



# MODERNISING COMPETITION LAW: EUROPEAN AGENCIES LOOK TO ADDRESS SUSTAINABILITY GAP

Governance and Impact – Part of the Horizon Scanning series

Promoting sustainability, including environmental objectives such as fighting climate change, has not traditionally been a core function of competition law enforcement. There is a growing view that competition law has even had a chilling effect on potential sustainability initiatives of businesses and has therefore been part of the problem rather than the solution.<sup>1</sup> But this may be set to change.

This article gives an overview of recent policy statements and proposals in Europe to adapt competition law enforcement to ensure it contributes to, rather than hinders, sustainability. The article concludes that there is growing momentum for change but that it remains to be seen whether the agencies' recent statements and proposals will result in specific and sufficiently bold action.

## A growing recognition of the need for change

There is a general and growing recognition across the globe of the pressing need to address sustainability challenges, such as climate change. For example, the UK's Financial Conduct Authority recently proposed changes to its rules that would require listed companies to disclose more information about how climate change is likely to impact their business.<sup>2</sup> Similarly, the Fashion Pact is a recently established global coalition of companies in the fashion and textile industry that have committed to upholding key environmental goals in their business operations.<sup>3</sup>

This trend is also affecting competition law enforcement, in particular the prohibition on anti-competitive agreements, which is designed to prevent companies from cooperating to restrict competition and, for example, raise prices or reduce quality to the detriment of consumers. But many are now suggesting that competition law has also made it more difficult for businesses to collaborate on desirable shared sustainability objectives (such as emissions reduction or recycling targets). The competition law "sustainability gap" appears to be two-fold. There is uncertainty about:

- when businesses can collaborate or what they can collaborate on, i.e. which initiatives are unlikely to restrict competition at all and therefore fall outside the scope of the competition rules; and
- the extent to which initiatives that do restrict competition are capable of exemption because they achieve sustainable objectives.

This lack of legal certainty is regarded by many as having a chilling effect on desirable cooperation between businesses on sustainability initiatives.

## Recent policy statements

Recent policy statements notably from the European Commission and the competition authorities in the UK, the Netherlands and France pick up on this theme.

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1. See e.g. [the Fairtrade Foundation's study of industry attitudes towards collaboration in the UK grocery sector](#). For an academic assessment of how enforcement of competition law may have hindered sustainability initiatives, see Simon Holmes, *Climate change, sustainability and competition law*, available [here](#).

2. More details are [here](#).

3. More information is available [here](#).

## European Commission - recent statements on competition law and sustainability

Against the backdrop of the inclusion of sustainability at the top of the EU's agenda for the 2019-2024 period,<sup>4</sup> Margrethe Vestager, the EU's Competition Commissioner, has recognised the benefits of competition for sustainability, noting for example that “competition also helps to drive innovation, and expand our society's stock of ideas and technologies that help us to live more sustainably”.<sup>5</sup> She recognised that “it's important that companies know about the opportunities which they already have, to work together for sustainability.” She believes the EC's upcoming review of the rules and guidelines on horizontal cooperation “could be [an] opportunity to explain how companies can put together sustainability agreements without harming competition.”<sup>6</sup> However, Vestager was clear that in her view there is no need for “new competition rules” to make sustainability agreements possible.

In a March 2020 speech on keeping the EU competitive in a green and digital world, Vestager indicated that the EC should also make use of the other powers it has, “to make it clear to businesses how they can cooperate, without harming competition. So we'll be ready to give informal guidance when it's needed – in

new or unclear situations, for instance.<sup>7</sup> This statement appears to refer to the EC's ability to provide informal guidance on the application of competition law to individual cases.<sup>8</sup> Vestager's statement was recently echoed by Olivier Guersent, Director General at DG Competition, European Commission.<sup>9</sup>

