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**Personal comments in response to the CMA call for inputs on
competition policy and the UK's net zero and environmental sustainability goals**

Maurits Dolmans
Cleary Gottlieb Steen & Hamilton LLP, London

This is a brief response to the CMA [call](#) for inputs ([CFI](#)) to help inform advice the CMA will provide to government on how competition and consumer regimes could better support the UK's net zero and environmental sustainability goals. The invitation to comment is appreciated.

This response is submitted in my personal capacity, as a private citizen and UK resident, informed by 35 years of experience as a competition lawyer, and a personal interest in environmental economics and policy. It does not bind the firm or any of its clients.

A. Executive Summary

If consumers in a market are willing to pay enough for firms to fund climate solutions, firms should compete on being cleaner and greener. Normal principles of competition law should apply, including, for instance, the rules to enable joint R&D.

If a significant number of consumers are not willing to pay enough to fund climate solutions, sustainability agreements should qualify for exemption, where the conditions are met. In assessing the conditions for exemption (or the conditions for proportionality of ancillary restraints), the CMA should take into account that:

- (a) while firms pursuing short-term profit only may have incentive to curb or avoid climate investment, firms taking long-term goals into account (including the need to minimize climate impact on their business) have incentives to maximize investment, and to encourage others to maximize investments too, from which all benefit ("spill-over benefits");
- (b) Absent sufficient consumer willingness to pay, however, market failures arise. Even firms with long-term climate change mitigation goals will be unwilling to invest in achieving those goals if others don't also, for fear of incurring a first-mover disadvantage, or enabling free riding. They have an incentive to invest only if others do too, and that may require cooperation (given inadequate regulation and carbon taxation worldwide).

When evaluating sustainability agreements, the CMA should therefore verify

- (a) Whether there are sustainability-related "spill-over benefits" i.e., whether firms benefit in the long run if their rivals eliminate greenhouse gas emissions or adopt other sustainability policies;
- (b) whether these private benefits align with public benefits; and
- (c) whether the parties to the agreement actually pursue these spill-over benefits.

If so, the sustainability agreement should be allowed so long as the proportionality or exemption conditions are met. The "fair share to consumer" condition must take into account the "polluter pays" principle. Accordingly, consumers can be deemed to receive a "fair share" of the benefit so long as the price increase or incremental cost they bear is less than the sum of (i) the benefit they derive from the sustainability agreement plus (ii) the social costs of greenhouse gas emissions (or other externalities) caused by their consumption. A "fair share" means the polluter pays, not that the polluter should be compensated.

The principles set out in this paper for assessment of private sector cooperation should apply to all forms of private sector conduct and transactions, including mergers and unilateral practices.

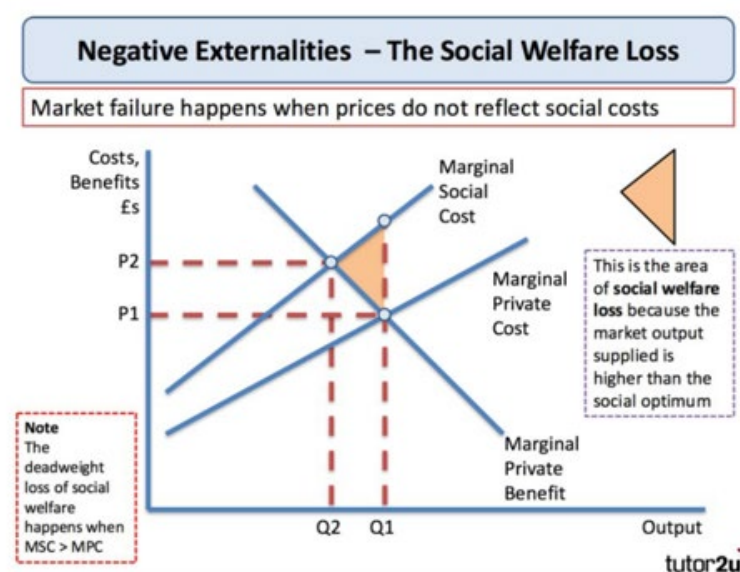
B. Discussion

When I started my career, in the early 1980s, publications like the *"Antitrust Paradox"* by Robert Bork inspired the notion that antitrust policy should leave as much room as possible to free markets, since market forces were thought to be the best way to maximize consumer welfare and an efficient allocation of resources. Welfare was defined as increased output and increased consumption of material goods and services. (See historical overview and insightful critique by John Newman on ["The Output-Welfare Fallacy: A Modern Antitrust Paradox"](#).) There was no thought given to policy goals such as sustainability. Externalities were ignored.

Yet if the climate crisis has brought home anything, it is that markets fail, and fail spectacularly when the environmental and climate impact is not taken into account.

