Competition and consumer policy for a sustainable future

Speech by Sharon Darcy, Director, Sustainability First, to the CMA
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Introduction to Sustainability First

I'm deeply honoured to be invited to speak at what I understand is the Competition and Markets Authority's first ever sustainability week.

In case you haven't heard of us, Sustainability First is a think tank and charity that develops practical solutions to improve environmental, social and economic wellbeing in essential services such as energy, water and communications.

For over 21 years we have been driving change in public utilities for sustainability.

We use our independent convening power and deep sectoral and regulatory expertise to bring key stakeholders in government, regulation, companies and civil society together in areas such as net zero, adaptive planning and regulation, and purposeful business.

We have three aims: to shape agendas; embed sustainability; and connect, engage and inspire people to change.

I'm Sharon Darcy, the Director of Sustainability First. My remarks today are in a personal capacity; after 5 years I'm actually stepping down as Director this week. And I wanted to draw on some of my wider experience in my remarks, including as a former Council Member of Which?, Board member of the Solicitors Regulation Authority and Consumer Futures and Expert Panel member of the UK Regulators Network.

Setting the scene

The CMA's March 2022 advice to government on how consumer protection and competition law can help meet the UK's environmental goals is to be warmly welcomed.

Work on green claims and the commitment to carry out a market study each year on a net zero relevant market are important steps towards the CMA having a greater focus on the environment. Putting this into action, and how the staff team interpret and implement subsequent decisions, will be crucial.[i]

The CMA has a good record in changing its approach to take account of changes in the wider world.

In recent years, through your work on digital markets, you have evolved your approach to deal with dynamic digital disruption and new innovations that upend business models and send shock waves through society.

You can learn from your experience with the Digital Markets Unit to bring a similar paradigm shift in your approach to your work on the environment.

Because when it comes to sustainability, we are also facing deep uncertainty and radical change across the economy.

To deliver net zero by 2050, we need systems change at scale and pace.

Nearly all actors and sectors of the economy – not just individuals or certain net zero relevant markets - will need to fundamentally alter how they do business if we are to avoid catastrophic climate breakdown and build a future which is climate resilient.

And all this change needs to happen in the 2020s; a decisive decade for climate action. If greenwashing erodes trust and leads to inertia, or delays substantive change, we will not only increase costs for future generations but will curtail future standards of living and potentially pass irreversible climate tipping points.

The CMA clearly cannot bring about change in this area on its own. Action is needed by all actors on all fronts. The CMA is just one element in a bigger picture.

However, you can play an incredibly important role in this area.

Directly, in terms of helping markets and innovation to flourish, stamping out sharp practice and ensuring consumers aren't taken for a ride by misleading claims.

Indirectly, your influence can, however, be potentially far more significant. The CMA's actions and communications can remove concerns around the threat of the 'dead hand' of competition law that may get in the way of the transformative innovation we need to see.

Your guidance and market studies really can help to 'create the weather.' The tools you use, both hard (enforcement) and soft (culture and guidance), can create the space for innovation. Whilst acknowledging that this isn't risk free, your approach can help shape markets.

It must be an incredibly exciting time to be in the CMA. You face an exciting if daunting array of digital and environmental challenges. And you are about to have a new CEO and Chair. As you together chart your way through these choppy waters and think about the culture and approaches that you need to be future fit, there are some fundamental issues that need consideration.

In the rest of my speech I'd like to highlight three areas that merit wider thought:

1. What evidence-based decision making looks like for a truly sustainable competition and consumer protection policy
2. Collaboration, partnership working and mergers for a sustainable world
3. Roles, responsibilities and democratic mandates during disruptive change

Competition and consumer policy for a sustainable future

1. Evidence based decision-making and environmental sustainability

The CMA is widely respected the world over for its rigorous and detailed analysis.

Your expertise in assessing cost and efficiency is second to none.

To truly assess environmental sustainability impacts, however, requires a wider analysis framework and broader evidence base than that traditionally used.

Externalities

It requires systematically asking new questions and gathering new information about externalities, or what you may term 'out of market benefits'. Externalities which in many cases, we are still working out how to value and where it can be difficult to put a price on things.

