United Kingdom National Report – LIDC Congress Milan 2022

Sustainability and Competition Law: What role could/should sustainability goals play in competition policy and enforcement and how are competition authorities addressing this?

This Report has been prepared to assist the International Rapporteur, Professor Julian Nowag, in reporting to the LIDC Congress in October 2022.

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1 Introduction

The interaction of competition law and sustainability has been a live question for the UK government and the UK's Competition and Markets Authority ("CMA") in recent times. With the hosting of COP26 in Glasgow in 2021, the fight against climate change concerns has benefited from renewed political will.

Momentum across a wide range of environmental social and governance ("ESG") issues has continued over the last year. The pandemic spurred environmental and social concern prompting, for example, the UK government's strategy in 2021 to 'build back greener'. This strategy reflected a move more broadly across Europe. These initiatives demonstrate the continued – and growing – sentiment that ESG concerns are no longer an afterthought, but rather seen as a pre-condition (in Europe at least) to economic growth.

Increasing sustainability concerns and public policies are also placing growing pressure on businesses and consumers to make investment, innovation and purchasing decisions that promote, or at least are not harmful to, the environment. While competition policy is far from the primary driver of these social and economic changes, competition policy should, nevertheless, recognise this social and political shift. This includes e.g., consideration of environmental benefits as potentially a key aspect of competition between firms, as well as a source of benefits to consumers, and avoiding chilling business interest in pro-environmental initiatives. A respect and concern for sustainability measures must, however, distinguish between genuine environmental benefit and 'greenwashing' that acts as a fig leaf for collusive or anticompetitive behaviour.

By way of context, the UK competition regime is strongly rooted in the European approach, but has a number of distinctive quirks. Reflecting the UK's former EU membership, much of the UK competition regime currently mirrors the EU competition law rules contained in Article 101/102 of the Treaty on the Functioning of the European Union ("TFEU"), and the underlying principles. While in the EU, the UK was obliged to follow EU case law, generating much relevant precedent at EU level. However, even during its EU membership, UK merger control had a notably independent streak and the scope and use of its markets regime had no analogue in the EU. Following the UK's departure from the EU and the end of the transition period on 31 December 2020, EU competition law no longer applies in the UK. UK competition authorities and courts must still ensure there is no inconsistency with principles laid down by the EC and the European courts before 31 December 2020,[2] but – significantly – UK regulators and courts now have the freedom to diverge.

The CMA is increasingly active in exploring sustainability issues both in its publications and in its wider ambitions for global thought leadership. Citing sustainability as a "strategic priority" in its recent annual reports,[3] a key theme for the CMA is supporting the transition to low carbon growth, including through developing healthy and competitive markets in sustainable products and services. The CMA further notes it will continue to prioritise cases that could impede the UK's Net Zero goals for a low-carbon economy.[4]

The CMA has consulted on and issued guidance on how it considers sustainability-related issues across the antitrust, mergers and markets regimes. In particular, it: (i) issued an information sheet on sustainability agreements in January 2021; (ii) conducted a market study into electric vehicle (EV) charging points and, subsequently, undertook an antitrust investigation and accepted commitments in relation to long-term exclusivity agreements for EV charge points at motorway service areas; (iii) provided advice to the UK Government on how the current competition and consumer law frameworks facilitate or hinder sustainability and Net Zero objectives; (iv) established a Sustainability Task Force to spearhead further engagement with

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[2] Section 60A of the Competition Act 1998.

[3] Competition and Markets Authority Annual Report and Accounts 2022 to 2023, published on 24 March 2022, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1062414/Final_Annual_Plan_for_2022_23.pdf. Accessed 12 May 2022.

[4] Ibid at para. 2.51.

these issues; and (v) under its consumer powers, has published a 'Green Claims Code' to help businesses and consumers avoid 'greenwashing' claims.

The CMA has generally focused upon environmental sustainability (and, in its advice to government, it specifically considered the linkage with the UK's commitment to Net Zero by 2050). The CMA has not indicated interest in a wider formulation of sustainability which would incorporate, for example, social and ethical issues (in line with broader corporate ESG priorities and the UN Sustainable Development Goals ("SDGs")), as has been the case for example in Germany and more broadly, the EU.[5]

However, to date, and despite the extensive discussion around consideration of sustainability issues, sustainability considerations have so far only played a limited role in actual enforcement. The CMA has (with the exception of its market study into the EV charging market) yet to apply sustainability considerations in competition law (either antitrust enforcement or merger control) as either a sword or accepted its use as a shield (likewise, nor have sustainability considerations been significant in private competition proceedings).

This Report is split into three sections which consider the interaction of competition law and sustainability by assessing the role and impact of the UK's relevant legal instruments. First, it considers the impact of the Chapter I prohibition in the Competition Act 1998 ("CA98") (i.e., the prohibition on anti-competitive agreements) on cooperation between competitors. Second, how the CA98 Chapter II prohibition (i.e., the prohibition on abuse of a dominant position) can be used to help advance sustainability aims. Third, how the merger control and markets regimes can and should be used to support sustainability goals in the UK.

2 Section 1: Sustainability agreements and the Chapter I prohibition

This section of the Report will focus on the role that the Chapter I prohibition (and its EU equivalent, Article 101 TFEU), contained in section 2 of the CA98, plays, (and more importantly) could play, in supporting action towards a more sustainable future. In short, it will be argued that the Chapter I prohibition has the capacity to be applied in a way which furthers sustainability goals. While it is clear competition law does not prohibit sustainability agreements outright, the ambiguity caused by a lack of clear guidance as to the application of the provisions to such agreements and fear of enforcement (and significant penalties) prevents businesses from taking bolder action in pursuit of sustainability goals. Under the existing legal framework in UK, this Report will explore the various ways in which cooperation agreements directed at achieving sustainable goals may be "shielded" from the Chapter I prohibition and how the shield may be strengthened.

This section will refer primarily to the position and the 'state of play' in the UK under Chapter I CA98. Nonetheless, given the similarity between the UK and EU regimes on cooperation agreements, reference will be made to EU law and practice.

There are currently no reported cases in the UK, nor examples of antitrust enforcement by the CMA, which involve a consideration of the application of the Chapter I prohibition (or the exemption criteria) to sustainability agreements. Accordingly, the impact of the existing framework to such agreements will be considered, highlighting any areas where a degree of flexibility and clarity of approach would be welcomed.

2.1 What is a 'sustainability agreement'?

Before diving into the detail of the Chapter I prohibition, it is worth briefly addressing what a sustainability agreement is and the importance of cooperation – to put the role competition law has to play into context.

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[5] The German Federal Cartel Office assessed three ESG initiatives in early 2022: (i) Living Wages in the Banana Sector; (ii) Animal Welfare Initiative or Initiative Tierwohl; and (iii) in the milk sector. See also, EU Commission, *Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (March 2022) (the "*Draft Horizontal Guidelines*") at para.543 which defines sustainable development in terms of "*environmental and social (including labour and human rights) development*", available at: https://ec.europa.eu/competition-policy/public-consultations/2022-hbers_en. Accessed 12 May 2022.

Simply put, a sustainability agreement is any agreement between competitors which pursues one or more sustainability objectives.[6] The term 'sustainability agreement' was recently defined by the EU Commission in its Draft Horizontal Guidelines as: "any type of horizontal cooperation agreement that genuinely pursues one or more sustainability objectives, irrespective of the form of cooperation".[7]

The CMA provided the following example of such agreements in its 'information sheet' to businesses: "For example, businesses may decide to combine expertise to make their products more energy efficient or agree to use packaging material that meets certain standards in order to facilitate package recycling and reduce waste".[8]

There are various types of cooperation agreements that can contribute to sustainability goals (the following list is non-exhaustive):

(i) Standard setting agreements or codes of conduct promoting practices – "by which businesses, often through trade associations or standardisation organisations, set standards on the environmental performance of products, production processes, or the resources used in production"[9] – including joint standards and certification labels (i.e., about the use of raw materials or production methods);

(ii) Binding commitments and agreements that incentivise participants to contribute to a sustainability objectives;

(iii) Joint development of new products, technologies or markets, where pooling of resources or expertise is required to achieve sufficient scale – for example, the development of innovative carbon capture technologies;

(iv) Agreements to phase out, improve or replace unsustainable products with more sustainable ones (i.e., reducing or phasing out packing materials or technologies where greener alternatives are available);

(v) Agreements to combine resources – for example, coordinating stock, warehouse and transportation, or agreeing to make joint purchasing decisions;

(vi) Agreements to reduce environmental damage; and[10]

(vii) Agreements by which participants, their suppliers and/or their distributors, agree to adhere to, or respect, particular sustainability laws including labour laws (e.g., on child labour and

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6 "Sustainability" or "sustainable development" is a broad concept which lacks a universally agreed definition. The Brundtland Commission in 1987 defined sustainable development as: "development that meets the need of the present without compromising the ability of future generations to meet their own needs". Others adopt the definition used by the UN in Resolution, "The future we want" (adopted by the General Assembly on 27 July 2021) 66/288 at para.1: "an economically, socially and environmentally sustainable future for our planet and for the future present and future generations", available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_66_288.pdf. Accessed 12 May 2022.

7 EU Commission, Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (March 2022), para.547.

8 CMA, Guidance "Environmental sustainability agreements and competition law" (27 January 2021), available at, https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law. Accessed 12 May 2022.

9 The CMA, in its information sheet, dedicated the majority of its attention to 'standard-setting agreements'. However, it is important to note that standard setting agreements, although important, are only one type of sustainability agreement. See CMA, Guidance "Environmental sustainability agreements and competition law" (27 January 2021), available at, https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law. Accessed 12 May 2022.

10 For example, see ACM, "Guidelines on Sustainability agreements – Opportunities within competition law" (26 January 2021), at para.8.

minimum wages), environmental rules (i.e., banning illegal logging practices), and fair-trade rules.

2.2 Why is cooperation between businesses important?

Cooperation is key to tackling climate change and supporting the transition towards a more sustainable future. Although action by individual companies can take the agenda a long way, the problem of climate change will not be solved without strong and collaborative partnerships between businesses. Cooperation between businesses has the potential, not only to achieve a much greater impact (through economies of scale), but to decrease risk and drive innovation – particular in relation to new and enhanced technologies. Through collaboration, businesses are able to: "[…] tap into expertise, skills, time, or other assets that they may not have access to internally… multisector collaborations enable each contributor to bring their strengths to the table and tackle a challenge that would not be possible to solve individually."[11]

In addition, the UN SDGs specifically call for cooperation and highlight the need for businesses to work together to solve common challenges.[12]

2.3 Recent developments in the UK

The CMA made "supporting the transition to a low carbon economy" one of its strategic objectives in both its annual plan for 2021-22 and 2022-23.[13] It is likely that this will remain a key objective in the forthcoming years. Thus far, the CMA has sought to address this objective principally through two different lenses, namely a competition lens and a consumer protection lens. For our purposes, we focus on the competition lens however, it is worth noting that that the CMA is also doing work in the consumer space (for example, on 20 September 2021, the CMA published a "Green Claims Code" aimed at protecting consumers from misleading environmental claims amidst concerns over "greenwashing"[14] and there is further work in the pipeline).

The CMA first published guidance in relation to sustainability and competition law on 27 January 2021 in the form of an 'information sheet' aimed at businesses and trade associations setting out some key points to be considered when deciding to enter into sustainability agreements.[15] The guidance is very high-level and does not go beyond stating general principles.

Further, on 19 July 2021, Kwasi Kwarteng, the Secretary of State for Business, Energy and Industrial Strategy ("BEIS"), wrote to the CMA asking it to provide advice to the UK Government on how competition and consumer law frameworks could be enhanced to better support net zero and sustainability goals, including preparing for climate change.[16]

Following a public consultation, on 14 March 2022, the CMA published its advice to the UK Government, on how competition and consumer laws can better support the UK's Net Zero and sustainability goals (the

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[11] The Sustainability Institute "*Leveraging the Power of Collaborations*" (December 2020), p22, accessible at: https://www.sustainability.com/globalassets/sustainability.com/thinking/pdfs/report-leveraging-the-power-of-collaborations.pdf. Accessed 12 May 2022.

[12] SDG 17 entitled "Advancing Partnerships" seeks to meet the goals of the UN 2030 Agenda through partnerships, whether between national governments, the international community, civil society, the private sector, or any other actor.

