

Green Agreements Guidance:

**Guidance on the application of the
Chapter I prohibition in the
Competition Act 1998 to
environmental sustainability
agreements**

CMA 185

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1. Overview

- 1.1 Ensuring environmental sustainability is a major public concern. This includes in particular the fundamental challenge of tackling climate change.
- 1.2 The Competition and Markets Authority (CMA) helps people, businesses and the UK economy by promoting competitive markets and tackling unfair behaviour. Within that context, the CMA's ambition includes ensuring that competition supports a resilient economy that can grow sustainably.¹
- 1.3 One of the elements of this ambition is to ensure that competition law does not impede legitimate collaboration between businesses² that is necessary for the promotion or protection of environmental sustainability.
- 1.4 The purpose of this document³ is to provide guidance on the application of the competition rules outlined in the '**Chapter I prohibition**' in the Competition Act 1998 (which is the prohibition on agreements between businesses that are restrictive of competition) to agreements relating to environmental sustainability between competitors⁴ ('**environmental sustainability agreements**').⁵ This document also sets out specific additional guidance in relation to environmental sustainability agreements which combat or mitigate climate change ('**climate change agreements**'), where a more permissive approach to assessing the benefits of these agreements is adopted. Further details on the scope of this Guidance and what we mean by '**environmental**

¹ The three main pillars of the CMA's work on environmental sustainability are (1) ensuring that markets for sustainable products and services develop in competitive ways; (2) helping people make informed choices about the climate impact of the goods and services they use; and (3) ensuring that competition law is not an unnecessary barrier to companies seeking to pursue environmental sustainability initiatives.

² Agreements between 'businesses' can also include agreements between businesses and trade associations or non-governmental organisations when they are engaged in an economic activity.

³ This document is intended to supplement the Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements ('**Guidance on Horizontal Agreements**') (CMA174).

⁴ Whenever this Guidance refers to 'competitors' this also includes potential competitors.

⁵ This Guidance is about the application of the prohibition on anti-competitive agreements contained in Part I, Chapter I of the Competition Act 1998 to agreements between competitors in relation to environmental sustainability. Parties to a vertical agreement (ie where the parties operate at different levels of the supply chain) on environmental sustainability may want to consider the present Guidance, to the extent that it covers issues that are relevant to the particular vertical agreement, in addition to the [CMA's Guidance on the Vertical Agreements Block Exemption Order](#) (CMA166) (the '**Guidance on Vertical Agreements**'). This is also referred to as the 'VABEO Guidance' in other CMA publications. See also footnote 12 below. The assessment under the Chapter I prohibition as described in this Guidance is without prejudice to the possible parallel application of the Chapter II prohibition (which is the prohibition on abuses of a dominant position) to environmental sustainability agreements; or to any CMA investigation of an agreement that would result in a merger or joint venture within the merger provisions of the Enterprise Act 2002. See [Mergers: Guidance on the CMA's jurisdiction and procedure](#) (CMA2).

sustainability agreements’ and **‘climate change agreements**’ are set out in **Section 2** below.⁶

- 1.5 Given the scale and urgency of the challenge to ensure environmental sustainability and particularly to combat climate change, and the degree of public concern about such issues, the CMA is keen to help businesses take action on climate change and environmental sustainability, without undue fear of breaching competition law. This is particularly important for climate change because industry collaboration is likely to make an important contribution to meeting the UK’s binding international commitments⁷ and domestic legislative obligations⁸ to achieve a net zero economy, and to play an essential part in delivering the UK’s net zero ambitions.⁹
- 1.6 The CMA has made a public commitment to promoting environmental sustainability and to helping accelerate the transition to a net zero economy.¹⁰ This Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements (**‘this Guidance’**) forms an important part of the CMA’s wider work in this area.
- 1.7 Effective competition is important for the benefit of people, businesses and the UK economy as a whole. The benefits include giving businesses incentives to improve innovation and productivity. In these ways competition can help further goals of environmental sustainability; indeed, innovation in environmental sustainability is an increasingly important parameter of competition between businesses (as an aspect of the quality of the product or service provided), as well as being a policy goal in itself.

⁶ References in this Guidance to the term ‘agreement’ also cover other forms of cooperation, including concerted practices and decisions by associations of undertakings, unless otherwise stated.

⁷ The Paris Agreement: the United Nations Framework Convention on Climate Change (2015) introduced the overarching goal to hold ‘the increase in the global average temperature to well below 2°C above pre-industrial levels’ and pursue efforts ‘to limit temperature increase to 1.5°C above pre-industrial levels’.

⁸ [The Climate Change Act 2008 \(2050 Target Amendment\) Order 2019, SI 2019/1056](#) amended the existing legally binding target (section 1 of the Climate Change Act 2008) to require the UK to bring all greenhouse gas emissions to net zero (a 100% reduction from 1990 levels) by 2050. In Scotland, the [Climate Change \(Scotland\) Act 2009](#), as amended by the [Climate Change \(Emissions Reductions Targets\) \(Scotland\) Act 2019](#), brings Scotland’s emissions targets to net zero by 2045, with interim targets of 75% below the baseline by 2030, and 90% lower than the baseline by 2040. In Wales, the [Climate Change \(Interim Emissions Targets\) \(Wales\) Regulations 2018](#) sets interim targets of 63% lower than the baseline by 2030, and 89% lower than the baseline by 2040, and the [Environment \(Wales\) Act 2016](#) brings Wales’ emissions targets to net zero by 2050. For Northern Ireland, the [Climate Change Act \(Northern Ireland\) 2022](#) sets the target to lower emissions by at least 100% of the baseline by 2050.

⁹ The [UK’s Net Zero Strategy](#) was published in October 2021 and sets out the UK’s ambitions ‘to lead the world in ending our contribution to climate change’. Scotland’s strategy: [Securing a Green Recovery on a Path to Net Zero](#) (December 2020) sets out its plan to meet Scotland’s ‘world leading emissions reductions targets’.

¹⁰ See the CMA’s Annual Plan 2023/24, which was published on 23 March 2023: [Annual Plan 2023 to 2024 \(CMA180\)](#). Helping accelerate the UK’s transition to a net zero economy and promoting environmental sustainability are included among the CMA’s proposed medium term (3 year) strategic priorities.

1.8 Nevertheless, the CMA recognises that there are circumstances where collaboration between competitors may be needed to promote environmental sustainability. Possible examples include:

- where a business that acts first by itself to promote environmental sustainability could sustain a competitive disadvantage compared with its rivals. This might occur, for example (i) where an individual business might be disadvantaged by switching to a more sustainable but costlier input if its competitors do not do so, or (ii) where a supplier is deterred from switching its supply to a more sustainable product because customers may not immediately understand or value it, making the risks to a business switching to it alone greater. These are forms of ‘first-mover disadvantage’ and may mean that no business has the incentive to switch without some form of collaboration, resulting in a ‘coordination failure’ that collaboration could overcome;
- where businesses may individually lack the resources and capabilities to achieve more environmentally sustainable outcomes but could achieve them collectively. For example, a business may have the required technical expertise among its employees to innovate its production processes to reduce its carbon emissions, but lacks the research and development facilities to trial and fully develop the innovation;
- where businesses may individually possess the resources and capabilities to achieve more environmentally sustainable outcomes, but they could realise the benefits more quickly and on the scale demanded by the risks of climate change if they did so collectively (eg by pooling resources); or
- where businesses pool their efforts to reduce duplication of activities in ways that are necessary to improve efficiency and otherwise benefit consumers. This may be the case for standard-setting, for example where development of a sustainability label, applied to certain qualifying products, by a number of businesses across a market may reduce confusion for end consumers.

1.9 This Guidance explains the circumstances in which collaboration between competitors to promote environmental sustainability may, or may not, be permitted under the Chapter I prohibition in the Competition Act 1998.¹¹

This Guidance

1.10 This Guidance covers three broad situations within the legal framework of the competition law prohibition on anti-competitive agreements, known as the ‘**Chapter I prohibition**’:

- First, environmental sustainability agreements between competitors which are **unlikely to infringe the Chapter I prohibition**. Examples of environmental sustainability agreements which are unlikely to infringe the Chapter I prohibition – either because they do not relate to the way that businesses compete with each other or because they do not have an appreciable adverse effect on competition – are given in **Section 3**.
- Second, environmental sustainability agreements between competitors which **could infringe the Chapter I prohibition** (unless they are ancillary restraints or benefit from ‘exemption’ as described below). Examples are set out in **Section 4**.
- Third, environmental sustainability agreements between competitors which could benefit from **exemption**. We consider how environmental sustainability agreements which would otherwise infringe the Chapter I prohibition may nonetheless be permitted because of an **exemption** from the prohibition. This is explained in **Section 5** for **environmental sustainability agreements generally**, and in **Section 6**, which explains the approach for **climate change agreements**.

Climate change agreements

1.11 The CMA considers that a more permissive approach to exemption is appropriate in relation to agreements which contribute to combating climate change. In the specific context of **climate change agreements** (defined in paragraph 2.4 of this Guidance), the CMA considers that it is appropriate to apply the criteria for exempting agreements from the Chapter I prohibition

¹¹ Whether or not a particular agreement or restriction infringes the Chapter I prohibition or benefits from exemption under section 9 of the Competition Act 1998 will depend on the specific facts. Whilst this Guidance (and the examples contained in it) are intended to assist businesses, it is for the parties to any agreement to satisfy themselves based on their specific situation that the agreement is compatible with competition law. However, and as mentioned in paragraph 1.14 and set out in more detail in **Section 7** of this Guidance, businesses can seek informal guidance from the CMA.

more broadly than for other types of environmental sustainability agreements or agreements in other areas.¹² This approach to climate change agreements is justified by the fact that climate change represents a special category of threat: the sheer magnitude of the risk that climate change represents (including the need for urgent action),¹³ the degree of public concern about it, and the binding national and international commitments that successive UK governments have entered into¹⁴ set it apart. Consequently, by reducing negative externalities¹⁵ which contribute towards climate change, climate change agreements merit this approach.¹⁶

- 1.12 This Guidance therefore sets out the CMA's assessment of the legal analytical framework that applies for environmental sustainability agreements, including climate change agreements.

