collaboration projects:

- 1) Fairtrade Foundation's 'Shared Impact Initiative', concerning the extension by various UK retailers of the existing Fairtrade scheme by providing qualifying producers with greater security of supply allowing them to invest in sustainable practices (the "Fairtrade Guidance"²); and
- 2) a WWF-UK scheme, involving proposed commitments by a number of UK supermarkets to reduce greenhouse gas emissions in their supply chains (the "WWF-UK Guidance"³). Further, in April 2024, the CMA published a

Submission Guide detailing best practice in submitting a request for informal guidance to the CMA. This article draws out key takeaways for businesses considering green collaboration projects and related competition law risks.



Key Practical Lessons

When preparing a request for informal guidance, the most important lessons learned so far are:

- What is the 'but for': as in other areas of CMA decision-making, the CMA assesses any collaboration against the market that it considers would have emerged absent the relevant collaboration. For those considering a request for informal guidance, it is an important reminder to focus on the incremental benefits of a proposal over and above the status quo.
- Refer to the Guidance: both the informal guidance and the Submission Guide frequently refer back to the Green Guidance. Familiarity with this document, therefore, appears of paramount importance, and careful consideration should be given to how any proposed collaboration might be bought clearly within the parameters of, and examples within, the Guidance.

1 https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf

2 <https://www.gov.uk/government/publications/cma-informal-guidance-fairtrade-environmental-sustainability-agreement#:~:text=The%20stated%20objective%20of%20the,reduce%20the%20environmental%20impact%20of>

3 <https://www.gov.uk/government/publications/informal-guidance-on-wwfs-proposal-wwf-basket-climate-action>

- **Appreciable effect on competition:** in the Fairtrade Guidance, the CMA accepted that the proposal did not affect the main parameters of competition (such as price), and did not cover an appreciable share of the overall market. It therefore fell outside the prohibition of anticompetitive agreements altogether. In addition, the CMA noted that while the proposal restricted the commercial autonomy of the participants, this was objectively necessary and proportionate to the objective pursued (a so called “ancillary restraint”).
- **Self-assessment expected:** both Fairtrade and WWF-UK carried out their own self-assessments which the CMA seems to have relied upon in its own “light touch” analysis. Indeed, the CMA has stressed that it can only offer informal guidance based on the information it has been given, and it’s down to businesses to give the CMA all the details it needs to make an assessment. Parties’ considering collaboration on sustainability initiatives should, therefore, be prepared to undertake a relatively detailed self-assessment before approaching the CMA. In its analysis, the CMA has considered carefully the potential for proposals to lead to market exit and/or increased concentration and, therefore, a reduction in consumer choice or lessening of competitive pressure on remaining participants. These areas should, therefore, be addressed in self-assessment.
- **No independent fact finding:** as a corollary to the above, the CMA does not seem to have engaged in fact finding exercises of its own, in particular in relation to potentially affected markets and players. For instance, the CMA’s WWF-UK Guidance emphasises that the CMA did not seek feedback from upstream suppliers who could be affected. Any supplier complaints during implementation would, therefore, need to be taken into account by the supermarkets, possibly necessitating reengagement with the CMA. This may make the informal guidance process less suitable for potentially contentious or controversial projects.
- **Need for monitoring and review:** in each case, the CMA analysis is clearly tied to the specific facts at the time of consultation. It is clear that, if the facts change, so might the CMA’s assessment, and parties will need to keep this under review.



Benefits In The Balance

Where the CMA considers that there may be harm to competition, it will go on to consider whether that harm would be offset by any relevant customer benefits resulting from the agreement, notably adopting a wider approach to assessing such benefits in the case of climate change agreements. The key points to note on the practical application of this test are the following.

- **Some uncertainty is okay:** the CMA is prepared to draw conclusions based on the information available without agonised crystal ball gazing. In the WWF-UK Guidance, the CMA seems to have been satisfied with a fairly macro view of the benefits i.e., not the precise size of the resulting emissions reductions. While the CMA states that it will expect cogent empirical evidence to support the objective benefits of any agreement, the standard applied by the CMA in its assessment in practice (i.e., reasonable grounds to expect) seems quite a low bar.
- **CMA approach grounded in climate science:** unsurprisingly the CMA refers to climate metrics utilised by the wider UK government (such as those in HM Treasury’s Green Book). Parties should, therefore, quantify the

anticipated benefits of sustainability agreements against recognised metrics endorsed by government where possible.

- **Indispensability:** the collective action proposed must be indispensable to achieving the objectives sought. The Green Guidance indicates that indispensability is not limited to scenarios where the outcome would otherwise be unachievable and may also include situations where benefits can be achieved more efficiently (at reduced cost or more quickly). For instance, in the WWF-UK Guidance, the CMA considered, in its assessment of indispensability, the necessity of achieving a consistent approach across common supply chains.

So Where Are We?

The CMA’s Green Guidance sought to increase legal certainty, allowing businesses to pursue green goals confidently. The informal guidance issued to date is undoubtedly a positive step in that direction. It provides a useful roadmap for similar initiatives. However, even then, given the material caveats in the Green Guidance, informal consultation with the CMA is likely to be prudent on significant environmental collaboration that could affect key parameters of competition. Finally, particular care should be given to how competition authorities in other relevant jurisdictions might respond. For instance, there is a markedly different regulatory backdrop in the U.S. in respect of collaboration on environmental grounds. In the EU, there is no favourable regime for climate change agreements which may necessitate more involved economic assessment of benefits to consumers.

