



Legal Voices for the Future

Sustainability and Competition Law

22 October 2024

Cleary Gottlieb Steen & Hamilton LLP
2 London Wall



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About Legal Voices

Legal Voices for the Future is a collaborative learning forum established and run by early career practitioners from different areas of the legal profession!

Our objective is to give a voice to a new generation of lawyers on the most pressing issues facing us: the climate and ecological crises.

We do this by hosting monthly knowledge sessions open to everyone - lawyers and non-lawyers - but we also host member only webinars to provide members with an informal way to connect with interesting speakers, to ask engaging questions and to learn even more about the climate and ecological crises!

We want to empower our members to use the law as a force for positive change and to collaborate on solutions to climate change and related societal injustices.





Sustainability and Competition Law

Structure of the session

1. **Discussion of creative content** –
Jordan Sanchez, *On Climate Denial*
2. **Introductory presentation** –
Sustainability Agreements: the UK and
the US
3. **Panel discussion** – Sandrine Delarue
(CMA) and Maurits Dolmans (Cleary
Gottlieb)





Slido



Slido number: 1425281

Link to join:

<https://app.sli.do/event/81RFmihvyWBmGCUFJWKED7>

Please ask questions and get involved with our questions!



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Creative Content

Jordan Sanchez, On Climate Denial



Introductory Presentation



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Denial is the first stage of grief, but what are you grieving?
Maybe the fact that our clean air is leaving,
Our lungs constantly receiving the grey,
Ourselves slowly receding into the black.

Our blue waters we pretended to love,
Suffocated with plastic we disposed of.
Red turns the dove who flies away
With no turning back.

Back into time when I still saw—
Seeing green and gold and green and blue
Seeing is believing but I can only see
One place at one time.
Hurricanes in Houston,
Freezing people in Chicago,
Bangladesh underwater—
But I can only see
One place at one time.

The time is now, but when is now really?
Three months ago, two weeks ahead, last year—
Yesterday.

It was yesterday,
When I was anxiously waiting for a phone call
From Grandma Vicky down in San Juan.

It was yesterday,
When I saw the beautiful island suffocated by the heavy
grey fog.
It was yesterday.

The New York City skyline is flooded.
Not with water this time,
But empty promises that float to the top,
Stealing the air and
All you can do is sit and stare—

Stare at the world around you.
She is crying to you in the form of
Ashes and smoke,
Smoke and ashes.
Ashes and hope;

They are all we have left.
And all there is left to do is right.
Searching for direction,
All we can look to is each other.
Look up and what do you see?
What do you hear?

If it is a colorless world you do not fear,
You aren't thinking hard enough,
Thinking far enough.
Look inside yourself and
Ask if you're doing enough.

If you acknowledge the climate crisis
You'll see that the climate price is
Too much for us to bear,
And I'm not talking polar bears.

All it takes is for you to care,
Not about the birds, the bees,
Or Florida's orange trees,
But about people.
Your family, neighbors, community,
Creating the change we need to see.
When you stop and breathe,
All you can think is:

This problem is so much bigger than me.
But no one is asking you to plant a billion trees,
Or develop renewable energies,
But we all have to contribute
To this international society.

You see,
Big problems are made up of little ones,
And solutions are the same way.
Acceptance is the last stage of grief, but this state is
impossible to claim.
The world will never be the same,
Call the crisis by name — climate denial.
All it takes to break those chains is mindful living,
and small steps that still make a difference.



Jordan Sanchez, On
Climate Denial



Discussion Questions

1. *“Denial is the first stage of grief, but what are you grieving?”*

The poem begins with likening denial as the first stage of grief (the other stages being anger, bargaining, depression and acceptance). How does this metaphor shape your understanding of climate denial? What might people be grieving when they refuse to acknowledge the climate crisis?

2. The poem constantly shifts between evoking negative and positive emotions. What is the role, and balance, of evoking positive and negative emotions to effect action towards the climate crisis?
3. Consider passages such as *“Ask if you’re doing enough”*, *“This problem is so much bigger than me”*, *“Big problems are made up of little ones, And solutions are the same way”* and *“Searching for direction, All we can look to is each other”*:
 - a. what balance does the poem strike between the individual (individual accountability, agency, etc.) and the collective (collaborating to achieve a solution, etc);
 - b. as lawyers, what is our role in contributing to solving the crisis?



Jordan Sanchez, On
Climate Denial



Sustainability Agreements in the UK and the US



Introductory Presentation



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If companies wish to pursue sustainability outcomes, in what ways might they wish to collaborate in order to achieve this?



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The Challenge – from an economic perspective:

- Traditionally, emitting CO₂ does not result in any additional costs to the emitter, though it does to society (“**negative externality**”)
- These societal costs are not internalised by emitters (i.e., the price for such activities) is too low, leading to overconsumption/production of carbon-intensive goods (“**market failure**”)
- Another way to put this: the atmosphere is a public good, and businesses have no incentive not to exploit it (“**Tragedy of the Commons**”)
- Pursuing sustainability outcomes may require significant investment / foregoing of short-term profits - This may put individual companies at competitive disadvantage (“**first-mover disadvantage**”)

Should companies be allowed to achieve sustainability goals by co-operating with competitors?





