



Environmental sustainability and the competition and consumer law regimes
Advice to the Secretary of State for Business, Energy and Industrial Strategy
Call for inputs document

Comments from the BRC



About the BRC

The BRC is the trade association for UK retailers and our membership comprises over 170 major retailers - whether operating physical stores, multichannel or pureplay online - plus thousands of smaller, independent retailers through a number of smaller retail Trade Associations that are themselves members of BRC. Our members deliver an estimated £180bn of retail sales and employ just over 1.5 million colleagues. Our purpose is to make a positive difference to the retail industry and the customers it serves, today and in the future

Response format

BRC members welcomed the opportunity to submit comments to the CMA orally. The observations below broadly bring together those comments and subsequent additions.

Overview and reflection on issues found in developing co-operative approaches.

1. The BRC has developed a substantial climate action roadmap for retailers to achieve net zero together with a number of workstreams. This can be found at <https://brc.org.uk/climate-roadmap>
2. In developing the roadmap, members did not consider that either consumer or competition law and enforcement were an impediment. Agreements were made individually by businesses.

Reflection on Competition Law and impact

Overview and reflection on issues found in developing co-operative approaches.

1. The BRC has developed a substantial climate action roadmap for retailers to achieve net zero together with a number of workstreams. This can be found at <https://brc.org.uk/climate-roadmap>
2. Alongside action from individual retailers, the scale of the decarbonisation challenge requires concerted pre-competitive action from retailers working together with their suppliers and other stakeholders, alongside government action to enable the necessary technological, behavioural and market transformations.
3. In developing the roadmap, members did not consider that either consumer or competition law and enforcement were an impediment. Agreements were made individually by businesses.
4. The retail industry Climate Action Roadmap has been designed to enable all stakeholders involved in this journey to act. It identifies stretching objectives for decarbonisation and key milestones in the decarbonisation journey. It has been designed to help retailers, of all sizes and in all sectors, and their partners across the



retail value chain, to identify where and how to take action for the greatest impact.

Reflection on Competition Law and impact

5. There was a study and publication three or four years ago in which the BRC co-operated with Fairtrade and which addressed the complications of Competition Law. It took a specific example of the need for agreements on wages in poorer countries as an illustration – and the potential problems for the first mover in the absence of agreement – but it was intended to have a wider relevance. The final chapter specifically considers changes needed to Competition Law or Guidance.
6. We assume the CMA still has this Report but for ease of reference it can be found at
 - <https://www.fairtrade.org.uk/wp-content/uploads/legacy/Competition-Law-and-Sustainability---Fairtrade-Report.pdf>.
7. As noted above, in the absence of legal potential for agreement and discussion on prices, there is in general an issue for the first mover, unless they are dominant in the market, being at a disadvantage if others do not follow, especially a key competitor. We recognise that any change here would be unlikely even as an exemption for green purposes – but the CMA has asked where there are issues. The answer for the first mover probably lies elsewhere – in changing the public perception of the value of green initiatives and therefore providing a reputational advantage to the first mover. However, one needs to be aware that while consumers may support actions in principle, in terms of hard pressed household budgets, there may be a disjoint when it comes to actions.
8. The request to the CMA would be for active advice and clear guidance on just how far businesses can go. As we will spell out below, we believe the CMA should adopt a more willing approach to providing assured advice to businesses and groups of businesses than hitherto – at least in this area of policy.
9. Having said that, it should be clear that not all businesses always want to co-operate. There is such a thing as commercial advantage – one of the reasons a claim might be made or a new product developed.
10. It would be useful to be able to have a conversation around setting the minimum price to reflect the environmental impact. A clear framework for such conversations could assist to avoid reputational damage if an approach is taken that is challenged even if later accepted as lawful. In reality, legislation is needed for these issues to avoid an outlier acting differently for market share. Pricing of plastic bags is a case in point.
11. There are good examples of industry-led voluntary agreement that lead to tangible results in achieving sustainability goals. The Courtauld Commitment 2030 is an initiative supported by the majority of our retailers (grocers) and it enables collaborative and non-competitive action across the entire UK food chain to deliver farm-to-fork reductions in food waste, greenhouse gas (GHG) emissions and water stress, helping the UK food and drink sector achieve global environmental goals. This