[13] CMA, Annual plan for 2021 to 2022 (23 March 2021), accessible at: https://www.gov.uk/government/publications/competition-and-markets-authority-annual-plan-2021-to-2022. Accessed 12 May 2022.

[14] CMA, Guidance on environmental claims on goods and services (20 September 2021), accessible at: https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims. Accessed 12 May 2022.

[15] CMA, Guidance "Environmental sustainability agreements and competition law" (27 January 2021), available at, https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law. Accessed 12 May 2022.

[16] Letter from Kwasi Kwarteng, Secretary of State for BEIS, to Andrea Coscelli for the CMA on sustainability (2021), accessible at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004016/sos-letter-to-andrea-coscelli-on-sustainability.pdf. Accessed 12 May 2022.

"Advice to Government").[17] In its Advice to Government, the CMA concludes that the current competition laws in the UK are not themselves an obstacle to sustainability initiatives, and therefore do not require fundamental change or reform. The CMA considers that many initiatives aimed at achieving sustainability goals can take place under the existing competition regime. The CMA does however acknowledge that stakeholders emphasised the need for more clarity around how competition law will be applied in an environmental sustainability context, including in relation to the exemption criteria.

The CMA has established a 'Sustainability Taskforce' dedicated to sustainability issues in order to lead the development of additional guidance (in relation to Chapter II of the CA98) and to further the debate with government and industry stakeholders.

2.4 Sustainability as a "shield" and the Chapter I prohibition

There are various ways in which sustainability agreements might 'escape' the prohibition on anti-competitive agreements[18] and in this sense sustainability considerations act like a "shield". The following four routes, have been the subject of extensive debate in this context:[19]

First, not all agreements between competitors which pursue sustainability goals are caught by the Chapter I Prohibition, i.e. where they do not affect key parameters of competition (such as price, choice, quality, innovation etc) or are entered into by competitors with low market share (i.e. the anticipated effect on competition would be minimal).

Second, by satisfying the exemption criteria in section 9 of the CA98 (and its EU equivalent Article 101(3) TFEU).

Third, on the basis of the reasoning in Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751 (commonly known as the "Albany route").[20]

Fourth, by applying the 'ancillary restraints' or 'objective necessity' doctrines to sustainability agreements.

This Report focuses on the first two 'routes'. Although the *Albany, Wouters and Meca-Medina* line of jurisprudence (routes three and four) potentially provide an escape for sustainability agreements, arguably the preferred approach from a participating company's point of view is through the application of the exemption criteria.[21]

2.4.1 Agreements not caught by Chapter I

As to the first 'route', the CMA recognises that "Many forms of collaboration between businesses for the achievement of sustainability goals are unlikely to raise any competition law issues" but does not elaborate.[22] The CMA intends to provide further guidance on "when sustainability agreements will not

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17 CMA, Environmental sustainability and the UK competition and consumer regimes: CMA advice to the Government (14 March 2022), available at https://www.gov.uk/government/publications/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government. Accessed 12 May 2022.

18 Holmes, Climate change, sustainability and competition law (2020) Journal of Antitrust Enforcement, Volume 8, Issue 2, p368.

19 In particular, see the series of essays in Concurrences, "Competition Law, Climate Change & Environmental Sustainability" (March 2021), edited by Simon Holmes, Dirk Middelschulte and Martijn Snoep.

20 Holmes, Climate change, sustainability and competition law (2020) Journal of Antitrust Enforcement, Volume 8, Issue 2, p 370.

21 That said, there are strong parallels to be drawn between sustainability and the objectives protected in these cases (i.e., in *Meca-Medina*, rules to safeguard "equal chances, […] the integrity and objectivity of competitive sport and ethical values in sport"). The concept of "ethical values in sport" could be said to be analogous to the values inherent in sustainability objectives. We therefore encourage the CMA to at least indicate that it will consider if genuine sustainability considerations exclude the application of Chapter I on a case-by-case basis.

22 CMA, Guidance "Environmental sustainability agreements and competition law" (27 January 2021), available at, https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law. Accessed 12 May 2022.

restrict competition",[23] which is welcomed. The fact that an agreement genuinely pursues a sustainability objective should be taken into account in determining whether the restriction in question is a restriction by object or a restriction by effect within the meaning of the Chapter I prohibition – as has been suggested in the EU Commission's Draft Horizontal Guidelines. Accordingly, it can be considered that the following types of agreement are, in principle, likely to be "shielded" (or fall outside the Chapter I prohibition) by reason of a lack of appreciable effect on competition: (i) agreements imposing loose environmental commitments with no specific commitments or obligations contained therein, (ii) commitments as to general outcomes or objectives absent any precise/specific mechanics for achieving those, and (iii) commitments as to specific actions on matters that do not affect key parameters of competition. However, while these forms of cooperation may be beneficial, since there is unlikely to be any appreciable effect, they will also be inherently limited in their impact and effectiveness in achieving sustainability goals.[24]

2.4.2 Exclusion from UK competition law

The ultimate form of "shield" would be to grant sustainability agreements (or at least those aimed at reaching net zero goals) an exclusion order under the CA98, such that they are excluded from the Chapter I prohibition altogether (either generally or in specified circumstances).[25] While these powers should be used sparingly, there can be no doubt that the climate crisis provides "exceptional and compelling reasons of public policy" to exclude agreements from the ambit of the Chapter I prohibition in certain circumstances.

2.5 The exemption criteria and sustainability agreements

The ambit of the exemption criteria, contained in section 9 of the CA98 (and its EU equivalent, Article 101(3) TFEU), is highly relevant to ongoing efforts to address climate change and progress sustainable development objectives. The CMA has stated that sustainability agreements can be individually exempt on a case-by-case basis but has expressed no view as to the establishment of any block exemptions that cover sustainability initiatives.

In short, a sustainability agreement (like any other agreement)[26] caught by the Chapter I prohibition may be exempted provided the parties to the agreement can show that the following four cumulative conditions in section 9 of the CA98 are satisfied:[27]

Condition 1: the agreement must contribute to improving (i) the production or distribution of goods or (ii) to promoting technical or economic progress.

Condition 2: consumers must receive a fair share of the resulting benefit(s).

Condition 3: the restrictions must be indispensable to achieving these objectives.

Condition 4: the agreement must not give the parties any possibility of eliminating competition in respect of substantial elements of the products in question.

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[23] CMA, Environmental sustainability and the UK competition and consumer regimes: CMA advice to the Government (14 March 2022), available at https://www.gov.uk/government/publications/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government. Accessed 12 May 2022.

[24] Brink and Ellison, "Article 101(3) TFEU: the Roadmap for Sustainable Cooperation" in Concurrences, Competition Law, Climate Change & Environmental Sustainability (March 2021), at p42.

[25] Paragraph 7 of Schedule 3 to the CA98 provides that, an exclusion order can be made where the relevant minister is satisfied that there: "are exceptional and compelling reasons of public policy why the Chapter I prohibition ought not to apply". Exclusion orders were granted in relation to Covid-19 – and there are analogies that could and should be drawn with the climate crisis.

[26] There is nothing inherently different about sustainability benefits in the context of an exemption.

[27] The CMA stated it would have regard to the EU Commission's Guidelines on the application of Article [101(3)]: see CMA, "Guidance on the functions of the CMA after the end of the Transition Period" (December 2020), para 4.21, accessible at https://www.gov.uk/government/publications/guidance-on-the-functions-of-the-cma-after-the-end-of-the-transition-period. Accessed 12 May 2022.

The CMA has not yet provided any particular guidance as to the application of these criteria to sustainability agreements, we discuss the application of each below.

2.5.1 Condition one – "Benefits"

The types of "benefit" set out in condition one in section 9 of the CA98 are exhaustive but are framed in the alternative. Arguably all four types of benefit can and do encompass sustainability in the following ways:[28]

(i) "improving production" such as by using fewer, or more sustainable, resources resulting in a better allocation of resources;

(ii) "improving distribution" such as by sharing or pooling of logistics to reduce transport emissions;

(iii) "promoting technical progress" such as through the development of new, greener or cleaner technologies; and

(iv) "promoting economic progress" which could encompass 'anything that provides a higher standard of living'.[29]

Construing the "benefits" in this way, is also consistent with the UK's (and the EU's) commitment to moving towards a more 'circular economy' whereby resources are used optimally, in particular by extracting the maximum use out of those resources already in circulation and creating new resources in a sustainable way.[30] The transition to a circular economy specifically envisages businesses working together to create a framework for more sustainable products, and emphasises the need to make changes to existing supply chains and business and market models. It is expressly recognised by the UK government that "The move to a more circular economy will bring the four UK nations environmental, financial and social benefits".[31] It is also stated that moving towards a circular economy results in reductions in GHG emissions and the creation of new jobs. Accordingly, there is currently enough scope under the existing rules to allow benefits deriving from sustainability agreements to be recognised as "economic progress" for the purposes of the exemption framework. In any event, one should resist the temptation to squeeze everything into the economic box given the additional three alternatives (see above).

This reading is also consistent with the CMA's merger assessment guidelines ("MAGs"), discussed further below, which expressly recognise 'environmental sustainability benefits' as relevant consumer benefits.[32] The same principle equally applies to benefits flowing from sustainability agreements but confirmation and

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[28] EU Commission, "Communication from the Commission to the Council and the European Parliament On Environmental Agreements" (1996) COM(96) 561 final, p17: "In analysing individual cases under Article [101(3)], […] the protection of the environment might be considered as an element which contributes to improving the production or distribution of goods and to promoting technical and economic progress.", accessible at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51996DC0561&from=DE. Accessed 12 May 2022. Further, the EU Commission's Draft Horizontal Guidelines also recognise at pp.577-578 that "[…] cleaner technology, less pollution, measures to preserve or restore biodiversity, improved conditions of production and distribution, more resilient infrastructure or supply chains, better quality products" constitute relevant benefits.

[29] M. Dolmans, "Sustainable Competition Policy and the "Polluter Pays" Principle" in Concurrences, Competition Law, Climate Change & Environmental Sustainability (March 2021).

[30] See, for example, the UK Government's policy statement, accessible at: https://www.gov.uk/government/publications/circular-economy-package-policy-statement/circular-economy-package-policy-statement and the EU's Circular Economy Action Plan, accessible at: https://ec.europa.eu/environment/pdf/circular-economy/new_circular_economy_action_plan.pdf. Accessed 12 May 2022.

[31] UK Department for Environment, Food and Rural Affairs (Defra), the Department of Agriculture, Environment and Rural Affairs (DAERA), "*Circular Economy Package policy statement*" (30 July 2020) https://www.gov.uk/government/publications/circular-economy-package-policy-statement/circular-economy-package-policy-statement. Accessed on 12 May 2022.

[32] CMA, "Merger assessment guidelines" (CMA129) updated 18 March 2021 (the "MAGs"), para 8.21, accessible at <https://www.gov.uk/government/publications/merger-assessment-guidelines>. Accessed 12 May 2022. These are discussed further in Section 3 below.

guidance from the CMA on this point would be valuable. The CMA's Advice to Government notes the possibility of this definition being expanded in the future: "…it may become apparent that the concept of 'relevant customer benefits' in the mergers and markets regimes should be expanded to explicitly include sustainability, or that a new 'sustainability' public interest consideration should be added."[33]

It would plainly be wrong (and unhelpful) to classify environmental or sustainability benefits as 'non-economic' or as requiring an unduly broad interpretation of the law.[34]

2.5.2 Condition two – 'fair share'

The second condition requires that consumers receive a "fair share of the resulting benefits" (i.e. the improvements generated by the agreement). The meaning of "fair share" has been the subject of debate, particularly whether "full compensation" is required. "Fair share" does not, in our view, require consumers to be "fully compensated" for the costs of any agreement as a matter of ordinary language or law. First, the wording of section 9 CA98 (and Article 101(3) TEFU) makes no reference to "full compensation". Secondly, the EU jurisprudence does not support such an interpretation.

