ENVIRONMENTAL SUSTAINABILITY AND THE COMPETITION AND CONSUMER LAW REGIMES.

CMA CALL FOR INPUTS.

RESPONSE OF SIMON HOLMES

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In addition to teaching competition law at Oxford he is an adviser to the NGO, ClientEarth; a strategic Adviser to SustainablePublicAffairs in Brussels; a member of the Competition Commission of the International Chamber of Commerce (ICC); a member of the international advisory board of the LDC (Insituto de derecho de la competencia); and an associate member of the UCL Centre for Law, Economics, and Society (CLES).

He writes and speaks regularly on competition and regulatory issues and has a particular interest in the relationship between climate change, sustainability and competition law. He is co- editor of a new book on this published by Concurrence: "Competition Law, Climate Change and Environmental Sustainability".

1. INTRODUCTION.

1.1 I have written and spoken widely on climate change, sustainability and competition law/policy. Rather than repeat this here (and to keep this input brief) I would refer the CMA to it generally and will refer to particular parts of my papers where appropriate in my comments below. **Annex A** lists my key publications in this area (with links). I would refer the CMA to the principal paper in the Journal of Antitrust Law, "Climate change, sustainability and [EU] competition law", (my "JAE Paper") and to my "UK Paper" ("Climate change, sustainability and competition law in the UK"). I will also refer to my submission with ClientEarth last month to the European Commission in response to its recent consultation on its horizontal guidelines.

1.2 While these comments are brief, I would be happy to discuss any aspect with you.

1.3 I start by welcoming the CMA's confirmation in its 2021/22 Annual Plan that it continues to develop capability to "ensure that when delivering our statutory functions, we act in a way which supports the transition to a low carbon economy." This should be front and central when the CMA is developing its policy in this area (and when considering my own comments in this note).

1.4 I endorse your focus on "environmental sustainability" (para 7 of your note)) and will also use environmental sustainability and sustainability interchangeably. In this context I also note and commend the Dutch competition authority ("ACM") singling out "environmental damage agreements" for a more progressive treatment.

1.5 Para 10 of the CMA's note refers to the challenge of balancing sustainability benefits and competition outcomes. I see nothing fundamentally new there. It is inherent in, competition law generally, and specifically in the structure of the Chapter 1 prohibition, that different factors have to be assessed before coming to a conclusion as to whether an agreement (or merger) can be approved or prohibited (ie that it meets the statutory criteria either way). There is nothing inherently different about sustainability benefits—especially as (in the context of an exemption) they are only relevant to the extent that they fall within one of the 4 limbs of the first condition of Section 9 CA '98 ("improving production"; "improving distribution"; "promoting technical progress"; or "fing economic progress").

To this I would add **2 comments:**

- First, significant strides have been made in environmental economics in recent years (eg in calculating the cost of carbon/emissions).
- Secondly, it is not always necessary or appropriate to quantify everything. This has been recognised by the European Commission in its 2004 Exemption Guidelines[1]

[1] *Referring to qualitative benefits to consumers the Commission recognised that "any such assessment necessarily requires value judgment. It is difficult to assign precise values to dynamic efficiencies of this nature" (para 103). It noted that "in many cases it is difficult to accurately calculate the benefits to consumers such that it is only necessary to provide estimates and other data to the extent reasonably possible, taking account the circumstances of the individual case" (para 94).*

and again more recently in the draft Dutch Guidelines[2]. Not everything in life that is worthwhile can be reduced to a monetary value.

2. COMPETITION LAW ENFORCEMENT (Pages 8-11 of the CMA's paper).

A. The Chapter 1 Prohibition (Pages 8 & 9 of the CMA's Paper).

2.1. My views on sustainability agreements and Article 101 TFEU and the Chapter 1 Prohibition are set out in Part V of my JAE paper and on pages 389 and 390 of my UK Paper. There is also a summary in my paper for the OECD RoundTable on Sustainability and Competition Policy (see Annex A, point 3). I would add the following observations on the CMA's note and questions in this area.

Para 20 (a) & (e)--Collective Boycott?

2.2. The superficial analysis of efforts to phase out unsustainable products, technologies and modes of production as a "collective boycott" is a good example of the way in which unwarranted fear of competition law can inhibit urgent action to transition to a low carbon economy and move to a more sustainable economy (see, for example the sustainable fishing example at point 5 in Annex B.