Your new Sustainability Taskforce will be examining how to measure benefits in a sustainability context. This is the new 'real-world' economics that we need to survive and thrive in this disrupted world. It is exciting cutting-edge thinking and we are all on a journey here.

The Sustainability Taskforce will no doubt want to consider how far CMA processes and procedures capture and assess information about the following four types of externalities:

- **Nature based impacts**: In his landmark February 2021 biodiversity report for the UK Government, Professor Dasgupta noted that nature is often invisible, mobile and silent. Understanding and measuring natural impacts can be challenging. And there is another element of complexity here. Professor Dasgupta also noted that we are part of nature not separate from it.[ii] If by harming nature we harm ourselves, what are the implications of this for assessing definitions of harm in a competition case?

- **Inter temporal impacts**: Mark Carney has pointed out that in much of our decision making we face the 'tragedy of the horizon.' Inter-temporal factors, including the interests of future generations, often get overlooked. The Government has made a commitment to reach net zero by 2050. How does the CMA take the interests of those consumers who may not yet be borne but will be reaching early middle age in 2050 into account in its decisions?

  Olivier Guersent, Director-General, DG COMP, European Commission has noted this point and that 'green efficiencies' are further away in time and hence more difficult to quantify.[iii] Sustainability First's work with Frontier Economics has considered what a model for dealing with the intergenerational impacts of decarbonisation and climate adaptation might look like.[iv] Our calls for a lower discount rate to help address this point may be relevant to the CMA's market studies.

- **Geographical and spatial impacts**: many environmental impacts don't respect local, regional or national boundaries. And as previously noted, nature is often mobile.

Wider global moves regarding sustainability reporting, not just on Scope 3 carbon emissions but also into environmental and social impacts, are likely to require an increasingly sophisticated understanding of the impacts of value chains across different geographies. Learnings from the new German Act on Corporate Due Diligence Obligations in Supply Chains may be helpful here.

- **Tragedy of the commons**: many environmental benefits can also fall into this category. For example, in the pandemic, many of us became more aware of the value of green spaces for our mental and physical health. Or to take another example, energy efficiency can clearly deliver multiple positive outcomes but is the Cinderella of the sector (and was noticeable by its absence from the Government's recent Energy Security Strategy). How do these types of collective benefits get picked up and recognised in discussions around efficiency? How are externalities which benefit communities and the places where they live reflected in competition and consumer policy decisions?

There is clearly significant work going on in the financial reporting community which is starting to quantify some of these issues. The Taskforces for Climate and Nature Related Financial Disclosures are leading the way. And clearer signals on carbon pricing could at least address carbon measurement. Many investors and firms are also developing and testing wider measurement frameworks, including on social issues, with the World Benchmarking Alliance[v] and the Just Transition movement[vi] carrying out significant activity alongside a plethora of sometimes confusing wider 'ESG' benchmarks.

Green claims

All of this is clearly relevant to much of the CMA's work, including that on **green claims**. Your recommendations to the Secretary of State that they amend the consumer protection framework to create statutory definitions of environmental terms, provide a positive obligation to disclose environmental information, to improve supply chain transparency in this area and to add misleading or unsubstantiated green claims to banned practices, and for the payment of redress in the collective interest, are to be welcomed.

Until you have an agreement on what environmental impacts are important, including the relevant externalities, and how to measure these it can be difficult for all parties, including consumers, to make meaningful or consistent comparisons and choices.

What can the UK learn from the Netherlands Authority for Consumers and Markets (ACM) who have led much of the early thinking in this area? And how can we build on the EU taxonomy for sustainable activities?[vii]

Even once definitions in this area have been standardised, however, for some goods and services it may still be difficult for consumers to make meaningful use of this information.

What does 'caveat emptor' actually mean for purchases which may have significant long-term or multi-dimensional environmental impacts, such as heat pumps, for example?

Clearly, there may be areas where even with tighter definitions, consumer green purchasing activity may be fraught with difficulties.

Standardising environmental information is vital to avoid green wash. However, this is just the beginning. Going forward, understanding the limits of green definitions, however tightly and consistently drawn, is likely to become increasingly important.

Are there also lessons to be learned here from other sectors here such as health claims and food labelling, where competition approaches may need to be replaced by regulation? An interested observer might note that despite significant work of claims and labelling in these areas over decades, we still have an obesity crisis and much of our soil is degraded.

