COMPETITION LAW IN A CHANGING CLIMATE

The 9th David Vaughan CBE QC Lecture on Antitrust Litigation

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Introduction: competition law as a living system

London's burning, so the song goes. London was indeed burning this summer, which was the UK's hottest summer since records began in 1884. On a single day in July, the London Fire Brigade was called to 63 grass fires. The picture was the same across Europe. In July, the temperature in Sardinia reached over 48°C, one of the highest temperatures measured in European history. The river Danube dried up, revealing the fossilised bones of a woolly mammoth. Last week, Prime Minister Andy Burnham said in his speech to COP31, "The climate crisis is not a distant threat. It is upon us all now".

The rather chilly air-conditioned courtrooms of the Competition Appeal Tribunal offered a temporary respite from the heatwave this summer. But the law cannot be insulated from the world outside. The law is a tool for the regulation of a changing society, and it must respond to the needs of that society. Terry Pratchett put the point characteristically pithily: "The world turns, Your Reverence, and we must spin with it."[2]

Competition law is no exception. Its history is one of applying enduring foundational principles to changing markets. Market power and dominance, collusion, exclusionary conduct and economic efficiencies remain as central today as they were decades ago. But their application evolves as businesses change, technologies develop, economies transform and public priorities shift.[3] Modern antitrust law emerged in response to the industrial concentration and cartelisation associated with the corporate "trusts" of 19th century America. Across the Atlantic, competition law became a core principle of European law alongside post-war reconstruction

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1 President of the Competition Appeal Tribunal. I am very grateful to Teddy Hunt and Russell O'Brien, Referendaires at the Tribunal, for their assistance with this lecture, and to Prof David Bailey KC, Prof Simon Holmes, Maurits Dolmans and Zoe Leventhal KC for their comments on earlier drafts.

2 Pratchett, *The Truth* (Corgi, 2001), p. 47.

3 See generally Ariel Ezrachi, "Sponge" (2017) 5 *Journal of Antitrust Enforcement* 49.

and the creation of the European common market. It adapted in response to the privatisation and liberalisation of markets in the 1980s and 1990s, and with the rise of digital markets and platform economies. Just as the European competition law framework was able to respond, at speed, to the challenges created by the 2008 financial crisis and the Covid-19 pandemic, so it must now evolve in relation to the economic and societal challenges of climate change and environmental sustainability.

That does not suggest that competition law should take the place of environmental law. Nor is it for judges to trespass into the realm of environmental policy. But if climate change is now affecting the way in which markets function, the incentives facing businesses, and the choices made by consumers, then we must ask how far competition law can and should take those developments into account, to reflect the changing needs of the 21st century economy.

To explore this topic, I will address five issues. First, why is there a role for competition law at all in this debate? Secondly, how have the familiar antitrust principles in the Chapter I and II prohibitions, and Articles 101 and 102 TFEU, already been used to address environmental sustainability issues? Thirdly, how are regulators in the UK and further afield shaping the debate? Fourthly, what is the role of State aid and subsidy control? Finally, I will make some comments on the emergence of environmental collective proceedings. I don't have time to cover mergers, but I should note that this is also an area of competition policy for which sustainability is becoming a relevant consideration.[4]

In addressing these themes, I am indebted to the work of a growing body of academics and practitioners in this field, some of whom have been talking and writing about this issue for many years. The printed version of this speech gives references to some of the literature, for those who are interested to read further. I should also emphasise that any views expressed in this lecture are my own, and should not be taken as representing the approach of the Competition Appeal Tribunal or indeed the High Court more generally.

(1) The role of competition law

I will start then with this question: should competition law have any role in tackling climate change? In the Chicago school of thought, the sole legitimate objective of competition law is

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4 Holmes, "Competition Law can't save the planet – but it can help. Here's how", (2026) 9 *Concurrences* 1, 5–6.

the maximisation of consumer welfare, measured in purely economic terms.[5] Environmental objectives might not fit easily within that analysis. Instead, on this view, responsibility for climate change lies solely with governments and legislatures.

The contrary view is that this is too narrow and static an interpretation of the role and scope of the competition law principles. Governments and legislatures must of course set the framework for addressing climate change. So for example, in the UK, the Climate Change Act 2008 established a statutory framework for reducing greenhouse-gas emissions, now with a requirement of achieving net-zero emissions by 2050. On the global stage, the Paris Agreement was adopted at COP21 in 2015. In the EU, the Commission launched the European Green Deal policy in 2019. That was followed by the adoption in 2021 of the European Climate Law, which like the UK legislation requires the achievement of net-zero greenhouse gas emissions by 2050.

But governments and public authorities cannot deliver the necessary changes alone. Governments face practical and political constraints. Individual countries fear a loss of global competitiveness, through the so-called first-mover disadvantage. And while there is a consensus on the long-term benefits of emissions reductions, the short-term costs tend to be politically unpopular.[6]

More fundamentally, governments cannot determine every innovation, investment decision or technological breakthrough needed to turn those objectives into reality. The knowledge required is dispersed among businesses, entrepreneurs, investors and consumers. It emerges through experimentation, investment and competition. Well-functioning markets therefore play a crucial role in identifying which solutions succeed, and in ensuring that success is driven by genuine efficiency, innovation and responsiveness to market forces.

