CLIMATE CHANGE IS AN EXISTENTIAL THREAT: COMPETITION LAW MUST BE PART OF THE SOLUTION AND NOT PART OF THE PROBLEM

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I. INTRODUCTION: CLIMATE CHANGE – THE MORAL IMPERATIVE

It is increasingly accepted that we face a "climate emergency" and that "business as usual" is not an option.[2] What has this got to do with competition law? Well, very little and a lot.

A little in the sense that competition law is a small part of a very big picture. When I put off a light, cycle rather than drive, or eat chicken rather than beef, I can only make a minute contribution to the challenges we face. When we look at transport issues some will say agriculture is a bigger issue. And so on, and so on…

But, not only do we have to start somewhere, I argue that we have a moral imperative to do so and to take action whenever and wherever we can – and that includes competition law (our own particular niche).

And competition law does have a lot to do with climate change. At one level it is part of the capitalist system which is designed to use up more and more of the earth's scarce resources, producing more and more "stuff" that we do not need. It is not my goal in this article to challenge the whole system: there are excellent works by both economists such as Kate Raworth ("Doughnut Economics") and lawyers such as Michelle Meagher ("Stakeholder Competition") which do that.[3]

However, we do not need to attack the basic principles of capitalism or competition law to see that competition law is part of the problem.

The most obvious examples are where firms want to collaborate to make their businesses more sustainable. Examples from my own experience include:

- Supermarkets developing systems to increase recycling;
- Suppliers looking to reduce their use of plastics/packaging; or
- Suppliers and retailers looking to make fishing more sustainable.
- Examples from the cases include:
- Agreements to reduce car emissions;
- Attempts to encourage more sustainable chicken production; and

2 If you would like to read something on Climate change, how about "There is no Planet B" by Berners Lee?

3 Kate Raworth, "Doughnut Economics: seven ways to think like a 21st century economist." Michelle Meagher, "Competition is killing us. How big business is harming our society and planet-and what to do about it." due to be published by Penguin in September 2020. See also "Competition Overdose: how free market mythology transformed us from Citizen Kings to market servants," Maurice Stucke & Ariel Ezerachi.

- Agreements to increase the collection of plastic.
- Agreements to make more environmentally friendly washing machines.

Sometimes these initiatives have gone ahead and/or been approved. However, in many cases they have either been:

- rejected (e.g. "*Chicken of Tomorrow*")
- not pursued either:
    - after consideration of the competition law risks; or
    - not even considered for fear of the potential competition risks.

This was shown clearly in empirical research conducted by Linklaters with nearly 60 percent of businesses saying they had walked away from sustainability projects for fear of competition law (with 92 percent calling for changes or clarification of competition law). No wonder more and more of us are getting angry and frustrated!

Often all that is needed is some robust advice. Sadly, in many cases, that advice is unduly conservative and both business and competition authorities are over-risk averse. As a result, important initiatives that could help combat climate change are stifled or still-born.[4] Many examples of these sort of initiatives to help industry work on a more sustainable basis, and which should not generally fall foul of competition law, were set out recently in an excellent paper prepared by Unilever. It would be tragedy if these groundbreaking projects do not go ahead for unfounded fear of competition law.[5]

Some issues will be more difficult than this (but not impossible): e.g. agreements to pay a fair and sustainable price to poor farmers.

Others should be easy: e.g. agreements to facilitate recycling of packaging, etc.

What is clear is that we urgently need to move the dial radically in the direction of permitting arrangements that contribute to combatting climate change, in particular, and to protecting the environment and sustainable production in general.

Other areas where competition law may be relevant to sustainability issues include the approach to "abuse" in Article 102 cases and the analysis of mergers. These will be mentioned briefly below. For reasons of space, this paper does not cover the relationship between sustainability issues/climate change and either state aid and/or public procurement (although these are important issues which would merit separate papers in their own right).

My goal in this short article is to look at what can and must be done within the context of EU law as it is: i.e. on the basis of my reading of the EU treaties as they stand (a separate paper cited on the front page of this article looks at the position under UK law).

The starting point for any analysis of the treaties should be what I term their "constitutional" provisions – i.e. the important bits at the beginning that explain what they are all about.

Treaty on European Union – Article 3

Article 3 of the Treaty on European Union sets out the EU's objectives:

4 Many share this concern. For example, the Committee on Economic and Monetary Affairs of the European Parliament in its 2018 annual report on competition policy ("the Parliamentary Report"). See also "Competition Law and Sustainability. A Study into Industry Attitudes towards Multi-Stakeholder Collaboration in the UK Grocery Sector."

5 Unilever submission to the European Commission (under "competition law and sustainability": https://www.unilever.com/sustainable-living/our-approach-to-reporting/engaging-with-stakeholders/.

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Article (1)

"The Union's aim is to promote peace, its values and the well-being of its peoples"

Article 3(3)

"The Union … shall work for the sustainable development of Europe … and a high level of protection and improvement of the quality of the environment."

Article 3(5) says:

"it shall contribute to … the sustainable development of the earth" and to "free and fair trade." (emphasis added)

I accept that exactly what "sustainable" or "fair" mean in a particular context can be very difficult. However, I do not see how one can seriously argue that these concepts are not relevant in applying the rest of the treaties (and that includes the competition provisions).

In my view, reading these provisions together clearly indicates that where there is a conflict between sustainability and narrow economic goals the proportionality principle should be applied.

Furthermore, as we shall see this is written into the competition provisions of the treaty – most notably in Article 101(3). And, before anyone suggests this is all too difficult, and there is too great a risk of inconsistent outcomes (especially in a decentralized system), this is also the case with narrow price centric so-called "economic" considerations.

