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Draft CMA Guidance on Environmental Sustainability Agreements

Cleary Gottlieb Response to the CMA's Consultation

1. We appreciate the opportunity to comment on the CMA's Draft Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to Environmental Sustainability Agreements ("**Draft Guidance**").

2. The CMA's Draft Guidance is important and timely. Despite international consensus on the urgency of climate action and the UK's adoption of binding targets, markets are not serving consumers in a way that is consistent with these goals. We agree with the considerations underlying the Draft Guidance, to the effect that

   a. a combination of market failures and collective action problems can cause long-term damage to climate stability and the environment, which in turn can cause long-term harm to competition, the economy, and society;

   b. private sector cooperation can help overcome these concerns, given deficiencies in effective regulation; and

   c. competition law should enable rather than obstruct such consumer welfare-enhancing cooperation.

3. The Draft Guidance is clear, principled, and forward-thinking, and establishes the CMA as one of the leaders in this area worldwide. They make a significant contribution to the ongoing debate on the compatibility between competition policy and the need to address the global climate and environmental crisis. At the same time, certain aspects would benefit from refinement and greater ambition. In particular:

   a. The Draft Guidance should explicitly reflect the "polluter pays" principle. Accordingly, (a) cooperation that legitimately serves to mitigate climate change and environmental damage, and that is necessary and proportionate to that end, should be allowed even if it increases prices (internalizes social costs), so long as the price increase is less than the social cost avoided as a result of the agreement; and (b) the "fair share to consumer" condition should take into account all benefits to consumers, not just in-market benefits, should not require full compensation of consumers affected by the agreement, and should allow a cost-benefit analysis on a worldwide basis, not just for UK consumers.

b. The CMA's approach in assessing if climate change agreements qualify for exemption should apply to all forms of agreements to mitigate major environmental harm with worldwide effect, including in particular biodiversity agreements (for example, agreements designed to protect biodiversity through sustainable food production, sustainable fishing methods, bans on insecticides and herbicides with damaging long-term side effects on pollinators, bans on products from newly deforested areas, or bans on illegal wildlife trade).

4. In the remainder of this submission, we comment paragraph by paragraph. Where appropriate, we suggest changes to the text of the Draft Guidance (additions underlined, deletions struck through), accompanied by a short explanation.

1. Overview

5. **Para. 1.8 – Examples of circumstances where competitor collaboration enhances environmental sustainability.** The Draft Guidance identifies two examples of situations where agreements between competitors may be needed to protect or advance environmental goals: (i) to overcome first-mover disadvantages, and (ii) where firms individually lack the resources or capabilities to achieve the sustainable outcome.

a. In relation to the second situation (the achievement of sustainable outcomes), we note that the faster achievement of climate goals could deliver important consumer welfare benefits, given the urgency of action required to stay below the 1.5°C cap (or reduce the period of time when the world remains above the 1.5°C cap),[1] and the urgency of steps needed to deal with the biodiversity crisis. We therefore recommend to add: "*where firms may individually lack the resources and capabilities to achieve more environmentally sustainable outcomes but could achieve them collectively, or could achieve the goal more quickly or effectively e.g., because the combination of complementary capabilities or standardization accelerates the process or increases the certainty of a successful outcome*."

b. The CMA could add as a third situation "*where firms' activities create negative externalities for consumers and for other firms, that they have no (or insufficient) incentives to avoid unilaterally, e.g., where their emissions increase climate change risks or environmental risks for others, and others' emissions increase climate change or environmental risks for them, that in the absence of fully effective regulation or taxation can be resolved only through mutual cooperation*".

c. As a fourth situation, the CMA should recognize that competitor collaboration can help market forces work more efficiently by improving transparency and avoiding

[1] IPCC Press Release for Sixth Assessment Report, April 4, 2022: "*In the scenarios we assessed, limiting warming to around 1.5°C (2.7°F) requires global greenhouse gas emissions to peak before 2025 at the latest, and be reduced by 43% by 2030; at the same time, methane would also need to be reduced by about a third. Even if we do this, it is almost inevitable that we will temporarily exceed this temperature threshold but could return to below it by the end of the century*", available at: https://www.ipcc.ch/2022/04/04/ipcc-ar6-wgiii-pressrelease/.

the duplication of resources. A key example is standard-setting, where the creation, dissemination, and implementation of clear and accurate standards can play a significant role in capturing consumer willingness to pay for such benefits, directing them towards the products and services that best cater for such benefits, and rewarding innovation. Such standard-setting efforts may be preceded by collaboration on joint studies and research to develop the relevant standards.