That leads us to the role of competition law in ensuring the efficient functioning of those markets. Environmental characteristics are increasingly dimensions of competition, just as environmental costs may be symptoms of a poorly-functioning market. When I buy a new car, I look for an electric one. When I buy a new washing machine, I check its energy rating. Business from electricity providers to supermarkets to suppliers of toilet paper compete to tell

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5 Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books 1978), p. 51.

6 See e.g. Dolmans, Lin and Hollis, "Sustainability and Net Zero Climate Agreements – A Transatlantic Perspective" (8 September 2023), pp. 3–4.

you about their green credentials and commitment to sustainability. As the former Competition Commissioner Vestager said, "competition helps to make our economy greener".[7] So a cartel to limit competition in relation to environmental sustainability is capable of infringing competition law on entirely orthodox principles. Equally, in relation to environmental harms, economics has long treated pollution as an externality,[8] and the polluter-pays principle has on that basis long been regarded as a legitimate consideration in a competition law analysis.[9]

Of course, quantification is difficult. The benefits from sustainability improvements may be uncertain and highly dispersed. But those problems will be familiar to anyone who has tried to assess pass-on in a competition damages action. Government agencies routinely value environmental impacts using economic and scientific models.[10] And judges habitually deploy the broad judicial axe when evidence is sparse or imprecise.[11] If competition law claims can be brought for the unpaid value of the social media data of millions of consumers,[12] or for lost CPU performance,[13] there should not be an inherent problem with assessing the societal cost of carbon emissions in a damages action. Indeed there is a growing body of expert evidence that does just that.[14]

It should also be remembered that competition law already requires courts and competition authorities to balance considerations that cannot easily be quantified, such as potential

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7 Executive Vice-President Vestager's keynote speech at the 25th IBA Competition Conference, "Competition policy in support of the Green Deal", Speech/21/7754 (10 September 2021).

8 Arthur Cecil Pigou, *The Economics of Welfare* (Macmillan 1932), pt II, chapter IX, §10.

9 See e.g. OECD report, "Competition Policy and the Environment" OCDE/GD(96)22, p. 5, commenting that the polluter pays principle "is consistent with competition policy to the extent that it remedies a market failure, internalising the pollution externality".

10 https://carbonimpactstracer.com, explained in Abram, Maher, Perkins-Kirkpatrick, *et al*, "Quantifying the regional to global climate impacts of individual fossil fuel projects to inform decision-making", (2025) *npj Climate Action* 4, 92.

11 See e.g. *Sainsbury's v Visa* [2020] UKSC 24, §§217–226; *Mastercard v Merricks* [2020] UKSC 51, §51; *London and South Eastern Railway v Gutmann* [2022] EWCA Civ 1077, §58; and *Royal Mail Group v DAF Trucks* [2024] EWCA Civ 181, §§145–148.

12 *Meta v Gormsen* [2024] EWCA Civ 1322.

13 *Gutmann v Apple* [2023] CAT 67.

14 The Sabin Center for Climate Change Law (Columbia Law School) has a thematically organised database of scientific reports relevant to climate litigation and policy-making, including reports of experts in legal proceedings that rely on climate attribution science. Recent commentary on climate attribution science includes Alessi, Phillips, Delta Merner *et al*, "The next phase of climate attribution" (2026) *npj Climate Action* 5, 84.

competition, innovation incentives, barriers to entry and long-term efficiencies. And that has explicitly been extended to environmental considerations in this jurisdiction.

As long ago as 2002, in its decision in the *Lucite* case, the OFT relied on the environmental benefits arising from a reduction of greenhouse gas emissions as a basis for exemption of an agreement that would otherwise have been caught by the Chapter I prohibition.[15] In the *Cityhook* case a few years later, the OFT did not find it necessary to consider the environmental benefits of the disputed conduct, but in the judicial review of its decision Mr Justice Foskett confirmed that there may be cases where it would be appropriate for competition regulators to take account of environmental considerations.[16]

It is important to emphasise that while environmental considerations may enter competition analysis, that certainly does not give sustainability a trump card. Ecological economists may disagree with the standard models of growth and consumer welfare, and some people in this room might sympathise with that position. But that is not a debate for the judge deciding a competition law case. As of now, competition policy remains concerned with efficient market transactions and the necessary trade-offs that come with them.[17] What the courts can do is to interpret competition law coherently with a legal system in which climate change and climate policy form part of the economic and regulatory background.

Indeed, I would go further, and say that to do so, where relevant, is a faithful reflection of the purposes of the competition law rules. Competition law is not an arid tool for theorists of industrial economics. It springs from a concern about the negative effects on society of untrammelled market power, whether arising from market concentration, or from collusion. In the US Supreme Court decision in the case of *Spectrum Sports v McQuillan*, Justice Byron White said that:

> "The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy

15 OFT decision in CA98/17/02 *Lucite International and BASF* (29 November 2002), §§39–40.

16 *R (Cityhook) v Office of Fair Trading* [2009] EWHC 57 (Admin), §§108–109.

17 See Suzanne Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press 2011), p. 190.

> competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest."[18]

Thirteen years later, Lord Nicholas Stern said that "Climate change presents a unique challenge for economics: it is the greatest and widest-ranging market failure ever seen."[19] So it is not surprising that climate change and sustainability issues are increasingly visible in competition law policy and analysis.[20]

(2) Environmental sustainability under the Chapter I and II prohibitions/Articles 101 and 102 TFEU

Chapter II prohibition/Article 102 TFEU

Moving on to the way in which environmental sustainability has already arisen in competition analysis, I'll begin with abuse of dominance. It is well-established that the categories of abuse are not closed. In the 23 years since the Competition Appeal Tribunal was established, its cases have moved from challenges to the pricing conduct of pharmaceutical companies and utilities, through to today's collective actions challenging the business policies of multinational technology companies. That evolution illustrates the ability of competition law to respond to new forms of market power and distortions of competition.