The Treaty on the Functioning of the European Union ("TFEU") Articles 7, 9, and 11

Just in case there was any doubt about the need to balance potentially conflicting goals, the TFEU makes this clear.

Article 7 says:

"The Union shall ensure consistency between its policies and activities taking all of its objectives into account." (emphasis added)

Article 9 says:

"In defining and implementing its policies and activities, the Union shall take into account … the 'protection of human health.'"

(Which is surely capable of taking into account having enough to eat and producing basic foodstuff on a sustainable basis?)

Article 11 says:

"Environmental protection requirements must be integrated into the definition and interpretation of the Union policies and activities, in particular with a view to promoting sustainable development." (emphasis added)

Where does it say "except when implementing the Union's policies on competition"? Nowhere – and it is not even optional: environmental consideration "must" be taken into account when implementing all of the EU's policies and activities.

Failure by the competition establishment to focus on the "constitutional" provisions of the treaties reflects a failure to note, and take proper account of, the move from a mere "Economic Community" (under the EEC or European Economic Community) to the much broader concept of a European "union" with the establishment of the European Union on November 1, 1993 – and everything that that entails for a wide range of social, political, economic and sustainability goals.

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Logically I would now turn to interpreting the competition law provisions in the light of these "constitutional" provisions. Unfortunately, I feel obliged to take a brief detour down the road that much of the competition establishment has taken over the last 30 years or so – the so-called "consumer welfare" detour.

A. The Consumer Welfare Detour

Where does this term appear in either the constitutional or competition provisions of the treaties? Answer: nowhere. Two points are noteworthy:

First, there is no basis for the adoption of a narrow "consumer welfare" test anywhere in the Treaties – and therefore in EU law (or the analogous national competition regimes in Europe).

Second, if consumer welfare were the correct legal standard, then it would not be a bad one if looked at afresh. A quick google of the meaning of the term "welfare" tells us that welfare is about "the health, happiness and futures of a person or group." Among other things it is synonymous with "well-being and good health. It is not just about "profit" or "fortune."

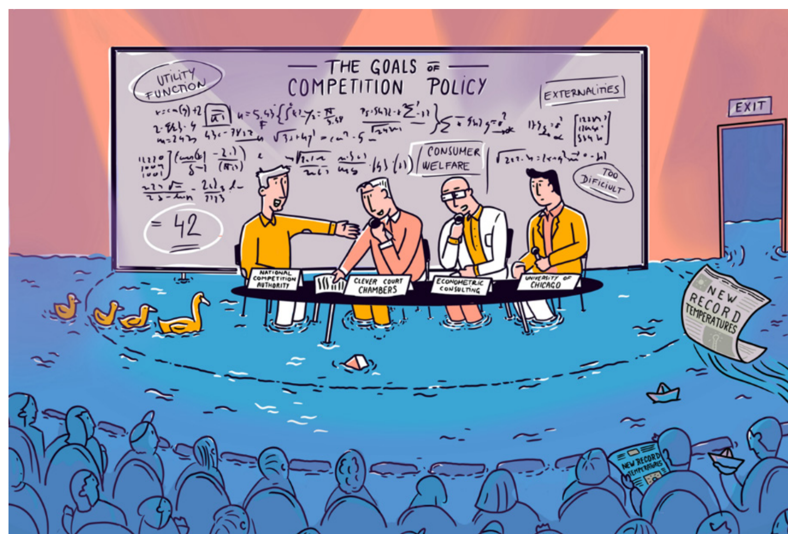
These concepts seem capable of encompassing concerns such as:

- having enough food to eat;
- having clean air to breathe; and
- producing goods using fewer resources.

In other words, they invite consideration of sustainability issues at least as much as narrow financial considerations.

Precisely what should be the goals of competition policy is the subject of extensive literature and endless debate.[6] What is clear, however, is that consumer welfare, in the narrow sense of consumer surplus, appears nowhere in the treaties and at most should only be part of a much wider set of goals focusing on both the competitive process and the core goals of the treaty set out above, including for present purposes, sustainability.

Rather than consider further the goals of competition in the abstract, I will briefly consider the competition provisions of the TFEU, particularly those dealing with potentially anti-competitive agreements (Article 101) but also with potential abuses of a dominant position (Article 102) and with mergers (the EU Merger Regulation). These issues are considered in more detail in my paper on "Climate Change, Sustainability and Competition Law" published in the Journal of Antitrust Enforcement by Oxford University Press.



6 Most leading textbooks include a discussion of the goals of competition law; e.g. Competition Law, Whish & Bailey, 9th ed at pages 18 to 24.

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II. ARTICLE 101. NEED AGREEMENTS PROMOTING SUSTAINABILITY BE CAUGHT BY ARTICLE 101 AND, IF THEY ARE, SHOULD THEY BE EXEMPTED?

In broad terms, Article 101(1) prohibits anti-competitive agreements and Article 101(3) provides for them to be exempted if certain conditions are met.[7]

My primary points are threefold:

(1) if we are serious about tackling the existential threat posed by climate change there is a political, economic and moral imperative to maximize the possibilities for allowing (and thus encouraging) arrangements to tackle climate change. Now is not the time to be timid;

(2) We have the legal tools to do this. Not only do the "constitutional" provisions of the treaties require this (see above) but there is plenty of authority from the Court of Justice of the EU ("CJEU) in support of this and a number of examples in Commission decisions to embolden us;

(3) My hope is that a better understanding of the legal possibilities (and legal requirements) should encourage the development of agreements to tackle climate change and other sustainability issues and diminish the dark shadow that competition law currently casts over potential collaboration.

