Making markets green & contestable: Not whether we can, *but* 'how' can we achieve it?

Comments on the CMA's 'Environmental sustainability and the competition and consumer law regimes (CMA '148con, dt. 29 September 2021)

Dr. Kalpana Tyagi
Assistant Professor (Competition and Intellectual Property) Law
Managing Coordinator, The Innovator's Legal Aid Clinic
Maastricht University, Maastricht, The Netherlands*
Email: [redacted]

10 November 2021

This note responds to the Competition and Markets Authority's (CMA) call for inputs to the document **'Environmental sustainability and the competition and consumer law regimes'**[1] (hereafter, referred to as *'The Document'*). A discussion on the issue of sustainability in competition law requires a working definition. This is on account of the fact that a healthy and working relationship between competition and sustainability, at least on the face of it, seems somewhat counterintuitive and clairvoyant. Whereas, competition law seeks to promote price-based (static) and innovation-driven (dynamic) competition; 'sustainability' issues may call for an easing (at least provisionally) of such strict requirements. In light of the 'more economic approach' to competition policy, quantification of the costs and benefits associated with an activity are a must. An absence of economic discussion and an abstract approach may invite the worrying reproach of protecting competitors and not competition. The issue also calls for an action on multiple fronts, including but not limited to competition, consumer protection and

* In compliance with the requirements for transparency, I confirm no conflict of interest. This paper represents my opinion based on my academic research and should not be attributed to my academic institution. In addition, it may be useful to add that I am currently conducting academic research on the interface between sustainability and competition and trade law within the framework of Horizon 2020: Making Agricultural Trade Sustainable (MATS) RUR-21-2020.

[1] Competition and Markets Authority, '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*' CMA 148con (29 September 2021) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1021364/CFI_-_sustainability_advice_.pdf

regulation.[2] In order to balance the economics-driven approach of 'competition law and economics', and the complex issues associated with 'sustainability', there emerges a need to define an outer silhouette of a balanced policy debate.

To propose one such workable framework, wherein sustainability issues may more objectively and systematically be addressed in competition law, this note proposes the framework of ***'"sustainable" competition on the merits'[3].*** In para 9 of the Document, the CMA lucidly refers to the distinction between competition and consumer law, and how the two regimes are 'sensitive to sustainability considerations' and can effectively complement the larger policy goal of 'UK's Net Zero objectives'.[4] In its policy brief, 'Competition on the Merits', the OECD defines competition on the merits as permissible conduct by a dominant enterprise, even if such a conduct were to negatively impact market entry or market expansion.[5] In addition to this, there exists a distinction between fair competition and competition on the merits. Whereas the focus of 'fair competition may be an individual, *competition on the merits* safeguards competition as an organizing principle of economic policy'.[6] Adding a dimension of 'sustainability' gives way to the concept of *'sustainable competition on the merits'*.[7] The underlying principle of such an approach is that conduct which impacts the structure of the markets, be systematically addressed within the competition law framework. And conduct, that is more likely to '*mislead*' an individual consumer, be addressed within the framework of consumer laws. An affirmative action in this direction is evident in the CMA's approach to the '*green claims'*, in other words, *'misleading environmental claims'*.[8]

This proposed policy framework approaches the issue of 'green claims' from the lens of consumers, in other words consumer protection law and may include aspects such as using promising labels like 'nature friendly', 'environment conscious' and 'eco-friendly', without a clear and categorical definition of these terms. To illustrate this with an example, a makeup brand launches a new product line and advertises thus:

---

[2] Maarten Pieter Schinkel and Leonard Treuren, 'Green Antitrust: Friendly Fire in the Fight Against Climate Change' in *Competition Law, Climate Change & Environmental Sustainability* S.Holmes, D.Middelschulte and M.Snoep (eds) (Concurrences, 2021) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3749147

[3] For an elaborate discussion on the issue, *see* Kalpana Tyagi, 'From 'Competition on the merits' to 'Sustainable' Competition on the Merits' *(forthcoming* 2022) available at https://www.researchgate.net/publication/356082975_Competition_Policy_with_a_touch_of_Green_From_'Competition_on_the_merits'_to_'Sustainable'_Competition_on_the_Merits

[4] CMA, The Document, at para 9.