A comment made by Lord Justice Green in his judgment refusing permission to appeal the Tribunal's decision to certify Dr Gormsen's collective action against Meta makes just this point:

> "… this is an area of law which is, *par excellence*, new and evolving. The use of data as a proxy for monetary payment is a rapidly increasing phenomenon of modern digital life and as such it is generating a range of new legal issues. As was pointed out in *Flynn Pharma* … the law is flexible and there is no single test which must, necessarily, be applied to determine abuse."[21]

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18 *Spectrum Sports v McQuillan* (1993) 506 US 447, 458.

19 Lord Nicholas Stern, *Stern Review on the Economics of Climate Change* (Cambridge University Press, 2007), Executive summary.

20 It is notable that the current Commissioner for competition, Teresa Ribera Rodríguez, is also responsible for a "clean, just and competitive transition" to a decarbonised economy, working with the Commissioner for Climate, Net Zero and Clean Growth: see mission letter from President von de Leyen (17 September 2024), noting that "Europe needs a new approach to competition policy – one that is … better geared to our common goals, including decarbonisation".

21 Above n. 12, §30.

Some commentators argue that environmentally unsustainable business practices should be regarded as abuses in themselves, on the basis that such conduct should not be regarded as competition on the merits.[22] That debate may well reach the courts. But even without going that far, the existing case-law already provides clear indications of the ways in which environmental considerations might arise in abuse of dominance cases, through the application of the existing categories of abuse.[23]

In *AstraZeneca*, for example, manipulating a regulatory process through misleading representations was found to constitute an abuse of a dominant position.[24] It doesn't take a leap of imagination to envisage the same principle arising in an environmental context. An abuse might arise if a dominant undertaking were to misrepresent its emissions or environmental performance in order to obtain or retain a regulatory advantage: for example, to secure an environmental permit, or avoid regulatory restrictions or costs. Breaches of environmental regulations might also lead to higher costs for consumers, whether through the exclusion of competitors or other mechanisms. An argument along these lines has already been advanced in the *Roberts v Severn Trent Water* litigation, to which I will return later.

Likewise, limiting technical development is expressly identified as a possible form of abuse. The classic case of *Magill* established that a refusal to supply can also be an abuse where it prevents the emergence of a new product for which there is consumer demand.[25] *Magill* itself concerned the publication of television guides. Today, *Magill* arguments are more typically made in relation to access to technology, such as aspects of Apple's iOS operating system in the *Kent v Apple* case.[26] *Android Auto* is an example of this sort of analysis being used in a green technology case. Google had refused to make its Android Auto platform interoperable with Enel's app for finding electric vehicle charging stations, which competed with Google

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22 See e.g. Iacovides and Vrettos, "Radical for Whom? Unsustainable Business Practices as Abuses of Dominance" in Holmes, Middelschulte and Snoep (eds), *Competition law, Climate Change & Environmental Sustainability* (Concurrences, 2021), with further references; and Holmes, "The New Article 102 Guidelines and sustainability", (2026) 11 *Concurrences* 25, 27.

23 See Kingston, above n. 17, pp. 299–327.

24 Case T-321/05 *AstraZeneca v Commission* EU:T:2010:266, in particular §§352–61; upheld in Case C-457/10 P *AstraZeneca v Commission* EU:C:2012:770, §§98–99. See also *Roberts v Severn Trent Water* [2026] EWCA Civ 222, §§47 and 63.

25 Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission (Magill)* EU:C:1995:98, paras 50–57.

26 *Kent v Apple* [2025] CAT 67, §§371ff.

Maps. The Italian competition authority imposed a fine of more than €102m, which was substantially upheld by the Italian courts following a reference to the Court of Justice.[27]

There is nevertheless a legitimate concern that the prohibition of abuse of dominance should not be turned into a general regulatory tool. The Competition Appeal Tribunal emphasised in *Gutmann Trains* that competition law is not a general law of consumer protection. And a dominant undertaking does not commit an abuse merely because it could have conducted its business in a different way that benefited consumers.[28] The question must always be whether the disputed conduct differs from competition on the merits.

For present purposes, however, the key point is that when we ask what does constitute competition on the merits, it is necessary to have regard to the reality of the economy as it has developed today. That may include giving value to something which, a generation ago, would not have been regarded as a relevant parameter of competition.

An example is the valuation of user data in the digital economy, which I have already mentioned. In *Meta v Bundeskartellamt*, the CJEU held that access to personal data and the processing of that data have become a "significant parameter of competition between undertakings in the digital economy", such that to exclude that when assessing abuse of dominance would "disregard the reality of this economic development".[29] Similar arguments are in my view likely to arise in relation to the green economy.

So far, I have been discussing what some commentators refer to as the use of Article 102 or the Chapter II prohibition as a "sword", to address practices that are harmful to the environment. The other side of the analysis is that environmental obligations might also be relied upon as a shield, to rebut the suggestion that conduct is exploitative or exclusionary in the first place.[30] For example, if environmental regulatory requirements increase a company's

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27 Case C-233/23 *Alphabet v Autorità Garante della Concorrenza e del Mercato* EU:C:2025:110.

