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Response to call for input on: Environmental Sustainability and the Competition and Consumer Law Regimes

This paper responds to the UK Competition and Markets Authority ("CMA") Call for Inputs[1] ("CFI") relating to competition law enforcement, merger control and consumer protection.

Section A: Competition Law Enforcement

1. Introduction

1.1 We appreciate the opportunity to respond to this consultation on how the UK competition regime can better support the UK's Net Zero and sustainability goals.

1.2 The timing is good. As is apparent from the COP26 meetings, the defining question for the "**decisive decade**" is how the various pledges and targets can be achieved in practice.[2]

1.3 We acknowledge that the CMA has begun work in this area, aligned with its strategic objective to support the UK's transition to a low carbon economy. This includes CMA guidance on misleading environmental claims on products sold to consumers, the market study into electric vehicle charging in the UK and the guidance on sustainability agreements and competition law.

1.4 We concur with the view that regulation and government policy are important means to achieve the UK's Net Zero and sustainability goals. But we strongly believe that the private sector must be allowed to play a proper role in developing more sustainable supply chains and more environmentally-friendly products and services. There are two reasons for this:

(a) Regulation has a number of imperfections. It is slow to materialize (perhaps too late) and can be reduced to a 'lowest common denominator' by political compromise. National rules will obviously have a limited reach (inadequate to address a global problem) and might only divert the problem elsewhere).[3]

(b) Unilateral action might preferred by antitrust regulators but may not be effective. There are already many internal and external drivers for an individual company to engage in sustainable business practices. Sustainability is a proven driver of growth and can protect companies from the direct impact of climate change on their operations, e.g. supply chain disruption, the need to change technology and litigation risk. But as companies commit to more ambitious targets and find themselves being held to account (quite legitimately) by government, shareholders, consumers, employees and the finance community, there is a palpable realisation that they will need to act with competitors to achieve meaningful change on the scale and in the timeframe needed. Even large and highly efficient firms may lack sufficient scale to transform or create markets. Pioneers may fear isolation if they act first but are unable to recover their additional costs. We are aware that corporate sustainability teams may face challenges in persuading commercial colleagues to commit

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1021364/CFI_-_sustainability_advice_.pdf

[2] *See* e.g. https://www.iisd.org/articles/global-climate-change-governance-search-effectiveness-and-universality

[3] See observations made in the context of the European added value assessment relating to "An EU legal framework to halt and reverse EU-driven global deforestation": "a risk of diverting non-certified production away from the EU market to others that do not require deforestation-free certification, could undermine the idea of a positive impact that this measure could have on FRC-producing and consuming countries around the world."
https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654174/EPRS_STU(2020)654174_EN.pdf

to more ambitious targets which impact bottom lines through higher costs or the loss of more profitable business in the short-term.

1.5 So the central theme underpinning this submission is that joint initiatives by industry peers must be allowed to fill the gap that regulation and unilateral action are unable to close.[4] Antitrust agencies have a role to play in facilitating this without needing to overhaul their toolbox or subvert the established consumer welfare standard.

1.6 The logic and efficiency of stimulating private sector solutions was recognized by the CMA's predecessor, the Office of Fair Trading ("OFT") more than a decade ago in its 2010 contribution to the OECD roundtable on Horizontal Agreements in the Environmental Context where the OFT acknowledged that "*agreements between firms may be particularly appealing to policy makers as they may help achieve policy goals without the requirement of government legislation or explicit regulation. Such agreements have the potential of allowing firms to pursue actions that secure beneficial environmental outcomes in as efficient a way as possible*".[5]

1.7 In response to **Question 25(a) of the CFI**, we are certainly aware of situations where competition law (not specifically the Competition Act 1998 ("CA98")) has played a part in frustrating potential initiatives that would have involved peer collaboration and supported the UK's Net Zero and sustainability goals.

1.8 In our experience it is the spectre of 'by object' categorisation which most often results in projects being unduly shelved. In fact, we actually think that the recent EU case law provides a solid basis for presuming that genuine sustainability projects should be assessed against an effects standard. Following Brexit, we think the CMA has an opportunity to make this clear. Annex 1 outlines the kinds of agreements and more specific scenarios in respect of which guidance would be particularly welcome. Two categories of conduct are quickly identifiable as candidates for clear characterisation as suitable for assessment against an effects standard: agreements that seek to bring about decisive change (e.g. mandatory standards) and arrangements that are designed to create new markets – such as offtake guarantees to ignite supplier investment in new infrastructure etc..

1.9 Naturally, we understand that the CMA must take care to ensure that sustainability does not become a cover for cartel conduct. Whilst sustainability can be an important differentiator in many industries, we do not see a risk of sustainability becoming a smokescreen for illegal behaviour because the existing rules are sufficiently robust to address this. This has been illustrated by recent enforcement directed at agreements designed to impede sustainable outcomes (which one might refer to as 'green blocking' rather than 'greenwashing' which is more concerned with exaggerating green credentials unilaterally). However, the legal boundaries are critical. That is why we encourage the CMA to explain the circumstances in which a joint agreement to phase out environmentally damaging products (and similar) should not be characterised as a hard-core collective boycott. The 'green blocking' cases where companies are alleged to have agreed to 'go no further' to achieve sustainable outcomes also underline the need for clear guidance on sustainability standard-setting. Indeed, in manufacturing, a tech standard

[4] Plus, regulation may in any event necessitate industry collective action. Examples include impending national and EU legislation introducing mandatory supplier due diligence requirements – which may require joint auditing and information sharing between peers to work in practice.

[5] See "Horizontal Agreements in the Environmental Context" www.oecd.org/competition/cartels/49139867.pdf

will often be one that all seek to meet (to allow interoperability) whereas in relation to sustainability, recent cases suggest that this kind of coalescence could be problematic.

1.10 In response to **Question 25(b) of the CFI,** we think that new CA98 guidance on sustainability cooperation would be extremely helpful. In practice, some of the methodology (e.g. low commonality of cost/measuring appreciability) could have read-across to other ESG goals. We have suggested particular scenarios/cases studies in Annex 2.

1.11 In summary, this submission explains why it would be really helpful for business to have clear guidance on:

(a) **When sustainability agreements will not fall within Chapter I** or will qualify for an effects analysis and not have an appreciable effect on competition (see **Section 2** below).