Ex-ante action

As you get a better grip on externalities, you will no doubt want to consider how this knowledge is applied not only after environmental risks have crystalised but also ex-ante to shape markets. And how you may be able to use market studies etc. to seek to prevent harms from occurring in the first place.

Environmental issues can, however, present challenges for modelling future impacts. This is because when it comes to climate change, the past is not necessarily a good guide to the future. Non-linear change and ecological tipping points can make it more challenging to assess future harms and benefits.

And some of the solutions to environmental problems, such as digital approaches, predictive analytics and smart networks, through the carbon used in data centres etc can actually increase the scale of the challenge.

Taken together, these points indicate that new approaches may be needed to judge actual and potential harms and benefits from a sustainability point of view. Using proxy measures and carrying out scenario analysis, along with understanding qualitative assessments of impacts from those that have already experienced harms (such as flooding, for example) are likely to be increasingly important when dealing with future uncertainties in this area.

2. Collaboration, partnership working and mergers

Whilst competition is clearly going to be important to get the innovation needed for the transition to net zero, so too will be collaboration. To balance the different aspects of sustainability, facilitate the shift to greater circularity and to support systems change often requires a focus on co-benefits and partnership working.

In some cases, all that may be required is the breaking down of decision-making silos within organisations or forging partnerships with other organisations in other non-related sectors.

However, in other areas, sharing of data, closer co-operation or co-ordination between organisations within a sector and their supply chain may be needed. This poses various issues for competition bodies.

How to ensure that this does not lead to price fixing or collusion is a clear challenge.

Fair shares for horizontal agreements

The CMA's developing thinking on **fair shares for horizontal agreements** is clearly relevant here. I would argue that with externalities in mind, it is vital that you look beyond narrow measures of willingness to pay and also seek to understand the **broad range** of potential fundamental impacts, both positive and negative, that may arise as a result of such agreements.

Asking who the harms fall on and benefits accrue to is clearly key. This inevitably raises distributional issues as well as those of practicality. The question of how benefits may actually be passed on to the consumer is also important.

Drawing the boundaries – social impacts and market definitions

When examining such benefits, it can be difficult to separate out environmental impacts from social impacts. It is interesting to note that the new European draft Horizontal Cooperation Guidelines published on the 1st March, unlike the previous version, have gone broader than the environment to also cover social sustainability and reference the UNSDGs.[viii]

Social and environmental issues are deeply inter-linked. Not only because the most vulnerable are the most likely to bear the costs of climate change and this is therefore the right moral course of action. But to politically de-risk the transition. In short, to avoid potentially mass social unrest, we also need a just transition.

It would clearly be undesirable if in the UK the move towards environmental issues was at the expense of issues of consumer vulnerability and inclusion.

If market definitions are scoped too narrowly, rather than taking into account the need in certain areas for transformative innovation, including how risks and rewards are shared in business models and processes, competition interventions could just reinforce existing unsustainable practices. There will clearly be risks on both sides.

In its advice to government the CMA has noted that '*if government wants to be more explicit in how environmental benefits should be taken into account, it could amend the legal framework*.'

Sharing examples of potential problems where markets aren't working may be helpful in making this decision. Here are a few potential examples[ix]:

a) **In energy**: An example could be the potent Green House Gas SF6, which has a warming potential 23,000 times more powerful than carbon dioxide. SF6 is used as an insulating layer in electricity substation switch gear and circuit breakers.[x] Innovation in this area in terms of developing safer alternatives has been sorely

lacking because it is a long-run challenge, can be seen as too difficult and no one 'owns' the problem. How would the CMA respond to collaborative work in this area, with incumbents and across the supply chain?

b) **In housing**: Another example could be sharing data amongst housing developers and their supply chain on innovations for sustainable construction and sustainable living. No one is currently pulling this information together and although social housing is regulated, the private rented sector and private sector are not in the same way.

Having a cross housing innovation test bed which looked at sustainability from a very broad perspective (including supply and demand impacts for energy, water, and other materials) could make sense. Given that the first mover in doing this could potentially be at a disadvantage, there are arguments for greater co-ordination, or potential state subsidies, in this type of area.