The Chapter I Prohibition – unlawful agreements

- Prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which (a) may affect trade within the United Kingdom, and (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom.
- Subject to various exclusions and exemptions, including under s. 9 CA 1998, where an agreement:
 - contributes to (i) **improving production or distribution**, or (ii) **promoting technical or economic progress**;
 - allows **consumers a fair share** of the resulting benefit;
 - **does not impose** on the undertakings concerned **restrictions which are not indispensable** to the attainment of those objectives; and
 - **Does not** afford the undertakings concerned the possibility of **eliminating competition** in respect of a substantial part of the products in question.





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Would these agreements raise concerns from a competition law perspective?

1. *An agreement between companies to **use joint funds to train industry workers** in sustainable production practices.*
2. *An agreement between business on the **price at which they will sell** paper that meets an agreed environmental sustainability standard.*
3. *An agreement between companies to **stop using a particular type of polluting packaging**.*





The CMA's Green Agreements Guidance

- **What agreements does the guidance apply to?** – Environmental sustainability agreements
- **What agreements are unlikely to infringe the Chapter I prohibition?**
 - Non-appreciable agreements, no effect on main parameters of competition, doing something jointly which none of the parties could do individually, cooperation required by law, pooling information, industry standards, phasing out of non-sustainable products, industry-wide targets, certain agreements between shareholders
- **How can agreements which do engage the Chapter I prohibition be justified?**
 - (i) Benefits to production, distribution or technical/economic progress, (ii) indispensability, (iii) consumers receive a fair share of the benefit, (iv) no substantial elimination of competition
- **Do climate change agreements (a subset of environmental sustainability agreements) constitute a special category?**
- **Is it possible to seek more specific guidance from the CMA in cases of uncertainty?** – yes, the CMA has an open-door policy





Informal Guidance under the CMA's open-door policy

- Businesses considering entering into environmental sustainability agreement can approach the CMA for informal guidance on their proposed agreement
- CMA is also willing to accept requests for informal guidance from representative bodies or a nominated representative of the parties to the agreement
- CMA will indicate any options, concerns, risks and possible solutions available to parties and *may* provide informal guidance on the application of competition law/the guidance to the agreement
- Seeking such guidance may offer protection from fines, in case of enforcement action later on
- CMA may publish a summary of agreements with an assessment of risks and solutions





Merger control

- As part of the CMA's role to promote competition for the benefit of consumers, it investigates mergers, to ensure that they do not result in a **substantial lessening of competition**
- The CMA may take into account relevant customer benefits (lower prices, higher quality or greater choice, greater innovation), e.g., when deciding whether to refer to Phase 2 investigation, or considering remedy options
- Benefits in the form of environmental sustainability and supporting the transition to a low carbon economy may constitute relevant customer benefits in some circumstances





The Chapter II Prohibition – abuse of dominance

- Subject to certain exclusions, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.
 - Examples: imposing unfair prices or other trading conditions, limiting production/markets/technical development, applying dissimilar conditions to equivalent transactions (creating competitive disadvantages for trading parties), making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations
- How might sustainability considerations be relevant to the analysis?
 - New indicators for dominance? Non-sustainable conduct as abuse practice? Factor for justification?





Antitrust rules in the US

- **Key prohibitions:**
 - contracts/combinations/conspiracies restraining trade/commerce (Sherman Act, s. 1)
 - Prohibition on unfair methods of competition (FTC Act, s. 5)
- **No specific guidance for climate-change / other sustainability related matters**
- **Potentially relevant considerations:**
 - “safety zones”, standard setting, rule-of-reason analysis, the *Noerr-Pennington* Doctrine





Antitrust and anti-ESG

- Certain state Attorney-Generals and Members of Congress have been raising antitrust violation allegations against banks, asset managers, insurance companies and other financial services providers.
- Political pressure has significantly affected certain industry associations (e.g., NZIA)

"We...are concerned with the legality of your commitments to collaborate with other insurers and asset owners in order to advance an activist climate agenda. ...

The push to force insurance companies and their clients to rapidly reduce their emissions has led not only to increased insurance costs, but also to high gas prices and higher costs for products and services across the board, resulting in record-breaking inflation and financial hardships for the residents of our states.

... it is well-established that certain arrangements among business competitors are strictly forbidden because they are unfair or unreasonably harmful to competition. ...[Your] "targets" and requirements appear to violate these well-established laws. To start, several of the "targets" put conditions on the terms of your insurance contracts."





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What can we as lawyers do?

1. *Communicating these issues to clients? If so, how?*
2. *Policy work / lobbying?*
3. *Test cases?*





Break



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Sandrine Delarue & Maurits Dolmans



Panel Discussion



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Sustainability Agreements – the UK

Panel Discussion

1. The regulatory landscape in the UK
2. To what extent have competition law concerns prevented the pursuit of sustainability outcomes in the UK?
3. Exploring the Green Agreements Guidance
4. Impact of sustainability considerations on merger control





Sustainability Agreements – outlook

Panel Discussion

1. Is the current legal/regulatory position sufficient, or is reform needed?
2. What other sustainability projects are on at the CMA?
3. What practical advice can be given to companies, and what can (junior) lawyers do?





Sustainability Agreements – the US

Panel Discussion

1. Antitrust-based anti-ESG arguments
2. Evaluation: how valid are these arguments?





Thank you!



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