The CJEU's judgment in Case C-382/12 *MasterCard Inc. and others v European Commission* [2014] ECLI 2201 ("*Mastercard")* is often misinterpreted as requiring "full compensation". However, *Mastercard* itself contains no reference to the concept of full compensation. The case concerned an assessment of fair share in the context of two-sided markets. The CJEU considered whether benefits which accrued to consumers on a different side of the market, could be taken into account for the purposes of the fair share condition – and if so, whether those benefits were alone sufficient to meet the fair share condition. It was held that:[35] (i) "it is necessary to take into account […] all the objective advantages flowing from the [agreement]" (para 237) to "all consumers in the relevant markets", including on separate but connected markets (para. 234), and (ii) benefits that accrue to consumers in connected markets may be counted towards the fair share requirement, provided those consumers negatively affected by the restriction also receive some of the benefits (para.242).[36] On the facts of *Mastercard*, there was no overlap between the two sets of consumers (namely, cardholders and merchants), and accordingly the CJEU upheld the General Court's finding that the advantages to cardholders were not of a character to compensate for the disadvantages to competition alone (paras.240-242). Accordingly, as a matter of law, *Mastercard* did not establish a requirement for full compensation and requires no more than "appreciable objective advantages" for those affected by the restriction.

In any event, it is worth highlighting that *Mastercard* is confined to cases involving two-sided markets. Sustainability agreements are, in general, unlikely to face the same issues as those in *Mastercard*. Environmental or climate-related benefits are likely to have broad impacts on society and will naturally include those consumers who are "negatively" affected by the restriction of competition in the agreement. In addition, requiring consumers to be fully compensated in this context would be inconsistent with the "polluter pays" principle enshrined in EU law.[37]

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[33] This reflects the suggestion made by Simon Holmes in "Climate change, sustainability and competition law (2020) Journal of Antitrust Enforcement, Volume 8, Issue 2, at pp. 391-392.

[34] Ibid, fn.36 pp 354-405 and pp 372-373.

[35] See the discussion at paras 230 to 248 of the *Mastercard* judgment.

[36] At para 248 of *Mastercard*, the CJEU also recognised that the extent of the 'share' of benefits received need not be the same and may even differ between different groups of relevant consumers – such a conclusion runs counter to any suggestion of full compensation.

[37] We consider that "fairness", in this context, should reflect the "polluter pays" principle under Article 191(2) TFEU. For a fuller discussion of this point see M. Dolmans, "Sustainable Competition Policy and the "Polluter Pays" Principle" in Concurrences, Competition Law, Climate Change & Environmental Sustainability (March 2021).

Separately, in 2020 the UK Supreme Court issued a judgment in *Sainsbury's Supermarkets Ltd v Visa Europe* concerning the fair share requirement in two-sided markets. The Supreme Court, relied on the Opinion of Advocate General Mengozzi in *Mastercard* in holding that:

> "The merchants are the consumers of the services which are subject to the restriction of competition, and are therefore the consumers which the second condition is presumably intended to protect. *If the merchants <u>are not fully compensated</u> for the harm inflicted on them by the restrictive measure, it is difficult to see how they can be said to receive a "fair" share of the resultant benefits. As the Advocate General indicated at point 158 of his Opinion, it is not the purpose of competition law to permit anti-competitive practices to harm consumers in one market for the sake of providing benefits to those in another*."[38] (Emphasis added)

The Supreme Court relies on the Opinion of AG Mengozzi, which was not binding on, nor was it followed by, the CJEU in *Mastercard* in relation to fair share. The Supreme Court finds that 'fair share' requires 'consumers' to be 'fully compensated' for the harm inflicted by the restriction of competition. We respectfully consider this part of the judgment to be confined to its own facts – and reflects the Supreme Court's assessment of what was "fair" in the context of the two-sided market governing multilateral interchange fees. We do not consider that this establishes a wider requirement for full compensation in every case. For the reasons set out above, a full compensation requirement is inconsistent with the decision in *Mastercard*. This point appears to be recognised by the CMA in its Advice to Government:

> "Our view is that, if a particular agreement or practice restricting competition leads to environmental benefits to a broader group of consumers than just those adversely affected by the restriction of competition, such benefits, in principle, can be taken into account in the 'fair share' assessment under section 9 CA98. This is because the harmed consumers are also part of the broader group of consumers that receive the environmental benefits. However, based on existing case law, a share of those benefits must accrue to those consumers who suffer from the restriction of competition, and those consumers must also be fully compensated for the detriment they suffer. This suggests that the 'fair share' assessment would not, in principle, permit a situation where benefits to one group of consumers are offset against net harm to an entirely different group of consumers (without sufficient benefit accruing to the harmed consumers). Notwithstanding this limitation under the existing [UK] case law, the CMA considers that the current framework gives scope to take into account environmental benefits as part of the assessment under section 9 CA98. Existing precedents show that the 'fair share' criterion has been applied flexibly in practice in light of specific circumstances of each case. Moreover, this is an area where the case law may evolve further in the future, including in light of the scope for the CMA and courts to depart from EU precedent in certain circumstances under section 60A CA98, which potentially provides additional flexibility." [footnotes omitted]

The CMA expressly refers to the limitation in the case law in relation to environmental benefits and indicates its intention to apply the 'fair share' condition "flexibly". The CMA raises the possibility of using section 60A of the CA98 as a means of departing from the EU jurisprudence (as applied by the Supreme Court),[39] which would arguably be a sensible approach to adopt. As it stands, the current approach of "full compensation" is unduly narrow, inconsistent with the Section 9 exemption of the CA98 and Article 101(3) TFEU,[40] and runs contrary to the CMA's strategic objective of "supporting the transition to a low carbon economy".

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[38] *Sainsbury's Supermarkets Ltd and others v Visa Europe Services LLC and others* [2020] UKSC 24, at para.174.

[39] CMA, Environmental sustainability and the UK competition and consumer regimes: CMA advice to the Government (14 March 2022) at footnote 11, available at https://www.gov.uk/government/publications/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government. Accessed 12 May 2022.

[40] Respectfully, the CJEU in *Mastercard* did not go so far as to mandate "full compensation" in every case. On our reading of *Mastercard*, which is consistent with that of the ACM, the CJEU requires "appreciable objective advantages" for the affected

The application of the 'fair share' condition in section 9 CA98 is one of the most important areas in the context of competition law and sustainability agreements. Any suggestion that "full compensation" is required (which we do not consider is required as a matter of law for the reasons set out above) acts as a real barrier to businesses entering into sustainability agreements in the first place. Therefore, there is a need for a shift away from concepts of "full compensation" and towards a global approach to "benefits", in recognition of the global nature of the fight against climate change.

2.5.3 Collective benefits

Benefits arising from sustainability agreements on the whole tend to benefit consumers (and even society) collectively, rather than individually. The EU Commission, in its Draft Horizontal Guidelines, acknowledges 'collective benefits', albeit in a limited way. However, the CMA's position is less clear.

In order for sustainability agreements to have the greatest possible role/impact in the fight against climate change, competition authorities must begin to recognise "appreciable collective benefits" and benefits to 'indirect users' (or society at large). This includes collective benefits outside of the relevant product market and geographic market. Benefits such as the prevention and reduction of GHG emissions, and protection or conservation of biodiversity are inherently collective (and global) in nature. Additionally, the EU Commission deals with this exact point at paragraphs 601-608 of the Draft Horizontal Guidelines, recognising the role 'collective benefits' have to play in internalising negative externalities associated with non-sustainable consumption decisions of consumers.[41]

2.5.4 Qualitative or quantitative?

Both qualitative and quantitative data can be adduced to demonstrate that the agreement will lead to the benefits claimed. This is accepted by the CMA in its Advice to Government: "[the fair share condition] does not necessary require a quantitative assessment; as the EU's guidelines on Article 101(3) exemption acknowledge, the assessment can factor in qualitative efficiencies which require a value judgment (EU exemption guidelines section 3.4.3)".

In terms of quantifying environmental benefits from agreements, there exists a number of economic tools to effectively 'convert' environmental effects into monetary terms.[42]

Once quantified, they need to be balanced against the potential reduction in competition. In particular, two key areas which would benefit from further guidance from the CMA are:

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consumers (at para.234) and left the door open to the possibility that this may be less than "full compensation" in certain circumstances. Rather, we consider that the statement (at para.242) of the CJEU judgment, interpreted by the Supreme Court as disregarding 'out of market' benefits entirely from the assessment under fair share, is actually more nuanced. On our reading, it simply supports the proposition that "out of market benefits cannot 'in themselves' compensate for in market disadvantages". The key point is that there is evidence that such benefits are enjoyed by affected consumers. See, M. Dolmans, "Personal comments in response to the CMA call for inputs on competition policy and the UK's net zero and environmental sustainability goals" (10 November 2021) p13, fn. 1, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1061313/Maurits_Dolmans.pdf. Also see ACM, Legal Memo, "What is meant by fair share for consumers in article 101(3) TFEU in a sustainability context" (27 September 2021), p3 available at https://www.acm.nl/sites/default/files/documents/acm-fair-share-for-consumers-in-a-sustainability-context.pdf. Accessed 12 May 2022.

[41] However, although the reference to collective benefits by the EU Commission is helpful and encouraging, we note the inherent inconsistency with the final sentence of paras. 601 and 602, which, on one reading, seem to suggest collective benefits may only be counted where they do in fact accrue to all those consumers affected by the restriction of competition (i.e., they are in the same group) – which we consider to be an undesirable outcome. We prefer the expressions in paras. 603 and 606(c) – which refer to the in-market consumers as substantially overlapping or being "part of" the larger group of beneficiaries – which is much more flexible and realistic.

[42] An extremely helpful overview of such methods can be found in the study commissioned by the Dutch ACM and the Hellenic Competition Commission, "Technical Report on Sustainability and Competition" (26 January 2021), available at <https://www.acm.nl/en/publications/technical-report-sustainability-and-competition>. Accessed 12 May 2022

Out of market benefits: Although the CMA has indicated its view of "consumers" for the purposes of the 'fair share' requirement, it is not clear whether this extends to consumers outside the UK.[43] If competition law is to facilitate businesses' cooperation in pursuit of beneficial sustainability objectives – it would be advisable to allow out of market benefits. This could be done, for all sustainability agreements or a subset.[44]

Discounting: Economic literature offers various views on how to estimate the discount rate for environmental effects – it would be helpful if the CMA provided clarity on the discounting rate it would accept.[45]

2.5.5 Conditions three and four – "indispensability" and "elimination of competition"

Conditions three and four are not at the centre of the 'sustainability' debate (and are largely uncontroversial) but it is important to remember that they are vital (and ever present) safeguards when considering the correct approach to the scope of conditions one and two. For example, the 'indispensability condition' is considered to be an important part of the architecture of section 9 CA98 (and Article 101(3) TFEU). It acts as a vital safeguard, ensuring 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 these powerful safeguards that we should not be afraid to interpret and apply conditions one and two of section 9 CA98 in a manner which is consistent with the wording of the statute, the transition to a low carbon economy, and the pressing need to combat climate change.

It should also be borne in mind that necessity has the potential to act a barrier to firms going beyond existing national law, regulations or industry standards. However, such cooperation may be precisely what is needed to achieve the goal more quickly (particularly where regulations are outdated, and the legislative process is slow) or to go further than the regulations require.

2.6 Using competition enforcement as "sword" to promote sustainability

Although the EU Commission has made clear that, as a starting point, if the agreement pursues a genuine sustainability objective, it will not amount to a restriction 'by object' but its effects on competition will need to be assessed, the CMA has been less clear.[46] What the CMA is very clear on is that "sustainability agreements must not be used as a cover for a business cartel or other illegal anti-competitive behaviour". In this sense, the provisions may be used as a "sword" to prohibit cartels hiding behind sustainability initiatives. In March 2022, the CMA and EU Commission announced that they are investigating anti-competitive behaviour involving a number of vehicle manufacturers relating to arrangements for recycling old or written-off vehicles. The CMA stated its investigation "reflects the CMA's commitment – outlined in its draft Annual Plan 2022 to 2023 – to prioritise promoting environmental sustainability through effective competitive markets".[47] It seems that this could be a sign of competition enforcement increasingly being used as a "sword" to promote sustainability.

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[43] CMA, "Merger assessment guidelines" (CMA129) updated 18 March 2021, para 8.20, accessible at <https://www.gov.uk/government/publications/merger-assessment-guidelines>. Accessed 12 May 2022.

[44] For example, ACM permits wider benefits to be taken into account when considering environmental-damage agreements.

[45] For a fuller discussion of this point and quantification generally, see Linklaters and Oxera, "Response to CMA call for inputs on environmental sustainability and the competition and consumer law regimes" (19 November 2021) at para.19, available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1061310/Linklaters_and_Oxera.pdf>. Accessed 12 May 2022.

[46] Thus far, the CMA has been silent as to whether agreements which pursue sustainability objectives could be considered to be an object restriction but makes clear that 'by object' restrictions must be avoided in any case.