(b) **When standards adopted in pursuit of sustainability goals will fall outside Chapter I**. Standards can be used to drive more environmentally accountable or ethical outcomes at various levels of the supply chain. The current EU guidance on when standardisation would fall outside Article 101(1) is helpful but tailored guidance is needed urgently because (i) current guidance seems more concerned with technological standards developed by the manufacturers (whereas environmental standards may actually be a collectively applied standard for suppliers to manufacturers) and (ii) decisive industry action is likely to require mandatory standardisation – e.g. moratoria to prevent environmental degradation; design requirements to improve recyclability (see **Section 3** below).

(c) **The wide range of sustainability-related benefits that are relevant** under s.9 CA98. It is key for business and their advisers to be able to identify relevant benefits and understand the kind of evidence or quantification that is needed (if indeed quantification is needed at all). We welcome the clarification in the recent EU Policy Brief[6] that qualitative benefits will be recognised, including improvements which do not necessarily mean a cost-saving for consumers, as well as more sustainable production processes which may not change the physical attributes of the product. Again this is not a new concept for the CMA. The OFT acknowledged in its 2010 OECD that 'rainforest friendly' coffee or biodegradability could provide benefits to buyers where consumers place a value on this.[7] See **Section 4.**

(d) **How to address 'out of market' benefits – especially those benefiting wider society**. This is obviously a critical area for many sustainability agreements which seek to address negative externalities. We welcome the explanation in the recent EU Policy Brief that the Commission may be prepared to take into account benefits to society as a whole in certain circumstance. We encourage the CMA to provide clarity in this area.In its 2010 submission, the OFT recognized some logic in taking such benefits into account. It noted that this would mean that the "*totality of benefits of an agreement to all customers are taken into account*" and that this would "*reduce the likelihood of competition policy being a block on potentially government sponsored initiatives and would ensure consistency with standard cost-benefit analysis*". In the context of its review of a UK-specific block

[6] Competition Policy Brief 1/2021 - Policy in Support of Europe's Green Ambition Competition policy brief. 2021-01 September 2021 - Publications Office of the EU (europa.eu)
[7] See footnote 4, p. 102.

exemption for certain public transport ticketing schemes, it seems that the OFT considered that "*in addition to the economic efficiencies, ticketing schemes can lead to indirect benefits for other consumers, such as road users by, for example, increasing the efficiency of services which results in reduced congestion, noise and air pollution*". The OFT explained that, "*…where environmental benefits coincide with, or form an integral part of, economic benefits, they are likely to be capable of meeting the exception criteria*". The need to take wider benefits into account is covered in more detail in **Section 5** below.

1.12 Finally, we applaud the CMA's ambition to play a global leadership role in this area.

(a) Given that government policies in this field are, and should be, fast-moving, they will frequently be introduced by flexible policy instruments rather than by legislative compulsion. Corporate action conforming to government policies, at least where these are clear and precise, should benefit from a state action defence even in the absence of actual compulsion. The extent of the defence, which need not necessarily be absolute, should at least be sufficient to ensure that no resulting coordination can be considered a 'by object' infringement. The CMA could lead the thinking in this area.

(b) There is a need for international leadership by the CMA, particularly because of the risk of a fragmented legal approach to a topic which is by its nature of wide geographic significance. It is not satisfactory to wait until there are cases and precedents before acting. Lack of certainty means that positive arrangements do not get started.

(c) CMA policies and procedures could make a major difference here:

(i) The CMA could explain clearly the basis on which it intends to prioritise (or not) cases with a sustainability angle. For example, businesses would welcome any comfort that the CMA can provide that it would not prioritise cases where: (a) the primary aim of the collaboration is to pursue environmental goals, which contribute to the public interest or align to the UK or international governmental sustainability goals; (b) the collaboration is necessary to achieve material progress against those goals or achieve those public interest benefits; and (c) the collaboration is transparent and open to interested competitors. By reducing the enforcement risk of these initiatives, the guidance may limit the chilling effect that competition law may currently have on the types of potential activities described above.

(ii) The Greek Competition Commission has discussed the possibility of the creation of a 'sustainability sandbox', which would enable firms to notify business proposals for sustainable development. The CMA could explore this concept, just as the FCA created a regulatory sandbox[8]. This could allow the CMA to certify that there are no grounds for proceeding under the CA98. We think this would provide a useful basis for increasing the guidance available in this difficult but important area.

[8] https://www.fca.org.uk/firms/innovation/regulatory-sandbox

2. Clearer guidance is needed on when sustainability agreements will not fall within the Chapter I prohibition or have no appreciable effect on competition

No individual obligations on the parties to the agreement

2.1 Guidelines should clarify that, where there is no precise individual obligation placed on the parties, or where the parties are only loosely committed to contributing to the attainment of a sector-wide environmental target, the agreement is not caught by competition law. That is because of the discretion that is left to the parties as regards the means technically and economically available to attain the joint objective. It would however be useful to explain what is meant by "loosely" and what the nature of the target needs to be – e.g. a sectoral or regional aim which is wider than any relevant market?

2.2 Guidelines might reference and identify the key element of illustrative cases: *ACEA, JAMA/KAMA*[9] and *CEMEP*[10] where the Commission concluded that horizontal commitments agreed by a sector did not fall within Article 101.

An effects analysis is typically appropriate

2.3 Genuine sustainability agreement (such as those outlined in Annex 1) should not in our view qualify for a by object classification. It would be extremely useful for the CMA to provide business with some reassurance that their agreements will be looked at in their full context and that the 'by object' classification will only be applied in 'obvious' cases. Even with regard to EU jurisprudence, we think that there are often good reasons to adopt an effects analysis:

(a) The notion of 'anticompetitive by object' must be interpreted restrictively and applied only to certain types of coordination between undertakings which reveals in itself a sufficient degree of harm to competition[11]

(b) Sustainability initiatives will have a plausible purpose other than the restriction of competition[12]

(c) Initiatives will have many aspects and be nuanced, meaning that there is often no reliable experience (reflected in EU case law) about its anticompetitive nature[13]

2.4 For the reasons above, we encourage the CMA to clarify that common sustainability commitments will not be viewed as by object and can therefore benefit more easily from s.9 exemption. For example, this may include scenarios where scientific consensus calls for certain action in order to meet the Paris Agreement goals, such as hypothetical commitments not to finance fossil fuels or agreements to buy only from suppliers who do not engage in deforestation.