The key problem, simply put, is that the costs that production and consumption impose on society – including climate change, large scale pollution, and loss of biodiversity – are not included in the market price consumers pay. This leads to excessive output and overproduction (an inefficient allocation of resources), and a "tragedy of the commons" -- the degrading of our environment due to overuse, and a climate crisis due to excessive greenhouse gas emissions. Economist Sir Nicholas Stern [said](#) in 2007 that *"climate change is a result of the greatest market failure the world has seen"*.

Market failure



1. Sustainability is part of the CMA's business

The CMA's [stated mission](#) is to 'make markets work well in the interests of consumers, businesses and the economy.' Markets do not "work well" – and indeed cannot work well – if market failures result from, for instance, environmental externalities. The CMA should therefore take these into account in its policy and enforcement. The CMA in fact says that, "*Competition and consumer law exists to ensure that markets are working effectively and efficiently to meet the needs of consumers*" (CFI, para. 9). The logical conclusion is, again, that the CMA's enforcement policy cannot ignore supply-side and demand-side market failures, which (a) prevent markets from "working effectively" to achieve an efficient allocation of resources (including public goods and "natural resources"), and (b) mean that free market forces fail to meet the *full* needs of consumers.

The full need of consumers -- "consumer welfare" -- cannot just be defined in material terms as in "output", "wealth", or "prosperity", but also includes "*happiness, or wellbeing (of a person, community...)*" (OED). The environment in which we live is part of the overall quality of life and quality of consumption. The availability and consumption of "non-market goods" such as clean air, water, soil, and a manageable climate is or should be part of the overall consumer welfare standard, too. But why should a supplier produce cleanly if that means higher costs and rivals taking market share; why should a consumer buy green at a higher price if the neighbours keep buying polluting goods? We all suffer from the inefficiencies caused by these collective action problems, including the consumers themselves. Indeed, The non-monetary costs we impose on ourselves, on others, on society and on nature are part of the overall price we pay for our products and services.

It is, for these reasons, part of the CMA's remit and indeed the obligation of the CMA to integrate climate concerns in its competition law enforcement.

2. Market forces are inadequate to solve the climate crisis

More competition means more innovation, and innovation is supposedly the answer to everything. But as Prof. [Stiglitz](#) explains, innovation has been suboptimal, and we can't be sure that some innovator will emerge as *deus ex machina* to save the world. Worse, as mentioned above, competition is exactly the force that drives firms to use up natural resources and emit greenhouse gases as if there is no tomorrow. The costs will be borne by our children and our grandchildren.

Competition is the answer only in markets where firms know that enough consumers are willing to pay to eliminate all greenhouse gas emissions (and even then, we still have to repair the damage already done). In those markets, firms have an incentive to compete not just to be the cheapest and best, but also the cleanest and greenest supplier. Unfortunately, in many markets, consumers do not have the willingness or the ability to pay. That's when cooperation should be allowed, as a complementary tool, to spread the costs, reduce the risks, and speed up reduction of greenhouse gas emissions.

3. Regulation is in practice inadequate to resolve the climate crisis

The CMA takes the position that "*regulation and government policy are the primary means to achieve the UK's Net Zero and sustainability goals*" (CFI, para 8). But the CMA cannot divest itself from its responsibility to ensure that markets work efficiently and effectively, simply by pointing at other possible solutions than private sector action. It is certainly arguable that carbon taxation and an adequate emissions trading price are in theory a better answer (although interesting critiques appeared [here](#) and [here](#)), as is regulation to curb greenhouse gas emissions. But regulation is slow, and often ineffective, and carbon taxes especially are deeply unpopular. Carbon trading rights in the UK have gone up to just above £50 at the time of writing, but even that level is not enough to

compensate for the real (and ever-increasing) social cost of climate change. More important, carbon trading rights don't cover all greenhouse gases, including several that are much more potent than CO₂, and taxation and regulation cover only a fraction of the UK and the world's economy. See OECD data [here](#). The revenues are not dedicated to solving the climate crisis, either.

We are faced with what can only be called a “regulatory deficit” and probably more accurately, a “regulatory failure”. This concern is even greater when reviewed from a world-wide perspective, given that a number of key greenhouse gas emitting countries refuse to subscribe to adequate net zero goals, and many of those who say they do, do not actually pursue them with effective regulation.

When regulation is *in practice* [too little, too late](#), it is counterproductive to prohibit sustainability agreements on the ground that, *in theory*, taxation or regulation is a better tool. The perfect cannot be the enemy of the good. We have to use all available tools to reduce emissions, remove excess greenhouse gases, and repair the environment.

4. The threat of private liability is not enough for producers to act unilaterally

The Dutch “climate tort” [judgment](#) recently required Shell to reduce emissions by 45% by 2030 compared to 2019. But it remains an open question whether such liability could exist under English law, or the law of many other countries in the world. Also, Shell is appealing, arguing it should not be held to a standard that does not apply to its competitors. This is a perfect if depressing illustration of the collective action problem. Would it not be better to solve the problem by allowing oil and gas companies to agree that they will *all* comply with at least the same standard as Shell? A “compliance with law” agreement – of course with the right to do better than the minimum required by the Paris Agreement? [Truck manufacturers](#) and [telecom](#) companies are at least trying. Car manufacturers seem to be [discouraged](#) by free rider concerns or the inability to ensure an adequate network of charging points.

