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United Kingdom CARTELS

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This country-specific Q&A provides an overview of cartels laws and regulations applicable in United Kingdom.

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UNITED KINGDOM
CARTELS

1. What is the relevant legislative framework?

In the UK, cartel activity is considered both a civil and criminal offence. The corporate civil liability is set out in Chapter I of the Competition Act 1998 and the criminal cartel offence for individuals is set out in section 188 of the Enterprise Act 2002.

Chapter I of the Competition Act closely mirrors Article 101 of the Treaty on the Functioning of the European Union. It prohibits agreements, decisions and concerted practices between or among undertakings or associations of undertakings which have as their object or effect the restriction, distortion or prevention of competition within the UK and which affect trade within the UK.

Although section 9 of the Competition Act provides an exemption in cases where the efficiencies of an agreement outweigh the anticompetitive effects, it is highly unlikely that cartel behaviour, such as price fixing, would ever qualify for such an exemption.

The Enterprise Act sets out the criminal enforcement regime for individuals, which operates alongside the civil regime. Under section 188(1), any individual that agrees with others that their undertakings will engage in price-fixing, market-sharing, bid rigging or limiting supply or production may face a maximum five-year custodial sentence and/or an unlimited fine.

The offence applies in respect of arrangements both to make or implement such agreements or to cause such arrangements to be made or implemented. Moreover, the offence will be committed irrespective of whether the agreement reached is actually implemented by the undertakings.

2. To establish an infringement, does there need to have been an effect on the market?

Cartel conduct can be considered a violation of Chapter I of the Competition Act regardless of whether it was actually implemented or had any effect on the market. To establish an infringement, it is sufficient to show that the agreements or practices were intended to have an anti-competitive effect.

Under the Enterprise Act, individuals who agree to engage in cartel activities can face criminal prosecution, even if the activities were never implemented.

3. Does the law apply to conduct that occurs outside the jurisdiction?

The civil offence under Chapter I of the Competition Act applies to agreements that affect trade and competition in the UK, regardless of where the agreement was entered into or where the companies involved are incorporated, as long as the agreement in question is (or intended to be) implemented in the UK.

The UK government's latest proposed changes announced in April 2022 under the Digital Markets, Competition and Consumer Bill will broaden the territorial reach of the Chapter I prohibition, whereby it will apply to agreements even if they were (or were intended to be) implemented outside the UK, if there are (or likely to be) direct, substantial, and foreseeable effects within the UK.

Under the Enterprise Act, criminal proceedings in respect to an agreement entered into outside the UK may only be brought where the agreement has been implemented in whole or in part in the United Kingdom

4. Which authorities can investigate cartels?

The civil offence under the Competition Act is enforced by the CMA and the sectoral regulators who have concurrent powers (ie, Ofcom, Ofgem, Ofwat, the Civil Aviation Authority, Office of Rail and Road, NHS Improvement, Payment Systems Regulator and Financial Conduct Authority).

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The criminal offence under Enterprise Act is enforced by the CMA along with the Serious Fraud Office in England, Wales and Northern Island and with the National Casework Division of the Crown Office in Scotland.

5. What are the key steps in a cartel investigation?

Section 25 of the Competition Act gives the CMA the power to initiate an investigation and sets out the legal basis for doing so. The CMA can only exercise its investigative powers if there are reasonable grounds to suspect an infringement. There are three primary avenues through which the CMA is usually made aware of such evidence:

- through a complaint from a third party;
- by way of an application for leniency or a tip-off from a whistle-blower; and/or,
- via its own intelligence gathering activities.

The CMA must consider at an early stage whether to address the infringement through a civil procedure (ie, under the Competition Act) or a criminal procedure (ie, through the Enterprise Act) or both. The procedural rules and powers of investigation available to the CMA vary depending on whether a civil or criminal investigation is being conducted.

Under the civil enforcement procedure, the first formal step is to a send a case initiation letter to the undertakings involved. This document outlines the conduct that is being investigating, the legal basis for the investigation, the case-specific timetable and key contacts. The CMA will also begin its detailed information gathering.

