Sustainable Divergence between the UK and the EU—the Fair Share Principle in Practice

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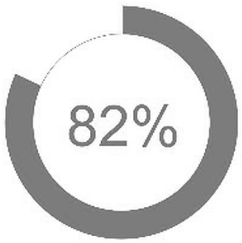
Introduction

The debate around incorporating environmental benefits in competition law is the focus of much interest by practitioners and businesses alike. Specifically, the analysis of sustainable collaborations under the rules of prohibiting agreements which restrict or distort competition (so called green agreements). Many regulators have now published proactive guidance to aid parties in navigating competition law in this area.[1]

In this article, we will provide insights into how the treatment of green agreements can diverge between jurisdictions due to the different approaches taken by regulators. Specifically, the analytical framework of the European Commission (EC) in its Horizontal Guidelines[2] and the UK Competition and Markets Authority (CMA) in its Green Agreements Guidance[3] will be applied to a hypothetical case study (a climate change agreement). We will discuss, in turn, how the different approaches of the regulators can lead to entirely different outcomes. The UK has adopted a more permissive approach, at least conceptually. It remains to be seen how this difference in approach plays out in practice, and if we might see more ambitious sustainability projects in the UK compared with the continent.

The commercial and legal landscape

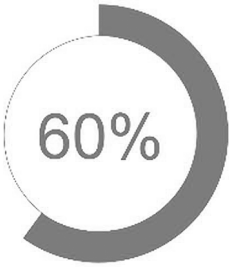
Research commissioned by Linklaters into the views of over 500 sustainability professionals found that:



82% believe that it is important to be working with peers to pursue sustainability goals.

Regulatory, moral and commercial pressures are combining to put businesses under more pressure than ever before to make meaningful contributions to combatting climate change.

However, 60% of those surveyed report that competition law played a role in their decision not to pursue a (joint) sustainability project.



* The views and opinions expressed in this article are the personal opinions of the author(s) and do not necessarily represent the views and opinions of Oxera Consulting LLP or Linklaters LLP.
[1] See for example the Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements and the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.
[2] Guidelines on the applicability of art.101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.
[3] Green Agreements Guidance: Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements 185.

It is clear that industry wants guidance—65% said that they would feel more inclined to collaborate with their peers where a competition law exemption or guideline was in place.[4]

Regulators throughout Europe are listening. 2023 saw finalised guidance being issued by both the EC in its Horizontal Agreements Guidelines, and the CMA in its Green Agreements Guidance. Both set out the approach that businesses can lawfully take to assess their sustainability collaborations while complying with competition law. These guidance documents sit alongside the previous guidance provided by the Dutch Competition Authority (the ACM) in 2020, which was a leader in this area (although the ACM has now indicated that its approach will align with the EC).

The framework for assessment of sustainability agreements is materially the same under the EU and UK guidance, reflecting the broadly common legislative framework. Agreements which result in an appreciable restriction of competition can be exempted from the prohibition (under TFEU art.1/Chapter I of the UK's Competition Act 1998) where certain conditions are fulfilled to demonstrate that positive environmental effects outweigh restrictive ones (e.g. increased prices, reduced output or restrictions on variety).

Part of this assessment involves considering whether consumers will receive a 'fair share' of the benefits under the agreement. This raises key questions around *who* the consumers are and *what benefits* are relevant. It is on these questions that the EC and the CMA have diverged (in both substance and form).

Potentially influenced by the risk of a read-across to other markets, as well as the risk that EU consumers facing higher prices may not be happy about subsidising EU citizens as a whole, the European Commission has taken a narrow view of the beneficiaries who are relevant for the purpose of any balancing act. In principle, as the ones paying potentially increased prices, the EC is only willing to take into account a fair share of any benefits that accrue to these consumers. There is flexibility to consider 'collective benefits' more generally, only where the group of people that benefit are substantially the same as the consumers in the relevant market.

By contrast, the CMA goes further than the EC, by introducing a category of 'Climate Change Agreements' defined as environmental sustainability agreements which contribute to combating climate change, typically by reducing greenhouse gas emissions. For Climate Change Agreements, an exceptionally broad approach is allowed, whereby the benefit of the agreement to *all* UK consumers can be considered (regardless of whether they are in the relevant market).

