

RESPONSE TO CMA CALL FOR INPUTS: ENVIRONMENTAL SUSTAINABILITY AND THE COMPETITION AND CONSUMER LAW REGIMES

This is an individual submission and all views are personal.

The CMA's challenge and opportunity

1. It is excellent news that the CMA is getting to grips with sustainability issues. This is a great opportunity for it to reconsider its view of competitive markets as ones that maximise output, and therefore emissions, in a fossil-fuelled economy. The CMA can rethink its mission to better reconcile traditional competition economics with the imperative of addressing climate change as the 'the greatest market failure the world has ever seen'. It is time for the CMA to listen to the warnings of the scientists and to understand who it is and what it is doing.¹ Finally, Greta Thunberg has recently set a simple test for the success of the CMA's sustainability initiative. Either it acts to reduce emissions now, or it is just more 'blah, blah, blah'.²

The CMA's mission is anti-sustainability

2. The CMA's current mission is to maximise carbon emissions and to maximise pollution. This may sound perverse, but it is sadly true.
3. Under its primary duty, 'the CMA must seek to promote competition, both within and outside the United Kingdom, for the benefit of consumers.' Its stated mission is to 'make markets work well in the interests of consumers, businesses and the economy.'³ The Call For Inputs (CFI) para 9 states that 'competition and consumer law exists to ensure that markets are working effectively and efficiently to meet the needs of consumers.' Further, para 28 states 'the CMA views competition as a process of rivalry between firms seeking to win customers' business over time by offering them a better deal. Rivalry creates incentives for firms to cut prices, increase output, improve quality, enhance efficiency, or introduce new and better products.'
4. These are familiar and established maxims of competition policy. They ignore environmental concerns. The underpinning economics mean that as it seeks to make markets competitive, the CMA aims for the price of a product to be competed down to just above its marginal cost, and so for production to be at the maximum profitable level.⁴ It therefore views a fully competitive market as one which maximises output, and so uses most resources,⁵ and so is inherently likely to be unsustainable.

¹ To apply Prime Minister Johnson's speech to the UN of 22 September to the CMA. See para 13:

<https://www.gov.uk/government/speeches/pm-speech-at-the-un-general-assembly-22-september-2021>

² <https://www.theguardian.com/environment/2021/sep/28/blah-greta-thunberg-leaders-climate-crisis-co2-emissions>

³

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/274059/CMA13_Vision_and_Values_Strategy_document.pdf

⁴ The CMA does not describe the underpinning economics in its public statements, but these statements are fully aligned with the traditional concept of a competitive market as one where price is just above marginal cost. This concept still holds in the more dynamic concept of markets now prevailing. See for instance <https://wilde.wordpress.com/2018/05/09/what-does-behavioural-economics-mean-for-competition-policy/>

⁵ Competitive levels of efficiency are likely to be better than monopoly levels, as firms have greater incentives to minimise their costs, so there are trade-offs. But a 1980s DDR Trabant achieved approximately 40 miles per gallon, which is roughly what my 2017 hatchback manages. Competitive markets drive some parameters

Specific factors make the problem worse

5. In addition to this universal issue with the standard definition of a competitive market, three factors exacerbate the CMA's adverse effects on the environment.
6. First, in competitive markets firms have strong incentives to minimise their costs. While they pay for energy (including embedded energy), there is currently no explicit financial cost to carbon emission or pollution, so they do not have a financial incentive to minimise those. Accordingly, firms and markets are indifferent to the damage their emissions cause, since they do not show on the corporate balance sheet. They have incentives to pursue growth strategies that ignore them, regardless of the personal preferences of some corporate executives. In Sir Nicholas Stern's words:⁶

'The problem of climate change involves a fundamental failure of markets: those who damage others by emitting greenhouse gases generally do not pay. Climate change is a result of the greatest market failure the world has seen. The evidence on the seriousness of the risks from inaction or delayed action is now overwhelming. We risk damages on a scale larger than the two world wars of the last century.'

