



PATH TO COP26: THE ROLE OF COMPETITION LAW IN TACKLING CLIMATE CHANGE

Governance, Sustainability & Society – Part of the Horizon Scanning series

The interplay between competition law and sustainability is a hotly debated topic. Several stakeholders have called for changes to the competition rules in order to help business address the environmental challenges. Following a period of consultation, the European Commission recently published a Competition Policy Brief setting out its views on the issue. The UK Competition and Markets Authority has also just launched its own consultation in this area. This briefing considers the role that competition law can be expected to play in the effort to meet the targets that will be agreed at the UN Climate Change Conference (COP26) in November.

Antitrust

The European Commission believes that environmentally ambitious policies will only be effective “if firms are pushed to innovate by competing intensely and fairly with each other.” It does, however, recognise that there are circumstances where unilateral action may not be sufficient. In order to encourage companies to jointly invest, identify solutions, produce, and distribute sustainable products, the Commission intends to provide guidance on the circumstances in which such cooperation complies with the antitrust rules. The guidance will be provided in the context of the ongoing revisions of the guidelines on vertical agreements and horizontal cooperation, the final versions of which are expected to come into force in June 2022 and January 2023, respectively. Ahead of then, the Commission sets out in the Policy Brief its current thinking on how the antitrust rules can support the green transition.

To begin with, the Commission notes that many sustainability agreements may in fact not restrict competition. It therefore intends to provide examples illustrating how sustainability objectives can be pursued safely using different types of

cooperation agreements, for example, via open standard setting. Where cooperation does restrict competition, the Commission intends to provide guidance on how sustainability benefits can be taken into account when assessing exemptions under the competition rules. The Commission notes that both qualitative and quantitative benefits may be taken into account. The benefits will not necessarily need to take the form of a direct or immediately noticeable product quality improvement or cost saving. However, the users of the relevant product must appreciate the benefits and be ready to pay a higher price for them.

The Commission has indicated that it intends to continue with its approach of assessing both the anticompetitive effects and benefits of a practice within the confines of each relevant market. It notes, however, that benefits achieved on separate markets may be taken into account provided that the group of consumers affected by the restriction and the group of benefiting consumers are substantially the same. The Commission considers that this should allow it to take into account sustainability benefits that accrue for the benefit of society as a whole. For example, if an agreement leads to a reduction in pollution to the significant benefit of society, the Commission notes that a fair share can be apportioned to the harmed consumers and so they can be fully compensated for the harm.

While the Commission is willing to take into account benefits to the wider society, it appears unwilling to move away from its interpretation that the consumers of the relevant product must be fully compensated. The relevant legislation, Article 101(3) TFEU, only requires that such consumers receive a fair benefit. A less strict approach had been promoted by respondents to the Commission’s consultation and appears to be supported by national competition authorities such

as the [Netherlands Authority for Consumers and Markets](#) and the [Hellenic Competition Commission](#). It will therefore be interesting to see how the Commission covers this issue in the forthcoming guidance and whether the inclusion of hypothetical examples will provide a greater degree of certainty for companies.

In order to be exempt under the competition rules, any restriction of competition must be indispensable to obtaining the relevant sustainability benefits. With the aim of assisting this analysis, the Commission intends to provide guidance on when and how market failures would necessitate an agreement between companies. It will also explain when existing regulation does or does not provide sufficient incentives for companies to produce in a sustainable manner. For example, the Commission notes that there may be instances where companies need to cooperate in order to override a first mover disadvantage and nudge consumers towards using more expensive sustainable products. However, the Commission also notes that “if consumers do value sustainable products, profit-maximizing companies are expected to offer such products independently rather than by cooperating”. It is currently unclear how this will interplay with the Commission’s insistence that it will only take into account benefits for which consumers are ready to pay a higher price.

The Commission’s aim for the revised guidelines is to provide clarity that would enable self-assessment and encourage investments in sustainable products, while preserving the effectiveness of enforcement. Companies are encouraged to approach the Commission with their projects in the coming months in order to inform the revision of the guidelines. In parallel, the Commission remains ready to consider requests for individual guidance letters in relation to sustainability initiatives that raise novel issues. The Commission also notes that it will consider adopting decisions finding that the competition rules are not applicable to particular sustainability initiatives where the public interest so requires.

Outside of the European Union, the UK Competition and Markets Authority (CMA) has already provided some [high level guidance](#) in this area. It has also recently launched a [consultation](#) asking for views on the ways in which the UK competition regime could be changed to help

achieve the UK’s sustainability goals. The consultation is open until 10 November 2021.

Further afield, it remains to be seen whether the US and other major global antitrust agencies will heed the calls for further guidance in this area.

Merger control

Several stakeholders have called for the competition authorities to take into account the positive and negative environmental impacts of deals when conducting their merger control assessments.

The CMA has provided some guidance on this issue in its [Merger Assessment Guidelines](#), which note that “benefits in the form of environmental sustainability and supporting the transition to a low carbon economy are relevant customer benefits in some circumstances”. That means that the CMA could treat those benefits as sufficient to outweigh a substantial lessening of competition (SLC) caused by a merger (and so not refer the deal to an in-depth investigation) or could take them into account when considering remedies. For these purposes, the CMA may take into account direct, indirect and future customers of the merged entity. The benefits may be taken into account even if they are expected to be realised in markets other than the one subject to an SLC finding. This should enable the CMA to take into account a broad range of benefits to consumers and society more generally.