Enforcement action

- 1.13 The CMA does not expect to take enforcement action against environmental sustainability agreements, including climate change agreements, that correspond clearly to the principles set out in this Guidance as informed by the examples included in this Guidance. However, parties to these agreements should keep their agreements under review to ensure that they continue to correspond clearly to the principles of this Guidance.
- 1.14 Where uncertainty remains, businesses are encouraged to approach the CMA under the open-door policy, set out below. Further information can be found in **Section 7** below.

¹² This approach to the application of the exemption criteria also applies to vertical agreements that contribute to combating climate change, in line with the UK's binding climate change targets under domestic or international law, and this Guidance constitutes a subsequent publication for the purpose of footnote 115 of the Guidance on Vertical Agreements.

¹³ The magnitude of the threat of climate change is exacerbated by the urgency of the actions needed to avoid reaching a tipping point. The Paris Agreement describes 'the urgent threat of climate change' and the need to 'reach the peaking of greenhouse gas emissions as soon as possible'.

¹⁴ See footnotes 7–9.

¹⁵ Negative externalities occur when production or consumption causes harm to unrelated third parties who are not (sufficiently) compensated for that harm.

¹⁶ In preparing this Guidance, the CMA received a number of representations advocating that agreements aiming to combat or mitigate other environmental issues, in particular biodiversity loss, should also benefit from the same approach as for climate change agreements. The CMA recognises that combating the loss of biodiversity is of critical importance and, in general terms, may be considered analogous in many respects to combating climate change in its significance. However, the causes of biodiversity loss are more diverse and disparate than climate change and the CMA is currently unable to offer clear guidance to businesses as to whether, and if so when, the benefits which might arise from individual agreements which aim to conserve biodiversity could be eligible for consideration under the same framework as for climate change agreements. The CMA intends to keep this issue under review and will provide further guidance in due course if appropriate. Many agreements to conserve biodiversity may still be permissible under competition law and businesses should feel confident assessing these agreements against the guidance provided in Sections 3, 4 and 5 of this Guidance.

Ongoing guidance

1.15 We are conscious that this Guidance cannot provide answers to all questions that businesses may have. We are keen to hear from businesses with questions that are not covered by this Guidance, as well as those seeking clarity or comfort on how this Guidance will be applied. In addition, from time to time, the CMA intends to publish updated guidance in the light of various environmental sustainability agreements that are brought to the CMA's attention and the understanding that is thereby built up as this Guidance is applied, to give evolving assistance to businesses involved in agreements relating to environmental sustainability. This is explained in more detail in paragraph 7.18 below.

Protection from fines

1.16 The CMA would not expect to take enforcement action where parties approach the CMA to discuss their agreement and the CMA does not raise any competition concerns (or where any concerns raised have been addressed). However, if the CMA concluded, in the future, that further investigation of that agreement was necessary,¹⁷ and then found at the end of the investigation that the agreement infringed the Chapter I prohibition, the CMA would not issue fines against the parties that had implemented the agreement provided that the parties did not withhold relevant information from the CMA which would have made a material difference to its initial assessment under the open-door policy (paragraph 7.13 below). The CMA will expect parties who have benefited from informal guidance to take reasonable steps to keep their agreements under review to ensure they remain consistent with the informal guidance provided by the CMA.

¹⁷ See paragraphs 7.15-7.16, below. This might, for example, occur because the anti-competitive effects of the agreement have proved to be materially greater than expected when the CMA provided its informal guidance or because the cumulative effects of the agreements subsequently entered into by other businesses within a sector result in additional anti-competitive effects not anticipated at the time of the CMA's informal guidance.

2. Scope

Environmental sustainability agreements

- 2.1 This Guidance applies to ‘**environmental sustainability agreements**’.¹⁸ This term captures agreements between competitors which are aimed at preventing, reducing or mitigating the adverse impact that economic activities have on the environment or assist with the transition towards environmental sustainability.¹⁹ At a general level, economic activity may, directly or indirectly, cause negative environmental externalities, including through causing pollution, reducing biodiversity, or contributing to climate change from greenhouse gas emissions.
- 2.2 Examples of environmental sustainability agreements include agreements aimed at, for example, improving air or water quality, conserving biodiversity and natural habitats, or promoting the sustainable use of raw materials. These would include:
- an agreement between farmers to improve and protect biodiversity by increasing acreage of hedgerows, or reducing usage of pesticides and/or synthetic fertilisers;
 - an agreement between fashion manufacturers to stop using certain fabrics that contribute to microplastic pollution in bodies of water; or
 - an agreement between waste management companies to commit to recycling a waste product rather than incinerating it.²⁰
- 2.3 Agreements which pursue broader societal objectives (for example, improving working conditions) are outside the scope of this Guidance.²¹

¹⁸ See footnote 9.

¹⁹ Including, for example, agreements to better enable the assessment of the impact of certain business activities on the environment.

²⁰ The examples listed here in paragraph 2.2 are illustrative of agreements that would constitute environmental sustainability agreements. However, their inclusion in this list does not indicate whether they would be permitted, which would depend on the specific facts and the application of the principles set out in this Guidance.

²¹ Depending on the nature of such agreements, they may be covered by other parts of the Guidance on Horizontal Agreements. It is for the businesses to self-assess their compliance with competition law and these agreements will not benefit from the open-door policy or the protections from enforcement and penalties set out in Section 7 of this Guidance. However, where such agreements have similar features to the environmental sustainability agreements described in this Guidance the principles set out in Section 3, Section 4 and Section 5 of this Guidance may help to inform aspects of businesses’ self-assessment of these types of agreement.

Climate change agreements

2.4 ‘**Climate change agreements**’ are a sub-set of environmental sustainability agreements. For the purpose of this Guidance, the term covers agreements which contribute to combating climate change. Such agreements will typically reduce the negative externalities arising from greenhouse gases, such as carbon dioxide and methane, emitted from the production, distribution or consumption of goods and services.²² These negative effects (and so the benefits of reducing them) are typically global in nature and are realised over long time periods (with uncertainty about their scale).

2.5 Examples of climate change agreements include:²³

- an agreement between manufacturers to phase out a particular production process which involves the emission of carbon dioxide;
- an agreement between delivery companies to switch to using electric vehicles;
- an agreement to pool funds, technology or expertise to support the development of more effective technology to capture and store carbon dioxide;
- an agreement between manufacturers to phase out the sourcing of a particular input, the production of which causes greenhouse gas emissions;
- an agreement between home builders only to purchase and install products that perform above a minimum energy efficiency standard, thereby reducing future emissions produced as a result of heating or cooling the home;
- an agreement between retail businesses to require or incentivise suppliers to phase down their greenhouse gas emissions in order to reduce emissions in their respective supply chains (**‘scope 3**

²² References in this Guidance to agreements that contribute to reductions in greenhouse gas emissions include, where applicable, agreements that contribute to removing greenhouse gases from the atmosphere.

²³ The examples listed here in paragraph 2.5 are illustrative of agreements that would constitute climate change agreements. However, their inclusion in this list does not indicate whether they would be permitted, which would depend on the specific facts and the application of the principles set out in this Guidance.

emissions’);²⁴ or

- an agreement between financial service providers not to provide support such as financing or insurance to fossil fuel projects.

Mixed agreements

2.6 Some environmental issues are closely interlinked (for example climate change and biodiversity). In some cases, therefore, businesses’ environmental sustainability agreements may generate both climate change benefits and other environmental benefits. For example, an agreement between book publishers to use only recycled paper to reduce deforestation may have both climate change and biodiversity benefits. Further detail on how these agreements should be assessed can be found in Section 6.

Relationship with the CMA’s Guidance on Horizontal Agreements

- 2.7 This document is intended to supplement and not replace the CMA’s Guidance on Horizontal Agreements (CMA174) (the ‘**Guidance on Horizontal Agreements**’).
- 2.8 Where an environmental sustainability agreement also concerns a type of cooperation described in the Guidance on Horizontal Agreements, businesses should also have regard to the relevant part of that guidance in addition to this document.
- 2.9 Where both sets of guidance apply to the same agreement, the parties to the agreement may rely on the relevant part of either this Guidance or the Guidance on Horizontal Agreements, whichever is the more favourable to the parties. For example, an agreement between competitors that is focussed on producing a more environmentally-friendly product, including through joint research and development, should be assessed by reference both to the principles set out in this Guidance and to the principles set out in Part 4 of the Guidance on Horizontal Agreements, with the guidance which is more favourable to the parties prevailing.

²⁴ Greenhouse gas emissions are commonly divided into three categories. Scope 1 (Direct emissions) are emissions that occur from sources that are controlled or owned by the reporting organisation, eg emissions associated with fuel combustion in boilers, furnaces, vehicles. Scope 2 (Energy indirect emissions) are emissions that are associated with the purchase of electricity, steam, heat or cooling. They are accounted for by the reporting organisation as they are a result of the organisation’s energy use. Scope 3 (Other indirect emissions) are emissions that are a consequence of an organisation’s actions which occur at sources that they do not own or control and are not classed as scope 2 emissions. Examples of scope 3 emissions are business travel by means not owned or controlled by an organisation, waste disposal, or purchased materials or fuels.

