



Climate change, sustainability, and competition law

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ABSTRACT

Climate Change is an existential threat. Competition law must be part of the solution and not part of the problem. This article draws on the constitutional provisions of the EU treaties and remarks by leaders such as Commissioner Vestager to show how competition law need not stand in the way of urgent action and co-operation by the private sector to fight climate change. It also shows how sustainability is relevant to both the analysis of mergers and dominance cases. It is a call to update our thinking, our guidelines and, if necessary, our law. Based on EU law it contains ideas that could inspire changes in other jurisdictions.

KEYWORDS: competition, climate change, sustainability, consumer welfare, mergers, agreements

I. INTRODUCTION

We face a ‘climate emergency’ in which ‘business as usual’ is not an option and in which a rapid move to more sustainable development is vital. Tragically, fear of competition law is often perceived to be an obstacle to much needed collaboration

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(The views expressed here are personal and cannot be attributed to any institution with which Simon is connected)

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If you would like to support those of us trying in our own small way to make competition law less ‘part of the problem’ and more ‘part of the solution’ do get in touch (comment and feedback welcome). My email address is: Eusebius.Holmes@icloud.com.

You may also like to join the Inclusive Competition Forum (of which I am a founder member). This is open to anyone with an interest in making competition law and policy more relevant to key environmental, economic, and social issues that we face. [www.inclusivecompetition.org]

between companies that aim to promote such sustainable development. Need this be the case? This article argues, no.

Competition law need not be part of the problem and can be part of the solution. As Commissioner Vestager put it at a recent conference in Brussels where she recognized the need for collaboration between companies in this area: ‘every one of us – including competition enforcers–will be called on to make a contribution’. The ‘constitutional’ provisions of the EU Treaties require sustainability and environmental protection to be taken into account when implementing ‘all’ of the EU’s policies and activities. We need to get away from arcane and narrow concepts (such as a narrow focus on short-term price effects) and get back to what the treaties (and their equivalents in national jurisdictions) actually say. It’s not the law that needs to change but our approach to it. It is hoped that this article will embolden legal and economic advisors, and competition enforcers to take a more robust approach and thus facilitate much needed collaboration to tackle climate change. The article also considers how Article 102 TFEU (Treaty on the Functioning of the European Union) might be used as a ‘sword’ to tackle sustainability issues and how sustainability might provide a ‘shield’ against allegations of abuse under Article 102. Finally, it looks at how environmental and sustainability issues might be taken into account under the EU Merger Regulation (EUMR)—whether as a factor leading to a deal being cleared or blocked. In particular, it suggests that more use could be made of remedies to deal with harms caused by otherwise efficiency enhancing deals. It concludes with eight concrete proposals to ‘nudge’ the competition establishment in this direction. If just some of these proposals were adopted, then competition law need not be part of the problem and can be very much part of the solution.

II. CLIMATE CHANGE: THE MORAL IMPERATIVE

It is increasingly accepted that we face a ‘climate emergency’ and that ‘business as usual’ is not an option. I am not going to go into the science and evidence for this but simply take this as a fact and the starting point for my analysis of its implications for competition law.¹ 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 focus on energy in France some will say, what about China? When we look at transport issues, some will say agriculture is a bigger issue. And so on, and so on. And so too when we look at competition law many say it is not a panacea for all the ills of the world and that we have other tools—most obviously regulation. And all these people are right.

But just because competition law cannot do everything, it does not mean that it cannot do anything. Not only do we have to start somewhere, I argue that we have a

1 If you would like to read something on Climate change, how about M Berners-Lee, *There is No Planet B* (CUP 2019); S Lewis and M Maslin, *The Human Planet. How we Created the Anthropocene* (Pelican 2018), especially Ch11: ‘Can Homo Dominatus Become Wise?; Nicholas Stern, *Stern Review on the Economics of Climate Change* (October 2006) <https://webarchive.nationalarchives.gov.uk/20100407172811/http://www.hm-treasury.gov.uk/stern_review_report.htm> accessed 17 January 2020; D Wallace-Wells, *The Uninhabitable Earth* (Allen Lane 2019).

moral imperative to do so in the case of climate change and to take action whenever and wherever we can—and that includes competition law (our own particular niche). Things need to change and, as Commissioner Vestager helpfully put it at a conference in Brussels on competition law and sustainability in October 2019 (the ‘Brussels Sustainability Conference’), ‘every one of us—including competition enforcers—will be called on to make a contribution to that change’.

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’) or Tim Jackson (‘Prosperity without Growth’) and lawyers such as Michelle Meagher (‘Competition is killing us’) which do that.² 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 of this are where the most effective (or only) way to achieve a sustainability goal is for firms to collaborate. As Commissioner Vestager said at the Brussels Sustainability Conference, ‘business has a vital role in helping to create markets that are sustainable in many different ways . . . and . . . sometimes business can respond to that demand [for more sustainable products] even better, if they get together’.

This approach should also be attractive to governments looking to minimize the legislation and regulation to which business is subject. As the UK competition authority has put it:

‘Agreements between firms may be particularly appealing to policy makers as they may help achieve policy goals without the requirement of government legislation or explicit regulation. Such agreements have the potential of allowing firms to pursue actions that secure beneficial environmental outcomes in as efficient a way as possible’.³

Examples of this 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 (see n 34);

2 K Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st Century Economist* (Random House Business Books 2017); T Jackson, *Prosperity Without Growth, Foundations for the Economy of Tomorrow* (Routledge 2016); M Meagher, *Competition is Killing Us: How Big Business is Harming Our Society and Planet - and What To Do About It* (Penguin Publishers forthcoming - September 2020). See also “Competition Overdose: how free market mythology transformed us from Citizen Kings to market servants”, Maurice Stucke and Ariel Ezerachi. To be published by Harpercollins, March, 2020.

3 See: OFT–OECD, OFT Contribution to the OECD Policy Roundtable on Horizontal Agreements in the Environmental Context 2010 (24 November 2011) <<http://www.oecd.org/competition/cartels/49139867.pdf>> accessed 17 January 2020 (‘2010 OECD Report’).

- Attempts to encourage more sustainable chicken production (n 136);
- Agreements to increase the collection of plastic waste (n 34); and
- Agreements to improve the efficiency of washing machines (n 48).

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

- rejected (eg ‘Chicken of Tomorrow’ see n 136); or
- not pursued either:
 - after consideration of the competition law risks; or
 - not even considered for fear of the potential competition risks.

Indeed, only recently I was involved with a vital initiative to prevent depletion of fish stocks in one of the world’s most important fishing areas which risked being derailed as one major buyer was afraid to sign up citing competition law risks. No wonder more and more of us are getting angry and frustrated! Often all that is needed is some robust advice. Sometimes this is available and helps bring about important change. A good example is an opinion given by a leading law firm for the Fair Wear Foundation (‘FWF’). Members of the FWF wanted to introduce a ‘living wage’ ensuring that workers employed in their garment factories were paid a minimum wage to meet basic living needs. Some members expressed fears that competition law prevented them taking collaborative action to introduce this (they feared this might be seen as a buying cartel—and as a by object infringement of Article 101). The opinion stated clearly that ‘such fears are based on a theoretical application of competition law and will not be realized in practice’ and that the initiative carried a ‘low practical risk of regulatory action’⁴ Bravo!—more of this please. Similar robust advice can, and should, be given to allay concerns in relation to necessary collaborative action to address a range of environmental and sustainability issues. It is incumbent on all competition lawyers (in house and external), competition economists and competition enforcers to give it.

Sadly, as Commissioner Vestager said in her speech at the Brussels Sustainability Conference ‘the legal profession has been too conservative’. Yes, indeed—and the same goes all too often for competition economists and enforcers and for business which is generally too risk averse. As a result, important initiatives that could help combat climate change are stifled or stillborn.⁵

4 Arnold and Porter LLP, *The Application of EU Competition Law to the Adoption of the Living Wage Standard* (Legal Opinion for the Fair Wear Foundation) <<https://api.fairwear.org/wp-content/uploads/2016/06/OpiniontoFWF-TheApplicationofEUCompetitionLawtoFWFLivingWageStandardfinal1.pdf>> accessed 17 January 2020.

5 Many share this concern. Eg, the Committee on Economic and Monetary Affairs of the European Parliament, *Annual Report on Competition Policy 2018* (31 January 2018) <[https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2018/2102\(INI\)](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2018/2102(INI))> accessed 17 January 2020 (‘the Parliamentary Report’) noted that ‘the narrow interpretation of Article 101 of the TFEU by the Commission’s horizontal guidelines has increasingly been considered an obstacle to the collaboration of smaller market players for the adoption of higher environmental and social standards’ [48]. See also Fair Trade Foundation, *Competition Law and Sustainability. A Study into Industry Attitudes towards Multi-Stakeholder Collaboration in the UK Grocery Sector* (Report) (February 2019), <<https://>

Some issues will be more difficult than those referred to above (but not necessarily impossible to solve): eg agreements to pay a fair and sustainable price to poor farmers.⁶ Others should be easy: eg agreements to facilitate recycling of packaging, etc.

The urgency of the climate change threat means we need to reappraise our approach to everything. A 2010 paper by the UK competition authority concluded that ‘the advantages and disadvantages of taking into account wider environmental benefits are finely balanced’.⁷ In 2010 I would probably have agreed, but, whatever the rights and wrongs of that conclusion in 2010, our current appreciation of climate change means that ‘balance’ has changed significantly: the scales have tilted. We must put more weight on environmental factors and 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. This is considered in Section V. 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 considered in Sections VI and VII below. For reasons of space, this article 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).

At the Brussels Sustainability Conference Commissioner Vestager reiterated the Commission’s ‘commitment to sustainability’ but acknowledged that ‘we’re still working out exactly what has to change, to make that promise a reality’. This article is intended to help us work out what has to change and, even more importantly, what can be done without any change to the law itself-but to our approach to it. Although this article is based firmly on EU law and the constitutional requirement to take the environment and sustainability into account in competition policy, it is hoped that many of the ideas discussed here can help inspire changes to the approach in other jurisdictions (particularly, but not exclusively, those modelled on EU law).

III. MY APPROACH

My primary goal in this article is to look at what can and must be done within the context of EU law as it is. What do I mean by that?

First, it means I am not looking at how the treaties should be changed in the light of the climate emergency or sustainability concerns (although this is something that

www.fairtrade.org.uk/Download.aspx?id=%7BEE9F8B75-8FFA-4E38-B87B-82BBE23A3D7C%7D> accessed 17 January 2020. This noted that:

- ‘market actors will not act unilaterally on sustainability issues due to a fear of competitive disadvantage that could result from an increase in their cost base’.
- ‘fear of an unfavourable ruling under competition law is a deterrent to a significant number of retailers from collaborating on sustainability issues, particularly on issues of low incomes and wages in the supply chain’.

‘there is likely to be direct, long-term consumer benefit from multi-stakeholder collaboration for sustainability purposes, eg, by reducing the risks of a collapse of production due to extreme weather’.

6 But see the discussion of price (n 35); see also the discussion in Section VI on using Article 102 as a ‘sword’ to attack unfair purchase prices.

7 See p 114 of the 2010 OECD Report (n 3).

merits urgent attention). Secondly, I am going beyond the law as it has been applied by various competition authorities in recent years (and even the courts). This is a freedom I now have as an academic and (to a certain extent) as a judge.

As a lawyer practising competition law for 35 years, I had to advise clients based on the likely attitude of the competition authorities and help them carry out a risk assessment. While I often encouraged them not to be too risk averse, my professional duties still obliged me to take full account of recent decisions of the authorities and guidelines (even if I felt these were wrong). Now I am able to stand back and look again at what the treaties actually say. If what the competition authorities are doing/saying (whether in decisions or in guidance) is not consistent with the treaties, I will argue that they are legally wrong. If more than one approach is consistent with the treaties then what the authorities say may not be illegal but I argue they can, and should, adopt the interpretation that is most favourable to the climate emergency and sustainability challenges that we face.

Where the Court of Justice of the European Union (CJEU) takes a view that I do not consider to be consistent with the treaties my position is more nuanced. As a judge, I must respect the CJEU as the ultimate arbitrator of EU law. As an academic, I would argue that the CJEU is wrong and can, and should, change its view. The issues in this article are all discussed on the basis of my reading of the EU treaties as they stand. However, such is the importance of the climate emergency that we face that, if competition law continues to be a barrier to urgent initiatives to combat climate change, then the law should either be ‘clarified’ (eg by means of Commission guidance or statements by competition authorities of their enforcement priorities or principles); amended within the scope of the existing treaties (eg by means of a block exemption); or (as a last resort) the treaties should be amended (eg to amend the relationship between the environmental/sustainability provisions and the competition provisions or to add specific provisions dealing with climate change). These possibilities are considered further in Section IX. So what do the treaties say? What are the goals of competition law? And what are the implications for sustainability issues—particularly in the area of agreements but also abuse of dominance and mergers?

IV. THE GOALS OF COMPETITION LAW AND THE ‘CONSTITUTIONAL’ PROVISIONS OF THE TREATIES

The starting point for any analysis of the treaties should be what I term their ‘constitutional’ provisions—ie the bits at the beginning that explain what they are all about. As a practitioner, I must confess I rarely looked at these. I just relied on what I ‘knew’ (or thought I knew) to be the position from experience and from the Commission’s guidelines and decisions. I could have told you roughly what Article 2 of the Treaty of Rome said but unprompted I would not have had a clue what Article 11 of the TFEU said (and I suspect I was not alone in this ignorance). Well, I was wrong—so let us put that right.

Treaty on European Union—Article 3

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

Article 3(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 (and I shall return to this issue later). 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 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. We will come back to this in Section VIII.

The Treaty on the Functioning of the European Union—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’.⁸ (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

⁸ The importance of this point is emphasized in para 7 of the Parliamentary Report (n 5) which: ‘underlines the fact that **competition rules** are treaty based and, as enshrined in Article 7 of the TFEU, **should be seen in the light of** the wider European values underpinning Union legislation regarding social affairs, the social market economy, **environmental standards**, **climate** policy and consumer protection; takes the view that the application of **EU competition law should address** all market distortions, including those created by negative social and **environmental externalities**’. (emphasis added).

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.⁹

EU Charter on fundamental rights—Article 37

Article 37 says:

‘A high level of environmental protection and improvement of the quality of the environment **must** be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development’. (emphasis added)

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 1 November 1993—and everything that this entails for a wide range of social, political, economic, and sustainability goals.¹⁰

While environmental and sustainability considerations must be taken into account in applying the treaties as a whole (and the competition provisions, in particular) as a matter of law, the existential threat that climate change poses for humanity, introduces a further dimension—a moral imperative to take them into account to the fullest extent that is legally possible.

