

negotiated
agreements

best practice checklist

“green alliance...”

This checklist is intended to be used by policy-makers in government, business and NGOs considering using negotiated agreements. The issues it raises are discussed further in Green Alliance's report *Signed, Sealed and Delivered? The role of negotiated agreements in the UK*. The aim of the checklist is to ensure that consideration is given to: when to use an agreement; the process used to develop an agreement; and the content of an effective agreement.

These guidelines are not intended to be prescriptive. One of the main advantages of negotiated agreements is their flexibility. In some situations not all of the points below will be relevant. However, each of the issues raised will be of concern to at least one stakeholder. For this reason clear justifications for not considering a particular issue should be made to aid the transparency and, ultimately, the success of the process over the long term.

when to use a negotiated agreement

Policy objective



- Is there a clearly defined policy objective?
- Is there a consensus on this objective?
- Is further consultation required?
- What is the relationship of the objective to the broader policy framework?

The policy objectives need to be clearly defined through public consultation before decisions are taken by government on the policy tools to use. The justification for the policy objective and its relationship to broader goals need to be clear. Loosely defined objectives, such as a desire to achieve unquantified reductions in resource consumption, may result in weak, unfocused agreements that are unlikely to fulfil environmental objectives.

Choice of policy tool



- Is a negotiated agreement the most appropriate policy tool?
- Have the advantages and disadvantages of negotiated agreements over other policy tools been explicitly evaluated?
- Will a package of complementary policy measures be required?

The advantages of a negotiated agreement over other approaches need to be evaluated in each case. Benefits may include the ability to go beyond regulatory standards, implementation flexibility and avoidance of unnecessary regulations. These need to be balanced against the potential for poor transparency, weak targets, free-riders and failure to achieve minimum standards. To create the right balance, negotiation may be required on a package of measures.

The relationship of an agreement to existing and proposed measures, such as taxes, regulation and market improvement needs to be clear.

Business participation



- What incentives are there for business participation?
- Is there scope for negotiation on key issues?

Government will need to provide external drivers for the negotiation process such as exemptions from tax for businesses with agreements or the threat of new and prescriptive regulations. Incentives need to be concrete and allow business to compare options.

Costs and benefits



- Have costs and benefits been evaluated in terms of long-term fulfilment of environmental objectives?

European experience shows that choosing negotiated agreements for low perceived administrative cost rather than environmental benefit results in poor policy. Negotiating objective led agreements can be resource intensive for both government and industry but may result in greater environmental returns.

Third party rights



- Will a negotiated agreement result in the removal or denial of rights to third parties?
- Have third parties been identified and consulted with?
- Could the development of a negotiated agreement result in legal challenges?

Regulations can create legal rights for third parties such as NGOs and individuals. Depending on their legal basis negotiated agreements may not. Third parties may want rights to raise challenges if environmental targets in agreements are not met.

Third parties may also have concerns about the democratic accountability of the negotiated agreement process.

Practicality of negotiation



- Is negotiation with the target sector practical?
- How many organisations will be involved in negotiation?
- Can the diversity of the sector be accommodated?
- Do representative bodies and associations exist for the sectors and are all the key players in the sector represented by these bodies?

Developing negotiated agreements can be resource intensive. A reasonable level of sector concentration and homogeneity is likely to be required to prevent negotiations becoming unwieldy. In sectors with large numbers of members, representative trade associations who can negotiate on behalf of the members are required. However, there may not always be a suitable trade association.

process of developing a negotiated agreement

The process of developing a negotiated agreement is as important to establishing the credibility of an agreement as its content. Third parties are unlikely to have the resources or want to be involved at all stages of developing an agreement, but they will want to be aware before the negotiation process starts what opportunities there will be for scrutiny, comment and input. Clear information and good process design can reduce efforts required from all parties.

In developing and concluding an agreement, the following should be publicly and visibly stated in advance of the negotiation process.

Objective of agreement



E.g. adoption of all cost-effective energy efficient measures by industry by 2010.

Relationship to broader government objectives



E.g. What proportion of the climate change strategy targets are the Climate Change Levy negotiated agreements responsible for?

Scope of negotiations



What issues are open/not open to negotiation?

Arrangements for information exchange



Is information asymmetry between government and business likely to be a problem? What process will be used to overcome this problem?

Justification for choosing a negotiated agreement



Why has a negotiated agreement been chosen over other tools such as a tax, regulation, information measures etc?

Indicative timetable for development of agreement



Including expected timetable for: initial proposals, consultation and amendment of proposals, negotiation process, opportunities for incorporation of third party comments, deadline for conclusion of agreement, scrutiny of final proposals by third parties, placing of final agreement in public domain and start date.

Recognition of negotiating entities



Appropriate and representative trade associations must exist, except in monopolistic or oligopolistic sectors, to enable manageable negotiations.

