ESG AND THE RISE OF GROUP CLAIMS IN THE CAT

AN EMERGING INTERSECTION?

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ESG principles have rapidly moved from niche to mainstream. Increasingly, businesses are held accountable not just for their economic performance but for their impact on society, the environment, and governance practices.

This shift is paving the way for competition law to play an interesting new role in enforcing ESG principles.

As both regulatory and public expectations intensify, competition law may become a key tool in addressing harmful corporate conduct that undermines sustainable and ethical business practices. And the Competition Appeal Tribunal (CAT) might just become a hotspot for this action.

Competition law, with its focus on promoting fair market conditions and consumer welfare, has traditionally not been directly associated with ESG principles, with its focus on broader social goals, such as environmental protection, employment rights, and corporate transparency. But corporate conduct that undermines these social goals, such as collusion to limit clean energy development or to suppress transparency, could now be challenged through competition law. The ability of competition law to adapt to these concerns is a key feature of its evolving role.

The potential for competition law to be used as a vehicle for challenging unsustainable practices is further compounded by the fact that group litigation has become a key feature in the UK legal landscape, particularly in the competition law context.

The rise in the use of litigation funding also supports the increase and ease with which these cases can be brought. By providing the financial resources needed to pursue complex and high-cost group claims, funders play a pivotal role in enabling access to justice for affected parties.

This is particularly significant for ESG-related claims, where the potential claimants may be widely dispersed or lack the resources to litigate independently.

But the intersection between ESG principles and competition law is not merely conceptual; it is increasingly a practical reality. In December 2023, Professor Carolyn Roberts[1] filed a claim in the CAT against six major UK water companies, alleging that they abused their dominant positions by providing misleading information to regulators leading to customers paying higher prices for sewerage services that were allegedly underperformed. The claim's first certification hearings were held in September 2024, with further hearings scheduled for early 2025. While these may be viewed as environmental claims at their core, the allegations of monopolistic behaviour underscore their competition law basis. It remains to be seen if this claim will be certified and indeed be successful at trial.

So Why Does The CAT and the Collective Redress Mechanism Matter For ESG Breaches?

One of the key advantages of bringing ESG-related group claims in the CAT is its unique and specialised collective redress mechanism. Outside the CAT, these mechanisms are often cumbersome, less efficient, or, in some cases, not well-suited to large-scale competition-related claims.

In contrast, the ability to bring "opt-out" collective actions in the CAT, meaning that affected parties do not need to individually opt in to the claim, is crucial when the harm is widespread and diffuse, as may often be the case in ESG breaches, such as when a cartel harms both market competition as well as environmental sustainability or social fairness. By allowing groups to sue collectively without requiring individual consent, the CAT ensures that the voices of all those impacted by anti-competitive behaviour can be heard.

Moreover, the CAT has specific procedural rules and a track record in dealing with complex competition-related claims, which makes it uniquely equipped to handle the intersection of ESG issues and competition law. Without this specialised forum, ESG group claims might face significant barriers to bringing about meaningful redress in other courts, which may lack both the focus and procedural efficiency needed for such cases.

Looking ahead, the CAT will likely see an increasing number of cases where ESG issues and competition law intersect with several factors driving this trend:

Public awareness and legal pressure: As public awareness of ESG issues grows, so does the pressure on businesses to conform to sustainable practices. Competition law offers a powerful mechanism to challenge those who engage in unsustainable or unethical business conduct that also undermines fair competition.

Regulatory evolution: Governments and regulators are increasingly attuned to the need for alignment between economic and environmental goals. The UK's Competition and Markets Authority (CMA) and the European Commission have already signalled an interest in examining how anti-competitive practices could harm sustainable business practices. This regulatory evolution will likely fuel an increase in ESG-based group claims in the CAT.

Global ESG standards: As international ESG frameworks and guidelines become more established, there is growing pressure for businesses to comply with these standards. Competition law, especially in jurisdictions like the UK, which have strong consumer protection and antitrust regimes, will be increasingly used to challenge firms whose actions undermine global ESG goals.

The interplay between competition law and ESG principles is still in its nascent stages, but is perhaps set to become an important feature of corporate litigation in the years to come. This isn't just a legal trend; it's a sign of how businesses are being held to higher standards across the board.

For companies, this means ESG isn't just about good PR anymore, it's about avoiding legal risk. And for claimants, the interplay with competition law is a powerful tool for seeking justice and driving change.

1 Professor Carolyn Roberts v Severn Trent Water Limited and others