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TABLE OF CONTENTS

03 **Letter from the Editor**

04 **Summaries**

06 **What's Next?**
Announcements

07 **CPI Talks…**
…with Martijn Snoep

09 **Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves)**
By Cristina A. Volpin

19 **Living Wage Initiatives: No Reason to Object**
By Alec Burnside, Marjolein De Backer & Delphine Strohl

25 **Climate Change Is an Existential Threat: Competition Law Must Be Part of the Solution and Not Part of the Problem**
By Simon Holmes

41 **EU Competition Law & the Green Deal: The Consistency Road**
By Gianni De Stefano

51 **Antitrust, Sustainability, and Living Wages/Living Incomes**
By Dario Soto Abril

55 **The Antitrust Car Emissions Investigation in the U.S. – Some Thoughts From the Other Side of the Pond**
By Julian Nowag & Alexandra Teorell

62 **The Difficulty of Conversations About Sustainability and European Competition Law**
By Anna Gerbrandy

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LETTER FROM THE EDITOR

Dear Readers

Sustainability has forced its way center-stage in the world of antitrust, and not before time. It has for a while been a familiar topic in academic circles, but agencies and practitioners are now increasingly alive to the pressing need to make antitrust part of the solution and not part of the problem. What is that problem? That familiar antitrust dogmas are seen as impeding the joint industry responses needed to rise to the pressing issues of the day.

Opinions differ on the means to that end. Can consumer welfare accommodate the challenge? Do we need a different welfare standard? Or do we in Europe simply oust antitrust and give priority to other Treaty goals? Is regulation the answer? This CPI collection gives voice to a range of views and I commend it to you.

And I also commend to you the draft sustainability guidelines issued by the Dutch competition agency (ACM), who show themselves to be leaders in this field. Their consultation exercise came too late for our authors to reflect on the proposal, but we have been fortunate to secure a last-minute interview with the ACM's chairman, Martijn Snoep, which you can read in this collection. The ACM has offered forthright guidance and shone a light where the European Commission, and others, should follow.

Finally, a disclosure: my firm is pro bono counsel to Fair Trade, for whom I took on the mandate to get this topic into the antitrust mainstream. I am glad to be able to include a paper by Dario Soto Abril, CEO of Fair Trade International. As for my mandate, this collection is a further step in the right direction. But we will not declare "job done" until advocacy has become published guidance.

Alec Burnside
Partner
Dechert LLP, Brussels

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SUMMARIES

07

CPI Talks…

…with Martijn Snoep

In this month's edition of CPI Talks… we have the pleasure of speaking with Martijn Snoep, Chairman of the Netherlands Authority for Consumers and Markets ("ACM"). Earlier in July 2020, the ACM released draft "Sustainability Agreements Guidelines." These Guidelines include examples illustrating the opportunities for business collaboration that contributes to a sustainable society. The ACM is now presenting these Guidelines to national and international interest groups, businesses, academics, interested parties, and government authorities for consultation.

09

Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves)

By Cristina A. Volpin

It is considered by many that sustainability considerations should not be taken into account by competition authorities when analyzing the effects of a conduct or transaction. This short article maintains that the impact on sustainability of certain types of conduct or transactions can be considered in the analysis of their price or non-price effects on quality, choice and innovation. This approach has the advantage of bringing sustainability considerations within the traditional competitive assessment framework, as opposed to characterizing them as public policy considerations that are outside the realm of competition law. This can be done by means of a relatively light fine-tuning of the current analytical toolbox and of the design of competition investigations, and it can help ensure that competition on sustainability, when it affects demand and supply in a particular market, is preserved.

19

Living Wage Initiatives: No Reason to Object

By Alec Burnside, Marjolein De Backer & Delphine Strohl

This paper addresses the misconception that agreements concerning the price to be paid to farmers, intended to ensure that their workers receive a living income, inevitably amount to object infringements. Such agreements will still need to be assessed for their effects, of course, and will need to be designed with appropriate care and attention. But recent EU case law reconfirms that agreements should not be mechanistically consigned to the "object" box, and guidance from antitrust agencies needs to actively embrace this message, so as to lend confidence to industry to engage constructively on living wage initiatives. Fear of falling straight into the object box is the elephant in the room, casting its shadow on the developing antitrust/sustainability debate. The elephant needs to be firmly shown the door.