2.5 We encourage the CMA to clarify that these kinds of agreement would not be viewed as hard-core or restrictive by object, but will instead be assessed holistically taking into account their

[9] Case COMP/37.634 JAMA and Case COMP/37.612 KAMA (1999), Commission Press Release IP/99/922, 1 December 1999
[10] CEMEP (2000), Commission Press Release IP/00/508, 23 May 2000.
[11] European Court of Justice (Third Chamber), C-67/13 P - *CB v Commission ("Cartes Bancaires"),* 11 September 2014, EU:C:2014:2204, para. 58.
[12] European Court of Justice (Fourth Chamber), C-307/18, *Generics (UK) Ltd and Others v Competition and Markets Authority*, 30 January 2020, EU:C:2020:52, paras 87-90.
[13] European Court of Justice (Fifth Chamber), C-228/18, *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others ("Budapest Bank")*, 2 April 2020, EU:C:2020:265, para 76.

purpose and effect, including wider benefits to society. We think that these kinds of agreements can be distinguished from more straightforward collective boycotts which are unequivocally about competitors agreeing on a course of conduct that will shield them from competition from the boycotted party. We do not think that the CMA would be departing from the case law if it were to recognise that joint purchasing in the sustainability context will be subject to an effects analysis.

An analysis may show that there is no appreciable increase in costs (or commonality of costs) and/or a low likelihood of any appreciable pass-on to consumers

2.6 Guidance is needed on when sustainability efforts will not have an appreciable effect on competition. Market share thresholds are unlikely to be helpful given that sustainability agreements usually require scale and therefore widespread take-up.

2.7 Instead, it would be helpful to focus on when an increase in cost would not be expected to raise concerns about a price increase whether because of its size or because highly competitive conditions in the upstream market mean that any price increase would be unlikely to be passed on to consumers.

2.8 Sustainability aims/targets are typically complemented by other joint initiatives, e.g., investment in suppliers/payment of incentives to farmers etc.. It would therefore be very helpful for the CMA to cover these sorts of arrangements and explain when such cooperation will not have an appreciable impact on competition because of, say, a low degree of commonality of costs[14] or why a consolidated fund should be considered for making these sorts of payments as opposed to direct payments from competitors to suppliers (if that were considered necessary by the CMA).

Legitimate public interest considerations may remove sustainability agreements from the scope of the Chapter I prohibition

2.9 Established European case law leaves no doubt that legitimate public interest considerations may exclude the application of Article 101 TFEU.

2.10 We appreciate the challenge of translating the *Wouters/Meca-Medina*[15] case law into guidance for a potentially indefinite variety of case scenarios, and the CMA would understandably refrain from a blanket exemption of all such agreements from Chapter I without further caveat, or limiting principles. But we think there is merit in exploring this further.

2.11 After all, Advocate General Mazak's opinion in *Pierre Fabre*[16] was that 'private voluntary measures' may fall outside the scope of Article 101(1) pursuant to the *Wouters* doctrine, provided the limitations imposed are appropriate in the light of a legitimate objective sought and do not go beyond what is necessary in accordance with the principle of proportionality. The Advocate General added that the legitimate objective sought must be of a public law nature and therefore be aimed at protecting a public good. However, it would seem reasonable for *Wouters* to be invoked where firms enter into agreements pursuant to a clearly articulated public policy.

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[14] See for example the arguments contain in this Opinion: https://api.fairwear.org/wp-content/uploads/2016/06/OpiniontoFWF-TheApplicationofEUCompetitionLawtoFWFLivingWageStandardfinal1.pdf

[15] Case C-309/99 - Wouters and others, Judgment of 19 February 2002; Case C-519/04P - Meca-Medina and Majcen v Commission, Judgment of the Court of 18 July 2006.

[16] Case C-439/09 EU:C:2011:113, para 35 of his opinion.

2.12 As Samantha Mobley argued in her recent article[17], we think the CMA could consider the idea of giving guidance to business that agreements between competitors which further the UK's ten point climate change plan fall outside the Chapter I prohibition by virtue of the overall context and objective of such agreements.

2.13 In any event, even under a more restrictive interpretation, we do not think that a business organisation such as one under a UN charter whose remit is to combat climate change should be treated any less favourably that the Dutch bar or a 'mere' sporting organisation such as the IOC or International Skating Union.

2.14 Overall, we believe that the current consultation presents the CMA with an opportunity to make the connection between Wouters and sustainability goals at time when it does not need to coordinate its approach with EU Member States and the European Commission. At the very least, CMA should reference this body of case law in its guidance, even if only to indicate that it will be taken into account as an element of a case by case analysis.

3. Clearer guidance is needed on when standards adopted for sustainability goals will fall outside the Chapter I prohibition

3.1 Standards can certainly be used to drive more environmentally accountable or ethical outcomes at various levels of the supply chain. The 'safe harbour' in current EU guidance is of some use. However, it is more tailored to technology/manufacturing than, say, a standard for more sustainable production applied upstream. Consequently, guidance on how to assess both voluntary and mandatory standards in a sustainability context is really needed.

3.2 The OFT provides a good example of an effective sustainability-related standard in its response to the OECD. The hypothetical scenario describes a voluntary initiative to make yogurt pots from a recyclable plastic. Even though the manufacturers and importers represented 70 per cent of yogurt sales within the relevant market, and the OFT considered that it could amount to a de facto industry standard, its conclusion was that the agreement would not give rise to appreciable restrictive effects on competition.

3.3 It would be useful if the CMA could use a scenario like this to provide further clarity. In particular:

(a) More clarity is needed on where the boundary lies between a voluntary and a mandatory standard. We do not think it is correct to treat a popular standard which has been voluntarily adopted as a *de facto* binding industry standard. In any event, in the yoghurt scenario, how relevant is it that the standard is voluntary? Would a different conclusion have been reached, had it been mandatory (even though the effect is the same)? Is the role of the Member State in encouraging recycling but not mandating the standard relevant? It would also be helpful if the CMA could explain its approach to standards that are only mandatory for those willing to participate. Would this sort of arrangement be outside Article 101(1) subject to a market coverage threshold?

(b) The OFT does not conclude that the standard would fall outside of Article 101 entirely. Why is that and is it significant that the manufacturers would still be able to compete on

[17] Samantha Mobley, "Can the UK Competition and Markets Authority Save the Planet?" https://www.linkedin.com/pulse/can-uk-competition-markets-authority-save-planet-samantha-mobley/

"price, quality, nutritional content". This could be important if a standard related to commodities/non- differentiated products.