[5] OECD Policy Brief, 'What is Competition on the Merits?' (June 2006) available at https://www.oecd.org/competition/mergers/37082099.pdf as referred in *supra* note 3.

[6] *Supra* note 3.

[7] *Supra* note 3.

[8] CMA, Misleading environmental claims available at https://www.gov.uk/cma-cases/misleading-environmental-claims

Case 1: Tagline for a consumer cosmetic:

'The most organic and animal-friendly sensation that will ever touch your delicate skin!'

Absent clear and cogent information about the origin of the ingredients, how and from where the ingredients have been sourced and whether the above-referred claim refers only to the product, or whether it refers to both the product as well as packaging, the above tag line can be very distinctly interpreted by different consumers.

While a potentially misleading and abstract claim, such as in case 1 above, can be effectively dealt with consumer policy; there may be cases where a decision to manufacture one such organic and sustainable product is not made at an individual or at a firm level; instead a group of firms come together and decide to henceforth, produce sustainable cosmetics.

Coordination at industry level calls for co-operation, meetings and agreements. Chapter 1 of the Competition Act, 1998 prohibits anti-competitive agreements. These may include not only formal agreements, but also so-called 'gentlemen's agreements'. Cartels are most frowned upon, and may invite imprisonment and/or fines in the United Kingdom (UK). In addition, it may also lead to a director's disqualification for upto 15 years. In 2016, the Company Directors Disqualification Act, 1986 was used for the first time to prohibit an individual to act as a director for a period of five years. This decision resulted from an agreement between competitors to refrain price competition on the Amazon platform.[9] Simply put, consequences following an infringement of Chapter 1, particularly the hard core restrictions, can be very serious not only financially, but also may lead to criminal sanctions and disqualification.

Considering the grey zone in which agreements are situated, a guidance , ideally a possibility for a case-by-case guidance can be very helpful to engage in or refrain from a certain conduct. Consider for instance our *Case 2*. An advice on *Case 2* may be very helpful for firms to make a merit-based sustainable decision.

Case 2: Sustainability *spills* over from closed-door discussions

'Beauty', 'Beauty Forever', 'Young beauty' and 'La Beauté tojours' are four principle manufacturers of cosmetic products in the UK. The four manufactures are also world's leading suppliers of cosmetic products. Together, they enjoy a market share of 80 per cent for cosmetic products in the UK. These four producers decide to change the consumption pattern of their customers. Their target relevant market is young women in the age group of 20-40

[9] CMA, 'Online sales of posters and frames: Director Disqualification' (1 December 2016) https://www.gov.uk/cma-cases/online-sales-of-posters-and-frames-director-disqualification; Caroline Hobson and Jacqueline Vallat, 'Case Comment : The CMA Secures First Director Disqualification for Breach of Competition Law' *Utilities Law Review : The CMA Secures First Director Disqualification Vol. 21 Issue 4*

years who are methodical consumers of beauty products. To create a market for the organic products amongst their target customer group, they meet and discuss the feasibility of the project. One of the issues that they all confront is the higher cost price of ethically sourced organic products. In addition, they also need to implement new production methods to produce these organic cosmetic product lines. Accordingly, they decide that in order to maintain the cost-effectiveness of their portfolio, they will discard some old product lines. The new product line is up to 20 per cent more expensive than the old portfolio. Interestingly, some of these manufacturers also have their retail outlets across cities such as London, Cambridge, Manchester and Liverpool. They decide to phase out the unsustainable product line from their stores, and henceforth, allocate about 75 per cent of the shelf space to their sustainable product range. They, accordingly, insist that other cosmetic retail outlets also ensure a certain percentage of the shelf space (minimum 75 per cent) to this sustainable product range.