Following an assessment of the evidence available, the CMA may: (i) decide to close the investigation due to administrative priorities; (ii) decide that there are no grounds for action; (iii) accept commitments with regard to future conduct; or (iv) issue a statement of objections, indicating its provisional view that the parties' conduct infringes competition law. The parties then have an opportunity to inspect the CMA file and respond to the statement of objections. The case may then proceed to a final infringement decision by the CMA imposing fines and issuing such directions as it considers appropriate to the parties to bring the anticompetitive conduct to an end. More information can be found in the CMA's guidance on the investigation procedures in Competition Act 1998 cases: (CMA8).

In parallel with the civil investigation, criminal proceedings against relevant individuals may also be launched if there are reasonable grounds for suspecting that a cartel offence has been committed. The CMA and the SFO share responsibility for conducting criminal cartel investigations, and in practice, the CMA often operates under the SFO's direction. If prosecuted, individuals are given an opportunity to respond to the allegations, and the case is ultimately heard in a criminal trial at the Crown Court.

6. What are the key investigative powers that are available to the relevant authorities?

The CMA may acquire evidence through the following means:

- Requests for information:

Where the CMA has reasonable grounds to suspect anticompetitive conduct, it has authority to issue a written notice requiring any person (including third parties) to provide specified documents or information that relates to any matter relevant to its investigation. Failure to comply with a formal information request without reasonable excuse can result in a fine. It is also a criminal offence to provide false or misleading information or to destroy, conceal or falsify documents.

- Dawn raids on business or domestic premises:

The CMA may access data held electronically (eg, on hard drives, laptops and mobile phones); take copies of relevant documents; require on-the-spot explanations of any such document; and interview individuals. If the dawn raid is carried out pursuant to a court warrant, the CMA can also use reasonable force to obtain entry and take away originals of soft-copy and hard-copy documents. The CMA can also apply for a court warrant to enter and search domestic premises where information relevant to the investigation may be destroyed if the CMA requests the material in a written format.

- Interviews:

The CMA may interview individuals connected with an undertaking that is being investigated. Any information obtained during these interviews cannot be used against that person in a criminal prosecution, except in certain limited circumstances.

Criminal cartel investigations will be carried out based on rules surrounding the collection of criminal evidence in the Police and Criminal Evidence Act 1984. The CMA and the SFO may also use covert surveillance in respect of domestic premises and private vehicles to obtain evidence. More information can be found in the CMA's

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guidance on the investigation procedures in Competition Act 1998 cases: (CMA8).

7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?

The power to require the production of information during both civil and criminal proceedings respects legal privilege. Under English law, there are two types of legal professional privilege: legal advice privilege and litigation privilege. Legal advice privilege safeguards communications between a lawyer and client that are intended to seek or provide legal advice or related legal assistance. Litigation privilege applies to communications made by or between either the client or their lawyer, and a third party, for the primary purpose of being used in connection with actual or pending litigation.

Moreover, communications with both external and in-house lawyers, as well as foreign lawyers, are capable of being protected by legal advice privilege in the UK.

8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?

There are three types of leniency available depending on the stage at which the application was made and the amount of information provided (see OFT's guidance on applications for leniency and no-action in cartel cases: OFT1495):

Type A: This type of immunity provides guaranteed full corporate immunity from financial penalties, guaranteed "blanket" immunity from criminal prosecution for all current and former employees and directors that cooperate with the CMA, and guaranteed director disqualification protection. To be eligible for Type A immunity, the undertaking must be the first to apply for leniency and disclose information that provides "a sufficient basis for taking forward a credible investigation."

Type B: Where the investigation into the cartel activity has already started, the first applicant may get corporate immunity from financial penalties (or reductions up to 100%) and criminal immunity from prosecutions for all or some of the employees and directors. Cooperating individuals may also avoid director disqualification. Unlike under Type A immunity, Type B immunity is not guaranteed, and the CMA also has discretion as to the level of reduction on any financial penalties. While there is no limit to the reduction, the CMA does not generally grant immunity or discounts of more than 50% on financial penalties in case of resale price maintenance (see Addendum to OFT1495). To benefit from Type B immunity or leniency, the information provided must "add significant value" to the CMA's investigation. It is, therefore, not available when the CMA has already gathered sufficient information to establish a civil infringement or to bring a successful criminal prosecution.