(c) Guidance should explain how the 'unrestricted participation', 'transparency' and access requirements (in paras 281 and 282 of the EU Horizontal Guidelines) should be met in markets with multiple levels – from farmer/processor to trader, retailer and end customer. That is particularly relevant in the sustainability context where standards may be developed by one level of the supply chain to be 'applied' to upstream firms without actually leading to any new product features, e.g. a standard which a company attaches to its purchases because they are grown or not grown in a certain way. The guidance should refer to the theory of harm, e.g. foreclosure or price increase/quality reduction etc. Intuitively, an agreement which is made or socialised across multiple levels in the market seems less likely to raise competition issues. That seems to be the case in the yoghurt example but the CMA should clarify whether this is a relevant factor.

4. A wide range of benefits are relevant under s.9 CA98, with no need for mathematical weighing

4.1 The Commission's current position on what qualifies as quality or innovation under the consumer welfare standard risks being insufficient to capture all relevant environmental and social benefits in that it tends to focus narrowly on what can be described as product functionality improvements.

4.2 The wording of s.9 CA98 does not warrant this restrictive reading. It looks at whether agreements contribute to "improving the production or distribution of goods or to promoting technical or economic progress". Therefore qualifying emission reductions as production-improving and biodiversity protection as contributing to economic progress needs no stretching of the letter of the law. Accordingly, many lawyers and economists have argued that the consumer welfare standard is "perfectly capable of integrating sustainability benefits.[18]

4.3 In any event, the Commission has in the past acknowledged a wide range of environmental benefits when carrying out competition law assessments[19] and we welcome the clarification in the EU Policy Brief that sustainability benefits can be assessed as qualitative efficiencies, which

[18] S. Holmes, Climate change, sustainability, and competition law, *Journal of Antitrust Enforcement*, Vol. 8, Issue 2, July 2020, pp. 354– 405, at pp. 362–365 and 372; M. Dolmans, Sustainable Competition Policy, *Competition Law and Policy Debate*, Vol. 5, Issue 4 and Vol. 6, Issue 1, March 2020; G. Murray, Antitrust and sustainability: globally warming up to be a hot topic?, Kluwer Competition Law Blog, 18 October 2019, http://competitionlawblog.kluwercompetitionlaw.com/2019/10/18/antitrust-and-sustainability-globally-warming-up-to-be-a- hot-topic/?print=print; M. Ristaniemi and M. Wasastjerna, Sustainability and competition: Unlocking the potential, in Sustainability and competition law, *Concurrences* no 4-2020, art. no 97390, pp. 26–65, at p. 53; C. A. Volpin, Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves), *CPI Antitrust Chronicle*, Summer 2020, 8; S. Delarue and M. Walker, United Kingdom, in S. Holmes, D. Middelschulte, M. Snoep (n 4); A. Miazad, Prosocial Antitrust, p. 22, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802194.

[19] The Commission relied on a reduction in air pollution and energy use, as well as the prospect of the development of lead-free materials. Philips-Osram (Commission Decision of 21 December 1994 (IV/34.252 - Philips-Osram) OJ [1994] L 378/37, paras 25-27); and see EACEM, XXVIIIth Report on Competition Policy (1998), p 15; it acknowledged a reduction in the use of raw materials and the volume of waste products, together with the environmental benefits of eliminating the transport of a particular hazardous substance. Exxon/Shell (OJ 1992 L37/16, para 38. Commission Decision of 18 May 1994 (IV/33.640 - Exxon/Shell) OJ [1994] L 144/20, paras 76-68 and 71). In Ford/Volkswagen, the development of a product with reduced or eliminated environmentally hazardous materials, low emissions and fuel consumption, and increased recyclability was viewed as beneficial. Commission Decision of 23 December 1992 (IV/33.814 - Ford Volkswagen) OJ[1993], OJ L 20/14, para. 26.

form part of the assessment under Article 101(3) TFEU. We consider that the CMA could take a similar approach and explicitly recognise the following as benefits:

(a) increased quality or longevity of a product which increases the value that consumers attributes to that product

(b) more sustainable methods – applied at any level of the supply chain from farming/production to distribution, collection and recycling - which consumers appreciate even though there is no direct or immediately noticeable product quality

4.4 The OFT itself recognised in its 2010 OECD response that 'rainforest friendly' coffee or biodegradability could provide benefits to buyers where consumers place a value on this.[20] That said, we do not consider consumer willingness to be the only or best test of 'benefits' for the following reasons:

(a) Willingness to pay studies take no account of long-term improvements/efficiencies. The introduction of more sustainable practices and technologies frequently comes with more or less temporary cost increases that, especially where the sustainability gain is substantial, businesses may be forced to pass on to consumers until the initial investment has paid itself off.

(b) Even where there is a degree of willingness to pay, cooperation may still be necessary to get the market as a whole to move to more sustainable production/consumption - and in the time scale needed in the light of the growing climate crisis.

As a result, rather than focus exclusively on the stated preferences of current consumers, the CMA should adopt a more long-term approach. At the very least, the CMA should adapt the 'willingness test' to include cases where the parties anticipate and project that consumers will value the improvements in the future. At times, it may be necessary to assess the genuine interest of consumers by taking into account behavioral biases, such as the irrationality of preferring small immediate benefits (such as a small reduction in the price) above much larger but later benefits, such as no depletion of a certain resource.

Also, the CMA should accept evidence that consumers appreciate the sustainability of a product in several forms (such as attitudinal surveys, voting patterns etc.) especially because "appreciation" may not translate (at least not in the short term) into a willingness to pay a higher price.

The 'net effect'/'no worse off' standard is inappropriate

4.5 The debate in this area, at least at EU level, is further clouded by para 85 of the Article 101(3) Guidelines which says that "the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement".

4.6 We are not aware of any legal requirement for a net benefit. The Horizontal Guidelines reference *Consten v Grundig*[21], but adopt a very wide interpretation. The Court of Justice only stated in that judgment that the improvement within the meaning of the first condition of Article 101(3) must show appreciable objective advantages of such a character to compensate for the disadvantages

[20] See Horizontal Agreements in the Environmental Context (oecd.org), p. 97.
[21] Consten v Grundig [1966] ECLI:EU:C:1966:41

which they cause in the field of competition. The Court did not specify that there must be net advantages at the level of consumers, nor that the consumers in each affected market must be assessed in isolation.