6. **Para. 1.11 (and 2.4) – Other major environmental risks and biodiversity.** We welcome the CMA's more permissive approach to exemption in relation to climate change agreements. We make further recommendations on its specific application below (see comments on Section 6).

7. While the CMA's proposal is an important step forward to "*ensuring that competition supports a resilient economy that can grow sustainably*",[2] that goal justifies the following change: "*The CMA considers that a more permissive approach to exemption is appropriate in relation to agreements which combat or mitigate climate change, as well as pollution and biodiversity threats with worldwide impact*".

   a. In the first place, the reasons the CMA gives for according this treatment to climate change agreements apply to all major environmental sustainability agreements, especially considering the cumulative impact of environmental pollution and the exhaustion of nature's biodiversity resources. The CMA refers to "*the sheer magnitude of the risk that climate change represents, the degree of public concern about it, and the binding national and international commitments that successive UK governments have entered into*."[3] However, many other forms of environmental harm similarly present substantial levels of risk to consumers, attract high levels of public attention, and are the subject of national and international agreements. A key example is the global threat to biodiversity. Biodiversity is the keystone to the complex and intertwined ecosystems that sustain human existence, and global biodiversity is under severe threat from pollution and the destruction of habitats for agriculture and industry.[4] Animal and plant extinction is currently tens to hundreds of times higher than it has averaged over the past 10 million years and is accelerating.[5] This environmental threat has the same features the CMA identified for climate change.

      i. First, the loss of biodiversity is a systemic risk threatening the survival of humans as well as other living species. According to the IPBES, "*The biosphere, upon which humanity as a whole depends, is being altered to an unparalleled degree across all spatial scales*".[6] Declining ecosystems have the

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2 Draft Guidance, para. 1.2.
3 Draft Guidance, para. 1.11
4 IPBES Global Assessment Report on Biodiversity and Ecosystem Services, Summary for policymakers (plain text), pp.3-4, available at: https://www.ipbes.net/global-assessment.
5 *Ibid.*, p.14.
6 *Ibid.*, p. 3.

potential to impact millions of lives and livelihoods around the world. For example: "*Currently, land degradation has reduced productivity in 23 per cent of the global terrestrial area, and between $235 billion and $577 billion in annual global crop output is at risk as a result of pollinator loss.*"[7] The CMA's explanation of the impacts of climate change applies equally to biodiversity loss: "*These negative effects (and so the benefits of reducing them) typically are global in nature and are realised over long time periods (with a high degree of uncertainty about their scale). By reducing the negative externalities, such agreements can generate efficiency gains by enabling a better use of scarce natural resources.*"[8]

ii. Second, there is strong public concern about the global loss of biodiversity. Most recently, 188 UN member states, including the UK, adopted the Kunming-Montreal Global Biodiversity Framework setting forth global targets for 2030.

iii. Third, the UK is bound by a number of national laws and international conventions protecting biodiversity. These include the Convention on Biological Diversity, Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the UNESCO World Heritage Convention, the Convention on the Conservation of Migratory Species of Wild Animals, the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), and the Bern Convention on the Conservation of European Wildlife and Natural Habitats. The UK has extensive national legislation for the preservation of nature in the UK and globally, including the UK Environment Act 2021 and the Wildlife and Countryside Act 1981.

iv. In view of the magnitude of the risk presented by the biodiversity crisis, the level of public concern and the commitments that governments – including the UK – have concluded to address the crisis, biodiversity deserves the same treatment as climate change under the CMA's guidelines.

b. In the second place, environmental sustainability agreements may contribute to various environmental goals alongside the abatement of climate change, so the CMA's policy could create uncertainty over how an agreement should be qualified, and whether (or which parts of) an agreement would qualify for treatment as a "climate change agreement". For example, an initiative to promote the use of sustainable forestry resources may protect biodiversity (by reducing habitat loss) as well as advance climate change mitigation (by preserving carbon sinks).