[47] CMA, Press release, "CMA launches investigation into recycling of cars and vans" (15 March 2022), available at: <https://www.gov.uk/government/news/cma-launches-investigation-into-recycling-of-cars-and-vans>. Accessed 12 May 2022.

The same point applies equally to information exchanges. Parties to genuine sustainability agreements ought to take care not to exchange any more competitively sensitive information than is strictly necessary – and sustainability should not be used as a cover to share such information.

2.7 Conclusion

Overall, what is most important is that businesses have certainty as to the approach which will be taken by competition authorities to sustainability agreements so that businesses are able to properly self-assess and are not deterred from entering into these agreements in the first place. If the UK, or elsewhere, intends to support the transition to a more sustainable future, there needs to be a degree of flexibility in respect of the application of the Chapter I prohibition and exemptions to sustainability agreements to enable the positive effects of such private arrangements to be realised.

This is particularly so in relation to the exemption criteria, given the requirement to self-assess. In the absence of detailed, context-specific, and example-driven guidance, it is extremely difficult for firms to anticipate how the CMA will treat their particular venture under the CA98, with the result being that many firms will often decide, on balance, not to proceed with the agreement.

3 Section 2: Using abuse of dominance laws to help take action for a sustainable future

This section of the Report will focus on the role that the Chapter II prohibition (and its EU equivalent, Article 102 TFEU), contained in Section 18 of the CA98, play, and (more importantly) could play, in supporting action for a more sustainable future. It will be argued there is more scope to use these "abuse of dominance" provisions than is often appreciated (and less of a tension between competition law and sustainability goals than some may suggest).

This section will refer primarily to the position and the 'state of play' in the UK under Chapter II of the CA98. Nonetheless, given the similarity between the UK and EU regimes on abuse of dominance, to aid in the discussion of Chapter II, significant reference will also be made to EU law and practice.[48] On this point we note that the CMA in its Advice to the UK government on "Environmental sustainability and the UK Competition and consumer regimes" of 14 March 2022[49] did not refer to Abuse of Dominance and there was only a brief reference to it in its 29 September 2021 "Call for Inputs" on this.[50]

Before diving into the nooks and crannies of the Chapter II prohibition and Article 102 TFEU, it is important to place the analysis in its proper context. In particular, the following five points are worth emphasising.

Whatever one's views on the extent to which "*dominant*" companies (or companies with wider market power) are particularly responsible for climate change and unsustainable business practices, it should however be accepted that, other things being equal, big companies are likely to have a bigger impact on the market/planet than small ones and are more likely to have a "*dominant position*" - or at least market power.[51] Regardless, it should be recognised that, if we have the tools to mitigate the impact of such companies on

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[48] It should be noted that the national competition laws of many countries (not only in Europe but around the world) are modelled on EU law - with many containing identical wording. Furthermore, even laws which use different words (such as Section 2 of the US Sherman Act) are generally trying to tackle the same fundamental problem-the control of market power and negative effects on the economy, society (and, ultimately, the planet).

[49] CMA, Environmental sustainability and the UK competition and consumer regimes: CMA advice to the Government (14 March 2022), available at https://www.gov.uk/government/publications/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government. Accessed 12 May 2022.

[50] CMA, "Environmental Sustainability Advice to Government: Call for Inputs", available at: https://www.gov.uk/government/consultations/environmental-sustainability-advice-to-government-call-for-inputs. Accessed 12 May 2022.

[51] It has been estimated that just 100 companies are responsible for over 70% of global industrial greenhouse gas emissions since 1988-and these companies are likely to be big ones (P. Griffin, "The Carbon Majors Database-CDP Carbon Majors Report 2017" (CDP, July 2017)).

climate change (or other unsustainable practices) we have a duty to use them. Not only is this a moral duty but it makes sense from a basic efficiency of time and resources perspective given the urgency of the task. In this context it is also worth recalling that there is no requirement in either UK or EU law to show a causal relationship between the dominant position and the abuse.[52]

If the concept of a dominant position captured circumstances where there was no real market power of concern, it would instinctively (and rightly) merit taking a cautious approach to the concept of abuse. However, the opposite is also true. If, as the evidence suggests, there is widespread (harmful) market power out there,[53] which is not necessarily caught by the narrower concept of a dominant position, then arguably a more robust approach to the concept of an abuse can, and should, be taken.[54] To be clear, this approach does not suggest stepping outside the ambit of the legal prohibition in Chapter II or Article 102, only not to be unduly timid in interpreting it.

Those with the greatest power have the greatest responsibility to use it properly. This sentiment has been echoed by the EU courts when analysing abuse of dominance, where they have often made it clear that the "special responsibility" of a company with a dominant position depends on the "degree of dominance" held by that company.[55] Such statements emphasise how in the face of extreme market power, there is no need to take a restrictive approach to its abuse.

To determine the correct approach to abuse, it is important to shed light on what the Chapter II Prohibition and Article 102 were supposed to (and can) achieve. How can we decide whether something is an "abuse" if we have lost sight of the purpose of the prohibition? As Iacovides and Vrettos argue,[56] competition lawyers and economists have got so trapped in a narrow (so-called) "more economic approach" or narrow so-called "consumer welfare" standard that they "are unable to think outside its narrow market confines."[57] As they rightly argue, by "accepting that unsustainable business practices can be abuses of a dominant position…we focus on what we as a society and Article 102 TFEU care about." As Iacovides and Vrettos conclude "our approach is about more competition, just not the toxic kind. It is a call for refocusing competition policy and reconnecting concepts such as "abuse" with the general goal of the system of EU competition law. Our proposals are activist, but they are certainly not radical." This approach rightly emphasises that, none of this is as radical as it might seem at first (superficial) sight.

None of this should suggest that the concept of abuse is a static one. Quite the contrary: it needs to be considered in the light of current economic, social and environmental priorities.[58] Right now the number

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[52] See, for example, CJEU, T-321/05, *Astra Zeneca v EU Commission* [2010 5 CMLR 28]. This approach was confirmed in the UK by the Privy Council in *Carter Holt Harvey Building Products Group Limited v The Commerce Commission* [2004] UKPC 37 at para. 49.

[53] See the IMF paper, "Rising Corporate Market Power: Emerging Policy Issues", SDN/21/01, particularly at pages 5, 7 and 16. This is also shown clearly in the work of scholars like De Loecker and Eeckhout. They show that corporate mark ups; profit rates and the valuation of companies (relative to sales) have all gone up dramatically in the last 40 years or so. See further for example, J. De Loecker, & J. Eeckout, (2018), Global market power (No w24768). US National Bureau of Economic Research; "The Profit Paradox" by J. Eeckout Princeton University Press, 2021 and T. Philippon's 2019 book "The Great Reversal: how America gave up on free markets".

[54] In this context we note the IMF's conclusion in its paper (at page 24) on "Rising Corporate Market Power": "the effects of corporate power can be partly mitigated by enforcing restrictions on the abuse of a dominant position more actively" (emphasis added). [Ibid fn. 56].

[55] See, for example CJEU, Case T-201/04, *Microsoft* [2007] ECR II-3601, paragraph 775. It is also clear that many cases of abuse of dominance have concerned so-called "super dominance "with market share of 70, 80 or even 90%. See, for example, the Intel Case, Case C-413/14P *Intel Corp v Commission* ECLI:EU:C:2017:632

[56] "Radical for whom? Unsustainable Business Practices as abuses of dominance" in "Competition Law, Climate Change & Environmental Sustainability" (March 2021), edited by Simon Holmes, Dirk Middelschulte and Martijn Snoep

[57] Iacovides and Vrettos ask a very pertinent question: "a market logic may work, but do we really want everything to be filtered through that logic if that is only possible because we contort concepts (e.g. consumer welfare) and tests that were devised in a different time and on the basis of discredited assumptions and failed ideologies?"

[58] What may have been the top priorities in 1957 -the date of the Treaty of Rome that first set out what is now Article 102 TFEU- (or even 1979 when the Hoffman La Roche case set out the classic definition of an abuse) such as the establishment of a "Common

one priority for the UK and the EU (and, indeed, the world) is the fight against climate change. This is reflected in the CMA's recognition of [fighting] "climate change and supporting the transition to a low carbon economy" as one of its top "strategic priorities"[59] and from an EU perspective, the EU's Green Deal and numerous statements by all EU institutions. While this section must base its analysis in what the Chapter II Prohibition and Article 102 say, the wider political, economic and, indeed, existential imperative cannot be ignored.

It is against that background that this section will now be consider the two ways in which abuse of dominance provisions such as the UK Chapter II Prohibition and Article 102 TFEU are most relevant to climate change and unsustainable business practices:

First, using them as a "sword" to attack unsustainable practices.[60]

Second, recognising sustainability as a potential "shield" against accusations that genuine practices to mitigate climate change or increase sustainability are an "abuse" of a dominant position.

3.1 The Chapter II prohibition as a "sword" to attack unsustainable practices

Before diving into the detail of specific unsustainable practices that may infringe the Chapter II Prohibition (and the examples given within those provisions themselves) it is again important to understand the context and the general purpose and meaning of the prohibition. Ten points, in particular, should be borne in mind:

(i) The classic definition of an "abuse" is that given by the CJEU in the *Hoffman La Roche* case: it is conduct "through recourse to methods different from those which condition normal competition in products or services"[61] (emphasis added). Exactly what this means is far from clear,[62] but two guiding principles may be suggested at this stage. First, what is "normal" may change over time and should reflect society's values at the time the assessment of potential abuse is made (e.g., disposing of chemicals in a river may have been "normal" and acceptable in the 1960s but is not now). Secondly, abuses should be as consistent as possible with what an ordinary citizen would consider to be an abuse: it is odd (to say the least) that loyalty rebates which *reduce* prices and which are widely given by companies regardless of their size are (generally) condemned as an "abuse" if given by a dominant company, but charging exorbitant prices for a product, or paying a supplier so little that (s)he can't feed a family, is something which many in the competition law bubble have difficulty seeing as an "abuse". Anyone outside that bubble would probably come to the opposite conclusion and, therefore, in the competition sphere, one should not be afraid to call out abuses which fit with one's innate sense of what an abuse of power is.[63]

Market" and the potential exclusion of competitors (especially from other member states) are not necessarily the top priorities in 2022 (or at least not the only ones). Of course, these still include a system of healthy competition etc. but this is not inconsistent with the overall priority of combatting climate change with all available tools.

59 CMA, Annual plan for 2021 to 2022 (23 March 2021), accessible at: https://www.gov.uk/government/publications/competition-and-markets-authority-annual-plan-2021-to-2022. Accessed 12 May 2022.

60 Abuse of dominance provisions can also be used as a "sword" to attack steps taken (or purportedly taken) in the name of sustainability if they are anti-competitive-either in the sense of "green washing" or because, on analysis they fall foul of Chapter II/Article 102. A sustainability motive, or simply being in the environmental sector, is no defence. An example of the latter from EU case law is the so-called "Green Dot" case [Case C-385/07 *P* [2009] ECR 1-6155]. On this see S. Kingston, Greening EU Competition Law, Cambridge University Press 2011, at pp.312-318 and C. Thomas "Exploring the Sustainability of Article 102" in Competition Law, Climate Change & Environmental Sustainability, 2021.

61 Case 85/76 *Hoffmann –La Roche* [1979] ECR 461] at para 91.

62 The argument is often somewhat circular. Having decided that a practice is an abuse it is held not to be "normal competition". Nor does the term "competition on the merits" really take the analysis any further for the same reason.

63 The point here is not to challenge the loyalty rebate cases like Intel (C-413/14P *Intel Corp v Commission* ECLI:EU:C:2017:632), or to argue for more intervention generally against high prices – although that may be warranted - but simply to make the point not to lose touch with the basic idea of what an "abuse "is. There may be instances where an abuse is complex/technical and not easily

(ii) Probably the most obvious and illogical disconnect, between the competition bubble and both the person in the street and the original meaning of the Chapter II Prohibition and Article 102, is the former's focus on "exclusionary" abuses (such as loyalty rebates) and the paucity of cases brought against "exploitative" abuses.[64] Not only are three quarters of the examples of abuses given in both the Chapter II Prohibition and Article 102 themselves, exploitative, but exploitative abuses fit more easily with one's innate sense of what is "fair" and what an "abuse" of power really is[65]. This is important in the current context as most instances of unsustainable activities will be exploitative, rather than exclusionary, in nature. There are some tentative signs of a renewed interest in exploitative abuses (and indeed beyond) both in the area of big tech – in particular in relation to platform and ecosystem power[66] - and in the number of excessive pricing cases brought by the CMA and other national competition authorities across Europe in recent years.[67]

(iii) Many of the reasons for a reluctance on the part of competition authorities to make full use of abuse of dominance provisions' potential are not relevant to the power and sustainability concerns which this Report focuses on. For example, while it can be argued (not always correctly) that the market will correct in the case of excessive prices[68], the same cannot be said for unfairly low purchase prices. Furthermore, potential concerns over the risk of harm through intervention when no underlying harm exists ("false positives") are vastly outweighed by the risk of not intervening when harm is being done ("false negatives") in the face of climate change –particularly given the uncertainties of tipping points and recognition that much of the damage being done is irreversible.