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 detour

9 This was explicitly agreed by the Member States when drafting Article 11: the word ‘all’ was underlined in the draft text, see: Julian Nowag, ‘The Sky is the Limit. On the Drafting of Article 11 TFEU’s Integration Obligations and its Intended Reach’ in S Sjafell and A Wiesbrock (eds), *The Greening of European Business Under EU Law: Taking Article 11 TFEU Seriously* (Routledge 2014); While environmental and sustainability considerations must be taken into account in applying the treaties as a whole (and the competition provisions, in particular) as a matter of law, the existential threat that climate change poses for humanity, introduces a further dimension—a moral imperative to take them into account to the fullest extent that is legally possible.

10 The Maastricht Treaty of 1992 reinforced earlier provisions on environmental protection (in the 1986 ‘Single European Act’) saying that these ‘must’ be integrated into the EU policies (rather than just be a ‘component’ of them). The Amsterdam Treaty of 1999 further strengthened this explicitly making this provision applicable in **all** areas of EU law and action (including policy-making, regulations, directives and decisions) and introducing the linkage between environmental protection and sustainable development (which is now reflected in Article 11 TFEU).

down the road that much of the competition establishment has taken over the past 30 years or so—the so-called ‘consumer welfare’ detour.¹¹

The consumer welfare detour

First, a question: where does this term appear in either the constitutional or competition provisions of the treaties? Answer: nowhere. At this point, I could write a lot about the ‘Chicago’ school, neo-liberalism, etc—but others have done this eloquently.¹² I will, however, make two points.

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). Secondly, if consumer welfare were the correct legal standard, then it would not be a bad one if looked at afresh. This invites two questions: what is a ‘consumer’ and what is ‘welfare’? The first of these questions is discussed in detail in the sub-section ‘The Exemption Route: Article 101(3)’, 2nd Condition (‘Fair Share for Consumers’). But what is meant by ‘welfare’?

Which bit of the word ‘welfare’ do some lawyers, economists, academics, and competition officials not ‘get’? 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’. Amongst other things it is synonymous with ‘well-being and good health’ (‘bonheur’; ‘comfort’; ‘bien-être’). It is not just about ‘profit’ or ‘fortune’.

This is entirely consistent with Article 3(1) of the TFEU which says that the ‘Union’s aim is to promote . . . the well-being of its peoples’. 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.¹³ So why have we let the Chicago School take us down a road where it sometimes seems as if the only things that matter are

11 As Commissioner Neelie Kroes put it in a speech in 2005 (Neelie Kroes, ‘European Competition Policy – Delivering Better Markets and Better Choices’ (Speech, European Consumer and Competition Day, London, 15 September 2015), <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_512> accessed 17 January 2020): ‘Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources’. Yes, but just financial welfare? Efficiency whatever the cost?.

12 Most leading textbooks include a discussion of the goals of competition law. See, eg R Whish and D Bailey, *Competition Law* (9th edn, OUP 2018) 18–24; For a classic exposition of the Chicago School of competition theory see RH Bork, *The Antitrust Paradox: a Policy at War With Itself* (Basic Books 1978); Bork refers to a revolution in antitrust law that transformed it from a ‘social policy’ to ‘merely law’; For a more recent discussion, see Ariel Ezerachi, ‘Sponge’, (2017) 5 JAE 49–75, and Ariel Ezerachi and Maurice Stucke, ‘The Fight Over Antitrust’s Soul’ (2017) 9 Journal of European Competition Law & Practice 1–2.

13 One way of doing this is to take account of so-called ‘externalities’ when applying any sort of ‘welfare’ standard (n 31), (n 133) and Section VIII, point(vii).

short-term price effects?¹⁴ As Thomas Horton has put it, this approach is in danger of turning us into ‘moral zombies and economic sociopaths’ making ‘decisions in a moral vacuum’.¹⁵

If the law required this, that would be bad enough. But to adopt this approach when the law does ‘not’ require it is morally reprehensible.¹⁶ Like the Emperor Nero, we are fiddling while Rome is burning. We are squabbling over technocratic issues while climate change gathers frightening momentum. Before turning back to the road leading to a proper interpretation of the goals of competition law and interpretation of the competition provisions of the treaty, it is worth noting three points:

First, it is interesting that a natural reading of the word ‘welfare’ fits very well with both:

- i. The Sustainable Development Goals (SDGs)¹⁷ third goal: ‘Good Health and Well-being’; and
- ii. Emerging concepts of measures of national well-being (such as ‘happiness’) instead of, or as a complement to, GDP.

To the extent competition law allows us (and it does) it makes sense to interpret it in a manner consistent with the SDGs, to which we have signed up and in line with the more progressive thinking on the economy as a whole.¹⁸

Secondly, a fresh look at the term ‘welfare’ avoids getting hung up over false choices between seemingly contrasting approaches: eg between consumer welfare, on the one hand, and ‘fairness’; ‘well-being’; or public interest/public policy considerations on the other.¹⁹

14 When pressed, most economists would deny that consumer welfare is just about short-term price effects, or even primarily about it, and would accept that dynamic issues are more important. Sadly, in practice, one often gets the impression that either only short-term price effects have been taken into account or that they are the only factors to which any weight has been given. This may simply reflect a reluctance to give weight to factors perceived (often wrongly) to be less predictable and certainly a tendency to give excessive weight to what is easily measurable (n 130).

15 Thomas J Horton, ‘Fairness and Antitrust Reconsidered: An Evolutionary Perspective’ (2014) 44 *McGeorge Law Review* 823–64.

16 My focus in this article is on the position under EU law (and, indirectly, on the position in most EU Member States). That said, just because the narrow approach to ‘consumer welfare’ is largely an import from the US, we should be careful not to make the mistake of assuming that it is somehow mandated by US law. My understanding is that there is no more reason for a narrow focus on consumer welfare under US law than under EU law. This is well illustrated by Sandeep Vaheesan’s helpful paper: Sandeep Vaheesan, ‘The Profound Nonsense of Consumer Welfare Antitrust’ (2019) 64 *The Antitrust Bulletin* 479–94. This is not a US versus Europe debate—or should not be.

17 The Sustainable Development Goals (‘SDGs’) are a collection of 17 global goals agreed by the UN General Assembly in 2015 for 2030.

18 There is an interesting parallel here. Just as Raworth (n 2) argues that we shall be agnostic about growth, and that GDP should be a possible incidental by-product of the pursuit of wider [more sustainable] goals, so too writers like Maurice Stucke argue that ‘consumer surplus should be a by-product of a competitive process that provides economic opportunity and freedom, Maurice Stucke, ‘Should Competition Policy Promote Happiness?’ (2013) 81 *Fordham Law Review* 2275–645.

19 See, eg Horton (n 15) and Christopher Townley, ‘Is There (Still) Room for Non-Economic Arguments in Article 101 TFEU Cases?’ (2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2162864> accessed 17 January 2020.

Thirdly, my criticism of the narrow price centric approach to ‘consumer welfare’ is not a criticism of economics or economists (well, not all of them). As Kate Raworth’s ‘Doughnut Economics’ reminds us, ‘economics’ originally meant the ‘art of household management’ and throughout most of history the subject has been concerned with broader social and political concerns (as the term ‘political economy’ clearly suggests).²⁰ The ‘neo-liberal’ approach with its narrower focus on financial considerations (and in the context of competition economics, short-term price effects) is a relatively new phenomenon.²¹

As Vaclar Smil has put it: ‘the fundamental problem is that economics has become so divorced from fundamental reality . . . until economics returns to the physical rules of human existence, we’ll always be floating in the sky and totally detracted from reality’²². Or, as David Blanchflower (an economist advocating an approach to economics more grounded in reality) has noted many economists rely on ‘largely untested theoretical models that amount to little more than mathematical games’.²³ This is what Paul Romer, a former chief economist at the World Bank, has called ‘mathiness—playing with regression to give a false sense of precision’ others might call it alchemy! Meanwhile the planet continues to heat up.

Precisely what should be the goals of competition policy is the subject of extensive literature and endless debate. 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.²⁴

20 See (n 2); For an account of how the original and more holistic approach to economics has changed, see J Aldred, *License to be Bad – How Economics Corrupted Us* (Allen Lane 2019) eg at Ch 1.

21 Often traced back to the Mont Pelerin Society in the late 1940s, Milton Friedman, Friedrich Hayek and right wing free-market think-tanks such as the American Enterprise Institute in Washington and the Institute for Economic Affairs in London.

22 See V Smil, *Growth: From Microorganisms to Megacities* (MIT Press 2019);—‘The Limits of Humanity’, Special Series, *The Financial Times* (September 14/15 2019), 10.

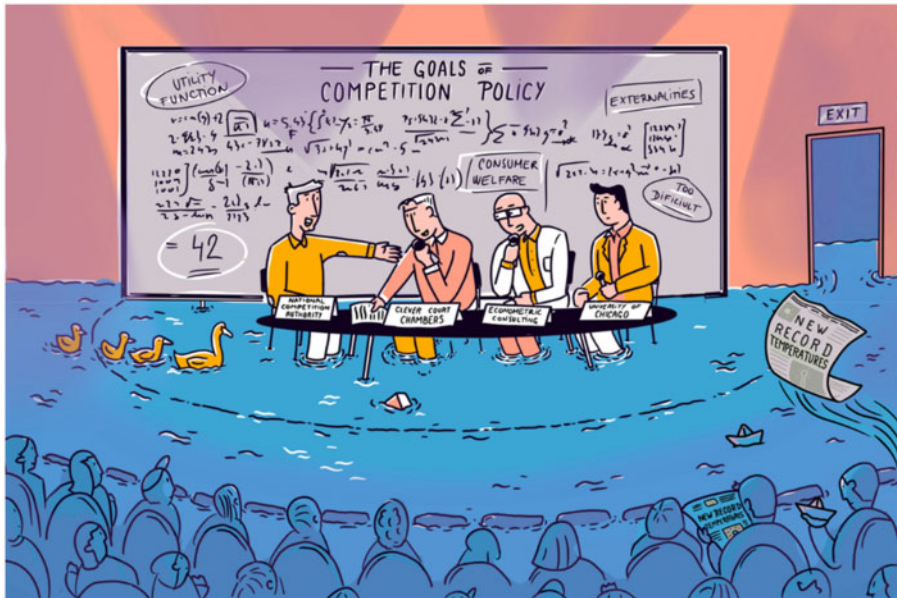
23 DG Blanchflower, *Not working, Where Have All the Good Jobs Gone?* (Princeton University Press 2019).

24 Progressive authors have articulated this in slightly differing terms but these authors would all agree that this goes beyond what Maurice Stucke calls the ‘mindless pursuit of accumulating cheap products’. Stucke focuses on ‘the happiness literature’ and, while accepting that this does not provide an analytical framework for analysing routine antitrust issues he concludes that this ‘literature suggests that competition policy in industrial wealthy countries would be more efficacious (in terms of increased well-being) in promoting economic, social, and democratic values, rather than simply promoting a narrowly defined consumer welfare objective’ (n 18);

While Stucke focuses on ‘happiness’ and well-being, others, such as Horton, focus on ‘fairness’ concluding that ‘a workable antitrust fairness standard can be developed and applied’ (n 15). While not written into Commission guidelines his work finds a strong echo in multiple speeches and press releases by Commissioner Vestager. A focus on fairness (at least in terms of outcomes) also helps ensure that the business community and the wider public sees the competition authorities and their work as legitimate.

Julian Nowag says ‘it would be a misunderstanding to see the requirement of Article 11 TFEU as making sustainability a goal or, even a primary goal, of competition law’. For him it is akin to the rights of defence or other fundamental rights: something that needs to be taken into account. I have no views either way. For me the important thing is that sustainability is given due weight in the analysis in accordance with the law: J Nowag, ‘Competition has a Sustainability Gap’ (n 25). The European Commission in its 2004 Exemption Guidelines says the ‘aim of the Community competition rules is to

Rather than considering further the goals of competition in the abstract, I turn now to a more specific consideration of the competition provisions of the TFEU, particularly in Section V to those dealing with potentially anti-competitive agreements (Article 101) but also, in Section VI, with potential abuses of a dominant position (Article 102) and, in Section VII, with mergers (the EU Merger Regulation). In Section VIII I consider some of the objections that have been raised to taking environmental issues into account ('Is it all too difficult'). Section IX sets out some proposals for reform.



V. ARTICLE 101. NEED AGREEMENTS FOR 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. A number of excellent articles and books have been written discussing the scope of these provisions—in particular, the extent to which so-called ‘non-economic’ or ‘public interest’ factors can be taken into account (and a number of these specifically consider environmental issues and sustainability agreements).²⁵ These typically discuss the cases

protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources’ [26]. Although I would object that consumer welfare is not in the treaties this seems reasonably workable so long as (a) ‘consumer welfare’ is read in its natural meaning (as discussed above) and (b) the term ‘efficient allocation of resources’ encompasses sustainability (eg the renewability of those resources) as it would on a natural reading and, in particular, when interpreted in the light of the ‘constitutional provisions’ considered above.

25 Some good examples include: Ioannis Lianos, ‘Polycentric Competition Law’ (2018) 71 *Current Legal Problems* 161–213; S Kingston, *Greening EU Competition Law and Policy* (CUP 2012); Julien Nowag;

of the European Courts, the decisions of the European Commission and various guidelines issued by the Commission (particularly the 2004 Exemption Guidelines and the 2010 Horizontal Guidelines).²⁶

Much of the debate is framed in terms of taking a narrow or wide view of competition law. For example, Cyril Ritter's paper discusses whether competition law should merely avoid conflicts with other EU policies (a 'minimalist view') rather than be interpreted in a way that maximizes the objectives of those other EU policies ('the maximalist view'). Similarly, Julian Nowag draws a distinction between:

- i. preventing conflicts between the policy to be integrated (eg here, environmental policy) and the relevant sectoral policy (here, competition policy) – which he calls the 'first form of integration'; and
- ii. integrating the two by means of a balancing exercise—which he calls the 'second form of integration'.

He draws a further distinction between 'supportive' and 'preventative' integration. Supportive integration means applying the sectoral rules so as to allow measures that are beneficial for the policy which is to be integrated (here, environmental policy). Preventative integration means application of the sectoral rules (here, competition policy) to avoid harm to the policy to be integrated (here, environmental policy).²⁷

In my view, the constitutional provisions of the treaty requires us to take the 'maximalist view', the 'second form of integration' and both the 'supportive' and 'preventative' integration approach.²⁸

While I touch on some of the arguments in support of this, others have done so in more detail. My primary points are threefold:

- i. 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;

'Environmental Integration in Competition and Free Market Laws (OUP 2016). Townley (n 19); Alexandra Teorell, 'A Company's Guide to Environmental Action' (Mater Thesis, Lund University 2019); Cyril Ritter, 'The Interface between Competition and Regulation in EU Law' (unpublished); Or Brook, 'Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts and Five Competition Authorities' (2019) 56 CMLR 121–56; Julian Nowag, 'Competition Law's Sustainability Gap? Tools for an exemption and Brief Overview' (2019) Lund University Legal Research Paper Series, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3484964> accessed 17 January 2020; the 2010 OECD Report (n 3); Maurits Dolmans, 'Sustainable Competition Policy' (to be published); Gianni de Stefano, 'Measurable Environmental Protection as a Necessity for Competition Law' (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3533499> accessed 16 March 2020.