Type C: The second applicant or later applicants (or coercers), regardless of whether there is a pre-existing investigation, that provide information that "add significant value" to the investigation before a statement of objections is issued, may receive a reduction that is typically between 25% and 50%. The CMA may also award immunity from criminal prosecution for specific individuals and cooperating individuals may be able to avoid disqualification as a director, where corporate leniency reduction is granted.

9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?

As above, subsequent applicants that provide significant information before the statement of objections is issued may be granted Type C leniency.

10. Are markers available and, if so, in what circumstances?

Yes. Prior to submitting a leniency application, a representative from the undertaking or its legal advisors may approach the CMA anonymously to determine whether guaranteed immunity (ie, Type A) is available and to secure its position in the queue for leniency. To do so, the advisor must confirm that the undertaking has a "concrete basis" for suspecting cartel activity and a "genuine intention to confess." The advisor must also provide sufficient information to the CMA to determine whether a pre-existing investigation exists.

Where the applicant is already aware of a pre-existing investigation, it may contact the CMA to ascertain whether it is in the Type B immunity or leniency. If it is, the applicant can seek to establish whether the information it can provide would be sufficient to warrant a marker for Type B immunity in its particular case. The undertaking would have to specify the form and substance of the information it expects to be in a

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position to provide to the CMA.

11. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?

Applicants are required to provide full cooperation on an ongoing basis during the course of CMA's investigation and any subsequent proceedings. A senior representative of the undertaking will have to sign a letter indicating a commitment to continuous and complete cooperation throughout the investigation.

12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?

Where Type A immunity is granted to an undertaking, its current and former employees and directors that cooperate with the CMA will receive immunity from criminal prosecution. Where the applicant is an individual, neither the undertaking that employs them nor other individual employees are protected from Type A immunity but they may be able to obtain Type B immunity or leniency.

For applicants for Type B immunity, Type B leniency or Type C leniency, the CMA has discretion as to whether grant criminal immunity from prosecutions for all or some of the employees and directors.

13. Is there an 'amnesty plus' programme?

Yes, where an undertaking is cooperating with a cartel investigation in one market (the first cartel) obtains total immunity or 100% reduction in financial penalties in relation to its cartel activities in the second market (the second cartel), it will also receive a reduction in the financial penalties imposed in relation to the first cartel. This reduction in fine is in addition to any reduction granted as a result of its cooperation in the first market alone.

14. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?

Yes, an undertaking involved in a cartel activity may approach the CMA to initiate settlement discussions either before or after the statement of objections has been issued. The CMA retains discretion as to whether to accept a settlement agreement and will consider it as long as it believes that the evidential standard for giving notice of its proposed infringement decision is met.

The undertaking seeking a settlement must:

- make a "clear and unequivocal" admission of liability in relation to the nature, scope and duration of the cartel activity;
- terminate its involvement in the cartel activity;
- confirm that it will pay a penalty set at a maximum amount, including a settlement discount (capped at 20% before the statement of objections and at 10% after); and
- agree to procedural cooperation with the CMA on streamlined basis.

In addition, the undertaking must accept that there will be a final infringement decision against it, and it must agree not to appeal the decision to the Competition Appeal Tribunal (CAT). Even if another addressee of the infringement decision successfully appeals the decision, the final infringement decision remains binding against the settling undertaking.

The CMA does not enter into any other negotiations or plea-bargaining, nor does it accept variations to the established minimum standard requirements of the settlement procedure.

15. What are the key pros and cons for a party that is considering entering into settlement?

A key advantage of entering into settlement is the discounted level of the fine. The actual level of discount awarded will depend on the resource savings achieved as a result of the settlement. While the maximum level of discount available for settlement reached before a statement of objections is issued is 20%, it is capped at 10% for settlements after the statement of objections has been issued. The settlement discount is in addition to any leniency discount granted. The settling party may also value the streamlined procedure, which will save continued management time and legal fees, and cooperating with the CMA may help the party in its media communications when the decision is announced.

