Recognizing that businesses have an oversize role to play in mitigating climate change, some businesses are joining efforts in setting sustainability standards and criteria for their supply chain and operations. Some argue that such collaborations are anti-competitive because they could raise prices and harm consumers. However, several competition authorities have begun to clarify that if such collaborations are intended to increase environmental sustainability and climate mitigation effects, they may need to be considered important under the objective of climate change mitigation that governments want to achieve.

This paper explores what types of collaborative business activities can contribute toward mitigating climate change and whether such activities could potentially be chilled by competition laws. If indeed some such activities could be beneficial to society, how would one evaluate their effects both in terms of their impact on environmental sustainability? Lacking an economy-wide carbon price, this paper discusses the economics of and economic analyses that could be used to evaluate the impact of cooperations among businesses, with an emphasis on the potential effects of such cooperation on environmental sustainability and mitigation of climate change. In addition, this paper asks the question that if such cooperation can achieve outcomes equivalent to setting public policies that restrict greenhouse gas emissions, how should competition authorities consider the potential benefits created by such business collaborations when determining their potential impact on competition.

This paper only focuses on environmental sustainability only, not other parts of the “Environmental-Social-Governance” efforts. It discusses the general concepts in competition laws, with the focus on cooperation among businesses in achieving environmental sustainability.

I. Executive Summary

II. Introduction

A. Legal Landscape and Context in Europe and the U.S.

Competition authorities in the UK and Europe have been debating and deciding on how to treat cooperation between competing companies to achieve environmental sustainability (called “environmental sustainability agreements” by the UK Competition and Markets Authority.)

B. The questions raised include:

1. Do competition authorities have a responsibility to consider environmental sustainability and climate change when determining whether certain cooperation between companies may be deemed anti-competitive?

2. If so, how would competition authorities evaluate the potential effects of certain environmental sustainability agreements on competition?

C. “Environmental sustainability agreements” refer to agreements of concerted practices between competitors and potential competitors aimed at preventing, reducing or mitigating
the adverse impact that economic activities have on environmental sustainability. Economic activities that cause negative environmental externalities, including through pollution or contributing to climate change from greenhouse gas emission.¹

1. An example of cooperation between competing companies to achieve greater environmental protection and/or for mitigating climate change is firms collaborating with each other to jointly purchase inputs with low greenhouse gas emissions from suppliers. The competing companies might negotiate for and buy those inputs to reduce the cost of such “green” inputs, and thereby reduce the potential cost to consumers and to encourage the production of such “green” inputs.²

2. Other examples of cooperation between companies include: an agreement between manufacturers to phase out a particular production process which involves the emissions of greenhouse gases; an agreement between delivery companies to switch to using electric vehicles; or an agreement not to support such as financing or insurance to fossil fuel producers.³

D. This paper researches what types of business collaborations are being prevented by existing competition laws. What are the objectives of those collaborations? How are they different from existing collaborations that are allowed (such as joint research and development activities, standard setting)?

E. Some have raised questions about the role of competition authorities:

1. Some question whether competition authorities should have any role at all in environmental protection or climate change. If an action is anti-competitive, it does not matter whether that action happens to help improve environmental protection or reduce greenhouse gases.

2. Others argue that competition authorities should consider the resulting “sustainability benefits” when assessing whether the cooperation between companies are “worth the costs.”

Is there anything special about sustainability agreements that warrants some kind of special treatment by competition authority?

III. A New Framework Is Needed for Assessing the Relationship between Competition and Environmental Sustainability

A. Can cooperations among businesses that aim to achieve environmental sustainability bring about greater competition in the marketplace, versus the opposite? What kinds of joint

¹ See Section 2.1 of Draft guidance on the application of the Chapter 1 prohibition in the Competition Act 1998 to environmental sustainability agreements, Draft guidance, 28, February 28, 2023, UK Competition and Markets Authority, CMA 177.
² See Section 4.10 of Draft guidance on the application of the Chapter 1 prohibition in the Competition Act 1998 to environmental sustainability agreements, Draft guidance, 28, February 28, 2023, UK Competition and Markets Authority, CMA 177.
³ See Section 2.5 of Draft guidance on the application of the Chapter 1 prohibition in the Competition Act 1998 to environmental sustainability agreements, Draft guidance, 28, February 28, 2023, UK Competition and Markets Authority, CMA 177.
activities may contribute to competition at the same time contribute to mitigating climate change?

B. Do prior/existing competition laws stand in the way of sustainability efforts by the private sector?

The UK Competition & Markets Authority states:

There may be instances where, even if consumers are well-informed and competition is functioning properly, a market will operate in a way that is less environmentally sustainable than might be required to support a transition to Net Zero. Where this is the case, regulation may be the best way to address this market failure. Even in such cases, it is critical that consumer and competition law does not present barriers to the proper functioning of the market. (UK Competition & Markets Authority, Correspondence: Environmental sustainability and the UK competition and consumer regimes: CMA advice to the Government, March 14, 2022.)