c. Finally, the causes and effects of climate change and other important environmental issues are closely linked. Accordingly, the focus on climate change agreements may not be sufficiently comprehensive to address the broad range of climate

7 *Ibid.*, p.4.
8 Draft Guidance, para. 2.4.

change-related risks. In other words, separating biodiversity, worldwide pollution, and climate change is unhelpful and artificial. As the UN observes: "*Climate change and biodiversity loss (as well as pollution) are part of an interlinked triple planetary crisis the world is facing today. They need to be tackled together if we are to advance the Sustainable Development Goals and secure a viable future on this planet*".[9]

8. Should the CMA decide not extend its policy on climate change agreements to biodiversity and other forms of environmental agreements, we recommend that the Draft Guidance confirm that this is being kept under review and invite consultation, as part of the CMA's open-door policy, on environmental or biodiversity-related agreements that deserve more permissive treatment.

9. **Para. 1.13 and 7.10 – Enforcement action.** The current wording of the Draft Guidance appears to limit the level of comfort the CMA intends to provide, and seems inconsistent with the CMA's emphasis on a flexible and case-by-case assessment. This can be addressed as follow.

   a. Proposed revision: *"[T]he CMA will not take enforcement action against environmental sustainability agreements, including climate change agreements, that clearly correspond to examples used in this Guidance ~~and~~ or are consistent with the principles set out in this Guidance*".

10. **Para. 1.15 and 7.12 – Protection from fines.** We recommend that the CMA not impose fines where a published agreement is found to infringe the equivalent of the Chapter I prohibition but the parties followed the guidelines in good faith.[10] This would enhance the Guidance's impact on sustainable action, with no drawbacks for effective enforcement.

   a. Proposed revision: "*Where parties approach the CMA to discuss their agreement and the CMA does not raise any competition concerns (or where any concerns that were raised by the CMA have been addressed), or where a published agreement has infringed the Chapter I prohibition but the parties have followed the Guidance in good faith, we will not issue fines against the parties that implement the agreement (Section 7 below).*"

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9 UN, "Biodiversity – our strongest natural defense against climate change", available at: https://www.un.org/en/climatechange/science/climate-issues/biodiversity#:~:text=Climate%20change%20has%20altered%20marine,the%20first%20climate%2Ddriven%20extinctions.

10 *See also* Draft Dutch Authority for Consumers and Markets Sustainability Guidelines of January 26, 2021 ("**Draft ACM Guidelines**"), para. 72.

2. Scope

11. **Para. 2.4** – Please see our comments on Section 1 above, concerning agreements to combat other major environmental risks and the biodiversity crisis.

3. Environmental sustainability agreements which are unlikely to infringe the prohibition

12. **Para. 3.3.2 – Use of joint funds.** We recommend that the Guidance could include more examples of how joint funds could be used.

    a. Proposed revision: "*This could include, for example, where the joint funds are used for training activities for people working in the industry, to develop or encourage the use of more sustainable practices or processes, or to compensate for extra costs associated with switching to more sustainable practices*."

13. **Para. 3.4 – Joint initiatives to ensure commercial feasibility.** We recommend that the CMA clarify that joint initiatives are allowed also in situations where independent action would be commercially unfeasible (because it is too costly, time-consuming, or uncertain, or there are mutually blocking IPRs), in addition to cases where the parties do not have the technical capabilities. This is the appropriate counterfactual because businesses would not engage in any activity that is commercially unfeasible. There is thus no restriction of actual or potential competition that would have existed absent the agreement. The CMA should also supply guidance on what evidence might be appropriate, such as internal feasibility assessments.

    a. Proposed revision: *"Where businesses engage in joint initiatives in circumstances where ~~they would not~~, in the particular legal and economic context, ~~have been able independently to~~ it would not have been possible or commercially feasible on the basis of objective factors to carry out the initiative individually, for example because they do not have the technical capabilities, the cost is too high, the initiative too time-consuming, the results too uncertain, or mutually-blocking intellectual property rights conflict, this is unlikely to raise competition concerns (unless the businesses could have carried out the initiative using a form of cooperation that is less restrictive of competition). In such cases, there is no restriction of actual ~~and~~ or potential competition that would have existed in the absence of the agreement. Parties can provide evidence that they would not have been able to take on the initiative individually through, among other things, internal feasibility assessments."*