Section 9 of the UK Competition Act 1998, prescribes 4 sets of conditions to benefit from an exemption for prohibition in prescribed in Chapter I. These two positive and two negative conditions (total four conditions) are cumulative in the sense that they must be met together in order to benefit from the provisions of Section 9. These conditions are closely aligned with the four cumulative (two positive and two negative) conditions of Article 101 TFEU (Treaty on the Functioning of the European Union). While outright relaxation of these four requirements may not be advisable, it may be befitting to seek *flexibilities* in these requirements. As an example, the first and the second conditions - that agreement must lead to some efficiency gains (1) and a fair share of these benefits is passed on to the consumers (2) - may be looked at leniently; the third and the fourth condition – referring respectively to the necessity of the measure to achieve a desired result (3) and agreement should not lead to an elimination of competition (4), must be interpreted *sensu stricto*.[11]

Substantially speaking, as these conditions are grounded in sound economic principles, it seems that CMA will continue following these broad principles. Interestingly, henceforth, CMA will have an additional opportunity to separately investigate many of these agreements.[12]

Two relevant points may be added in this regard.

[11] OECD, 'Sustainability and Competition – Note by Greece' (3 November 2020) to be discussed at the 134th OECD Competition Committee meeting on 1-3 December 2020, p.12

[12] CMA, Guidance on the functions of the CMA after the end of the Transition Period, P.26, para 4.10 available at https://www.gov.uk/government/news/cma-publishes-eu-exit-guidance

First, in addition to a general set of guidelines, the CMA may consider setting up a ***'Sustainable Consultation Unit'*** (SCU). This Unit can be an *ad hoc unit* comprising of CMA officials, academics and industry experts; and shall be able to give a fair, but non-binding advice on the reasonableness (or the lack thereof) on the sustainability of an agreement. The SCU's advice can then feed as an input into the final guidance of the CMA. The *ad hoc nature* of the SCU will ensure that while the CMA can leverage on industry & academia-wide experience, it need not invest additional substantial resources to leverage from another emerging area of expertise. This also, is relevant in the big picture, as CMA, being one of world's leading competition authorities, can set a precedent with reason-based decisions flowing therefrom.

Sustainability clauses such as the one in *Case 2* need a 360 degree feedback for a merit-based decision. *Kips van Morgen* (Chickens of tomorrow) is a case in point. The producers of broiler meat entered into an agreement to offer *only* sustainable chicken. In other words, chicken that was farmed under more animal friendly and sustainable conditions. This, as expected, would have led to higher costs and thereby, negatively impacted consumer welfare in terms of reduced availability of lower priced chickens. The Dutch competition authority, *Autoriteit Consument & Markt* (ACM) conducted a detailed analysis, and reached the conclusion that the agreement could not benefit from any exemption.[13] The ACM subsequently engaged in an *ex-post analysis* to assess the impact of the decision on the market. Interestingly, a prohibition decision in this case led to more market entry for sustainable chickens. This means that however attractive it may seem, a blanket exemption for all sustainability agreements may not be a feasible option. What is desirable is that the CMA prioritizes its enforcement practices, encourages firms to actively come forward and request for an analysis. The SCU as suggested above, can offer some swift analysis and non-binding advice. Once this case analysis has reached a certain threshold, it may be useful to gather these experiences in the form of a policy document. In January 2021, the CMA released a '*Guidance on Environmental Sustainability Agreements and competition law*'. CMA's experience following from the above-referred approach can further feed into these guidelines.

An additional, **second** point merits mention. A case-by-case analysis while highly desirable, may not always be possible. To keep the balance, block exemption regulations merit some discussion. The upcoming *UK Vertical Block Exemption Order (VABEO)*, expected to enter

[13] Afspraken Kip van Morgen beperken concurrentie (26 January 2015) *De Autoriteit Consument & Markt: Nieuwsbericht* available at https://www.acm.nl/nl/publicaties/publicatie/13760/Afspraken-Kip-van-Morgen-beperken-concurrentie.

force in May 2022, and the accompanying *VABEO Guidance* can emerge as an important source of guide for environmental sustainability related issues.[14]

To conclude this short note, a quote from *Carl Sagan* one of the most well-renowned astronomer and planetary scientist of 20th century, may be befitting. *Sagan* once said that the universe (the nature), may not always be in perfect harmony with the ambitions of humankind. It is time that competition law furthers this dialogue between man and nature via *a competition policy with a shade of green*.

[14] CMA, *The retained Vertical Agreements Block Exemption Regulation: Consultation Document* 17 June 2021 CMA 145con available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/994552/VBER_recommendation_2021_consultation_with_annexes_170621_FINAL.pdf