3. Environmental sustainability agreements which are unlikely to infringe the Chapter I prohibition

- 3.1 This Section covers environmental sustainability agreements between competitors which are unlikely to raise any competition concerns and are therefore likely to fall outside the Chapter I prohibition – either because they do not relate to the way that businesses compete or may compete with each other, or because they do not have an appreciable adverse effect on competition.
- 3.2 The boundary between agreements which may not restrict competition at all and those which may but are unlikely to have an appreciable effect on competition²⁵ is not always clear-cut and will depend on the specific facts. Some of the examples included in this Section could fall on either side of the line depending on the precise facts.²⁶ The outcome for businesses is, however, the same in both cases: their agreement does not breach the Chapter I prohibition.
- 3.3 Agreements between businesses described in this Section will also be unlikely to raise competition concerns when the members of a trade association or an NGO enter into such agreements.²⁷ Likewise, a trade association or an NGO providing legitimate assistance, facilitation or support to businesses taking part in such an agreement is unlikely to raise competition concerns.
- 3.4 Where an agreement does not raise competition concerns (in accordance with this Section or otherwise), information shared directly or indirectly between the parties to that agreement will also not raise competition concerns provided that the information sharing does not go beyond what is objectively necessary to implement the agreement and is proportionate to its objectives.²⁸

Non-appreciable agreements

- 3.5 Where the parties to an agreement have a very small combined market share of the market affected by the agreement and provided that the agreement does not have the ‘object’ of restricting competition (as described in Section 4), the agreement is unlikely to cause an appreciable restriction of competition. The CMA explains its approach

²⁵ See paragraphs 3.55–3.59 of the Guidance on Horizontal Agreements.

²⁶ For this reason, we have not sought to categorise the agreements mentioned in this section as to whether they do not relate to the way that business compete or may compete or whether they are agreements which do not have an appreciable adverse effect on competition.

²⁷ Agreements between ‘businesses’ can also include agreements between businesses and trade associations or non-governmental organisations when they are engaged in an economic activity.

²⁸ See paragraphs 3.46 and 8.11 of the Guidance on Horizontal Agreements.

to such agreements in paragraphs 3.55 to 3.59 of the Guidance on Horizontal Agreements. The application of this is particularly relevant for assessing agreements between small and medium-sized enterprises, ie SMEs.

Agreements which do not affect the main parameters of competition

3.6 Businesses may rule out any concerns about competition law compliance if the environmental sustainability agreement in question does not affect or engage with the way those businesses compete. This is likely to be the case when the agreement does not affect the main parameters of competition between those businesses, such as price, quantity, quality, choice or innovation. Such agreements will generally fall outside the scope of the Chapter I prohibition. Examples of agreements which are unlikely to affect the main parameters of competition are set out below:

- An agreement which concerns the internal corporate conduct of the businesses, for example, to eliminate the use of single-use plastic in their business premises, or to moderate the use of heating and air-conditioning in offices, or to limit the number of printed materials. These internal policy changes can be the result of discussions in a common forum or reflect industry-wide guidelines or agreements.
- An agreement to pool funds to engage in activities to mitigate, adapt or compensate for the effects of greenhouse gas emissions generated in production. This could include, for example, where the joint funds are used for training activities for people working in the industry to develop or encourage the use of more sustainable practices or processes.
- An agreement to run a joint campaign to raise awareness about environmental sustainability issues within an industry or among customers, provided that the campaign does not amount to joint selling or advertising of specific products.
- Joint lobbying for policy or legislative changes, such as on carbon pricing, where businesses come together to influence policy or legislative change in order to protect and promote their interests. Such an arrangement must not involve the sharing of competitively sensitive information between competitors, nor must it be an attempt to use lobbying as a means for seeking the exclusion of a competitor (such as in the context of a standard-setting process where businesses seek to exclude competing products by

lobbying the standard-setting body in a way that influences the process to the point of controlling it).²⁹

Agreements to do something jointly which none of the parties could do individually

3.7 There may be circumstances where businesses would not, in the particular legal and economic context, be able independently to carry out an initiative on the basis of objective factors. For example, this might be because they do not have the technical capabilities, or because of the level of the risk involved or the level of the investment required. Where businesses cooperate in these circumstances, this is unlikely to give rise to restrictive effects on competition (unless the businesses could have carried out the project using a form of cooperation that is less restrictive of competition).³⁰

3.8 Examples of agreements that fall into this category may include:

- Where several housing corporations participate in a pilot project to develop zero-energy housing using a novel, more efficient technology in a particular area. If the housing corporations each individually lack the resources or capabilities such as the technical expertise to undertake this type of project individually, this cooperation is unlikely to raise competition issues.
- Where parties cooperate in early-stage scientific or technological research with an environmental sustainability objective, such as reducing raw material consumption. To achieve this objective, the parties embark on a joint research and development project, after which the parties will then independently implement any solution resulting from the project in their own production processes. If the parties have complementary skills and would individually, in the absence of the cooperation, not be able independently to engage in this activity and therefore would not have been able to develop competing technologies, it is unlikely to raise competition concerns.³¹

²⁹ See, for example, EU Court of Justice judgment of 12 May 2010, *EMC Development AB v. Commission*, T-432/05, EU:T:2010:189, paragraphs 79–82.

³⁰ See further the Guidance on Horizontal Agreements, paragraphs 3.45, 4.138 (in the context of R&D agreements) and 7.45 (in the context of joint tendering agreements).

³¹ Parties may also want to consider if their agreement can benefit from the Research and Development Block Exemption Order. See paragraph 4.1 onwards of the Guidance on Horizontal Agreements.

- 3.9 In such cases, there is no restriction of the actual or potential competition that would have existed in the absence of the agreement.

Cooperation required by law

- 3.10 Where cooperation between competitors is explicitly required by law, such cooperation is automatically excluded from the application of the Chapter I prohibition.³² However, the Chapter I prohibition will still apply if the law merely encourages such cooperation, rather than requiring it.³³
- 3.11 Additionally, where businesses agree that they will adhere to an existing UK legal requirement on them, this is also unlikely to raise competition concerns since businesses are expected to operate within the law, provided that businesses do not agree to limit their freedom to pursue lawful action that improves upon or exceeds the minimum legal requirements.³⁴

Pooling information about suppliers or customers

- 3.12 An agreement to pool objective, evidence-based information about, or provide a rating on, the environmental sustainability credentials of suppliers is unlikely to have an appreciable negative effect on competition if it does not require the parties to purchase (or refrain from purchasing) from those suppliers³⁵ or share competitively sensitive information including information about prices or quantities purchased from those suppliers.
- 3.13 Information regarding sustainability credentials could include whether such suppliers have environmentally sustainable value chains, use environmentally sustainable production processes or provide environmentally sustainable inputs. Similarly, an agreement to pool objective information about the environmental sustainability credentials of customers but without sharing competitively sensitive information about customers, prices or the quantities those customers purchase is unlikely to have an appreciable negative effect

³² See paragraph 5 of Schedule 3 to the Competition Act 1998. See also paragraph 3.60 of the Guidance on Horizontal Agreements.

³³ See also paragraphs 3.60, 8.17 & 8.18 of the Guidance on Horizontal Agreements.

³⁴ See, for example, the European Commission's Decision of 8 July 2021 in the *Car Emissions* case (Case AT.40178), in which it fined three car manufacturers for limiting customer choice by limiting the development of selective catalytic reduction (SCR) systems, which are used to remove NOx emissions from car exhaust flows. The European Commission said that the manufacturers 'knew that they had the technical possibility to clean better than required by law and compete on this important parameter relevant for consumers. Instead, they decided to collude by indicating to each other that none of them would aim at cleaning above the minimum standard required by law'. See European Commission Statement/21/3583, 'Statement by Executive Vice-President Vestager on the Commission decision to fine car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars', 8 July 2021.

³⁵ An agreement that does require businesses to purchase or refrain from purchasing from those suppliers should be assessed under section 9 of Competition Act 1998, for example see paragraph 4.11 below.

on competition. Examples could include information on the customers who recycle or otherwise dispose of waste sustainably.

Creation of industry standards

3.14 Environmental sustainability standardisation agreements have similarities with standardisation agreements addressed in Part 9 of the Guidance on Horizontal Agreements. That part contains further explanations of how to assess such agreements, including of some of the conditions set out in paragraph 3.15 below. However, environmental sustainability standardisation agreements also have certain special features.³⁶

3.15 Where competitors collaborate to develop environmental sustainability standards (for the purposes of paragraphs 3.14 to 3.18, a ‘standard’ also includes a code of practice) aimed at making products or processes more sustainable, this is unlikely to have an appreciable negative effect on competition, provided that:

- the process for developing the standard is transparent and it is possible for any business in markets affected by the standard to participate in the development of that standard;
- no business is obliged to implement the standard if it does not wish to do so (albeit the standard may require businesses that have committed to implement the standard to comply with the requirements of the standard, and may provide for a mechanism to monitor such compliance);³⁷
- any business can implement the standard on reasonable and non-discriminatory terms. This includes allowing effective and non-discriminatory access to the requirements and conditions for using the agreed label (or logo or brand name) for the standard, and permitting

³⁶ For example, the cost of adhering to, and complying with, an environmental sustainability standard can be high, particularly if this requires changes to existing production or distribution processes. Therefore, adhering to an environmental sustainability standard might lead to an increase in production or distribution costs and consequently to an increase in the price of the products sold by the parties. In addition, unlike technical standards, which ensure interoperability and encourage competition between technologies developed by different undertakings in the standard development process, questions of interoperability and compatibility between technologies are generally less relevant for environmental sustainability standards. Furthermore, many environmental sustainability standards are process-, management- or performance-based. This means that, unlike many technical standards, environmental sustainability standards often simply specify a goal to be met, without imposing a specific technology or production method to achieve that goal. Implementers of such environmental sustainability standards may commit to the target but remain free to decide on the use of a particular technology or production method to attain the target.