25

Climate Change Is an Existential Threat: Competition Law Must Be Part of the Solution and Not Part of the Problem

By Simon Holmes

Climate Change is an existential threat. Competition law must be part of the solution and not part of the problem. This paper 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. Finally, it contains a plea for us to learn the lessons from the COVID crisis for the climate crisis.

SUMMARIES

41

EU Competition Law & the Green Deal: The Consistency Road

By Gianni De Stefano

The EU roadmap for making the economy sustainable by reducing greenhouse gas emissions to net zero by 2050 and by at least 50 percent by 2030 (the Green Deal) is already affecting European Union antitrust policy and enforcement. My main argument is that the European Commission is already minded to tailor its competition enforcement to the Green Deal. In turn, the Green Deal legislation, and in particular the EU Green Taxonomy Regulation, offers quantitative thresholds to allow a proper balancing of sustainability benefits and anti-competitive effects to possibly exempt cooperation between competitors targeted at sustainability. This note is addressed to lawyers, who I argue already have the tools for advising corporations that they may cooperate to fight climate change whilst remaining in compliance of competition rules.

51

Antitrust, Sustainability, and Living Wages/ Living Incomes

By Dario Soto Abril

Some of the biggest challenges the world faces require companies to work together, e.g. the provision of living wages. This cooperation sometimes requires discussion of prices, e.g. farm-gate pricing. Companies fear that such dialogue among competitors infringes competition law, which has caused antitrust to become a key roadblock to the eradication of poverty and the achievement of other sustainability goals. The Fair Trade movement has been concerned about this impact of competition law on sustainability for years and therefore welcomes the vibrant debate among practitioners and academics on how to reconcile sustainability cooperation and competition law. Companies need legal certainty, and guidelines providing a framework for antitrust compliant sustainability agreements would fill that gap. Policymakers must not only proclaim the importance of sustainability but also create an environment in which private initiatives with good intentions can contribute to the eradication of poverty and other sustainability goals.

55

The Antitrust Car Emissions Investigation in the U.S. – Some Thoughts From the Other Side of the Pond

By Julian Nowag & Alexandra Teorell

Cooperation with and in the private sector to achieve positive environmental changes can come into conflict with competition laws. A recent example is the DOJ's investigation of car producers regarding their voluntary adoption of California's more stringent environmental standards. This brief paper looks at the DOJ's investigation and contrasts it with how such a case would have been handled under EU law. In the EU, it is questionable whether such an arrangement would even have been subject to competition law in the first place or prohibited under the EU's consumer welfare standard. While the DOJ dropped the case, it becomes clear that the U.S. and EU approaches to such agreements and standards seem to differ significantly, hence departing from the long-standing principle of comity. Questions also arise whether the goal of protecting the (federal) legislator rather than the consumer welfare standard motivated the case in the first place.

62

The Difficulty of Conversations About Sustainability and European Competition Law

By Anna Gerbrandy

Abstract: Starting off with an imaginary, but reality-grounded conversation between two fairly reasonable competition law persons – obviously with opposing views for it to be neither boring nor too short – this contribution tries to show why such conversations on competition law as hindering sustainability are often difficult. The article then quickly delves into some background-notions that are not always made explicit, but nonetheless generally inform such conversations. It then segues into an overview of the many legal (and some extra-legal) intricacies that such a conversation might touch upon by focusing on the "dehindering" focal points within European competition law before returning to a fundamental question: Why a fairly reasonable competition lawyer (or economist, for that matter) might conclude that sustainability is, indeed, also a concern for European competition law.

WHAT'S NEXT?

For August 2020, we will feature Chronicles focused on issues related to (1) **State AGs**; and (2) **EAB Antipasto**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2020, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES SEPTEMBER 2020

For September 2020, we will feature Chronicles focused on issues related to (1) **Failing Firm Defense**; and (2) **Price-Gouging**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

CPI TALKS…

…with Martijn Snoep

In this month's edition of CPI Talks…we have the pleasure of speaking with Martijn Snoep, Chairman of the Netherlands Authority for Consumers and Markets ("ACM").

Earlier in July 2020, the ACM released draft "Sustainability Agreements Guidelines."[1] These Guidelines include examples illustrating the opportunities for business collaboration that contributes to a sustainable society. The ACM is now presenting these Guidelines to national and international interest groups, businesses, academics, interested parties, and government authorities for consultation.

Thank you, Chairman Snoep, for sharing your time for this interview with CPI.