28 *Gutmann v First MTR* [2025] CAT 64, §79.

29 Case C-252/21 *Meta v Bundeskartellamt* EU:C:2023:573, §51.

30 Holmes, Kar and Cunningham, "Sustainability and Competition Law in the United Kingdom" in Këllezi, Pierre and Kilpatrick (eds), *Sustainability Objectives in Competition and Intellectual Property Law* (Springer 2024), p. 230. Holmes, "The New Article 102 Guidelines and sustainability", above n. 22, pp. 29–34.

cost base, that might justify the charging of higher downstream prices.[31] Reductions in emissions or waste might also be put forward as efficiencies benefiting consumers.

The Commission's new guidelines on the application of Article 102 to exclusionary conduct by dominant undertakings, published in September this year, confirm that an objective necessity defence may relate to the pursuit of a "genuine and objectively defined public interest objective", such as public health objectives, contribution to the EU's resilience, or other public interest considerations.[32] Sustainability objectives can easily fit in that list. The guidelines also recognise the potential for sustainability benefits leading to efficiencies, including addressing climate change, reducing pollution, and limiting the use of natural resources.[33]

But there are, again, important limits to this. The Commission emphasises that the pursuit of public interest objectives may not be used as a pretext for a dominant undertaking to disguise conduct that is aimed at strengthening its dominant position, such as by seeking to eliminate products that are said to be dangerous or inferior. The scope of that principle has been the subject of debate in the *Kent v Apple* case. Given the pending appeal in that case, I will simply say that this is clearly a topic of ongoing interest.

Finally, in relation to abuse of dominance, we should recognise that environmental initiatives may themselves give rise to concerns. An example is Germany's *Grüne Punkt* or "Green Dot" system for the collection and recovery of used packaging. The operator of that system originally had a de facto monopoly. But the system was objected to on the grounds that it required manufacturers to pay a licence fee by reference to all packaging bearing the Green Dot, even where some of that packaging was in fact collected and recovered through a competing recycling system. The European Courts upheld the Commission's conclusion that the scheme was contrary to Article 102, because the charging structure made it more difficult for customers to use rival recycling systems, and it therefore created a barrier to new entry and growth.[34] The

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31 See for example the discussion in *Albion Water v Water Services Regulation Authority* [2006] CAT 23, §§531–534 and 806.

32 European Commission, Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings, OJ C/2026/4675, §210.

33 ibid, §217 and fn 449.

34 Case T-151/01 *Der Grüne Punkt – Duales System Deutschland v Commission* EU:T:2007:154, §§48 and 178, upheld on appeal in Case C-385/07 P, EU:C:2009:456.

consequence was that the system was restructured, leading to a more competitive market with numerous different recycling systems.

A similar issue arose in the CMA's investigation of rapid EV charging at UK motorway service areas. This matters for sustainability and the government's decarbonisation ambitions, and, more selfishly, for getting my electric car to the Scottish Highlands without running out of charge. The conduct at issue was a series of long-term arrangements giving the Electric Highway network the exclusive right to install and operate charging points at sites covering around two-thirds of motorway service areas.

The CMA acknowledged that some exclusivity could help support the substantial upfront investment needed to expand the charging infrastructure, including at less profitable sites. But the CMA was concerned that rivals could be foreclosed, weakening competitive pressure and potentially leading to higher prices, poorer service and less investment. The CMA therefore sought to strike a balance, agreeing commitments permitting exclusivity for a limited period, but then opening up competition to enable new entry when competition would likely become more viable.[35]

Chapter I prohibition/Article 101 TFEU

Turning from dominance to collusion, there have been several cases where competition regulators have investigated agreements between competitors to limit competition in making their products more sustainable. An example is the Commission's 2021 decision in the *Car Emissions* case, where the Commission fined various car manufacturers for agreements which limited competition on the design and technical specifications of their vehicles in relation to the reduction of NOX emissions. In a press conference on the day the decision was published, Commissioner Vestager commented that "In today's world, polluting less is an important characteristic of any car. And this cartel aimed at restricting competition on this key competition parameter".[36]

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35 CMA decision in Case No 51050 *Decision to Accept Binding Commitments in Relation to Certain Exclusive Arrangements for the Supply of Electric Vehicle Chargepoints* (March 2022).

36 Commission decision in Case AT.40178 *Car Emissions*, C(2021) 4955; and Statement/21/3583 (8 July 2021).

More recently, the CMA investigated end-of-life vehicles, and in 2025 it found that a number of major vehicle manufacturers had participated in an agreement not to advertise when their vehicles exceeded the minimum requirement for a vehicle's recyclability. They also agreed limits in their marketing regarding the percentage of recycled material used in their vehicles. The CMA found that this was an object infringement, with the penalty reflecting that agreements which affect sustainability and the ability of consumers to make informed choices are serious infringements.[37]

But in some circumstances, cooperation between competitors may be necessary to achieve environmental benefits that firms cannot deliver alone. In particular, a first mover may incur costs that its rivals avoid. Common standards, new infrastructure and cleaner technologies may also depend on joint action across industries and supply chains. The question is then how to distinguish cooperation that is genuinely necessary to achieve a sustainability objective from coordination that suppresses competition.