The CMA will usually require a settling party to make an unequivocal admission of liability in relation to the nature, scope and duration of the infringement, which could have a detrimental impact on the party's position before other authorities and (potential) civil claimants.

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On the other hand, the CMA's settlement decisions are often less detailed than its fully contested decisions, so potential claimants may be hindered by having access to less information on which to base any follow-on claims.

Following a recent case where a settling party made an unsuccessful appeal to the CAT, the CMA's guidance now states that settling businesses must accept that the CMA's decision will remain final (even if challenged by another addressee) and that they will not challenge or appeal the decision to the CAT. Therefore, a settling undertaking may risk receiving a less favourable outcome than non-settling parties.

Furthermore, the CMA has complete discretion in deciding whether to settle and may withdraw from the settlement procedure at any point, even after successful completion of settlement discussions, where it is of the view that the undertaking is not complying with the settlement requirements.

16. What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?

The CMA may cooperate with the concurrent regulators and also with non-competition authorities. For example, it has a memorandum of understanding with the Information Commissioner's Office (ICO). This sets out how the CMA and ICO will cooperate, for example through information sharing and the potential for joint projects, particularly in relation to digital markets.

In international cases, the CMA also works closely with the European Commission, the US Department of Justice as well as authorities in Australia, Canada, and New Zealand. It may also cooperate with Scottish authorities in criminal cartel investigations where Scottish courts have jurisdiction.

17. What are the potential civil and criminal sanctions if cartel activity is established?

The CMA may impose a fine of up to 10% of the undertaking's worldwide turnover in the last business year for an infringement of Chapter I of the Competition Act. Directors may also be disqualified for up to 15 years under the Company Directors Disqualification Act 1986. The CMA may also pursue a separate but parallel criminal proceedings against the relevant individuals under the Enterprise Act, which can result in imprisonment for up to 5 years and an unlimited financial penalties. Infringing undertakings often face subsequent civil claims, which rely on the CMA's infringement decision as evidence of the cartel activity.

18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

In determining the level of fine to be imposed, the CMA will identify a starting point of up to 30% of the undertaking's turnover in the relevant market. There are no pre-set starting points that are deemed to be appropriate for different infringements, whereby the underlying objective is to deter future infringements. However, the CMA's guidance on penalties (CMA73) states that, for the most serious types of infringement such as cartel activities, the starting point is likely to be between 21% and 30%.

The CMA will adjust this starting point according to the duration of infringement, any aggravating or mitigating factors, and need for specific deterrence, settlement agreements and leniency applications. In any case, the final amount of penalty cannot exceed 10% of the undertaking's worldwide turnover in the last financial year.

Aggravating factors, which may increase the level of fine, include, for example, unreasonably delaying the investigation, the role of the undertaking as an instigator, the involvement of directors or senior management in infringement, retaliation against other cartelists to ensure compliance with cartel activity, continuing the infringement after the investigation's launch, and recidivism. Mitigating factors that may decrease the fine include acting under duress, termination of the infringement as soon as the CMA intervenes, and cooperation with the enforcement process.

The largest fine that the CMA has imposed on an individual company was in its Hydrocortisone decision, where the CMA fined Allergan £109 million for its subsidiary Accord-UK's involvement in abusive and cartel conduct in relation to the supply of hydrocortisone tablets. More recently, in 2023, 10 UK-based construction companies were fined a total of £60 million in relation to bid-rigging, with the highest fines being £17.5 million for Erith and £16 million for Keltbray.

19. Are parent companies presumed to be

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jointly and severally liable with an infringing subsidiary?

A parent company may be held jointly and severely liable with its infringing subsidiary where the parent company had the ability to and actually did exercise decisive influence over the subsidiary's actions.

Where the parent company has 100% shareholding in the infringing subsidiary, there is a rebuttable presumption that the parent company did indeed exercise such a decisive influence (following the so-called "Akzo presumption" under EU law).