I would suggest that there are five (overlapping) ways in which environmental or sustainability agreements might escape the prohibition on anti-competitive agreements:

(1) Some agreements are unlikely to restrict competition at all;[8]

(2) Take the view that sustainability agreements essentially fall outside Article 101(1) completely (the "Albany" route);[9]

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7 A number of articles, books and guidelines discuss the scope of these provisions – particularly the extent to which so-called "non-economic" or "public interest" factors can be taken into account. Good examples include:

- the "2004 Exemption Guidelines" and the European Commission's "Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements" (the "2010 Horizontal Guidelines");
- Polycentric Competition Law by Ioannis Lianos [UCL, Centre for Law; Economies and Society, Research Paper Series: 4/2018];
- Greening EU Competition Law and Policy by Suzanne Kingston;
- Sustainability and Competition Policy, Maurits Dolmans
- See also the UK Competition authority's contribution to the OECD policy roundtable on horizontal agreements in the environmental context, 2010.
- Environmental Protection as a Necessity for Competition Law, Gianni de Stefano.
- "A Fair Share: time for a carbon defence?" by Jordan Ellison.
- The submission by Unilever to the European Commission.

8 For example, the European Commission's 2001 Horizontal Guidelines said that an environmental agreement would be unlikely to restrict competition if:

a) it does not place any individual obligation on the parties, or if parties only commit loosely to contributing to a sector-wide environmental target,

b) the agreement stipulates environmental performance with no effect on product and production diversity, or

c) it gives rise to genuine market creation.

9 In the Albany case [*Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie.* Case C-67/96. ECR 1999 1-05751], the European Court of Justice ("ECJ") essentially decided that Article 101 does not apply to collective bargaining. The ECJ relied very heavily on the need to construe the "constitutional" provisions of the treaty with Articles 85(1) [now 101(1)] "as an effective and consistent body of provisions."

The court held that "agreements concluded in the context of collective negotiations between management and labor in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty." Exactly the same reasoning could be applied to sustainability agreements as for collective agreements in the workplace. The Albany judgment was very much a "political" or "policy" decision by the ECJ which was very conscious of the political sensitivity of competition law in the area of social policy.

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(3) See sustainability agreements as falling within the ancillary restraints/objective necessity doctrine (a less radical version of (2));[10]

(4) Some sustainability agreements fall within Article 101(3);

(5) Make more use of the more generous treatment of standardization agreements (essentially a variant on (1) and (4) above).[11]

The Exemption Route: Article 101(3)

Each of the above 5 options is considered in the fuller paper referred to above, but, unless it is clear that a sustainability agreement does not fall within Article 101(1) then, in my view, the most obvious way for it to escape the prohibition of that provision is for it to be exempted under Article 101(3). I will therefore discuss this option briefly here. There is a lot of academic debate about the scope of this exemption. However, my approach is quite simple: it is to look at what Article 101(3) actually says and interpret it (as the treaty says we "must") in the light of the "constitutional" provisions of the treaties. Article 101(3) requires an agreement to meet each of **four conditions** to be exempt.

CONDITION 1: Improvements & Progress

The agreement must: "contribute to improving the production or distribution of goods or to promoting technical or economic progress" (emphasis added).

Three things are immediately apparent:

(i) Again, there is no reference to "consumer welfare";

(ii) "Economic" progress is only one of four separate ways in which an agreement may meet the criteria of this condition;

(iii) Even if one focuses just on the "economic" criterion, many sustainability agreements will fall within this.

There have been a number of very helpful statements from the Commission over the years. For example:

"When the Commission examines individual cases, it weighs up the restrictions of competition arising out of an agreement against the environmental objectives of the agreement and applies the principle of proportionality in accordance with Article [101(3)]. In particular, improving the environment is regarded as a factor which contributes to improving production or distribution or to promoting economic or technical progress."[12] There have also been clear and helpful decisions of the Commission such as the much discussed CECED washing machine case.[13]

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10 There have been several cases over the years where the European Commission and the European courts have found a variety of agreements to fall outside Article 101(1) completely (either as "ancillary restraints" or as being "objectively necessary"). For a discussion of these concepts see Whish & Bailey, Competition Law, 9th Edition, pages 132 – 144. In principle, there is no reason why this approach should not be taken in the case of sustainability agreements such that proportionate restrictions inherent in a sustainability agreement, without which the Agreement would not have been concluded (*cf* Albany), and restrictions necessary to carry out an environmental regulatory task (*cf* Wouters) would fall outside Article 101(1) entirely.

11 There is no specific regulation or exemption for standardization agreements, and they would either need to fall outside Article 101(1), or meet the exemption conditions of Article 101(3), to escape the prohibition of Article 101. Many sustainability agreements take (or could take) the form of standardization agreements. Furthermore, the Commission's 2010 Horizontal Guidelines contain a specific chapter on standardization agreements and several commentators have suggested that environmental agreements have a greater chance of complying with Article 101 if constructed and assessed as standardization agreements.

12 XXV Report on Competition Policy.

13 CECED, OJ 2000 L187/47. In this case, the Commission granted an exemption to an agreement between producers and importers of washing machines (accounting for some 95 percent of European sales) which involved discontinuing the least energy efficient machines and pursuing joint energy efficient targets and developing more environmentally friendly machines. Despite increasing prices (by up to 19 percent) and removing competition on one element of competition, the Commission accepted that the collective benefits for society (i.e. a reduction in energy consumption) outweighed these costs.