Mergers

Taking thinking about co-ordination one step further, how should you treat potential environmental benefits in **mergers**?

If a merger promised to deliver significant positive sustainability impacts, how should this be balanced against potential harm to short-term prices? What about allowing a merger to monopoly if this could up the scale and pace of change that we need for net zero?

Clearly all these questions would require you to balance, or trade-off, different types of efficiency. Sustainability First's recent roundtable on **how to approach trade-offs and make choices on wicked sustainability issues** may be helpful here and assist you as you think how merger policy is considered through a sustainability lens.[xi]

All this can be complex and difficult. Being clear up front about the type of information that you may need form companies will be helpful and should help reduce the chilling effect of competition law. Your recent advice to government suggests that you acknowledge this and are prepared to address these issues.

The suggestion of expanding the concept of 'relevant customer benefits' to include a new sustainability public interest consideration would clearly be welcome. Perhaps war gaming what this might look like and whether it could really make a difference could be instructive?

3. Roles, responsibilities and democratic mandates during disruptive change

Given the scale and pace of change needed to address net zero and other environmental crises, the roles and responsibilities of many actors – in government, regulation, companies and indeed civil society - are starting to be questioned and changed.

Witness the challenges currently being posed to Ofgem around their role in the energy crisis and the suggestions for future institutional reform in that sector. Sticking to your mandates and keeping your head down can be problematic. Competition authorities are no exception.

The CMA's duties

If understanding environmental impacts requires a longer-term perspective, what does this mean for competition policy if this is based purely on **consumer outcomes?**

How should the needs of current and future consumers, and individual consumers versus communities, be balanced? What do price, cost and efficiency mean if, as the IPCC has warned, we are moving to catastrophic climate breakdown?

Going forward, to get a greater focus on sustainability, will the CMA's statues and views need to change to also include **the interests of citizens and communities**? Does the forthcoming BEIS review of utility regulation provide an opportunity to do this?

Democratic mandates and legitimacy

Clearly, the CMA operates within a legal framework set by government and you can't unilaterally change your focus.

So what should you do if, for example, there are residual market failures that sector specific regulation has been unable to address? Or that policy lacks coherence with regard to the environment in a particular area? Should you be a bystander, guide or change-maker?

Could you **use competition and consumer policy to not just protect the status quo but to promote wider sustainability?**

Being thinly stretched and with multiple priorities this may be seen as a politically risky and a step too far. The establishment of the **Sustainability Task Force** should absolutely help you make some of the difficult decisions that you face in this area.

To really maximise the impact of the Taskforce, you will no doubt be carefully considering its t**erms of reference and membership.** Ensuring this information is placed in the public domain will help ensure transparency and build confidence with the public that you are tackling sustainability issues in a robust and strategic way.

Here are five ideas of things you could also do:

a) **Open yourselves up to challenge**: Build your internal capacity in this area by bringing in new types of expertise and diversity of thought into your staff teams to help facilitate new conversations about sustainability. Ensure the voice of the third sector, that you are admirably wanting to get close to, is heard directly and systematically by your board. Get external voices represented in the new Sustainability Taskforce. Involve young people, who have a far greater vested interest in future environmental impacts, and those who have already experienced climate impacts, in the taskforce. There are examples here that you could learn from, including the Sustainable Futures Energy Forum that Sustainability First is currently setting up with Ofgem with the aim of getting the voice of young people into energy decision making.[xii] Commission 'think pieces' in

this area from academics or think tanks may help you 'change the weather' in wider government thinking.

b) **Use what you've got:** 'Off agenda' time or 'group away days' for CMA panel members could be helpful. Many will have significant experience of 'out of market benefits' that can help you assess how best to move forward in some of these more controversial areas and how you can communicate and provide guidance in these areas in ways that may effectively resonate with companies (particularly SMEs who as you know may struggle with detailed guidance) and other external stakeholders. Panel members are also likely to have insights into the CMA's internal culture which may be invaluable in thinking about how you change your approach.

c) **Safe spaces:** Open up a strategic and ongoing dialogue with key external organisations and government to explore new territories in a safe space, as the fair-trade movement has been doing in Europe for some time. This can be invaluable when dealing with complex issues and facilitate the more iterative approach which is often crucial for sustainability.