That question can largely be answered using familiar competition-law principles. At a fundamental level, the tools needed to assess such arrangements already exist within the Chapter I prohibition and Article 101. Some agreements may fall outside the prohibition altogether because they do not appreciably restrict competition.[38] It might also be possible to apply the doctrine of ancillary restraints, or the *Wouters* and *Meca-Medina* line of cases on agreements that pursue legitimate public interest objectives.[39]

Most importantly, sustainability agreements may qualify for exemption under Article 101(3) or s. 9 of the Competition Act. Two conditions are particularly relevant here: the agreement must improve production or distribution, or promote technical or economic progress, and it must allow consumers a fair share of the resulting benefits. There appears to be fairly widespread acceptance, at least in Europe, that agreements pursuing certain types of environmental benefits may contribute to economic or technical progress.

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37 CMA decision in Case 51098 *End-of-life vehicles* (1 April 2025), §7.55.

38 See e.g. Commission's informal guidance in Case AT.40976 *APM Terminals* C(2025) 4523 final, concerning a sustainability agreement to reduce CO2 emissions in European ports, press release IP/25/1769.

39 Kingston, above n. 17, pp. 233–42; and Case C-209/23 *FT and RRC Sports* EU:C:2026:597, §176 for a recent statement of the *Wouters* doctrine.

The harder question is whose benefits count. Can an exemption take account of benefits beyond the affected market – so-called "out of market" benefits? This is particularly acute for sustainability agreements. Emissions reductions do not only benefit the buyers of a particular product, but affect consumers across the market and indeed across the world. Biodiversity improvements may also be felt far beyond the relevant market. In both cases, the benefits may take years to materialise. So how should competition law deal with those benefits?

Article 101(3) and s. 9 of the Competition Act contain no express requirement that benefits must accrue within the same market in which competition is restricted. So it might be argued that the relevant question is simply whether the agreement produces sufficient benefits to justify the restriction, rather than whether those benefits accrue to the specific consumers affected. On the other hand, in the *Interchange fee* litigation, both the CJEU and the Supreme Court have said that the general position is that benefits on one side of the market cannot compensate for restrictions of competition on the other side of the market.[40]

As the CMA and others have pointed out, however, the *Interchange fee* litigation concerned two separate groups of consumers: retailers on one side of the market, and cardholders on the other. There are of course sound reasons for not adopting an approach to the exemption provisions which would allow or require competition authorities and the courts to trade off the interests of one category of consumers over another.[41]

But the analysis of environmental agreements addressing issues such as climate change is different, because the benefits of mitigating the impact of climate change apply to society as a whole. That includes the very same consumers as may be affected by the restrictive effects of the agreement. The CMA therefore considers that a different approach should be taken to climate change agreements, as I will explain shortly.[42] The Commission's 2023 Horizontal Cooperation Guidelines also expressly recognise that "collective benefits" accruing to a wider

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40 Case C-382/12 P *Mastercard v Commission* EU:C:2014:2201, §242; *Sainsbury's v Mastercard* [2020] UKSC 24, §§166, 172–4.

41 AG Mengozzi opinion in Case C-382/12 P *Mastercard v Commission* EU:C:2014:42, §158; *Sainsbury's v Mastercard*, ibid, §174.

42 CMA, Guidance on the Application of the Chapter I Prohibition in the Competition Act 1998 to Environmental Sustainability Agreements (12 October 2023), §§6.2–6.7 and fn 83.

section of society than just consumers in the relevant market may in certain circumstances be taken into account. In particular, the Guidelines note that:

> "… where consumers in the relevant market substantially overlap with, or form part of the group of beneficiaries outside the relevant market, the collective benefits to the consumers in the relevant market that occur outside that market can be taken into account if they are significant enough to compensate the consumers in the relevant market for the harm that they suffer.
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> For example, drivers purchasing less polluting fuel are also citizens who would benefit from cleaner air, if less polluting fuel were used. To the extent that a substantial overlap of consumers (the drivers in this example) and the wider beneficiaries (citizens) can be established, the sustainability benefits of cleaner air can be taken into account, provided that they compensate the consumers in the relevant market for the harm suffered."

The Commission therefore allows wider benefits to count where consumers in the relevant market "substantially overlap with", or form part of, the wider group of beneficiaries, provided that the benefits to those consumers are sufficient to compensate them for the harm they suffer.[43]

I can't leave the subject of sustainability agreements without commenting on the famous or perhaps infamous Dutch case concerning the *Chicken of Tomorrow* initiative. The case involved an industry-wide proposal for supermarkets, poultry producers and processors to agree to replace conventionally produced chicken with chicken meeting higher animal-welfare standards. Those involved no doubt expected that the initiative would be viewed favourably. But the Dutch competition authority, the ACM, concluded that the additional costs of the measures outweighed the benefits, even taking account of animal welfare and the positive environmental effects. The ACM also conducted a follow-up study a few years later, which suggested that the chicken market was *not* in fact one in which there was a first-mover disadvantage, because supermarkets had anyway begun to differentiate themselves from their competitors by offering more sustainable chicken products.[44]

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43 European Commission, Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements [2023] OJ C259/1, §§584–5, though see the comments of Dolmans and DeTar, "A Consistent Sustainable Policy for All Areas of EU Competition Law" in Levy, Winckler (eds), *Olivier Guersent Liber Amicorum* (Concurrences 2026), 307, at pp. 315–19.