In its Hydrocortisone decision of 2021, the CMA fined Allergan, Accord Pharmaceuticals, Intas, and Cinven for the abusive and cartel conduct of their respective subsidiaries. Allergan was the former parent of Auden Mckenzie, whereas Accord Pharmaceuticals and Intas were the then current parents of Accord-UK (the economic successor of Auden Mckenzie). The CMA also fined Cinven, the former parent of Advanz Pharma.

20. Are private actions and/or class actions available for infringement of the cartel rules?

Claimants can bring a private action for damages resulting from a breach of competition law either in the High Court or in the CAT. The claim may be brought as a "follow-on" damages action based on an earlier infringement decision of the CMA as binding evidence of liability. Where there is no previous infringement decision issued and thus the infringement is alleged, the claimants may bring a "standalone" action.

Collective proceedings may be brought before the CAT for follow-on and standalone cases on behalf of two or more claimants who have "the same, similar or related issues of fact or law". In order to start collective proceedings, the class representative will have to make an application for a collective proceedings order (CPO) before the CAT, which will authorise the class representative for the claimants and stipulate whether the claim may be brought on an "opt-in" basis (ie, the claim is brought on behalf of all persons that actively decide to participate) or on an "opt-out" basis (ie, the claim is brought on behalf of all persons who fit the description of the class unless they expressly choose to not participate).

The use of the CPO procedure is becoming more common in the UK following the landmark Supreme Court decision in Merricks v Mastercard, where the Supreme Court considered the collective proceedings regime for the first time and the CAT then granted the CPO. In 2022, the CAT certified the first opt-in collective proceedings, which was a follow-on claim brought by the Road Haulage Association resulting from the European Commission's 2016 Trucks cartel decision.

21. What type of damages can be recovered by claimants and how are they quantified?

Damages are calculated with the intention of restoring the claimant to the position they would have been in had the infringement not occurred.

Various comparator-based methods can be used to quantify the harm. Where a particular product has been cartelised, it may be possible to compare the price in the infringement scenario with a non-infringement scenario on the basis of price data observed either: (1) on the same market at a time before and/or after the infringement (2) on a different but similar geographic market, or (3) on a different but similar market. It may also be possible to combine these comparator-based methods.

Alongside these comparator methods, other methods exist to establish an estimate of the hypothetical non-infringement situation. These include the simulation of market outcomes on the basis of economic models and estimating a likely non-infringement scenario on the basis of costs of production and a reasonable profit margin.

Given the difficulties of proof inherent in the quantification of competition law damages the courts will adopt the "broad axe" principle and will be wary of "spurious accuracy". They will seek to make judgment calls to reach what they consider to be the true value of an overcharge based on the evidence provided. (See paragraph 479 of *BT and Royal Mail v DAF [2023] CAT 6.*)

22. On what grounds can a decision of the relevant authority be appealed?

Appeals against decisions by the CMA or the concurrent sectoral regulators under the Competition Act can be made to the CAT, which will consider the decision on the merits (ie, on points of law, points of fact or as to the amount of the fine). The CAT may send the case back to the CMA for reconsideration or pass its own judgment, which will supersede the CMA decision. The CAT judgments may be appealed to the Court of Appeal (on points of law or as to the amount of fine) and, subsequently, to the Supreme Court (on a point of law or

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public importance).

23. What is the process for filing an appeal?

The CMA decision must be appealed to the CAT within two months of the date on which the appellant was notified of the decision or the date that the decision was published, whichever is earlier. The application must specify the grounds of appeal and the relief sought with the CAT registrar.

24. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?

In February 2023, the CAT upheld the follow-on claims brought by Royal Mail and BT based on the European Commission's 2016 Trucks cartel decision, against companies in the DAF Group. The CAT rejected DAF's argument that BT and Royal Mail passed on the losses they suffered as a result of the cartel onto their customers of used trucks in the form of higher prices and found an overcharge of 5% for vehicles bought from DAF during the cartel period. Royal Mail and BT were awarded approximately £17.5 million in damages.