How are organisations that are not members of a trade association dealt with?

Should government agencies represent central government or are specialist negotiators/ facilitators required?

Eligibility criteria for participation in agreement



How is the eligibility for participation in an agreement determined E.g. by sector, size, industrial process. Restrictive eligibility criteria may be required to prevent too many sectors becoming involved.

Trade associations, although having an important role in the agreement's development, may not be appropriate signatories to the final agreement unless there is a means for the association to ensure its individual members deliver targets.

Mechanism for third party involvement during process and prior to adoption of agreement



Bodies which may want to scrutinise agreements for democratic or legal reasons include parliament, Office of Fair Trading, European Commission, NGOs, consumer representatives and unions amongst others.

content of agreement

If negotiated agreements are to successfully deliver environmental objectives, each party's commitments and the mechanisms for delivering them must be clear. The following points need to be considered:

Objectives of agreement (See above)



Targets

These should be clearly defined, ambitious and may be quantitative or qualitative (e.g. to implement a process by a particular date). Baselines must be clearly defined both in size and by date. Research on business-as-usual projections may be required to develop challenging targets. Best effort clauses should be rejected, as they are very hard to measure objectively. Weak targets will hold back innovation.



Parties to agreement

These may be different from the negotiation organisations. A mechanism to ensure that individual companies deliver the objectives of the agreement is essential. A chain of responsibility flowing from government to trade associations through to individual companies and directors is likely to be required to ensure that individual companies fulfil the terms of the agreement. Trade associations can negotiate on behalf of their members but are unlikely to be able to ensure compliance with final agreements. Agreements will therefore need to be signed by individual companies to ensure compliance and also to overcome free-rider problems.



Consideration needs to be given to the means of dealing with legal succession and bankruptcy of firms.

Substantive obligations and commitments

Government, as well as business, may need to make commitments in the agreement, including for example, to monitor progress, disseminate information and withhold new regulations. The costs to business of meeting the environmental targets in the agreement can be mitigated by, for example, giving tax rebates to companies meeting the terms of the agreement.



Each party's commitments need to be easily verifiable and unambiguous.

Clauses that preclude further action to address the issue under consideration during the agreement's duration should be avoided. Government should retain flexibility to accommodate developments such as new evidence on environmental problems.

Sanctions for non-compliance

Clear sanctions that can be used in a timely manner are absolutely essential to the success of agreements. Agreements that lack sanctions are unlikely to deliver.



Penalties for not complying with agreements, how they are applied, and the conditions under which they are triggered, need to be clearly and carefully defined.

Mechanisms that make penalties proportional to the level of performance may be more appropriate than all-or-nothing penalties. Sanctions can include financial penalties, naming and shaming of companies and the introduction of more stringent regulatory inspection for non-compliant companies.

Duration



A start date needs to be stated. Short, medium, and long-term evaluation points should be included to provide for a staged approach and allow on-going evaluation of progress and application of sanctions if required. The agreement should run for a sufficiently long period to allow industry response to ambitious targets.

Fulfilment of agreement



A mechanism for fulfilment of the agreement needs to be specified. For example, with a target to reduce emissions by 20 per cent, is the agreement fulfilled when the sector averages a 20 per cent reduction (good performers subsidise bad), when all companies have achieved a 20 per cent reduction (target as a minimum standard) or on a company by company basis (requires individual companies to sign up)?

The fulfilment mechanism has to be considered alongside who the signatories to the agreement are. The choice of mechanism can have a significant impact on the success of the agreement. For example, the first mechanism suggested above encourages free-riding, the second does not reward sector leaders.

Does early achievement of targets allow early termination, and can extensions be granted?

The following post agreement issues need to be addressed in the content of the agreement.

Monitoring and verification

Monitoring has to be clearly linked to the meeting of agreement terms.

Monitoring by a body acceptable both to the parties to the agreement and to other stakeholders is essential to the credibility of a negotiated agreement.

Consideration needs to be given to who collects data, what data is collected, collection frequency, how issues of commercial confidentiality are dealt with, how data is placed in the public domain and how this information is publicised.

Dissemination of best practice

Dissemination of best practice has been claimed as one of the main advantages of negotiated agreements. Provision should be made in the agreement to ensure that the elements that contribute to target fulfilment are identified and disseminated in the target sector.

Revision mechanisms

Mechanisms to modify agreements following review due to changed circumstances are important, but care must be taken to prevent loss of confidence from other stakeholders because these mechanisms are, or are perceived as, get-out clauses. Reviews should be conducted in a transparent way with the outcome of any review and its justification publicly reported.

Dispute resolution process

The agreement should set up processes and identify organisations to refer to should the need for arbitration arise as well as a statement of competent jurisdiction, e.g. UK private or public law.