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CONDITION 2: Fair Share for Consumers

The second condition which must be complied with for an agreement to be exempt under Article 101(3) is that the agreement allows "consumers a fair share of the resulting benefits."

"Consumer" could be read narrowly to mean just the actual or potential purchaser of the particular goods in question.[14] However, there are a number of reasons why this would be wholly unsatisfactory and it must be recognized that consumers have wider interests than their narrow financial ones (concerned with more or better goods at ever lower prices).[15]

In considering what is a "fair share" of benefits for consumers we should revisit the weight we attach to different factors. How much do we really benefit from having yet more cheap "stuff"? What weight should we attach to reducing carbon emissions and giving our children and grandchildren clean air to breathe? Unless we start to give proper weight to the things that really matter (climate change, health etc.) and question the weight to be given to narrow financial considerations, we will ask the right questions, but come to the wrong conclusions.

CONDITION 3: No More Restrictive Than Necessary

The requirement in Article 101(3) that the restrictions in an agreement should be no more restrictive than necessary[16] is an expression of the proportionality principle in EU law and is an important check on the broad approach (which I advocate) to the environmental improvement and progress of the first condition of Article 101(3).[17] It also invites consideration of less restrictive ways of achieving sustainability goals.

CONDITION 4: No Elimination of Competition

The final condition for exemption of an agreement is that there must be no elimination of competition in the relevant market.[18]

NB. My paper on these issues under UK law concludes that, notwithstanding the absence of equivalent constitutional provisions, the position on sustainability agreements under the UK equivalent of Article 101 is broadly the same (and same holds true for abuse of dominance considered below).[19]

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14 Unhelpfully, paragraph 47 of the Commission's 2010 Horizontal Guidelines says that "the concept of 'consumers' encompasses the customers, potential and/or actual, of the parties to the agreement."

15 These reasons include:

i) First, as shown above, Article 101(3) does not just relate to improvements in the production or distribution of goods. It may equally concern agreements relating much more generally to technical or economic progress where there may be no easily identifiable group of purchasers;

ii) As shown above, it is clear that environmental benefits fall within the first condition and these often benefit society as a whole not just a narrow group of purchasers;

iii) If there were any doubt about this then one should yet again recall the constitutional requirement that "environmental protection requirements must be integrated into the … implementation of [all] the Union policies and activities" (Article 11). To interpret the concept of "consumers" narrowly would run counter to this. Not only does this mean it cannot be correct as a matter of law, it would be contrary to the political, economic and moral imperative to do everything we (lawfully) can to combat climate change (let us not lose sight of this!)

iv) Happily, the Commission has often (but not always) recognized this – the clearest example being its CECED decision where it explicitly acknowledged that it was taking into account the "collective environmental benefits" of the agreement: the "environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers." This is consistent with the recognition in paragraph 85 of the Commission's 2004 Exemption Guidelines that "society as a whole benefits where the efficiencies lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources."

16 The third condition in Article 101(3) is that the agreement must not "impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives" (i.e. the improvements and progress referred to in the first condition for the applicability of Article 101(3) and discussed earlier above). In paragraph 73 of its 2004 Exemption Guidelines, the Commission suggests that this "implies a two-fold test. First, the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies. Second, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies." See also the examples of indispensable restrictions given in the Unilever submission.

17 For a discussion of these cases see, for example, Suzanne Kingston on Greening EU Competition Law and Policy, pages 280-287.

18 The fourth condition of Article 101(3) is that the agreement must not "afford such undertaking the possibility of eliminating competition in respect of a substantial part of the products in question." For a discussion of this, see Suzanne Kingston in Greening EU Competition Law and Policy at pages 287-292.

19 See article sited on the front page of this article.

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III. ABUSE OF DOMINANCE[20]

Article 102 TFEU prohibits any "abuse" of a "dominant position." There are circumstances where it may be possible to use Article 102 to attack certain practices which are objectionable from a sustainability point of view and/or which are damaging to the environment (i.e. using Article 102 as a "sword") and other instances where practices which might look potentially abusive are not when considered in the light of the environmental and sustainability provisions of the treaties (i.e. sustainability as a "shield"). A few words on each:

A. Article 102 as a "Sword"

One of the most obvious weapons with which to attack unsustainable practices under Article 102 is Article 102(a) which prohibits (as an abuse) all "*unfair purchase or selling prices or other unfair trading conditions*" of a dominant company. This is potentially broad ranging and, given that the European courts have consistently held that the categories of abuse under Article 102 are not fixed,[21] there is no reason, in principle, why it could not be used more widely to attack practices which are seen as unfair from an economic, political, social, environmental or moral point of view. One example might be the depressingly low prices paid by some retailers (or other intermediaries) to farmers for their produce.

I would suggest that a purchase price is potentially "unfair," and therefore potentially an "abuse," if:
it does not cover the true costs of production; or

does not enable the farmer to make some reasonable mark-up (to feed his/her family and produce food on a sustainable basis).

I am not suggesting that purchase prices negotiated by retailers should be attacked on a regular basis. It is likely that where there is a systemic problem the issue will generally be better tackled through regulation but, in principle, there is no reason why article 102 should not "plug the gaps" where necessary.

One could potentially see Article 102 being used as a "sword" to attack a wide range of breaches of international standards including the exploitation of child labor, environmental depravation, human rights, etc. This approach fits with our innate sense of what is an abuse of power. Indeed, given our natural sense of what is "fair" or an "abuse" of power it is perhaps surprising that so much of the focus in the past has been on "exclusionary," rather than, "exploitative" abuses. Is it not time to re-think the balance and tackle more "exploitative abuses"?

