

In recent months, competition authorities and regulatory bodies in the UK and across the world have been launching studies, investigations and consultations concerning the critically important issue of sustainability. In its draft 2021/22 Annual Plan, the UK's Competition and Markets Authority (CMA) has identified climate change and the transition to a low carbon economy as a key strategic priority. Businesses can expect sustainability to play an increasingly important role in competition law and consumer law, in support of environmental and climate policies and regulation.



Business cooperation and competition law

Achieving ambitious environmental aims may mean that businesses need to work together on sustainability projects, for example because an individual business would not have the resources to fund the cost of new technologies and processes, or because a project is of general application to a particular sector. Competition law clearly prohibits collusion involving price fixing, market sharing and/or bid rigging. But what is the position when businesses come together with the aim of reducing carbon emissions (or achieving other sustainability goals)?

Under the current competition law regime, it is for businesses to self-assess whether their cooperation gives rise to any competition risk. Business cooperation may be permissible under competition law if businesses can demonstrate that the cooperation produces benefits for consumers that outweigh any anti-competitive effects. In practice, it may be difficult to satisfy this test, not least because it may not be easy or possible to quantify environmental benefits. There is further uncertainty (and risk) for businesses as there is little relevant case law and no standalone exemption or guidance for sustainability agreements. Whilst R&D and specialisation agreements may be automatically exempted from competition law provided they satisfy certain requirements, sustainability agreements will not always fall within these exemptions (which are due to expire on 31 December 2022).



New competition guidance for sustainability agreements?

In its [draft Annual Plan 2021/22](#), the CMA has indicated that it will provide "high level materials" to enable businesses to cooperate when engaging in sustainability agreements. This plan is currently being consulted on (until 28 January 2021), with a final version expected to be published by the end of March 2021.

This follows the approach taken by other national competition authorities, such as the Netherlands

Authority for Consumers and Markets (ACM), which published [draft competition law guidelines](#) for sustainability agreements between competitors in July 2020. The Dutch guidelines distinguish between two types of sustainability agreement: those that do not restrict competition (e.g. codes of conduct promoting environmentally-conscious behaviour) and those that do restrict competition, but where the benefits arising from the agreement outweigh any anti-competitive effects. The ACM has confirmed that the benefits in question are those accruing to society as a whole and not only to consumers of the specific product.

Competition authorities in EU Member States, such as Greece and France, have also been considering how competition rules may be adapted to promote sustainable business practices. Some national authorities are more cautious in their approach: for example, the German Competition Authority considers that sustainability measures should be considered under environmental law and policies, rather than competition rules.

Earlier in the year the European Commission (EC) launched a call for contributions to gather ideas and proposals on how EU competition rules and sustainability policies can work together, which will help shape a competition policy supporting the European Green Deal. This may include changes to the way in which competition law is applied (for example, new general policy guidelines, and enforcement priorities), as well as changes to the State aid rules (to support green investments) and merger control (to ensure 'green' goals are achieved whilst effective competition is preserved). Consultation on these measures has recently closed and submissions will be considered at a conference in early 2021 (to register, please see [here](#)).



Green claims in the UK

The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (the CAP Code) sets out the

rules marketers must abide by currently when making environmental claims:

1. the basis of environmental claims must be clear in that they do not omit significant information;
2. the meaning of all terms must be clear to consumers;
3. claims which are absolute must be supported by a high level of substantiation. Comparative claims must be justified clearly;
4. claims must be based on the full life cycle of the advertised product;
5. it must not be suggested that claims are universally accepted if a significant division of informed or scientific opinion exists;
6. if a product has never had a demonstrably adverse effect on the environment, claims that imply the product has improved in the way claimed must not be made; and
7. claims must not be made that mislead a consumer as to the environmental benefit a product offers where this is to be expected from a certain type of product or the subject of the claim is a result of a legal obligation.

The CAP Code is an industry code, and so failure to comply does not lead to regulatory consequences, but marketers could be asked to remove an advertisement that does not comply.

The CMA launched an [investigation](#) on 2 November 2020 into whether 'eco-friendly' descriptions and labels used to promote products and services are misleading. It is concerned that the surge in demand for green products and services could incentivise businesses to make misleading, vague or false claims about the sustainability or environmental impact of the products/services. Misleading behaviour could include:

- exaggerating the positive environmental impact of a product or service;

- using complex or jargon-heavy language; and/or
- implying that items are eco-friendly through packaging and logos when this is not true.