Below, we look at the impact of diverging approaches between the EC and CMA on a hypothetical case study.

Introduction to the case study: the green agreement

The parties

Three grocery delivery companies supply online groceries to a combined total of 15% of households in the relevant geographic market.

The sustainability conundrum

Each manages a fleet of delivery vehicles with varying ages and fuel types, including petrol, diesel, hybrid, and electric. Despite being competitors, these companies recognise the mutual interest in reducing their carbon emissions. However, the companies are aware of the potentially high risk associated with individual efforts to transition to more sustainable fleets. There is little incentive for any of the companies unilaterally to undertake emissions-reduction measures, as this would lead to increased operational costs and necessitate higher prices for their customers. Such a scenario could put them at a competitive disadvantage—leading to losing customers to their rival companies that do not adopt environmentally sustainable practices.

The collaboration

To address this collective-action problem, the grocery delivery companies want to collaborate on reducing their fleet emissions. They develop an agreement to phase out older, more polluting, vehicles in their fleets, and replace them with more environmentally friendly alternatives. By coordinating their efforts, these competitors seek to eliminate the first-mover disadvantage associated with making their vehicle fleet more environmentally friendly—making it a more viable initiative for all parties.

The details

Over a designated period of time, each company commits to phasing out vehicles powered by diesel and petrol that are older than eight years. These aging vehicles will be replaced with either electric or hybrid alternatives in order to reduce emissions.

[4] Linklaters, "Competition Law and Sustainability Collaborations—Green Shoots?" available at *https://lpscdn.linklaters.com/-/media/digital-marketing-image-library/files/04_client-services/afig/2023/linklaters-llp_sustainable-collaboration-report_oct-2023.ashx?rev=257cdd58-d528-4345-83d0-1f721c0750d9&extension=pdf&hash=993750D7FA7B662F3654840130274B13*.

The benefits

The benefit of the agreement to society is the emissions-reduction outcomes. However, these benefits will vary across companies due to the compositions of their existing fleets and the choice between electric and hybrid replacements.[5] Despite these differences, by participating in the agreement each company contributes towards the emissions-reduction benefits.

The costs

In the short term, the societal cost of the agreement manifests as increased prices, but only for customers of the three companies. The agreement necessitates significant short-term investments from each participating company. Consequently, the price of delivery is expected to rise during this initial period as companies pass on the costs associated with acquiring and implementing the replacement vehicles. However, in the longer term there exists the potential for a decline in costs.[6]

The legal framework

The grocery company agreement should be assessed under TFEU art.101(1)/Chapter I of the Competition Act 1998 (UK) (CA98), as it negatively affects a parameter of competition (price). Under the UK framework, the agreement qualifies as a Climate Change Agreement, since it mitigates the effects of climate change by reducing greenhouse gas emissions.

The agreement does not involve price fixing or market sharing. Provided the parties are not agreeing to limit their fleet to the numbers of vehicles they currently have[7] then there is also no restriction of output. Therefore, in light of its legal and economic context, the agreement should not be considered a 'by object' restriction of competition, and so the agreement's *effects* on competition will need to be considered.

Analysis of the agreement's effects is a fact-specific exercise, and would involve consideration of the market power of the companies, how much freedom the companies are afforded in the context of the agreement, the market coverage of the agreement, any exchange of commercially sensitive information in connection with the agreement, and whether the agreement results in an appreciable increase in price or an appreciable reduction in output, variety, quality or innovation.

For the purposes of this exercise, it is assumed that the agreement will restrict competition by effect—particularly given the identified price increase.

To benefit from an exemption under TFEU art.101(3) /s.9(1) CA98, the parties will need to show the below.

1. The agreement contributes to, and the parties can produce evidence of, benefits such as improving production or distribution or contributing to technical or economic progress. These benefits will include reducing greenhouse gas emissions, reducing the environmental impact of products, introducing cleaner technologies or developing more energy-efficient processes.
2. The agreement, and any restrictions of competition within the agreement, must be indispensable to achieve those benefits.
3. Consumers must receive a fair share of the benefits, and the benefits must be substantial and demonstrable.
4. The agreement must not eliminate competition.