5. Private cooperation should be part of the solution

The CMA is right to recognize that *“public bodies and businesses can play an important role through a wide range of initiatives (including cooperation agreements and unilateral initiatives), translating into more sustainable supply chains and more environmentally-friendly products and services for consumers”* (CFI, para. 8).

The CMA should allow agreements, transactions, and unilateral conduct that efficiently prevent or reduce greenhouse gas emissions or pollution at source, or that make producers pay for removing past emissions and repair of the environment. Conversely, it should critically review and if need be, block agreements, transactions, and unilateral conduct that in balance impose greater costs on consumers (including consumers that do not buy the product), or reduce product quality.

The kind of agreements encountered in practice cover quite a range. They include the following non-exhaustive list, ranked more or less in order from the least problematic to the clearly impermissible (but recognizing that whether the agreement is permissible or not will depend on the specific provisions, as well as the facts and circumstances). All identifying details and related advice have been deleted to preserve privilege and confidentiality. Further guidelines would be welcome in particular with respect to agreements between the extremes on the spectrum – not because the analysis is necessarily difficult, but because business lack the necessary certainty about the CMA's policy for exemptions under Section 9(1) CA98. The right hand column provides some (non-exhaustive) references to relevant case law and materials from the EU or US.

Category	Non-exhaustive list of relevant references
<p>Joint lobbying for policy or legislative changes, such as carbon pricing, or adjustment of antitrust law to accommodate sustainability agreements.</p>	<p><i>See Noerr</i>, 365 U.S. at 136 (“[T]he Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint.”); <i>Pennington</i>, 381 U.S. at 657 (“<i>Noerr</i> shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.”).</p> <p>In <i>Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.</i>, 508 U.S. 49, 51 (1993), the Supreme Court clarified that <i>Noerr-Pennington</i> immunity does not extend to objectively baseless petitions or litigation that are “a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor.”</p>
<p>Information exchange / benchmarking / joint studies, such as: cooperation on scientific research and pre-competitive basic technology research and information sharing; benchmarking and exchange of experience on best practices to support industry, suppliers’, and customers’ attempts to reduce GHG emissions.</p>	<p><i>See</i> CMA 2021 Guidance on Environmental Sustainability Agreements; CMA CFI, para. 20(c).</p> <p>EU Guidelines on horizontal cooperation agreements (2001/C 3/02), para. 55 ff.</p> <p><i>See, e.g.</i>, Case No IV/35.742, F/2 – <i>Eucar</i> OJ [1997] C 185/05.</p> <p><i>See, e.g.</i>, Case AT.40178, <i>Car Emissions</i>, Commission Press Release IP/21/3581 (8 July 2021) (finding that car manufacturers unlawfully exchanged sensitive information on technical development so as to avoid competing on reducing harmful nitrogen oxide (NOx) emissions from diesel passenger cars beyond what was legally required under EU emission standards, despite possessing the necessary technology to do so).</p>
<p>Code of conduct. A non-binding code of conduct encouraging participants to follow specific sustainable practices.</p>	<p><i>See</i> Draft ACM Sustainability Guidelines, para. 24.</p>
<p>Support fund. An agreement to pool funds for non-competitive action to mitigate, adapt, or compensate for effects of GHG emissions.</p>	
<p>Standard setting. Labelling and certification of compliance with agreed GHG reduction methods such as use of low-GHG input or production methods.</p>	<p><i>See</i> CMA 2021 Guidance on Environmental Sustainability Agreements; CMA CFI, para. 20(a) and (b).</p> <p>EU Guidelines on horizontal cooperation agreements (2001/C 3/02), para. 257 <i>et seq.</i></p> <p><i>See</i> Draft ACM Sustainability Guidelines, para. 24.</p>