B. Sustainability as a "Shield"

Sustainability issues may also be used more as a "shield" against Article 102 where a dominant company engages in proportionate behavior to tackle environmental or climate change issues which might otherwise be considered to be abusive (and there is no way of achieving these objectives in a way that is less restrictive of competition): i.e. there is an "objective justification" for behavior which is *prima facie* abusive.[22]

20 For a fascinating discussion of the wider problems with big companies and an eloquent plea for "stakeholder antitrust" see Michelle Meagher's book, "Competition is killing us." For a fuller discussion of Article 102 and environmental issues, see Chapter 5 of Suzanne Kingston's book "Greening EU Competition Law and Policy."

21 See, for example, the judgment of the CJEU in *Astra Zeneca* [*Astra Zeneca v. Commission*; C-457/10P].

22 For a discussion of these issues see Chapter 9 of Greening EU Competition Law and Policy by Suzanne Kingston – particularly at pages 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.

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There is a strong case for this when Article 102 is read in the light of the constitutional provisions of the treaties considered above.[23]

It should not be necessary for a dominant company to justify its actions on the basis of its own commercial (i.e. profit seeking) interests. Providing the usual principles for an objective justification are met (notably that there is no less restrictive way of achieving the objective in question) it should be sufficient to show a genuine environmental (or other sustainability) objective.

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) multinationals which have the economic clout to make a real difference.

While we are right to be skeptical about some companies "green washing," there are companies (and certainly many, many individuals within companies) which are genuinely trying "to make a difference." Competition law should not make it more difficult to put these good intentions into practice. Allowing sustainability issues to act as a "shield" against 102 may, in some circumstances, assist with this.

IV. MERGERS

I suggest that there are **five ways** in which sustainability and climate change issues can, and should, be considered in the assessment of mergers under the European system of merger control:

(i) In the substantive assessment of the merger under Article 2 of the EU Merger Regulation ("EUMR");[24]

(ii) When considering "efficiencies" under the EUMR;

(iii) When considering "remedies";

(iv) Under Article 21(4) of the EUMR; and

(v) When mergers are reviewed under national competition law.

A. The Substantive Review of Mergers Under Article 2

Article 2(1) of the EUMR sets out the criteria which the Commission must consider when deciding whether to approve, or not to approve, a merger. These criteria include the "development of technical and economic progress provided that it is to the consumers' advantage and does not form an obstacle to competition" (Article 2(1) (b)).

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23 The following are be instances where environmental considerations might provide an "objective justification" for conduct that might otherwise be abusive:

(i) charging a higher price in order to cover environmental costs or re-invest in environmental protection (i.e. as a defence to allegations of excessive pricing). This approach would be consistent, with the "polluter pays" principle;

(ii) charging different customers different prices according to the use to which the product is put – e.g. how environmentally friendly it is (e.g. the energy efficiency of the downstream production process); i.e. as a defence to allegations of discriminatory pricing;

(iii) making the purchase of one product from the dominant company conditional on the purchase of another environmentally friendly product – but not necessarily from the dominant company (e.g. sale of a printer conditional on the purchase of recyclable toner cartridges): i.e. as a defence to an allegation of tying.

(iv) Offering exceptionally low prices to generate trial of a new environmentally friendly product: i.e. as a defence to an allegation of predatory pricing.

(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): i.e. as a defence to an allegation of refusal to supply.

For a further discussion of how environmental considerations may be relevant to individual abuses again see Suzanne Kingston "Greening EU Competition Law and Policy" at pages 312-326.

24 Council Regulation (EC) No. 139/2004 of January 20, 2004.

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The language here is similar to that in Article 101(3) discussed above and, for essentially the same reasons, not only can, but must, consider (where appropriate) environmental and sustainability issues. As previously argued this is very clear from the "constitutional" provisions discussed at the beginning of this article, a view confirmed by recital 23 of the EUMR which says that "the Commission must place its appraisal within the framework of the achievement of the fundamental objectives referred to in the [constitutional provisions] of the treaties."[25]

This means that *positive* environmental factors can play a significant part in clearing deals (i.e. concluding that the merger "would not significantly impede effective competition" – i.e. there is no "SIEC"). It can also play a part in concluding that a deal should be blocked – or only cleared subject to remedies (the merger "would significantly impede effective competition" – i.e. there is a SIEC).[26]

B. Environmental Factors as "Efficiencies"

The Commission tends to analyze (positive) environmental factors as "efficiencies" to see if they might "counteract the effects on competition, and in particular the potential harm to consumers, that [the merger] might otherwise have had."[27]

At paragraphs 78 to 88 of its Horizontal Merger Guidelines,[28] the Commission sets out the three cumulative conditions that "efficiency claims" must satisfy if they are to lead to a merger being cleared: they have to benefit consumers, be merger-specific and be verifiable.[29]

Environmental benefits and action to combat climate change are clear consumer benefits and should be considered under the EUMR for the same reasons – with appropriate weight being given to both the legal requirements of the constitutional provisions of the treaties and the moral imperative to fight climate change.

Environmental concerns can "justify" a merger so long as there are not less restrictive means of achieving the same environmental objectives and that the Commission can be "reasonably certain that the efficiencies are likely to materialise."