7. Second, the UK economy is still nearly 80% fossil-fuelled,⁷ so that by increasing output, firms increase fossil fuel consumption, and so increase their emissions.
8. Third, UK consumers love activities and things that are environmentally damaging, such as foreign holidays, driving cars, and eating meat.⁸ A comprehensive list would be very long. Decades of environmental activism, information, and climate disasters may have trimmed but have not stifled such environmentally-damaging demands. One of the key advantages of market economies is the freedom that consumers enjoy to make their own consumption decisions, and to define for themselves what counts as their 'benefit' or 'need'. But it is apparent that we continue to make choices that are having cumulatively disastrous effects. The CMA actively works to enable consumer choices and consumption, regardless of their carbon intensity or environmental impact.
9. Accordingly, the current position appears to be:
 - We are facing a great market failure in the shape of climate change.
 - The CMA has defined its mission as to make markets work well in the interests of consumers, businesses and the economy.
 - In practice this means that the CMA intervenes in markets to make them more competitive (as it currently understands that term), which likely

faster than others, in particular those that consumers value. My car is quicker than the Trabant, which accelerated from 0 to its top speed of 62 mph in 21 seconds. (<https://en.wikipedia.org/wiki/Trabant>)

⁶ <https://www.res.org.uk/resources-page/achieving-low-carbon-growth-for-the-world----sir-nicholas-stern-on-the-key-elements-of-a-global-deal-on-climate-change.html>

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1016822/UK_Energy_in_Brief_2021.pdf See page 13 'In 2020 the UK obtained 21.5% of its primary energy from low carbon sources, with 37% of this from bioenergy, 31% from nuclear, and 18% from wind.' There is controversy about the sustainability of 'bio-energy'. The position is complicated and will vary by industry. Further, many firms use or supply imported products, with the carbon embedded in them, but the UK position is broadly in line with the global: 'In 2019, around 84% of global primary energy came from coal, oil and gas.'

<https://ourworldindata.org/fossil-fuels>

⁸ UK meat consumption is falling, but not fast enough to meet sustainability goals.

<https://www.theguardian.com/food/2021/oct/08/cuts-uk-meat-consumption-doubled-health-researchers-food>

increases output, and so increases emissions and pollution, and so makes the market failure worse. The more effective the CMA is, the worse its impact on the environment is likely to be.

This is a striking paradox that the CMA could usefully consider.

Possible policy responses and the CMA's role

10. In terms of possible competition policy responses that would give markets appropriate incentives, the simplest way is to impose a direct financial cost to pollution that markets can 'see', perhaps in the form of a carbon tax. This would give the environmental consequences of production a financial cost that would affect firms' profits and so give firms economic incentives to minimise them. This is for government not the CMA. But for some 30-odd years (at least since Margaret Thatcher's speech to the UN in 1989⁹), UK governments have been unwilling to impose such costs to directly challenge consumption patterns in the interests of the environment.¹⁰
11. A way for the CMA at least to start to address this market failure is for it to assess pollution and emissions as it undertakes all its activities. The CMA is familiar with considering competitive and monopoly levels of output. It should also consider sustainable levels of output.¹¹ Producing quantitative estimates would enable the CMA and others to understand how emission and pollution levels are affected by any issue it is considering, and would be affected by any CMA intervention.
12. Such analysis could produce uncomfortable results. For instance: what are the competitive, the monopoly, and the sustainable volumes of London-New York weekend shopping trips?¹² From basic principles, I expect the first to be higher than the second, and suspect the last is close to zero such flights per year. Following that through would suggest that cartels in the airline industry are pro-sustainability, since they would increase prices, reduce flights, and so reduce emissions. This runs directly counter to established competition policy, by which such cartels are a clear violation of competition law and can be criminal under the Enterprise Act.
13. Finally, the CMA could set its own priorities to ensure that it focuses on markets that favour sustainability, and de-prioritise those that don't. The science of solar heat retention and its effects on the Earth's atmosphere and climate does not care why we burn fossil fuels, but we should. Promisingly, the CMA lists 'Supporting the transition to a low carbon economy' as the fourth of its four

⁹ <https://www.margaretthatcher.org/document/107817>

¹⁰ From 1993 to 1999, Conservative and Labour governments applied a 'fuel price escalator' to increase the costs of road fuels in the interest of the environment. The last increase under this policy took place in 1999. https://en.wikipedia.org/wiki/Fuel_Price_Escalator

¹¹ There is increasing science around the social costs of carbon emission, see for instance: Jarmo S Kikstra *et al* 2021 *Environ. Res. Lett.* 16 094037 <https://iopscience.iop.org/article/10.1088/1748-9326/ac1d0b>