44 Netherlands Authority for Consumers and Markets, "ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow'", ACM/DM/2014/206028; and ACM, "Dutch supermarkets offer chicken meat that is more sustainable without any anticompetitive agreements" (1 September 2020). The 2020 study report did, however, comment that it was possible that, despite the ACM's negative assessment of the initiative, the Chicken of Tomorrow agreements remained a focal point for the actions of supermarkets and other parties in the supply chain: see ACM report, "Welzijn kip van nu en 'Kip van Morgen'", 13 August 2020, pp. 3–4.

The case is somewhat different from some of the other situations I have discussed, given its focus on animal welfare rather than environmental issues such as carbon emissions and pollution. But it is a good example of a competition authority being willing and able to measure and weigh the costs and benefits to consumers of non-economic initiatives, although there have unsurprisingly been different views about the outcome of that analysis.[45]

(3) Regulatory action

Faced with that sort of divergence of views, and the consequent uncertainty for businesses, many competition authorities have responded by seeking to explain how they intend to apply competition-law principles to sustainability agreements.

United Kingdom

In the UK, the CMA published its Green Agreements Guidance in 2023. That Guidance starts from a straightforward premise: that industry collaboration is likely to be essential to delivering the UK's net zero ambitions, and that competition law should not impede legitimate collaboration that is needed to promote environmental sustainability.[46] This reflects the CMA's aim to do more with the existing competition law framework to support net zero and sustainability goals.[47]

The Green Agreements Guidance identifies categories of arrangements that are unlikely to infringe competition law, including collaboration to develop environmental standards, pooled sustainability information, and the setting of industry-wide environmental targets. In addition, the Guidance sets out how the exemption of restrictive agreements will be addressed by the CMA, noting that benefits to consumers can include future as well as current benefits. For agreements other than climate change agreements, the approach is for wider environmental

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45 See e.g. Holmes, "Climate change, sustainability, and competition law", (2020) 8 *Journal of Antitrust Enforcement* 354, n. 136; and with a different perspective Schinkel and Treuren, "Green Antitrust: Friendly Fire in the Fight Against Climate Change" in *Competition law, Climate Change & Environmental Sustainability*, n. 22 above.

46 Above n. 42, §§1.3 and 1.5.

47 CMA, Environmental sustainability and the UK competition and consumer regimes: CMA advice to the Government (14 March 2022). See also CMA Annual Plan 2026 to 2027 (23 March 2026) and earlier action plans, referring to environmental sustainability and net zero goals.

benefits to be taken into account only where they are enjoyed by the consumers of the product in question.[48]

But climate-change agreements are treated differently, as I have already mentioned. For these, the CMA says that it is appropriate to take into account the totality of the climate change benefits that the agreement brings to *all* UK consumers, on the basis of the magnitude of the risk of climate change, the degree of public concern, and the binding national and international commitments entered into by successive UK governments, some of which I mentioned earlier. The CMA therefore considers that climate change represents a "special category of threat" which sets it apart and requires a different approach to out of market benefits.[49]

The CMA has so far issued four pieces of informal guidance under its Green Agreements Guidance. The initiatives related to food-sourcing resilience, supermarket supply chain emissions, environmental, social and governance (ESG) due diligence in the construction sector, and regenerative farming networks. A point to highlight is that the second of those initiatives was analysed under the specific framework for climate change agreements. This was an initiative coordinated by the UK branch of World Wide Fund for Nature (WWF-UK) to encourage supermarkets to commit to reducing greenhouse gas emissions in their supply chains in particular ways. The CMA considered that the initiative might give rise to some anti-competitive effects, but that it would be reasonable to expect that the potential climate change benefits would equal or exceed any adverse effects on consumers.

It is too early to say whether this approach will be adopted more generally in competition law analysis. But what can be said is that this represents a serious attempt to reconcile the practical realities of climate change with established competition-law doctrine, rather than seeking to create an entirely new exemption regime.

European Union

We can see a similar development in the EU through the inclusion of a dedicated chapter on sustainability agreements in the Commission's 2023 Horizontal Cooperation Guidelines, which I have also mentioned. Those Guidelines recognise that sustainability agreements may be used

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48 Above n. 42, §5.22.

49 ibid, §6.4.

to address market failures associated with environmental externalities such as pollution or greenhouse-gas emissions, and they provide detailed guidance as to the circumstances in which cooperation may be lawful. The guidelines also establish a safe harbour for certain sustainability-standardisation agreements, and they explain how Article 101(3) should be applied in that context.[50] Consistent with the approach of the CMA, therefore, the Commission's approach seeks to explain how the established Article 101 principles can and should be applied where the cooperation in issue pursues environmental objectives.

While these guidelines are the first to consider, in depth, the subject of sustainability agreements, the Commission's willingness to recognise environmental benefits is not new. In the *CECED* case in 2000, washing-machine manufacturers accounting for approximately 95% of European sales had agreed to discontinue the most energy-inefficient machines and improve the environmental performance of future products. Although the agreement was expected to reduce competition in that respect and increase prices, the Commission concluded that the resulting energy savings and environmental benefits justified an exemption under Article 101(3).[51] The 2023 Guidelines now build on that practice, by setting out a more detailed and transparent framework for the application of Article 101 to sustainability agreements going beyond purely environmental agreements.