2.3. First, in some instances, it is not sufficient to set new higher standards or promote more sustainable products/technologies/modes of production but to phase out (or even halt) the unsustainable products etc (both to avoid the so-called "free rider" problem and in view of the urgency of the necessary transformation).[3]

2.4. Secondly, this can be seen in cases like CECED which required inefficient washing machines to be phased out.[4]

2.5. Thirdly, there are well established practices to reduce any potential anti-competitive effects of initiatives to move to sustainable sourcing: eg specifying objective and non-discriminatory criteria for products etc to be sourced/ used and building in fair and transparent appeal mechanisms. There is nothing unique to sustainability agreements in this respect.

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[2] See paras 53 to 56 of the ACM's "Sustainability agreements-opportunities within competition law" of February, 2021.

[3] See also para 25 of the ACM's guidelines referred to at footnote 2 which (when discussing categories of "allowed sustainability agreements") notes the need to ensure that "certain products..that are produced in a less sustainable manner are no longer sold".

[4] "CECED members agree no longer to manufacture or to import washing machines that do not meet the criteria that they have agreed upon" [Commission Decision of 24 January, 1999-at para 30.]

Para 20 (b) Standards.

2.6. Developing new industry wide standards is, indeed, often a good way to move to more sustainable production etc.[5] However, it is precisely when these standards "go beyond national laws or regulations" to meet sustainability objectives that they are most important. Where they do not go beyond these laws they may be more difficult to justify—but if they seek to move to the standard required by law/ regulation more quickly, they may still be justified (particularly given the urgency of the climate crisis**).**[6]

Para (c) Information Exchange

2.7. Parties to a sustainability agreement need to take care not to exchange any more competitively sensitive information than is strictly necessary. However, this is the case for *all* agreements between competitors and there is nothing unique to sustainability agreements in this respect. The usual safeguards can be included (eg firewalls, use of third parties, aggregation etc). Furthermore, the third condition of Section 9 CA '98 (re the indispensability of restrictions) will apply in the case of any exemption.

Para 22 Exemptions and the Section 9 Criteria.

2.8. My views on exemptions are set out in some detail on pages 18 to 29 of my JAE Paper.[7]

2.9. On the point made in para 22 as to "how relevant environmental benefits would be identified, measured and weighed against competition concerns" see para 1.5 above.

The First Criterion re Benefits (Discussion on Page 31 of the CMA's Appendix B).

2.10. On the first Condition for an exemption see pages 19 to 21 of my JAE Paper.

2.11. Considerable progress has been made in recent months in terms of a clear recognition that both quality gains and progress in terms of sustainability are clear "benefits" within the meaning of Article 101 (3) / Section 9 CA '98. A recent example of this can be seen in the European Commission's "Policy Brief" of 10 September on "Competition Policy in Support of the Green deal".[8]

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[5] *See page 29 of my JAE paper.*

[6] *Such an approach would be consistent with EU state aid law that aid cannot be granted merely for complying with EU standards.*

[7] *Although this refers to Article 101(3) TFEU the analysis is fundamentally the same for Section 9 CA '98 (see also pages 389 and 390 of my UK Paper).*

[8] *See the first 3 points under the heading "Antitrust" on page 5.*

2.12. The CMA asks whether the pursuit of sustainability objectives would be considered a relevant "efficiency gain". It may be an "efficiency gain" (which would be a big plus factor) but that is not the relevant test. The test is whether it is a "benefit" in the sense of the first condition of Section 9 CA '98 (of which there are 4 limbs as mentioned in para 1.5 above). Important as efficiency is, "benefit" is a wider term-and the term used in Section 9 (and Article 101(3) TFEU).

The Second Criterion re "Fair Share" (Page 31/32 of the CMA's Appendix B).

2.13. On the "Fair Share of the resulting benefit" see pages 21 to 28 of my JAE Paper.

2.14. See also the response of ClientEarth and myself to the narrow approach taken in the European Commission's Policy Brief to this topic. Its principal weakness is the notion that consumers "in the market" must be "fully compensated". This approach:

- Is inconsistent with Section 9 CA '98;
- Is not required by any case law;
- Would run counter to the strategic objective of "supporting the transition to a low carbon economy" and the fight against climate change more generally.[9]

The Third Criterion re indispensability (page 33 of the CMA's Appendix B).