C. Remedies[30]

Many mergers are approved on a conditional basis – i.e. subject to the acceptance of remedies by the competition authorities.[31] One way of taking account of potential negative effects on the environment of a merger might be to include in the remedy package measures to counter the negative effects on the environment identified in the course of the substantive assessment of the deal.[32]

It might be helpful for guidelines to be drawn up to deal with such remedies, most obviously in the Remedies Notice.

Such an approach would be consistent with the "balancing act" and the principle of proportionality discussed above: i.e. allowing mergers to proceed but dealing with the problems they nonetheless cause. This is also less radical (and hopefully more acceptable, politically) than an approach that says such mergers should be blocked.

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25 Recital 23 of the EUMR which came into effect in 2004 refers to the constitutional provision of the treaties as they then stood (Article 2 of the Treaty on the EC and Article 2 of the Treaty on the EU). For the "constitutional" provisions as they currently stand see the introduction above and, in particular, Article 11 TFEU.

26 Under Article 2(2) and 2(3) of the EUMR, the Commission must determine whether the merger is "compatible with the Common Market." This, in turn, depends on whether or not the merger (or "concentration") would "significantly impede effective competition" ("SIEC").

27 See Recital 23 of the EUMR.

28 Guidelines on the assessment of horizontal mergers under Council Regulation on the control of concentrations between undertakings [2004/ C 31/03].

29 For a further discussion of these, see Greening EU Competition Law and Policy, Suzanne Kingston at pages 332-340.

30 On remedies generally, see the Commission's Remedies Notice [2008/ C 267/01].

31 See Article 6(2) and Article 8(2) of the EUMR.

32 For example, an efficiency enhancing merger might lead to production being focused in a factory in region A, owned by one merging party, with the plant owned by the other merging party in region B closing down with a significant loss of employment in that region. A remedy package might include (i) measures in region A to counter the environmental damage from increased freight traffic, increased emissions and increased noise; and (ii) (more controversially) measures in region B to retrain or redeploy workers made redundant there. In this way, the positive effects of the merger can be achieved (which would not be the case if the merger was blocked) and the negative effects minimized.

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NB. My paper on the position in the UK suggests that there may be even greater scope to make effective use of remedies in the UK than in many other jurisdictions.[33]

D. Article 21(4) of the EUMR

Article 21(4) of the EUMR allows Member States to take "appropriate measures to protect legitimate interests" other than competition concerns. These concerns must either fall within those specified in Article 21(4) itself ("public security, plurality of the media and prudential rules") or be "any other public interest" which has first been communicated to the Commission by the Member State and "recognized" by the Commission.

There is no express reference to environmental protection, sustainability or climate change here but there are three ways in which these might be taken into account under Article 21(4):

(i) they might fall within one of the current "legitimate interests" – most likely "public security" (e.g. the need to ensure a secure and sustainable supply of energy).

(ii) a Member State could apply to the Commission to have an environmental/ sustainability/climate change concern "recognized" by the Commission as a legitimate interest.

(iii) Article 21(4) EUMR could be amended to include an express reference to environmental protection, sustainability, and/or climate change.

Finally, it must be noted that Article 21(4) provides a mechanism for a Member State to review and potentially *prohibit* a deal that is cleared (conditionally or otherwise) by the Commission under the EUMR. It does not provide any basis for a Member State to *approve* a deal that is blocked by the Commission.

NB. My paper on the UK discusses the current UK public interest test but recommends that this be amended to make express provision for "sustainability and climate change" as a "specified consideration" (which could exceptionally allow the relevant minister to block or clear a merger independently of competition law considerations).[34]

E. National Merger Control

Where a merger does not fall within the EUMR, it may be reviewed under the national merger control rules of one or more Member State. These rules may take into account environmental and sustainability factors to a greater (or lesser) extent than under the EUMR.[35] Indeed, some (e.g. Spain) contain express reference to environmental issues.

Unlike measures taken by Member States under Article 21(4) EUMR mergers, which are not reviewed under the EUMR but under national rules, can (if national law permits) either be blocked notwithstanding an absence of competition concerns or be allowed *despite* competition concerns.[36]

It is also noteworthy that various regimes outside the EU allow for a wider range of issues (particularly social and sustainability concerns) to be considered. The best known (and, arguably, the most progressive) of these is South Africa.

My paper on the UK sets out 5 ways in which sustainability concerns might be taken into account in UK merger control.[37]

33 See article sited on the front page of this article.

34 See section 5 d of the UK article sited on the front page of this article.

35 The "Final Report of the EU Working Group" of 10 March 2016 on Public Interest Regimes in the EU found that there were "12 jurisdictions [in the EU] where wider public interest considerations can either form part of the merger control assessment or can otherwise feature in the overall business decision making process."

36 A striking example of this is a decision of the German Economics Ministry in August 2019 to allow the Miba/Zollern joint venture that had previously been blocked by the BKA (the German Federal Cartel Office). The minister ruled that the positive effects of the transaction for the environment and climate protection outweighed the competitive disadvantages of the merger (citing noise reduction, reduced fuel consumption and, more generally, climate protection and a sustainable environment policy) [Ministerial approval Miba/Zollern, August 20, 2019 http://www.dkart.de.ministerial].

37 See section 5 of the UK article sited on the front page of this article.

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V. IS IT ALL TOO DIFFICULT?

It is sometimes suggested that it is too difficult to take into account wider issues than the narrow short-term (and often largely only price) effects and that competition authorities are ill equipped to do this. The answer to this is many-fold. In particular:

(i) First, we have to apply the law as set out in the treaties. If that is difficult, so be it.

(ii) It is a dereliction of our duty as citizens to shy away from that which is important and focus on what is perceived to be easy.[38]

(iii) In any case, it can be incredibly difficult and complex to assess even short-term price effects.