26 European Commission, 'Guidelines on the Application of Article 81(3) of the Treaty' [2004] OJ C101/97 ('2004 Exemption Guidelines') and European Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' [2011] OJ C 11/1 (the '2010 Horizontal Guidelines').

27 See (n 25).

28 Subject always to the qualifications set out within the competition provisions themselves—notably the third and fourth conditions of art 101(3). See further discussion of these conditions in the sub-section 'The exemption route: Article 101(3)' in Section V.

- ii. we have the legal tools to do this. Not only do the ‘constitutional’ provisions of the treaties require this (as discussed in Section IV above) but there is plenty of authority from the CJEU²⁹ in support of this and a number of examples in the Commission decisions to embolden us;
- iii. 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.³⁰

As mentioned in Section II, there are many circumstances where co-operation between competitors is necessary to achieve vital sustainability objectives (or, as Commissioner Vestager has recognized, it is the most effective way to do so). Where an individual company seeks to internalize a so-called ‘external cost’ (such as pollution of the air or using a more sustainable input) it is likely to incur an extra cost and it may suffer a significant competitive (or ‘first mover’) disadvantage if it is the first, or only, competitor to do this.³¹ Agreement amongst competitors is a way of ‘levelling the playing field’ on the basis of costs that reflect the true costs of production. To the extent that this encourages others to compete on this basis (ie on a fully cost or true cost basis) it can be seen as pro-competitive, rather than restrictive of competition. Furthermore, the more these costs are internalized, the greater the incentives for companies to lower these costs—a ‘win win’ for the environment and competition.

Furthermore, just as sustainability is an essential (and recognized) part of European Competition policy, a well-functioning competition policy can contribute to sustainability by encouraging green innovation and making business more responsive to consumers’ demands for sustainable products. If well designed and applied, the relationship between sustainability and competition policy can be mutually beneficial. There is therefore much to be gained if we can only get this right.

29 As Suzanne Kingston has concluded, ‘overall the CJEU has demonstrated itself to be a constitutionalist actor which is serious about the requirement to achieve real, substantive integration of environmental protection requirements into the EU’s economic policies, as required by Article 11’. It has ‘used what can be termed a ‘close look proportionality analysis’ closely examining [that] the purported environmental aims were actually being realised, and in the least restrictive manner’, Suzanne Kingston, ‘The Uneasy Relationship between EU Environmental and Economic Policies, and the Role of the CJEU’ (2015) UCD Working Paper in Law Criminology & Socio-Legal Studies, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2686526> accessed 17 January 2020.

30 Many others share my concern. See, eg the concerns expressed by the Economic and Social Committee of the European Parliament and in the study into industry attitudes to multi-stakeholder collaboration referred to in (n 5).

31 So-called ‘external costs’ are, eg, costs that arise during the production of a product which, instead of being borne by the producer, consumers or other buyers, are borne either by identifiable third parties (such as underpaid workers in off-shore factories); the tax payer (eg where the government bears the cost of cleaning up a polluted river); by society as a whole (eg in the case of air pollution) or future generations (eg in the case of the production of greenhouse gases).

A good example of the ‘first mover disadvantage’ is the decision of German discount retailer, Lidl only to sell Fairtrade bananas in Germany. Competitors did not follow and Lidl lost sales resulting in a reluctant reversal of the decision only 8 months later: <<https://bananalink.org.uk/news/Lidl-backs-away-from-fairtrade-bananas/>> accessed 18 January 2020.

There are various ways in which environmental or sustainability agreements³² might escape the prohibition on anti-competitive agreements. Different people will favour different routes (I too have my preferences). However, while an anathema to many lawyers, the key point is that vital progress on sustainability is supported, not impeded, by competition law: exactly how it is done is very much a secondary consideration.

I will consider five (overlapping) ways in which this might be done:

- i. Some agreements are unlikely to restrict competition at all;
- ii. Take the view that sustainability agreements essentially fall outside Article 101(1) completely (the ‘Albany’ route);
- iii. See sustainability agreements as falling within the ancillary restraints/objective necessity doctrine (a less radical version of (ii));
- iv. Some sustainability agreements fall within Article 101(3) (generally my preferred route);
- v. Make more use of the more generous treatment of standardization agreements (essentially a variant on (i) and (iv) above).

Agreements that do not restrict competition

It is self-evident that not all sustainability agreements will restrict competition. For example, the European Commission’s 2001 Horizontal Guidelines said that an environmental agreement would be unlikely to restrict competition if:

- i. it does not place any individual obligation on the parties, or if parties only commit loosely to contributing to a sector-wide environmental target,
- ii. the agreement stipulates environmental performance with no effect on product and production diversity, or

32 Paragraph para 179 of the European Commission’s 2001 Horizontal Guidelines defined environmental agreements as ‘agreements by which parties undertake to achieve pollution abatement, as defined in environmental law, or other environmental objectives . . . in particular those set out in Article 174 of the Treaty [of the EC]’. This provision is now Article art 191 of the TFEU and states that Union policy on the environment shall contribute to the pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment;
- protecting human health;

prudent and rational utilisation of natural resources;

promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combatting climate change’.

I am not aware of a definition of ‘sustainability agreements’ and am aware that for some sustainability agreements might include a wider range of issues (eg, reflecting the UN Sustainable Development Goals). For me, a sustainability agreement is one that contributes to sustainable development. The Brundtland Commission defined sustainable development as development that ‘meets the needs of the present without compromising the ability of future generations to meet their own needs’. This is a broad concept but in this paper article I am generally using the terms environmental and sustainability agreements interchangeably; Brundtland Commission, *Our Common Future* (Report) (Oxford University Press, OUP 1987).

iii. it gives rise to genuine market creation.

Although the 2001 Horizontal Guidelines have been replaced by the 2010 Horizontal Guidelines, arguably they can be used to interpret the latter where they do not contain sufficient guidance. If the EU is serious about being a world leader in tackling climate change, it is to be hoped that when the Commission updates the 2010 Horizontal Guidelines a chapter on sustainability agreements is not only included but sets out a clear roadmap that encourages their development.³³

There are a number of sustainability agreements which the Commission has accepted fall outside Article 101(1). Good examples are the JAMA and KAMA agreements concerning emission reductions amongst car producers but which did not impose a precise obligation as to the methods of achieving this.³⁴ More importantly, there are probably thousands of sustainability agreements which have been self-assessed as not falling within Article 101(1).³⁵ It is important not to lose sight of this when considering the next sections.

33 This would be consistent with the request by the Economic and Social Committee of the European Parliament in its 2018 Annual Report on Competition Policy (n 5) where, at para 48 it says that 'the Commission should create legal certainty on the conditions under which collective arrangements . . . for the purpose of sustainability . . . would be assessed under competition law, and encourage such initiatives within competition policy'.

34 JAMA and KAMA XXVIII the Report on Competition Policy (1998) (Japan Automobile Manufacturers Association and Korean Automobile Manufacturers Association, respectively). Another example is the DSD Case concerning the collection of plastic waste where because the agreement gave rise to a new market (plastic waste management), the Commission took the view that the agreement furthered competition, despite setting prices and establishing exclusivity: DSD case (COMP/34493).

35 A good example is given by the OFT in its submission to the 2010 OECD Report (n 3) 100. This concerned an agreement between major producers of Yoghurt which agreed with major packaging suppliers to develop and implement a voluntary initiative to make yoghurt pots from recycled plastic. The OFT explains why this would not fall within art 101(1). Most of these agreements will understandably avoid any reference to price. However, it is worth recalling that even agreements between competitors concerning price are not necessarily caught by art 101(1). eg an agreement between purchasers to pay a 'fair' or 'reasonable' price to farmers might escape art 101(1) if (a) the market share of the purchasers was small and/or (b) the cost of product was a small percentage of the price of their downstream product. Consider, eg a cup of coffee. Suppose this costs £2.50 on the high street, of this about 10p is for the coffee itself (4%). Of this 10p, only about 1p (10%) typically goes to the grower—ie 0.4% of the cost of the cup of coffee on the high street (Chelsea Bruce-Lockhart and Emiko Terazono, 'From Bean to Cup, What Goes into the Cost of your Coffee?' *Financial Times* (3 June 2019). However, these issues need to be analysed carefully on a case by case basis.

The difficulties are illustrated by various attempts over the years to pay a decent price to EU farmers for milk. Eg an MoU involving French cooperatives, farmers and retailers which included a minimum and maximum price was not challenged by the French competition authorities (but it concerned only one type of milk and one supermarket).

Under the Common Agricultural Policy there are general exemptions in arts 39–42 TFEU and a number of sector specific derogations from competition law. eg arts 149 and 150 of the CMO Regulation allows joint negotiations on the supply of milk by producers, provided that this does not concern more than 33% of the total national production; see: Fair Trade Advocacy, 'EU Competition Law and Sustainability in Food Systems. Addressing the Broken Links' (Brussels, February 2019) <http://www.responsibleglobalvaluechains.org/images/PDF/FTAO_-_EU_Competition_Law_and_Sustainability_in_Food_Systems_Addressing_the_Broken_Links_2019.pdf> accessed 17 January 2020, p 48.

The ‘Albany’ route

In the Albany case, the European Court of Justice (ECJ)³⁶ essentially decided that Article 101 does not apply to collective bargaining. In one sense the Albany case is just one of several cases applying the ancillary restraints/objective necessity doctrine considered at the sub-section ‘The Ancillary Restraints/Objective Necessity Route’ below. I separate it out for two reasons:

- i. 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’. It noted that the ‘social policy objectives pursued by [collective] agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking to adopt measures to improve conditions of work and employment’.

The court held that ‘it therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour 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. Indeed, arguably, the case is stronger for sustainability agreements given the express references to the ‘protection and improvement of the quality of the environment’ and to ‘sustainable development’ in the ‘constitutional’ provisions of the TFEU (see Section IV above).

- ii. The Albany judgement 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.

My own personal preference is generally to see appropriate agreements being exempted under Article 101(3)—and subject to the proportionality test which it contains.³⁷ However, for those who take a narrower view of Article 101(3) (or for agreements that do not clearly meet the four conditions of Article 101(3)), the Albany judgement potentially provides a clear cut and authoritative way of finding a sustainability agreement to fall outside Article 101(1) completely.

The ancillary restraints/objective necessity route

There have been a number of cases³⁸ over the years where the European Commission and the European courts have found a variety of agreements to fall

36 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] C-67/96 ECR 1999. That Albany is still ‘good law’ is clear from more recent cases such as *FNV Kunsten* which, not only reaffirmed the Albany principle, but extended it by holding that collective labour agreements involving ‘service providers in a situation comparable to that of [employed workers] may also fall outside Article 101(1) completely’, *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] C-413/13.

37 See the sub-section below ‘The exemption route: Article 101(3)’.

38 Examples include:

outside Article 101(1) completely (either as ‘ancillary restraints’ or as being ‘objectively necessary’).³⁹

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.

I would add two comments here:

- i. The application of these doctrines to environmental agreements has not yet been tested in the courts. While this may be seen by some as a difficulty, it is also an *opportunity* which should be grasped to minimize the extent to which competition law risks compromising vital action to tackle climate change.
- ii. In reality, many of these decisions can be seen as a policy decision reflecting how sympathetic (or otherwise) the court was at the time to the ‘public interest’ issue in question. As environmental, sustainability, and climate issues go up the political agenda the more likely it is that they will be treated sympathetically (like anti-doping rules) and less likely that they will be seen as something that is caught by Article 101(1), and which must meet the conditions of Article 101(3) if they are to escape that prohibition (like the restructuring of the Irish Beef Market).⁴⁰

The exemption route: Article 101(3)

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). As mentioned at the beginning of this Section V, much has been written about what can, and what cannot, be taken into account under Article 101(3).⁴¹ As discussed in Section IV, much of the difficulty arises from an unnecessary focus on a (narrowly conceived) ‘consumer welfare’ test which leads many writers to ask (with the best of intentions) unnecessary questions such as can ‘non-economic’, ‘public interest’, or ‘non-competition’ issues be taken into account?⁴² My approach is to look at what Article 101(3) actually says and interpret it

a. Albany (see the sub-section above ‘The ‘Albany’ route and n 36);

b. Self-Regulation of the Dutch Bar (Banning Multi-Disciplinary Partnerships) [1999] C309/99 Wouters [2002] ECR I-1577.

c. Meca-Medina [2006] C-519/04 ECR I-6991. If this case confirms the Wouters reasoning and extends it to include public health requirements, then why should it not be extended to environmental and sustainability issues? Both have a similar status in the ‘constitutional’ provisions of the treaty (see sSection IV.).

39 For a discussion of these concepts see Whish and Bailey (n 12) 132–44. See also the judgment of the UK’s Competition Appeal Tribunal in the *Ping* case [2018] CAT 13 [199] to [207].

40 Contrast the approach to anti-doping rules in *Meca-Medina* (n 38) and to the restrictions of the Irish beef industry in *Competition Authority v Beef Industry Development Society* [2008] C-209/07 ECR I-8637, [21].

41 See (n 25) for some examples.

42 This is not to suggest that such an approach is fatal to the argument for a proper and expansive interpretation of art 101(3) (my point is: it is not necessary to take this approach). eg the CFI (now the General Court) held in the *Métropole* case that: ‘the Commission is entitled to base itself on all considerations

(as the treaty says we ‘must’) in the light of the ‘constitutional’ provisions of the treaties.[Is that really such a radical approach?]. Article 101(3) requires an agreement to meet each of four conditions to be exempted. I will consider each in turn.

Condition 1: Improvements and progress

Probably the most important of these for present purposes is the first one. The agreement must: ‘contribute to improving the production **or** distribution of goods **or** to promoting technical **or** economic progress’ (emphasis added).

Four 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 (note the disjunctive ‘or’). There is therefore no need to translate all improvements and progress into ‘economic’ terms—and still less reason to reduce them to narrow financial considerations. While there may be instances where putting an economic value on a benefit may be useful in carrying out a proportionality analysis, this should not become a straitjacket restricting the application of Article 101(3). If it does, we are in danger of turning into Oscar Wilde’s cynic—knowing the price of everything, and the value of nothing⁴³;
- iii. Even if one focuses just on the ‘economic’ criterion, many sustainability agreements will fall within this. For example, is it not ‘economic’ progress if an agreement leads to the production of an engine that costs €1000 with half the emissions of its predecessor which also cost €1000? In my view, yes—and it is not necessary to establish that, but for the agreement, the less polluting engine would have cost €2000⁴⁴ (in any case, this is clearly ‘technical’ progress).

Consistent with this, the Organisation for Economic Cooperation and Development (OECD) has recognized ‘cost savings, innovation, improved quality and efficiency’ as ‘direct economic benefits’ which are ‘typically recognised in competition law analysis’.⁴⁵ Many, or even most, environmental benefits are likely to fall under one or more of the above heads.⁴⁶

connected with the pursuit of the public interest in order to grant exemption under Article 85(3) of the Treaty’, *Métropole Télévision v Commission* [1996] T-528/93 ECR II-649, [118].