4.7 We also highlight that the text of Article 101.3 / s.9 CA98 refers to the need for a "fair share" for consumers not that consumers are "no worse off". In any event, the latter may be the incorrect standard for assessing agreements that have widespread environmental effects such as to reduce noxious emissions. Whereas the "no worse off standard" is concerned with ensuring that private firms pass on enough of a benefit to consumers that are suffering the harm of reduced competition caused by their agreement, this concern does not arise in relation to environmental benefits which are by their nature enjoyed by all citizens and cannot be artificially reserved to collaborating firms.

4.8 While there may be instances where putting an economic value on a benefit may be useful in carrying out a proportionality analysis, this should not restrict the application of Article 101(3)/s.9 CA98. The Commission has itself acknowledged that Article 101(3) balancing is "not restricted to a mathematical exercise of clearly identified price/profits"[22] and it would be extremely useful for this to be reflected in the CMA guidance.

5. Updated guidance is needed on the markets in which the efficiencies may be realised (for self-assessment)

5.1 Environmental agreements are clearly intended to have significant widespread positive effects. The lack of clarity (and even logic) about which markets/consumers can be taken into consideration is preventing companies from pursuing laudable goals.

Narrow approach to 'out of market' efficiencies needs to be updated

5.2 The EU Exemption Guidelines explain in paragraph 43 that the assessment of efficiencies flowing from restrictive agreements must be made in the relevant markets to which the agreement relates. It goes on to say that "[n]negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market. However, where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same".

5.3 This appears to be an unduly narrow approach in the light of the EU jurisprudence:

(a) The Court of First Instance pointed out in *Compagnie Générale Maritime* that: "[f]or the purposes of examining the merits of the Commission's findings as to the various requirements of Article 85(3) of the Treaty and Article 5 of Regulation No 1017/68, regard should naturally be had to the advantages arising from the agreement in question, not only for the relevant market, …, but also, in appropriate cases, for every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement. Both Article 5 of Regulation No 1017/68 and Article 85(3) of the Treaty envisage exemption in favour of, amongst others, agreements which

[22] Comments made by Maria Jaspers at: https://www.ucl.ac.uk/laws/events/2019/oct/conference-sustainability-and-competition-policy-bridging-two-worlds-enable-fairer

contribute to promoting technical or economic progress, without requiring a specific link with the relevant market".[23]

(b) In *Mastercard*, the Court acknowledged that "the appreciable objective advantages to which the first condition of Article 81(3) EC relates may arise not only for the relevant market but also for every other market on which the agreement in question might have beneficial effects".[24]

(c) This of course fits with the approach in *Groupement Cartes Bancaires*, where the Court noted that "[i]n order to assess whether coordination between undertakings is by nature harmful to the proper functioning of normal competition, it is necessary, …, to take into consideration all relevant aspects – having regard, in particular, to the nature of the services at issue, as well as the real conditions of the functioning and structure of the markets – of the economic or legal context in which that coordination takes place, it being immaterial whether or not such an aspect relates to the relevant market.".[25]

5.4 It makes sense to take this wider view of relevant consumers/benefits given that Article 101(3) /s.9 CA98 not only relates to improvements in the production or distribution of goods but may equally concern agreements relating much more generally to technical or economic progress where there may be no easily identifiable group of purchasers.

5.5 Environmental benefits fall within the first condition and these often benefit society as a whole not just a narrow group of purchasers. The Commission has recognized this—the clearest example being its *CECED*[26] decision where it explicitly acknowledged that it was taking into account the 'collective environmental benefits' of the agreement: the 'environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers'.

5.6 This is consistent with the recognition in paragraph 85 of the Commission's 2004 Exemption Guidelines that "society as a whole benefits where the efficiencies lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources".

5.7 As a result, we call for recognition that efficiencies impacting other markets and indeed the common good/society as a whole can be considered. We appreciate that competition authorities like the CMA may prefer some limiting principles. In *Star Alliance*, the Commission took into account 'out of market efficiencies' which it said was justified by the facts of that case such as its finding of a 'considerable commonality' between consumers on different markets.[27]

5.8 However, we would argue that consumers do not need to be "substantially" the same (as is clear from the Commission's approach in *CECED*). Instead, we think that an overlap should suffice. It should not be necessary for the 'group of customers affected by the restriction and benefiting from the efficiency gains to be 'substantially the same' so long as they at least overlap – i.e. those affected by the restriction only need to be a subset of those enjoying the benefits.

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[23] Compagnie générale maritime and Others v Commission of the European Communities [2002] ECLI:EU:T:2002:50
[24] MasterCard, Inc. and Others v European Commission [2012] ECLI:EU:T:2012:260
[25] Groupement des cartes bancaires (CB) v European Commission [2014] ECLI:EU:C:2014:2204
[26] Commission decision of 24 January 1999, (Case IV.F.1/36.718 CECED) OJ [2000] L 187/47, p. 47–54
[27] https://ec.europa.eu/competition/antitrust/cases/dec_docs/39595/39595_3012_4.pdf (para 58 and footnote 43)

5.9 It seems to us that this is the proposal in the EU Policy Brief. The Brief is, however, unclear in when the wider societal benefits that can be attributed to the affected consumers will be regarded as sufficient. We think that, when it comes to environmental benefits affecting the atmosphere, there is a strong case for this condition to be fulfilled. Although currently on appeal, the recent Hague District Court judgment[28] requiring an energy company to cut its "global" emissions (on the basis that they had an impact on the human rights of Dutch coastal communities due to the threat of rising sea waters) also suggests that a link might be made between global initiatives and local communities. The various COP26 pledges by national governments but relating, in practice, to overseas forests and manufacturing processes also show that interconnectedness.

5.10 We encourage the CMA to act boldly at the outset of this decade of action. A more conservative approach would be to explain in guidance that out of market benefits resulting from agreements between competitors which further the UK's ten point climate change plan will be considered as part of the s.9 assessment.

5.11 We note that Austrian competition[29] law now makes it clear that customers are deemed to have received a "fair share" if the benefits resulting from the improvement of the production or distribution of goods or the promotion of technical or economic progress, "make an essential contribution to an ecologically sustainable and climate neutral economy".

5.12 The CMA could also take a pragmatic approach and recognize that, where the wider benefits are so large compared to, say, a small increase in price etc., there will again be a compelling case for exemption without the need for a full-blown mathematical exercise. See Example 4 in the ACM guidelines which describe a category of agreements that will only lead to a limited price increase or a limited reduction in choices for buyers, while, at the same time, allowing users to reap large benefits in return.[30]

6. Evaluating quantitative benefits

6.1 It is clear – e.g. from the [Article] 81(3) Guidelines that an assessment of qualitative efficiencies "necessarily requires a value judgment".[31] Similarly, the ACCC's comprehensive case practice in this field show that sustainability efficiencies can be captured effectively without putting numbers to them.[32]

6.2 At the same time, where possible, quantification can provide greater certainty in self-assessment. The comprehensive joint ACM/HCC technical paper,[33] provides guidance and inspiration.