³⁷ If the standard or code only applies to certain products sold by a business, then the obligation to comply with the standard should only apply to those products.

businesses that have not participated in the process for developing the standard to implement the standard at a later stage;

- businesses implementing the standard are free to go beyond the minimum environmental sustainability requirements set by the standard, or to develop or implement additional higher standards (or, if applicable, to develop alternative standards for any competing products they sell outside of the standard); and
- the standard is unlikely to result in an appreciable reduction in the availability of suitable products for consumers to purchase. A standard is, in particular, unlikely to result in an appreciable reduction in product choice if at least one of the following applies:
 - (i) the participating businesses are free to sell alternative competing products outside of the standard on the relevant market(s) affected by the standard, and remain free to independently determine which of their products the standard will apply to; or
 - (ii) the combined market share of the participating businesses³⁸ is sufficiently small (for example, below 20% on any relevant market affected by the standard) to allow sufficient alternative choice for consumers).^{39 40}

3.16 An example might be a logo used by publishers to certify that a book or magazine is printed using: (i) a minimum 50% content of recycled paper with all the remaining paper content 100% sustainably sourced (according to objective criteria); and (ii) recognised environmentally friendly printing processes and inks. The rules underpinning the standard are published on a website set up to promote the logo. Participating publishers are not obliged to use the standard on every book that they print, but they are obliged to ensure any book which bears the logo does comply with the standard. Third parties are permitted to use the logo on non-discriminatory terms, provided they too

³⁸ The combined market share of the participating businesses refers to the market share of the businesses' products in general in the relevant markets affected by the standard and is not limited to the products that are specifically covered by the standard or code.

³⁹ The CMA will consider the substance of the agreement, not its form. Regardless of the stated requirements of the standard, if the participating businesses have, in reality, agreed not to sell alternative competing products or services outside the standard (and the market share of the participating businesses exceeds 20% of the relevant market) the effects of the agreement will need to be assessed in accordance with Section 4 of this Guidance.

⁴⁰ This will not prevent the CMA from intervening in individual cases where an industry standard or code would result in an appreciable restriction of competition in the market. For example, due to the cumulative effect of industry standards or codes entered into by different businesses resulting in a significant price increase or a significant reduction in quality.

comply with the standard. The publishers are free to consider developing and participating in different standards and are not prevented from using more than 50% recycled material in their books.

- 3.17 As a separate point (independent of the competition assessment under this Guidance), it is important that businesses comply with consumer protection law as regards environmental labelling (and that they avoid misleading labels or ‘greenwashing’). If a label is developed to certify that a product meets a certain environmental standard, businesses using that label should ensure that their environmental claims are consistent with the CMA’s guidance on making environmental claims on goods and services.⁴¹
- 3.18 Where an environmental standardisation agreement does not meet the conditions described in paragraph 3.15, the industry standard may nonetheless be permissible but would need to be assessed under other parts of this Guidance (see Sections 4, 5 and 6), or by reference to provisions of the Guidance on Horizontal Agreements.⁴²

Phasing out / withdrawal of non-sustainable products or processes

- 3.19 Where competitors agree to phase out particular non-environmentally sustainable processes or cease procuring or supplying certain non-environmentally sustainable products,⁴³ this is unlikely to raise competition concerns where it does not involve either an appreciable increase in price or reduction in product quality or choice for consumers and provided that this does not have the object of eliminating or harming the parties’ competitors or market sharing. For an agreement to phase out non-sustainable products or processes that has an appreciable effect on the main parameters of competition, and so does not fall within this Section, see paragraphs 4.11 to 4.14 for further information.
- 3.20 For example, if businesses agree to stop using a particular type of polluting packaging and this will not affect the main parameters of competition, such as an appreciable increase in prices or reduction in quality, this is unlikely to

⁴¹ [CMA guidance on environmental claims on goods and services: helping businesses comply with their consumer protection law obligations](#), 2021 (CMA146). The use of labels obliges the adopters to comply with the environmental standard that the label represents and, if they cease to do so, they lose the right to use the label. Moreover, the label must not itself imply that the product has features that it does not. Where the label does not relate to every aspect of the product on which it appears, or relates to the business as a whole rather than the specific product, that should also be made clear. For example, where the label relates only to the packaging of goods, and not to the goods themselves, that should be made clear.

⁴² See Part 9 of the Guidance on Horizontal Agreements.

⁴³ Parties must be able to refer to objective evidence to show that the products or processes highlighted are not environmentally sustainable.

infringe the Chapter I prohibition unless for example its object was to eliminate a competing business from the market or to harm a competing business. Similarly, if businesses agree to stop supplying a particular type of product, but customers still benefit from significant choice (either from the parties or from other businesses operating in the market), this is unlikely to infringe the Chapter I prohibition.

Industry-wide environmental targets

- 3.21 The setting of non-binding targets or ambitions for the whole industry with regard to environmental sustainability objectives is unlikely to have an appreciable negative effect on competition, provided that the participating businesses remain free independently to determine their own contribution and the way in which the targets are realised or exceeded. Such industry-wide ambition might, for example, concern the reduction of carbon dioxide emissions. The targets may be long term (for instance aligned with meeting net zero) and may also include shorter term, interim targets.⁴⁴
- 3.22 An example of target setting agreements that is unlikely to have an appreciable effect on competition would be where the fashion sector agrees targets to increase gradually the amount of sustainable materials used in their clothing ranges, in accordance with agreed milestones, provided these milestones are sufficiently broad to preserve the ability of individual businesses to decide how they will meet the milestones.
- 3.23 Cooperation to support capacity building or to better enable businesses within an industry to set and monitor their own environmental sustainability targets is also unlikely to have an appreciable negative effect on competition, provided that it does not prevent or restrict additional unilateral action by businesses. For example:
- Competing businesses jointly developing materials to support their suppliers to meet the suppliers' own emissions targets is unlikely to have an appreciable adverse effect on competition.
 - Competing businesses developing a common methodology, which is available on an open-source basis, allowing industry participants to calculate and report the emissions or other environmental impacts

⁴⁴ However, businesses should not use the joint setting of targets as a means to limit their freedom to pursue more ambitious environmental sustainability targets independently. See for example footnote 34 in relation to the European Commission's Decision of 8 July 2021 in the *Car Emissions* case (Case AT.40178).

associated with their business activities in absolute terms is unlikely to have an appreciable adverse effect on competition.

- The establishment of a common framework to help businesses to set environmental targets, including emissions or business activities which are within the scope of the targets (to enable meaningful comparisons of the progress that has been made) and the duration and timing of the targets, is unlikely to have an appreciable adverse effect on competition. Such a common framework could allow for the unilateral setting, disclosure and reporting of the participants' targets, as well as how – in broad terms – the participants intend to meet their targets and the participants' progress towards meeting those targets.

Agreements between shareholders to vote for promoting corporate policies that pursue environmental sustainability

- 3.24 In some instances, shareholders in a company will compete among themselves in other markets (for example, asset managers may compete with each other by investing in different commodities for their clients). An agreement between shareholders of a single business to vote in support of corporate policies that pursue climate change or environmental sustainability agreements or against policies that do not, or to lobby jointly for corporate changes that pursue environmental sustainability objectives, will be unlikely to infringe competition law.
- 3.25 Equally, one shareholder indicating how it will vote regarding such policies is also unlikely to infringe applicable competition law.
- 3.26 Similarly, where there is an agreement (or network of similar agreements together) covering shareholders' conduct in relation to several businesses that are competitors in a market, there is unlikely to be a negative effect on competition in that market if the corporate policies, or the changes the shareholders are agreeing to, support, encourage or require the adoption of any of the categories of agreement set out in Section 3 of this Guidance.
- 3.27 Where the shareholder activity falls outside of one of the categories set out in paragraphs 3.24 to 3.26, the shareholder activity may nonetheless be

permissible but would need to be assessed under other parts of this Guidance (see Sections 4, 5 and 6).⁴⁵

⁴⁵ See also the Guidance on Horizontal Agreements and Guidance on Vertical Agreements. For example, where shareholders exercise decisive influence over a company, the agreement would need to be assessed by reference to the guidance on agreements between parent companies and their joint venture (see paragraphs 3.12–3.14 of the Guidance on Horizontal Agreements).

4. Environmental sustainability agreements which could infringe the Chapter I prohibition

- 4.1 This Section considers environmental sustainability agreements which (unlike those in the preceding Section) could infringe the Chapter I prohibition. If these agreements have the object or effect of restricting competition, they will be prohibited, unless they benefit from exemption on the grounds set out in Section 5 (for environmental sustainability agreements generally) and Section 6 (for climate change agreements).
- 4.2 The Chapter I prohibition distinguishes between agreements which infringe the prohibition because they have the ‘object’ of restricting competition (being those which can be regarded, by their very nature, as being harmful to the proper functioning of normal competition) and those which infringe the prohibition by virtue of having the ‘effect’ of restricting competition.
- 4.3 This Section starts by giving guidance on when environmental sustainability agreements may have the ‘object’ of restricting competition. It then goes on to set out relevant factors in considering ‘effects’ on competition of types of environmental sustainability agreement.

Environmental sustainability agreements with the ‘object’ of restricting competition

- 4.4 The distinction between infringement by ‘object’ and infringement by ‘effect’ is important because agreements found to have as their ‘object’ the restriction of competition are assumed by their very nature to be harmful to the proper functioning of normal competition without the need to examine their effects.⁴⁶
- 4.5 Particular caution is therefore needed in relation to environmental sustainability agreements which involve price fixing, market or customer allocation, limitations of output or limitations of quality or innovation, as these typically restrict competition by ‘object’.⁴⁷
- 4.6 For example, an agreement between competitors on the price at which they will sell products meeting an agreed environmental sustainability standard is

⁴⁶ In order to determine whether an agreement may be considered a restriction of competition by object, it is necessary to have regard to the contents of the agreement, its objectives and the legal and economic context of which it forms part. See the EU Court of Justice judgment of 11 September 2014, *Groupement des Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 53. See further paragraphs 3.34-3.41 of the Guidance on Horizontal Agreements.