Other countries, EU and beyond

Other authorities have taken similar steps. I will mention just a few. In October 2023, the Dutch competition authority produced guidance on its approach to sustainability agreements.[52] It has since used that guidance to clear a range of proposed initiatives, including an agreement between soft-drink suppliers to remove plastic handles from multipacks, cooperation on the transport and storage of carbon dioxide beneath the North Sea, arrangements among waste

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50 Above n. 43, chapter 9. Sustainability agreements are defined broadly to encompass not only environmental agreements (addressing, for example, climate change and reduction of pollution) but also agreements directed to the support of economic and social development, including labour and human rights: see §517.

51 Commission decision 2000/475/EC *CECED* [2000] OJ L187/47.

52 An English translation together with summaries of decisions can be found at: https://www.acm.nl/en/publications/policy-rule-acms-oversight-sustainability-agreements

collectors designed to promote recycling, and an agreement between garden centres to bar growers of plants who use illegal pesticides.[53]

In August 2024, the Portuguese Competition Authority published its Best Practices Guide on Sustainability Agreements, and the Belgian competition authority published similar guidelines on sustainability agreements in April this year. Competition law and sustainability guidance has also been produced by the Australian Competition and Consumer Commission, the Japanese Fair Trade Commission, and the New Zealand Commerce Commission.[54]

Austria has adopted a somewhat different approach. Rather than relying solely upon guidance, the Austrian legislature amended its Cartel Act in 2021 to make explicit provision for sustainability benefits within the exemption analysis, by specifying in the Austrian equivalent of Article 101(3) that consumers shall also be considered to be allowed a fair share of the resulting benefits where an agreement "contributes substantially to an ecologically sustainable or climate-neutral economy". That allows reference to be made to benefits accruing more broadly than to consumers in the affected market, providing a legislative answer to the question I raised earlier about out of market benefits.[55]

Contrasting perspectives from beyond the EU

It is, however, important to note that there is still an active debate as to the role that environmental objectives play within a competition law analysis, particularly outside the EU. In the US, there has been both green and anti-green antitrust litigation, which could probably be the subject of an entire lecture in its own right. For now I will simply mention the *Texas v BlackRock* case, where the state of Texas alleged that various top asset managers had agreed to use their shareholdings in coal companies to reduce coal output, which would in turn raise energy prices. The case survived a motion to dismiss in 2025, and one of the three defendants

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53 ICC (2023), "Taking the chill factor out of climate action – A progress report on aligning competition policy with global sustainability goals", pp. 11–12.

54 For a multi-jurisdictional overview, see ICC Guide "How to navigate sustainability agreements without breaching competition law – Applying competition law to sustainability agreements in the European Union, Germany, Japan, New Zealand, South Africa, United Kingdom and United States" (2nd edition, 2026).

55 Cartel Act s. 2(1); See also Austrian Federal Competition Authority Guidelines on the Application of Sec. 2 para. 1 Cartel Act to Sustainability Cooperations (September 2022), and Robertson, "Sustainability: a world-first green exemption in Austrian competition law" (2022) 13 *Journal of European Competition Law & Practice* 426.

settled this year, agreeing to avoid imposing ESG goals on its investments. But the other two defendants have not settled and the case is now listed for trial in 2028.

Beyond the US, another high-profile case has been the controversy surrounding the Amazon Soy Moratorium in Brazil, which was an agreement established in 2006 by major soy traders not to purchase soy produced on newly deforested areas of the Amazon. Its objective was to reduce soy-driven deforestation, while allowing agricultural production to continue on existing farmland. The initiative is frequently cited as an environmental success and is associated with a substantial reduction in soy-related deforestation, even while soy production continued to grow.

But despite those apparent benefits, Brazil's competition authority opened an investigation in 2025, with allegations that the Moratorium operated as an illegal buyer cartel, and a collective boycott against farmers who deforested land. The dispute ultimately reached the Brazilian Supreme Court, which concluded in 2026 that the Moratorium was constitutional and that any competition complaints against it should be dismissed. The Court accepted that the environmental objectives pursued by the arrangement, together with its broader economic benefits, were capable of justifying the cooperation between the participating traders.[56]

Competition litigators may gaze with envy at the progression of a case from regulator to Supreme Court in only a year. But for the subject of this lecture, what these two examples show is that although environmental considerations are increasingly recognised as relevant to competition law, there is not yet global unanimity on the question of how to take them into account.

(4) State aid and subsidy control

Let us now move on to the role of State aid and subsidy control regimes. As I have already noted, transition to a more sustainable economy comes at a cost. So who should pay? Within the EU, it is by now well-established that State aid is an important mechanism by which Member States can and do support the transition to a lower-carbon economy. The framework

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56 STF, ADI 7774 & ADI 7775, Ata de Julgamento, Tribunal Pleno, 12 August 2026. Note, however, that although the Supreme Court upheld the constitutionality of the Soy Moratorium, it also upheld state laws that remove tax incentives from farmers who comply with it. A number of commentators have suggested that, in practical terms, this may significantly undermine the effectiveness of the Moratorium and could ultimately lead to its demise.

governing when such aid may be granted is set out, in part, in the Commission's Climate, Environmental Protection and Energy Aid Guidelines, which entered into force in 2022.

Under these Guidelines, Member States may provide support for renewable-energy generation, industrial decarbonisation, environmental protection measures, clean technologies and other investments that might not otherwise occur. State aid frameworks have also enabled Member States to support the transition away from coal and other carbon-intensive forms of power generation, including support for plant closures, industrial transition measures and investment in lower-carbon alternatives.[57] It is interesting to note that over the past two decades the approach taken by the Commission has decisively shifted from separate assessment frameworks for aid for energy and environmental objectives to the multisectoral framework that is now applied, which is broadly focused on climate neutrality and cross-industry decarbonisation.