(iv) In principle, it should not matter how an abuse is classified: something either is, or is not, an abuse; the examples in the Chapter II Prohibition and Article 102 are just that – examples; and both the UK and European courts have consistently held that the categories of abuse are not closed.[69] In practice, it is often easier to convince a conservative competition establishment that an unsustainable practice is an abuse if it falls within a well-established category ("box ticked"), but equally there is no need to try to squeeze an unsustainable practice into a particular box into which it does not fit easily but which is clearly abusive. Not only is this not required as a matter of law, but it helps ensure that abuse of dominance provisions continue to evolve and prove themselves capable of dealing with the most pressing issues of our time. If it does not, they will seem increasingly arcane and risk becoming increasingly irrelevant.

(v) On the face of it, the Chapter II Prohibition and Article 102 would seem inherently well suited to attack unsustainable and exploitative actions by dominant (and often "super-

understood by non-experts (loyalty rebates and self-preferencing are probably examples of this) but these should be the exceptional cases-and certainly not blind us to the more obvious abuses.

[64] It is however understandable in the context of a prevailing so-called "free market" ideology premised on the (somewhat naïve) idea that as long as there is sufficient competitive pressure, and competitors are not excluded from participating in the market, there will be no opportunity for abuse of dominance or exploitation because dominance, if ever held, will be fleeting. Hence, the focus on exclusion on the assumption that this forestalls a need to target exploitation directly.

[65] This is consistent with the "travaux preparatoires" of the Treaty of Rome (the predecessor to the TFEU and which first set out what is now Article 102 TFEU) which indicated that the intention behind Article 102 was primarily to sanction exploitative abuses. (Akman, "Searching for the Long Lost-Soul of Article 82 EC": (2009) 29(2) Oxford Journal of Legal Studies 267, 271.)

[66] See I. Lianos and B. Carballa, "Economic Power and New Business Models in Competition Law and Economics: Ontology and New Metrics" CLES Research Paper Series 3/2021, March 2021.

[67] See, for example Pfizer Flynn in the UK (CMA, 18, December 2015 –and subsequent appeals.)

[68] This was a widespread view of US antitrust prior to its recent boost under President Biden and FTC chair, Lina Khan.

[69] See for example, CJEU, Case T-321/05, *Astra Zeneca v EU Commission* [2010 5 CMLR 28] or, in the UK courts, Purple Parking v Heathrow Airport [2011] EWHC 987 (Ch) paras 75-108.

dominant") companies. Furthermore, there is nothing in the jurisprudence of the UK or European courts to suggest to the contrary.[70] The question therefore is not so much, is it possible to use the Chapter II Prohibition to attack these practices, but is there the will to do so? This means a willingness by civil society and injured parties to bring cases to the attention of the competition authorities (or courts), and a willingness by the latter to take the cases on and look at the UK abuse of dominance laws with a fresh pair of eyes.

(vi) There is a strong legal case for factoring in environmental and other sustainability factors when considering whether conduct does, or does not, amount to an abuse, when the Chapter II Prohibition is read in light of other UK legislation including the UK's Climate Change Act 2008, the Paris Agreement of 2015, and the Human Rights Act of 1998, which all provide persuasive support for this.[71] The position is similar under Article 102 TFEU, when read (as it must be) in the light of the "constitutional" provisions of the treaties.[72] In particular: (i) The goals in Article 3 of the TFEU of a "high level of protection and improvement of the environment" and "the sustainable development of the earth"; and (ii) The clear requirement in Article 11 TFEU that "environmental protection requirements *must* be integrated into [*all EU*] …policies and activities" (emphasis added).

(vii) It is interesting that neither the Chapter II Prohibition nor Article 102 contain a general requirement that the abuse must have an adverse effect on competitors,[73] which makes the general focus on exclusionary, rather than exploitative, abuses all the more odd. In fact, neither provision explicitly requires there to be an effect (let alone adverse effect) on competition – only that it "may affect trade" (within the UK or between Member States as the case may be). This should not, however, be read into too much, given that these provisions should be read in context and they are to be found within the UK CA98 and in the chapter of the TFEU headed "Rules on Competition". While this almost certainly means an unsustainable practice which has absolutely nothing to do with competition cannot amount to an abuse, it does suggest there is more scope for finding an unsustainable practice to be an abuse so long as there is some reasonable nexus to the competitive structure of the market or competitive process.

(viii) There is also no general requirement in the Chapter II Prohibition or Article 102 that the practice must prejudice consumers for it to amount to an abuse.[74] This suggests that injury to other stakeholders such as suppliers or employees (or perhaps the environment) is sufficient for a practice to amount to an abuse[75]. At the very least it suggests that these provisions are not just concerned with consumers direct or short term interests but that the

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[70] If, contrary to this view, the CJEU were to take a different view, it would be open to the CMA and UK courts (which, post Brexit, are not constrained by the CJEU's (future) judgments) to take a different and more progressive approach to the UK's Chapter II prohibition and tackle unsustainable practices by dominant companies. This would be a rare positive example of the UK putting into practice the political slogan of "taking back control".

[71] S. Holmes, "Climate change, sustainability and competition law in the UK", (2020) 41 ECLR, Issue 8 at pp.387-390.

[72] On which see Holmes, Climate change, sustainability and competition law (2020) Journal of Antitrust Enforcement, Volume 8, Issue 2, Part IV.

[73] There is a requirement that "trading partners" be placed at a "competitive disadvantage" in the example of an abuse set out in Article 102(c) and Section 18 (2) (c) CA '98 dealing with discrimination (a point confirmed by the CJEU in Case C-525/16, *Meo-Servicios de Communioes e multimedia,* ECLI:EU:C:2018:270). This does not, however, apply to Article 102 or the Chapter II Prohibition as a whole.

[74] Although this is a requirement in the example of an abuse given in Section 18 (2) (b) of the CA '98 and in Article 102(b) concerning "limiting production, markets or technical development". See more generally, P. Colomo, "Anticompetitive Effects in EU Competition Law", Journal of Competition Law & Economics, Volume 17, Issue 2, June 2021.

[75] It also means that there is nothing equivalent in the Chapter II Prohibition or Article 102 themselves to the requirement in each of Section 9 of the CA '98 and Article 101(3) TFEU; namely that consumers must get a fair share of the benefits of an agreement if it is to be exempt from the prohibition in Chapter I on anti-competitive agreements.

abuse may consist of damage to consumers' longer term interests – whether through the weakening of the structure of competition or, arguably, in terms of the practices' impact on the planet and the environment in which those consumers live and breathe.

(ix) Notwithstanding the points made above, it is clear that many or most unsustainable practices with which competition authorities are likely to be concerned will affect competition and affect competitors and/or prejudice consumers. Indeed, most such practices will have most of the characteristics of other well established categories of abuse and competition law violations. For example, those dominant companies which avoid paying the true price for inputs or off-load costs onto third parties and society, whether by paying unfair prices to suppliers, dumping waste in rivers, avoiding tax liabilities, or polluting the atmosphere, or which delay introducing more sustainable products or fail to open up their product ecosystems to more sustainable alternatives or components, or refuse to licence new green technologies on fair terms, are: (i) gaining an unfair competitive advantage over rivals who are not doing so; (ii) raising barriers to entry and excluding sustainable competitors (and these competitors may be just "as efficient" in financial terms – and perhaps more efficient in natural resource and planetary terms - as the dominant company but simply not be engaging in the same unsustainable practices);[76] (iii) potentially reducing incentives to innovate (as companies may question: why bother innovating to reduce costs if you can cheat the system?); and (iv) not engaging in "normal competition" or "competition on the merits".

(x) The approach advocated in this section is in no way inconsistent with the so-called "more economic" approach, (even if there are some doubts about that approach generally). On the contrary, it is an approach which is far more in tune with the original (and better) meaning of "economics".[77] When competition authorities strengthened their economic capabilities in the early 2000s, it was largely in response to criticisms of their (relative) lack of these capabilities in some earlier cases. Nothing in that made (or makes) it inevitable that the approach to competition law and economics should focus on a narrow "Chicago" version of the consumer welfare standard or neoclassical price theory – and certainly does not require or permit an unduly narrow approach to the Chapter II prohibition. The approach to competition policy and sustainability in fact, provides more, not less, scope for the intelligent use of economics – especially environmental economics.[78]

This Report will now consider some examples of abuses contained within the Chapter II prohibition and Article 102 TFEU themselves.

3.2 Unfair prices and Conditions (Article 102(a) TFEU and Section 18 (2)(a) CA98)

Section 18(2)(a) CA98 and Article 102(a) give as examples of potential abuses, "unfair purchase or selling prices or other unfair trading conditions" of a dominant company. This is potentially broad ranging and there is no reason, in principle, why this could not be used more widely to condemn unsustainable practices which are unfair from an economic, political, environmental or climate change point of view.

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[76] As Iacovides and Vrettos point out, in assessing whether the competitors are "as efficient" as the dominant company it would not seem appropriate to make the comparison based upon the dominant company's costs as these are artificially suppressed by the very abuse complained of—consistent with the recognition that prices that are a result of market power cannot be a proper baseline for the conduct of the SNNIP test-to avoid the so-called "cellophane fallacy". See, "Radical for whom? Unsustainable Business Practices as abuses of dominance" in "Competition Law, Climate Change & Environmental Sustainability" (March 2021), edited by Simon Holmes, Dirk Middelschulte and Martijn Snoep.

[77] For an account of how the original and more holistic approach to economics has changed, see J. Aldred, "License to be Bad-How Economics Corrupted Us" (Allen Lane, 2019) e.g. at Chapter 1.

[78] See also Holmes, Climate change, sustainability and competition law (2020) Journal of Antitrust Enforcement, Volume 8, Issue 2, at pp. 9-11 and point (vii) on pp.45-46.

3.2.1 Unfair purchase prices

An example is the incredibly low prices paid by many retailers and intermediaries to farmers for their produce (e.g., bananas, coffee and cocoa) – prices which do not enable those farmers to feed their families; do not cover the true costs of production; can lead to an excessive use of scarce resources (land, water etc); and often discourage the development of more sustainable methods of production. To those brought up in the competition bubble this might seem radical, but looking at the wording and purpose of section 18(2)(a) CA98 and Article 102(a) afresh, with a clear focus on fairness and on all aspects of prices and trading terms, it can quickly be seen that it is not. If it is possible to challenge unfair *selling* prices for being too *high (“*excessive pricing*”)* or for being too *low* (“predatory pricing”), it begs the question: why not challenge depressingly *low purchase* prices? – and, as already pointed out, markets are hardly likely to “self-correct” in the case of *low* (as opposed to *high*) prices.[79]

3.2.2 Predatory Pricing

Often selling prices are unsustainably low because they do not reflect the true costs of production.[80] Obvious examples are where some of the costs of production have been off loaded onto society (e.g., in the form of carbon emissions not captured or effluent not treated and dumped on land or in rivers) - the so-called “negative externalities”. Another example is where the prices paid for inputs (whether raw materials like cocoa or exploitative labour) are unsustainably low (e.g., because they do not reflect the true costs of purchasing those inputs).

In these instances, the prices might be shown to be predatory once the “true” costs of production are properly taken into account (but otherwise applying the usual tests for predation as set out by the courts in cases like Akzo[81]). While this may not be straightforward, (but nor have historic predatory pricing cases been), it does merit further consideration – especially by environmental economists.

3.2.3 Other Unfair trading conditions

Wherever, a dominant company imposes unsustainable practices on a customer or supplier there is no reason why these could not be condemned as an abuse. One example (outside the area of pricing) might be requiring a supplier to produce a product in an environmentally damaging way.