d) **Get more value out of your own existing work:** Explore cross-sector learnings, themes and interdependencies from across market studies, as these relate to sustainability. For example, given the need to improve the measurement of environmental impacts, are there any lessons that can be learned from the audit market study? What about examining any transferable learning from the creation of the Digital Markets Unit for new work on sustainability?

e) **Share information:** If your work has identified areas where a partnership approach may be helpful that no one else has picked up, could you play a role in signalling this to other actors - government departments, regulators, companies, innovation funders etc – that these areas need attention? Our research on cultures for sustainability has identified that this type of knowledge sharing between organisations is crucial to navigate complex systems change.[xiii] We are feeding this thinking into our work on the Sustainability Principles that need to shape cultures and guide decision making for a more sustainable and resilient future.[xiv]

Concluding remarks

One of your core objectives is to improve trust in markets. To do this, markets need to be reliable and work in practice. Current markets have brought multiple benefits across the globe. But many aspects of the existing arrangements in the market economy are not sustainable. The consumerist lifestyles that we lead are not resilient.

This is the CMA's first ever sustainability week, a development to be truly welcomed. As you think about what you might do differently as a result and how you can embed sustainable approaches into your ongoing work, please take a moment to stand back.

To stand back and ask yourself what a twenty first century competition authority might look like in a sustainable world.

As ACM have said, 'competition law and sustainability can go hand in hand.'[xv] The CMA's advice to government on how competition and consumer law can meet UK environmental goals is a good start.

You know the importance of not getting in the way. I'd encourage you to be brave and go further.

To **lift your sights from a short-term and narrow consumerist framing and explore what a flexible and sustainable competition and consumer protection regime might look like**.

And to ask what role the CMA might play in facilitating markets which are truly resilient for people and planet.

I've suggested three areas for consideration that will help you reshape your culture and how you implement change in practice:

1. Rethinking the evidence base in your investigations to take greater account of externalities, particularly inter-temporal ones;
2. Taking a broader view of the potential benefits from collaboration and partnership activity and how these are shared in a fair way; and
3. The role of the CMA and how you can do more to build your legitimacy and make the most of what you've got to better navigate disruptive change.

People respect the CMA's expertise and unique insights. You help shape many of our social expectations about what is fair and unfair in business practice. Please don't waste your own monopoly privilege. Use it to help us all create a better a world.

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[i] https://www.sustainabilityfirst.org.uk/images/Sustainability_Principles_Needs_Case_Briefing_Nov_2021_FINAL.pdf

[ii] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962785/The_Economics_of_Biodiversity_The_Dasgupta_Review_Full_Report.pdf

[iii] https://www.eesc.europa.eu/en/programme-competition-policy-and-social-sustainability

[iv] https://www.sustainabilityfirst.org.uk/images/publications/expert_viewpoints/And_what_about_your_grandchildren.pdf

[v] https://www.worldbenchmarkingalliance.org

[vi] See, for example, https://www.lse.ac.uk/granthaminstitute/investing-in-a-just-transition-global-project/

[vii] https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-taxonomy-sustainable-activities_en

[viii] https://www.eesc.europa.eu/en/programme-competition-policy-and-social-sustainability

[ix] Other examples could include: The sharing of data amongst carbon capture and storage clusters has been identified by others as potentially problematic in this area. Proposals to address this have included measures such as firewalls, clean team, and the use of anonymised or historic data (https://www.dentons.com/en/insights/articles/2021/november/11/cop26-sustainability-agreements-and-competition-law); or the difficulties of scaling up and mainstreaming nature based solutions in both water catchments and agriculture.

[x] https://www.sustainabilityfirst.org.uk/images/publications/other/SF6_Time_to_Get_Serious.pdf

[xi] https://www.sustainabilityfirst.org.uk/blog/411-principles-trade-offs-roundtable

[xii] https://www.sustainabilityfirst.org.uk/sustainable-futures-energy-forum

[xiii] https://www.sustainabilityfirst.org.uk/images/Culture_report_FINAL_21.2.22.pdf

[xiv] https://www.sustainabilityfirst.org.uk/sustainability-principles
[xv] https://www.oecd.org/daf/competition/sustainability-and-competition.htm