6.3 It would be very useful if the CMA could also explain when and how benefits of environmental agreements can be expressed in monetary terms. We note that the ACM refers to "environmental

[28] The Hague District Court, *Milieudefensie et al. v Royal Dutch Shell plc*, NL:RBDHA:2021:5339 (26 May 2021), available here.
[29] Section 2(1) of the Austrian Cartel Act which is equivalent to Section 9 CA '98 and Article 101(3) TFEU.
[30] https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within- competition-law.pdf
[31] Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, pp. 97–118, at para. 103
[32] *See*, e.g., the 2020 Battery Stewardship Council Final Determination, paras. 4.13–14 (https://www.accc.gov.au/system/files/public-registers/documents/Final%20 Determination%20-%2004.09.20%20-%20PR%20-%20AA1000476%20-%20 BSC_0.pdf) and the 2008 Sydney Waste Management Group of Councils Authorisation Determination, paras. 6.51–54 (https://www.accc.gov.au/system/files/public- registers/ documents/D08%2B110060.pdf).
[33] https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf

prices" or "shadow prices" which are values that indicate the harm of, among other things, polluting emissions and greenhouse gas emissions.

6.4 The Commission's 2004 Exemption Guidelines confirm that future benefits are relevant (albeit with some discounting for the fact that these benefits are in the future). This is certainly appropriate as the need to consider future generations (future 'consumers') is central to the very concept of sustainability. However, when discounting for future benefits, the CMA should also consider future costs which may be increasing.

7. More explicit guidance is needed on when the indispensability criterion is met

7.1 Guidance would be useful on when the CMA is satisfied that a sustainability agreement does not impose on the parties restrictions that are unrelated or unnecessary to the fulfilment of its objective benefits.

7.2 The European Commission has been through this thought process in relation to sustainability benefits. In *CECED*[34] the Commission was satisfied that industry-wide targets, information campaigns and ecolabels would not have been a viable way of achieving the same objectives as the restrictions under consideration. It would be useful if the CMA could share its thinking in relation to this and other justifications. This could include:

(a) where a restriction is needed in order to overcome a first-mover disadvantage (e.g. by avoiding free riding on investments to set up an eco-label)

(b) where individual action would be feasible in spite of limited scale, but co-operation would be imperative to deliver meaningful environmental or social results in an acceptable timeframe.

(c) where individual businesses – even with strong buying power – lack the necessary leverage to induce systemic changes required in the supply chain.

7.3 Many competitor co-operations will involve short-term scale-ups, meaning that they may not be indispensable once penetration of the sustainable technology, practice or product itself has been attained. The CMA could helpfully provide guidance on when sustainability agreements would have to be restricted to the relevant transitory periods in order to satisfy this criterion.

Section B: Merger Control Regime

8. Introduction

8.1 We agree with the CMA's preliminary views regarding the relationship between sustainability and the assessment of mergers. Sustainability is recognised as a parameter of competition and it ought to play an important role in the CMA's assessment of whether a merger may result in a substantial lessening of competition ("**SLC**"), as well as in the assessment of efficiencies. The current regime, however, provides no or inadequate guidance on how sustainability is to be assessed in these instances and we provide below our comments on the role we expect the CMA to take on to address this.

8.2 Moreover, above and beyond the CMA's preliminary views set out in the CFI, we note that the CMA should also take sustainability into account when assessing remedies, with factors relating

[34] Commission decision of 24 January 1999, (Case IV.F.1/36.718 CECED) OJ [2000] L 187/47.

to sustainability harms of benefits being considered in the assessment of the proposed undertakings[35]. Further still, we agree with Simon Holmes' suggestion that the Enterprise Act 2002 should be amended to include "sustainability and climate change" as "specified considerations" under section 58 to provide the UK Government with the legal possibility to intervene where a merger raises sustainability concerns.[36]

Sustainability should be treated as a parameter of competition in its own right – and be part of the competitive assessment

8.3 In the context of a substantive assessment, the CMA can certainly consider sustainability when defining the relevant market and analysing how consumers differentiate green(er) products from other products. An example at EU level is *Aleris/Novelis*[37], where the EC considered that lightweight aluminium used for the production of fuel-efficient vehicles with reduced emissions could be considered to form a separate product market.[38] This would afford consumers increased protection on the narrower market of environmentally friendly aluminium. With consumer choices moving towards environmentally friendly products and/or technologies, as well as regulatory requirements increasingly emphasizing environmental qualities of products and technologies, we expect this tendency to increase.

8.4 While UK merger control lacks a direct equivalent of Article 2 (1) b EUMR (the "development of technical and economic progress provided that it is to the consumers' advantage and does not form an obstacle to competition"), we do not think this prevents the CMA from properly building relevant sustainability issues into the competitive analysis.

8.5 **Non-price competition**: The CMA's Merger Assessment Guidelines[39] acknowledge that the range of possible non-price aspects of competition that firms may use to win customers is wide, and that terms such as 'quality' should be interpreted broadly and include "the sustainability of a product or service". Many of the effects of mergers most relevant to sustainability in general, and climate change in particular, are likely to fall within this concept. For example, if a merger is likely to lead to the production of more sustainable products (e.g. less polluting products or goods which are manufactured using fewer natural resources) then those goods can be seen as being more innovative and of a higher quality.

8.6 **Rivalry-enhancing efficiencies**: the CFI explains that "benefits to the environment could … potentially be considered as rivalry-enhancing efficiencies in appropriate cases to the extent that they impact competition in the relevant market". We welcome this guidance which should be added to paragraph 8.3 of the MAGs with some examples, e.g. if the merged entity can produce products using fewer natural resources that should be seen a clear 'efficiency'.