C. Should competition law provide sufficient clarity and certainty such that it does not create a chilling effect inhibiting cooperation that would improve environmental sustainability? [This is an important point, particularly in the US.]

IV. What types of sustainability agreements do not harm competition?

A. When firms work with industry groups to set new standards to reduce GHG emission from their supply chain and processes, could they increase product differentiation that better serve consumers?

1. Could innovative product or service differentiation increase the competitive forces in the market?

2. Could firms create new products and services via joint efforts and thereby help create demand that otherwise might not emerge. Could the marketing of such new products and services help educate consumers about the benefits of environmental sustainability?

B. Could the benefits of certain industry-driven sustainability efforts accrue to society-at-large, and therefore is worth exploring a broader definition of the relevant markets?

1. The sustainability benefits may accrue to consumers that include those targeted by the products and services, plus, those outside of the immediately defined market. Under such circumstances, is it necessary to quantify those benefits both inside and outside of the defined market.

2. When the benefits accrue to “society-at-large,” those positive externalities could be compared to setting an equivalent sector-specific, or producer-specific carbon price. If that is the case, would it be useful to compare the potential costs associated with the “sustainability agreement” against the potential “cost of carbon emissions abated.”

3. Would it be helpful to articulate these benefits and evaluate whether the benefits are “worth” any of the alleged costs of sustainability agreements?
C. How should the businesses' policy objectives be examined?

1. Could businesses determine their own joint "sustainability goals" lacking government regulation?

2. What if those "sustainability goals" are not aligned with government goals?

D. Should joint efforts that claim sustainability goals and drive certain competitors out of business be considered anti-competition. For example, if a group of electricity buyers decide jointly that they will not purchase power from sources that pollute, and thereby drive certain power generation companies out of business. And then the buyers turn around and set up a subsidiary that invests in renewable energy generation. Are such activities considered anti-competition even if they achieve sustainability goals?

1. Is it possible that such sustainability agreements do not decrease competition? Once the joint efforts reduces support for legacy resources, such as coal power plants, do they also open up opportunities, for example, for other resources that compete to become the new types of resources, despite the group of buyers’ activities?

2. More generally, since competition does not stand still in time, can reducing support for legacy resources increase the competitive forces in the market for new resources or new technologies to compete and flourish.

V. Economic analyses are at the core of whether sustainability agreements may be anti-competitive.

A. Is it the case that there is no need to prove that more sustainable goods would have been more costly without the sustainability agreement if the new sustainable goods or services genuinely demonstrate innovation and progress? 4 (How would one know when something is demonstrating innovation and technical progress? Can these features be analyzed objectively?)

B. Can environment benefits be a part of quantifiable economic benefits that include cost savings (including externalities), innovation (finding new ways of doing business), improved quality and efficiency (measured by total energy in versus total energy out)?

When evaluating whether sustainability agreements harm competition, below are a few preliminary approaches to consider:

C. The analytical process and assumptions need to be clear.

1. Presumption of competition: Start by assuming that the joint efforts are genuinely used for and only for reducing environmental harms. Economic analyses could be and should be performed regardless of any alleged harm that might be caused by the joint efforts. (While the authorities may only pay attention to those that demonstrated

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some level of anticompetitive behaviors, efforts associated with environmental sustainability by themselves do not necessarily have to be anticompetitive in nature.)

2. Analyze the effects of the cooperation among businesses by measuring the impact in terms of environmental benefits, in tons of greenhouse gas emissions reduced, that otherwise could not be achieved.

   a) Present a counterfactual where the cooperation does not exist and the "race to the least cost" could mean greater damage to the environment. Also need to assume that public policy would change over time and therefore the effects of the collaboration among business would also evolve over time. (For example, future regulation may limit the greenhouse emissions from certain sectors or certain economic activities, and therefore, under those future circumstances, any incremental benefits of the cooperation between businesses would diminish.)

   b) Use as many real-life examples in the closest market as possible to demonstrate the effect of the cooperation among businesses.

   c) When measuring the impacts, need to be as specific as possible in the metrics used in evaluating the environmental benefits, including reductions in greenhouse gas emissions, air pollution, damaging land-use, and potential secondary effects.

   d) Cases should be evaluated based on the potential of their efforts, plus, the resulting effects. It is not enough to simply examined the results because sometimes the results might not have been anticipated, and/or, the results were strongly influenced by factors outside of the sustainability agreements.

VI. Economic approaches in traditional competition analyses and how accounting for environmental sustainability agreements might change them.

   A. Market Definition
   B. Impact on Consumers of Anti-competitive Behaviors
   C. Adjustments to the Traditional Market Definition
   D. Adjustments to the Consumer Group
   E. Other Approaches

VII. Where to Draw the Line?