



COMPETITION LAW AND SUSTAINABILITY: EXPECTATIONS FOR 2021

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

The interplay between competition law and sustainability was a hotly debated topic in the competition law community in 2020. This briefing provides an indication of the developments we can expect in this space in 2021 from Europe's competition regulators.

European Commission

The first major event of 2021 is the European Commission's (EC) online conference on 4 February to discuss the [outcome](#) of its 'Call for Contributions' (the details of which can be found in our [previous briefing](#)). Registration for the conference is still [open](#). The [agenda](#) for the conference largely follows the structure of the 'Call for Contributions' with initial sessions on what needs to be achieved and the interplay between competition law and sustainability, followed by more detailed sessions on the antitrust, merger control and State aid rules.

It will be interesting to see whether the 'Call for Contributions' leads to the EC taking a more activist stance, for instance by providing specific sustainability guidelines for use by businesses and advisors when assessing sustainability agreements. Those wanting the EC to take a more radical approach may, however, be disappointed, as Commissioner Margrethe Vestager has already started managing expectations by [publicly stating](#) that the EU competition rules will see a "reboot" rather than a "revolution".

We also expect the EC to be busy in 2021 with the ongoing review of its guidelines on State aid for environmental protection and energy (the [EEAGs](#)). The EEAGs set out the framework under which the EC will assess the compatibility of State aid granted to support projects to enhance environmental protection and energy generation adequacy. In

November, the EC launched a consultation seeking views on whether the EEAGs should be amended. As the EC acknowledged when publishing the results of its [fitness check evaluation](#), "*there are indications that the scope of the guidelines might have been too restricted and that the guidelines are too tightly focused on specific aid categories and technologies.*" In particular, the EC noted that as the European Green Deal has significantly stepped up the EU's environmental ambitions, a more significant review of the EEAGs is required.

As the consultation has now closed, the next step in the EC's review is for the Commission to publish a revised draft of the EEAGs, which will be open for further public consultation. It will be interesting to see the extent of the changes in these draft guidelines, and whether the EC seeks to address the criticism that the existing EEAGs are too complex. The EC intends for the revised EEAGs to enter into force on 1 January 2022.

UK Competition and Markets Authority

We expect the Competition and Markets Authority (CMA) to become more active on sustainability initiatives in 2021.

On 27 January, the CMA published an [information sheet](#) to help businesses looking to work together on sustainability projects to navigate competition law. Although this high level document largely restates existing competition law guidance, the CMA explained in an accompanying [blog post](#) that it will consider taking further steps as the international discussions on competition law and sustainability develop. This aligns with the CMA's [draft Annual Plan for 2021/22](#), which promised "*high level materials*" for businesses as an "*interim step*" while

the CMA examines in greater depth possible solutions to ensure that competition law does not act as an unnecessary obstacle to sustainability agreements.

The CMA's [draft Annual Plan for 2021/22](#) also reiterates its promise from its 2020/21 Annual Plan to make "*supporting the transition to a low carbon economy*" one of its priorities. The means by which it intends to pursue this priority in 2021/22 are largely the same as they were last year: by contributing to international discussions on the topic, devoting resources to provide advice and support to Government on policymaking in this area, and considering how its existing tools can help businesses engaged in sustainability initiatives to comply with competition law. The CMA's efforts in 2020 may have been hampered by the impact of COVID-19, but we should expect the CMA to take a more proactive stance under the 'new normal' in 2021.

We otherwise expect the CMA to be busy in 2021 working on its investigation of 'eco-friendly' descriptions and labels and its market study into electric vehicle charging.

The first investigation, [announced](#) in November, is concerned with the so-called 'greenwashing' of products or services. This occurs when the positive environmental impact of a product or service is exaggerated, or if it implies that items are eco-friendly when this is not true. The investigation will include a number of sectors, but is expected to focus on areas where consumers appear to be most concerned about 'eco-friendly' claims, including fashion, cosmetics, food and cleaning products. In due course, the CMA plans to issue guidelines for businesses regarding greenwashing and the provision of environmental information, so as to prevent misleading claims that could erode consumers' trust.

With the Dutch competition authority, the CMA is also co-leading an International Consumer Protection and Enforcement Network project on greenwashing, with the aim of producing high-level guidance for businesses that could help set consistent global expectations on the truthfulness of environmental claims.

Separately, the CMA's [market study into electric vehicle charging](#) is intended to make sure that this fast-growing sector works well for UK drivers. This

follows the UK Government's decision to bring forward the ban on new petrol and diesel vehicles to 2030, thereby making the switch to electric vehicles more imminent for UK drivers.