8.7 **Relevant customer benefits:** We endorse the CMA's March 2021 Merger Assessment Guidelines where it specifically recognized that reduced carbon emissions as potentially relevant

[35] Sustainability and Competition Law, Report of the International Developments and Comments Task Force, 11 August 2021
[36] cclp_working_paper_cclpl51.pdf (ox.ac.uk)
[37] M.9076 – *Aleris/Novelis* (decision not yet published), EC press release IP/19/5949.
[38] Similarly, in the EC, decision of 5 May 2015, M.7292 – *DEMB/Mondelez/Charger OPCO*, the Commission considered whether non- conventional including organic-grown coffee would form a separate market from conventional coffee. The Commission has also considered whether standard or non-standard (certified and/or traceable) cocoa beans would form separate product markets (M.7510 – *Olam/ADM Cocoa Business* (decision of 10 June 2015).
[39] Merger Assessment Guidelines (CMA129) (publishing.service.gov.uk)

to an efficiencies analysis[40]. However, we believe that the approach taken in these Guidelines is too narrow: reducing carbon emissions is crucial but it is only one of the many important sustainability factors that ought to be taken into account.

8.8 We also acknowledge that account can be taken of benefits to consumers in markets other than where the SLC is found. This is, of course, particularly helpful in the context of environmental benefits (since it would not just be the buyers of goods in a particular market that benefit from cleaner air if production results in less pollution and the emission of fewer greenhouse gases). However, we think that the scale and pace of the climate crisis means that the CMA should not focus exclusively on "UK customers". The CMA has an opportunity to position itself as a global regulator that it is able to take into account out-of- jurisdiction sustainability benefits. Paragraph 8.23 of the MAGs hints at the possibility of this, clarifying that the definition of customers under the s.30(4) of the Enterprise Act 2002 for the purpose of considering 'relevant customer benefits' enables the CMA to "take into account a broader range of efficiencies and benefits from a merger to consumers and to **society more generally**". [emphasis added]. In our view, the CMA should clarify that out of market/jurisdiction benefits can be taken into consideration in order to capture benefits that arise to society more generally – i.e. the assessment will not in practice be limited to the parties' customers and their downstream customers (which is a possible interpretation of the s.30(4) EA02 definition).

8.9 Finally, it is acknowledged that a deal's impact on the environment and sustainability can be hard to quantify. It may therefore be difficult to assess whether the claimed efficiencies are likely to materialise, and are substantial enough to counterbalance potential consumer harm. A reduction of CO2 emissions may materialise (with a reasonably degree of certainty) but may not be certain. Similarly, it will take time before any similar efficiency can occur, and this will by definition add uncertainty to the merger review. As such, we encourage the CMA to take into account the appropriate (longer) timeframe for efficiency assessments relating to sustainability.

8.10 When it comes to weighing up the different factors under consideration (competition, efficiencies, sustainability benefits etc.), the CMA is the appropriate body to make such assessments. No other body is as well qualified to assess mergers and it is experienced in weighing up different factors in different industries. Not only can it draw on the increasingly wide range of skills within the CMA itself, it can seek advice from other bodies- both within the public and private sector. The CMA could also engage outside consultants (in the same way as it sometimes seeks consultants in other areas-notably in economics or for consumer surveys etc.).

Remedies

8.11 Sustainability considerations may be relevant when considering remedies whether in cases where sustainability issues are an element of the theory of harm, or where a proposed undertaking addresses other aspects of the substantive assessment of the deal but have a negative impact on sustainability. In this context, the CMA would be well placed and may well consider more appropriate behavioural remedies, in addition to divestitures. Where necessary, the CMA could liaise with other public bodies or local authorities, though we would recommend that the consultations are scoped very carefully so as to avoid unnecessary delays to deal timetable.

[40] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970322/MAGs_for_publication_2021_.pdf.

Public interest

8.12 We agree with the suggestion made that the Enterprise Act 2002 should be amended to include "sustainability and climate change" as "specified considerations" under section 58.[41] This would provide the UK Government with the legal possibility to intervene where a merger raises sustainability concerns which at the moment are not arguably caught by the relevant provisions. This would allow the Government to take the final decision on whether the CMA ought to conduct a detailed investigation, and decide whether to block or clear the transaction (on the advice of the CMA).

Section C: Consumer Protection Law

8.13 We are of the view that the current framework constrains and frustrates initiatives that might support the UK's goals as the law has not been drafted with this in mind. There is naturally some ambiguity as to what would be classified a material piece of information or a material omission with respect to a product or service's sustainability or impact on the environment. We can draw parallels here with the digital services sector and the ambiguity that has arisen in respect of applying the framework to the consumer-facing services provided by providers of digital services/digital content and their associated liability.

8.14 With that in mind, to the extent that the CMA's response to the CFI will be a proposal for new regulation similar to, e.g. energy or food labelling, requiring companies to comply with additional information requirements in respect of products and services, whilst we agree that supplementing the framework in this way would address one of the key concerns of the lack of consumer awareness, we would flag that clear, in-depth guidance with comprehensive definitions will be crucial for its success.

8.15 In terms of addressing current issues of supply chain transparency, a key requirement in our view will be to allay concerns regarding the sharing of information between competitors within the supply chain. Supply chain members need to feel confident that they can disclose potentially sensitive information regarding their processes without sharing any of their trade secrets.

8.16 The CMA has clear opportunity to develop the consumer protection law framework to help achieve the UK's Net Zero and sustainability goals. Development in line with the EU proposals would be welcome, for example, the sustainable products initiative and its proposed expansion. Any development should be supplemented with clear, in-depth guidance explaining how to apply the changes in practice, e.g. as with the Green Claims Code. We hope that any developments would include:

- clear definitions for key terms;
- a practical means for measuring the carbon footprint of a product;
- a practical means for measuring the expected lifetime of a product;
- a universal labelling system for proper disposal of a product (aligned with home recycling); and / or

[41] cclp_working_paper_cclpl51.pdf (ox.ac.uk)

- an accreditation to guide consumers as to the sustainability / environmental impact of a brand / product / service (e.g. a "green sticker").

8.17 However, it will be important to balance any additional obligations on traders with the commercial impact for businesses so there is a level playing-field for traders – and to ensure that any new regime is proportionate and does not provide a financial barrier to compliance for smaller market players.

8.18 It is important to highlight the success of self-regulation as part of the framework e.g. the ASA's advertising codes, where reputational damage incentivises compliance. Companies generally comply with the advertising rules as a result.

8.19 From a practical perspective, the framework itself should only be prescriptive to the extent that standards or requirements are synonymous with, e.g. EU standards, in order to facilitate compliance by multi- jurisdictional companies. Imposing different requirements to those prescribed by the EU Commission would impose an unreasonable burden on companies providing services or products to consumers in multiple jurisdictions.