⁴⁷ See also the CMA’s campaign: [Cheating or Competing? Its your business to know the difference.](#)

likely to restrict competition by object. Another example of an agreement between competitors that is likely to restrict competition by object is where the agreement limits their or others' ability or incentive to innovate in order to meet or exceed a sustainability goal or to achieve that goal more quickly (eg an agreement not to adopt a new less polluting production process).⁴⁸

- 4.7 Where competitors collaborate in order to achieve an environmental sustainability goal, it is possible that some parts of that collaboration may involve a restriction of competition by object even where other aspects of the collaboration may be unlikely to restrict competition.⁴⁹
- 4.8 Although in practice it has sometimes proved difficult to demonstrate that agreements that involve restrictions of competition by object meet the conditions for 'exemption' (set out in Section 5 below), nevertheless in certain circumstances such agreements are in principle capable of benefiting from exemption. Parties to such agreements, or proposals for such agreements, should not automatically assume that they are prohibited, and should consider whether they might benefit from exemption (by reference to the criteria discussed in Section 5 and Section 6 below).

Ancillary restraints – restrictions necessary and proportionate to a permitted environmental sustainability agreement

- 4.9 Furthermore, there are circumstances where certain restrictions, which would otherwise be a restriction of competition by object⁵⁰, may be permitted, namely where the restriction is considered to be an 'ancillary restraint' to a wider environmental sustainability agreement which is itself not in breach of the Chapter I prohibition or benefits from exemption. Such ancillary restraint will itself be permitted where it is objectively necessary to implement, and proportionate to the objectives of that ,wider environmental sustainability .

⁴⁸ See, for example, the European Commission's Decision of 8 July 2021 in the *Car Emissions* case (Case AT.40178), in which the European Commission fined three car manufacturers for their conduct in connection with developing SCR systems, which are used to remove NOx from car exhaust flows. It found that the parties colluded to limit technical development in the field of NOx-cleaning and thereby limit customer choice.

⁴⁹ See, for example, the European Commission's Decision of 8 July 2021 in the *Car Emissions* case (Case AT.40178). The European Commission [accompanied its decision with a letter to the parties](#) informing them of the kinds of conduct that it saw 'no reason to further investigate as [a] competition law infringement', including: joint development of a software platform for AdBlue dosing; the decision to focus joint development on liquid SCR systems; standardisation of the AdBlue filler neck; joint preparation of charge sheets for parts of SCR systems; discussion of quality standards for AdBlue; discussion of warning strategies aimed at ensuring the timely refill of AdBlue; discussion of the build-up of an appropriate infrastructure for AdBlue supply; and discussion and preparation of a common position of the car manufacturers concerning future legislative proposals concerning car emission cleaning.

⁵⁰ Or effect.

This will only be the case if that wider agreement would be impossible⁵¹ to carry out absent the restriction in question, having regard to its objectives and legal and economic context. However, the fact that the operation or the activity covered by the wider environmental sustainability agreement would be more difficult to implement, or less profitable without the restriction concerned, does not in itself make that restriction objectively necessary and thus ancillary.⁵²

- 4.10 An example of an ancillary restraint would be in the context of a group of competitors cooperating to jointly purchase inputs with a low carbon footprint from large suppliers. The competitors negotiate jointly for volume discounts that lead them to purchase more of the low carbon footprint input. The volume discounts that they negotiate will likely feed into lower prices for downstream customers which will encourage production and purchase of alternative products with a lower carbon footprint. To make it effective, the purchasing group requires some of its members not to hold memberships of, or participate in, other competing purchasing groups. Regardless of whether the restriction on joining other purchasing groups restricts competition by object or effect, it may in this example be treated as ancillary and therefore as not raising competition concerns, provided that the main purchasing agreement is permitted⁵³ and the ancillary restraint is necessary and proportionate to ensuring the purchasing group functions properly and maintains its contractual power in relation to suppliers.

Collective withdrawal

- 4.11 There are also certain types of restriction that in certain contexts would be regarded as a restriction by object but in other contexts would fall to be considered as restrictions by effect.
- 4.12 An example of this is an environmental sustainability agreement that involves a group of competing purchasers agreeing only to purchase from suppliers that sell sustainable products and those suppliers operate at a different level of the market to the purchasers. Such a collective withdrawal agreement can

⁵¹ EU Court of Justice judgment of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 91. See also the judgment of 4 July 2018 of the Court of Appeal (England and Wales) in the joined cases of *Sainsburys v MasterCard; AAM v MasterCard; Sainsbury's v Visa* [2018] EWCA 1536 (Civ), paragraphs 58–74 (issue not considered on appeal).

⁵² See for example the EU Court of Justice judgment of 11 September 2014, *MasterCard v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 91. See further paragraph 3.46 of the Guidance on Horizontal Agreements.

⁵³ For further guidance on the assessment of purchasing agreements under the Chapter I prohibition, see Part 6 of the Guidance on Horizontal Agreements, and in particular paragraphs 6.6–6.43.

be distinguished from an agreement involving a horizontal collective boycott which has been held in past cases to restrict competition by object. In the case of a horizontal collective boycott, the object is to harm or eliminate a competitor that is operating at the same level of the market as the participants in the boycott, whereas for this type of vertical arrangement it is to remove unsustainable products from the supply chain⁵⁴ without harming the parties' competitors.⁵⁵ Such a collective withdrawal agreement should therefore typically be the subject of an effects analysis (see further paragraphs 4.14 to 4.16 below).

- 4.13 Similarly, an environmental sustainability agreement that involves a group of competing suppliers agreeing not to provide products or services to customers that produce environmentally damaging products or services would also be unlikely to restrict competition by object provided that the agreement does not harm the parties' competitors.

Assessing the 'effects' of environmental sustainability agreements

- 4.14 Where an environmental sustainability agreement does not qualify as a restriction of competition by object, it will only infringe the Chapter I prohibition if it has an appreciable negative effect on competition. Even if it has such an effect, the agreement may still benefit from exemption from the prohibition if it meets the conditions for exemption (see Sections 5 and Section 6 below).
- 4.15 Environmental sustainability agreements may lead to various types of restrictive effects, such as increased prices, reduced output, product quality, product variety or innovation, market allocation, or anti-competitive foreclosure of other competitors.
- 4.16 To establish whether the environmental sustainability agreement has an appreciable negative effect on competition, the factors set out below in particular are likely to be relevant. However, the assessment of the effects of agreements is fact-specific and therefore parties would need to consider the following factors in the context of their agreement.
- The market coverage of the agreement, ie whether the agreement covers all or only part of the relevant market(s). In some cases, the market

⁵⁵ See further paragraphs 6.15 and 6.16 of the Guidance on Horizontal Agreements and the [Expert report on Horizontal Guidelines on purchasing agreements: Delineation between by object and by effect restrictions by Whish and Bailey](#) for the European Commission, 2022.

coverage may be insufficient to distort competition to an appreciable extent, because of the constraint from other products or suppliers.

- Whether the businesses participating in the agreement, individually or collectively, have market power in the relevant market(s) affected by the agreement.⁵⁶ The greater the market power of the businesses participating in the agreement, the more likely it is to have an appreciable impact on competition.
- The extent to which the agreement constrains the freedom of action of the parties. For example, in the case of an agreement to develop new standards for a particular product, whether the parties remain free to sell products not subject to the standard and whether they are free to take steps which go beyond the minimum set by a standard.
- The ability for non-parties to participate. For example, in the case of an agreement to introduce a new environmental sustainability labelling system, whether other businesses are able to take advantage of the system on non-discriminatory terms.⁵⁷
- Whether or not the agreement involves the exchange of competitively sensitive information between the parties that is not necessary for the performance of the agreement.
- Whether the agreement is likely to lead to an appreciable increase in price or reduction in output, product variety, quality or innovation.

⁵⁶ [Competition law - Assessment of market power \(OFT415\)](#), 2004

⁵⁷ As set out in paragraph 3.16, agreements to develop environmental sustainability standards are unlikely to have an appreciable negative effect on competition if they meet certain conditions, including that other businesses are able to take advantage of the standard on reasonable and non-discriminatory terms. Where one or more of the conditions in paragraph 3.16 is not met, the agreement may still not have an appreciable effect on competition, but this will require a more detailed assessment based on the specific facts.

5. Exemption for environmental sustainability agreements generally

- 5.1 This Section covers agreements which fall within the scope of the Chapter I prohibition and restrict competition appreciably but are capable of **exemption** under section 9(1) of the Competition Act 1998 because the benefits of the agreement outweigh the competitive harm.
- 5.2 Parties seeking to benefit from exemption must be able to 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.⁵⁸
- 5.3 In this Section, we explain how environmental sustainability agreements can meet each of these conditions.

Condition 1: Benefits to production, distribution or technical or economic progress

- 5.4 The parties to the agreement need to have evidence of objective benefits arising from the agreement. It is for the businesses to show that the agreement in question, with reference to objective evidence, is likely to give rise to such benefits.⁵⁹ These benefits could include:
- eliminating or reducing the harmful effects arising from the production or consumption of particular goods or services that the market has failed to address, for example reducing greenhouse gas emissions;

⁵⁸ See the Guidance on Horizontal Agreements, paragraph 3.50.

⁵⁹ See, for example, EU Court of Justice judgment of 6 October 2009, *GlaxoSmithKline v Commission*, C-501/06P, C-513/06P, C-515/06P and C-519/06P, EU:C:2009:610, paragraphs 92–95.

- improving product variety or quality (for example, creating new or improved products which have a reduced impact on the environment);
- reducing production or distribution costs (for example, combining resources to create economies of scale in relation to a new, more environmentally sustainable input, enabling the parties to produce or distribute their products more cheaply);
- shortening the time it takes to bring environmentally sustainable products to the market;
- improving production or distribution processes (for example, the introduction of new cleaner technologies); and
- increasing innovation (for example, developing new, more energy-efficient processes).

5.5 Benefits may be felt outside the UK as well as in the UK, but the agreement will only benefit from exemption if benefits to UK consumers outweigh the harm they suffer as a result of the agreement.⁶⁰ (In the context of agreements that reduce greenhouse gas emissions outside the UK, a benefit to UK consumers can be presumed because UK consumers will receive a share of the benefits of combatting global climate change irrespective of where the reduction occurs and the question is whether the benefits accruing to UK consumers are of sufficient scale to outweigh the harm to UK consumers caused by the agreement. This is covered in Section 6).