In relation to 1, the parties will need to provide evidence of the baseline emissions of their fleets, as well as the emissions from the replacement vehicles (see step 1 below).

In relation to 2, the parties will need to look carefully at each clause of the agreement to ensure that any restrictions of competition are necessary to achieving the aim. For example, any restrictions on the size of the fleets run by each company, or the types of vehicle (e.g. makes/models etc.), would seem unlikely to be indispensable. It should be clear that the agreement will end (and any form of information sharing will end) at a point in time which should be as short as possible—at the very latest, once all parties have fully switched to lower emissions fleets.

In relation to 4, the parties will need to articulate the various different parameters on which they will still compete. For example, the price of groceries, delivery times/responsiveness, geographic coverage, etc. They could also evidence the impact of competitive pressures from outside the online grocery market, such as from brick-and-mortar stores.

While these aspects are important, the assessment of these issues will be largely common within the UK and EC frameworks. The remainder of this article looks at the key area of divergence. Who are the 'consumers' in this context? What does a 'fair share' really mean? How can it be quantified?

Steps in assessing fair share to consumers

Assessing the 'fair share to consumers' is a crucial aspect of evaluating the proposed agreement. This can be done by means of a cost-benefit analysis (also known as an impact assessment).

[5] For instance, companies with older, more polluting vehicles in their fleets stand to achieve a more substantial reduction in emissions compared with competitors with newer vehicles, or those already incorporating hybrid technology into their fleets.
[6] This is due to: (i) the likelihood that new electric vehicles will become cheaper over time; (ii) the potential for new electric or hybrid vehicles to exhibit enhanced efficiency, leading to lower running costs. For simplicity, the case study does not explicitly model these anticipated cost reductions.
[7] i.e. they can expand their fleet as much as they want to service additional grocery delivery customers, as long as the expansion utilises green vehicles.

This economic assessment of the effects of the proposed agreement is done to ensure that the benefits derived from the coordinated efforts of the grocery delivery companies (in this case the emissions reductions) compensate sufficiently to address the negative effects on consumers (in this case the short-term increase in prices that consumers pay to cover the cost of replacing the vehicle fleets). If the benefits do not sufficiently outweigh the costs, then the sustainability-based rationale for the coordinated agreement is unlikely to be accepted by a competition authority.

Quantifying these benefits and costs involves seven steps.

1. Identify baseline emissions.
2. Determine emissions reductions.
3. Calculate the environmental benefits.
4. Consider whether there is a 'substantial overlap' of consumers (EU approach only).
5. Apportion the benefits.
6. Estimate the cost and associated price rise of the measures.
7. Compare the benefits and drawbacks of the agreement.

These are explained in more detail in the sections below.[8]

Step 1: identify baseline emissions

Both UK and EU

The first step is to estimate the baseline emissions of the three delivery companies. That is, the yearly emissions produced by their vehicle fleets prior to the implementation of the phase-out agreement. This step provides a benchmark for comparison when assessing the benefits of the agreement at a later stage.

This involves collecting data on the number and type of vehicles (petrol, diesel, hybrid, electric) in each company's fleet and their respective emissions levels. It is important to reflect the different emissions levels by vehicle type. It is assumed that for the grocery delivery trucks in this example, petrol trucks are the most polluting, emitting 14 tonnes of CO2 per year, whereas electric trucks are the least polluting, emitting just three tonnes of CO2 per year.[9]

The carbon values per tonne of CO2 are then combined with the emissions per vehicle type and applied to the companies' fleets to establish a baseline against which emissions reductions can be measured. In this case, the companies combined emissions per year is 280,000 tonnes of CO2.

Figure 2: Baseline combined CO2 emissions per year

Step 2: define abatement measures and determine emissions reductions

Both UK and EU:

The second step of the cost-benefit analysis of this agreement is to estimate the emissions reductions that each company will achieve by implementing the phase out measures over the course of five years.[10]

This involves using the same carbon value and emissions by vehicle type figure as in step 1, and applying it to the companies' new fleet compositions each year. This calculates the impact of the agreement by comparing the emissions of the replaced polluting vehicles with the emissions of the new environmentally friendly vehicles.