(iv) The balancing of (often conflicting) interests is not easy, but it is exactly what courts and competition authorities already do.

(v) Competition authorities and courts are increasingly well-equipped to carry out this sort of balancing act.

(vi) Taking into account the full range of factors required by the treaties is an approach which is far more in tune with the original (and better) meaning of "economics" and provides opportunities to take account of the considerable development in environmental economics in recent years such as new techniques for the valuation of the benefits from environmental resources and initiatives.[39]

The more I have considered the weak objections raised against taking climate change into account in modern competition law, the more I am inclined to borrow a phrase from Barack Obama: "Yes we can!"

While I believe that there is much more that can (and should) be done to fight climate change and other sustainability issues, without falling foul of competition law, it is not suggested that this should replace regulation which will often be the first choice solution (e.g. legislation on air pollution).

VI. SOME CONCLUSIONS

On the basis of the treaties, the current narrow approach to competition law is certainly not inevitable and is, in many respects, illegal. Even more importantly, it is an approach that can often be damaging from an environmental and sustainability perspective and, in particular, it is holding back vital initiatives to combat climate change. In other words: competition law is part of the problem.

The good news is that a great deal can be done without a change to the law. Essentially, what is needed is a change in the way that competition law and economics are viewed and applied. We need to look at the EU treaties afresh (both the competition provisions and the constitutional provisions) and think again about what economics is really about.

That said, we live in a conservative, risk-averse culture and it will also be necessary to "nudge" the entire competition law establishment in the right direction. A number of writers and reports have made detailed proposals in this regard but I would make nine proposals:

A. Positive Statements by Competition Authorities

Top of my list is more positive statements from the competition authorities as to what can be done without infringing competition law. At present there is a serious and damaging asymmetry: business hears (quite rightly) what cannot be done but rarely hears what can be done. Such positive statements can take many forms. For example:

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38 Commissioner Kroes has noted "we cannot just wash our hands of responsibility and say that competition law cannot or should not protect the consumer against negative medium to long-term effects just because it is difficult to assess." [Speech at the Fordham Law Institute, September 23, 2005].

39 For an interesting discussion of these issues see Chapter 5 of Suzanne Kingston's "Greening EU Competition Law and Policy." There have been a number of cases where competition authorities have used various quantitative techniques in sustainability cases, the best known being the Commission's CECED case and the decision of the Dutch Competition Authority in the "*Chicken of Tomorrow*" case. For further discussions of the "*Chicken of Tomorrow*" case see pages 26-28 of Ioannis Lianos' Polycentric Competition Law.

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(a) Speeches like the speech of Commissioner Vestager at the Brussels conference on Competition Law and Sustainability in October 2019;

(b) Press releases where the authority indicates that it does not see a problem with a particular initiative (or at least that it does not intend to take action (sometimes a good steer is given behind closed doors but it would be helpful to publicize this constructive approach);

(c) Decisions confirming that an agreement does not infringe Article 101(1) or that it meets the exemption conditions of Article 101(3). Article 10 of Regulation 1/2003 provides for this but in the 15 years since it came into force not one such decision has been made;

(d) Strategic steers from government to competition authorities.

In this context the call from Commissioner Vestager, and other national competition authorities (e.g. in Germany and the Netherlands), to bring cases to them is welcome. It is incumbent on business, their advisors and NGOs concerned about climate change and sustainability to respond to that invitation.

NB. My paper on the UK suggests that the CMA could include work done in line with its "strategic objective" of "supporting the transition to a low carbon economy" in its annual "impact assessment." It could also use its statutory duty to make recommendations on regulatory and policy issues to other bodies (such as the Environment Agency) where it identifies sustainability issues and competition law is not the right (or adequate) policy tool.[40]

B. Test Cases in Court

To the extent that the competition authorities are unwilling to give positive guidance then companies and NGOs should look to the courts for affirmative rulings. Indeed, the European courts have often been very good at looking at the treaties as a coherent whole and interpreting the competition provisions accordingly (consider, for example cases such as *Albany*).

C. Publication of Legal Opinions

Companies receiving, or lawyers giving, positive advice about initiatives to combat climate change (or other issues concerning the environment or economic/social injustices) could seek to publicize this wherever client confidentiality permits.

D. Updating Guidelines and Notices

Modernizing guidelines to reflect the realities of a world where climate change is an existential threat. **Three** examples would be:

- Including in the successor to the Commission's 2010 Horizontal Guidelines, a chapter on climate change, sustainability and the environment (to facilitate collaborative action in these areas);
- Updating the Commission's Exemption Guidelines-in particular to clarify, and hopefully expand, the range of consumers taken into account when assessing whether consumers get a "fair share of the benefits" when looking at the exemption criteria of Article 101(3) (see Section B at Condition 2).
- Including in the EU's Merger Remedies Notice, guidance on remedies to deal with the collateral damage of mergers that might otherwise be blocked if such remedies are not put in place.

NB. My UK paper makes 3 suggestions in relation to updating UK guidelines.[41]

40 See section 8. 1. (e) and (f) of my UK article cited on the front page of this article.

41 *The CMA's guidance on "Agreements and concerted practices" of December 2004;

*It's "Merger Assessment Guidelines" of September 2010; and

*Updating the CMA's MIR guidelines to reflect its Annual Plan with a strategic objective of taking climate change into account.

