



Going Green – staying on the right side of competition law

15 May 2023

Sustainability increasingly top of the agenda

Environmental issues are high on the agenda for many consumers and businesses alike. They are also increasingly an area of focus for competition authorities around the world, including the Competition and Markets Authority (CMA), who are keen to ensure that competition law concerns do not unnecessarily prevent businesses from collaborating legitimately on environmental sustainability initiatives.

The intersection of competition law and environmental sustainability is a current hot topic. We consider a few key developments in this area.

CMA's annual plan 2023/24

In its recent [annual plan](#), the CMA has confirmed that one of its ambitions is for the whole UK economy to “grow productively and sustainably” and a medium-term priority is to help accelerate the UK's transition to a net zero economy and to promote environmental sustainability. Previously, the CMA's annual plans had only focussed on priorities for the coming year. This new medium-term priority setting marks a longer-term focus to the CMA's strategies covering a 3-year horizon.

As detailed below, one of the key ways in which the CMA is seeking to achieve this is through competition law guidance to help to ensure that competition law is not “an unnecessary barrier” for businesses contemplating green initiatives. In addition to its competition law focus, the CMA is using its consumer protection powers to help consumers make informed choices about the green credentials of goods and services, including taking action to tackle ‘greenwashing’ (i.e. misleading claims about the environmental characteristics of products and services). For example, it recently opened a consumer law [investigation](#) following concerns about the eco-friendly and sustainability claims relating to certain fashion products and is following up on its [call for information](#) about sales practices in the green heating and insulation sector. In addition, the CMA has confirmed that its Sustainability Taskforce, set up to lead its work on sustainability, is now operational.

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CMA's guidance on environmental sustainability agreements

As part of its sustainability focus, and to help businesses take action on climate change and sustainability without fear of breaching competition rules, the CMA recently published [new guidance for consultation](#) (which ended 11 April 2023). The CMA's draft guidance on the application of competition law to environmental sustainability agreements (ESAs) should provide some much-needed comfort to businesses that wish to participate in green initiatives, but may be reluctant to do so given the risks of infringing UK competition law. ESAs are agreements or concerted practices between actual or potential competitors aimed at preventing, reducing or mitigating the adverse impact their economic activities have on environmental sustainability or assessing the impact of their activities on environmental sustainability.

The guidance goes further than CMA guidance generally. It sets out the principles and provides examples of arrangements which are unlikely to infringe the Chapter I prohibition (s 2(1) of the Competition Act 1998 (the **Act**)), those which could infringe it and those which might benefit from exemption (under s9(1) of the Act). The guidance highlights the importance of the context of the ESA for the purposes of a competition law assessment and the need to quantify the benefits, which could be future ones.

The CMA is adopting a more permissive approach to climate change agreements with wider consumer benefits to be taken into account when applying the exemption criteria. Thus, the benefits to all UK consumers will be relevant to the assessment of whether the benefits of the climate change agreement outweigh the harm to competition. The CMA is mindful of the evolving landscape and will consider updating/supporting its guidance as its own experience develops.

In an important further step, the CMA is offering an open-door policy, whereby businesses can seek informal guidance. This does not negate the need for businesses (and their legal advisers) to conduct a preliminary competition law self-assessment in relation to a proposed ESA, but does demonstrate the CMA's willingness to work with businesses where their proposed initiatives are not covered by the guidance or where there are uncertainties remaining. Subject to confidentiality considerations and following consultation with the parties, the CMA is looking to publish summaries of the initiatives on which informal guidance has been sought, along with an assessment of the risks identified and proposed solutions. In order to encourage such engagement, the CMA has said that it will not issue fines against parties to an ESA where they have sought informal guidance in advance (and have addressed any concerns if raised by the CMA) and, at a later stage, the ESA is considered to raise competition law concerns. The CMA will also not take enforcement action against ESAs which "clearly correspond" to the examples and are consistent with the principles set out in the guidance.

The European Commission's approach

The European Commission has also acknowledged the importance of sustainability agreements and the need for guidance. In its draft, [revised Horizontal Guidelines](#), it has included a chapter on sustainability agreements, although they should be assessed primarily based on the type of agreement rather than as a special category. Sustainability agreements are broader in nature for these purposes than the CMA's definition of ESAs as they include not only environmental initiatives, but also social objectives, such as employment and human rights, animal welfare and healthy food. The European Commission has recently been consulting on [draft Guidelines](#) on designing sustainability agreements in the agriculture sector so as to benefit from the exclusion from EU competition law introduced in the recent reform of the Common Agricultural Policy.