43 See further Section VIII (vii) ‘Is it all too difficult’.

44 The same logic led the Commission to conclude in the CECED Decision (n 48) that; ‘the future operation of the total of installed machines providing the same service with less indirect pollution is more **economically** efficient’ (emphasis added).

45 See 2010 OECD Report (n 3) 11.

46 While I take issue with the use of these labels, the OFT’s contribution to the 2010 OECD Report (n 3) contains an interesting analysis of so-called direct and indirect benefits. It acknowledges that ‘direct economic benefits, even those of an environmental nature [!], allow for greater objectivity, are more amenable to quantification and generally fall within a competition authority’s area of expertise. As such, the advantage of taking them into account when examining horizontal agreements appears to be non-controversial and to fit well with standard competition assessment of horizontal agreements under Article 101’.

So far as so-called ‘indirect economic benefits’ are concerned OFT’s paper sets out (p 104 to 108) the arguments for and against ‘incorporating environmental issues in the analysis of horizontal agreements’.

In this sense it is legally wrong (and unhelpful for the analysis) to classify environmental (or any other benefits) as somehow ‘non-economic’ or as (only) ‘indirect economic benefits’ (or ‘non-competition issues’). We should resist the temptation to apply arbitrary labels to everything; we should look at the specific facts, benefits and issues and apply the law accordingly.

- iv. There is no reference here to ‘pro-competitive effects’. Many lawyers and economists (myself included) lapse into saying that Article 101(3) allows one to balance the ‘pro-competitive effects’ against the ‘anti-competitive effects’ identified under Article 101(1). Wrong: this is not what Article 101(3) says. While this is sometimes a useful shorthand (certainly when advising lay clients), it can be both lazy and misleading. In important or difficult cases it is essential to *focus on what Article 101(3) actually says*.

While at times there are decisions and statements by the Commission and commentators that are unhelpful, we should never lose sight of four things:

- i. the constitutional requirement that ‘environmental protection requirements must be integrated into the . . . implementation of [all] the Union policies and activities’ (Article 11 TFEU); and
- ii. 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’⁴⁷; and
- iii. clear and helpful decisions of the Commission such as the much discussed CECED washing machine case.⁴⁸

On p 98 it states that ‘the main advantages of including indirect and non-economic (sic) benefits in the analysis of horizontal agreements would be **that the totality of benefits of an agreement to all customers are taken into account**. This would reduce the likelihood of competition policy being a block on potentially government sponsored initiatives and would ensure consistency with standard cost-benefit analysis’. Exactly!

(emphasis added). I would acknowledge (and indeed agree) with most of the points made by the OFT under the heading ‘arguments against including indirect and non-economic environmental benefits’ (p 106–108). However, I see these mainly as difficulties to be overcome not as reasons not to include environmental benefits (and, indeed, costs) in the analysis (see also Section VIII: ‘Is it all too difficult’).

It is not a question of what types of environmental benefits (and costs) should be taken into account: it is a question as to the weight we should place on them.

- 47 European Commission, ‘XXV Report on Competition Policy’ (Brussels/Luxembourg, 1995). Interestingly, this statement was made in 1996. If this was the position in 1996, before the current environmental ‘constitutional’ provisions were included in the treaties in their current form, then logically this is even more the case now.
- 48 CECED (*Conseil Européen de la Construction d’appareils Domestiques*) (CECED [1999] L187/470J 2000)]. In this case, the Commission granted an exemption to an agreement between producers and importers of washing machines (accounting for some 95% of European sales) which involved discontinuing the least energy efficient machines and pursuing joint energy efficient targets and developing more

- iv. Many helpful comments by advocate generals and the CJEU over many years: for example, in the *3F v Commission* judgement the CJEU held: ‘... the Community has not only an economic but also a social purpose, the rights under the provisions of the Treaty on State Aid and competition must be balanced, where appropriate, against the objectives pursued by social policy’.⁴⁹

It is sometimes suggested that some of the Commission’s statements and decisions favourable to the environment predate so-called ‘modernisation’ around the turn of the century. Be that as it may, these are often the statements and decisions most aligned with both the treaties and the acknowledged need to respond to climate change.⁵⁰ Competition policy needs a further reboot to reflect current realities and our political, economic and environmental priorities. The older cases serve to show that what is needed has been recognized as consistent with the law. Put another way, it shows we have the legal tools. We must not be afraid to use them.

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’.

This invites two questions: who are the relevant ‘consumers’ for this purpose? And what is a ‘fair share of the resulting benefit’?

Consumers

Paragraph 47 of the 2010 Guidelines says that the ‘concept of “consumers” encompasses the customers, potential and/or actual, of the parties to the agreement’. Similarly, paragraph 84 of the Exemption Guidelines says that the ‘concept of “consumers” encompasses all direct or indirect users of the products covered by the agreement’.

So far, so good (or, at least OK). But is that **all** it ‘encompasses’. In my view, no:

- 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;

environmentally friendly machines. Despite increasing prices (by up to 19%) and removing competition on one element of competition, the Commission accepted that the collective benefits for society (ie a reduction in energy consumption) outweighed these costs.

49 *3F v Commission* [2009] C-319/07 P ECR I-5963, [58].

50 I welcomed ‘la nouvelle vague’ in film, and ‘modernism’ in architecture but that does not mean we can’t seek inspiration from older films or the Sistine chapel. Furthermore some of the worst (and dare I say, dangerous) architecture in the 1960s post-dates modernism, and the best modern architecture adheres to much higher standards. Perhaps we will look back at some competition decisions of the ‘noughties’ in the way we now look at much of 1960s architecture: well meant but, in retrospect, a disaster.

- 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. In this sense it must be recognized that consumers have wider interests than their narrow financial ones (concerned with more or better goods at ever lower prices);⁵¹
- iv. 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!)
- v. Happily, the Commission has often (but not always) recognized this—the clearest example being its CECE 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’ (emphasis added).⁵² 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’.
- vi. A narrow view of consumers does not seem consistent with several judgments of the European courts. For example, in *Compagnie Generale Maritime* the General Court (then the CFI) held that, in considering Article 101(3) (as it now is): ‘regard should naturally be had to the advantages arising from the agreement in question, not only for the relevant market . . . but also, in appropriate cases, **for every other market** on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or efficiency of which the agreement in question might be improved by the existence of that agreement . . . [Article 101(3)] of the Treaty envisage[s] [exemption in favour of, amongst others, agreements which contribute to promoting technical or economic progress, **without a specific link with the relevant market**’ (emphasis added).⁵³

51 This point is echoed in para 78 of the 2018 Annual Report on Competition Policy (n 5); See also the sub-section ‘Article 102 as a ‘sword’’ in Section VI below.

52 See (n 48).

53 *Compagnie Generale Maritime* [2002] T-86/95 II-01011. For further cases suggesting that a narrow approach is not correct (or in need of an ‘update’) see the cases cited by Grant Murray in his excellent short blog: Grant Murray, ‘Antitrust and Sustainability: Global Warming Up to be a Hot Topic?’ *Kluwer Competition Law Blog* (18 October 2019) <<http://competitionlawblog.kluwercompetitionlaw.com/>

While I consider a narrow approach to consumers is inconsistent with the treaties and risks undermining vital agreements to combat climate change, it must be recognized that there must be some limits to the concept of consumers. For example, it would not seem right to suggest that an agreement restricting competition (and caught by Article 101(1)) in product market A, and in geographic market X, nevertheless satisfies the conditions of Article 101(3) because of benefits accruing exclusively in product market B, and geographic market Y. So there must be some limits to the concept of consumers, but what are they?

Paragraph 43 of the Exemption Guidelines is an attempt to identify those limits and the consumers whose interests must (or can) be taken into consideration when applying Article 101(3) and assessing whether they get a 'fair share' of the resulting benefits identified under the first condition of Article 101(3). Paragraph 43 begins in fairly restrictive terms:

'The assessment under Article [101(3)] of benefits flowing from restrictive agreements is in principle made within the confines of each relevant market to which the agreement relates. The Community competition rules have as their object the protection of competition on the market and cannot be detached from this objective. Moreover, the condition that consumers must receive a fair share of the benefits implies in general that efficiencies generated by the restrictive agreement within a relevant market must be sufficient to outweigh the anti-competitive effects produced by the agreement within that same relevant market. Negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects in another unrelated geographic or product market'.

It then goes on, however, to recognize that in many circumstances for Article 101(3) to work in practice (and as envisaged by the treaties) such a narrow approach is not appropriate:

'However, where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same'.⁵⁴

This broadening is to be welcomed but, for the reasons given above, it does not go far enough. As Grant Murray has argued, paragraph 43 is in need of what he calls an 'update' in the light of recent cases⁵⁵—or, at the very least, expanding if it is to take proper account of environmental agreements whose benefits (eg clean air, fewer greenhouse gases, etc) are often wide in scope. In this respect I would suggest:

2019/10/18/antitrust-and-sustainability-globally-warming-up-to-be-a-hot-topic/> accessed 18 January 2020.

54 It's a pity the term actually used in art 101(3), 'benefits', is not used here, rather than an imported term 'efficiencies' but the meaning is, nevertheless, clear.

55 See the cases cited by Grant Murray (n 53).

- i. It would be helpful if the Commission provided further guidance on 'where two markets are related'; and
- ii. It should not be necessary for the 'group of customers affected by the restriction and benefiting from the efficiency gains [to be] **substantially the same**' so long as they at least overlap. For example, in the CECED Case, the consumers affected by the restriction of competition were not 'substantially the same' as those to whom the 'collective environmental benefits' accrued (the reduced pollution from electricity generation) and yet (as mentioned above) the Commission explicitly stated that such 'environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers'.

This suggests 2 possibilities:

- i. The group of customers affected by the restrictions must be a subset of those benefiting from the benefits (a narrow view); or
- ii. It is sufficient that there is some overlap between the group of customers affected by the restrictions and those receiving the benefits (a broader view).

Paragraph 85 of the Exemption Guidelines say that 'the net effect of the agreement must be neutral from the point of view of those customers directly or indirectly affected by the agreement . . . '. In principle, this can work, whether the narrow or broader view referred to above is taken, so long as it is clear that this assessment of the 'net effect' of the agreement is carried out looking at the affected consumers as a whole and not just a subset of those (ie those directly affected by the restrictions of competition). This point is implicit in the last sentence of paragraph 85 of the Exemption Guidelines which merits repeating here:

'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'

Exactly! This point also emerges clearly from the passages in the CECED Decision cited above. To the extent that these points are not clear, clarification or guidance from the Commission would be welcome (certainly when the 2010 Guidelines are updated).

An important question, in the context of the fight against climate change, is whether *future* consumers can be taken into account? Happily, the Commission's 2004 Exemption Guidelines give a clear and positive answer (but with some discounting for the fact that these benefits are in the future).⁵⁶ This is most welcome as the need to consider future generations (future 'consumers') is central to the very concept of sustainability whether it is the effect of an agreement on climate change

56 See paras 87 and 88 of these guidelines (n 26). In discounting for future benefits we should be careful not to discount future costs which may be going up and which are often underestimated (see the Stern Report on how future climate change costs are underestimated (n 1)).

or other environmental issues such as the need to preserve biodiversity and an ecosystem compatible with sustaining a global food system.⁵⁷

Whether consumers outside the EU can also be taken into account is less clear. Regrettably the legal position is not clear.⁵⁸ That said, the benefits of many environmental agreements will not be limited to a particular geographic area such as the EU so the issue may not arise in such cases.

Fair share of the resulting benefit?

The second question that arises is what constitutes a 'fair share of the resulting benefit'?

- i. First, some boring technical points. The condition does not suggest that consumers must benefit from a lower **price**. It does not even suggest that the consumer's benefit need take the form of a 'fair' price. It speaks more generally of a 'fair share of the resulting benefit' which is clearly a flexible concept capable of taking into account wider sustainability concerns. Furthermore, nothing here suggests that it is necessary to quantify and reduce these to narrow financial considerations.
- ii. The Commission has helpfully recognized this in its 2004 Exemption Guidelines specifically noting that:

The benefits to consumers can:

"take the form of qualitative efficiencies such as new and improved products creating sufficient value for consumers to compensate for the anti-competitive effects of the agreement, including a price increase" (paragraph 102).

57 In this context see Ioannis Lianos and Amber Darr, 'Hunger Games: Connecting the Right to Food and Competition Law' (2019) *CLES Research Papers Series*, <file://sann-ad-02.st-annes.ox.ac.uk/MemberData\$/sann5572/Downloads/SSRN-id3414032.pdf> accessed 18 January 2020.

58 Until recently, I would have said (with regret) that it was probably not possible to take into account consumers outside the EU. However, in the light of the recent decision of the Dutch Supreme Court in the Urgenda case there is an argument that the EU authorities are obliged to take into account the effects on consumers beyond the EU's borders. In the Urgenda case the court held: 'states have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment beyond the limits of national jurisdiction'. This judgment was based (to a great extent) on the UN Climate Change Convention and on the European Convention on Human Rights to which the EU, like the Netherlands, is bound [Urgenda, Dutch Supreme Court press release of 20 December 2019].

However, even if the view is taken that the effects on consumers outside the EU cannot be taken into account under 101(3), that would not mean that we should not be concerned about the extra-territorial effect of pollution (or social harms) generated within the EU, or environmental damage effectively off-shored by importing products with particularly adverse effects on the environment and climate change (be it beef, wine, cars or oil). It would mean that tools other than competition law are likely to be required; eg regulations or taking imported goods into account when designing and assessing carbon neutral targets. See also the sub-section 'Article 102 as a 'sword'' in Section VI below.

"Any such assessment necessarily requires value judgement. It is difficult to assign precise values to dynamic efficiencies of this nature" (paragraph 103).⁵⁹

"In many cases it is difficult to accurately calculate the benefits to consumers such that it is only necessary to provide estimates and other data to the extent reasonably possible, taking into account the circumstances of the individual case" (paragraph 94).

"Furthermore, this is the case even when an agreement results in increased prices for consumers" (paragraph 104).

- iii. Consistent with this both the Commission and the European courts have often recognized the benefit to consumers of (so-called) external factors without feeling any need to reduce them to narrow financial considerations.⁶⁰
- iv. The Commission accepts that the environmental qualities or characteristics of a product are parameters of competition. For example, the Commission is investigating whether 5 German manufacturers colluded 'not to improve their products, not to compete on quality' by limiting the 'development and roll-out of emission cleaning technologies for new diesel and petrol passenger cars' and whether they 'denied consumers the opportunity to buy less polluting cars'.⁶¹ If environmental factors are a relevant parameter of competition, it must be a factor relevant to their customers (indeed, the above statements by the Commission implicitly confirm this). If this is the case, it is logical to accept that improvements in these environmental factors are of benefit to consumers for the purpose of the assessment under Article 101(3).
- v. The question also arises whether it is just the subjective perception of a particular group of consumers of the environmental/sustainable benefits that needs to be assessed (the approach taken in the 'Chicken of Tomorrow' case—see (n 136)). While this is superficially attractive, there is a strong case for taking a wider view:
 - Which 'consumers' views are to be taken into account? As discussed above, this may be purchasers of particular goods or society as a whole;
 - The revealed preferences of consumer surveys need to be used with extreme caution. In particular, they are very susceptible to what questions are asked (and how they are worded);

59 Note also the comments in (n 130) on the importance of focusing on what is important and not just on what is easy or readably measurable. It is better to be roughly right than exactly wrong.