In this case, the agreement will result in the companies collectively reducing their carbon emissions by 762,000 tonnes of CO2 over the first five years of the agreement.

[8] If information required to undertake this analysis is not publicly available, the parties will need to ensure that they do not exchange competitively sensitive information. The exact steps will be context dependent, but might for example include ringfencing or data anonymisation and aggregation.

[9] These are estimated by multiplying the estimated tonnes of CO2 emitted per kilometre for each vehicle type by the estimated kilometres covered by a delivery truck in a year (just under 50,000). Transport Environment (2022), "How clean are electric cars?", 30 May, *https://www.transportenvironment.org/discover/how-clean-are-electric-cars/*.. Transport Engineer (2021), 'How to run a supermarket delivery fleet', 11 June, *https://www.transportengineer.org.uk/transport-engineer-features/how-to-run-a-supermarket-delivery-fleet/237971*.

[10] A shorter or longer time period than five years could be used depending on the specifics of the case. Five years has been chosen in this instance to capture the medium-term benefits of the agreement.

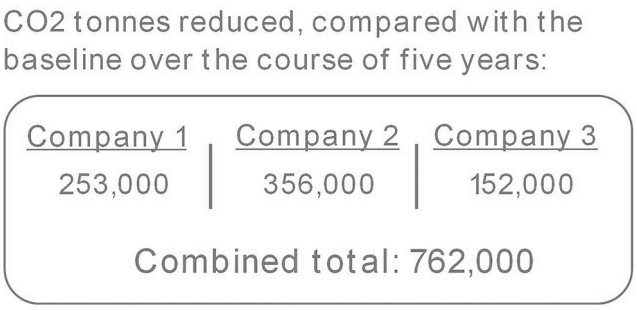


Figure 3: Combined CO2 emissions reduced over five years

Step 3: calculate the environmental benefits

The next step is to calculate the environmental benefits of the agreement.

EU

When estimating the benefits associated with an agreement, the EC separates the benefits into three categories.[11]

Use benefits: the benefits that the user gets from the consumption or use of the product covered by the agreement (for example, it may be cheaper for consumers to run environmentally friendly appliances in the long run).

Non-use benefits: indirect benefits resulting from consumers' appreciation of the impact of their sustainable consumption on others (for example, consumers feeling better when they opt for a washing liquid not because it cleans better but because it is less contaminating).

Collective benefits: benefits pertaining to a wider section of society that occur irrespective of the consumers' individual appreciation of the product (for example, cleaner air).

In this case study, for simplicity, we assume that there are no use, or non-use benefits to consumers.

UK

The CMA does not use the same categories of benefits as the EU, but notes that the parties to an agreement will need to evidence objective benefits arising from the agreement. The CMA also provides a non-exhaustive list of examples which includes eliminating or reducing harmful effects of production or consumption, for example, by reducing greenhouse gas emissions. The hypothetical case study falls within this bracket and, again, for simplicity, we assume that there are no other benefits.

Outcome of approaches

Therefore, for these purposes the quantification exercise for the EC and CMA is the same, and we only need to quantify the collective benefits of saved emissions in monetary terms.

This involves multiplying the CO2 tonnes saved by the agreement by the monetary value of carbon. When doing a cost-benefit analysis, there are a variety of methods to quantify environmental (and other non-monetary) effects. The method applied in this case study to estimate the monetary value of carbon is the abatement cost method.[12]

UK government-endorsed valuation method

This method of carbon valuation is used by the UK government, not as a policy instrument in itself, but as a way to guide government decision making.[13]

The abatement cost method focuses on assessing the costs of reducing emissions to meet environmental targets. This involves setting the value of carbon at a level that is consistent with the level of marginal abatement costs required to reach the net zero targets that the UK has adopted at a UK and international level. In practice, they are calculated as the cost of the most expensive emissions-reducing technique required to meet government's emissions targets.