In February 2023, the CAT held that the CMA cannot compel an undertaking to respond to its requests for information (so-called "Section 26 Notice") unless it has a sufficient territorial connection to the UK. The appeals were filed by BMW and Volkswagen following the CMA's formal requests for information to the German parent companies of the car makers during its investigations into the UK subsidiaries. The CAT ruling means that the CMA may address the Section 26 Notices to the whole group through an undertaking with a UK territorial connection, which will then be responsible for informing the whole group of the notice. However, only those with a sufficient territorial connection to the UK will have an obligation to respond.

In March 2023, the CMA found that ten construction companies colluded to rig bids for demolition and asbestos removal contracts from January 2013 to June 2018, and imposed fines totalling to nearly £60 million. All ten companies were involved in agreements to intentionally lose tenders, causing customers to pay higher prices or lower quality services. Additionally, five of the companies were also part of schemes whereby the designated losers of the contracts were compensated by the winner that were concealed by false invoices. The CMA also secured the disqualification of three directors involved.

25. What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, impact of COVID-19 in enforcement practice etc.)?

There has been a decline in the number of cartel cases in both the UK and EU in the recent years. Some believe that this trend can be attributed to fewer companies being willing to come forward with leniency applications, which have traditionally been a critical means of detecting cartels.

In particular, as a result of the rise of private actions for follow-on damages, companies may be less inclined to apply for leniency. This is because the reduction in fines (if full immunity is not granted), which is the main incentive for leniency applications, is not guaranteed to compensate for the risk of follow-on damages claims where the damages incurred may exceed the fine imposed by the CMA.

Although it is no longer possible to bring strict follow-on damages actions in the UK for European Commission cartel decisions made after the transition period, there has been an increase in the number of cartel damages claims filed in the UK. This increase is due to several factors, including the availability of several European Commission decisions made before the transition period that can still be used for follow-on damages. The UK remains a preferred jurisdiction to bring these claims due to the developments aimed to facilitate the private enforcement of competition law. In cases involving European Commission decisions post-transition period, claims can still be filed in the UK on a stand-alone basis.

Another emerging trend amidst a decline in leniency applications is the CMA's increased reliance on dawn raids and cooperation with other competition authorities. Following a pause during the Covid-19 pandemic, the CMA has already conducted several dawn raids. The CMA Director for Enforcement warned that this should be taken as a signal of the CMA's intention to resort to them more frequently in the future. Additionally, since the end of the Brexit transition period, the CMA can now initiate parallel investigations into cartel activity taking place beyond the UK with the European Commission. Most recently, the CMA launched dawn raids on suppliers of fragrances and fragrance ingredients in consultation with the Antitrust Division of the US Department of Justice, the European Commission and the Swiss Competition Commission. Similarly, the CMA and the European Commission launched parallel dawn raids on several

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vehicle manufacturers in March 2022.

26. What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?

Over the next 12 months, the CMA is expected to shift its attention towards areas of essential spending with the rising cost of living as well as increasing its focus on markets for sustainable products and services in line with its objective of supporting the UK's transition to a net-zero economy,

In its annual plan for 2023 to 2024, the CMA set out the key areas on which it intends to focus in the next 12 months, which include the following:

- to concentrate on areas of essential spending and other areas causing financial pressure on consumers, including by clamping down on cartels in public procurement, healthcare, and other areas that directly impact public and household expenditure;
- to identify potential competition issues within UK labour markets;
- to act in markets for sustainable products and services and undertake further work on green claims and on energy efficiency; and,
- to ensure digital markets are competitive and innovating businesses have access to digital markets, including through preparing for the introduction of new statutory powers for the DMU.

In the context of its work on the intersection of environmental sustainability and competition law, the CMA also released its draft guidance on environmental sustainability agreements (CMA 177) in February 2023. The draft guidance proposes a more flexible approach to applying the Chapter I prohibition to such agreements, with the possibility of a complete exemption in some instances, acknowledging the need for collaboration among businesses to achieve sustainability goals while cautioning against their misuse to cover cartel behaviour.

The CMA encourages businesses involved in the development of sustainability initiatives and agreements to seek informal guidance at an early stage. Importantly, businesses implementing an agreement that has been discussed with the CMA, and where no competition issues were raised, will not be subject to a fine.

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