pre-competitive forum has facilitated a whole chain collaboration and successful results such as 17% overall reduction in food waste, worth £365m (£1m per day), up to 670,000 tonnes of GHG emissions avoided through 251,000 tonnes less food being wasted, and also up to 60,000 tonnes of food redistribution Roadmap (145 million meals) – source: [WRAP Food Waste Reduction Roadmap – progress report](#).

12. Similar initiatives led by WRAP have been set up for plastics (UK Plastics Pact) and textiles (Textiles2030). While we encourage our members to sign up to these, insofar as there is a great deal of work happening for the industry in aligning environmental metrics and reporting in a non-competitive way, we wish to highlight that these initiatives entail a financial commitment that smaller brands and retailers are not always able to commit to or afford and ultimately are not part of the 'club'.
13. In terms of policy implementation such as, for example, the roll out of the Scottish DRS scheme, competition considerations have been raised in instances where the delivery of the schemes objectives would be better achieved through a third-party partnership involving a service provider (like a compliance scheme or a waste management business). Under the Scottish DRS regulations, retailers are obligated to provide customers with a takeback option for DRS containers sold through e-commerce. The set up of such a collection system is challenging with potential environmental and financial implications. Retailers have questioned whether subcontracting a third party for the delivery of that obligation is fully compliant with competition rules, especially if a group of major retailers chose to opt for a specific company which would have the monopoly over that specific takeback collection offer. This is even more valid when there is a massive merger happening in the waste management sector (Suez/Veolia).

Reflection on Consumer Law and Enforcement Impact

14. The easier to identify issues are in the area of consumer law, advice and enforcement.
15. A common theme in discussions across the board has been the excess of information requirements which can arise from not only consumer protection law but also specific rules around – for example - food, energy, reporting requirements, ASA Codes, terms and conditions; requirements of some certification schemes etc. Sometimes these are developed in silos without any overall approach – so that even the definitions in different regulations can be different. In terms of the green agenda, excessive requirements to explain and justify claims in consumer facing communications (as opposed to being able to justify the explanation to enforcers) and different requirements from the ASA compared with other regulators could undermine the desire to promote, or introduce new, products or services if claims that consumers can understand cannot be made.

16. Issues that arise are

- The need for a clear understanding of how consumers view claims – both the average consumer in accordance with the strict definition and consumers in general. The BRC has produced some background in this regard. <https://brc.org.uk/climate-roadmap/section-8-pathway-5-helping-our-employees-and-customers-to-live-low-carbon-lifestyles/87-helping-customers-live-low-carbon-lifestyles-a-practical-guide-for-retailers/>
- The need for an overall consideration of information requirements and whether a new requirement is really necessary – and retrospectively whether all those currently in force are really necessary.
- The test should be whether consumers are ever likely to refer to most of the requirements or make their decisions on the basis of the information presented. If information is merely there for the sake of it, there is little point. Indeed, all the evidence suggests that consumers pay little if any attention when faced by so much information.
- The need to consider the disjoint between online requirements and those in a store face to face. Regulators tend to think that there is infinite capacity online so more and more requirements get added – they need to take into account the use of mobiles for online purchases and in the future the rise of automated voice ordering.
- Ideally there would be consideration of the key information to be provided at all times – which consumers might actually see and expect to see and be wary of sites that do not provide it – and information that can be found on a business website.

17. The lack of common definitions is also both a plus and a minus – especially of broad terms like sustainable, ethical sourcing, ethical trade etc. There is even a lack of consistency between various standards that claim to provide cover for such claims. In the absence of a clear understanding, one business may be using the term differently from another. Clearly where businesses merge, this could create real problems rms. In requesting some potential definition, there is a balance to be struck between a definition that is so tight that it inhibits innovation because a claim does not quite fit, that it leads to endless disputes over the claim at the margins as to whether it fits, and that it cannot keep pace with new technology – and a definition that is sufficiently broad and adaptable to new technology to allow a reasonable amount of claims while still being a useful definition. There may be room for some form of informal understanding.