5.6 The benefits of an agreement need to be substantiated and cannot simply be assumed. They also need to be objective, concrete and verifiable. In practice, this means that the parties need to be able to describe clearly the benefits that the agreement is expected to bring about,⁶¹ to an extent commensurate with the expected negative effects on competition. For example, if the parties claim that their production methods will be improved by using cleaner manufacturing processes, they need to be able to describe as concretely as they can the expected benefits (such as what process will be improved and how), how

⁶⁰ Further detail on how to quantify the benefits to UK consumers of agreements that reduce greenhouse gas emissions or other environmental harms is set out in paragraphs 5.25-5.28 below.

⁶¹ The environmental sustainability benefits relevant for this task will only be those which occur as a result of the agreement, over and above the situation that would arise in its absence. For example, where an agreement reduces emissions from a production process, the benefits of the agreement would only include the reductions which would not have arisen in the normal course of business, or the fact that they arise earlier than they would have.

likely it is to materialise and within what timeframe, and to have evidence to support such claims.

- 5.7 In the context of environmental sustainability, it is not unusual that the benefits may materialise in future, over a relatively long period of time. It is legitimate to have regard to such future benefits.⁶² The quantification of such future benefits, and the extent that they may need to be discounted, will need to be considered, according to the nature of the agreement and the claimed benefits (see paragraph 5.26 below).

Condition 2: Indispensability

- 5.8 The parties to the agreement need to be able to show that the agreement is no more restrictive of competition than is indispensable (or reasonably necessary)⁶³ to achieving the benefits. In other words, there must be no less restrictive, but equally effective, alternative.⁶⁴ For example, it may be less restrictive but equally effective to restrict joint development activities to the startup or pilot phases of a project; to grant licences to intellectual property rather than engaging in joint product development; or to exclude collaboration on customer-facing activities such as joint marketing.
- 5.9 In practice this means that an agreement or restriction is likely to be considered indispensable, or reasonably necessary, to achieve the relevant benefits if the parties can demonstrate that either:
- in the absence of the agreement, they would not otherwise be able to achieve the level of benefits (of the type described under condition 1 above) which the agreement seeks to achieve (eg for economic reasons or given a lack of expertise or scale), or
 - that the agreement enables the parties to achieve the benefits more efficiently (eg at reduced cost or more quickly).

This does not, however, provide a generalised basis to justify moving away from competition on the development of greener technologies, supply chains or products.

⁶² See the European Commission's Guidelines on the application of Article 101(3) of the Treaty, OJ C 101/97, 27.4.2004, paragraphs 87 & 88.

⁶³ See the European Commission's Guidelines on the application of Article 101(3) of the Treaty, OJ C 101/97, 27.4.2004, paragraphs 73–82.

⁶⁴ This is assessed by reference to what the situation would be likely to be with and without the agreement or restriction concerned.

- 5.10 For example, an agreement between competitors to adopt a more environmentally sustainable input (eg an alternative to plastic) may be considered indispensable if that agreement enables them to achieve economies of scale by significantly increasing the demand for the more sustainable input (through a lower final sales price), with the result that they benefit from reduced costs compared to the situation where there was not a collective agreement (and subject to meeting all the other exemption conditions too).
- 5.11 Another example would be in an industry in which a less polluting material has been developed, but manufacturers individually lack incentives to use that new material as it would make their products significantly more expensive and would require them to make additional investments to promote their more sustainable products (ie, the first mover disadvantage). In that case, it might be necessary for manufacturers to collectively agree to use the new material to overcome the first mover disadvantage and ensure that the environmental benefits can materialise (or materialise more quickly).
- 5.12 Sometimes the restriction of competition in the agreement may be considered indispensable if it is necessary to align the incentives of the parties and to ensure that they concentrate their efforts on the implementation of the agreement. In that case, the parties would need to evidence what additional benefits would result from the restriction that would not have occurred in its absence. For example, where the parties to a standard agree not to operate outside it and this results in an appreciable reduction in product choice for consumers, they would have to show what benefits would result from the restriction that would not have happened if, for example, they only had established a voluntary standard.
- 5.13 By contrast, where there is sufficient demand for a sustainable product to generate incentives for businesses to develop a sustainable product individually, an agreement involving cooperation between various parties will not be indispensable to achieving environmental sustainability benefits on the basis that consumers will in practice buy the product and businesses should compete to satisfy the demand. An agreement may however be indispensable if the demand for the sustainable product leads to insufficient market coverage or limited economies of scale, and collective action by competitors makes it possible for the environmental sustainability benefits that would accrue to the consumers to materialise more quickly or more cost-efficiently or lead to an appreciably larger market coverage. The parties must evidence that there are

not enough consumers willing to pay for a more sustainable product at this point in time.⁶⁵

- 5.14 There may be situations where there are already regulations or policies in place that address the environmental harm which the agreement is seeking to address. A cooperation agreement may, however, be necessary if it enables the parties to exceed the environmental sustainability goal covered by the public policy or regulation or to achieve the goal more quickly or more cost-efficiently. In that case, the parties to the agreement would need to explain what the shortfalls of the existing public policies and regulations are and to what extent the cooperation is indispensable to generate the claimed benefits.
- 5.15 In all cases it is essential that the restrictions in the agreement go no further than is indispensable to achieve the relevant benefits, and careful consideration should be given to the scope and duration of those restrictions. An agreement must not contain any unnecessary restrictions of competition. If the overall objective can be realised in a less restrictive manner, without this taking away from the magnitude or timescale of the potential benefits and the likelihood that they will be achieved, then that approach should be taken. For example, where an agreement involves businesses jointly producing a new, more sustainable product, it is unlikely to be necessary for the parties to agree the price at which they will sell the new product for the benefits of the collaboration to be realised.

Condition 3: Consumers receive a fair share of the benefit

- 5.16 The parties need to be able to show that the benefits that result from the agreement are passed on to UK consumers and that those benefits outweigh the harm that UK consumers will suffer as a result of the agreement.
- 5.17 For these purposes, benefits can include future as well as current benefits (see paragraphs 5.7 and 5.25 to 5.28 on quantification of future benefits) that accrue to direct as well as indirect users (in other words, they include not just the direct customers of the parties to the agreement, but also those who purchase from those customers).

⁶⁵ There are multiple ways in which consumers' insufficient willingness to pay for a more sustainable product could be evidenced. For example, surveys of consumers' preferences may sometimes be an appropriate and proportionate way of measuring this willingness to pay. There are multiple approaches to collecting survey evidence and businesses who rely on customer surveys to evidence consumer willingness to pay should carefully consider which method is appropriate in their specific circumstances.

- 5.18 Consumers may benefit directly as a result of their consumption or use of the products covered by the agreement.⁶⁶ This would be the case, for example, where the agreement results in improved product quality or variety or lower prices. For example, an agreement to replace plastic packaging with packaging made from other more environmentally sustainable material could benefit consumers directly by making it easier for consumers to recycle the product packaging or because it reduces the price of the product.
- 5.19 Consumers of the products may also benefit indirectly,⁶⁷ for instance where they value the broader environmental sustainability benefits of the agreement and the impact of those benefits on others (outside the relevant market). An example would be where furniture producers cooperate not to import or produce furniture made from wood grown unsustainably and this leads to significantly higher furniture prices. Consumers may be willing to pay higher prices for furniture made from sustainable wood because they value the (indirect) benefit of not contributing to deforestation, and not (or not exclusively) because of any direct use benefit, such as any improvement in furniture quality or longevity. In this example, for the purported benefits to be taken into account, the parties would be expected to provide evidence to demonstrate that consumers value those benefits, for example consumer survey evidence.

Who are the relevant consumers?

- 5.20 In general, in assessing whether consumers receive a fair share of the benefits of the agreement, the relevant consumers are consumers of the products or services to which the agreement relates (ie consumers in the relevant market). The cost to those consumers of the restrictive effect must therefore be offset by the benefits those consumers receive. For example, where the agreement limits the use of environmentally harmful components in a certain product and that results in a higher price for consumers, the benefit those consumers receive from the improved environmental quality of the product must outweigh the increased cost. In contrast, it is not normally appropriate to offset the harm to consumers in one market against benefits arising to a different set of consumers in another market.⁶⁸
- 5.21 However, where two markets are related, benefits achieved on separate markets can be taken into account, provided that the consumers affected by

⁶⁶ These benefits are also known as individual use benefits. See paragraph 5.22 below.

⁶⁷ These benefits are also known as indirect use benefits. See paragraph 5.22 below.

⁶⁸ See judgment of the UK Supreme Court of 17 June 2020 in *Sainsbury's v Mastercard* [2020] UKSC 24, paragraph 174.

the restriction and receiving the benefit are substantially the same or substantially overlap. An example would be where two airlines cooperate to achieve a particular sustainability benefit on a certain airline route and this leads to higher prices for UK airline passengers.⁶⁹ In this example, for those consumers who travel both on the airline route on which the cooperation takes place and on connecting routes, it would potentially be appropriate to take into account benefits to those consumers that accrue on both sets of routes on the basis that there is a substantial overlap in the consumers flying on those routes.

- 5.22 In the case of agreements to achieve environmental sustainability benefits, the overall benefits of these agreements may extend beyond the consumers of the specific products in question. As noted above, in general, it will only be appropriate to take account of the proportion of those wider environmental benefits⁷⁰ that are enjoyed by the consumers of the product in question. For example, there may be a societal benefit (arising now or in the future) to restricting plastic use, but only the proportion of this wider societal benefit that can be apportioned to consumers of the product in question (and, where appropriate, in related markets) is relevant for the assessment.⁷¹ It is for the parties to decide which type of benefits (direct, indirect or collective benefits) they want to bring forward and, depending on the case, they may be able to take into account a combination of various types of benefits.
- 5.23 For climate change agreements, a more permissive approach to assessing whether consumers receive a fair share of the benefits, and in particular to identifying who the relevant consumers are, is appropriate. This is explained further in Section 6 of this document.