The EC's signal that it is willing to give informal guidance is notable because until very recently, no such informal guidance had been issued since the current system of EU enforcement was introduced in 2004.<sup>10</sup> That changed in early April 2020 when, in the context of the escalating COVID-19 crisis in Europe, the EC set up a dedicated mailbox that businesses can use to seek informal guidance on specific initiatives, and provided such guidance (by issuing a “comfort letter”) concerning a specific cooperation project.<sup>11</sup> It also adopted a Temporary Framework to provide antitrust guidance to companies cooperating in response to urgent situations related to the COVID-19 outbreak.<sup>12</sup>

Lastly, a recently published Commission communication on the EU's “Farm to Fork” strategy suggests that the Commission may also issue sectoral guidance in relation to sustainability initiatives. In particular, as part of the strategy, the Commission “envisages clarifying the competition rules for collective initiatives that promote sustainability in supply chains”.<sup>13</sup>

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4. See Commission agenda priorities, including the European Green Deal (which aims to make the EU ‘carbon neutral’ by 2050) [here](#) and [here](#). The Green Deal objectives have been integrated into the Commission's proposal for a EUR750 billion COVID-19 recovery plan (announced on 27 May 2020) ([see here](#)). Announcing the plan, Commission President Ursula von der Leyen said that: “The recovery plan turns the immense challenge we face into an opportunity, not only by supporting the recovery but also by investing in our future: the European Green Deal and digitalization will boost jobs and growth, the resilience of our societies and the health of our environment”.
  5. Vestager's speech is available [here](#).
  6. The EC recently consulted on the review of the Horizontal Block Exemptions Regulations - see [here](#).
  7. Vestager speech, March 2020, available [here](#).
  8. Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters). Vestager also said in her March 2020 speech: “And we should consider making use of our power to decide formally that the antitrust rules don't apply to an agreement, when that agreement doesn't harm competition. So that, by replacing doubt with certainty, we can unlock new possibilities for cooperation.” This refers to the power of the EC to adopt decisions finding that an agreement or practice does not infringe Article 101 TFEU, where the Community public interest so requires. See Article 10 of Regulation 1/2003. The EC, acting on its own initiative, may by decision find that Article 101 TFEU is not applicable in a certain case, either because the conditions of Article 101(1) TFEU are not fulfilled or because the conditions of Article 101(3) TFEU are satisfied.
  9. Guersent was speaking at the ABA Antitrust Virtual Spring Meeting – see MLex article, DG comp returning to the office from May 4, 28 April 2020.
  10. The Commission has suggested that this is because it was keen to establish the practice of firms self-assessing compliance of their agreements with EU competition following the 2004 reforms. See Guersent at the ABA Antitrust Virtual Spring Meeting – see MLex article, DG comp returning to the office from May 4, 28 April 2020.
  11. The project is aimed at avoiding situations of shortages of critical hospital medicines.
  12. The [Temporary Framework Communication](#) explains the main criteria that the EC will follow in assessing these possible cooperation projects. Such projects would not be problematic under EU competition law or they would not give rise to an enforcement priority if they would be: (i) designed and objectively necessary to actually increase output in the most efficient way to address or avoid a shortage of supply of essential products or services, such as those that are used to treat COVID-19 patients; (ii) temporary in nature; and (iii) not exceed what is strictly necessary to achieve the objective of addressing or avoiding the shortage of supply.
  13. The Commission has scheduled this clarification of the rules for the third quarter of 2022 so it is some time off. The EU's “Farm to Fork” strategy aims to make European agriculture more resilient and environmentally friendly. The strategy sets a number of targets for 2030, including a 50 percent reduction in the use of chemical pesticides. See [Commission Communication, A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system, COM\(2020\) 381](#).