60 See eg cases such as *Metro, Exxon/Shell* and *Phillips/Oram* as cited by Grant Murray in his blog (n 53).

61 *Car Emissions* AT.407178. See European Commission, 'Press Release: Antitrust: Commission Opens Formal Investigation into Possible Collusion between BMW, Daimler and the VW Group on Clean Emission Technology' (Brussels, 18 September 2018), <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5822> accessed 18 January 2020 and European Commission, 'Press Release: Antitrust: Commission sends Statement of Objections to BMW, Daimler and VW for restricting competition on emission cleaning technology' (Brussels, 5 April 2019), <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2008> accessed 18 January 2020.

- These preferences may differ from those expressed by the same citizens through other means (eg elections or consumer attitude surveys).⁶²
 - The constitutional provisions of the treaty make it very clear that environmental protection and sustainable development are clear benefits for the Union (and therefore for consumers) and it 'only' remains to be assessed whether these benefits exceed the harm from the anti-competitive effect of the agreement (the 'balancing' or 'proportionality' principle).
- vi. There is a stronger case for a 'fair share of the resulting benefits' being assessed on an 'objective' basis with the relevant competition authority or court taking into account all the circumstances and available evidence (of which the expressed preferences of particular groups of consumers may be one element).
 - vii. When assessing whether consumers get a 'fair' share of the benefit, we could also take into account that the price paid post the agreement may be closer to the 'true' price of the product than that before the agreement if any price increase merely reflects the fact that some of the (so-called) externalities are now factored into the price which they pay (see further n 31 on externalities and n 133 on True Costs).
 - viii. Finally, in considering what a 'fair share' of benefits is we should revisit the weight we attach to different factors. How much do we really benefit from having ever more cheaper 'stuff'? What weight should we attach to reducing carbon emissions and giving our children and grandchildren clean air to breathe? These sort of questions are relevant whenever we are doing a balancing act or applying the principle of proportionality (for example in Condition 1 of Article 101(3) or when assessing 'abuse' under Article 102 (See Section VII below). In this context it should be noted that the Stern Report on climate change showed clearly that we greatly underestimate the future costs of climate change.⁶³ There is also a lot of research and evidence showing that the benefits of material possessions (or 'stuff') are ephemeral.⁶⁴ 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.⁶⁵

62 This may also explain the so-called 'eco paradox'; consumers want to 'do the right thing' and are, in principle, willing to pay more to do so, but hesitate when actually making purchases in store.

63 See (n 1).

64 See Joshua Becker, '9 Reasons Buying Stuff Will Never Make You Happy', *Becoming Minimalist* (March 2014), <<https://www.becomingminimalist.com/buying-stuff-wont-make-you-happy/>> accessed 18 January 2020.

65 A poignant illustration of this is perhaps an example given by the OFT on p 114 of its submission for the 2010 OECD report (n 3). The UK government wanted to develop a voluntary industry agreement to reduce the use of single-use carrier bags in supermarkets. The OFT gave advice and, following this, instead of setting up a voluntary agreement, the government, merely asked industry to consider how they could encourage consumers to reduce their use of single use plastic carrier bags (which proved to be pretty ineffective and legislation was introduced in 2015 imposing a 5p per bag charge). I am not privy to the OFT's advice but I do wonder whether, if more weight had been put on the environmental benefits of the levy, the outcome would have been different and we would have achieved the benefits many years

Concluding comment on consumer benefits.

From discussions with various officials in competition authorities it seems that a key obstacle to an approach to Article 103(3) that is more sympathetic to agreements to combat climate change is the group of customers to whom the benefits must accrue. Some suggestions as to a suitable approach, and the limits to the customers in question, have been made above. For those who advocate a wider approach to the first condition of Article 101(3) (such as myself) acceptance of such limits (and perhaps others) may be the necessary 'price' we have to pay in the real world if we are to get 'buy in' from the competition enforcement community to a more progressive approach to sustainability in general and to the fight against climate change in particular. Together we 'must' find a way to move forward.

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 necessary⁶⁶ is an expression of the proportionality principle in EU law. Although I am aware that its application has led to a number of environmental agreements failing to be exempt from Article 101,⁶⁷ I consider the proportionality principle to be an important check on the broad approach (which I advocate) to the environmental improvement and progress of the first condition of Article 101(3). For example, agreements to pass on environmental charges to consumers would almost invariably be considered unlawful even if it could be argued that such pass on might motivate customer conduct consistent with environmental policy goals.⁶⁸

The requirement also invites consideration of less restrictive ways of achieving sustainability goals. Take the example of one of the more difficult sustainability goals; paying sustainable prices to suppliers of agricultural products. Rather than buyers agreeing to pay a minimum price to suppliers, they might need to consider agreeing to set up a fund to help their suppliers in various ways—thus remaining free to agree their purchase prices individually.

earlier? I would also hope the CMA would now be able to give robust advice now if a similar question was put to them (after all most officials will have watched David Attenborough's 'Blue Planet!').

- 66 The third condition in art 101(3) is that the agreement must not 'impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives' (ie the improvements and progress referred to in the first condition for the applicability of art 101(3) and discussed earlier under Condition 1 above). In para 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'.
- 67 For a discussion of these cases see, eg Kingston (n 25) 280–87. For a good example of an environmental agreement (which included restrictions on both price and consumer choice) see the *CECED Decision* (n 48), [58]–[63].
- 68 See the 2010 OECD Report (n 3) 12. Encouragingly this also notes that certain jurisdictions have allowed agreements to pass on environmental charges in narrowly defined circumstances. The example given concerned wholesalers agreeing to pass on recycling charges for packaging materials to the producers responsible for producing the packaging in the first place (consistent with the fundamental 'polluter pays' principle).

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.⁶⁹

While I, again, consider this to be an important check on any potential misuse of Article 101(3), it is rarely going to prevent a sustainability agreement meeting the conditions of Article 101(3) and so do not propose to discuss it further.⁷⁰

The standardisation approach

At the beginning of this Section VI on Article 101, I suggested that one way in which more sustainability agreements might escape the prohibition of Article 101 (or do so more easily) might be to frame them as standardization agreements.⁷¹

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. However, I mention them here for four reasons:

- i. Many sustainability agreements take (or could take) the form of standardization agreements. For example, it seems likely that many of the animal welfare objectives might have been achieved in the ‘Chicken of Tomorrow’ case if the arrangements had been framed as a standardization agreement (see n 136);
- ii. The Commission’s 2010 Horizontal Guidelines contain a specific chapter on standardization agreements and make a number of helpful comments (including giving an example of an environmental agreement meeting the condition of Article 101(3) and noting that even agreements involving high market shares may still escape Article 101 completely).⁷²
- iii. In her Brussels Sustainability Conference speech Commissioner Vestager highlighted the possibilities for business to ‘get together to agree standards for sustainable products and . . . they can do that without breaking the

69 The fourth condition of art 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’.

70 For a discussion of this, see Kingston (n 25) 287–92. For an example of an environmental agreement where the Commission was satisfied that there was no ‘elimination of competition’ see [64]–[66] of the CECEC Decision (n 48).

71 Para 252 of the Commission’s 2010 Horizontal Guidelines says: ‘standardisation agreements have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply’.

72 Note, eg the following comments in *ibid*: Para 258: ‘Standardisation agreements generally have a positive economic effect’; para 277: ‘Where participation in standard-setting, as well as the procedure for adopting the standard in question, is unrestricted and transparent, standardisation agreements which set no obligation to comply with the standard and provide access to the standard on fair, reasonable and non-discriminatory terms, do not restrict competition within the meaning of Article 101(1)’; para 290: ‘As the effectiveness of standardisation agreements is often proportional to the share of the industry involved in setting and/or applying the standard, high market shares held by the parties in the market(s) affected by the standard will not necessarily lead to the conclusion that the standard is likely to give rise to restrictive effects on competition’; para 300: ‘Standardisation agreements can give rise to significant efficiency gains’. ‘Standards on, for instance, quality, safety and environmental aspects of a product may in addition facilitate consumer choice and can lead to increased product quality’.

competition rules' providing certain conditions are met. The conditions she set out are not controversial and most sustainability agreements should satisfy them:

- a. Sustainability agreements should not be a cover for cartels;
- b. You can agree what 'sustainability' means and create a well monitored label-but you can't agree how to pass the extra costs on to consumers;
- c. A handful of companies can't 'define what products are allowed on the market in a way that suits them –and keep others out'; and
- d. Every business has to have a 'fair and equal right to use the standard' (eg any product that meets the requirements for sustainability should be able to use that label).

Importantly she made it clear that 'we don't need new competition rules to make this possible' and that 'it's important that companies know about opportunities which they already have to work together for sustainability'. Indeed, yes. The big challenge is to get that message out to businesses.

- iv. Several commentators have suggested that environmental agreements have a greater chance of complying with Article 101 if constructed and assessed as standardization agreements.⁷³

A high profile and recent example of business seeking to address climate change through the use of standards is the agreement between four car makers (Ford, Honda, BMW, and VW) to adhere to higher standards for exhaust pipe emissions. This is being looked into by the US Department of Justice but it is difficult to see how this could infringe antitrust law (this is a US case but the broad principles are essentially the same as under EU law for present purposes). In particular, this is a classic case of 'first mover disadvantage': ie if any one car maker unilaterally increases its exhaust emission standards it is likely to give itself a cost (and a likely competitive) disadvantage. Secondly, it increases the participating firms' costs (not their prices) so, to the extent the arrangement impacts on non-participating car makers it may tend to give those third parties a cost advantage rather than disadvantage.⁷⁴

VI. ABUSE OF DOMINANCE

I will deal more briefly with Article 102 TFEU which concerns the abuse of a dominant position (usually by large companies) as it is less central to the day-to-day tension between competition law and climate change (at least under the current

73 A good example is Teorell's dissertation (n 25); Consistent with the argument in this article she concludes that 'environmental agreements can form a solution for tackling climate change'. Another example is a speech by a senior DG Competition Official, Luc Peepkorn, 'Sustainability Agreements: an EU Competition Law Perspective' (unpublished): 'Sustainability agreements are a form of standard-setting agreement. When assessing these agreements, the rules developed for standard-setting agreements provide a first point of reference'. Both of these papers helpfully summarize the conditions under which they consider environmental / sustainability agreements may avoid being caught by art 101(1) completely.

74 See Herbert Hovenkamp, 'Are Agreements to Address Climate Change Anti-competitive?' (2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3451931&download=yes> accessed 18 January 2020.

competition law framework).⁷⁵ Nevertheless, 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 (ie 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 (ie using sustainability as a ‘shield’). I will consider each in turn:

VI.i. 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,⁷⁶ 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. The question is more ‘is there a will to use it?’ rather than ‘is it possible to use it?’

While this article has generally focused on the relationship between competition law and the environment/climate change, Article 102(a) provides an opportunity to consider the use of competition law to tackle other non-sustainable practices such as the depressingly low prices paid by some retailers (or other intermediaries) to farmers for their produce. There is, of course, an environmental/climate change aspect to this in that such low prices encourage an excessive use of scarce resources and low prices (eg for bananas, cocoa, coffee) are discouraging many sustainable land use practices.⁷⁷ There is also an obvious political/social/economic/moral angle. What is ‘fair’ about a price if a farmer cannot afford to feed his/her children?⁷⁸

I would suggest that a purchase price is potentially ‘unfair’, and therefore potentially an ‘abuse’ if:

- a. it does not cover the true costs of production; or
- b. does not enable the farmer to make some reasonable mark-up (to feed his/her family and produce food on a sustainable basis).

75 For a fascinating discussion of the wider problems with big companies and an eloquent plea for ‘stakeholder antitrust’ see Meagher (n 2). For a fuller discussion of art 102 and environmental issues, see Chapter 5 of Kingston (n 25).

76 See eg *AstraZeneca AB and AstraZeneca plc v European Commission* [2012] C-457/10P.

77 Sometimes (but not always) there are short-term costs associated with more sustainable land use practices. Low prices can push producers to switch to less sustainable practices with lower short-term costs.

78 The link between abuse of power and adequate food was shown clearly in 2010 by Olivier de Schutter who found a ‘direct link between the ability of competition regimes to address abuses of power in supply chains and the enjoyment of the right to adequate food’, Olivier de Schutter, ‘Addressing Concentration in Food Supply Chains’, Briefing Note 03, (2010), <https://www.ohchr.org/Documents/Issues/Food/BN3_SRRTF_Competition_ENGLISH.pdf> accessed 18 January 2020, p 1.

If this seems radical or too difficult (and wearing my old private practitioner hat it would have to me) then consider the following:

- i. we are not considering any fancy new or innovative category of abuse (à la Astra Zeneca⁷⁹) but the very first category of abuse set out in Article 102 itself (a provision that has not changed since 1957). Furthermore, the concept of fair trade lies, not only at the historic heart of competition law and antitrust,⁸⁰ it is expressly written into the constitution of the EU. For example, Article 3(5) of the Treaty on European Union states clearly that one of the EU's objectives is to 'contribute to . . . the sustainable development of the earth' and to 'free and **fair** trade' (emphasis added).
- ii. Consistent with this, Article 39 TFEU states that one of the key objectives of the Common Agricultural Policy (CAP) is to 'ensure a fair standard of living for the agricultural community' and that 'supplies reach consumers at reasonable prices'. Note that it says 'reasonable' prices not 'low' prices. Is it 'reasonable' to pay farmers a price that means their families are living below the poverty line or have to rely on foodbanks? Furthermore, Article 42 TFEU makes it clear that (*inter alia*) the competition rules only apply at all to trade in agricultural products to the extent that 'account [is] taken of the objectives set out in Article 39'.
- iii. In a 2009 communication on fair trade the European Commission 'welcomed' 'schemes that guarantee a minimum price to farmers in developing countries' stating that a fair price was one 'guaranteeing a fair wage covering the costs of sustainable production and living'. Surely, if these are the criteria to determine what is considered to be a 'fair' price, it is not a big step to consider that prices which do **not** meet these criteria are 'unfair' (and therefore potentially an 'abuse' under Article 102)?⁸¹
- iv. Yes, it is difficult to determine what is a 'fair' purchase price (what is a reasonable markup?). Yes, the competition authorities and courts are (quite rightly) reluctant to become price regulators. But authorities and courts already condemn selling prices both as excessively *high* (an 'exploitative' abuse)⁸² and as unacceptably *low* (whether as predatory or otherwise exclusionary).⁸³ These issues are difficult (and authorities and courts should only intervene with care) but the conceptual issues raised by unfair purchasing prices and unfair selling prices are very similar. Just as the law has

79 See (n 76).

80 eg the concept of fairness and fair competition was a major driver of the US Sherman Act of 1890. For a discussion of fairness and antitrust see Horton (n 15) and see Section VIII 'Is it all too difficult?' and (n 137).