14. **Para. 3.7 – Cooperation required by law.** The CMA should clarify that it is referring to a legal requirement "to cooperate".

    a. Proposed revision: *"Cooperation between competitors which is made or done to comply with a legal requirement to cooperate is automatically excluded from the*

application of the Chapter I prohibition. However, the Chapter I prohibition will still apply if the law merely encourages such cooperation, rather than requiring it."

15. **Para. 3.8 – Compliance with non-UK legal requirements.** This paragraph should refer to compliance with legal requirements, regardless of their source, so as not to discriminate against non-UK legal regimes. For instance, the CMA should not prohibit an agreement to comply with deforestation laws in countries where those laws are not (or are inadequately) enforced. Absent cooperation in such cases, firms may feel compelled to exploit gaps in the UK's regulatory framework fearing that, if they do not, rivals will. Yet, businesses are expected to operate within the law, as the Draft Guidance correctly states, and that principle applies even if the law is foreign. The counterfactual, in other words, is full compliance with law, whatever the source of the law.[11] Such agreements must not, however, prohibit individual or collective initiatives to go further than the law requires.

    a. Proposed revision: "*Where businesses agree that they must adhere to existing ~~domestic or international~~ legal requirements (whether domestic, foreign, or international), this is also unlikely to raise competition concerns since businesses are expected to operate within the law, provided that the agreement does not exclude individual or joint action to go beyond the minimum legal requirements.*"

16. As to the last sentence, we note that in the absence of a harmonization of laws, competitor collaborations may be justified also by the desire to comply worldwide with legislation introduced in advanced economies or important markets. Competitors should not be penalized for agreeing to comply with higher sustainability standards.

17. **Para. 3.9 – Pooling of information.** Customers at all levels of trade may find a rating system helpful to chart suppliers' sustainability footprints and their progress toward improving sustainability. Such a rating system should be based on objective, relevant, and verifiable criteria.

    a. Proposed revision: "*An agreement to pool information about and/or provide appropriate ratings on the environmental sustainability credentials of suppliers, for example suppliers which have environmentally sustainable value chains, use environmentally sustainable production processes or provide environmentally sustainable inputs, but without requiring the parties to purchase (or refrain from purchasing) from those suppliers and without sharing competitively sensitive information about prices or quantities purchased from those suppliers is unlikely to have an appreciable negative effect on competition.*"

18. **Para. 3.11 – Sustainability standards.** We note that the Draft Guidance does not completely mirror the European Commission's requirements for standardization

[11] *See, e.g.*, Draft ACM Guidelines, para. 45.

agreements but appear somewhat more permissive.[12] While we are generally in favor of legal harmonization, we agree with the CMA's approach, since the criteria in the European Commission's draft guidelines for standardization agreements that the CMA chose not to include are not essential to ensure compatibility with the Chapter I prohibition. The reference to a "*a significant price increase*" in the draft EU Guidelines in particular is vague and likely to lead to confusion. If the CMA introduces such a condition – which we do not encourage – we recommend that "*a significant price increase*" be defined as "*a price increase higher than the total social cost or damage avoided as a result of the agreement*" (see the discussion on para. 3.13 of the Draft Guidance below).

19. The CMA should, however, clarify that it is referring to standards at any level of the supply chain, so as also to capture agreements to mitigate scope 3 emissions. In addition, the CMA should also provide for a "soft safe harbor" for other models of standardization.[13]

    a. Proposed revision: "*Where competitors collaborate to develop industry standards or codes of practice aimed at making products or processes more sustainable at any level of the value chain (whether scope 1, 2, or 3), this is unlikely to have an appreciable negative effect on competition, provided that: […]*

    b. *Failure to comply with one or more of these conditions does not create a presumption that the agreement restricts competition within the meaning of Chapter 1. However, if some of these conditions are not met, it will be necessary to assess, in particular, whether and to what extent the agreement is likely to – or actually does – lead to an appreciable negative effect on competition, and meets the criteria for exemption. Different models for standardisation efforts may exist and undertakings are free to put in place rules and procedures that do not violate competition rules but that differ from those described above.*"

