

of companies active in digital platforms, software, fintech, biotech, pharmacology, agriculture chemicals, or health technology, regardless of whether they exceed Turkish thresholds, so far as they reach Turkish markets and users.”

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COMPETITION

Competition policy—Competition and Markets Authority report—sustainability and environmental considerations in competition enforcement—proposed actions—wider sustainability considerations—UK merger assessment guidelines—EU consultations

🔗 Competition and Markets Authority; Competition policy; Consumer policy; Emissions targets; Sustainability

Sustainability and Competition Law: Competition and Markets Authority publishes advice to Government

On 14 March 2022, the United Kingdom’s (UK) Competition and Markets Authority (CMA) published its environmental and sustainability advice to Government.¹

The advice was solicited in a 2021 letter from the then Secretary of State for Business, Energy and Industrial Strategy (BEIS) to the CMA.² It asked three questions:

1. Do current competition and consumer legal frameworks constrain or frustrate initiatives that might support the UK’s Net Zero and sustainability goals, and if so how?
2. Are there changes to the UK’s competition and consumer law that would help achieve the UK’s Net Zero and sustainability goals?
3. Are there other opportunities within the UK’s competition and consumer policy toolbox that would support the UK’s Net Zero and sustainability goals, which the Government should be considering?

With regards to the first question, the CMA noted that it was not convinced that the current rules “are themselves an obstacle to sustainability initiatives such that fundamental changes to those frameworks are necessary”.³ It was noted, however, that clarification on how such rules would be applied to sustainability initiatives would be welcome, particularly given that the CMA, in the same way as the European Commission, relies heavily on parties self-assessing whether their actions and agreements are compatible with competition law.⁴ In this context, it was advised that guidance should be given on “how sustainability benefits might be weighed against competition concerns in relation to cooperation between businesses”, so that businesses might be able to better assess whether potential agreements infringe the prohibition contained in Ch.I of the Competition Act 1998 (the Act).⁵ Moreover, clarity was sought by stakeholders on when and how relevant exemptions,

¹ CMA, “Environmental Sustainability and the UK competition and consumer regimes: CMA advice to Government” (the Advice) (14 March 2022), <https://www.gov.uk/government/publications/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government>.

² Secretary of State for Business, Energy and Industrial Strategy, Letter to Andrea Coscelli (19 July 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004016/sos-letter-to-andrea-coscelli-on-sustainability.pdf.

³ The Advice, Section 2, Question 1.

⁴ The Advice, Section 2, Question 1.

⁵ The Advice, Section 2, Question 1.

contained in s.9 of the Act, might apply to sustainability agreements.⁶ Section 9 currently exempts agreements under Ch.I where they improve production or distribution, or promote technical or economic progress, while allowing consumers a fair share of the resulting benefit.⁷ The CMA therefore proposes that it will provide more guidance on: (i) when sustainability agreements will not restrict competition; (ii) the concept (and measurement) of ‘benefits’ in s.9 in a sustainability context; and (iii) the issue of what constitutes a “fair share” of benefits for consumers.⁸

On the question of what would constitute a “fair share”, the CMA’s view is that “if a particular agreement or practice restricting competition leads to environmental benefits to a broader group of consumers than just those adversely affected by the restriction in competition, such benefits, in principle, can be taken into account...”.⁹ Notwithstanding the fact that the customers suffering a detriment will form part of the group naturally reaping environmental benefits, the CMA notes the possible issue that European Union (EU) case law requires *sufficient* benefits to affected consumers in order to offset the harm.¹⁰ Interestingly, however, the CMA predicts that the UK’s case law may grow to diverge from EU jurisprudence in this area.¹¹

With regards to the second question, the CMA noted that it had “not seen sufficient evidence to merit recommending changes to competition law at this stage”, though it did not exclude the possibility that this view may evolve.¹² Specifically, the CMA expects that “new and innovative sustainability initiatives... may reveal the limitations of the existing framework”.¹³ One suggestion in this regard was that it may become appropriate to have a block exemption for sustainability arrangements, or to class sustainability as a “relevant customer benefit” in the CMA’s merger and markets work.¹⁴