Category	Non-exhaustive list of relevant references
	<p><i>See, e.g., American Society of Mechanical Engineers v. Hydrolevel Corp.</i>, 456 U.S. 556 (1982) (finding that a standard-setting organization colluded with a member company and excluded a competitor by issuing “unofficial” finding that this competitor did not meet certain standards). <i>United States v. Brown University</i>, 5 F.3d 658, 675 (3d Cir. 1993) (allowing agreement to achieve “social benefit”)</p> <p><i>See also</i> DOJ & FTC, Antitrust Enforcement And Intellectual Property Rights: Promoting Innovation And Competition, at 33-56 (Apr. 2007).</p>
<p>Targets for emission reduction. Targets for GHG emissions reduction.</p>	<p><i>See</i> Case COMP/37.231, <i>ACEA</i> (1998), Commission Press Release IP/98/865 (16 October 1998); Cases COMP/37.634, <i>JAMA</i> and COMP/37.612, <i>KAMA</i> (1999), Commission Press Release IP/99/922 (1 December 1999). (Industry-wide targets were set to reduce CO₂ emissions from cars. So long as the average target was met, each member was free to apply more or less stringent targets. Members were free to determine how to meet the target, competing in the development of CO₂-efficient technologies. The Commission found that the commitments did not restrict competition under Article 101(1).)</p> <p><i>See also</i> <i>CEMEP</i> (2000), Commission Press Release IP/00/508 (23 May 2000). (Manufacturers of electric engines agreed to reduce sales of the least efficient engines by 50%, but enjoyed discretion as to how to contribute to the achievement of this joint target. Likewise, the Commission found no infringement of Article 101(1) because the agreement was not capable of appreciably restricting competition.)</p> <p><i>See</i> Case COMP/39.579, <i>Consumer detergents</i> (13 April 2011); Case AT.40178, <i>Car Emissions</i>, Commission Press Release IP/21/3581 (8 July 2021).</p> <p>Draft ACM Sustainability Guidelines, second draft, para. 23.</p>
<p>Compliance agreements. Agreement to commit to ensure compliance with national and international laws (also by customers, suppliers, and business partners) to prevent freeriding on non-sustainable illegal activities in the production chain (in particular in territories or sectors with ineffective enforcement)</p>	<p><i>See</i> Draft ACM Sustainability Guidelines, Example 2.</p> <p>A hypothetical example could be a potential agreement in the oil and gas sector that all parties will consider themselves bound by the same principles as are applied to Shell under the recent Hague District Court judgment in Milieudefensie vs Shell.</p> <p>Conversely, an agreement whereby competitors purposely refrain from reducing emissions beyond the minimum standard required by law unlawfully restricts competition. <i>See, e.g.,</i> Case AT.40178, <i>Car Emissions</i>, Commission Press Release IP/21/3581 (8 July 2021)</p>

Category	Non-exhaustive list of relevant references
<p>Agreement on secondary activities. Agreements to improve sustainable practices not affecting price, output, or product diversity (<i>e.g.</i>, sustainable packaging, transport, methane control, take-back/recycling schemes, <i>etc.</i>)</p>	<p>EU Guidelines on horizontal cooperation agreements (2001/C 3/02), para. 186.</p> <p><i>See also</i> NMa Case 6456, <i>Pig castration anaesthesia</i> (2008); Draft ACM Sustainability Guidelines, para. 25.</p>
<p>Carbon valuation (or “polluter pays”) agreement. The parties would quantify the social cost of their individual GHG emissions and each commit to invest an equivalent amount in initiatives to curb GHG, or carbon offset.</p>	<p>Not implemented to my knowledge. See description in article</p>
<p>Joint R&D. Agreement to collaborate in developing new technologies that result in lower GHG emissions or ancillary technology.</p>	<p>EU Block Exemption Regulation on R&D agreements and specialization agreements.</p> <p>EU Guidelines on horizontal cooperation agreements (2001/C 3/02), para. 138; Case E–3/16, <i>Ski Taxi SA v Norwegian Government</i>, para 98.</p> <p><i>See also</i> Draft ACM Sustainability Guidelines, para. 26.</p> <p>US FTC & DOJ Collaborations Guidelines at § 3.31(a) (“Most [R&D] agreements are procompetitive Through the combination of complementary assets, technology, or know-how, an R&D collaboration may enable participants more quickly or more efficiently to research and develop new or improved goods, services, or production processes.”).</p>
<p>Joint projects, joint venture, joint production, and network and asset sharing. Agreement to collaborate to produce non-GHG energy/products in circumstances where the relevant investment would otherwise be too risky or costly.</p>	<p>CMA CFI, para. 20(d).</p> <p>EU Guidelines on horizontal cooperation agreements (2001/C 3/02), para. 187; Case E–3/16, <i>Ski Taxi SA v Norwegian Government</i>, para 98.</p> <p>Case COMP D3/34493, <i>DSD</i> (17 September 2001), para. 114 (nation-wide collection of packaging for recycling with exclusivity provision and pre-agreed price did not lead to any appreciable restriction of competition and was therefore not caught by Article 101(1), because it was necessary for “<i>the establishment of a new, functioning market in the recovery of sorted plastic and composite packaging</i>”); Case IV/F1/36.172, <i>Arge Bat</i> (24 March 1998) (variable disposal costs of used battery take back scheme would be included in producer battery price – implementation of polluter pays principle).</p>