Differing approaches in various Member States

In addition to the EU's initiatives, a number of national competition authorities (NCAs) have also been taking action including issuing their own guidelines. There have also been some sustainability initiatives assessed under competition rules by NCAs, including the Belgian Competition Authority, Germany's Bundeskartellamt and the Dutch ACM. For example, in 2022 the Dutch ACM issued a 'no action' letter in relation to the agreement between Shell and TotalEnergies to collaborate in the storage of CO₂ in the North Sea¹.

Notes

1. <https://www.acm.nl/system/files/documents/no-action-letter-agreement-shell-and-totalenergies-regarding-storage-of-co2-northsea.pdf>

A reminder of environmental initiatives given a red light

Although various competition authorities are seeking to support legitimate collaboration, the message is clear that they will be alert to cartel activity undertaken in the guise of environmental sustainability. There have already been examples of technical collaboration which have veered into anti-competitive collusion:

- In 2021, the European Commission found that the Daimler, BMW and Volkswagen (VW, Audi and Porsche) groups had been involved in a cartel relating to restrictions on technical development rather than agreeing to fixing prices, sharing markets or allocating customers². Despite the relevant technology being available, they had colluded so as not to compete beyond the legal requirements. In light of the novel nature of the cartel, the European Commission gave guidance in the form of a published letter³ to the car manufacturers as to the aspects of the co-operation which did not raise competition concerns. It also reduced the fines by 20% to €875 million.
- This contrasts with the cartel decision a decade earlier when European producers of washing powder were fined €315 million for infringing competition law⁴. Initially the companies had implemented an initiative through their trade association to improve the environmental performance of laundry detergent products. However, the environmental initiative did not require collusion/co-ordination in respect of their pricing nor other anti-competitive practices to maintain their respective market shares.

Environmental based collective proceedings

Whilst the approach by many competition authorities to environmental initiatives is to be welcomed, there are also interesting recent class action developments in relation to the intersection of competition and environmental issues.

Professor Roberts, a water resource management specialist, is the proposed class representative looking to bring opt-out collective proceedings in the Competition Appeal Tribunal for competition law damages against water and sewerage companies in England on behalf of a significant class of UK bill-paying households. It is understood that the proposed class representative will allege that each of these companies is a monopolist in its locality and, in breach of their dominant position (under s18 of the Act), the proposed defendant companies had increased customer charges due to their alleged unlawful discharges of untreated sewage and wastewater into waterways.

If certified, Professor Roberts' class action will be the first collective proceedings claim in the UK with an environmental focus.

Promoting sustainability on the right side of the line

Given the importance of sustainability, companies - both large and small – may well wish to co-operate with one another to transition to more sustainable business models to help tackle climate change. In publishing further guidance, competition authorities increasingly recognise that greater clarity is needed to help ensure that businesses are not unduly impeded by competition law from moving towards more sustainable business practices.

Whilst the CMA's focus is on environmental sustainability rather than wider social objectives (unlike some competition authorities), its proposed guidance and open-door policy mark a welcome approach to helping businesses navigate this tricky area.

When seeking to pursue their environmental goals through collaboration, businesses will still need to ensure that they stay on the right side of the line from a competition law perspective, both in the UK and in any other relevant jurisdiction where cross-border collaboration is required. With differing approaches and varying policy considerations depending on the country in question, ensuring that any international collaboration on sustainability initiatives takes account of all relevant competition concerns remains paramount.

A version of this article was first published in the inaugural edition of ThoughtLeaders4 Competition Magazine on 12 May 2023, available [here](#).

For further discussion of the CMA's recent draft sustainability guidance, please see [here](#).

For competition law related queries, please contact **Melanie Musgrave** or **Leonia Chesterfield**.

Notes

2. https://ec.europa.eu/competition/antitrust/cases1/202146/AT_40178_8022289_3048_5.pdf
3. https://ec.europa.eu/competition/antitrust/cases1/202146/AT_40178_8022302_3050_5.pdf
4. https://ec.europa.eu/competition/antitrust/cases/dec_docs/39579/39579_2633_5.pdf