18. In food, there is a lack of understanding of the term ‘best before’ which can lead to food waste as consumers – and some enforcers - believe it is the same as a ‘use by’ date. Likewise blanket prohibitions of certain types of promotions seem to lack an understanding of the complexity. There is a difference between a simple multi-buy as opposed to deals for two or three different types of products which can contribute to an overall healthy diet and a weekly shop.

19. There is an international dimension where manufacturers supply a whole range of different markets. They are unlikely to be willing to change labels for one country alone – or at least other than for a price especially if the country concerned is not a major part of their market.

20. There is a clear need to ensure that liability for claims is firmly and legally directed at the point in the chain where the claim and knowledge of whether it is legitimate lies. This becomes even more important if an administrative fines system is to be adopted where 'beyond reasonable doubt' is not the basis of any decision. Many manufacturers, not necessarily the very largest, refuse to supply the details behind any claim to retailers, some of whom are seen as competitors. There have been quite a few recent instances where when pushed a manufacturer has refused to justify the promotional material it wishes a retailer to use – with the result that either the retailer takes its word or refuses to co-brand the promotion. There are certain 'must haves' that a retailer will want to stock – but it faces acceptance of the word of the manufacturer or not having the product on its shelf. Legislation needs to change to either require manufacturers to supply the information or to place the legal obligation on manufacturers or to allow retailers to accept certain claims from certain manufacturers on trust. The latter may require a list of recognised manufacturers who can be trusted. While the CMA says it will adopt a pragmatic approach, the ASA tends to be less pragmatic and to place the obligation firmly on the retailer. More consideration is needed as to the extent to which a retailer needs to go to prove due diligence.
21. In the case of textiles certification of a claim often follows months after the product has been shipped. There is a real issue of verification and there needs to be guidance on what is 'good enough' as opposed to perfection given every country seems to use different definitions.
22. Lack of enforcement of consumer protection law in general presents just as many problems for green claims and the desire to be accurate and to innovate as elsewhere. The ASA has its Code and there are often threats to go to the ASA for an adjudication. This is not a satisfactory approach for overall enforcement and confidence in the system. The ASA tends to look to the retailer as the advertiser rather than look to the manufacturer if that is the source of the claim. For example, one retailer wanted to suggest that it is greener not to have paper statements for consumer accounts. It was challenged on the basis that this did not take account of how consumers would store the data provided. It was easier to change the message – but consumers were probably less likely to do what most people would consider as green.
23. If some businesses can simply ignore the rules, consumers will lose confidence and legitimate businesses will reduce their innovation. Claims are important if net zero is to be achieved – but if they are to be challenged on different bases by different regulators, the incentives to innovate will decline. Some businesses want to take a first step and the advantage of that is they can make a new green claim. If that is excessively surrounded by small print, its value is reduced.
24. The CMA wishes to move to an administrative basis for its use of consumer powers. The issues noted above all point to the need for the same approach to the validity of a claim to be taken by all enforcers including the ASA if businesses are to be willing to make the investment needed. More than that, given it is clear there is no clarity in much of this area – and indeed that the potential for claims to change as technology



changes – the need for assured advice needs to be recognised. We have argued elsewhere – and believe the case is strongest here – that the CMA needs to work more closely with Trading Standards in the sense that it needs to accept assured advice under the Primary Authority scheme issued by Trading Standards. Indeed we believe that the interests of net zero and sustainability in general could be strongly advanced if the CMA were to act in the same fashion as a Primary Authority and be willing to provide assured advice to individual businesses. We recognise this would be a totally new departure for the CMA. We believe it applies in general for a body with Administrative enforcement powers. But we particularly believe it applies in this totally new area of business commitment – both in competition and in consumer protection.