The UK's equivalent to the EU guidelines is found in the Energy and Environment Principles in Schedule 2 to the Subsidy Control Act 2022. Those principles provide a framework through which public authorities can support environmentally beneficial technologies, infrastructure projects and industrial transition measures, including subsidies directed towards the reduction of emissions. Importantly, as with the EU State aid framework, it remains necessary to show that the subsidies are designed to remedy an identified market failure, are limited to what is necessary and proportionate to achieve their objective, and are designed to bring about a change of economic behaviour of the beneficiary.[58]

These principles were referred to in the recent litigation between Zenobē Energy and GEMA, in the Competition Appeal Tribunal.[59] The case concerned a cap and floor scheme encouraging investment in long-duration electricity storage – in other words, storing electricity when renewable output is plentiful, and releasing it when wind or other renewable generation falls. Zenobē challenged aspects of the scheme under the Subsidy Control Act, arguing (among other things) that GEMA had failed to consider the energy and environmental principles under the

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57 European Commission Climate, Environmental Protection and Energy Aid Guidelines (CEEAG) [2022] OJ C 80/1.

58 See the main subsidy control principles in Schedule 1 to the Subsidy Control Act 2022.

59 *Zenobē Energy v Gas and Electricity Markets Authority* [2026] CAT 53.

Act. Its underlying concern was that support for long-duration storage could distort competition to the detriment of shorter-duration technologies, which are the focus of its own business.

Ultimately, the Tribunal did not get into these issues, because it held that there was in fact no subsidy decision within the meaning of the Subsidy Control Act. In any event, the Tribunal said that the scheme fell outside its jurisdiction because it was established under a statutory duty imposed on GEMA by the Electricity Act. The case nevertheless illustrates the point that environmental sustainability is already starting to feature in subsidy control litigation in this jurisdiction.

(5) Environmental collective proceedings

Finally, I turn to collective proceedings brought on environmental grounds. In the UK, various environmental collective claims have been brought as private law actions, in some cases managed through group litigation orders. Examples are the *Dieselgate* emissions litigation[60] and the *Mariana Dam* litigation,[61] as well as various domestic environmental damage claims.[62]

Group litigation procedures can be used to manage private claims. The UK does not, however, have a dedicated procedure for bringing collective actions on broad public interest grounds, unlike (for example) the collective actions regimes in the Netherlands and Portugal, which I have spoken about on another occasion. Nevertheless, given the comments that I have already made about the potential for environmental claims to be made on competition law grounds, it is not surprising that there are now signs that claimants might seek to fill this lacuna by making use of the Competition Act collective actions regime.

We have already seen the first attempt to do so. In 2023 and 2024 Professor Roberts filed a series of collective proceedings in the Competition Appeal Tribunal on behalf of household consumers against a number of water and sewerage companies. The claims alleged that the companies had under-reported pollution incidents to Ofwat, which had enabled them to charge customers more than they otherwise would have been able to do. The claims framed the alleged

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60 *Various claimants v Mercedez-Benz Group and others* [2026] EWHC 1753 (KB).

61 *Municipio de Mariana v BHP Group* [2025] EWHC 3001 (TCC).

62 See e.g. Damian Grave, Maura McIntosh, Gregg Rowan and others, *Class Actions in England and Wales* (Sweet & Maxwell) 3rd Edition, ch 11.

breaches of environmental reporting obligations as abuses of dominance under the Competition Act.

The Tribunal ultimately refused to certify the proceedings, but it did *not* conclude that conduct of this kind could never engage competition law. Rather, it held that Parliament had established a specialist statutory framework under the Water Industry Act 1991 for regulating the conduct in question and that, on the proper construction of that framework, the abuse of dominance cause of action was unavailable in this case.[63] The Court of Appeal upheld the Tribunal's decision by a majority earlier this year,[64] but the Supreme Court has given permission to appeal, with the hearing listed for next February. Whatever the outcome of that appeal, the case indicates the potential of using the competition collective actions regime as a route for obtaining redress for environmental harms.

It would be premature to conclude that environmental collective proceedings are about to become a major category of competition litigation. But I suspect that *Roberts* will not be the last attempt to use competition law as a vehicle for addressing conduct whose origins lie in environmental regulation. Private enforcement may therefore prove to be the next frontier in sustainability-related competition litigation in this jurisdiction.

Conclusion

In conclusion, let me return to where I began. Climate change is already influencing the way businesses operate, the technologies they develop and the choices that consumers make. As I have sought to show this evening, competition law has a long history of adapting to change. Its strength lies both in its enduring principles, and in the willingness of practitioners, competition authorities and courts to apply those principles to a changing world.

David Vaughan QC, a pioneer of his generation at the bar, was one of the first advocates to recognise the potential of European and competition law in domestic litigation, through landmark cases such as *Courage v Crehan* which established the right to claim damages for a breach of EU competition law.[65] I hope that the examples that I have discussed this evening

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63 *Roberts v Severn Trent Water* [2025] CAT 17.

64 *Roberts v Severn Trent Water* [2026] EWCA Civ 222, Zacaroli LJ dissenting.

65 Case C-453/99 *Courage v Crehan* EU:C:2001:465.

show how those of us who follow in his footsteps can bring that same pioneering spirit to the challenges of our own time.