20. **Para. 3.13 – Withdrawal or phase-out agreements.** We recommend that the Guidance should cover agreements that replace or reduce environmentally unsustainable processes or products. The CMA should also provide further guidance on what constitutes an "*appreciable increase in price*". The appropriate standard for

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12 There is substantial overlap between the requirements for standardization agreements under the two sets of guidelines but also some differences. Unlike the Draft Guidance, the draft EU Guidelines specifically require that the standardization agreement (a) does not lead to (i) the unnecessary exchange of commercially-sensitive information or (ii) a significant price increase or significant reduction in the choice of products, and (b) is accompanied with a monitoring system to ensure compliance (European Commission draft revised Horizontal Guidelines of March 1, 2022 ("**Draft EU Guidelines**"). The Draft Guidance specifically require that participating businesses remain free to develop alternative standards (Draft Guidance, para. 3.11), whereas the Draft EU Guidelines require that "*participating undertakings should remain free to adopt for themselves a higher sustainability standard than the one agreed with the other parties to the agreement*" (para. 572).

13 Draft EU Guidelines, para. 574.

"*appreciability*" is provided by the "polluter pays" principle.[14] In accordance with that principle, a price increase that is less than the externality imposed on society in the counterfactual should not be deemed appreciable. Such externalities are economically undesirable, lead to an inefficient allocation of resources, and lead to an increase in climate change risk to the detriment of everyone, including consumers. We therefore recommend that "*appreciable*" be defined as "*higher than the total social cost or damage avoided as a result of the agreement*".

a. Proposed revision: "*Where competitors agree to phase out particular ~~non-~~ environmentally unsustainable processes or cease procuring or supplying certain ~~non-~~environmentally unsustainable products ~~and~~ or agree to replace them with more sustainable alternatives, this is unlikely to have an appreciable negative impact on competition where it does not involve an appreciable increase in price for consumers or an appreciable reduction in product choice. "Appreciable increase in price" means an increase in price that is greater than the social cost or damage avoided as a result of the agreement.*"

21. **Para. 3.15 – Agreements setting targets.** This paragraph should also apply to "binding" targets, as long as participating businesses can independently determine how they achieve (or overachieve) these targets. The binding or non-binding nature of a target should not have any implications for competition – certainly where the targets are needed to meet the Paris Agreement and other legal obligations the UK Government has undertaken. The section on industry-wide efforts should also explicitly take account of the need to reduce scope 3 emissions.

a. Proposed revision: "*The setting of binding or non-binding targets or ambitions for the whole industry with regard to environmental sustainability objectives (including scope 3 emission reduction targets) are unlikely to have an appreciable negative effect on competition, provided participating businesses remain free to determine their own contribution and the way in which the targets are realized or exceeded. Such an industry wide ambition might concern the reduction of carbon dioxide emissions~~, but where such targets are not binding on the participating businesses (which remain free to determine their own contribution and the way in which the targets are realized)~~.*"

22. **Para. 3.18 – Common frameworks for target setting.** For the reasons given in relation to para. 3.15 above, the CMA should clarify that the framework may be binding or non-binding. A binding framework would not affect competition if participants are

[14] "*[T]here is considerable public interest in the maintenance of a healthy environment, and in the principle pithily expressed as 'the polluter must pay'*", Neuberger J. in *Re Mineral Resources* [1999] BCC 422 at para. 431, cited with approval in *Scottish Environment Protection Agency & Ors v Joint Liquidators of the Scottish Coal Company Ltd* [2013] CSIH 108 at para. 144. *See also* The Environmental Damage (Prevention and Remediation) Regulations 2009 – as amended by the Environmental Damage (Prevention and Remediation) (England) Regulations 2015.

free to withdraw from them at any time, but their binding nature would enhance the effectiveness of their operation and incentivize active participation.