8.20 Regarding practice around planned obsolescence of products; and/or promotion of over-consumption, to the extent the CMA considers addressing these, the CMA should provide clear, in-depth guidance, which can be practically applied. We hope that any updates to the framework in respect of obsolescence will cover repairing products, the longevity of external vs. internal products, battery life and spare parts. To tackle over-consumption, we would like to highlight the approach recently taken by the government in respect of the advertising of foods with high levels of fat, sugar or salt, e.g. restrictions on when and how the products can be advertised. Additional (proportionate) restrictions could apply to disposable products, fast fashion items or low quality items.

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November 2021

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Annex 1

Sample Cooperation Where Guidance Is Needed

1. Sustainability agreements where there is no impact on competition

1.1 A binding commitment to meet sectoral targets which do not mandate how individual companies meet that target

1.2 Agreements between competitors where they commit to respect laws and agree to demand legal compliance from suppliers and other business partners

1.3 Information exchange on anonymously provided business partner compliance with ESG rules/laws, including systems to conduct due diligence and monitoring of third parties, e.g. joint mapping of harvesting locations and deforestation incidents

1.4 Sharing of good practices, systems and tools to risk assess, control or monitor business activities from a sustainability perspective

2. Sustainability agreements which may have only de minimis impact

2.1 Joint commitments to ensure living wages for workers

2.2 Joint incentives for suppliers/producers to switch to use more sustainable farming methods or to confine agriculture to certain areas (e.g. already cleared land)

3. Agreements which develop new markets

3.1 Agreements which help create new markets by jointly creating resources and demand, e.g. collective demand for the development of a product mature enough and facilities which are large enough for scaled production

3.2 Collective commitments to buy, e.g. to create necessary demand for farmers to start planting more diverse crops and to develop technological expertise

3.3 Joint infrastructure funding to unlock the development of collection and sorting infrastructures—industry- owned/-run or operated by third parties—like in the example of the Australian Consumer and Competition Commission's recent *Battery Stewardship Council*[42] which involves a fixed levy which is passed on to consumers in order to drive collection/recycling and innovation in these activities

4. Examples of legitimate environmental aims which deserve an effects analysis

4.1 Binding minimum environmental standards which go beyond national laws/regulations

4.2 Restrictions which result in a temporary or permanent moratorium, e.g., fishing, halting deforestation

[42] ACCC, Voluntary battery stewardship scheme granted authorisation, 4 September 2020, https://www.accc.gov.au/media-release/voluntary-battery-stewardship-scheme-granted-authorisation; *see also* https://globalcompetitionreview.com/sustainability/sustainability-and-antitrust-in-australia-outlier-or-blueprint

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Annex 2

Sample Case Study Issues

We set out below a number of hypothetical sustainability agreements/objectives in respect of which clearer guidance on the non-applicability of the Chapter I prohibition or the availability of s.9 exemption would be useful so that businesses are not deterred from entering into agreements that have positive consumer benefits.

1. Binding targets which leave scope for competition as to how they are reached

1.1 The largest five firms in the industry agree that they will all:

(a) reduce their global emissions by 30%

(b) reduce the global use of a polluting input by 20 %

(c) ensure that at least 40 % of global volumes purchased meet or exceed a certain environmental standard.

1.2 Although the percentages are binding, the companies can decide how to meet those levels (including where in the world they adjust their manufacturing/purchases in order to meet the threshold).

2. Unilateral/voluntary commitments

2.1 In order to join a particular trade association, members need to commit to a particular minimum standard. Members decide unilaterally whether or not they wish to join the association.

2.2 Would this be assessed as a joint arrangement between those that had signed up, or a series of unilateral commitments?

3. No agreement on a parameter of competition

3.1 A trade association's members are all Buyers who together account for 90% of the market. They agree that, in the event that they discover that a supplier does not meet any standard applied unilaterally by the Buyer, the delisting will apply to the supplier's entire corporate group as regards the product in question (or potentially more) and not just the company/division selling to the Buyer.

4. Non-appreciable impact on price

4.1 While an environmental agreement is forecast to increase the wholesale price of an input, this 'premium' is calculated to be very modest at around less than 1% of the total cost of the end product as sold to consumers. Is there a de minimis level at which the price concerns will be less? Or what considerations should apply when addressing this on a case by case basis? Is commonality of cost relevant?

4.2 Competing buyers accounting for 90 % of a market identify certain suppliers to whom they wish to pay financial incentives/compensation so as to bring about greener manufacturing processes. In which circumstances, if any, could this raise competition issues? Consider: choice of recipient; impact on end price etc. Which factors would be relevant and why, e.g. commonality of cost etc.?

Are there any circumstances in which the CMA would prefer such payments to be made via a third party administered fund? If so, why?

5. Information exchange

5.1 A trade association with members accounting for 90% of the market establishes a database of suppliers that have failed to meet a certain standard (regardless of whether that standard exceeds legal requirements etc.) or who have been involved in deforestation incidents. The database does not include any sensitive information.

6. Benefits

6.1 Competitors reach an agreement on a more environmentally-friendly manufacturing/farming process or on how to improve working conditions. However, the product is unchanged by the process improvement. Can that agreement be said to generate a qualitative efficiency?

6.2 An agreement produces environmental benefits (reduced CO2 emissions/less traffic noise) for consumers who do not buy the products covered by the agreement. In which situations, if any, will those benefits be relevant to an exemption analysis? Would it make a different if the consumers that bought the products also experienced the same environmental benefits?[43]

[43] See the OFT submission to the OECD roundtable discussion here: http://www.oecd.org/competition/cartels/49139867.pdf In particular, see p.104 where the OFT reasons that: "…where environmental benefits coincide with, or form an integral part of, economic benefits, they are likely to be capable of meeting the exception criteria. In the public transport ticketing review, we considered that while the ticketing agreements under consideration were likely to create economic benefits for passengers and transport operators (for example, better quality bus services and improved transport networks for the former and increased patronage and greater certainty as to revenue and lower administrative costs for the latter), the wording of section 9(1) of the UK Competition Act 1998 (equivalent in substance to Article 101(3) for material purposes) was wide enough to allow the OFT to take account of benefits for other road users and consumers . The main thrust of the analysis under section 9(1) relates to the economic efficiencies that are directly or indirectly passed on to consumers and that wider benefits to society would not normally be sufficient on their own for section 9(1) to apply. However, we considered that in addition to the economic efficiencies ticketing schemes can lead to indirect benefits for other consumers, such as road users by, for example, increasing the efficiency of services which results in reduced congestion, noise and air pollution".