## The UK CMA – sustainability objective in its 2020 / 21 annual plan

The UK Competition and Markets Authority (CMA) recently published its annual plan for 2020/21 and one of its priorities in the plan is “supporting the transition to a low carbon economy”.<sup>14</sup>

The CMA proposes to do this through a variety of means, including by “furthering our knowledge of the interaction between competition and consumer protection law and achieving the transition to a low carbon economy”. It also intends to:

- “contribute to the nascent international discussions on the role of competition and consumer law in supporting the low carbon economy”;
- devote resources to providing advice and support to Government on the impact of policies on competition and consumers in relation to climate change and sustainability; and
- support businesses “in adapting to climate change while ensuring that markets remain competitive and open to disruptive innovation”. It will therefore consider how its existing tools can help businesses and “communicate better to ensure that businesses engaged in sustainability initiatives know how to comply with competition law” to avoid a chilling effect.

## The Dutch and French competition authorities 2020 plans

Finally, the Dutch competition authority’s 2020 Agenda announced that the authority will “introduce guidelines regarding sustainability and competition”, including by explaining “how arrangements between businesses regarding sustainability, and specifically the energy transition, fall within the Dutch Competition Act”,<sup>15</sup> while the French competition authority’s 2020 Roadmap places sustainable development “at the core of [the authority’s] action” and promises that the authority will take part “in a collective discussion on how climate issues can be incorporated by [a] group of [French] regulators”.<sup>16</sup>

## Will this result in specific and sufficiently bold action?

### Providing general guidance

It is encouraging that the EC and the Dutch competition authority are considering introducing general (and, for the EC, sectoral) guidance in this area. The EC’s Temporary Framework guidance to firms with a need to cooperate in the context of the COVID-19 crisis may provide a useful blueprint for equivalent guidance on the compatibility of sustainability initiatives with EU competition law.

The CMA’s Annual Plan and the French authority’s 2020 Roadmap do not make clear whether general guidance is envisaged for the UK and France, respectively. But it is likely to be important if the CMA is to succeed in its aim of supporting the UK’s transition to a low carbon economy and the French authority in its aim to place sustainable development at the core of its action. Businesses would likely appreciate general guidance on the authorities’ approach to assessing the compatibility with competition law of sustainability agreements. Similar to the EC, the CMA issued general antitrust guidance on business cooperation in response to COVID-19 reassuring businesses that it would not take enforcement action against coordination between competing businesses if the coordination meets certain specified criteria.<sup>17</sup> Again, this may provide a useful precedent for the creation of similar guidance on sustainability initiatives.

### Providing specific guidance in individual cases

It is also encouraging that the EC is open to providing informal guidance to firms considering specific sustainability initiatives. The provision of such guidance in the context of COVID-19 lends credibility to the EC’s signal that it is willing to do the same in relation to sustainability goals after so many years without the informal guidance process being used.

The CMA’s Annual Plan does not mention the possibility for businesses to request informal guidance on sustainability initiatives in individual cases. This is also true of the Dutch 2020 Agenda and the French 2020 Roadmap. All three authorities did however

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14. <https://www.gov.uk/government/publications/competition-and-markets-authority-annual-plan-2020-to-2021>

15. The ACM 2020 Agenda is available [here](#).

16. For more detail, see [here](#).

17. In particular, the coordination should be (i) temporary; (ii) clearly in the public interest; (iii) contributes to the benefit or wellbeing of consumers; (iv) deals with critical issues that arise as a result of the COVID-19 pandemic; and (v) lasts no longer than is necessary to deal with these critical issues (CMA, CMA approach to business cooperation in response to COVID-19 (CMA118), p. 6). For detailed commentary, please see our briefing on COVID-19: Competition Law Considerations (update on competitor collaborations), available [here](#).

express a willingness to help businesses understand how their proposals to cooperate in the context of COVID-19 would be assessed under competition law.<sup>18</sup> Those considering cooperation initiatives designed to achieve sustainability goals would likely welcome the same opportunity to seek informal comfort.

