



9th November 2021

To: sustainabilityadvice@cma.gov.uk

Dear CMA

Environmental sustainability and the competition and consumer law regimes, CMA advice to the Secretary of State for BEIS

Sustainability First is an independent think tank and charity focused on promoting economic, social and environmental wellbeing in public utilities (see www.sustainabilityfirst.org.uk).

We welcome the opportunity to provide an input into this important area. Our comments are primarily based on our in-depth research and expertise in the energy and water sectors. Although they may have wider applicability in other sectors of the economy, there are some particular features in these utilities that need to be taken into account when considering questions of sustainability. These include: extensive environmental impacts; the role of the sectors in enabling decarbonisation, preserving biodiversity and ensuring resilience in other areas of the economy; long-asset lives; and the use of private capital to deliver public value in often monopolistic circumstances.

We have arranged our responses according to the questions posed by the Secretary of State. We would be delighted to discuss these in further detail.

(a) If, and how, do current competition and consumer legal frameworks constrain or frustrate initiatives that might support the UK's Net Zero and sustainability goals?

In December 2020, Slaughter and May completed a major piece of pro bono work for Sustainability First analysing the extent to which the legal and regulatory frameworks of the energy, water and telecommunications industries create barriers (or facilitate) the pursuit of sustainability initiatives.¹

Sustainability First's conclusion from this work is that there *is* scope within the current legal and regulatory arrangement for more to be done to encourage sustainability and that no

¹ Sustainability First (January 2021) [How far do current legal and regulatory frameworks in public utilities deliver for sustainability – and is further legislation required?](#)

one should hide behind the law or regulation not to deliver sustainable outcomes in utilities. Generally, companies have flexibility within the existing regulatory regime to pursue sustainability initiatives and regulators have flexibility within the existing legal regime to support sustainability practice. All sides need to recognise their own agency in delivering sustainability.

That being said, it is important to recognise that to get change at the scale and pace needed to deliver on our net zero commitments, and to enable the more fundamental systems change needed to ensure the wellbeing of people and planet, competition and consumer protection laws will need to reorientate to give far greater weight to net zero and resilience.²

In addition to the above, given current frameworks, it might take a brave company or regulator to take sustainability initiatives that do not have implicit support from the Government and other stakeholders. The Call for Inputs recognises that delivering sustainability often requires a difficult balancing act, trade-offs and identification of win-wins which can be complex and challenging. Competition and consumer policy frameworks can play a key role here.

Our analysis of Slaughter's work concluded that to address these issues requires not only changing some of the 'hard levers' open to government actors but also supporting the transformational change in mindsets and attitudes now taking place across the economy towards sustainability. We have identified that this needs to address the following gaps – **the '4 i's'** - in terms of delivering sustainability, addressing climate impacts and long-term public interest outcomes in utilities:

- 1) **Influence:** How companies, regulators, policy makers and investors are influenced by the behaviours of other stakeholders. Our research has pointed to the need to acknowledge that it is crucial to understand how "external" factors (e.g. values and trends regarding environmental, social and economic contexts) influence decision making and how this is inevitably informed by the cultural weightings those making decisions use;
- 2) **Interaction:** How different actors - companies, regulators, policy makers, investors and civil society groups – and issues interact (both within and between sectors) noting that one can influence the other. This is particularly important for sustainability where decision making often requires partnerships, collaboration and systems thinking that can span organisational silos. Knowing that greater interaction between all actors in the sectors is needed is not sufficient to facilitating it; it is essential to clarify how actors should interact, which again is also shaped by organisational cultures and processes;
- 3) **Interpretation:** How the law and regulation are interpreted by all sides. Interpretation of both existing laws and regulations as well as existing or new principles, cannot be viewed independently of the cultural and organisational

² For an analysis of some of the issues around systems change, see our October 2021 book [Together for a Fair Climate Future](#) (pages 33-53).

situation of those interpreting them. How different actors interpret the legal and regulatory frameworks in which they operate can shape how they approach trade-offs and co-benefits; and

- 4) **Implementation:** How policy and regulation are implemented in practice. Implementation is also shaped by culture but can also be impacted by practicalities and events.

Our major Sustainability Principles project is developing a framework of principles to address these issues.³ The CMA would be very welcome to attend the invitation only project workshop that we are holding in partnership with the British Academy on how to approach sustainability related trade-offs and identify synergies / co-benefits.

As the CMA considers further how it makes value judgements on the balance between competition and sustainability outcomes, it will clearly also want to consider *who* is making the judgements. This raises questions of governance and diversity in the CMA's own boards and committees (as well as in regulators and companies): including diversity of expertise; cognitive diversity; and socio-demographic diversity.⁴ Our Together for a Fair Climate Future work has highlighted the importance of this issue for better decisions and for building public support for decarbonisation.