81 <<https://www3.fairwear.org>> accessed 18 January 2020.

82 eg *Napp Pharmaceuticals Holdings v DG of Fair Trading* [2002] EWCA Civ 796.

83 For an example of predatory pricing see *Akzo Nobel v European Commission* [2010] C-550/07P and *Intel* for an example of exclusionary pricing *Intel v Commission* [2017] C-413/14P.

developed around what is an unfairly high ('excessive') selling price, or unfairly low ('predatory') selling price, so too could rules be developed to determine what is an unfairly low purchase price.⁸⁴

- v. I am not suggesting that purchase prices negotiated by retailers should be attacked on a regular basis. First, the issue only arises if a purchaser holds a dominant position (either individually or, exceptionally, collectively)—which is rarer than people often realize.⁸⁵ Secondly, just as it is difficult to establish that a selling price is 'excessive'⁸⁶ or "predatory" it is likely to be difficult to establish that a low purchase price is 'unfair'. For these reasons it is likely that where there is a systemic problem (eg the low prices paid by the global north to producers in the global south for primary products such as cocoa, coffee, or bananas, the issue will generally be better tackled through legislation.)⁸⁷ However, where for a variety of reasons, regulation does not provide a sufficient solution, there is no reason in principle why Article 102 cannot be invoked.
- vi. We are not alone. In particular, concerns have been expressed by the European Parliament's Economic and Monetary Affairs Committee over unfair and unsustainable low prices paid to farmers:
 - a. 'the concept of a "fair" price should not be regarded as the lowest price possible for the consumer, but instead must be **reasonable** and allow for the **fair remuneration** of all parties along the food supply chain'.
 - b. 'Consumers have interests other than low prices alone, including animal welfare, environmental sustainability . . .'
 - c. 'Greater account [should] be taken of the value of "public goods" in food pricing'.
 - d. 'EU competition policy [should] look beyond the lowest common denominator of 'cheap food'.
 - e. 'The costs **of production must be taken fully into account** when agreeing prices in contracts between retailers/processors and producers

84 Economists and accountants would no doubt play a major role in this but I would anticipate that the starting point would be some measure of total costs up the production and shipping chain and some concept of a reasonable profit. Ideally, these should reflect costs that are often termed 'externalities' (eg the environmental damage caused by the product) but it may be that this element is best dealt with by means of regulation (eg an obligation to include it in a specified way in purchase costs) rather than dealt with on an ad hoc ex-post way under art 102.

85 eg, it is unlikely to reduce the difficulty of low prices paid by supermarkets in the UK for milk or by purchasers globally for bananas, coffee or cocoa. On this see also (n 35).

86 See, eg, *UK Competition Appeal Court's judgement in 'Flynn Pharma Ltd and Flynn Pharma (Holdings) Ltd v CMA* [2018] CAT 11.

87 A clear example of this is the EU's recent directive on unfair trading practices in business to business relationships in the agricultural and food supply chain. This contains new rules that ban, for the first time, certain unfair trading practices imposed unilaterally by one trading partner on another (Directive (EU) 2019/633 on Unfair Trading Practices in Business-to-Business Relationships in the Agricultural and Food Supply Chain (2019) OJ L111/59). In addition, many (most?) EU member states have legislation on unfair trading practices (eg the UK and Italy). Furthermore, some countries (eg Germany) have laws analogous to EU law on abuse of dominance which deal with behaviour where one company has significant market power relative to others.

with the intention of ensuring **prices that at least cover costs**' (emphasis added).

Paragraph 78 of the 2018 Annual Report on Competition Policy (n 5). Note also that this approach is entirely consistent with the natural meaning of consumer welfare discussed in the sub-section 'The consumer welfare detour' above.

- vii. Another (more radical) way of tackling this issue might be to treat the subsequent *selling* price as predatory; ie after taking into account all the 'true' upstream costs of production and supply (as discussed in n 84 and n 33) but otherwise applying the usual rules on predatory pricing (as, for example, set out by the CJEU in *Akzo*).⁸⁸ This will not be easy but, given the importance of the issue, it merits further consideration (progressive economists, please note).
- viii. It is also worth noting that national competition regimes have acknowledged the need to tackle abuses by suppliers. For example, the Italian Competition Authority has been given power to punish conduct resulting in 'an unwarranted exercise of bargaining power on the demand side'.⁸⁹
- ix. Although beyond the scope of this article, 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 labour, environmental depravation, human rights, etc. In many instances, the most obvious way to deal with these issues is by regulation but, in principle, there is no reason why Article 102 should not 'plug the gaps'. Not only would such use be consistent with the CJEU's acceptance that the categories of abuse are not closed,⁹⁰ but this approach fits with our innate sense of what an abuse of power is. 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. Furthermore, 3 of the 4 types of abuse listed in Article 102 are exploitative rather than exclusionary. This is hardly surprising given that competition law and policy is supposedly concerned with protecting consumers (and this regardless of whether a 'consumer welfare' standard is espoused). Is it not time to rethink the balance and tackle more 'exploitative abuses'?

88 See (n 83). See also the discussion of 'True Costs' (n 133).

89 Art 62 of the Law 27/2012.

90 cF *Astra Zeneca* (n 76). This, of course, works both ways and Article 102 could (and should) also be used to attack 'green washing'. For example the Italian competition authority recently found ENI guilty of 'green washing' when it made misleading environmental claims about its diesel fuel. The practice was found to be an "unfair commercial practice" but, potentially, art 102 (or its national equivalents) could be invoked. <<https://mlexmarketinsight.com/insights-center/editors-picks/energy-and-climate-change/eu-ropes/eni-fined-by-antitrust-watchdog-in-italys-first-greenwashing-case>> accessed 18 January 2020.

Sustainability as a 'shield' against the use of Article 102

Sustainability could also be used more as a 'shield' against Article 102 where a dominant company (or exceptionally companies which are collectively dominant) engage in proportionate behaviour 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): ie there is an 'objective justification' for behaviour which is *prima facie* abusive.⁹¹

There is a strong case for this when Article 102 is read in the light of the constitutional provisions of the treaties considered in Section IV above. In particular:

- the goal in Article 3 of the Treaty on European Union of a 'high level of protection and improvement of the environment'; and
- the clear requirement in Article 11 TFEU that 'environmental protection requirements **must** be integrated into [all EU] . . . policies and activities' (emphasis added).

Although there are few decided cases of direct relevance, the following might 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 reinvest in environmental protection⁹²: ie as a defence to allegations of 'excessive pricing';
- ii. charging different customers different prices according to the use to which the product is put—eg how environmentally friendly it is (eg the energy efficiency of the downstream production process); ie 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 (eg sale of a printer conditional on the purchase of recyclable toner cartridges)⁹³: ie as a defence to an allegation of 'tying'.
- iv. Offering exceptionally low prices to generate trial of a new environmentally friendly product: ie 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 (eg denying access to

91 For a discussion of these issues see Ch 9 of Kingston (n 25)—particularly, p 304–12; 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.

92 This approach would be consistent, not only with the 'polluter pays' principle, but also the approach suggested above in relation to challenging abusively *low* prices for failing to properly reflect environmental costs (see the sub-section above 'Article 102 as a sword').

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

diesel vehicles—provided this was done on a non-discriminatory basis): ie as a defence to an allegation of ‘refusal to supply’.⁹⁴

What I hope the above examples illustrate is that it should not be necessary for a dominant company to justify its actions on the basis of its own commercial (ie 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) large multinationals which have the economic clout to make a real difference.⁹⁵

While we are right to be sceptical about some companies ‘green washing’ there are companies (and certainly 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 Article 102 to act as a ‘shield’ may, in some circumstances, assist with this.

VII. MERGERS

In this section, I will consider how sustainability and climate change issues can, and should, be taken into account in the assessment of mergers. I would suggest there are ‘five options’ under the European system of merger control:

- i. In the substantive assessment of the merger under Article 2 of the EUMR;⁹⁶
- ii. When considering ‘efficiencies’ under the EUMR;
- iii. When considering ‘remedies’;

94 For a further discussion of how environmental considerations may be relevant to individual abuses see Kingston (n 25) 312–26.

95 Note, eg, Business Roundtable, ‘Statement on the Purpose of a Corporation’ (August 2019), <<https://opportunity.businessroundtable.org/wp-content/uploads/2019/12/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures.pdf>> accessed 18 January 2020 (Business Roundtable represents US companies with a market cap of trillions of dollars). Their statement includes a commitment to:

• ‘dealing fairly and ethically with our suppliers’; and to

‘protect the environment by embracing sustainable practices across our businesses’.

In itself this is to be commended. That said, the latest ‘Responsible Business Tracker’ of UK companies found that while 86% of those surveyed had a ‘purpose statement’ only 17% had a plan to make sure it was practised at every level [‘Business in the Community: responsible business tracker’]. Another example is the so-called ‘B Corps’, companies which have made a legal commitment to maintain certain minimum social and environmental standards (certified by ‘B Lab’, a global not for profit organisation). As of June 2019 there were over 2,750 certified B Corporations across 64 countries. For a discussion as to whether ‘companies [are] right to abandon the shareholder first mantra?’ see the Financial Times edition of the 26th of August 2019 from page 11 onwards. See also Andrew Hill, ‘The Limits of the Pursuit of Profit’, Financial Times (24 September 2019) <<https://www.ft.com/content/c998cc32-d93e-11e9-8f9b-77216be1f17>> accessed 18 January 2020.

96 Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 24 (EUMR).

- iv. Under Article 21(4) of the EUMR; and
- v. When mergers are reviewed under national competition law.

I will comment on each of these in turn.

The substantive review of mergers under Article 2

Article 2(1) of the EUMR sets out the criteria which the Commission must take into account 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)).

The language here is similar to that in Article 101(3) discussed in the sub-section ‘The exemption route: Article 101(3)’ in Section V above and, for essentially the same reasons, the analysis not only can, but must, take into account (where appropriate) environmental and sustainability issues. As previously argued this is very clear from the ‘constitutional’ provisions discussed in Section IV above, 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’.⁹⁷

This should work both ways. Most obviously it means that *positive* environmental factors can play a part in clearing deals (ie concluding that the merger ‘would not significantly impede effective competition’—ie there is no ‘SIEC’). Logically, but more controversially (and, certainly more exceptionally), it can play a part in coming to a conclusion that a deal should be blocked—or only cleared subject to remedies (ie the merger ‘would significantly impede effective competition’—ie there is a SIEC).⁹⁸

I argue that this works both ways as Article 2 of the EUMR is completely neutral on this point. Unlike Article 101 TFEU, Article 2 of the EUMR is not in two parts. It does not say ‘if there would be a SIEC a merger may nevertheless be cleared if there is compensatory technical or economic progress’, etc. On the contrary, whether or not there is ‘technical or economic progress’, etc is a factor which the Commission ‘should take into account’ in making its ‘appraisal of the concentration’ as to whether it is ‘compatible with the common market’—ie in making the initial determination as to whether there is, or is not, a SIEC.⁹⁹ Indeed, in paragraph 76 of the Horizontal Merger Guidelines, the Commission (quite rightly) says it ‘performs an **overall competitive appraisal** of the merger’ and that this includes taking into account the ‘development of technical and economic progress’.¹⁰⁰

97 Recital 23 of the EUMR refers to the constitutional provision of the treaties as they then stood (art 2 of the Treaty on the EC and art 2 of the Treaty on the EU). For the ‘constitutional’ provisions as they currently stand see Section IV and, in particular, art 11 TFEU.

98 Under art 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).

99 See (n 98).

100 European Commission, ‘Guidelines on the Assessment of Horizontal Mergers under Council Regulation on the Control of Concentrations between Undertakings’ [2004] C 31/03.

In practice, however, I accept that environmental and sustainability factors are more likely to play a part in clearing deals that contribute positively to the environment (than in contributing to deals being blocked which are felt likely to harm the environment). There are three inter-related reasons for this:

- i. In practice, the Commission tends to analyse factors such as environmental benefits under the heading ‘efficiencies’ (discussed below): ie they are essentially taken into account *after* a *prima facie* finding of a SIEC (ie ‘as if’ it were a two-part test *à la* Article 101).
- ii. Merger control is a prospective analysis and it is necessary to analyse the likely future effects of a merger. While this is a matter of evidence and proof on a case-by-case basis, I expect it will be easier to satisfy a competition authority or court of the likely environmental benefits of a merger than of the likely future environmental harms.¹⁰¹
- iii. Probably reflecting the above, the Commission recently made some comments hostile to taking into account environmental and climate change factors as a basis for challenging the Bayer/Monsanto deal.¹⁰²

The above said, there is considerable evidence suggesting that mergers rarely achieve the claimed benefits¹⁰³ and there is increasing concern over rising levels of

101 On this see the discussion in section V above in the sub-section ‘The exemption route: Article 101(3), Fair Share of the resulting benefits at point (ii).

102 There was widespread opposition to the *Bayer / Monsanto* deal by environmental NGOs and a wider public on the basis of environmental and climate change concerns. Commissioner Vestager responded that ‘while these concerns are of great importance, they do not form the basis of a merger assessment’, arguing that such concerns ‘are handled by my colleagues and national authorities and are subject to European and national rules to protect food safety, consumers and the environment and climate’, Margrethe Vestager, ‘Commission Letter on Monsanto/Bayer’ (Brussels, 22 August 2017) <https://ec.europa.eu/competition/mergers/cases/additional_data/m8084_4719_6.pdf> accessed 18 January 2020. I make no comment as to whether, in this particular case, she was right that these matters were best dealt with by other means but, as shown above, the idea that risks to the environment and climate ‘do not form [part of] the basis of a merger assessment’ is contrary to art 2 of the EUMR—especially when properly read in the light of the constitutional provisions of the treaties (see Section IV). *Bayer / Monsanto* [2018] M.8084. For a Commission perspective on this case, see European Commission, ‘Competition Merger Brief’ (2018) 2/2018 6, <<https://ec.europa.eu/competition/publications/cmb/2018/kdal18002enn.pdf>> accessed 18 January 2020. For a critical view of the deal, see Ioannis Lianos and Dmitry Katalovsky, ‘Merger Activity in the Factors of Production Segments of the Food Value Chain: A Critical Assessment of the Bayer / Monsanto Merger’ (2017) Policy Paper Series (or its summary here: <https://www.ucl.ac.uk/laws/sites/laws/files/redrafted-baysanto-report-summary_.pdf>).