The investigation is most likely to be relevant to the textiles and fashion industry, travel and transport, and fast-moving goods (food and beverages, beauty products and cleaning products). As part of its investigation, the CMA is considering whether a failure to provide all relevant information regarding the sustainability of a product or service (for example whether it is non-recyclable) could breach consumer law.

The CMA intends to publish guidance for businesses in Summer 2021 and may take enforcement action if it finds evidence that businesses are making misleading claims or omissions.



International enforcement of green claims

The CMA is also looking at green claims in a global context. It is co-leading (with the ACM) a green claims project under the auspices of the International Consumer Protection and Enforcement Network (ICPEN). The CMA co-ordinated a sweep of randomly selected websites with ICPEN members from 9 to 20 November 2020, with the aim of identifying the types of misleading green claims being made globally. The project plans to publish high-level guidance for businesses that could help to set global expectations on the truthfulness of environmental claims.

The ACM has already provided five ‘[rules of thumb](#)’ for businesses in the Netherlands making green claims about their products and services, which must:

1. make clear what sustainability benefit the product offers;
2. substantiate sustainability claims with facts, and keep them up-to-date;
3. ensure comparisons with other products/services/companies are fair;
4. be honest and specific about the company’s efforts with regard to sustainability; and

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5. ensure that visual claims and labels are useful to consumers and not confusing.

The EC is also cracking down on potential ‘greenwashing’ claims, by requiring that any green claims are substantiated against a standard methodology to assess their impact on the environment, as part of the European Green Deal mentioned above.



Electric vehicles

On 2 December 2020, the CMA launched a [market study](#) into the electric vehicle charging sector in the UK. This sector is crucial to both the UK Government, following its ban of new petrol and diesel vehicles by 2030, and other governments – the German competition authority launched a similar sector inquiry into electric vehicles charging infrastructure in July 2020.

The CMA is investigating two themes: (i) how to ensure the electric vehicle charging sector remains competitive, while also attracting the private investment needed in order to grow; and (ii) how to ensure consumers using electric vehicle chargepoints have confidence that they can get the best out of the service, particularly in terms of accessibility.

The market study will cover the supply of chargepoints for plug-in hybrid and all-electric passenger vehicles (both cars and light vans). It will examine charging in a range of different settings, including home and off-street parking; on-street parking; workplace; hub and destination; and en-route charging.

The study is intended to be concluded “well within” the statutory 12 month deadline. If the CMA identifies any features of a market that raise competition concerns, it can make recommendations to Government or other bodies for regulatory or legislative reform, issue guidance to businesses and consumers, and/or make a reference for a full market investigation. It can take enforcement action against individual companies if it uncovers unlawful practices.

Interested parties have until 5 January 2021 to submit comments to the CMA on the two themes raised by the study.



Green finance

Sector regulators, such as the UK Financial Conduct Authority (FCA) are taking actions to encourage sustainability. The FCA has publicly stated that it wants green and sustainable finance to be at the heart of the continued growth of London as a global financial centre. Examples of recent measures in support of sustainability include:

- the creation by the FCA and the Bank of England’s Prudential Regulation Authority of the Climate Financial Risk Forum, which is due to publish industry guidance, covering climate-related disclosures, risk management, scenario analysis and innovation; and
- new FCA rules, as from 1 January 2021, of requiring premium listed companies to make better disclosures about how climate change affects their business, consistent with the recommendations of the Taskforce on Climate-related Financial Disclosures (TCFD). The FCA is also consulting in the first half of 2021 on extending the scope of these rules and on introducing TCFD obligations for asset managers, life insurers and pension providers.

It seems likely that the draft competition guidance for sustainability agreements published by some competition authorities may influence the FCA’s future actions in this field.

Conclusion

As the climate crisis grows in urgency, regulators are beginning to adapt their tools in response. These shifts in competition rules may offer businesses a real opportunity to further their sustainability goals in a way which has not been possible to date. For businesses that operate in the UK, the end of the Brexit transition period (on 31 December 2020) will mean that the CMA must adopt its own measures to deal with the treatment of sustainability agreements under competition law (whilst currently retaining existing EC automatic exemptions for certain categories of agreement). Time will tell whether the CMA uses the UK’s sovereignty to seek to become a leading player in driving the climate change agenda forward.