a. Proposed revision: "*Similarly, the establishment of a common binding or non-binding framework for target setting, including which emissions and business activities are within the scope of the common framework and the duration and timing of the targets, would be unlikely to infringe the Chapter I prohibition. Such a common framework could allow for the unilateral setting, disclosure and reporting of the participants' targets, as well as how – in broad terms – the participants intend to meet their targets and the participants' progress towards meeting those targets.*"

4. Environmental sustainability agreements which could infringe the Chapter 1 prohibition

23. **Para. 4.9 – Ancillary restraints.** The Guidance would benefit from more examples of restrictions that would be deemed "ancillary" to environmental sustainability agreements. For instance:

a. exchanges of information on prices and sales in the context of production agreements involving the joint distribution of the jointly produced sustainable products (where the joint production and distribution itself is permissible or necessary to achieve sustainability objectives);

b. exchanges of technical information needed for otherwise permissible sustainability standard setting;

24. The above restrictions are "ancillary" to those other types of cooperation described in the CMA's draft Guidance on Horizontal Agreements. They should similarly be treated as "ancillary" to any legitimate environmental sustainability agreement of which they form part.

25. **Para. 4.11 – Agreements to buy only sustainable input products, or not to supply unsustainable projects.** We welcome the CMA's analysis of environmental sustainability agreement only to purchase from suppliers that sell sustainable products, and more generally, the CMA's recognition that certain types of restrictions that might be considered a restriction "by object" in one context may merit a nuanced "by effect" analysis (or even an "ancillary restraints" analysis) in another. This includes initiatives that may be very effective in combating climate change, but which have not been fully implemented due to uncertainty over their compliance with competition laws, like the "Race to Zero" initiatives.[15] We recommend that this paragraph be extended to agreements not to supply goods and services to unsustainable projects, since agreements to reduce scope 3 emissions may concern both the upstream or downstream value chain:

[15] For example, the UN-convened Net Zero Asset Owner Alliance has produced guidance for its members to refrain from oil and gas investments. *See* https://www.unepfi.org/industries/position-on-oil-and-gas-sector/

a. Proposed revision: *"... An example of this is an environmental sustainability agreement that involves a group of competing purchasers or sellers agreeing only to purchase from, or sell products or services only to, suppliers that sell sustainable products or services. ...*

5. Exemption for environmental sustainability agreements generally

26. **Para 5.4 – Examples of benefits.** We propose the following revisions to the list of examples that are relevant to environmental goals:

a. Proposed revision: "*reducing production ~~and~~ or distribution costs (for example, combining resources to create economies of scale in relation to a new, more environmentally sustainable input, enabling the parties to produce or distribute their products more cheaply);*

b. *"increasing the pace with which beneficial production or distribution processes come to market (for example, an agreement that increases demand for a more sustainable input, thereby generating economies of scale and lowering average total costs faster than would otherwise happen)*"

27. **Para 5.6 – Future benefits and harms.** Just as the Draft Guidance considers future benefits, the Guidance should also take into account the avoidance of future harms when assessing the benefits generated by the agreement.

a. Proposed revision: "*In the context of environmental sustainability, it is not unusual that the benefits may materialise in future, over a relatively long period of time. It is legitimate to have regard to such future benefits. The quantification of such future benefits, and the extent that they may need to be discounted, will need to be considered, according to the nature of the agreement and the claimed benefits (see paragraph 5.25 below). Similarly, it is legitimate to have regard to future harms that may be avoided as a result of the agreement, including the manner in which the costs of addressing such harms is reduced due to early action.*"

28. **Para. 5.15 – Benefits to non-UK consumers.** The CMA should not limit the cost-benefit analysis to UK consumers only. The climate and biodiversity crises are global in nature. Apart from this, due to global supply chains that are pervasive in the UK economy and the nature of environmental externalities, the beneficial impact of environmental sustainability agreements relating to consumption in the UK (or a significant portion of such impact) may be experienced by consumers outside the UK. The "polluter pays" principle requires that if production intended for UK and non-UK consumers causes climate or environmental damage elsewhere (such as the flooding of low-lying areas abroad), agreements to mitigate that damage should not be prohibited purely on the ground that UK consumers do not benefit.