On the third question, the key policy initiative put forward in the advice was the launch of a “Sustainability Taskforce” within the CMA.¹⁵ Among the functions of such a taskforce would be to consider the interaction between sustainability and the prohibition of abuse of a dominant position (under Ch.II of the Competition Act 1998) which was not otherwise considered in the advice.¹⁶ The CMA also pledged continued engagement with stakeholders, ranging from SMEs to consumer bodies and academics, on the relevant issues.¹⁷ Specifically, the CMA expressed a willingness to speak to stakeholders who “provided examples of the ‘chilling’ effect competition law could have on sustainability agreements”.¹⁸

This advice, of course, is not the limit of the CMA’s current engagement with sustainability issues. For example, the revised Merger Assessment Guidelines published last year suggest that environmental sustainability and “supporting the transition to a low carbon economy” may be relevant customer benefits of mergers.¹⁹ The CMA’s recent market study into electric vehicle charging points has also yielded enforcement action on the market.²⁰

The advice provided by the CMA is part of a wider trend of competition authorities seeking to engage with the question of sustainability. The European Commission’s Draft Guidelines on Horizontal Cooperation Agreements (the Draft Guidelines), include a new s.9 devoted to

⁶ The Advice, Section 2, Question 1.

⁷ Competition Act 1998, Section 9(1)(a).

⁸ The Advice, Section 2, Question 1.

⁹ The Advice, Section 2, Question 1.

¹⁰ The Advice, Section 2, Question 1.

¹¹ The Advice, Section 2, Question 1.

¹² The Advice, Section 2, Question 2.

¹³ The Advice, Section 2, Question 2.

¹⁴ The Advice, Section 2, Question 2.

¹⁵ The Advice, Section 2, Question 3.

¹⁶ The Advice, Section 3.

¹⁷ The Advice, Section 3.

¹⁸ The Advice, Section 3.

¹⁹ CMA, “Merger Assessment Guidelines”, (18 March 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051823/MAGs_for_publication_2021_--_.pdf, para.8.21.

²⁰ The Advice, Section 3.

sustainability.²¹ Whilst the Draft Guidelines make the point that sustainability agreements will only yield competition concerns where they affect the “parameters of competition, such as price, quantity, quality, choice or innovation”, they make clear that certain of these agreements will naturally fall under the purview of art.101(1) Treaty on the Functioning of the European Union (TFEU).²² Examples include agreements between competitors to “jointly purchase products having a limited environmental footprint”, or sustainability agreements in the form of “R&D or specialisation agreements”.²³ For completeness, the Guidelines note that horizontal co-operation agreements purporting to yield sustainability benefits can still be assessed for individual exemption under the criteria in art.101(3) TFEU.²⁴

The Government’s recent update on its plans to reform competition law and consumer policy did not include sustainability-related announcements.²⁵ However, the CMA noted in its advice that it expects guidance on sustainability agreements to be included in its revised Horizontal Guidelines.²⁶ The CMA intends to publish a draft of these for consultation later in 2022.²⁷

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²¹ European Commission, “Communication from the Commission-Guidelines on the applicability of Article 101 of the Treaty of the Functioning of the European Union to horizontal co-operation agreements DRAFT”, https://ec.europa.eu/competition-policy/public-consultations/2022-hbers_en, Section 9.

²² The Draft Guidelines, para.551.

²³ The Draft Guidelines, paras 557 and 558.

²⁴ The Draft Guidelines, Section 9.4.

²⁵ Department for Business, Enterprise and Industrial Strategy, “Consultation outcome-Reforming competition and consumer policy: government response” (20 April 2022), <https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response>.

²⁶ The Advice, fn.21.

²⁷ CMA, “The retained Horizontal Block Exemption Regulations — R&D and specialisation agreements — Consultation document” (8 April 2022), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1067501/HBERs_recommendation_for_consultation_.pdf, para.1.17.