Although, in the past, exploitative cases have tended to relate to pricing practices, there is nothing in the Chapter II prohibition or Article 102 TFEU to suggest that that should be the case, quite the contrary: it explicitly refers to “other” unfair trading terms. Furthermore, some of the reasons for the low level of enforcement action against exploitative pricing practices do not apply (or are less relevant) in the case of non-pricing practices; for example, the enforcer does not risk becoming a price regulator and the market is less likely to self-correct in relation to abuses which do not concern excessive prices. Indeed, many of the criteria identified in the cases when assessing “unfairness” in Article 102(a) can be readily seen in the case of the sort of unsustainable practices with which we are concerned: they are often “unnecessary”; “disproportionate” “unilaterally imposed” etc.

3.3 Limiting the production of products or services (Article 102(b) TFEU and section 18(2)(b) CA98)

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[79] For a fuller discussion of this see Holmes, Climate change, sustainability and competition law (2020) Journal of Antitrust Enforcement, Volume 8, Issue 2. Another example is the unsustainable production of meat discussed by Iacovides and Vrettos in “Radical for whom? Unsustainable Business Practices as abuses of dominance” in “Competition Law, Climate Change & Environmental Sustainability” (March 2021), edited by Simon Holmes, Dirk Middelschulte and Martijn Snoep.

[80] For an excellent discussion of ‘true costs’ and ‘true pricing’ see True Price Foundation, ‘A Roadmap for True Pricing. Vision Paper — Consultation draft’ (2019), <https://trueprice.org/a-roadmap-for-true-pricing/> accessed 19 January 2020. This paper article includes some helpful ideas on how to determine a ‘true price’ in terms of which external costs should be taken into account, how negative externalities should be quantified and how to ‘monetise’ them.

[81] CJEU, Case C-550/07P, *Akzo Nobel v European Commission*, ECLI:EU:C:2010:512.

Section 18(2)(b) CA98 and Article 102(b) TFEU give as examples of potential abuses: "limiting production, markets or technical development to the prejudice of consumers". Suzanne Kingston provides some colour on examples of practices by a dominant company which are damaging from a sustainability perspective that might constitute such abuses:[82]

First, limiting the ability of third parties to develop environmentally friendlier production method or products.[83]

Second, failing to satisfy a clear demand for an environmental service [or product].[84]

Third, be extremely inefficient in refusing to use an environmentally friendly technology thus increasing environmental costs.[85]

Such examples may seem novel to some but that is not a problem either as a matter of law or policy. The courts have consistently made it clear that the categories of abuse are not closed86 and the climate crisis demands thinking afresh, re-interpreting old ideas, and using all the tools available.

3.4 Using sustainability as a "shield"

The second way in which sustainability and monopoly power interact is the potential for sustainability considerations to act like a "shield" against accusations that genuine efforts to fight climate change or prevent unsustainable practices amount to an abuse under abuse of dominance provisions.

Environmental considerations are sometimes seen as a "defence," or as an "objective justification," for conduct by a dominant company that might otherwise be considered to amount to an abuse[87].

This approach is reflected in the CMA's "Call for inputs" referred to above[88] where (at para. 24) it suggested that: "If a business with market power conducts or takes part in a sustainability initiative that might otherwise be considered an abuse of dominance, this conduct may fall outside of the Chapter II CA98 prohibition if it can demonstrate that the conduct in question is objectively justified and proportionate. This would need to be considered on a case by case basis, and evaluating whether the conduct is 'proportionate' may, in practice, present challenges similar to those mentioned in paragraph 20 above in relation to the section 9."

However, arguably it should not be necessary to mount a "defence" in this way: something either is, or is not, an abuse and unlike the Chapter I prohibition (or its EU equivalent, Article 101 TFEU[89]) there is no two part test set out in either the Chapter II prohibition or Article 102 TFEU.

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[82] See S. Kingston, Greening EU Competition Law, Cambridge University Press 2011, p.325.

[83] By analogy to cases like Suiker Unie, (CJEU, Case 40/73, Coöperatieve Vereniging "Suiker Unie" UA and others v Commission, ECR 1663).

[84] By analogy to cases like P&I Clubs IGA [OJ 1999 L 125/12]

[85] By analogy to cases like Port of Genoa [OJ 1997 L 301/27].

[86] CJEU, T-321/05, *Astra Zeneca v EU Commission* [2010 5 CMLR 28].

[87] On this approach sustainability would be an "objective justification" for conduct which is prima facie abusive where a dominant company (or exceptionally companies which are collectively dominant) engage in proportionate behaviour to tackle environmental or climate change issues (and where there is no way of achieving these objectives in a way that is less restrictive of competition). See, for example, the excellent discussion of this by S. Kingston, Greening EU Competition Law, Cambridge University Press 2011 at pp.304-312). She identifies three categories of 'objective justification': (1) where a dominant company takes 'reasonable steps' to protect its commercial interests; (2) if the efficiencies justify the conduct such that there is 'no net harm to consumers'; and (3) legitimate public interest grounds.

[88] CMA, Environmental Sustainability Advice to Government: Call for Inputs, available at https://www.gov.uk/government/consultations/environmental-sustainability-advice-to-government-call-for-inputs. Accessed 12 May 2022.

[89] Article 101 (1) TFEU prohibits anti-competitive agreements etc and Article 101(3) sets out the conditions under which they may be exempt from that prohibition.

As noted at above, there is a strong legal case for factoring in environmental and other sustainability factors when considering whether conduct does, or does not, amount to an abuse when the Chapter II prohibition is read in light of the UK's Climate Change Act 2008, the Paris Agreement of 2015, and the Human Rights Act of 1998 (with a similar analysis applying when Article 102 is read (as it must be) in the light of the "constitutional" provisions of the treaties as referred to above).[90]

There is an equally strong moral and logical case. If conduct is genuinely intended to combat climate change, reduce environmental damage or otherwise contribute to sustainable development, it is difficult to see how, as a matter of common sense and language, that it can be seen as an "abuse" that the law intended to prohibit. There may be exceptions to this, but these will be rare. Indeed, in these cases it is likely that the conduct was not genuinely intended to reduce environmental harm or it was done in an anticompetitive manner.[91]

There is a further practical reason why it is better to take account of sustainability factors in the initial assessment of a potential abuse rather than as an "objective justification" or as a "defence". In the former case, it is for the competition authority to establish the abuse; in the latter case, there is (an evidential) burden of proof on the dominant company to establish the objective justification. Since there is no two-part test in the Chapter II prohibition or Article 102 (unlike Article 101 and the Chapter I prohibition), the competition authorities continue to bear the burden of proof throughout and therefore it makes sense for the assessment to form part of the analysis of the alleged harm.[92]

Although there are few decided cases of direct relevance, the following are examples of instances where environmental (or other sustainability) considerations could act as a "shield" against, or alter, a conclusion/finding that such conduct is potentially abusive:

(i) charging a higher price in order to cover environmental costs or reinvest in environmental protection:[93] in order to counter allegations of 'excessive pricing';

(ii) charging different customers different prices according to the use to which the product is put—such as how environmentally friendly it is (e.g., whether products are recycled or the energy efficiency of the downstream production process); in order to counter allegations of 'discriminatory pricing':

(iii) making the purchase of one product from the dominant company conditional on the purchase of another environmentally friendly product (e.g., sale of a printer conditional on the purchase of recyclable toner cartridges):[94] in order to counter an allegation of 'tying';

(iv) Offering exceptionally low prices to generate trial of a new environmentally friendly product: in order to counter an allegation of 'predatory pricing';[95]

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[90] On which see Holmes, Climate change, sustainability and competition law (2020) Journal of Antitrust Enforcement, Volume 8, Issue 2, Part IV.

[91] See, for example the "Green Dot" case discussed in footnote [97].

[92] In practice, the difference may not be enormous as it will always be important for the dominant company to convince the authority of the objective facts relevant to the sustainability benefits of its conduct and (in reality) of its genuine motives.

[93] This approach would be consistent, not only with the 'polluter pays' principle, but also the approach suggested above in relation to challenging abusively low prices for failing to properly reflect environmental costs (see above on the Chapter II Prohibition as a "sword").

[94] Although it would be necessary to show that there was no less restrictive solution. For example, this might mean requiring that the environmentally friendly product was bought but not necessarily from the dominant company.

[95] Suzanne Kingston suggests two ways in which environmental considerations may be relevant to accusations of predatory pricing. "In the first place, evidence that the intention of the dominant undertaking pricing above AVC but below ATC was genuinely pursuing environmental protection aims in so doing should mean that the conduct is not considered abusive. This follows from the Akzo test itself without needing to consider the effects of Article 11 TFEU. In the second place, evidence that a dominant undertaking pricing below AVC was genuinely pursuing legitimate environmental protection aims, and that there is no less

(v) Refusing to grant access to an essential facility to a user who intends to use the facility for environmentally unfriendly purposes (e.g. denying access to diesel vehicles—provided this was done on a non-discriminatory basis): in order to counter an allegation of 'refusal to supply'.

The CMA in its "Call for Inputs" referred to above suggests that "where a business (or businesses) with market power enters into sustainability initiatives or agreements, this *may* give rise to a Chapter II infringement *risk* if the initiative or agreement involves an abuse of this power" (emphasis added). It goes on to give various examples of where this "risk may arise".[96] While it is agreed that there "may" be a "risk" of infringement, these are also good examples of where this conduct *may not* amount to an abuse - either on a proper analysis of the conduct it cannot reasonably be considered to be and "abuse" or (as the CMA suggests in the passage quoted above) it may be "objectively justified" and "proportionate".

While sustainability considerations may mean that something which might otherwise look like an abuse is not an abuse on closer analysis, sustainability is no "get out of jail free" card. Competition law applies just as much where sustainability issues are at stake. It is no defence that a company or companies operate in an environment related sector.[97]

3.5 Some concluding remarks on the "shield"

It is well established that a dominant company can take "reasonable steps" to protect its own commercial interests if they are attacked by rivals so long as the actual purpose is not to "strengthen this dominant position and abuse it" and its actions are proportionate to the threat which it faces.[98] If this is the case in relation to commercial interests, then, *a fortiori*, a dominant company should be able to take such steps where its motives are not those of commercial gain at all.

It is sometimes objected that it is not for private companies to take action in the public interest and that such matters should be left to the public authorities[99]. Such arguments now appear outdated in the face of a growing climate emergency (and the lack of political appetite to commit unilaterally without the aid of private enterprises, evident at COP 26). Rather, all the resources of the public and private sector must be engaged to combat climate change – as is well recognised by the UK government (with its commitment to

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restrictive way of achieving these aims, should rebut the AKZO presumption of abuse". See for example, S. Kingston, Greening EU Competition Law, Cambridge University Press 2011, pp.322-323).

96 "For example, Chapter II infringement risk may arise where: (a) A business with market power changes its pricing policies in connection with a sustainability initiative to incentivise customers to purchase more sustainable products and/or to use the relevant products or services in a sustainable way. (b) A business with market power seeks to ensure it can recoup the cost of significant environmental investments through increasing prices or entering into long-term exclusive arrangements. (c) A business with market power changes the terms on which it sells its products or services in connection with a sustainability initiative, for example making the purchase of one product or service conditional on the purchase of another sustainable product. (d) A business with market power refuses to deal with suppliers or customers who do not meet sustainability criteria that the business with market power has set and which are not required by law".

97 This is illustrated by the so-called "Green Dot" decision of the European Commission (and subsequent judgements of both the General Court and the ECJ). In this case DSD was found by the Commission to have abused its dominant position on the market for the organisation of the take cash back and recovery from consumers of used sales packaging in Germany. DSD owned the famous "Green Dot" trademark and under a network of agreements it required companies to pay them a fee for all sales packaging distributed within Germany which bore the Green Dot trademark regardless of whether or not those manufacturers were actually using DSD's services (i.e. they were disposing of the packaging themselves or using a competing system). This meant that such companies had to pay twice for the disposal of packaging. The Commission found it to be exploitative of customers to require the payment of a fee for a service that was not actually provided. It was also exclusionary in that it made it harder for competing systems to be set up. It is noteworthy in two respects: that the case concerned re-cycling was no reason to treat the case any differently from any other; and the concerns which the Commission had here were classic competition concerns: anti-competitive exploitation and foreclosure. Case C-385/07 P [2009] ECR 1-6155].