29. We note also that the CMA's existing block exemptions are based on an assessment that is not limited to costs and benefits to UK consumers either[16] – taking into account the full benefits to all consumers worldwide is therefore not "exceptional". Finally, the limitation of the analysis to UK consumers would involve a collective action problem at international level: if the UK ignores benefits for non-UK consumers, other antitrust authorities would have cause to ignore benefits to UK consumers, and the cause of climate change mitigation could be significantly undermined. See also the discussion on para. 5.19 and 6.4 of the Draft Guidance below.

    a. Proposed revision: "*The parties need to be able to show that the benefits that result from the agreement are passed on to ~~UK~~ consumers and that those benefits outweigh the harm that ~~UK~~ consumers will suffer as a result of the agreement.*"

30. **Para. 5.19 – Who are the relevant consumers – assessment of "fair share" should take full account of avoidance of negative externalities.** In assessing whether a consumer receives a "fair share" of the environmental benefits, the balancing exercise should take into account all the benefits and negative effects arising from the agreement, in accordance with the "polluter pays" principle.

31. Under 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 environmental sustainability agreement plus (ii) the total benefit to others of reduced greenhouse gas emissions (or other positive externalities) generated by the agreement, divided by the total number of consumers who buy the relevant product worldwide. In other words:

    Price increase (or value decrease) < benefit + positive externalities.[17]

32. The "polluter pays" principle finds solid support in English law. As Neuberger J (as he then was) observed in *Mineral Resources*: "*there is considerable public interest in the maintenance of a healthy environment, and in the principle pithily expressed as 'the polluter must pay'.*"[18]

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16 *See e.g.*, the CMA's draft Guidance on Horizontal Agreements, para. 3.43 ("*the concept of 'consumers' includes all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers*").

17 In some cases, the benefit may simply be the reduction of the "negative externality" that the agreement enables, such that benefit + positive externality = reduction of negative externality. However, in some cases, consumers enjoy benefits in addition to the reduction of the negative externality. For example, in Case IV.F.1/36.718 – *CECED*, the European Commission identified both a reduction of the negative externality (reduced pollution) as well as the direct benefit of lower costs for consumers due to reduced consumption of water, electricity, or detergent.

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

33. There is convincing support for the polluter pays principle also in economics[19] and in ethics[20] – and these two factors cannot be ignored when the relevant criterion is "fairness".

34. It is not "fair" for consumers to insist that they be compensated (and *a fortiori* to claim full compensation) for ceasing to impose costs on others (negative externalities), who moreover have no say in the decision to consume or not to consume. A "fair share" means the polluter pays, and they should be appropriately deterred from creating damage in the first place or remediate the damage, not that the polluter should be compensated for ceasing to pollute.

    a. *Proposed revision: "In contrast, it is not normally appropriate to offset the harm to consumers in one market against benefits arising to a different set of consumers in another market. At the same time, for the assessment of what is a "fair share," the CMA will take into account that it is also not normally appropriate for consumers to impose costs on others, including a different set of consumers in another market, and in particular if that different set of consumers has no influence in the decision to consume or not. In the cost benefit balancing, the CMA will therefore take into account the "polluter pays" principle. In accordance with this principle, the cost benefit calculation will proceed in two stages. First, the CMA will compare any increased costs to consumers in the relevant market resulting from*

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19 For economic analysis, we refer to the theories of Nobel Prize-winning economist Ronald Coase (R. Coase, "The Problem of Social Cost", Journal of Law and Economics, Vol. 3 (Oct., 1960), pp. 1-44). Coase found that while it does not matter in principle whether a producer has the right to pollute (in which case society will have to pay him to cease pollution) or whether society has a right to an unpolluted environment (in which case a producer will have to pay to pollute), it is important (a) to specify clearly and explicitly who has the right, and (b) the decision to whom a right should be allocated should be based on (i) which allocation involves minimal social costs, and (ii) which allocation minimizes transaction costs to solve disputes. As he explained: "*The rights of the various parties should be well-defined and the results of legal actions easy to forecast*" (p.19). The "polluter pays" principle reflects Coase's requirements on the allocation of rights, given in particular the need to avoid perverse incentives (*i.e.,* incentives to threaten to increase pollution so as to be compensated for not doing so) and the existential threat posed by environmental crises such as climate change. 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 where – 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.