The CMA also notes in its [ongoing consultation](#) that mergers may give rise to rivalry-enhancing efficiencies which could contribute to the UK’s sustainability goals. For example, a merger might enable a more efficient and sustainable production process or better innovation and R&D. In order to take these efficiencies into account, they must be relevant to the process of rivalry in the particular market in which the CMA is considering a possible SLC. If the efficiencies outweigh any anticompetitive effects, the CMA may decide not to find an SLC.

The CMA stresses, however, that assessing relevant customer benefits and rivalry-enhancing efficiencies is challenging. Moreover, weighing-up the environmental benefits against potential competition concerns will require value judgments. The CMA invites stakeholders to provide their views on these issues and also seeks

suggestions for changes to the merger control regime that might contribute to protecting the environment.

At this stage, the European Commission has not heeded the calls for more guidance on the circumstances in which sustainability benefits may be used to clear a merger. The [Competition Policy Brief](#) just notes the pre-existing position under the [Horizontal Merger Guidelines](#) that in order to take efficiencies into account they must “benefit consumers, be merger-specific and be verifiable”.

The Commission appears to believe that a more vigorous application of the current merger control rules will best support the green transition. The Commission [refers](#) to previous cases in which innovation theories of harm or consumer preferences for sustainable products were considered as evidence that the EU Merger Regulation is well suited for addressing climate change issues. The Commission also refers to its [controversial new Article 22 policy](#) as a tool to tackle possible enforcement gaps in respect of acquisitions of nascent competitors and therefore stop “killer acquisitions” of green innovators. It remains to be seen whether the Commission will consider these issues further as part of its [upcoming review](#) of competition policy to ensure that Europe is fit for the digital age.

Subsidy control rules

It is widely recognised that significant investment from both the public and private sector is required to address the climate change challenge. The co-investment of public and private funds will mean that the issue of subsidy control will play a significant role.

In the UK, the Subsidy Control Bill is still making its way through Parliament. However, the UK Government has [noted](#) that it is intended to allow flexibility to meet public sector objectives, including those relating to the environment and climate change. Further guidance is expected to reflect the specific nuances for different categories of subsidies, including energy and environmental projects.

In the EU, the Commission recognises the need to adapt State aid policy to allow governments to invest more alongside private enterprise. The Commission points to the revision of three key policy documents to help support the transition:

- New [Climate, Energy and Environment Aid Guidelines](#) (CEEAG) will come into force in January 2022. The guidelines will expand the scope for using State aid to help address climate issues and allow governments to fund a larger share of the costs. The CEEAG will apply broadly across many areas and will cover all technologies that may help meet Europe’s climate change targets. The CEEAG will also discourage aid to projects involving the most polluting fossil fuels and will discourage support for gas projects that are more than strictly a temporary solution.
- The General Block Exemption Regulation has been [revised](#) to facilitate the granting of State aid - without prior approval by the Commission - in areas important for the green transition.
- The Commission is also [reviewing](#) the State aid rules on Important Projects of Common European Interest (“IPCEI”) to clarify the conditions under which Member States can pool public and private resources for developing innovative projects in key sectors. The IPCEI rules are intended to enable breakthrough innovation in strategic value chains. In the last two years, the Commission has approved investments of more than €6 billion by 12 EU countries to develop innovative, greener batteries and new projects are in the pipeline to help decarbonise industry and transport.

The Commission also believes that other State aid policy measures, such as the [Regional Aid Guidelines](#) and sectoral frameworks, will play a key role in the transition. In addition, the [Recovery and Resilience Facility](#), which is intended to aid the recovery from the Covid-19 crisis, will play a role in steering investments towards greener objectives as it requires at least 37% of the expenditure to support the green transition.

Looking to the future

Over 200 nations are expected to pledge new carbon reduction targets at COP26. Regardless of the exact outcome of the conference, the decisions and guidance issued by the competition authorities over the coming years will have a real impact on businesses as they seek to address the new challenges.

Environment related enforcement action

Competition authorities are keen to stress that protecting competitive markets contributes to the pursuit of sustainability objectives. Recent enforcement actions and ongoing consultations show that the authorities can be expected to continue applying the rules across all sectors of the green economy:

- Antitrust: The Commission [imposed](#) fines of €875 million in July 2021 after finding that five car manufacturers colluded on technical development in the area of nitrogen oxide cleaning. The Commission found that the companies had agreed to avoid competition on cleaning in excess of minimum legal requirements (despite the relevant technology being available). The CMA has also recently announced an antitrust investigation into Electric Highway's long-term exclusive arrangements with motorway service operators, which may "make it difficult for other operators to provide competing charge-points".
- Markets regime: The CMA's [electric vehicle charging report](#) (July 2021) found concerns in relation to the rollout of electric vehicle charge-points and warned that more needs to be done ahead of the planned ban on sales of new petrol and diesel cars. The CMA has also [asked](#) stakeholders for suggestions of other markets that might benefit from a market study in order to help address the UK's sustainability goals.
- Consumer protection law: The CMA [announced](#) in October 2021 that companies offering products and services that claim to be "eco-friendly" may be subject to consumer law enforcement action if their claims prove to be misleading. The CMA also published the Green Claims Code containing guidance for businesses to help them understand and comply with their obligations. The CMA has also [asked](#) for views on how the UK consumer protection regime could be changed in order to help achieve the UK's sustainability goals.



Lisa Wright

Partner

T +44 (0)20 7090 3548

E lisa.wright@slaughterandmay.com



Paul Walter

Senior BD Consultant

T +34 646 615 276

E paul.walter-consultant@slaughterandmay.com

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