Category	Non-exhaustive list of relevant references
	<p>Draft ACM Sustainability Guidelines, para. 26.</p> <p>US FTC & DOJ Collaborations Guidelines at § 2.1 (acknowledging that “[e]fficiency gains from competitor collaborations often stem from combinations of different capabilities or resources”).</p>
Joint purchasing of clean input materials.	<p>See CMA 2021 Guidance on Environmental Sustainability Agreements;</p> <p>EU Guidelines on horizontal cooperation agreements (2001/C 3/02), para. 194 ff</p> <p>See US TFC & DOJ Collaborations Guidelines at § 4.2.</p> <p>See DOJ Business Review Letter to Textile Energy Ass’n (Sep. 4, 1998) (DOJ did not intend to challenge a joint-purchasing agreement for energy where “[t]he purchasing agent will be independent of the [collaboration’s] members” and “individual members will remain free to purchase all, or part, of their energy requirements independently”).</p>
<p>Output or sales reduction / phase-out agreements.</p> <p>Agreement to reduce purchasing of high-carbon input, output or sales.</p>	<p>CMA CFI, para. 20(a) (referring to possible collective boycott) and 20(e).</p> <p>Case IV.F.1/36.718, <i>CECED</i> (24 January 1999), p. 47–54 and especially para. 56 (agreement to phase out least energy-efficient washing machines exempted).</p> <p>See also <i>CEMEP</i> (2000), Commission Press Release IP/00/508 (23 May 2000). (Manufacturers of electric engines agreed to reduce sales of the least efficient engines by 50%, but enjoyed considerable discretion as to how to contribute to the achievement of this joint target. The Commission found no infringement of Article 101(1) because the agreement was not capable of appreciably restricting competition. The concept of “by object” infringement – which normally applies to output restrictions – was applied restrictively.)</p> <p>See Case C–345/14, <i>Maxima Latvija v Konkurences padome</i>, EU:C:2015:784 (agreements that pursue a legitimate sustainability goal should be assessed with reference to their effect).</p> <p>ACM, <i>Energieakkoord</i> (2013), here (prohibiting an agreement to close down older coal-fired power plants to cut CO₂ emissions, since emissions trading rights were not withdrawn and other firms would likely buy them, thus maintaining overall emissions – positive effects outside Dutch territory were disregarded). <i>But see</i> Dutch Supreme Court, <i>State of the Netherlands v Urgenda Foundation</i>, NL:HR:2019:2007 (20 December 2019), available here; The Hague District Court, <i>Milieudefensie et al. v Royal Dutch Shell plc</i>, NL:RBDHA:2021:5339, available here (26 May 2021)</p>

Category	Non-exhaustive list of relevant references
	(recognizing an obligation to reduce emissions despite (1) the indemnifying effect of emissions trading rights, because the latter only applied to some of the emissions for which the actor was responsible, and did not cover emissions outside the EU, and (2) the possibility that other actors would offset any reduction in emissions by increasing theirs).
Market or customer allocation.	
Price fixing. Agreements to raise hydrocarbon prices with a view to reducing output of high-GHG products, or agreements to reduce output of high-GHG products.	

6. Sustainability agreements should qualify for exemption

Where consumers are willing to pay for green products, firms may have an incentive to collude on greenwashing. Of course, we shouldn't allow climate claims to cloak collusion, like the [AdBlue cartel](#). It turns out that the criteria for exemption under Section 9(1) CA98 are adequate and indeed well suited to distinguish between desirable sustainability agreements, on the one hand, and undesirable collusion, on the other. (The same applies to the proportionality analysis under the *Albany*, *Wouters*, and *Meca-Medina* line of cases, which follows comparable criteria discussed [elsewhere](#).)

The discussion below assumes that the agreements affect competition, since if they do not, no exemption is needed.

For a sustainability agreement to qualify for exemption, it must meet four criteria:

(a) ***"Economic progress", and the importance of longer-term goals and "spill-over benefits".***

"Economic progress". First, the agreement must *"contribute to improving production or distribution, or promoting technical or economic progress."* The notion of *"economic progress"* covers agreements that help resolving market failures, reducing greenhouse gas emissions, increasing availability of clean and green products and services (as well as non-market goods), or reducing or internalizing negative externalities. Production and distribution methods are *"improved"* if their social costs are reduced by using cleaner manufacturing processes or lowering direct or indirect emissions. Similarly, technological solutions to reduce pollution and emissions are *"technical progress"*.

"Contribution". Whether an agreement can be genuinely said to *"contribute"*, on balance, to economic progress requires an analysis of the goals and effects of the agreement and causality. This involves both a subjective review (what do the parties say are their goals?), and an objective analysis (what are the parties' incentives, are the stated goals credible, and is the agreement capable of leading to the stated goals?). If this analysis shows private sustainability coordination seeks and is capable of

leading to socially beneficial effects or increasing consumer welfare, the agreement should be found to “contribute to... economic progress.”