20 As to equity, Oxford mathematician, economist, and game theorist Prof. Ken Binmore discusses the Golden Rule as the one fundamental norm of fairness that all religions and philosophies share. Pursuant to this rule, a consumer/producer should treat others (who bear the burden of externalities of her consumption/production) the same way she would have others treat her (when others by their consumption/production impose externalities on her). This leads to the "polluter pays" principle. 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 – whether they are a producer, consumer, or the person who is damaged by the externalities without having a say. A consumer therefore receive 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). This, too, leads to the "polluter pays" principle.

the agreement with the reduction of social costs resulting from the agreement. If the reduction of social costs exceeds the increased costs to consumers, the agreement can be approved. If the costs to consumers exceed the reduction of social costs, the CMA will calculate the "net costs" (costs to relevant consumers minus social costs) and assess whether the agreement entails further benefits for those consumers in the relevant market. The agreement can be approved if those further benefits exceed the net costs."

35. **Para. 5.23 – Substantial and demonstrable benefits.** The CMA should also take into account the market share covered by the parties to the agreement, in assessing whether quantification is needed. This mirrors the ACM's approach in their draft guidelines.[21]

- Proposed revision: "*In many cases, it will not be necessary to quantify the benefits precisely. In particular, this will be the case if it is clear that the benefits are of a sufficient scale to offset (or more than offset) the harm to competition, for example, because the agreement will only result in a limited price increase or reduction in choice, and it is obvious that the benefits will be significant. This will also be the case if the undertakings involved have a limited combined market share.*"

6. Exemption for climate change agreements

36. **Para. 6.4 – Relevant consumers should include non-UK consumers.** For the reasons given in relation to para. 5.15, the assessment should include all consumers, not just UK consumers. This would also be consistent with the CMA's rationale for distinguishing climate change agreements in its application of the "fair share of the benefit" condition. These agreements "*seek to limit negative externalities of a type that are likely to have devastating effects inside the UK* ***and outside of the UK*** *and immeasurable long-term effects on the whole planet once certain tipping points are reached*".[22]

a. Proposed revision: "*The CMA therefore considers it appropriate, in the case of climate change agreements, to depart from the general approach and exempt such agreements if the 'fair share to consumers' condition can be satisfied taking into account the totality of the benefits to all ~~UK~~ consumers (whether in the UK or elsewhere) arising from the agreement, rather than apportioning those benefits between consumers within the market affected by the agreement and those in other markets. The CMA considers that the full benefits to all ~~UK~~ consumers (whether in the UK or elsewhere) should be taken into account because of the exceptional*

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21 *See* Draft ACM Guidelines, para. 54.

22 *See* Draft Guidance, para. 6.4 ("*[C]limate change represents a special category of threat that sets it apart and requires a different approach to the pass-on criteria. This reflects the sheer magnitude of the risk that climate change represents, the degree of public concern about it, and the binding national and international commitments that successive UK governments have entered into. It also reflects the fact that climate change agreements seek to limit negative externalities of a type that are likely to have devastating effects inside the UK and outside of the UK and immeasurable long-term effects on the whole planet once certain tipping points are reached*.").

nature of the harms posed by climate change (and therefore the exceptional nature of the benefits to consumers from combating or mitigating climate change or its impact); climate change represents a special category of threat that sets it apart and requires a different approach to the pass-on criteria."

7. CMA's open-door policy, enforcement action and protection from fines

37. **Para. 7.10, 7.12 and 7.14.** We refer to our comments on the corresponding paragraphs in Section 1 above.

38. **CMA participation in international competition networks.** The Guidance seeks to improve clarity for business on sustainability initiatives, in order to accelerate the delivery of environmental goals. We applaud the CMA's focus on this strategic priority, and encourage the CMA to build on the Guidance by promoting dialogue among antitrust agencies to advance policy thinking and improve policy harmonization in this area. A uniform approach among competition agencies is particularly important to facilitate climate agreements. Due to the global scale of the problem, the most impactful agreements aimed at tackling climate change will need to be multinational in reach or involve multinational companies. A uniform approach reduces compliance costs and enhances legal certainty, which will facilitate more ambitious action.

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