The table below shows that the UK government's valuation of carbon in 2024 is £256t/CO2e (central estimate),[14] using the abatement-cost approach. This is the value of one tonne of CO2 that we use in our case study—this is assumed to be the same regardless of whether the agreement is in the UK or the EU.

Table 1: Carbon values per tonne of CO2

Year	£ per tonne
2024	256
2025	260

[11] European Commission (2023), 'Guidelines on the applicability of art.101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements', 1 June, paras 571–89.
[12] Dependent on which instrument or methodology is chosen, the price for a tonne of carbon can differ substantially. Price differentials arise on different platforms for pricing and trading carbon units, due to different methodologies (e.g. BEIS' 'target-consistent' valuation approach), as well as with certification of quality. The (unsubsidised) price of negative emissions technologies, especially engineering-based technologies (such as direct air capture), is likely to significantly exceed traded EU ETS prices.
[13] Department for Business, Energy & Industrial Strategy and Department for Energy Security & Net Zero (2021), "Valuation of greenhouse gas emissions: for policy appraisal and evaluation", 2 September, *https://www.gov.uk/government/publications/valuing-greenhouse-gas-emissions-in-policy-appraisal/valuation-of-greenhouse-gas-emissions-for-policy-appraisal-and-evaluation#annex-1-carbon-values-in-2020-prices-per-tonne-of-co2*.
[14] In £2020 prices.

Year	£ per tonne
2026	264
2027	268
2028	272
2029	276
2030	280

Note: Central series in 2020 prices.

Source: Department for Business, Energy & Industrial Strategy and Department for Energy Security & Net Zero (2021), 'Valuation of greenhouse gas emissions: for policy appraisal and evaluation, 2 September, Annex 1, *https://www.gov.uk/government/publications/valuing-greenhouse-gas-emissions-in-policy-appraisal/valuation-of-greenhouse-gas-emissions-for-policy-appraisal-and-evaluation#annex-1-carbon-values-in-2020-prices-per-tonne-of-co2*.

Now that we have the abatement cost value of carbon, we multiply this by the emissions reductions achieved by the agreement (762,000 tonnes of CO2). This equates to £202.2m in saved emissions.

Table 2: Monetary benefit of the agreement over five years

	Carbon values (£ per tonne/CO2)	Emissions reductions	Monetary benefit (£m)
Year 1	256	96,078	£24.6
Year 2	260	117,031	£30.4
Year 3	264	160,725	£42.4
Year 4	268	183,441	£49.2
Year 5	272	204,394	£55.6
Total			*£202.2*

Step 4: identify the relevant consumers (EU approach only)

EU

The EC approach is to consider the benefits to consumers inside the relevant market, unless there is a 'substantial overlap' between the consumers in the market where the agreement takes place (e.g. online grocery delivery) and the market where the wider benefits are felt (e.g. citizens that breathe cleaner air).

The concept of 'substantial overlap' is not defined in the Horizontal Guidelines. While the EC specifically considers a similar example to the facts here, 'drivers purchasing less polluting fuel are also citizens who would benefit from cleaner air, if less polluting fuel were used.'[15] The guidance does not take a clear position on how to approach this issue, but merely states:

> 'To the extent that a substantial overlap of consumers (the drivers in this example) and the wider beneficiaries (citizens) can be established, the sustainability benefits of cleaner air can be taken into account, provided that they compensate the consumers in the relevant market for the harm suffered.'[16]

In this case, all of the customers of the grocery delivery companies will benefit from clean air (i.e. 100% of the in-market customers will experience the collective benefit). However, the pool of people who benefit from clean air is much broader, since only 15% of households in the relevant market use online grocery delivery services. If the EC were to take the view that 15% of households did not constitute a substantial overlap, with the total number of beneficiaries of clean air, then the benefits to those outside the market cannot be taken into account.

UK

In contrast, in the UK the fair-share assessment of a climate change agreement is assessed in relation to '*all UK consumers*'.

