ClientEarth

January 2026

Public consultation on proposed Anti-Competitive Conduct and Agreements Enforcement Guidelines – Canadian Competition Bureau

ClientEarth and Simon Holmes' contribution

1. Introduction

ClientEarth is a global not-for-profit environmental law organisation, working in over 60 countries around the world using the law to protect people and the planet. As part of its work, it has contributed to the development of competition guidelines in various jurisdictions where these are relevant to environmental and broader sustainability considerations.[1]

Simon Holmes is a competition lawyer with over 40 years' experience who has written and spoken widely on the interface between climate change, environmental sustainability and competition law and policy.[2]

[1] More information on ClientEarth is available on its website: https://www.clientearth.org/.
[2] https://www.law.ox.ac.uk/people/simon-holmes

As such we warmly welcome the opportunity to provide feedback in response to the Competition Bureau's consultation on anti-competitive conduct and agreements – but limiting this feedback to areas relevant to sustainability.

2. Guidelines

We very much welcome Section 7.2.6.5 on "Agreements related to protecting the environment" to help businesses that are considering working together to protect the environment. In our view such cooperation is a vital complement to regulation and the efforts of individual firms if we are to put our economy on a more sustainable footing at the necessary scale and speed-consistent with Canada's climate change policies, and ambitious plans to cut emissions and move towards net zero.

The need for such cooperation has been generally accepted by the global competition establishment both at the international level in bodies such as the OECD[3] and ICN and at the national level – with wide-spread encouragement and support from the business community.[4] An increasing number of jurisdictions have adopted specific guidelines on the application of competition law to sustainability agreements – notably European jurisdictions such as the EU[5] and UK[6] but also countries as diverse as Australia, Japan, Korean, New Zealand and Singapore (and others planning to do so).[7]

We would strongly urge the Canadian Bureau to adopt similar guidelines with those of the UK's CMA being the most progressive and best aligned with the need to use all available policy tools to combat climate change and enable the transition to net zero. We would also urge the Bureau to study the Dutch ACM's "Policy Note", "Oversight of sustainability agreements" of 4 October, 2023 which, in our view, is very much "best in class".[8]

Finally, for the avoidance of doubt, just as a competition authority should ensure that competition law does not stand in the way of legitimate cooperation to promote environmental sustainability, it should condemn agreements by which firms collude to restrict competition on environmental factors where these are parameters of competition. This is as much a cartel as price fixing or market sharing and should be

[3] See, for example, Environmental considerations in Competition Enforcement: legal assessment [DAF/COMP (2021) 4].
[4] For example, see reports by the International Chamber of Commerce (ICC) for COPs 27 and 28: "When chilling contributes to warming. How competition policy acts as a barrier to climate action" and "Taking the chill out of climate action. A progress report on aligning competition policy with global sustainability goals".
[5] These are contained in Chapter 9 of the European Commission's Guidelines on Horizontal Agreements of July, 2023. See also the Commission's antitrust guidelines for sustainability agreements in agriculture of 7 December, 2023 and ClientEarth responses to the public consultations: Revised draft Horizontal Guidelines on Sustainability Agreements | ClientEarth and Sustainability agreements in agriculture – EC draft guidelines on antitrust derogation | ClientEarth.
[6] Green Agreements Guidance of 12 October, 2023 and ClientEarth response to the public consultation: CMA Draft guidance on the application of the Chapter 1 Prohibition in the UK Competition Act 1998 to Environmental sustainability agreements (28 February 2023) | ClientEarth.
[7] For example, the Belgian Competition Authority which opened a consultation on its draft guidelines on sustainability agreements (in French) on 6 October, 2025 and ClientEarth response to the public consultation: Consultation publique sur le projet de lignes directrices sur les accords de durabilité – Autorité belge de la concurrence | ClientEarth (in French).
[8] The Dutch ACM's earlier draft guidelines were very much the "market leader" on this topic but, as a member state of the EU, it never finalised this draft deferring on substantive competition law to the European Commission and its sustainability guidelines. The "policy note" explains how the Dutch competition authority aims to do more to encourage and protect agreements preventing environmental damage.

punished as such. Indeed, given the importance of the transition to net zero, such harmful collusion on environmental issues may be a factor aggravating a fine imposed by the authorities.[9]

3. Guidance

We are most encouraged that the Bureau envisages that, in appropriate cases, it would issue certificates confirming that Section 90.1 does not apply to an agreement related to protecting the environment.[10]

Such a process for providing comfort/informal guidance has been widely called for by the business community (and its absence in the past has been a major inhibitor of important cooperation agreements).[11]

An increasing number of competition authorities have responded to this call and adopted an "open door"/ "porte ouverte" policy encouraging businesses to seek help and guidance from them.[12]

Since then, more and more such informal guidance/comfort has been provided by competition authorities including the UK, Dutch, French, Belgium and German competition authorities – and most recently the European Commission.[13]

4. Abuse of dominance

We are also pleased to see that the Bureau's proposed guidelines will cover, not only anti-competitive agreements, but also anti-competitive conduct – and specifically, abuses of dominance.