2.15. In my view the indispensability criterion is a very important part of the architecture of Section 9 (and Article 101(3)) and a vital safety valve that ensures that agreements (whether sustainability agreements or otherwise) are not exempted when it is not necessary to do so. However, it is precisely because we have this powerful safety valve that we should not be afraid to interpret and apply Conditions 1 and 2 of Section 9 in a manner which is consistent with its clearly stated terms, the transition to a low carbon economy, and the urgent need to combat climate change.

B. The Chapter II Prohibition (Page 10 of the CMA's Paper).

2.16. My views on how sustainability issues can be factored into the Chapter II prohibition are set out in pages 30 to 36 of my JAE Paper[10]. In brief I suggest:

* The Chapter II Prohibition could be used more as a "sword" to tackle unsustainable conduct by dominant companies (principally as exploitative abuses); and

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[9] See points 2.3 and 2.4 on pages 7 to 9 of the submission referred to in point 4 of the papers provided in Annex A.

[10] Although this refers explicitly to Article 102 TFEU the issues are the same under the Chapter II Prohibition (see pages 389 and 390 of my UK Paper).

* Sustainability initiatives by dominant companies may sometimes mean that conduct that might (superficially) appear to be a potential abuse is not an abuse (ie it would act as a "shield" against unjustified accusations of abuse-eg by downstream customers).

C. Competition Law Enforcement Questions (Page 10 of the CMA's Paper).

Paras 25 (a) and (c).

2.17 Both as a solicitor advising businesses on competition law (for some 35 years) and recently as an advisor to NGOs and consultants working in the sustainability sector, I have come across many instances where unwarranted FEAR of competition law has held back initiatives to fight climate change or combat unsustainable practices. Some examples of these are set out in **Annex B** to this note. These are all situations where the current competition law regime (not just in the UK but more widely) has had the effect of frustrating or limiting actual or potential agreements or initiatives to support Net Zero or sustainability goals.

2.18. I would emphasize that it is not actual cases brought by competition authorities against sustainability initiatives (which are very rare) that has been the problem. As explained in my papers (eg the JAE Paper[11] and that on Consumer Welfare in point 7 in Annex B) it is much more the narrow (and often over price centric or short term) approach to competition law/economics that has been the issue. That-- and the fact that business (quite rightly) hears (from competition enforcers –and I suspect many advisors) what it *cannot* do but does not hear enough about what it *can* do. There is an important advocacy role here for the CMA.

Para 25 (b).

2.19. As explained in detail in my papers, I feel we already have the legal tools to take proper account of net zero and sustainability goals in the CA '98 (and Articles 101 and 102 TFEU) regimes. However, to the extent that the CMA disagrees with any aspect of my assessment but, nevertheless, is committed to "supporting the transition to a low carbon economy" then I would suggest that limited changes should be made (but the CMA knows better than I do if/where it disagrees with me).

2.20. 2 areas where I recognise that there is not consensus are:

*the question as to *which* consumers must get the benefits of an agreement (ie the benefits set out in condition 1 of Article 9 CA '98). Are these just the particular widgets in question (the so-called "in-market" customers) or customers more widely? This could be clarified-in favour of the latter if we are serious about issues such as climate change where everyone benefits; and

*the question whether those customers must be fully compensated for any detriment which they may incur as a result of the agreement (as the European Commission has sometimes suggested) or whether they should receive a "fair share" as clearly stated in

[11] *See, for example Parts I to IV of that paper.*

Section 9 CA '98 (and Article 101(3) TFEU)? In my view the law could not be clearer but if there is doubt it is important to remove this[12].

2.21. In this context I note that the Austrians have recently amended their equivalent to Section 9 CA '98 and Article 101(3) TFEU (Section 2(1) of the Austrian Cartel Act). This 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".

3. MERGER CONTROL REGIME (Pages 12 to 15 of the CMA's paper).

3.1. My views on the merger control regime are set out in my JAE Paper at pages 36 to 44 and in my UK Paper at pages 390 to 393.

Rivalry-enhancing efficiencies (para 30).

3.2. I welcome the CMA's recognition that "benefits to the environment could therefore potentially be considered as rivalry-enhancing efficiencies in appropriate cases to the extent that they impact competition in the relevant market" and that these could "outweigh any anticompetitive effects" such that the CMA may decide not to find an SLC.

