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Competition Law and Sustainability Collaborations – Green Shoots?

Exposure to antitrust liability whether at the hands of an agency or a claimant is a concern for companies when considering collaborating on environmental, social and governance (ESG) issues despite the 360 pressure they are facing to improve their sustainability performance. But guidance from EU and UK antitrust regulators is starting to have an impact, with companies increasingly having the confidence to work together on sustainability projects.

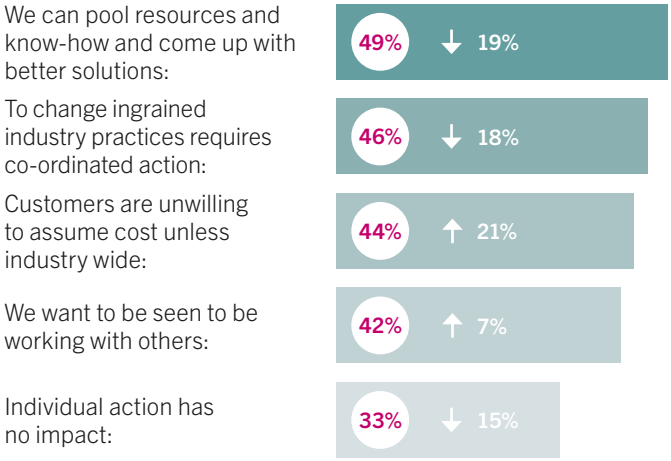
New research commissioned by Linklaters has found that despite most companies wanting to work together, businesses are still put off collaborating on ESG issues due to fear (rightly or wrongly) of falling foul of competition rules and the risk of litigation. But this may be set to change, with guidance this year from EU and UK authorities and the offer of discussion and agency comfort giving many the confidence to move forward with projects previously seen as too risky.

The survey of over 500 sustainability professionals in the UK, USA, France, Germany and the Netherlands sheds new light on the interplay between competition law and sustainability. Linklaters commissioned the same survey in 2020 and this report compares this year's results with our previous findings.

Motivation

of sustainability professionals believe it is important to be working with peers to pursue sustainability goals – although slightly down from 2020, there remains clear consensus that collaboration is key to becoming more sustainable.

The motivation to collaborate has changed since 2020:



Of special interest is the increase in those believing that customers are unwilling to assume additional cost for sustainable products and services, as this is of keen interest to regulators – the so-called "first-mover disadvantage". Where companies can show that customers are unwilling to pay unless the cost is industry-wide, this can help to convince regulators of the need for collaboration. And the rise of the desire to be seen to be working with others shows the increased importance to companies of demonstrating to their customers and their investors that they are committed to and actively improving their sustainability credentials.

Other changes may suggest that some businesses have the confidence to forge their own path independently of others as well as perhaps growing budgets that are increasingly available for ESG projects, which were perhaps a harder sell before now.

Competition law still a barrier to collaboration?

Most sustainability professionals feel that competition law has been a barrier to sustainability collaborations:

reported concrete examples of sustainability projects that were not pursued because legal risk was too high, a figure which is stable since our 2020 report.

reported that competition law has played a role in their not pursuing a sustainability project, up from 48% in 2020.

But that risk is not preventing all collaboration efforts from proceeding. Around 1/3 of survey respondents report having been involved in one or more sustainability collaborations:

- Pooling of logistics resources e.g. truck or delivery fleet.
- Agreements not to use certain suppliers or fund certain projects.
- Joint funding and operation of recycling schemes.
- Agreements to jointly develop a new green product e.g. new packaging.
- Developing mandatory minimum standards in a sector.

The impact of new guidance

With new guidance from a number of competition authorities, are companies feeling more confident? In short, it seems the answer is yes.

say that where there is a competition law exemption or guideline, they would be more inclined to work together.

Encouraging signs

In 2020 when Linklaters conducted its first survey, there was no specific guidance from competition authorities on sustainability collaborations. Since then, regulators including the European Commission, the UK CMA and the Dutch ACM have provided detailed guidance on when sustainability collaborations will fall outside competition rules and the approach they will take when assessing whether the benefits of a sustainability collaboration outweigh any harm to competition (see our articles here and here).

We asked about the impact of the guidance:

were aware of the EU and UK Guidance.[1]

Of those who were aware of the EU Horizontal Guidelines (HGs) and CMA Green Agreements Guidance, a substantial majority found the guidance clear and felt that it would change their approach to risk in those jurisdictions:

	EU	UK
I have a good understanding of what is and isn't permitted:	72%	70%
As a result of the Guidance, I will take forward projects that have previously been thought too risky:	80%	78%

Whilst there is certainly more to do to raise awareness of the guidance, with over 1/3 of sustainability professionals being unaware of the EU and UK guidance, it is still early days. The HGs came into force in July 2023 and the CMA Guidance in October 2023.