Longer-term goals and “spill-over benefits”. Some critics of integrating sustainability in competition policy argue that the incentives are not right, and that sustainability agreements lead to less sustainability than conditions of competition – and imply that these agreements therefore do not “contribute” to economic progress or consumer welfare. But these critics focus on abstract models, which consider solely short-term profit incentives. Economic consultants Oxera analysed this in a paper [“when to give the green light to green agreements”](#). They confirm that firms who focus solely on short-term profits may have an incentive to avoid competition on sustainability, or hold back on such measures, as the AdBlue cartel did. Importantly, however,

“where positive spill-overs exist between firms, efforts by one firm also benefit other firms. In this case, the level of sustainability efforts by other firms would actually have a positive effect on a firm achieving its own objectives. Allowing firms to coordinate their sustainability efforts will then lead to higher overall effort levels.”

Accordingly, the CMA should look at the following when analysing sustainability agreements:

- (a) whether firms benefit in the long run if their rivals eliminate greenhouse gas emissions or achieve other sustainability objectives (“spill-over benefits”);
- (b) whether these private benefits align with public benefits; and
- (c) whether the parties to the agreement actually pursue these spill-over benefits.

Absent spill-over benefits, or absent an indication that these benefits are effectively pursued, there may be a suspicion that companies are agreeing to limit sustainability efforts or hold back -- in which case there is on balance no adequate contribution to “economic progress”. But if firms have a genuine incentive to pursue efficient sustainability goals, and effectively do so, the CMA should not assume that they are just out to rip off consumers or limit climate action, and should not stand in the way of achieving the spill-over benefits.

Indeed, companies benefit in various ways if their rivals eliminate pollution and greenhouse gas emissions.

- Surely long-term survival is the first one, keeping in mind the recent [IPCC](#) Report and its dire warnings of climate “tipping points”. It’s true that managers often pursue short-run profits at the cost of future risks. But more and more firms realize that short-term profits are not the sole measure of success, and that it is worthwhile to pursue longer-term survival of our environment and, therefore, themselves, our economy, and society as a whole. Some Board members, managers, and shareholders read the IPCC Reports or listen to the discussions at COP26, and realize it serves little purpose to pursue profit at the expense of survival. Yet they may be discouraged from investing enough in clean and green alternatives, for fear that their rivals free ride and steal their customers. Their rivals, in turn, may fear the same from them. Cooperation as an appropriate way to solve such a collection action problem.
- Other positive spill-over effects include reduction of physical climate risks to their business, faster development of clean solutions (sharing risks, creating economies of scale and scope), or levelling the playing field by avoiding the litigation risk of asymmetric liability – as Shell knows, following its [liability case](#).

The Oxera paper contains an interesting list of examples of “spill-over ” benefits, and explains that when economic models are adjusted to take these into account, they show that cooperation (meeting

the conditions above) leads to improved sustainability outcomes compared to conditions of competition.

Evidence that the participants really sought legitimate climate objectives could be found in internal corporate statements, an objective assessment of the nature of the agreement, and economic analysis (in particular the presence of market failures and regulatory deficiencies). Parties who publish their agreements, open them up to public scrutiny, and discuss them with stakeholders, can be presumed to really seek legitimate benefits and not just to line their own pockets or limit climate action.

(b) “Indispensability”, and the importance of “willingness to pay”.

Second, the agreement must *“not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives”*. In other words, cooperation must be “necessary”, in the sense that there is no realistic, less restrictive, and equally effective alternative.

Agreements may not be indispensable if in prevailing market conditions, firms have the incentive to compete individually on being greener and cleaner. This is the case if:

- (a) enough consumers have sufficiently “willingness to pay” (WTP) to fully eliminate or compensate for these emissions, and to clear up the damage of the past, and
- (b) producers and consumers can actually discern (and calculate) these costs and integrate them into their production and consumption decisions.

In such circumstances, market forces should be adequate to achieve the sustainability goals.

WTP is usually assessed based on stated preferences (surveys), or revealed preference studies. See [here](#) and [here](#). It is important, though, to take account of demand-side market failures. For instance, consumers often underestimate the future cost of climate change, or the effects that imposing costs on others may have for themselves in the long run. Other deficiencies include inadequate information, confirmation bias, hyperbolic discounting, and free rider concerns.

Because of these demand-side market failures, WTP will often be inadequate to internalize environmental and climate change externalities. Unless there is effective regulation, taxation, or emission trading, private cooperation may then be necessary to eliminate or mitigate climate change and environmental risks to resolve supply-side market failures such as first mover disadvantages, free rider concerns, and collective action problems, and other market failures arise.

The burden of proof would normally rest on the parties to the agreement. Market failures and absence of adequate regulation are, however, the normally prevailing situation in environmental economics. It is appropriate, therefore, not to demand quantitative evidence of collective action problems in connection with agreements genuinely pursuing spill-over benefits in situations where the parties provide a credible qualitative explanation of the existence of market failures and regulatory deficiency.

(c) “Fair share to consumers”.