The benefits must be substantial and demonstrable

- 5.24 To satisfy condition 3 (see paragraph 5.16 above), the parties need to be able to demonstrate that the benefits are substantial enough to offset any harm caused by the restriction of competition (eg a price increase, or a reduction in product choice).

⁶⁹ See by analogy European Commission Decision of 23 May 2013 in Case AT.39595, *Air Canada/United Airlines/Lufthansa* where the European Commission accepted to credit both in-market and out-of-market efficiencies.

⁷⁰ These benefits are also known as collective benefits.

⁷¹ Evidence for collective benefits contained in public authorities' reports or in reports prepared by recognised academic organisations may be of particular value for this assessment.

- In many cases, it will not be necessary to quantify the benefits precisely.⁷² In particular, this will be the case if it is clear that the benefits are of a sufficient scale to offset (or more than offset) the harm to competition. For example, where the agreement will only result in a limited price increase or reduction in product choice (this may be the case if the market coverage of the agreement is limited), and it is obvious that the benefits will be significant.
- In other cases, some quantification of the benefits may be necessary.

5.25 Businesses are expected to appraise both the environmental benefits (and negative effects, if applicable) and the effects on competition from an agreement. When it is unclear that the total benefits are sufficient to outweigh the total harm, the parties to the agreement will need to quantify the benefits and negative effects.⁷³ However, we recognise that the quantification exercise may not always be straightforward and that it may not always be possible to come up with a precise answer.⁷⁴

5.26 For many of the challenges of quantifying environmental and competitive benefits and negative effects, there are established techniques that can be employed to overcome these.

5.27 First, there are methodologies for the quantification of many types of environmental benefits.⁷⁵ These include techniques to express non-monetary benefits in monetary values. For instance, in relation to greenhouse gas emission reductions, there are established instruments for valuing carbon emissions such as HM Treasury's Green Book supplementary guidance on the valuation of energy use and greenhouse gas emissions for appraisal,

⁷² An example where another competition authority considered that precise quantification was unnecessary can be seen in the approach taken by the Netherlands national competition authority, the ACM, in its [letter to parties Shell and TotalEnergies](#) (April 2022) regarding a joint marketing initiative. The ACM determined, on the basis of the information available to them, that in this case the fair share criterion did not lend itself to a quantitative estimation of costs and benefits, and that based on a rough estimate, the environmental sustainability benefits clearly outweighed the costs.

⁷³ In order to balance the benefits against the harm, it may also be necessary to quantify the harm caused by the agreement (eg the extent of any likely price rise).

⁷⁴ See paragraph 94, 102, and 103 of the European Commission's Guidelines on the application of Article 81(3), to which the CMA will have regard in accordance with section 60A of the Competition Act 1998.

⁷⁵ See for instance section 9 of the [Green Book](#), which is guidance published by HM Treasury on appraising public policy options, and provides detail on specific approaches to non-market valuation techniques and unmonetisable values. A technical overview of different methodologies for quantifying environmental benefits is provided in a report commissioned by the Dutch and Greek competition authorities, see in particular Table 1 in the [Technical Report on sustainability and competition \(acm.nl\)](#).

which may be applied to convert the reduction in greenhouse gas emissions into monetary values.⁷⁶

- 5.28 Second, there are also established techniques for comparing costs and benefits which occur over different time periods on a consistent basis (eg, by applying an appropriate discount rate)⁷⁷ and for dealing with uncertainty in appraising these costs and benefits (eg sensitivity and scenario analyses).⁷⁸ Businesses should apply these techniques in a way commensurate with the size of the agreement's effects. We would expect businesses to follow best practice appropriate for the industry in which they operate and the nature of environmental benefits at hand.⁷⁹ Parties may want to approach the CMA to discuss their approach under the CMA's open-door policy (See Section 7 below).

Condition 4: No substantial elimination of competition

- 5.29 In order to benefit from the exemption, the agreement must not eliminate competition in respect of a substantial part of the products in question. In other words, there must be meaningful remaining competition on the market(s) affected by the agreement.
- 5.30 Where the agreement covers the entire market, this condition may still be satisfied if there is still scope for the parties to compete on main parameters (eg on price or quality), even if they align other aspects of their competitive behaviour. In situations where the agreement only covers some, but not all, businesses within the market, the condition would be satisfied.
- 5.31 Moreover, elimination of competition for a limited period of time, where this has no impact on the development of competition after that period elapses, is not an obstacle to satisfying this condition. For example, an agreement between competitors to limit, for a temporary period, the production of one

⁷⁶ See [Green Book supplementary guidance: valuation of energy use and greenhouse gas emissions for appraisal \(gov.uk\)](#). An example of such techniques applied by another competition authority is seen in the ACM's endorsement of an agreement between system operators for electricity and natural gas to work together to reduce CO₂ emissions (24 February 2022). In assessing the benefit of the proposed initiative, the ACM applied shadow pricing techniques to determine what monetary value was given to the benefits realised through the CO₂ reduction, with the shadow price in this instance being the social valuation of the necessary CO₂ emissions reduction as formulated with reference to the Dutch climate policy objective by the expected CO₂ savings that would be generated from the alternative, less polluting investment. See, [System operators can collaborate in order to reduce CO₂ emissions \(acm.nl\)](#)

⁷⁷ For a methodology, see for instance: [Freeman et al. \(2018\) 'Social Discount Rates for Cost-Benefit Analysis: A Report for HM Treasury'](#). See also approaches to quantifying costs in the food sector: de Adelhart Toorop et al. (2021) ['Methodologies for true cost accounting in the food sector'](#) in *Nat Food* 2, 655–663.

⁷⁸ See the Stern Review: the Economics of Climate Change (2006).

⁷⁹ Traditional approaches to discounting may not always be appropriate, in particular taking into account the risk of underestimating future environmental benefits (see also paragraph 6.4 below).

variant of a product, containing a non-sustainable ingredient, in order to introduce a sustainable substitute for the product to the market, with the aim of raising consumer awareness about the characteristics of the new product, is likely to meet the condition.

6. Exemption for climate change agreements

- 6.1 The criteria for exemption applicable to climate change agreements (as defined in paragraph 2.4 above) are the same as the four conditions described in Section 5 above – save that, in considering condition 3, the need for consumers to have a fair share of the agreement’s climate change benefits, the CMA considers that a more permissive approach is appropriate in assessing who are the relevant consumers.
- 6.2 As explained in Section 5, the ‘fair share to consumers’ condition generally requires an assessment of whether the harm to consumers of the agreement’s products is offset by benefits to substantially the same set of consumers. With limited exceptions,⁸⁰ benefits to consumers in other markets are not included in this assessment.⁸¹ What this means is that where the benefits arise across multiple markets, only the proportion of the benefits which accrues to the consumers harmed by the agreement is taken into account (see paragraph 5.20 above).
- 6.3 In the context of climate change agreements, there is a concern that having regard only to the climate change benefits accruing to the consumers in the relevant market would have perverse and harmful effects. If, for example, an individual business is minded to switch to energy use that will reduce carbon emissions, such as abandoning fossil fuels, which will be more costly in the short term (giving an immediate competitive disadvantage), it might be reluctant to do so unless its competitors in the same market do so too. Its fear of the ‘first mover disadvantage’ might therefore constrain it from switching to energy sources that would combat or mitigate climate change (and thereby benefit all UK consumers). It is only if that business can coordinate such a switch of energy use with its competitors, that this constraining factor is removed and the business (and indeed its competitors) is willing to make the (beneficial) switch. The same may be true in respect of businesses agreeing to supply lower emitting but more costly or less profitable goods or services. Such coordination between competitors is to be encouraged.
- 6.4 The CMA therefore considers it appropriate, in the case of climate change agreements, to depart from the general approach and exempt such agreements if the ‘fair share to consumers’ condition can be satisfied taking

⁸⁰ See above, paragraphs 5.21-5.22, and also paragraph 43 of the European Commission’s Guidelines on the application of Article 81(3), to which the CMA will have regard in accordance with section 60A of the Competition Act 1998.

⁸¹ This traditional approach reflects concerns to avoid the risk of opening the door to trading off other public policy goals against competition and leaving groups of consumers worse off in pursuit of those broader goals.

into account the totality of the climate change benefits to all UK consumers arising from the agreement, rather than apportioning those climate change benefits between consumers within the market affected by the agreement and those in other markets. The CMA considers that the full climate change benefits to all UK consumers should be, exceptionally, taken into account because of the exceptional nature of the harms posed by climate change (and therefore the exceptional nature of the benefits to consumers from combating or mitigating climate change or its impact); climate change represents a special category of threat that sets it apart and requires a different approach to the pass-on criteria. This reflects the sheer magnitude of the risk that climate change represents (including the need for urgent action), the degree of public concern about it, and the binding national and international commitments that successive UK governments have entered into. It also reflects the fact that climate change agreements seek to limit negative externalities of a type that are likely to have devastating effects inside the UK and outside of the UK and immeasurable long-term effects on the whole planet once certain tipping points are reached.

- 6.5 For example, an agreement between delivery companies to switch to electric vehicles would benefit all UK consumers through a reduction in carbon dioxide emissions. As this is a climate change agreement, the different approach to the ‘fair share to consumers’ condition means that the delivery companies will be able to take into account the totality of the carbon dioxide emissions reduction to compensate the harm to consumers of the relevant products that results from their agreement, without apportioning those benefits between consumers of the delivery service (inside the relevant market) and other UK consumers (ie the wider group of the consumers who benefit from the agreement, which is outside the relevant market).
- 6.6 To benefit from this approach, the parties to the agreement would need to demonstrate that the climate change benefits are in line with, or exceed, existing legally-binding requirements or well-established national or international targets including the overarching climate change goals set out in the Paris Agreement,⁸² that UK consumers benefit from the agreement and that the benefits offset the harm. In taking account of these benefits, both the direct and indirect benefits to the consumers in the relevant market and the benefits to UK consumers in general are potentially relevant. Such an assessment will therefore require an appraisal of both climate change benefits and negative effects. Businesses should carefully describe the climate change

⁸² See footnotes 7 to 9.

benefits (and harm caused by climate change, if applicable) and any effect on the consumers of the relevant products. As set out in paragraphs 5.24 to 5.28 above, we would expect businesses to apply the same considerations as to whether there is a need to quantify and, in cases where there is a need to quantify, for them to apply appropriate quantification techniques in a way commensurate with the relative size of the agreement's effects and to follow best practice recognised in the industry in which they operate and appropriate for the nature of environmental benefits and effects on competition at hand. As with any other agreement that restricts competition appreciably, the parties to a climate change agreement will also have to demonstrate that the other conditions of exemption are met.