¹² This example is deliberately provocative, and I enjoy flying. But I make repeated use of flying as an illustration in this submission since (i) the service is easy to understand and relateable; (ii) the industry entails lifting loads of fossil fuels high into the atmosphere and burning them where they do the most environmental damage due to radiative forcing; (iii) flying is very largely a discretionary activity, as the rapid shutdown in March 2020 in response to the Covid threat showed; and (iv) the CMA and its predecessors the OFT and CC have been active in the sector. We could use examples from any industry that uses fossil fuels, which I think means almost all of them.

business priorities for 2021/22,¹³ but the initial suggestions for certain consumer and markets work that CFI para 9 makes seem unambitious and could limit the CMA's role. Within this business priority, the CMA does not yet appear to have engaged with the implications of its view of competitive markets as those which maximise outputs in a fossil-fuelled economy. See further paras 22 to 25 below.

The CMA's questions

14. The CMA's specific questions are secondary to the main issue identified above. A key insight is that all commercial activities have an environmental impact, and this should inform all the CMA's decisions: there is no limited category of agreement, conduct, transaction or market feature that relates to sustainability. They all do, though some activities are more polluting than others.

Competition law and 'sustainability agreements'

15. The CMA states that such agreements are 'cooperation agreements between businesses (including industry-wide initiatives and decisions of trade associations) for the attainment of sustainability goals, such as tackling climate change'.¹⁴
16. In applying competition law, while subjective intent may be informative, authorities do not allow undertakings to categorize their own agreements and conduct. Instead they consider the overall effect to see whether agreements or conduct is beneficial or not. The CMA could adopt that approach with regards to sustainability, rather than establishing a new category of 'sustainability' agreement.
17. The key environmental issue is whether any agreement or conduct increases or decreases emissions and pollution over time, regardless of the parties' claims. A hardcore cartel could significantly decrease emissions, but the CMA has said that it remains unlawful, regardless of its effect on the environment.¹⁵ This is the conflict the CMA needs to resolve, and its Sustainability Agreements guidance comes down firmly in favour of traditional competition, and so of maximum output and maximum emissions, regardless of the 'greatest market failure'.
18. Second, it may be that there is significant pro-sustainability innovation and investment held back by s.2 CA98, although it is unclear why this should be. The CMA is asking for relevant facts (CFI para 25) and I encourage it to stick to its principle of making evidence-based decisions in this regard. The current debate around the criteria in s.9 CA98 and Article 101(3) TFEU may, depending on the evidence the CMA receives, be a distraction from the key issue, and itself increase emissions.

Mergers and market inquiries

19. Just as with agreements and competition law, the key question is whether any transaction, feature or potential CMA remedy would increase or decrease emissions and pollution over time.

¹³ <https://www.gov.uk/government/publications/competition-and-markets-authority-annual-plan-2021-to-2022/annual-plan-2021-to-2022>

¹⁴ <https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law>

¹⁵ *Ibid.*

20. Regarding Mergers, the CFI Question 6 asks: 'are you aware of any examples of cases reviewed under the current merger regime where environmental factors have not been able to be fully taken into account?' The short answer is 'all of them', since the CMA does not consider emissions and pollution as part of its standard analysis and decision-taking process. For just one example, I worked for a while on the *Ryanair/Aer Lingus* merger at the Competition Commission and the possible effect on emissions played no part in our analysis.
21. For an example under the Markets regime, the Competition Commission celebrated its *BAA* investigation as a success in forcing airport sales.¹⁶ Again, emissions were no part of its analysis, despite the obvious environmental issues with flying. Even when it conducted its Remedies Evaluation, the CMA took no account of sustainability issues and identified the main benefit of its remedies as increased passenger numbers.¹⁷ It published that Evaluation in 2016, some 10 years after Stern's report identifying the potentially catastrophic costs of climate change and 'business as usual'.¹⁸
22. CFI para 36 states 'quantification of an efficiency or RCB relating to environmental sustainability is very challenging or not feasible. Even if quantification were feasible, the CMA notes that it would be weighing up two very different sets of considerations.' Para 37 notes the lack of an established framework for weighing competition against sustainability.
23. This seems pessimistic and defeatist. Courage! Remember we do these things not because they are easy but because they are hard,¹⁹ and on plausible predictions, our civilisation depends on avoiding the worst climate changes. The CMA has intelligent and creative staff and determined leadership that can rise to this challenge.
24. In terms of environmental costs, typical merger analysis entails forward predictions of at least 2 years, while regulatory work often runs on 5-year cycles. Accordingly, the CMA has experience of predicting how industries will develop, and it could apply that with regard to projecting future outputs and emissions, to