Section 9(1) CA98 requires that consumers receive *“a fair share of the resulting benefit”*. A similar requirement applies under EU law.

Climate benefits qualify for exemption. Section 9(1) CA 98 does not impose limitations as to the nature of the benefit, or the relevant market to which the benefit should belong. The benefit need

not be a monetary gain, but can include quality increases or improvements of living conditions or circumstances of consumption.

Consumers can benefit from effective sustainability agreements, because of reduced climate risk or improved environment, even if output decreases as a result of the agreement. In an interesting recent [paper](#) on the “*output-welfare fallacy*”, Prof. John Newman explains that “*alleviating a negative externality can reduce output of a relevant product yet increase consumer welfare*” (his emphasis). Commenting on a car makers’ agreement with the State of California to produce lower-emission vehicles, he added “*in this market less output might be good, not only for society as a whole but even for consumers of vehicles. There’s a variety of markets in which negative externalities can drive output higher, yet even the consumers of the products can be worse off due to a prisoners’ dilemma.*”

A cost increase (even if it leads to an increase of the price for the good or service) should not be a barrier to exemption, so long as the overall consumer surplus *with* the agreement is higher than in the counterfactual (without the agreement). Consumer surplus can be calculated as follows:

$$\text{Overall Consumer Surplus} = (\text{WTP} - \text{Market Price} - \text{SCC}) \times \text{Quantity Consumed}$$

(where WTP is “willingness to pay” and SCC is “social cost of carbon”). If the SCC decrease is more than the market price increase, consumers still benefit overall. (The social cost of carbon can be quantified, as Sir Nicholas Stern and Prof. Joe Stiglitz [explain](#), as well as [others](#). See also Sir Partha [Dasgupta](#) for quantification of the impact of biodiversity loss.)

“Fair share” does not require “full compensation”. By their terms, neither Section 9(1) CA 98 nor Article 101(3) TFEU require that the benefits to consumer “fully compensate” them for the costs, nor do they impose limitations as to the nature of the benefit, or the relevant market to which the benefit should belong.

Nonetheless, there is debate in the EU on the question whether a “fair share” requires that consumers be fully compensated for any price increase or reduction of choice resulting from a sustainability agreement. While EU policy is no longer binding after Brexit, the debate is of some interest.

Until 2004, the European Commission followed a thoughtful approach towards environmental agreements. It found in [CECED](#) (para 56) that

“The Commission reasonably estimates the saving in marginal damage from (avoided) carbon dioxide emissions (the so-called ‘external costs’) at EUR 41 to 61 per ton of carbon dioxide. On a European scale, avoided damage from sulphur dioxide amounts to EUR 4 000 to 7 000 per ton and EUR 3 000 to 5 000 per ton of nitrous oxide (11). On the basis of reasonable assumptions, the benefits to society brought about by the CECED agreement appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines.

On that basis, it held that

“Such environmental results for society would adequately allow consumers a fair share of the benefits even if no [in-market] benefits accrued to individual purchasers....”

The Austrians just [adopted](#) the pre-2004 principle in Austrian Competition law. The [Dutch](#) and [Greek](#) authorities wish to do so as well.

In 2004, however, the European Commission changed course. It took the position that consumers must receive “full compensation” and that these benefits should be realized within the same market as that in which the effects of the restriction of competition were felt. See 2004 [Guidelines](#) on application of Article 101(3) TFEU (para. 43). The Commission invokes the case law of the European Court of Justice, but as the ACM explains [here](#), those cases do not hold what the Commission says. The real background for the policy change was administrative convenience. When modernizing competition law, the Commission divested itself of its exemption monopoly, and required companies to “self assess” whether the conditions for exemption were met. But it apparently did not trust companies to get it right, so it took away with the left hand much of what it had given with the right.

In the extraordinary circumstance of a [climate crisis](#), with “devastating impact” as confirmed by [Parliament](#), there is no longer any justification for this restrictive policy choice. And after Brexit, there is no reason for the CMA to follow the same line. Pre-Brexit case law (where UK courts and CMA were required to follow the EU approach) is no longer determinative.¹

The share allowed to consumers can be “fair”, where even a small reduction of a risk with potentially large and devastating consequences of extreme weather events and tipping points could significantly improve – indeed preserve – the customer’s life and home and that of their offspring. Such an advantage (even if a future one) surely outweighs the economic cost of a price increase. Even if discounted, and even for individual consumers, the value of avoiding a climate cataclysm is significant.