Step 5: identify the relevant benefits

EU

The EC Guidelines could be open to multiple interpretations on the specific point of dealing with collective benefits.[17] We have yet to see them applied in recent cases. Our interpretation is that there is no 'substantial overlap'. Therefore parties are required to apportion the collective environmental benefits to the consumers of the online grocery services (inside the relevant market), and to disregard benefits to other consumers within the relevant market (the wider group of customers who also benefit from the agreement that are outside of the relevant market). In practice, this means that while the benefit to all consumers totals £202.2m, the benefit to the 15% of households that use online grocery delivery services from the three parties to the agreement is £30.3m (15% of £202.2m).

UK

By contrast, the CMA's approach is to take into account the relevant benefits to all UK consumers because the agreement qualifies as a Climate Change Agreement. The relevant benefits under the CMA approach therefore amount to £202.2m.

[15] European Commission (2023), "Guidelines on the applicability of art.101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements", para.585.
[16] European Commission (2023), "Guidelines on the applicability of art.101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements", para.585.
[17] European Commission (2023), "Guidelines on the applicability of art.101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements", paras 583–84.

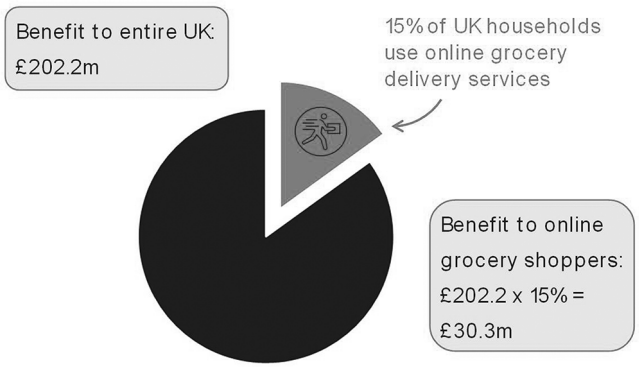


Figure 4: Illustration of benefits with and without apportioning to the relevant market

Step 6: estimate the cost and associated price rise of the measures

Once the benefits of the agreement have been estimated, the next step is to calculate the costs associated with implementing the agreement.

In this case this includes calculating the expenses relating to the companies acquiring and operating the replacement vehicles, and then estimating the associated price rise to consumers. It is assumed that in order to invest in the new vehicles, the companies will each increase prices by a one-off 1% in the first year.

If 15% of households in the relevant market use grocery delivery services and each spends approximately £3,600 on grocery delivery per year, a one-off 1% price rise equates to £36 per household per year, or £152.3m for all 4.23m households.

Table 3: Calculation of the cost associated with the agreement

Households that use online grocery delivery services	4.23m
Average yearly grocery delivery spend	£3,600
Price rise	1%
Increased cost per household per year	£36
Total cost increase	£36 x 4.23m = £152.3m

Step 7: compare benefits and negative effects of the agreement

The final step is to compare the calculated environmental benefits (from steps 3 & 5) with the estimated consumer cost impact (from step 6) to examine whether consumers receive a 'fair share' of the benefits of the agreement.

Figure 5: Weighing of the benefits and costs of the agreement

UK

As the costs of the agreement (£152m) are less than the monetary benefits when taking into account all UK consumers (£202.2m), under the CMA framework this agreement would, subject to the other criteria (e.g. indispensability, no elimination of competition), be unlikely to restrict competition in the UK and could proceed.

EU

However, under the European Commission rules the agreement would be likely to be found to restrict competition. This is because the costs (£152m) are greater than the benefits to consumers within the relevant market—the grocery-delivery customers (£30.3m).

Conclusion

With this hypothetical and stylised example, the empirical differences between the approaches at EC and UK level are stark. However, in practice, the assessment will be much less clearly defined—there may well be flexibility regarding identification of the relevant market, or in

quantifying what represents a 'fair' share of the benefits which may help the EC to bridge this perceived gap. In the meantime, firms should take comfort that the EU and UK authorities are largely aligned, such that the divergences in approach should not be overstated.

In particular, with both regulators operating a clear 'open door' policy, we look forward to seeing authorities issuing more decisions in the coming years to provide additional legal certainty for firms wishing to collaborate on sustainability issues.