Last, transparency around trade-offs, including on the evidence and assumptions on which they are based, how interdependencies have been taken into account, mechanisms used etc, will be crucial to develop confidence in the judgements the CMA may make in this area.

(b) Are there changes to the UK's competition and consumer law that would help to achieve the UK's Net Zero and sustainability goals?

We have identified three key areas where we consider changes to competition law could help to achieve net zero and wider sustainability goals:

1. **Cooperation, collaboration and partnerships:** We consider that there is a case for clearer competition law guidance to facilitate co-operation between companies to deal with climate, and potentially other environmental issues (such as systemic biodiversity and habitat loss), recognising the CMA's lead on this rather than sector regulators. The CMA put out guidance to support cooperation on Covid.⁵ Something similar on climate could be helpful recognising that concern about potential competition issues can inhibit collaboration on public interest issues.

In our view, partnerships are crucial in certain areas to deal with systemic risks and to open up the opportunities for greater circularity etc. Striking an appropriate balance between competition and collaboration can be difficult. Both can be

³ See here for more details of this project <https://sustainabilityfirst.org.uk/sustainability-principles>

⁴ See Chapter 6, Sustainability First (October 2021) [Together for a Fair Climate Future](#)

⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875468/COVID-19_guidance_-_pdf

important. Clearer guidance and careful signalling by the CMA and others is needed here to ensure that competition legislation isn't judged as more restrictive than it actually is.

2. A focus on wider citizen as opposed to consumer interests, outcomes and harms.

This is particularly important for essential services such as utilities and sectors going through transformative change where market boundaries are fluid and dynamic.

Taking a citizen perspective entails not only understanding wider social and community impacts but also embracing broader and longer-term perspectives that include the needs and interests of current and future generations.⁶

3. Supporting new purposeful regulatory and business approaches: Our extensive Fair for the Future Project (2018-2021) identified the role of corporate purpose in delivering environmental sustainability and public value in utilities and the need for utilities regulation to move from a series of one-shot 'winner takes all' games in price control periods to a more strategic approach to the delivery of public interest outcomes over multiple price control periods.⁷ For this to happen, regulators need to experiment and innovate. They need to consider how their approach could change to enable a more purposeful environment and the type of assurance they need from businesses that they are delivering environmental sustainability and wider public value.

By its nature, not all of this innovation will work. The CMA needs to coinvent and reinvent how they interact with regulators on the purposeful agenda, to provide the space to allow regulators to adopt a more permissive approach without facing reputational damage or undue blame where properly considered innovation/experimentation does not ultimately deliver the benefits hoped for.

This will entail consideration of what the red lines are in terms of where regulators may transfer assurance to third parties and where they can take a more risk based approach. As sustainability metrics improve and certification mechanisms such as B Corps become more robust, there will be increasing scope for regulators to place more reliance on these mechanisms, or, for example, on solutions co-invented with local community stakeholders. Early and transparent discussions with the CMA about how much weight should be placed on such assurance will be important to build trust and confidence in new approaches.

On consumer protection, we are supportive of proposals to tighten green claims in business to consumer markets. Behaviour change and public support will be crucial for the delivery

⁶ Sustainability First (June 2021) [And what about your grandchildren?](#)

⁷ Sustainability First (March 2021) [Regulation for the future: The implications of public purpose for policy and regulation in utilities](#)

of net zero. It is vital that these aren't undermined by misleading marketing and green / purpose wash.

(c) Are there 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?

Current consultations on the Defra Strategic Policy Statement (SPS) for Ofwat and the planned BEIS SPS for Ofgem and HMT cross-regulatory SPS provide opportunities for government to start to address these issues. The CMA will clearly want to consider the implications of this new guidance for its work.

Regulators have clearly already recognised the need for a greater focus on environmental sustainability. One of the challenges of putting this into effect is the need to move from a comparative static view of the future to recognising that the future will be different and potentially subject to catastrophic and irreversible environmental tipping points. This is relevant to questions around investment ahead of need etc. Regulators are starting to address this through mechanisms such as adaptive regulation and adaptive planning.⁸ The CMA will need to consider how it can create space for such initiatives in its own approach.

Last, our work on purposeful business has identified four areas that are crucial for utility companies to focus on if they are to balance and align interests to deliver more sustainable outcomes and public value: meaningful engagement; metrics and disclosure; people and culture; and integrating purpose into core strategy.⁹ Greater focus of competition and consumer policy on how to support change in these areas will be important to deliver wider sustainability goals.

⁸ Sustainability First (September 2021) [Adaptive regulation and adaptive planning: Issues for economic regulation in water and energy](#)

⁹ Sustainability First (September 2021) [Balancing act: How to align social and environmental interests in the UK in the light of the pandemic and in the pursuit of net zero](#)