The law prohibiting abuses of dominance is a powerful and flexible tool which has proved to be adept at challenging many new forms of harmful conduct when perpetrated by firms with market power. We believe there is a strong legal, economic, moral and environmental case for exploring how these laws can be used to combat unsustainable conduct where the firm responsible has a dominant position.[14]

[9] See, for example, the *AdBlue* case of the European Commission fining European car manufacturers 875 million Euros for restricting competition in emission cleaning technology for diesel cars. See also the decision of the Italian Competition Authority which found the negative effect on the development of sustainable mobility to be an aggravating factor when fining Google 100 million Euros for abuse of a dominant position on 13 May, 2021 [upheld by the grand chamber of the European Court of Justice on 25 February, 2025 in Case C-233/23 Google Android Auto].

[10] Section 7.2.6.5 of the Bureau's Consultation Document.

[11] See the call to action in the ICC reports referred to in footnote 4 above and the real-life examples of the uncertainty and fear of competition law (whether founded or not) which inhibited sustainability initiatives proposed by businesses.

[12] See the EU, UK, Dutch and Belgian guidelines (or draft guidelines) referred to in footnotes 5 to 7 above. See also the French Competition Authority Communiqué relatif aux orientations informelles de l'Autorité en matière de développement durable of 21 December, 2023.

[13] For an overview of some of these see Sustainability and Competition Policy in Europe: recent developments [JECLAP, Vol 15, Issue 8, December, 2024, pages 562 to 570 at Section 2 D]. See also guidance letters issued by the European Commission on 9 July, 2025 on a sustainability agreement to reduce Co2 emissions in European Ports (pursuant to its Notice on Informal Guidance of 2022) and on 15 July 2025 on a sustainability agreement in the wine sector.

[14] For a discussion of this see "Using the abuse of dominance provisions to help fight climate change and unsustainable conduct" by Simon Holmes and papers cited therein [to be published in the next issue of the Science Po Law Revue].

Introducing guidelines on anti-competitive conduct is consistent with the European Commission's proposal to introduce guidelines on abuse of dominance[15]. That said, the version of the Commission's draft guidelines published in 2024, only covers so-called "exclusionary" abuses – and not "exploitative" abuses: we see no reason why the Bureau's guidelines should be limited in this way. Furthermore, the Commission's 2024 draft did not contain a specific section on sustainability[16] but we are hopeful that this omission will be rectified in the next draft bringing the abuse of dominance guidelines into line with the Commission's 2023 Guidelines on Horizontal Agreements (which contain a whole chapter on sustainability) and what we expect to see in 2026 when the Commission publishes draft updated merger guidelines[17].

In parallel to these initiatives, there are a growing number of decisions where European competition authorities have recognised environmental considerations in the assessment of abuse of monopoly power and there are a number of cases in the pipeline.[18]

Deceptive Marketing Practices

One example of conduct that may amount to a breach of the abuse of dominance provisions is deceptive marketing. We were pleased to see this recognised by the Bureau in paras 605 and 606 of its consultation document ("we may also investigate deceptive marketing under the abuse of dominance provisions where it appears that the false or misleading marketing practices are related to a broader set of anti-competitive conduct or agreements").

Deceptive marketing as an anti-competitive practice has been of increasing concern to ClientEarth in the recent past. It has also been found to amount to an abuse of dominance by several competition authorities – notably the European Commission and the French and Italian authorities (upheld by the courts)[19].

5. Conclusion

In conclusion we warmly welcome this initiative by the Canadian Bureau – particularly its proposals regarding the potential to issue a certificate for agreements related to protecting the environment.

Given the laudable approach which Canada has taken in the recent past to fighting climate change, its ambitious emission reduction targets, and its recognition of the need for faster delivery, we would

[15] Communication from the Commission: guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings of 3 July, 2024.
[16] They do however, contain a number of elements that make it clear that unsustainable conduct by dominant companies may, in certain circumstances, amount to an abuse of a dominant position (see Section 4 of the article cited in footnote 14 above).
[17] The Commission made numerous references to sustainability, decarbonisation and resilience in its consultation of May, 2025 on reform of the EU merger guidelines (including a helpful "Topic D" entitled "Sustainability and Clean Technologies". We do not yet know exactly how this will be reflected in the revised merger guidelines but this suggests that there is likely to be substantive coverage of sustainability.
[18] See, for example, the cases summarised in Section 3 of the article cited in footnote 14 above.
[19] See, for example Commission fines Teva 462.6million Euros over misuse of the patent system and disparagement [of a competing product] to delay rival multiple sclerosis medicine [31 October, 2024]; Italian competition decision fining Roxtec for abusing a dominant position by implementing a complex strategy (including exclusionary litigation and disparagement) aimed at foreclosing its main competitor [upheld by the Italian Court on 30 September, 2025] in Van Bael & Bellis issue on Competition law, Vol 2025, No 10, p. 7; and French Competition Authority fines of 444 million euros on Novartis, Roche and Genetech for a denigration campaign and misleading and alarmist messages to public authorities [upheld by the French Supreme Court in July 2025] in Van Bael & Bellis issue on Competition law, Vol 2025, Nos 7-8, p. 11.

encourage the Canadian Bureau to provide practical guidelines in relation to the application of competition law to such agreements.

Furthermore, we would like to see a holistic approach being taken with the protection of the environment being covered in guidelines in relation to all aspects of competition enforcement: i.e. both anti-competitive agreements and abuse of dominance (and, indeed, merger enforcement guidelines in due course).

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