- 6.7 The CMA considers that this approach to the 'fair share to consumers' condition is in line with existing case law on the application of the exemption,⁸³ but, in any event the CMA does not expect to take enforcement action against parties to climate change agreements that correspond clearly to the principles set out in this Guidance as informed by the examples included in the Guidance (including in Section 6). If businesses are uncertain about the application of this Guidance, then the CMA is operating an open-door policy whereby businesses considering entering into an environmental sustainability agreement can approach the CMA for informal guidance. For further detail see Section 7, below.

Mixed agreements

- 6.8 Some environmental issues are closely interlinked (for example climate change and biodiversity). In some cases, environmental sustainability agreements may therefore generate both climate change benefits and other environmental benefits. In these cases, the climate change benefits that arise from the agreement should be assessed using the alternative treatment outlined in this Section (see paragraph 6.6), and any other environmental benefits should be assessed using the general approach (see Section 5, see in particular paragraph 5.22).

⁸³ In *Sainsbury's v Mastercard* [2020] UKSC 24, the UK Supreme Court confirmed the principle that the harm to one set of consumers should not be offset against the benefits to a different set of consumers (see, in particular, paragraphs 173 & 174). However, this was in a situation where the customers sustaining harm from the agreement were different from the customers benefiting from the agreement (retailers vs cardholders) – the two sets of customers were essentially separate from each other. In contrast, the benefits of mitigating the impact of climate change apply to society as a whole, a group of consumers which by definition includes, and is not wholly distinct from, the consumers of the agreement products who may be adversely affected by the restrictive effects of the agreement.

6.9 For example, an agreement between businesses to eliminate deforestation from their supply chains may result in climate change benefits, as forests can provide an important source of carbon storage. However, the agreement may also generate significant benefits to biodiversity.⁸⁴ If presenting quantitative evidence on the anti-competitive effects and benefits of an agreement,⁸⁵ businesses should quantify the benefits in two categories⁸⁶ (climate change benefits and other benefits) and add these together.

⁸⁴ Similar principles would also apply to environmental sustainability agreements that help preserve other natural carbon sinks.

⁸⁵ See paragraphs 5.25–5.28, above.

⁸⁶ To the extent that quantification is necessary, see paragraph 5.24.

7. CMA's open-door policy, enforcement action and protection from fines

Enforcement action

- 7.1 The CMA does not expect to take enforcement action against environmental sustainability agreements, including climate change agreements, that correspond clearly to the principles set out in this Guidance as informed by the examples included in this Guidance. However, parties to these agreements should keep their agreements under review to ensure that they continue to correspond clearly to the principles of this Guidance. Where uncertainty remains, parties are encouraged to approach the CMA under the open-door policy, set out below.

The CMA's open-door policy

- 7.2 We appreciate that this Guidance cannot answer all of the questions that businesses may have about whether their environmental sustainability agreements are compatible with UK competition law. However, the CMA is determined to help businesses who genuinely try to do the right thing in relation to environmental sustainability.
- 7.3 Therefore, the CMA is operating an open-door policy whereby businesses considering entering into an environmental sustainability agreement can approach the CMA for informal guidance on their proposed agreement if there is uncertainty on the application of this Guidance. This could be because businesses have questions or concerns that are not covered by this Guidance or in order to seek clarity or comfort on how this Guidance will be applied in the particular circumstances.

Who should contact the CMA

- 7.4 The CMA would normally expect the parties to the agreement to approach the CMA with a request for informal guidance. However, we recognise that in some cases this may be impractical (for example, due to the number of businesses involved in an agreement) or another organisation may be better suited to this role (for example, because they are coordinating the development of the agreement within the industry). The CMA is therefore also willing to accept requests for informal guidance from representative bodies

such as trade associations, NGOs⁸⁷ or a nominated representative of the parties to the agreement. Where a representative body is approaching the CMA, we would still expect the parties to the agreement to be engaged with the request and willing to support the CMA's consideration of the agreement, for example by providing supporting information in response to specific questions about the agreement if required.

When to contact the CMA

- 7.5 We would typically expect businesses to approach the CMA at an early stage in the development of an environmental sustainability agreement, having first conducted an initial self-assessment of their agreement following the principles set out in this Guidance as informed by the examples included in this Guidance. The parties should highlight the specific issues which are not clear from this Guidance and where they need advice from the CMA.
- 7.6 Parties should contact sustainabilityguidance@cma.gov.uk with their request for informal guidance, providing any documentation relevant for the assessment of the agreement in good time before any initial meetings.
- 7.7 Businesses may also approach the CMA in advance of this if they wish to explore whether an agreement is something the CMA would, in principle, be willing to consider providing informal guidance on. The CMA may, at its discretion, consider draft submissions and provide feedback to businesses if this is likely to help to improve the efficiency of the open-door process in a particular case.

Informal assessment by the CMA

- 7.8 The CMA intends the open-door process to be a light touch review that is proportionate to the size, complexity and likely impact of the agreement. Informal assessment will typically be conducted on the basis of publicly available information and the information shared with us by the businesses.
- 7.9 The CMA will indicate any options, concerns, risks and possible solutions available to parties in relation to the proposed agreement.
- 7.10 Where we feel comfortable, we may provide informal guidance to businesses that we do not think that competition law is likely to be engaged or we think

⁸⁷ An approach by an NGO may also be appropriate where the NGO has been responsible for coordinating the development of the initiative within the industry and therefore had significant pre-existing background about the agreement and the context in which it has been developed.

that the conditions for exemption are likely to be met and, based on the information we have seen, how we believe this Guidance applies. In some circumstances, we may agree adjustments with the parties that should be made to the agreement before it is implemented.

- 7.11 If the agreement concerns a regulated sector, the CMA will also consult the relevant sector regulator when considering requests for informal guidance under the open-door policy.⁸⁸

Implementation

- 7.12 Following engagement with the CMA, we would expect parties to implement the adjustments necessary to bring their agreement in line with competition law before putting their agreement into practice.

Protection from fines

- 7.13 The CMA does not expect to take enforcement action in relation to an agreement which was discussed with the CMA in advance under the open-door policy and where the CMA did not raise concerns (or where any concerns that were raised by the CMA have been addressed by the parties). However, if in the future we were to conclude that further consideration of the agreement was necessary⁸⁹ the CMA would not issue fines against the parties that had implemented the agreement if it were to subsequently conclude that the agreement infringed the Chapter I prohibition of the Competition Act 1998. This is on the condition that the parties did not withhold relevant information from the CMA which would have made a material difference to its initial assessment under the open-door policy.

Monitoring and further adjustments

- 7.14 Where the parties to an environmental sustainability agreement come to us in good faith for informal guidance, and it later transpires that their agreement appreciably restricts competition, we would expect to consult with the parties to agree adjustments to bring the agreement to the right side of competition law.

⁸⁸ If applicable, the CMA may also consult with other regulators or public bodies where we believe they may have an interest in the agreement or relevant information about the sector affected by the agreement that could help inform the CMA's informal guidance.

⁸⁹ This might, for example, occur because the anti-competitive effects of the agreement have proved to be materially greater than expected when the CMA provided its informal guidance or because the cumulative effects of the agreements subsequently entered into by other businesses within a sector result in additional anti-competitive effects not anticipated at the time of the CMA's informal guidance.

- 7.15 The CMA will expect parties who have benefited from informal guidance to take reasonable steps to keep their agreements under review in light of the informal guidance provided by the CMA (as businesses should do with any agreement to which competition law may be applicable). If the basis on which the informal guidance was given no longer applies, the parties will need to reassess the agreement's compliance with the competition rules and, if necessary, agree with the CMA adjustments to bring the agreement back into line with competition law. This might, for example, arise because there has been a material change to the structure of the market which means that the assumptions that underpinned the informal guidance are no longer applicable.
- 7.16 If the parties fail to implement adjustments that are required to bring the agreement back into line with competition law the CMA reserves the right to withdraw the protection from fines from that point forward.

Publication

- 7.17 The CMA would typically expect, giving due regard to any confidentiality concerns (and after consultation with the parties), to publish a summary of agreements with an assessment of risks and solutions.⁹⁰ These examples will support similar agreements to proceed with confidence of how to remain on the right side of competition law.
- 7.18 As we learn more about the issues faced by businesses in navigating the application of the Chapter I prohibition in relation to environmental sustainability agreements, we may update this Guidance or publish supplementary guidance in order to provide greater clarity to business.

Private enforcement

- 7.19 If an environmental sustainability agreement in relation to which the CMA has provided informal guidance is subject to private litigation, the CMA may consider intervening in that litigation. The decision whether to intervene in a case will be taken on the basis of the CMA's published prioritisation principles.

Director disqualification

- 7.20 Where the CMA has made a commitment not to enforce against parties, subject to the conditions set out in 7.1 and 7.13, above, the CMA will similarly

⁹⁰ There may be circumstances where it will not be appropriate to publish a summary of an initiative, not to publish a summary at a certain time, or to publish an anonymised summary, due to commercial sensitivities relating to the project. However, the CMA expects these circumstances to be the exception and would expect businesses to have credible reasons to justify not publishing a summary of the project.

not seek to disqualify any directors of businesses who are party to an agreement.