103 See, eg, Bruce A Blonigen and Justin R Pierce, ‘Evidence of the Effects of Mergers on Market Power and Efficiency’ (2016) National Bureau of Economic Research, No w22750 <<https://dx.doi.org/10.17016/FEDS.2016.082>> accessed 19 January 2020. This found Mergers and Acquisitions ‘significantly increase mark-ups on average but have no statistically significant average effect on productivity’. Other studies have repeatedly shown that mergers are value destroying from the perspective of the acquiring shareholders.

concentration in many industries (and some markets).¹⁰⁴ While this is a vast and controversial topic beyond the scope of this article, I would only note here that we should probably be less afraid of ‘Type 1 Errors’¹⁰⁵ (resulting from blocking a deal or clearing it subject to wide-ranging conditions) than we have been in the past (particularly bearing in mind how few deals are actually blocked).¹⁰⁶

Environmental Factors as ‘Efficiencies’

As mentioned above, the Commission tends to analyse (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’.¹⁰⁷

At paragraphs 78–88 of its Horizontal Merger Guidelines, 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. A few brief words on each:¹⁰⁸

a. Benefit Consumers¹⁰⁹

As argued in considering the second condition of Article 101(3) in the sub-section ‘The exemption route: Article 101(3) above, environmental benefits and action to combat climate change are clear consumer benefits and should be taken into account 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.

b. Efficiencies must be ‘merger specific’

In the Commission’s words this means the efficiencies must be ‘a direct consequence of the notified merger and cannot be achieved to a similar extent by less anti-competitive alternatives’.¹¹⁰ This last element is similar to the ‘no more restrictive than necessary’ consideration in Article 101(3)¹¹¹ and can be seen as an expression of the proportionality principle. It is an important (and I would suggest legitimate) limitation on the extent to

104 See, eg Jan De Loecker and others ‘The Rise of Market Power and the Macroeconomic Implications’ (2017) NBER Working Paper No w23687, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3023087> accessed 19 January 2020.

105 ie the prohibition of a merger that is not anti-competitive.

106 eg over the period 21 September 1990 to 31 July 2019 (over 29 years) the Commission received some 7414 notifications of mergers of which only 30 (or 0.04%) were prohibited under art 8.3 EUMR. A further 447 (or 6%) were cleared subject to remedies in either phase 1 or phase 2.

For the avoidance of doubt, I would emphasize that I am in no way ‘anti-merger’ This is despite the argument that mergers leading to lower prices are likely to lead to more consumption and the use of more resources -partly reflecting my scepticism as to whether mergers do in fact lead to lower prices (n 103). Lower prices, in and of themselves, go on the plus side of the equation. My point is simply that over enforcement is simply not a significant risk in current merger control.

107 See Recital 23 of the EUMR.

108 For a further discussion of these, see Kingston (n 25) 332–40.

109 paras 79–84 of the Horizontal Merger Guidelines.

110 para 85 of the Horizontal Merger Guidelines.

111 See the sub-section ‘The exemption route: Article 101(3)’ Condition 3 in Section V above.

which environmental concerns can ‘justify’ a merger as there may well be less restrictive means of achieving the same environmental objectives.

c. Efficiencies must be ‘verifiable’¹¹²

To the extent that this simply means that the Commission must be ‘reasonably certain that the efficiencies are likely to materialise’ this is a legitimate limitation on the extent to which environmental factors can justify a merger. That said, given that many environmental benefits (and even more so initiatives to combat climate change) may take some time to materialize (and can be difficult to quantify) it is important: (i) to avoid taking an overly narrow financial approach (and that estimates and value judgements are made);¹¹³ and (ii) that the overriding objectives of the treaty (as set out in the ‘constitutional’ provisions) are kept in mind.

This prompts a concluding criticism of the approach to environmental factors as ‘efficiencies’. As mentioned above, the Commission proceeds *as if* there was a two-part test under the EUMR: ie first a finding of a competition problem; second a finding of ‘efficiencies’ that might counteract this. The problem with this approach is that it appears to switch the burden of proof: ‘it is for the notifying parties to show to what extent the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger, and therefore benefit consumers’.¹¹⁴ While it is accepted that the parties bear the evidential burden of providing relevant facts and other evidence in relation to the assessment of the appraisal of the deal under Article 2 of the EUMR, the overall legal burden of proof still lies with the Commission.¹¹⁵

Remedies

Many mergers are approved on a conditional basis—ie subject to the acceptance of remedies by the competition authorities.¹¹⁶ 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 under Article 2 EUMR (particularly Article 2(1)(b)).¹¹⁷ 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

112 paras 86–88 of the Horizontal Merger Guidelines.

113 See the discussion in Section V at the sub-section ‘The exemption route: Article 101(3)’, Condition 2 re: consumers receiving a ‘fair share of the resulting benefit’ and, in particular, the extracts from the Commission’s ‘2004 Exemption Guidelines’ (n 26) discussing benefits to consumers. Note also the discussion ‘is it all too difficult?’ in section VIII and the reference there to modern environmental valuation techniques (at Vii).

114 para 87 of the Horizontal Merger Guidelines.

115 See, eg *EDP v Commission* [2005] T-87/05 2005 II-03745.

116 See art 6(2) and art 8(2) of the EUMR.

117 On remedies generally, see European Commission, ‘Notice on Remedies Acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulations’ [2008] C 267/01.

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.¹¹⁸

It might be helpful for guidelines to be drawn up to deal with such remedies, most obviously in the Remedies Notice—see n 117). Indeed, these might be similar to the Commission's guidelines on 'efficiencies' discussed in the sub-section 'Environmental Factors as 'Efficiencies'' above in that they should:

- 'benefit consumers'—and perhaps explicitly other stakeholders, notably employees;
- be 'merger specific' in that the harms being remedied must be a direct consequence of the merger (to put it another way, the remedies must be 'no more extreme than necessary' to remedy the harm likely to be caused by the merger); and
- the harms being remedied must be 'verifiable' (allowing for the uncertainties of a prospective analysis).

Such an approach would be consistent with the 'balancing act' and the principle of proportionality discussed in Section IV: ie 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.

Three aspects of the Commission's practice on remedies merit comment in the context of 'environmental remedies':

- i. Remedies to deal with likely negative environmental effect of a merger would often (but not always) take the form of a so-called 'behavioural' remedy (eg a commitment not to introduce certain 'bad' environmental practices of the acquirer into the business of the target). The Commission has repeatedly stated a preference for more 'structural' remedies saying that they will accept 'non-divestiture remedies such as behavioural provisions, only in specific circumstances'.¹¹⁹ In practice, however, the Commission has often accepted behavioural remedies (particularly as part of a package of remedies).¹²⁰ Furthermore, whether or not a remedy is accepted depends, not on the form it takes, but whether (in combination with any other elements of the remedy package) it does, or does not, eliminate the concerns identified in the course of the appraisal of the concentration.¹²¹ The more

118 An example of a case where a merger has been allowed but only subject to behavioural remedies to deal with the potential adverse effects of the merger is the merger between Mid Kent Water and South East Water which was reviewed by the UK's (then) Competition Commission. The behavioural remedy was designed to preserve the 'water resource' benefits arising from the merger.

119 See, eg Para 69 of the Commission's Remedies Notice (n 117).

120 eg Pernod Ricard/Diageo/Seagram Spirits [2001] Comp/M.2268].

121 The CJEU has repeatedly stated that 'behavioural commitments are not by their nature insufficient to prevent the creation or strengthening of a dominant position, and they must be assessed on a case-by-case basis in the same way as structural commitments', eg in *EDP v Commission* [2005] T-87/05 II-03745 at [100] and cases cited there.

this appraisal takes proper account of environmental and sustainability considerations (in accordance with the constitutional provisions of the treaties), the more likely it is that a remedy including environmental or other sustainability concerns will be appropriate.¹²²

- ii. It is established Commission practice that, before remedies can be offered and accepted, 'it is the responsibility of the Commission to show that a concentration would significantly impede competition' and that the Commission 'is not in a position to impose unilaterally any conditions to an authorisation decision'.¹²³

In practice, the position is much more fluid and the parties will often offer a remedy to deal with anticipated or expressed concerns of the Commission. It remains the case, however, that the eventual conditional clearance will state that a SIEC was initially found but that the concerns identified were removed by the remedies offered.

Arguably, however, this is not necessary under the EUMR. Article 8(2) of the EUMR simply states that 'where the Commission finds that, following modification by the undertakings concerned [ie by the offer of remedies] a notified concentration fulfils the criterion laid down in Article 2(2) [ie that there is no SIEC] . . . it shall issue a decision declaring the concentration compatible with the common market'.

There is no pre-requirement in the EUMR itself that a SIEC is found 'before' the remedy is taken into account, only that there is no SIEC, 'after' taking into account the remedy.¹²⁴ This suggests the Commission has a greater discretion to accept remedies than is generally felt to be the case.

- iii. While the above point may be controversial, what is already well accepted is that the Commission has more scope to accept remedies in phase 1 of the EUMR as these are designed to remove the 'serious doubts' about the

122 paras 9–14 of the Remedies Notice discusses the 'basic conditions for acceptable commitments'.

123 See Para 6 of the Remedies Notice.

124 I am not aware of any judgement of the court on this point. There are, however, some comments by the CJEU which could be read to suggest that the remedy can be no more extensive than necessary to remedy the competition concerns identified, see, eg paras 93 and 95 of *EDP v Commission* (n 121). However, (i) the parties had accepted in that case that there was a SIEC so the court did not have to decide whether a SIEC was a pre-condition to a remedy; and (ii) any comments on art 2 and remedies were obiter as the questions asked of the court concerned an alleged 'abuse of power' and not an alleged breach of art 2. In this context, I also note that the CJEU (and its predecessor) has expressly confirmed in antitrust cases that the Commission is entitled to accept 'commitments' under art 9 of Regulation 1/2003 in circumstances where it would not have been entitled to impose such measures under art 7 of Regulation 1/2003 (eg *Commission v Alrosa* [2010] C-441/07 P, paras 46 and 48–50). A possible objection to this analogy is that the purpose of art 7 is to bring an infringement to an end, whereas a decision under art 9 is intended to address concerns the Commission has raised following a (so-called) 'preliminary assessment' arguably analogous to the 'serious doubts' which the Commission may have at the end of a phase 1 review under the EUMR—see the sub-section 'Remedies' (iii) above. It is noteworthy, however, that commitments accepted under art 9 of Regulation 1/2003 (which effectively 'clear' arrangements being looked at under arts 101 or 102) are often similar to remedies which effectively 'clear' a deal under the EUMR.

merger that the Commission has at the end of phase 1.¹²⁵ For this reason, remedies offered in phase 1 (to avoid a phase 2) may be more extensive than those which might have been considered necessary at the end of a phase 2. Where appropriate, these could include remedies to remove any ‘serious doubts’ about the environmental (or other) impact of the deal.

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 ‘recognised’ 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):

1. they might fall within one of the current ‘legitimate interests’—most likely ‘public security’ (eg the need to ensure a secure and sustainable supply of energy).
2. A member state could apply to the Commission to have an environmental/sustainability/climate change concern ‘recognised’ by the Commission as a legitimate interest. This should have a good chance of being recognized by the Commission given that it is required by Article 21(4) (third paragraph) to carry out an ‘assessment of its compatibility with the general principles and other provisions of community law’. This must include consideration of the constitutional provisions of the treaties which require that environmental protection and sustainable development ‘must’ be taken into account in all Union policies and activities (see Section IV above).
3. Article 21(4) EUMR could be amended to include an express reference to environmental protection, sustainability and/or climate change.¹²⁶

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. In this sense it is a potential complement to Article 2 of the EUMR which I have suggested is more likely to lead to a merger with *positive* environmental effects being cleared than to one with *negative* effects being blocked (see the sub-section ‘The substantive review of mergers under Article 2’ above).

¹²⁵ See art 6(2) of the EUMR and para 6 and fn 4 of the Remedies Notice.

¹²⁶ In this context it is noteworthy that at page 112 of its submission to the 2010 OECD Report (n 3) the OFT noted that, although the UK merger regime provides for ministers to intervene in mergers to protect certain public interest issues, the current list of issues does not include environmental concerns but that these ‘could be added to the list by legislation’.

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 states. These rules may take into account environmental and sustainability factors to a greater (or lesser) extent than under the EUMR.¹²⁷ Indeed, some (eg Spain) contain express reference to environmental issues.

Unlike measures taken by member states under Article 21(4) EUMR (the subsection ‘Article 21(4) of the EUMR’ above) 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. A striking example of the latter 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 German Federal Cartel Office. The minister ruled that the positive effects of the deal 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).¹²⁸ It is also noteworthy that various regimes outside the EU allow for a wider range of issues (particularly social and sustainability concerns) to be taken into account. The best known (and, arguably, the most progressive) of these is South Africa.¹²⁹

VIII. IS IT ALL TOO DIFFICULT?

It is sometimes suggested that it is too difficult to take into account wider issues than narrow short-term effects (or dynamic effects looking primarily at price) and that competition authorities are ill-equipped to do this. The answer to this is many fold.

- 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 (whether as lawyers, economists, judges or competition enforcers) to shy away from that which is important and only focus on what is (often wrongly) perceived to be easy or readily measurable.¹³⁰

127 The EU Merger Working Group, ‘Public Interest Regimes in the European Union – Differences and Similarities in Approach’ (Report), 10 March 2016, (<https://ec.europa.eu/competition/ecn/mwg_public_interest_regimes_en.pdf>, accessed 19 January 2020, 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’.

128 Maximilian Konrad, ‘Ministerial Approval Miba/Zollern: A Green Industrial Policy For Medium-Sized Companies’ (D’Kart Antitrust Blog, 20 August 2019) (<<https://www.d-kart.de/en/blog/2019/08/20/ministererlaubnis-miba-zollern-gruene-industriepolitik-fuer-den-mittelstand/>> accessed 19 January 2020).

129 The role of public interest factors has recently been strengthened as they will now be a core assessment area in merger control—whereas public interest was previously only a secondary area of assessment (Competition Amendment Bill B23B – 2018).