Relevant Customer Benefits (paras 35 and 36).

3.3. Having focussed on RCBs in my UK Paper (pages 391/392) I was pleased to see the CMA recognising that RCBs "might include benefits in the form of environmental sustainability and supporting the transition to a low carbon economy". I agree.

3.4. However, in my UK paper I identified some limitations to a reliance on RCBs to take into account sustainability benefits. In particular, the concept of "relevant customers" is limited to the parties' customers and their customers down the chain.[13] As we have seen in the context of the section 9 exemption this is unduly narrow as sustainability benefits often benefit a much wider range of customers (eg emission reduction). I therefore suggested that a new provision should be included expressly dealing with climate change (or net zero) and sustainability analogous to that for RCBs. This could be done by adding a new sub-clause to s 22(2) of the EA 2002 expressly relieving the CMA from a duty to refer a merger to a detailed investigation if:

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[12] *On these questions see Paras 2.3 and 2.4 of the ClientEarth/Simon Holmes submission to the Commission referred to in point 4 in Annex A.*

[13] *EA 2002 s 30(4).*

"the climate change or sustainability benefits of the relevant merger situation concerned outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition concerned".

Clearly reference could be made to "net zero" or "the transition to a low carbon economy" instead of "climate change" if preferred by the CMA or ministers.

Value Judgments (paras 36 and 37 and Question (d) in para 39).

3.5. On the question of weighing up the different factors under consideration (competition, efficiencies, sustainability benefits etc) see my comments at para 1.5 above.

3.6. In my view 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. I do not claim to know exactly how such bodies would respond to such requests for help (positively I hope) but bodies that come to mind are the Environment Agency and the Climate Change Committee. 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).

Public Interest

3.7. Another area where in my UK Paper I suggested a possible change to current UK merger law is in relation to public interest (see page 392 of my UK Paper).

3.8. In particular I suggested that "climate change and sustainability" be expressly added to s 58 EA 2002 as "specified considerations". Again different words could be used to reflect the UK government's "net zero" goal and/or the CMA's "strategic objective" of "supporting the transition to a low carbon economy".

4. MARKETS REGIME (PAGES 22 TO 24 OF THE CMA'S PAPER).

4.1. My views on the Markets regime are set out on pages 392/393 of my UK Paper.

4.2. Analogous to my suggestion above on public interest in the context of mergers, I suggested that "climate change and sustainability" be specified as public interest considerations in the context of the markets regime.[14] Again different words could be used to reflect the "net zero" goal and the "transition to a low carbon economy" objective.

[14] *This can be done by ministerial order without the need for primary legislation (EA 2002 s 153*).

4.3. I would add one point to my earlier comments. I am aware that some feel MIRs use up too many resources -and do not always lead to changes that justify the use of those resources (cf the criticisms of the banking and energy investigations). In my view this should not discourage the CMA from using its valuable powers in this are –which are often envied by other competition authorities around the world. In particular, these powers enable the CMA to look at issues beyond those that it can tackle (at least not initially) under its CA '98 powers. I would encourage the CMA to use its powers in a targeted way to look into particular problems identified. A good example of this is the recent market study into electric vehicle charging.

ANNEX A.

SIMON HOLMES, PAPERS ON CLIMATE CHANGE, SUSTAINABILITY AND COMPETITION POLICY.