98 E.g., CJEU, Case T-30/89, *United Brands* [1976] ECR 207, para.189.

99 See cases like CJEU, Case C-53/92 P, *Hilti,* ECR II-1439, 1994, para. 118. However, in such cases one has the suspicion that the public interest arguments (re safety) were added on once its anti-competitive tying conduct was attacked. See also the Commission's 2009 Guidance on Article 82 (now Article 102 TFEU) [OJ 2009 C 45/7].

"deliver a Net Zero and more environmentally sustainable economy"); by the CMA in its Call for Inputs;[100] and by the EC - particularly in relation to the Green Deal[101]). Regulation is indeed necessary, but it is often limited in scope or geographic reach and is often slow in coming or simply not ambitious enough to fight climate change (and combat unsustainable practices) on a sufficient scale or at the necessary speed (not least because some companies and trade associations lobby against it).[102]

As a matter of law, it is clear that the concept of "abuse" is an objective concept and does not depend on the motives of the dominant company. In practice, whether sustainability initiatives are genuine or not is very relevant. It will be very rare that enforcement action will be taken against a company where the evidence (e.g., internal documents) shows clearly that that company was genuinely doing something for sustainability reasons.[103]

Dominant companies should not be discouraged from 'doing the right thing' or trying to make a contribution to combat climate change for fear of the competition law consequences. This is important as dominant companies are often (not always) large multinationals which have the economic clout and the potential to make a real difference. While it is correct to be cognisant of the possibility of some companies 'green washing'[104] there are companies (and certainly many individuals within companies) who are genuinely trying 'to make a difference'. Competition law should not make it more difficult to put these good intentions into practice. Allowing abuse of dominance provisions to act like a 'shield' may, in some circumstances assist with this.

3.6 Conclusion on abuse of dominance and sustainability

This section of the Report has sought to argue that there is more scope to use abuse of dominance provisions such as the UK Chapter II prohibition than is often appreciated (and there is less of a tension between competition law and sustainability goals than is sometimes suggested).

In particular, competition lawyers and authorities alike should not be afraid to re-visit the fundamental purpose of these provisions. When this is done, it will often be clear that unsustainable conduct by dominant companies is an "abuse" such that the Chapter II prohibition can be used as a "sword" to attack them.

Conversely, there is scope to recognise sustainability as a shield against (false) accusations that genuine practices to mitigate climate change or to pursue sustainability goals are an abuse of a dominant position.

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[100] "The CMA believes that regulation and government policy are the primary means to achieve the UK's Net Zero and sustainability goals. However, the CMA also believes that other 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". (CMA, "Environmental Sustainability Advice to Government: Call for Inputs", available at: https://www.gov.uk/government/consultations/environmental-sustainability-advice-to-government-call-for-inputs. Accessed 12 May 2022.)

[101] See, for example, the EC's policy brief of 10 September 2021, "Competition Policy in Support of Europe's Green Ambition" (the "Green Deal Policy Brief"): "*In order to reach the goals set out in the European Green Deal, everyone, private and public, must play their part. This includes competition enforcers*" (emphasis added).

[102] See "How a powerful US lobby group helps big oil to block climate action", Chris McGreal, The Guardian, 19 July 2021, reporting that: "Critics accuse Shell and other major oil firms of using API [the American Petroleum Institute] as cover for the industry. While companies run publicity campaigns claiming to take the climate emergency seriously, the trade group works behind the scenes in Congress to stall or weaken environmental legislation."

[103] This may be contrasted with cases where the public interest considerations appear to have been added on after the event or where the actions amount to fairly orthodox anti-competitive conduct (as per the Green Dot case – discussed in footnote [97]. Note also the Commission's acknowledgment at para 559 of its Draft Horizontal Guidelines of 1 March, 2022 that "the fact that an agreement genuinely pursues a sustainability objective may be taken into account in determining whether the restriction in question is a restriction by object or a restriction by effect within the meaning of Article 101(1)" – see EU Commission, Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (March 2022).

[104] This concept is explored further in the CMA's new Green Claims Code, accessible at <https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims>. Accessed 12 May 2022.

In this way, the laws governing abuse of dominance can indeed help take action for a sustainable future – and play an active part in ensuring that future (rather than being an obstacle to it).

4 Section 3: UK merger control and sustainability in the UK[105]

Although the focus of the sustainability debate has, for good reason, often focused on potential obstacles to competition cooperation, merger control regimes nevertheless have a role to play in both advancing and protecting the sustainability agenda. This could arise in two different ways, for example, a competition authority prohibiting or requiring remedies in relation to a merger on the basis of sustainability concerns, i.e. because it may result in environmental harm (akin to using sustainability considerations as a "sword"); or alternatively, approving a merger on the basis that resulting environmental benefits can justify / offset any harm that may stem from the loss of competition (akin to the "shield" approach).

The CMA has not, to date, considered sustainability issues in-depth in any merger control review, but we anticipate there will be an increasing number of transactions being reviewed by the CMA which have a sustainability angle for the following reasons: (i) the CMA is likely to proactively seek out such deals in line with its "strategic priority" to encourage sustainability goals; (ii) businesses operating in sustainability-related sectors are expanding incredibly fast, which is likely to increasingly drive M&A and investment in these sectors; and (iii) even in the wider economy, ESG considerations are driving commercial decision-making and strategies, leading to sustainability-related investments.

The CMA's ability to scrutinise transactions involving a sustainability-element is facilitated by its relatively broad and flexible jurisdiction. It has jurisdiction to review transactions involving either: (i) a Target that has UK turnover of GBP 70 million or greater; or (ii) a share of supply of goods or services in the UK of 25% or more. This latter threshold is far more flexible and 'elastic' than a market share test and provides the CMA with very significant discretion in determining whether the parties overlap. It is, therefore, well positioned to 'call in' transactions with sustainability implications.

4.1 Sustainability as a "sword": assessing sustainability as a parameter of competition

There are two principal routes for the CMA to account of sustainability considerations during the merger control review process – where sustainability is a key parameter of competition between the parties, or where the parties anticipate environmental efficiencies or customer benefits arising from the merger, which can be used to 'offset' any harm to consumers from the loss of competition.

First, it can consider sustainability as part of the initial competition assessment. As part of its merger assessment, the CMA will identify the competitive parameters that are most important to the process of rivalry. The nature of competition will influence the theories of harm considered, and it will consider both price and non-price aspects of competition as relevant in the circumstances.[106] If one of the parameters for competition between the merging parties is sustainability-related (e.g., the parties compete on energy efficiency, 'green' credentials, or sustainability innovation) the CMA can account for that in its competitive assessment.

The CMA has, in principle, taken important steps towards accounting for sustainability considerations during merger control reviews. In 2021, the CMA updated its MAGs and explicitly recognised that the sustainability of a product or service can constitute a non-price aspect of competition that can be an

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[105] For further discussion of how sustainability considerations can be factored into merger control see articles by Kar, Cochrane and Spring and by Burnside, De Backer and Strohl in Holmes, Climate change, sustainability and competition law (2020) Journal of Antitrust Enforcement, Volume 8, Issue 2, Part VII Part VII; and S.Holmes and M.Meagher, "A Sustainable Future: how can control of monopoly power play a part", SSRN May 3, 2022.

[106] CMA, "Merger assessment guidelines" (CMA129) updated 18 March 2021 (the "MAGs"), para 2.3-2.4, accessible at <https://www.gov.uk/government/publications/merger-assessment-guidelines>. Accessed 12 May 2022.

important part (or even the primary focus) of the competitive process,[107] i.e. where firms compete on factors relevant to environmental sustainability. Applying this principle to a specific transaction could, therefore, enable the CMA to challenge a merger on the basis that it would result in a substantial lessening of competition (an "SLC") on sustainability parameters – and either prohibit the merger or require remedies to prevent the loss of competition (and resulting environmental harm).

This is particularly relevant in the context of 'sustainability-killer acquisitions'. As in the wider pharmaceuticals and technology context where this concept was initially popularised, this could involve an established firm acquiring a new and innovative firm to pre-empt future competition. This could be a polluting firm acquiring a 'green' competitor that has innovated a more sustainable approach. The consequence of this transaction may be that the innovating business is shut down ('killed') or that its innovative technology remains on the market as a niche product but is not expanded across the market.

In this scenario, where competition is on sustainability-related terms, prohibiting the transaction may be unnecessary as cleaner rivals may be able to persuade environmentally conscious customers to switch to them and exercise an ongoing competitive constraint. However, if there would, nevertheless, be a negative environmental impact, this may require remedies or even prohibition – particularly if consumers may not accurately assess future costs (hyperbolic discounting), have status quo biases which make them reluctant to try new products, or may believe that choices made at an individual level cannot make a difference.

4.2 Sustainability as a "shield": offsetting SLCs with sustainability benefits

The second way in which the CMA can account for sustainability is by recognising environmental benefits that stem from the transaction – and considering whether these environmental benefits (whether independently or in conjunction with other efficiencies) are sufficient countervailing factors that they prevent or mitigate any SLC arising from a merger by offsetting anticompetitive effects.[108]

Merger efficiencies fall into two categories: (i) rivalry-enhancing efficiencies (which must not only be timely, specific and sufficient to prevent an SLC from arising, but also merger-specific and benefit customers in the UK); and (ii) relevant customer benefits ("RCBs") (i.e., benefits to UK customers, other than through improved competition in the relevant market).

The updated MAGs recognise that environmental benefits can constitute merger efficiencies. Efficiencies can include sustainable elements to the extent they are rivalry-enhancing, and may include enabling more efficient/sustainable production processes, better innovation or more environmentally-friendly R&D. RCBs can be broader, and capture environmental benefits such as reduced carbon emissions and supporting the transition to a low carbon-economy (to the extent that firms do not normally compete on sustainability).[109] The CMA also notes that a merger may lead to lower energy costs and some benefits that customers may value (such as a lower carbon footprint of the firm's products).

Such RCBs may act as countervailing factors that prevent or mitigate any SLC arising from the merger.[110] A significant advantage of the CMA accounting for environmental RCBs is that, unlike rivalry-enhancing efficiencies, they can be realised in markets other than the relevant market.[111]

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[107] CMA, "Merger assessment guidelines" (CMA129) updated 18 March 2021 (the "MAGs"), para 2.5, accessible at <https://www.gov.uk/government/publications/merger-assessment-guidelines>. Accessed 12 May 2022.

[108] Ibid, para.8.1

[109] Ibid para. 8.3(b), 8.21

[110] Although the CMA notes that it is rare for a merger to be cleared on the basis of rivalry enhancing efficiencies or relevant customer benefits alone (for example, as of March 2021, the CMA had only cleared three cases on the basis of RCBs), CMA, "Merger assessment guidelines" (CMA129) updated 18 March 2021, para 8.27, accessible at <https://www.gov.uk/government/publications/merger-assessment-guidelines>. Accessed 12 May 2022.).

[111] However, this is perhaps limited by the concept of "relevant customers" which only includes the parties' direct consumers under s.30(4) of the Enterprise Act 2002.

4.3 Consideration of sustainability issues in CMA merger reviews to date

Although the CMA has now laid the conceptual framework for addressing sustainability in merger cases, there has been very limited analysis of such issues in merger control cases to date - although, as noted above, this is likely to change as sustainability issues become increasingly important for businesses, both as a parameter of competition (in response to shifting consumer preferences) and as a driver of M&A activity.

The CMA recognised the role of sustainability as a non-price parameter of competition between firms in *Cargotec Corporation / Konecranes Plc* (2021).[112] In particular, it considered that the parties were, in part, close competitors for the supply of 'reach stackers' ("RS") because both parties were taking active steps to develop electrified mobile equipment and considered themselves as being among the few suppliers that could offer a full range of RS (including value, premium and eco-friendly).[113] However, the CMA accounted for a wide variety of evidence across numerous products in reaching its decision that the transaction would result in an SLC, and did not specifically find or indicate that the SLCs would result in environmental harm (e.g., that eco-friendly RS may become more expensive or no longer be available).