130 As Maurice Stucke has noted: ‘antitrust analysis over the past thirty years overstated the importance of competitive dynamics that were easier to assess (productive efficiencies and short-term price effects) and marginalised or ignored what was harder to assess (dynamic efficiencies; systemic risk; and political, social, and moral implications of concentrated economic power)’, Maurice Stucke, ‘Should Competition

- iii. If we do not focus on the issues that really matter, we risk driving competition law into irrelevance (and many would argue this has already happened in the US).
- iv. In any case, it can be incredibly difficult and complex to assess even short-term price effects. Anyone who thinks otherwise has either never been faced with hundreds of pages of conflicting econometric evidence (I have) or is deluding themselves (or perhaps both!).
- v. The balancing of (often conflicting) interests is not easy but it is exactly what courts and competition authorities already do. The principle of proportionality (mentioned several times already) is a good illustration of this. This balancing requirement is even written into the third condition of Article 101(3) (generally referred to as the 'no more restrictive than necessary' test).¹³¹
- vi. While we may often disagree with them in individual cases, competition authorities and courts are increasingly well equipped to carry out this sort of balancing act. Not only is an assessment of evidence (both qualitative and quantitative) at the core of their work, the authorities and courts are employing people with increasingly diverse backgrounds and skill-sets (ie not only lawyers and economists but those with backgrounds in finance, psychology, IT and a wide range of businesses and industries).¹³²
- vii. In any case, taking into account the full range of factors required by the treaties (ie more than the narrowly conceived consumer welfare effects) is anything but a 'less economic' approach. On the contrary, it is an approach which is far more in tune with the original (and better) meaning of

Policy Promote Happiness?' (2012) 81 *Fordham Law Review* 2575, <<https://ssrn.com/abstract=2203533>> accessed 19 January 2020. Similarly, 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' (Neelie Kroes, 'Preliminary Thoughts on Policy Review of Article 82', Speech, Fordham Corporate Law Institute, New York, 23 September 2005, <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_537> accessed 19 January 2020). Furthermore, just because something is less certain does not mean that it can't be taken into account. Uncertainty may play into the nature of the evidence required in relation to it, but not only can it, but it must, be taken into account in the analysis. As the Chief Economist at the UK's CMA, Mike Walker, has noted 'the current approach seems to be that it is better to be exactly wrong than roughly right. If we treat consumer welfare in the way that you want to (which makes sense to me) then the balance of probabilities test does not allow us to avoid making long-term uncertain decisions. Competition authorities need to be clear about this' (Mike Walker in correspondence with the author). He is right and this view is consistent with the helpful comments by the Commission in the 2004 Exemption Guidelines referred to in Part V in the the sub-section 'The exemption route: Article 101(3)' under Condition 2 'Fair Share of the Resulting Benefits' at point (ii).

131 See the discussion of Condition 3 in Section V. Interestingly, the European Commission itself said in a submission to the OECD in 1966 that: 'striking a balance between competition and environmental policy was:

- relatively easy [in Article 101(3)] cases applying
 - the principle of proportionality'
- [OECD Competition Policy and the Environment (Paris, OECD 1966 at 74).]

132 The UK's Competition Appeal Tribunal and Competition and Markets Authority are good examples of this.

‘economics’ (see the discussion under ‘consumer welfare’ in the ‘The consumer welfare detour’ in section IV above).

A good illustration of this is the way in which taking into account (so-called) externalities when looking at costs (see n 31) means that these costs reflect the true costs of producing products (rather than a subset of them). They are therefore a better reflection of the true economic cost of those products. In turn, prices which reflect those costs are a better reflection of the true price of those products.¹³³

It also provides opportunities to take account of the considerable developments in recent years in both technology (such as satellites, sensors, drones, block chain, and AI) which enable data to be collected and measured better, and in environmental economics (such as new economic techniques for the valuation of the benefits from environmental resources and initiatives).¹³⁴ There is no more reason to ignore these techniques than there is to ignore any other efforts to quantify the effects of an agreement, merger or alleged abuse, etc.

Furthermore, 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 CECED¹³⁵ case and the decision of the Dutch Competition Authority in the ‘Chicken of Tomorrow’ case.¹³⁶

The above said, while there is a place for quantitative techniques, there is no prerequisite to use them in all cases and estimates and/or a value judgment are often more helpful (see the discussion in the sub-section ‘The exemption route: Article 101(3)’ in Section V above of a ‘fair share

133 For an excellent discussion of ‘true costs’ and ‘true pricing’ see True Price Foundation, ‘A Roadmap for True Pricing. Vision Paper — Consultation draft’ (2019), <<https://trueprice.org/a-roadmap-for-true-pricing/>> accessed 19 January 2020. This paper article includes some helpful ideas on how to determine a ‘true price’ in terms of:

- which external costs should be taken into account;
- how negative externalities should be quantified; and
- how to ‘monetise’ them.

(See, in particular, Section IV. of the paper and its appendix).

134 For an interesting discussion of these issues see Ch 5 in Kingston (n 25).

135 See (n 48).

136 In the *Chicken of Tomorrow* case chicken producers came to an agreement to improve the welfare of chickens (and to replace ‘regular’ chickens with the ‘chicken of tomorrow’). The Dutch Competition Authority (the ACM) attempted to quantify the benefits of these improvements (based on a consumer survey) and found that the improvements came at a higher cost (1.45 eurocents per kilo) than a combination of what consumers were willing to pay (68 eurocents per kilo) and the positive environmental effects (14 eurocents per kilo) (ie a total of 82 eurocents). They therefore concluded that the potential advantages to animal welfare did not outweigh the reduction of consumer choice and potential price increases and the initiative was abandoned. I would make one observation. In the case of improvements in animal welfare, a willingness to pay test may be the best quantitative test available in the context of an art 103(3) analysis. However, where climate change (and perhaps other environmental or social issues) are at stake, it is necessary to consider dynamic and long-term effects particularly future benefits to consumers and society (on which I note the comments of the European Commission at paras 87 and 88 of its 2004 Exemption Guidelines and its approach in the CECED case referred to in (n 48). For further discussions of the *Chicken of Tomorrow* case see Lianos (n 25) 26–28.

for consumers' and the Commission's comments in its 2004 Exemption Guidelines)

- viii. It is sometimes suggested that taking into account issues such as the environmental impact of an agreement (or, indeed, a merger) will lead to the 'politicisation' of the process. First, there is no more reason for the process to be 'politicised' in the sense of competition authorities' independence being compromised than at present. Secondly, to the extent that what is meant is that the authorities will receive submissions from a wider range of interested parties (eg Environmental NGO's) then that is a welcome development. Large corporates spend millions on lawyers, economists, accountants, and lobbyists (quite legitimately) arguing their case before authorities. If a wider range of interests are taken into account that can only 'level the playing field' and be for the better—particularly bearing in mind the goals of the treaties discussed in Section IV above.
- ix. Some have suggested that taking the concept of 'fairness' into account in competition analysis is not practical. Certainly, it has its limitations (and I would not pretend that it is capable of being defined in any useful way). However, as Commissioner Vestager has said, fairness is about the 'social rationale' of competition principles and not their application in individual cases. Certainly, it does not follow that just because something is 'not fair' that competition law is infringed (but then it is not the case that anything that restricts competition infringes competition law). However, fairness is certainly something to take into account when balancing different factors and when applying the principle of proportionality. It is also a useful sense check when looking at the result of any competition analysis. Does this seem fair? Does it look right? If nothing else, it might be a prompt to look again at the analysis.¹³⁷
- x. Some have suggested that taking into account action to combat climate change is a 'slippery slope': ie what else should be taken into account? Where do we stop? I have some sympathy with this concern but would make two points. First assess other issues on their own merits and apply the law in an open minded way to see if the relevant legal test is met (eg when looking to see if there is 'improvement', 'progress' or customer 'benefit' in the sense of Article 101(3) or an 'abuse' in the sense of Article 102). Secondly, the climate crisis is an existential threat and of a different order of concern to others. Whatever the difficulties may (or may not) be in taking into account other issues and concerns, these must not be used as a pretext for not taking into account climate change concerns (where the treaties permit or require this).
- xi. Finally, and perhaps in desperation, those trying to resist taking into account sustainability issues have even suggested it might be somehow

137 For a discussion on 'fairness' see Horton (n 15) and Damien Gerard, 'Fairness in EU Competition Policy: Significance and Implications' (2018) 9 *Journal of European Competition Law & Practice* 211 <<https://doi.org/10.1093/jeclap/lpy027>> accessed 19 January 2020.

‘undemocratic’, ‘illegitimate’ or costly for competition authorities to take sustainability into account. The answer to this is at least fivefold:

- a. First the EU treaties were enacted by democratically elected governments (and we have to apply them-see Section IV);
- b. Secondly, neither the EU legislative system, nor the European courts (CJEU, General Court and their predecessors) has ever ruled in favour of a narrow consumer welfare view of EU competition law;
- c. Thirdly, for the most part, we are not calling on the competition authorities to ‘work on environmental matters’. More often, we are asking them ‘not’ to intervene to prevent agreements promoting sustainability which do not infringe competition provisions when properly interpreted in the light of the constitutional provisions of the treaties. It is largely the private sector which is called upon to act (consistent with the comments by Commissioner Vestager at the Brussels Sustainability Conference first referred to in Section II. above).
- d. Fourthly, to the extent that a competition authority does spend time and effort considering (eg) environmental issues then this is only to the extent mandated (or at least permitted) by the treaties.
- e. Finally, there is no greater challenge faced by humanity than climate change and, as Commissioner Vestager has said, ‘every one of us-including competition enforcers-[is] called upon to make our contribution’.¹³⁸ Furthermore, President Ursula von der Leyen has put fighting climate Change at the heart of her programme. So perhaps time and effort contributing to that are time and effort well spent.

I would emphasize that I am in no way suggesting that competition law should replace regulation which will often be the first choice solution (eg legislation on air pollution) or the prudent solution (eg where it is difficult to get consensus and/or everyone comfortable with the competition implications of initiatives concerning price or giving rise to significant commonality of costs). That said, there are circumstances where competition law can be used either as a complement to such regulation, or to fill a gap where regulation is inadequate in some way. Furthermore, there is a great deal that the private sector can (and should) do to fight climate change issues. Often this is best done by companies working together (or at least agreeing on various standards) and we should all look to minimize the extent to which competition law obstructs this.

IX. SOME CONCLUSIONS AND PROPOSALS FOR ACTION

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

138 See the call to arms by Commissioner Margrethe Vestager, ‘Competition and Sustainability’, Speech, GCLC Conference on Sustainability and Competition Policy, Brussels, 24 October 2019 <https://wayback.archive-it.org/12090/20191129200524/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-sustainability_en> accessed 19 January 2020.

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 (much of that was done in the 1990s¹³⁹—relatively unnoticed—at least by many competition lawyers and economists). Essentially, what is needed is a change in the way that competition law and economics are applied. We need to remind ourselves constantly that competition (or, indeed the study of economics) is not an end in itself but a means to an end, a means to achieve other goals.¹⁴⁰ We therefore need to look at the EU treaties afresh (both the competition provisions and the constitutional provisions) and think again about what competition law and economics are really about. Whether we are lawyers, economists, academics, competition officials, or judges, we need to ask ourselves whether the competition work we are (or have been) doing is really achieving what we want it to achieve? As Commissioner Vestager put it in her Brussels Competition and Sustainability speech: ‘is this really the best we can do?’ It may be achieving many of the things that we endorse (tackling harmful cartels and flagrant abuses of power, and approving some efficiency enhancing mergers) but if it is also endorsing (directly or indirectly) environmental degradation and unsustainable practices and standing in the way of vital action to fight climate change then it has to change—and it can. As argued throughout this article, the most urgent change needed is to how we think about competition and economics; to get away from a range of arcane, technocratic and unhelpful concepts (such as a narrow focus on short-term price effects); and to get back to what our treaties (and their equivalents in other jurisdictions) actually say.¹⁴¹

Proposals for action

That said, despite very few cases having been brought against environmental or sustainability agreements,¹⁴² we live in a conservative, risk-averse culture and it will also be necessary to ‘nudge’ the establishment in the right direction. A number of writers and reports have made detailed proposals in this regard¹⁴³ but I would mention just **eight**:

139 Principally by the Maastricht Treaty of 1992 and the Treaty of Amsterdam 1999. See the resulting provisions post the Treaty of Lisbon 2009 set out in Section IV.

140 See Section IV.

141 Again, see Section IV.

142 See eg the comment by the UK’s OFT in the 2010 OECD Paper (n 3) 103: ‘The OFT has not opened any investigations into horizontal agreements including environmental agreements’.

143 See, eg the ‘Conclusions and Practical Solutions’ set out in ‘Addressing the Broken Links’ (n 35) 50–54. In particular, this includes eight points which ‘recommend some practical solutions on how to embed sustainability concerns into competition law from a regulatory and enforcement perspective’. These fall under 3 headings: ‘interpretative changes’; ‘institutional changes’; and ‘regulatory changes’ (see pp 52–54). See also the four recommendations of the Fairtrade Foundation paper on ‘Competition Law and Sustainability. A Study into Industry Attitudes towards Multi-Stakeholder Collaboration in the UK Grocery Sector’ (2019) 19 <<https://www.fairtrade.org.uk/Download.ashx?id=%7BEE9F8B75-8FFA-4E38-B87B-82BBE23A3D7C%7D>> accessed 19 January 2020.

(1) 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:

- (a) Speeches like the recent speech of Commissioner Vestager cited many times in this article;
- (b) Press releases where the authority has indicated 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.

This asymmetry is particularly problematic in the light of the growth of private damages actions. A finding of an infringement by the Commission is binding on national courts and can be used as a basis for a ‘follow on’ action for damages in those courts. However, there are no corresponding decisions providing protection (or at least some comfort) the other way.

In this context the call from Commissioner Vestager, and other national competition authorities (eg 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. National authorities should also let it be known that they are ready and willing to take a look at initiatives to fight climate change. More authorities should follow the example of the Dutch and Germans.

(2) 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*, and *FNV Kunsten* discussed in the sub-section ‘The ‘Albany’ route’ in Section V above and in n 36).¹⁴⁴

(3) 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 publicise this wherever client confidentiality permits. A good example is the opinion on a living wage prepared for the Fair Wear Foundation (referred to in Section II and n 4).

(4) Updating commission guidelines and notices.

144 For the approach of the CJEU see (n 29).

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

(a) Including in the successor to the 2010 Horizontal Guidelines, a chapter on climate change, sustainability and the environment (to facilitate collaborative action in these areas);¹⁴⁵

(b) Updating the 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 the sub-section on the "Exemption Route: Article 101 (3)", "Condition 2; Fair Share for Consumers" in Section V).

(c) Including in the 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.¹⁴⁶

(5) 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.¹⁴⁷

Competition authorities can make it clear that they will prioritize cases likely to have an impact on climate change.¹⁴⁸ Governments can take a lead and make it clear that it expects all government departments and authorities to prioritize action against climate change.¹⁴⁹

(6) 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'¹⁵⁰ and nothing is included. Either that or what is included 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.

145 See further (n 30) and (n 5) and the discussion in Section V on Article 101 and the dark cloud hanging over much needed collaboration.

146 See sub-section 'Remedies' in Section VII above.

147 See, eg the Dutch Authority for Consumers & Markets, 'ACM Sets Basic Principles for Oversight of Sustainability Arrangements' (2016) <<https://www.acm.nl/en/publications/publication/16726/ACM-sets-basic-principles-for-oversight-of-sustainability-arrangements>> accessed 19 January 2020. 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'.

148 The author understands that the UK's competition authority (the CMA) is discussing making it clear in its next annual plan that sustainability cases are a priority for them. This is very welcome.

149 In the UK this could be in 'The Government's Strategic Steer To The Competition Authority' which is published annually.

150 See Section VIII.

(7) 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.¹⁵¹

(8) Treaty changes.

As a last resort, we could amend the 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).

If these, and no doubt other,¹⁵² changes are made then competition law can cease to be 'part of the problem' and become 'part of the solution'.

151 See Part VII at the sub-section 'Article 21(4) of the EUMR'.

152 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—see (n 87)).