The impact on those who are aware of the Guidance is encouraging, with most feeling that the authorities have provided a clear steer on where the line between legitimate co-operation and illegal collusion is likely to fall. And the concrete result is that projects that may previously have stalled can now proceed.

> Indications that following the EU and UK Guidance, over half of those surveyed are prepared to take forward projects previously considered too risky are encouraging. Authorities have opened the door – businesses need to be prepared to step through.
>
> **Jonathan Ford** Partner

[1] Respondents were asked separate questions on whether they were aware of the European Commission Guidance and the CMA Draft Guidance. Results were 57% in response to each question.

Meanwhile in the US

In the US, there is no guidance from authorities in place. There have been highly publicised federal and state inquiries into ESG initiatives, mainly from Republican officials in the financial services sector. These have not so far translated into concrete antitrust enforcement and do not appear to be significantly chilling the appetite for sustainable collaboration with US based respondents – poll results being broadly in line with those elsewhere.

Is (more) reform needed?

Opinions are split on whether more reform is needed, but notwithstanding encouraging signs from the guidance, most of our respondents felt there was more to be done:

- 34% think more or different guidance from competition authorities on lawful vs unlawful cooperations is still needed.
- 25% feel a specific exemption from competition rules is needed.
- 20% believe legislative change (as seen for example in Austria) is required.

And interestingly, these figures do not change significantly if looking only at those who were aware of the EU and UK Guidance.

Our view is that what is needed now is more public decisions by authorities to give businesses (and their advisors) certainty about how principles that have been explained in the guidance will be implemented in practice, similar to the Dutch approach in the Shell/Total case below.

The indications from our survey that **60% of sustainability professionals would seek guidance from the EU Commission or UK CMA** suggests that there will be a number of businesses prepared to bring forward test cases, albeit that 40% don't (yet) have the confidence to avail of the open-door policies offered by authorities. Policies such as those in the Netherlands and the UK of not fining parties who seek informal guidance may help confidence levels.

Case study

Shell and Total wanted to collaborate in relation to building and jointly marketing infrastructure to store CO_2 in empty natural gas fields in the North Sea. They consulted with the Dutch authority and the authority provided a published comfort letter explaining why the ACM was not going to further investigate the collaboration.

The letter indicated that there would be restrictions on competition specifically on price in the early launch phase of the project when the parties would operate joint tariffs. But the ACM considered these restrictions to be indispensable because the parties could not have developed the infrastructure independently and needed to cooperate in order to achieve minimum viable scale. The ACM also considered joint marketing to be indispensable due to the risk profile of the project.

Litigation risk

Competition risk arising from antitrust regulators is only one part of the puzzle. The US has always had an active culture of litigation and the politicisation of the green agenda in the US makes the risks particularly acute. And with significant growth of collective action litigation in the UK and across Europe:

of survey respondents worry about litigation risk relating to sustainability collaborations.

> Litigation risk, especially in the US, needs to be factored into sustainability collaborations, but our view is that the risk can be managed.
>
> **Thomas McGrath** Partner

Methodology

The research was conducted by Censuswide, among a sample of 502 sustainability professionals (middle managers, senior managers, c-suite and business owners) in the UK, US, Germany, France and the Netherlands, to understand the interplay between competition law and sustainability. Respondents were polled across a range of company sizes (based on annual revenue), types and sectors including corporates and financial institutions. The data was collected between 30.06.2023 – 14.07.2023. Censuswide abides by and employs members of the Market Research Society and follows the MRS code of conduct which is based on the ESOMAR principles.

Conclusion

We need to get to a point where sustainability leaders are no longer put off collaborating on ESG issues where collaboration is needed due to fear of breaking competition rules. Only then will we see larger strides in projects and initiatives around the green and wider sustainability agenda. Whilst the survey has underlined the embedding period we are currently in with these new rules, businesses need to start engaging in conversations with regulators on some of these issues to develop a greater understanding of the new parameters. Linklaters' 2020 survey placed a spotlight on the demand from business leaders for guidance and whilst regulators have seemingly caught up with this need, there is an awareness gap and companies and financial institutions are still hesitant. By the next survey, while we expect the dial to have shifted, the pressure facing companies is only set to increase.

Learn more about our ESG Competition offering and ESG practice through the links below:

> Antitrust and Sustainability at Linklaters.

> Explore Environment, Social and Governance at Linklaters.

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