¹⁶ <https://www.gov.uk/cma-cases/baa-airports-market-investigation-cc>

¹⁷ https://assets.publishing.service.gov.uk/media/57399d43ed915d152d00000b/evaluation_of_baa_market_investigation_remedies.pdf Figure 1.1 estimates 30,000 additional passengers at the divested airports between 2009 and 2016. Para 1.6(a): "The increase in passenger numbers is likely to have created benefits to consumers in the form of improved connectivity and choice. As a result of these improvements in connectivity and choice more passengers are able to fly, including some that would not otherwise have done so. These passengers benefit directly from having taken those journeys. Second, expanding supply puts downward pressure on prices for air travel all else being equal. While wider development in the airports and aviation market make it difficult to establish a definite causal link between the CC's divestment remedies and the increase in passenger throughput, the weight and breadth of evidence clearly suggests that the CC's intervention was the main driver of the observed changes." The Evaluation is 164 pages long, and makes no reference to climate change or sustainability, although there are some references to local environmental issues. A proper analysis is beyond me, but if each flight lasted only 1 hour, those 30,000 flights would produce 7,500,000 kg of carbon emitted, directly attributable to the CC's action. (Based on 250kg carbon emitted per passenger hour flight: <https://www.carbonindependent.org/22.html>) I suspect this is a significant underestimate, and am sure the CMA could produce a much better estimate of the carbon emissions caused by its BAA remedies.

¹⁸ <https://www.lse.ac.uk/granthaminstitute/publication/the-economics-of-climate-change-the-stern-review/> A key finding is: "the benefits of strong and early action far outweigh the economic costs of not acting". That was in 2006.

¹⁹ <https://www.youtube.com/watch?v=Ateh7hnEnik> Averting catastrophic climate change is a more worthy goal than impressing the USSR and sending 24 men on some very expensive tourism, astonishing achievement though that certainly was. https://en.wikipedia.org/wiki/List_of_Apollo_astronauts

help it assess relevant adverse effects on the environment likely to arise from its decisions and interventions.

25. In terms of assessing the competition benefits (and so how the consumption related to specific activities could be weighed against its damage to the environment), this is a question that faces us as a society, and the CMA should not expect to act in isolation. Government, which has posed the current questions, could assist, as part of its strategic steer to the CMA.²⁰ It may involve establishing a hierarchy of 'needs' that should guide CMA priorities and the weighting of its assessments in different industries. In that hierarchy, my need for a New York shopping trip may rate lower than your need for a mobility scooter, or everyone's need for basic foodstuffs. Currently, legally, those needs are all equal. As noted in paragraph 13, the atmosphere does not care why we emit carbon, but we should.

Consumer protection

26. I have only limited experience, and only repeat that while misleading consumers is bad and undermines markets, we now have long experience that even well-informed consumers choose to undertake environmentally damaging activities. Accurate information on its own is not enough to reduce pollution and emissions. Notably, in the consumer protection field, the CMA recently intervened to improve the market for and possibly reduce the price of PCR tests,²¹ which could reduce the costs of flying, which should increase flight volumes, which would increase emissions.

And finally...

27. There is no doubting the wonderful power of competitive markets to supply consumers' needs.²² But markets are blind to pollution, and consumers want environmentally destructive things. The CMA needs to address these two dangerous features of UK markets if it is to have a positive role in confronting possibly the major challenge of our time.

Mark Bethell

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²⁰ <https://www.gov.uk/government/publications/governments-strategic-steer-to-the-competition-and-markets-authority-cma> The current steer is silent on the environment and sustainability.

²¹ <https://www.gov.uk/government/news/cma-publishes-recommendations-to-improve-pcr-testing-market>

²² For any doubters, Frank Dikötter's *The Tragedy of Liberation* (Bloomsbury 2013) details the Communists' progressive regulation of the Chinese rural economy from 1949 to 1953, via so-called mutual aid teams, then collectivisation, fixed-price state monopolies, and curtailed freedom of movement. Immiseration and starvation quickly followed. See Chapter 10 in particular. This was just the precursor to the greater catastrophe of the 'great leap' famine of 1958 to 1962.