1. JAE Paper "Climate Change, Sustainability and Competition Law": https://academic.oup.com/antitrust/article/8/2/354/5819564?login=true
2. "Climate Change, Sustainability and Competition Law in the UK" (published in the ECLR, July, 2020); https://www.law.ox.ac.uk/sites/files/oxlaw/cclp_working_paper_cclpl51.pdf
3. Climate Change and Competition Law –Simon Holmes note for OECD Roundtable on sustainability and competition law: https://one.oecd.org/document/DAF/COMP/WD(2020)94/en/pdf
4. Horizontal agreements between companies-revision of EU competition rules. ClientEarth and Simon Holmes contribution to the Commission's consultation. https://www.clientearth.org/media/3c4lsaex/clientearth-and-s-holmes-contribution-horizontal-agreements-04-10-2021.pdf
5. "Competition Policy supporting the Green Deal". [Concurrences No 1-2021]. https://www.concurrences.com/en/review/issues/no-1-2021/conferences/sustainable-development-what-role-for-competition-policy-new-frontiers-of
6. "Climate Change is an existential Threat: competition law must be part of the solution and not part of the problem" [CPI Antitrust Chronical, July 2020]. https://www.competitionpolicyinternational.com/climate-change-is-an-existential-threat-competition-law-must-be-part-of-the-solution-and-not-part-of-the-problem/
7. "Consumer welfare, sustainability and competition law goals" [Concurrence No 2-2020]. https://www.concurrences.com/en/review/issues/no-2-2020/foreword/consumer-welfare-sustainability-and-competition-law-goals-93496-en
8. *Covid 19 Lessons for climate change blog:* http://competitionlawblog.kluwercompetitionlaw.com/2020/04/23/climate-change-sustainability-and-competition-law-lessons-from-covid-19/

See also "Competition Law, Climate Change & Environmental Sustainability", edited by Simon Holmes, Dirk Middelschulte and Martijn Snoep-a collection of some 40 essays. [Concurrence]. https://www.concurrences.com/en/all-books/competition-law-climate-change-environmental-sustainability

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ANNEX B.

EXAMPLES OF WHERE FEAR OF COMPETITION LAW HAS INHIBITED VITAL ACTION TO SUPPORT NET ZERO AND OTHER SUSTAINABILITY GOALS.

1. In the supermarket sector, in order to bring about a meaningful reduction of single use plastic and increase rates of recycling, big names need to work together. If a single supplier works with each of its supermarket customers the systems they agree may not work for other suppliers: this is inefficient and sub optimal from a sustainability perspective. Similarly, if a supermarket works with each of its suppliers the systems they agree may not work for other supermarkets: again, this is inefficient and sub optimal from a sustainability perspective. If suppliers and retailers work together (with appropriate safeguards) whole systems can be made more sustainable and at a faster pace.

2. Deforestation is the 2nd largest source of GHGs and a major driver of biodiversity loss with most of this being driven by activity in the Amazon and Cerrado regions in the Mercosur. Leading soft commodity traders have expressed a willingness to work together to tackle this issue but often cite competition law concerns as a limiting factor. While there need to be limits to the information exchanged and what is agreed, the competition rules need to facilitate, rather than impede, vital joint work to tackle this.

3. A major and growing concern is the link between crops like soya and tropical deforestation and conversion of native vegetation with consequent impacts on bio-diversity, carbon emissions, water systems and local communities. Initiatives like the UK RoundTable on sustainable Soya bring together key players in the market to work together to achieve a secure, resilient sustainable supply of soya: ie soya that is legal and cultivated in a way that protects against conversion of forests and valuable native vegetation. What is “sustainable“ soya, and what is not, is a complex question which industry players (with expert advice) are well placed to analyse and to develop appropriate criteria- while leaving industry players free to make their own unilateral purchasing decisions. Again, this can be done without infringing competition rules but legal uncertainty has meant that many players, while in principle ready to play their part, are nervous of doing so.

4. The fashion industry has a huge environmentally harmful impact, particularly in terms of the raw materials going into garments which are often only worn for a few months, but also in terms of the impact in producer countries (land clearance, water usage etc). It also has a significant role to play in terms of social sustainability (eg avoidance of child labour and other forms of exploitation of workers in some of the poorest countries in the world). Many in the industry acknowledge this and the Fashion Pact was established to change things

recognising that “no single company or executive can enact change at the scale or speed needed to protect our planet”. While respecting the boundaries, it is important that competition rules do not impede such valuable work.

5. Fishing quotas are agreed by governments but the industry and consumers have an interest in avoiding overfishing and depletion of stocks and are often willing to go further and/ or faster than governments. An example of this is an agreement among suppliers and UK retailers to ensure that mackerel is fished on a sustainable basis as stocks are depleted in the North Atlantic. The system is carefully designed to comply with competition rules but at one point one firm took the view that a boycott of unsustainably caught fish would transgress competition law as an anti-competitive boycott. Others appreciated that the system was competition compliant. We need to work hard to ensure that all businesses understand that such vital collaborative efforts can work within the existing competition rules and that such initiatives are not held up, or unnecessarily limited in scope, as a result of unfounded fear of competition enforcement.

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