See section 8.4 of my UK Article cited on the front page of this article

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E. Guidance on Competition Authorities' Priorities

Competition authorities should set out clear guidelines (or "enforcement priorities") to help companies understand better when action is likely to be taken (and when it is not likely to be taken) in relation to sustainability arrangements.[42] The inclusion of climate change in the UK CMA's annual plan for 2020/2021 is to be welcomed.

F. Block Exemptions

If guidelines are not sufficient to get urgent collaborative action going, then block exemptions should be considered. The most obvious example would be a new block exemption for a defined category of sustainability agreements (certainly encompassing environmental protection and climate change issues but possibly other issues relevant to a more sustainable future). We should not, however, be too ambitious. If we try to include too many things there is a danger that it is seen as "all too difficult" and nothing is included. Either that or what is include is too conservative to be useful as it is trying to cover too many varied things. Given the climate emergency I would advocate a liberal but clear focus on arrangements to fight climate change.

G. Changes to the Law

Relatively minor changes to the law itself. It should not be necessary to change the EU treaties themselves, but it is inevitable that provisions of regulations and directives will be cited as a reason (or excuse) for inaction. These may therefore have to be changed. One possible example would be to add a reference to the environment and climate change as a "legitimate interest" in Article 21(4) of the EUMR.

Nb. My UK paper makes a couple of suggestions for changes to UK Merger control law to enable it in appropriate circumstances to take climate change and sustainability into account better (in line with the CMA's strategic objective of "supporting the transition to a low carbon economy").[43]

H. Lessons from the COVID Crisis

The COVID-19 crisis has shown how governments and competition authorities around the world have been able and willing to act in a crisis-and the Commission has been no exception. If we can do this to fight one (hopefully, short-term) crisis why can't we show the same resolve in the face of an existential threat like climate change?

The obvious parallel in the current context has been the relaxation of the competition rules to ensure that competition law does not "impede necessary cooperation between businesses to deal with the current crisis and [to] ensure security of supplies of essential products and services."[44] This is much what I and others have been calling for to ensure that competition law (or, more frequently, fear of competition law) does not stand on the way of vital action by business to fight climate change (and, as already noted, Commissioner Vestager has recognized that "sometimes business can respond to that demand [for more sustainable products] even better, if they get together.")

There are potentially 2 strands to this "relaxation" of competition law in the face of this crisis: competition authorities around the world's approach to cooperation in response to COVID-19, and the exclusion of certain agreements from competition law in certain counties (such as the UK).

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42 See, for example, "ACM [the Dutch competition authority] sets basic principles for oversight of sustainability arrangements." These are "based on three basic principles: (1) ACM will not take action against sustainability arrangements that enjoy broad social support if all parties involved such as the government, citizen representatives, and businesses are positive about the arrangements; (2) ACM is able to initiate an investigation upon receiving complaints or indications regarding sustainability arrangements; (3) ACM helps find quick and effective solutions, should problems arise."

43 *specifying "climate change and sustainability" as public interest considerations in Sections 58 and 153 of the Enterprise Act; and

* inclusion in Section 22 (2) of the Enterprise Act of a new exception to the CMA's duty to refer certain mergers to a detailed investigation where the climate change/sustainability benefits outweigh the competition effect.

See section 8.7 of my UK article cited on the front page of this article.

44 "*CMA approach to business cooperation in response to Covid-19*," March 25, 2020, CMA 118.

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For example, the CMA says it recognizes the vital role business is playing to tackle the consequences of COVID-19 and that it:

understands that this may involve coordination between competing businesses. It wants to provide reassurance that, provided that any such coordination is undertaken solely to address concerns arising from the current crisis and does not go further or last longer than what is necessary, the CMA will not take action against it.

The CMA sets out the circumstances where it will not take enforcement action.[45]

One only needs to change a few words (most obviously "COVID-19 pandemic" to "climate crisis") and you have a draft blue print for valuable guidance to businesses trying to fight climate change and to assist in the move to a low carbon economy.[46]

I. More radical changes? (Treaty Changes?)

I believe we have the basic legal tools we need and that more radical changes should not be necessary. However, as a last resort, we could amend the EU treaties to make even clearer the need to take environmental and sustainability issues into account when applying the competition provisions (and perhaps add an express reference to climate change).

My UK paper also floats some more radical ideas such as widening the state compulsion defense; a UK Generations Act; and creating a legal obligation to consider climate change and sustainability before decisions and regulations can be taken or enacted by certain public bodies.[47]

If these, and no doubt other,[48] changes are made then competition law can cease to be "part of the problem" and become "part of the solution." Or, once again to borrow a phrase from Barack Obama, "Yes we can" take account of climate change and sustainability when applying competition law.

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45 This is where measures to coordinate action taken by businesses:

(a) *Are appropriate and necessary in order to avoid a shortage, or ensure security, of supply;*

(b) *Are clearly in the public interest;*

(c) *Contribute to the benefit or wellbeing of consumers;*

(d) *Deal with critical issues that arise as a result of the Covid -19 pandemic; and*

(e) *Last no longer than is necessary to deal with these critical issues"*

CMA 118 of 25, March, 2020.

46 For a fuller discussion of the lessons from the COVID-19 crisis for the climate crisis, see my blog to which there is a link on the cover page of this article.

47 See Section 8 at points 9,10 and 11 of my UK article cited on the front page of his article.

48 Nothing here is intended to detract from the need to introduce legislation on the environment, sustainability and climate change. Competition law is no panacea and certainly no substitute for legislative and other administrative action. Indeed, when it is clear that competition law is not the problem (or the answer, even after all changes discussed here), this can act as a catalyst for legislative action (an example being the EU's new rules on unfair trading practices).

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