A “fair share” must reflect the “consumer pays” principle. The definition of “Fairness” should reflect the “consumer pays” principle. This principle finds solid support in economics and ethics, as well as English law.² Neuberger J observed that:

¹ This applies in particular to the UK Supreme Court judgment in [Sainsbury’s against Visa and Mastercard](#), where the UK Supreme Court relied on the Opinion of Advocate General Mengozzi in *Mastercard*, suggesting that “full compensation” is appropriate. The judgment concerns Article 101(3) TFEU, rather than Section 9 CA98, and a two-sided market where there was no overlap *whatsoever* between the customers benefiting from the agreement and those paying for it (whereas a sustainability agreement may benefit everyone, including the consumers who feel the effect of the agreement). Also, European Court of Justice in [Mastercard](#) did not exactly follow the Advocate General but left open the possibility of the consumers receiving “*appreciable objective advantages*” (para 234), which may be less than “full compensation” (see [here](#)). More importantly, the CMA and UK Courts are no longer bound by Articles 3 and 16 of Regulation 1/2003, which prohibited UK courts from exempting agreements that were prohibited by the Commission or the European Court.

² Oxford mathematician, economist, and game theorist Prof. Ken Binmore [discusses](#) the Golden Rule as a norm that all religions and philosophies share. Pursuant to this rule, a consumer should treat others (who bear the burden of externalities of her consumption) the same way she would have others treat her (when others by their consumption impose externalities on her). Harvard philosopher Prof. John Rawls in his “Theory of Justice” describes a system as “fair” if it is acceptable to all participants in that discussion under a “veil of ignorance”, *i.e.*, before they know where in that system they will be placed. A consumer therefore receives a “fair share” of the benefits of a sustainability agreement if that share is acceptable to them *before* they know whether they are consumer or a neighbour bearing the burden of an externality caused by that consumption (and who would require compensation for the externality). Economist Hal Varian [proposes](#) that a distribution is fair from an economic perspective when a group of agents divide a bundle of goods and “no agent wishes to hold any other agent’s final bundle.” This might be a situation where everyone gets the same bundle (“even division allocation”), or when – perhaps after trading – each finishes with a bundle which best matches her preferences. This can be called an “envy test.” Where producers, consumers, and third parties vie for a “fair share” of benefits of a sustainability agreement, this test can be met only after externalities are eliminated in accordance with the “consumer pays” principle. In fairness, the costs (externalities) must be paid before the benefits can be shared.

“there is considerable public interest in the maintenance of a healthy environment, and in the principle pithily expressed as ‘the polluter must pay’.”³

In accordance with this principle, a consumer receives a “fair share” of the environmental benefits if the price increase or incremental cost they bear is less than the sum of (i) the benefit they derive from the sustainability agreement plus (ii) the social costs of greenhouse gas emissions (or other externalities) caused by their consumption. In other words:

$$\text{Price increase (or value decrease)} < \text{benefit} + \text{externality}.$$

It is not “fair” for consumers to claim a share of the benefit of an agreement while ignore the costs their consumption imposes on others (externalities), who moreover have no say in the decision to consume or not to consume. It is their demand for the products in question that created the problem for society in the first place. They deserve no compensation for having to pay for the climate damage they create. Restoring the balance by first eliminating the costs on others is “fair” in accordance with the general principle that “the polluter should pay.” A “fair share” means the polluter pays, not that the polluter should be compensated.

(d) Residual competition. Finally, the agreement must not “*afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.*”

This should not be a barrier to sustainability agreements where residual competition on price, quality, functionality, and innovation continue to be possible.

C. Conclusion

We are in a climate crisis. Parliament in 2019 [declared](#) “*an environment and climate emergency following the finding of the Inter-governmental Panel on Climate Change that to avoid a more than 1.5°C rise in global warming, global emissions would need to fall by around 45 per cent from 2010 levels by 2030, reaching net zero by around 2050.*” The United Kingdom has ratified the Paris Agreement. It enshrined its commitment in the Climate Change Act, and adopted a [Net Zero Strategy](#). It is now the obligation of all arms of Government to do what is possible to achieve the goals of that agreement. The CMA rightly lists ‘*Supporting the transition to a low carbon economy*’ as the fourth of its four [business priorities for 2021/22](#). The CMA should therefore adopt guidelines and an enforcement policy to allow – and indeed encourage – the private sector to play a role in this, as much as possible.

When assessing private cooperation, the CMA should verify whether the parties to the agreement genuinely seek “spill-over benefits” that align with public benefits. If so, the agreement should qualify for exemption. In determining whether the conditions for exemption are met, the CMA should drop the artificial requirement of “full in-market compensation”, and not demand apportionment and quantification where climate benefits are clear (since everyone will benefit, directly or indirectly, including current and future consumers).

The principles set out in this paper for assessment of private sector cooperation should apply to all forms of private sector conduct and transactions, including mergers and unilateral practices.

³ Re *Mineral Resources* [1999] BCC 422, at 431, cited with approval in *Scottish Environment Protection Agency & Ors v Joint Liquidators of the Scottish Coal Company Ltd* [2013] CSIH 108 at [144] (Scottish Environment Protection Agency). See also The Environmental Damage (Prevention and Remediation) Regulations 2009 – as amended by the Environmental Damage (Prevention and Remediation) (England) Regulations 2015.