Now that the UK has left the EU, it will be interesting to see if there is a divergence in the CMA's positioning on this subject compared to other European regulators. We anticipate that, to the extent there is divergence, it will be more in terms of rhetoric than substance given the CMA is still collaborating with EU regulators, such as their greenwashing work with the Dutch authority.

Dutch Authority for Consumers and Markets

The Dutch Authority for Consumers and Markets (ACM) was the first competition authority in the EU to take a formal stance on sustainability focused collaborations. In July 2020, it published draft guidelines in respect of so-called sustainability agreements entered into between competitors or vertically linked companies. Further details on these guidelines can be found in our [previous briefing](#).

On 26 January, the ACM published a [revised draft](#) of these guidelines in response to feedback. The most significant change is the provision of more information about the difference between environmental-damage agreements and other sustainability agreements. This separation is important when it comes to the 'fair share' test. The ACM proposes that for environmental-damage agreements the expected benefits for society as a whole, not just those of the direct consumers, can be taken into account. While the guidelines previously noted this approach would only apply where the agreement efficiently contributes to compliance with an international or national standard, the latest draft helpfully states it will also apply if the agreement assists in realising a concrete policy goal, such as a governmental target to reduce CO2 emissions.

The revised guidelines also provide further information on the ways in which the benefits of sustainability agreements can be substantiated. Of importance is the ACM's recognition that it will take into account long-term benefits as these are typical of many sustainability agreements. The ACM has also published a [technical report](#) by three economists, which explains the methods that may be used for

substantiating the benefits of the sustainability agreements. The ACM states that the report, which was commissioned jointly with the Hellenic Competition Commission (HCC), is intended to form a scientific basis for a more open approach to sustainability agreements in competition policy.

The ACM declared its revised draft as “*ready for further European coordination*” and stressed the importance of drawing up European-wide guidelines. In doing so, and by largely reaffirming the position taken in its initial draft guidelines, the ACM has helped to set the tone for the EC’s conference in February. Given the ACM’s early activism in this space and its involvement with the CMA on its greenwashing project, we sense that the ACM’s activity will continue to drive discussions on this topic in 2021.

Other European regulators

In addition to commissioning the technical report referred to above, the HCC has contributed to the debate by publishing a [Staff Discussion Paper](#) that makes a number of suggestions, including the creation of a competition law sustainability “sandbox” in which market participants could collaborate on sustainable business projects with some measure of protection from competition rules. It also proposes the establishment of an “Advice Unit” comprising experts from different regulatory authorities who could provide informal advice on sustainability-related initiatives. The public consultation on these proposals is ongoing. It will be interesting to see if anything emerging from the EC conference in February alters the substance of the HCC’s proposals.

The French Autorité de la concurrence (the **Autorité**) [made clear](#) early in 2020 that it would place sustainable development “*at the core of [the Autorité’s] action*”. As of the latest update in

December, the Autorité [announced](#) it had set up a dedicated sustainability team within its investigation services, and would continue to integrate sustainable development into its decision-making practices throughout 2021.

Interestingly, the German Federal Cartel Office (FCO) currently appears to be heading in a different direction on this issue. Following a [virtual working group meeting](#) last year on this topic, the FCO published a [paper](#) indicating that it believes its role in promoting change is limited: “[*the FCO’s*] *only responsibility is the protection of competition*”. It states that sustainability is a policy consideration. Should a conflict arise in a certain case between competition law and sustainability then it is for government ministers to make the ultimate decision via Germany’s ministerial authorisation process, not for the FCO to decide. This position was reiterated by the German Federal Government in its [response](#) to the EC’s ‘Call for Contributions’.

Conclusion

Looking ahead, we expect the debate over how competition law interacts with sustainability objectives to intensify. This is especially the case in the run-up to COP 26 in November 2021, which will drive increased scrutiny of government authorities and what they are doing to achieve sustainability targets.

The role of European competition regulators in shaping the ability of businesses to collaborate to achieve sustainability objectives should not be underestimated. Far from being a theoretical debate, the decisions taken by regulators over the coming year will have a real impact in determining the degree to which businesses can work together to meet the world’s sustainability goals



Lisa Wright

Partner

T +44 (0)20 7090 3548

E lisa.wright@slaughterandmay.com



Andrew Gilbert

Associate

T +44 (0)20 7090 3681

E andrew.gilbert@slaughterandmay.com

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