The CMA also considered potential sustainability efficiencies in *Cargotec/Konecranes*. The parties argued that "an important part of the deal rationale is to ensure that the parties would be better placed to address sustainability challenges in the industry, by providing a platform for innovation". However, the CMA decision states that the parties did not provide further evidence to support this argument. Given that the CMA applies a high evidentiary standard for accepting rivalry-enhancing efficiencies arising from a merger (irrespective of whether sustainability-related or not), it – unsurprisingly – did not consider it had sufficient evidence to either assess or give credit for any sustainability-related efficiencies that would offset the SLC.[114]

The CMA also considered environmental benefits arising from a merger in *Pennon Group plc / Bristol Water.*[115] This merger involved regulated water companies and, as such, was assessed under a distinct regime which does not apply the usual SLC test. Nevertheless, as in the standard process, the parties were able to argue that the prejudice arising from the merger could be offset by merger-specific relevant customer benefits (RCBs), and therefore still has comparative value. In this case, the parties argued that the RCBs would include, among other benefits, "environmental benefits".[116] However, the CMA noted that it was unclear whether the environmental benefits would be merger-specific and whether the proposed benefits would be cost effective. The CMA also noted that the acquirer was a "poor performer on environmental outcomes".[117] It concluded, that there was insufficient evidence that the potential RCBs would outweigh the merger's adverse impacts.

As such, the CMA has not accepted proposed environmental benefits resulting from a transaction as a basis on which to offset the harm from loss of competition. This emphasises the importance of the CMA being prepared to put sufficient weight on sustainability benefits as offsetting potential competitive harm. However, in at least one, if not both, of the recent cases where the parties mooted environmental benefits, it

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[112] Cargotec Corporation / Konecranes Plc Merger Inquiry, Final report dated 29 March 2022, available at: https://assets.publishing.service.gov.uk/media/62458e408fa8f52773d76abf/310322_Cargotec_Conecranes_Final_Report.pdf Accessed 12 May 2022.

[113] Ibid. para.201.

[114] Ibid. para.58.

[115] Case ME/6946/21, Pennon Group plc / Bristol Water Holdings UK Limited merger enquiry, full text decision available at: https://assets.publishing.service.gov.uk/media/622a2efcd3bf7f5a86be8f8a/Pennon_Bristol_fulltext.pdf. Accessed 12 May 2022.

[116] Ibid. para.57.

[117] Ibid. para.57

does not appear that the parties provided sufficiently detailed evidence to enable the CMA to rely on those benefits.[118]

4.4 Incorporating sustainability into merger control going forward

It is clear, therefore, that if the CMA is to act on its "strategic priority" by using merger control to support the sustainability goals, this requires action on behalf of both regulator and dealmakers.

The CMA, for its part, has laid out a high-level framework for incorporating sustainability considerations into its merger analysis through its updated MAGs. More, however, must be done. In particular, the CMA must have a clearer, publicised process for quantifying such benefits and demonstrating how they can be applied to offset anticompetitive harms. The CMA has said that it is considering whether it can provide practical guidance on how it weighs sustainability-related efficiencies and RCBs against competition concerns.[119] Without guidance on these steps, dealmakers and their advisers will struggle to assess, justify and present (both for internal approval and to the CMA) even genuinely 'green' transactions.

Nevertheless, if the CMA is to accept and give credit to sustainability benefits, much of the onus (initially at least) is on merging parties. Dealmakers (and their advisers), need to be willing to present and effectively defend mergers motivated by sustainability objectives or that will generate sustainability benefits. Business rationales need to be clearly articulated and the efficiency analyses well-evidenced. Absent such evidence, even genuine sustainability benefits risk being perceived as greenwashing and competition authorities will not have a credible basis to give meaningful and sufficient credit to such benefits to outweigh any competitive harm. The following three points are particularly important for merging parties to be able to demonstrate:

Merger-specificity: sustainability benefits must be "reliant on the merger in question" and cannot also be brought about by other means. The CMA will investigate, and the parties will need to explain, what barriers there are against merging firms achieving the same improvements absent the merger. In particular, the CMA may be sceptical whether the sustainability benefits could also be achieved by the firms acting independently or if consumers could access the sustainability benefits without the merger.[120]

Verifiability: merging parties will need to provide sufficiently detailed evidence in order for the CMA to verify efficiency claims. The CMA notes in its Guidelines that many efficiency claims by merger firms are not accepted by the CMA because the evidence supporting those claims is difficulty to verify and substantiate.[121] Yet in most cases those efficiencies are usually cost and revenue synergies and more easily balanced against, for example, potential price rises, than less quantifiable sustainability benefits.

Internal documents: although these are not a specific part of the CMA's criteria, internal business documents are likely to be reviewed by the CMA and will be key in supporting (or undermining) the deal rationale and potential efficiencies (i.e., they must be consistent with the purported environmental goals, and not instead indicate an anticompetitive rationale). A company's wider ESG record may also be considered for evidence as to the credibility of the parties' aims (as in *Pennon / Bristol Water* where the CMA noted that Pennon was already a poor performer on environmental outcomes).

4.5 Public interest regime

[118] CMA, "Merger assessment guidelines" (CMA129) updated 18 March 2021, para 8.27, accessible at <https://www.gov.uk/government/publications/merger-assessment-guidelines>. Accessed 12 May 2022.

[119] CMA, Environmental sustainability and the UK competition and consumer regimes: CMA advice to the Government (14 March 2022), available at https://www.gov.uk/government/publications/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government. Accessed 12 May 2022.

[120] CMA, "Merger assessment guidelines" (CMA129) updated 18 March 2021, para 8.16-8.19, accessible at <https://www.gov.uk/government/publications/merger-assessment-guidelines>. Accessed 12 May 2022.

[121] Ibid. para.8.6.

Beyond what is currently permitted under the legislative framework, one way of strengthening the role of sustainability considerations within the merger control regime would be to enable the UK government to intervene in merger cases on sustainability grounds, by adding sustainability as a 'public interest consideration' under section 58 Enterprise Act 2002 ("EA02"). This would allow the government to intervene to refer a merger for an in-depth investigation, or block or clear a transaction on sustainability grounds (e.g., clearing it where the merger gives rise to competition concerns and it considers that, in the interests of public policy, the merger's environmental benefits outweigh any potential restriction of competition). Indeed, in its Advice to the Government, the CMA noted that the Government may wish to add a new 'sustainability' public interest consideration, or legislate to specifically include sustainability benefits as RCBs.

4.6 Sustainability and the UK's market inquiry regime[122]

A particularly important tool for the CMA (as well as other sectoral regulators in the UK which also have competition powers) in advancing the sustainability agenda is the power to undertake market inquiries. These generally involve a 12-month market study, and may be followed by a subsequent 18-24-month in-depth market investigation. In contrast to investigations under the Enterprise Act for a merger control review, market inquiries can be launched by the CMA in order to examine whether, and if so why, markets may not be working well and if there are competition or consumer problems within the market. In particular, it will take an overview of regulatory or other economic drivers as well as patterns of consumer and business behaviour.[123]

In contrast to its competition enforcement capacity, there is no need for any market participant to be suspected of infringing competition law in order for the CMA to commence an investigation, conclude that the market is not working effectively, or to recommend/require remedies. Indeed, market inquiries can lead to a range of outcomes, including: (i) a clean bill of health; (ii) encouraging businesses to self-regulate; (iii) making recommendations to government to change regulation or public policy; (iv) taking competition or consumer enforcement actions; (v) behavioural remedies, such as market-opening measures and informational remedies; and (vi) structural remedies, such as divestiture or IP remedies.

Market inquiries are, therefore, a particularly effective means for the CMA to ensure and shape effective competition in emerging markets relevant to sustainability and net zero goals before competition issues develop or become acute. Moreover, the CMA considers that it can, where appropriate, take into account environmental sustainability to the extent that it leads to economic harm to consumers.[124]

In 2021, the CMA completed a market study into electric vehicle charging, an emerging market of central importance to the green transition and Net Zero ambitions. The market study identified a number of challenges for the sector as it develops and set out a number of remedies. These remedies included recommendations to government to increase the pace and scale of charging roll-out across the UK. The CMA also used the market study as the basis to launch a Chapter I investigation into long-term exclusivity arrangements for charging along motorways. It subsequently accepted commitments by the relevant firms in March 2022. The CMA noted in its decision that the transition from petrol and diesel cars to EVs is key to the UK's net zero commitments by 2050. As such, the CMA considered it was "essential that there is a

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[122] See, also the discussion in Holmes, Climate change, sustainability and competition law (2020) Journal of Antitrust Enforcement, Volume 8, Issue 2 at pp392-393.

[123] Market studies and investigations – guidance on the CMA approach: CMA3, published on 10 Janury 2014, para.1.5 available at: <https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases#issuing-the-cmas-provisional-findings--the-statement-of-objections-and-draft-penalty-statement.>. Accessed 12 May 2022.

[124] CMA, "Environmental Sustainability Advice to Government: Call for Inputs", para.79, available at: https://www.gov.uk/government/consultations/environmental-sustainability-advice-to-government-call-for-inputs. Accessed 12 May 2022.

comprehensive and competitive EV charging network in place".[125] In an open letter to the motorway service area operators and EV charge point operators, the CMA noted its decision will help develop a competitive charging network to support the government's ban on new petrol and diesel car sales by 2030.

Reflecting the importance of the sector and the importance of the policy prerogative in shaping its market monitoring and enforcement work, the CMA has publicly committed to launching at least one market study in a Net Zero-related market in the next financial year.

Moreover, as with mergers, sustainability could be included as a public interest consideration under s.153 of EA02, enabling the UK government to intervene in markets cases on sustainability grounds.

4.7 Conclusion

This Report has sought to consider the ways in which sustainability considerations can be used as (i) a "sword" when applying competition law by finding agreements/practices/mergers that are unsustainable or harmful to society as anticompetitive, and (ii) a "shield" by protecting agreements/practices/mergers genuinely aimed at achieving sustainability goals from the application of competition law.

Although UK competition law is alive to the issues in this context, it can and must go further than it currently has in order to facilitate businesses in achieving sustainable goals in the fight against climate change and the move towards a more sustainable economy.

Appendix I: Simon Holmes, Selected Papers on Climate Change, Sustainability and Competition Policy

[125] CMA, Case number 51050, "Decision to accept binding commitments in relation to certain exclusive arrangements for the supply of electric vehicle charging points" (8 March 2022), para.1, available at: https://assets.publishing.service.gov.uk/media/622634d28fa8f5490d52ef91/EV_decision_to_accept_commitments_V2_070322.pdf. Accessed on 12 May 2022.

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1. A Sustainable Future: how can control of monopoly power play a part? Simon Holmes and Michelle Meagher, 3 May, 2022. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4099796>

2. Revised draft horizontal guideless on sustainability agreements. ClientEarth and Simon Holmes' contribution to the European Commission's public consultation, April, 2022. Available at: https://www.clientearth.org/latest/documents/horizontal-agreements-between-companies-revision-of-eu-competition-rules/

3. JAE Paper "Climate Change, Sustainability and Competition Law", accessible at: https://academic.oup.com/antitrust/article/8/2/354/5819564?login=true

4. "Climate Change, Sustainability and Competition Law in the UK" (published in the ECLR, July, 2020); available at: https://www.law.ox.ac.uk/sites/files/oxlaw/cclp_working_paper_cclpl51.pdf

5. Climate Change and Competition Law –Simon Holmes note for OECD Roundtable on sustainability and competition law: available at https://one.oecd.org/document/DAF/COMP/WD(2020)94/en/pdf

6. Horizontal agreements between companies-revision of EU competition rules. ClientEarth and Simon Holmes contribution to the Commission's consultation, October, 2021. Available at: <https://www.clientearth.org/media/3c4lsaex/clientearth-and-s-holmes-contribution-horizontal-agreements-04-10-2021.pdf>

7. "Competition Policy supporting the Green Deal". [Concurrences No 1-2021]. Available at https://www.concurrences.com/en/review/issues/no-1-2021/conferences/sustainable- development-what-role-for-competition-policy-new-frontiers-of

8. "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]. Available at: <https://www.competitionpolicyinternational.com/climate-change-is-an-existential-threat-competition-law-must-be-part-of-the-solution-and-not-part-of-the-problem/>

9. "Consumer welfare, sustainability and competition law goals" [Concurrence No 2- 2020]. Available at: <https://www.concurrences.com/en/review/issues/no-2-2020/foreword/consumer-welfare-sustainability-and-competition-law-goals-93496-en>

10. Covid 19 Lessons for climate change blog, April 2020: Available at: <http://competitionlawblog.kluwercompetitionlaw.com/2020/04/23/climate-change-sustainability-and-competition-law-lessons-from-covid-19/>

11. Competition Law, Climate Change & Environmental Sustainability", edited by Simon Holmes, Dirk Middelschulte and Martijn Snoep, [Concurrence]. Available at: <https://www.concurrences.com/en/all-books/competition-law-climate-change-environmental-sustainability>