It may be that firms can be encouraged to use existing mechanisms to discuss their proposals with the authorities. It may also be the case that authorities need to consider whether those existing mechanisms are fit for purpose. The CMA for instance does have existing processes that could be used, for example its short form opinions (SFO) tool.<sup>19</sup> However, the SFO tool has not been well used to date. There may be structural reasons for this, for example, resistance among businesses to the decisions/opinions being published or low levels of awareness of the procedures. To ensure that it is effective in providing businesses with the guidance and transparency that they require, the CMA may need to take the time to understand the reasons for the low usage and revamp its process, if required.

### Is legislative reform needed?

So far, the authorities appear to be focusing on what can be done to facilitate sustainability initiatives of companies within existing legislative frameworks. A number of past decisions by European competition authorities illustrate that it is possible for agreements that promote sustainability but restrict competition to be exempted from the prohibition on anti-competitive agreements within the existing frameworks, although this was by no means common practice. The EC, for example, approved an agreement to improve the energy efficiency of washing machines (the CECED decision).<sup>20</sup> While the Commission found that the agreement would reduce some aspects of competition, it concluded that the benefits of reduced emissions from electricity generation, as well as the cost savings from more energy-efficient equipment, outweighed these restrictions. The Commission

therefore interpreted the condition of “a fair share of the benefits for consumers” (for exemption under Article 101(3) TFEU) broadly to include “collective environmental benefits”.<sup>21</sup>

However, a different approach may be required - or desirable from an efficiency and legal certainty point of view - to legitimise proposed actions that cannot be favourably assessed using existing concepts (even if systematically interpreted broadly or progressively). Legislative reform, for example, by amending the exemption criteria so they specifically refer to sustainability or adopting a specific block exemption regulation for sustainability agreements may be necessary.<sup>22</sup>

## Conclusion

Authorities are still thinking through the implications and implementation of the proposals and it remains to be seen whether these will result in clearer guidance and bolder decisions therefore addressing the sustainability gap and easing the tension between competition law and sustainability initiatives of businesses. But there is clearly a growing momentum behind their introduction and the quick and decisive action of some authorities in response to the COVID-19 crisis might serve as an example or catalyst for change. So watch this space!

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18. CMA, CMA approach to business cooperation in response to COVID-19 (CMA118), p. 11. For the Dutch authority, see [here](#) and the French authority, see [here](#).

19. For more information, see: <https://www.gov.uk/government/publications/guidance-on-the-cmas-approach-to-short-form-opinions>

20. [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_00\\_148](https://ec.europa.eu/commission/presscorner/detail/en/IP_00_148)

21. The Commission noted that the “environmental results for society would adequately allow consumers a fair share of the benefits even if no [economic] benefits accrued to individual purchasers”. For commentary on this decision, see for example, Simon Holmes, Climate change, sustainability and competition law, available [here](#).

22. On the possibility of new legislation, see also Jordan Ellison, A Fair Share: Time for the Carbon Defence? (February 21, 2020), available [here](#). Also interesting in this context is the Dutch legislative proposal regarding sustainability initiatives (“Wet ruimte voor duurzaamheidsinitiatieven”), which was submitted to the Dutch House of Representatives last year. The [proposal](#) aims to encourage collaboration between undertakings towards sustainability goals by removing the barrier of competition law.

## Get involved in the conversation

We are talking to a number of clients about these issues and would be keen to hear from others on any specific concerns or questions that you may have on the application of competition law to sustainability initiatives.

The new focus on sustainability evidenced by the policy statements discussed in this briefing presents an opportunity to shape the debate on the interface between sustainability and competition law and we are keen to ensure that our contributions reflect a range of views and experiences.

If you would like to get in touch, please contact the authors of this briefing or your usual Slaughter and May contact.

## Sustainability and Climate Change at Slaughter and May

Slaughter and May, along with a number of other law firms and organisations, is a member of the Chancery Lane Project, a pro bono collaboration to develop new model contracts and laws to help businesses tackle climate change.<sup>23</sup>

Our teams have also been advising clients on their sustainable finance arrangements, which fund their sustainability goals.

More information about how green finance can support broader business goals is available [here](#).

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23. Further information is available at <https://chancerylaneproject.org>