1. Why did you decide to publish these "Sustainability Agreements Guidelines"?

Sustainability – as a policy issue – has gained tremendous importance for the government and for us as multifunctional competition, consumer, telecoms, and energy authority over the years. And so has, in this slipstream, the call on businesses to take responsibility. Businesses increasingly want to take up this responsibility for the sake of the environment in general, and against global warming specifically. Lack of transparency and standards, first mover disadvantages and economies of scale sometimes require agreements among competitors. But competition rules may stand in the way or are at least perceived as a barrier for collective initiatives. Our present Guidelines on Competition Law and Sustainability of 2014 neither fully reflect our current thinking nor do they include the experience that we gained in the assessment of actual cases. I believe that the new draft Guidelines clearly show our aim to increase the opportunities for businesses to collaborate in pursuit of sustainability objectives that help to solve the big environmental challenges our societies are facing. We are open to actively engage in a dialogue with businesses on how competition rules play out in sustainability initiatives, guiding them to solutions that fall outside the scope of competition law, or that fully compensate the users for any price increase, or, under certain conditions, that are beneficial to society as a whole.

2. Sustainability is sometimes narrowed to environmental objectives although the concept is much broader. How do you define true sustainability agreements and avoid attempts to "greenwash" collaborations which may not have genuine sustainability objectives? How do you assess whether consumers get a "fair share" of the sustainability benefits?

We do not envisage a narrow definition of sustainability. In principle, all kind of agreements that fall within the broad description of sustainability of the 2012 UN Resolution 66/288 are covered by our Guidelines.[2] Nevertheless, we do make a distinction within the broad category of sustainability agreements. The framework that we envisage contains basically two lines of reasoning. The first one follows the more traditional approach, while the second is moving the needle a bit as it diverges from the strict interpretation of Article 101(3) that a fair share of the benefits for users implies that they must under all circumstances at least be compensated for the negative effects of the agreement. In the first approach, the definition of sustainability is not critical, as the approach does not differ from the one that is followed with respect to any other kind of efficiency and follows the traditional and well-known interpretation of Article 101(3).

The second approach deviates from this traditional approach and we strongly believe that this is in line with EU case law. Admittedly, the EU courts have never explicitly endorsed this approach but at the same time, they have never ruled to the contrary either. This second approach is restricted to what we have labelled as "environmental-damage agreements." This category of agreements is strictly defined: (i) the agreement must aim to prevent or limit an obvious environmental damage (economists would say: decrease negative externalities that the companies con-

1 https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf.

2 https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_66_288.pdf.

cerned are causing), and (ii) the agreement contributes efficiently to compliance with international or national requirements to prevent or limit environmental damage to which the government is bound. An "efficient contribution" means that the agreement must lead to a net benefit for society as a whole. In the case of environmental-damage agreements, the users will get a fair share of the benefits if the benefits for society as a whole (users and non-users) outweigh the costs for the users. We believe this is a fair share under these specific circumstances because the users inflict with their consumption a negative externality upon non-users that the government is required to prevent or limit. As long as users and non-users share equally in the environmental gains, it's a fair outcome that the pain of the restriction of competition is taken on by the users only. The counter factual, the situation without the agreement, is that the pain of the environmental damage is shared equally but only users get the gain of the lower price. This would be against one of the leading principles that the polluter pays for the environmental damages he induces. Obviously, the other criteria for the application of Article 101(3) should also be met before the agreement is exempted. Notably, that the agreement and all its restrictions must be necessary to achieve the environmental goals pursued, and that the agreement does not afford the companies in question the possibility to eliminate competition in respect of a substantial part of the products and services concerned. We believe that these conditions taken together will prevent the situation where this new framework can be applied in an undesirably broad manner and will provide no room for "greenwashing."

3. The ACM Guidelines will undoubtedly become a reference point for businesses also outside of the Netherlands because of the present lack of guidance from other competition authorities. Have you discussed the Guidelines with other agencies and do you expect them to follow suit?

We discussed the draft Guidelines with the European Commission and within the European Competition Network and also intend to discuss the Guidelines within the OECD and the ICN. The importance of the matter as well as our aim to offer guidance for sustainability agreements is shared by many colleagues. But it is too early to say whether they also share our ideas. A complicating factor is that the majority of the NCAs have less experience than we have when it comes to analyzing sustainability agreements. They cannot evaluate from their own experience our new approach towards sustainability agreements in general and environmental-damage agreements more specifically. Therefore, we will continue to discuss our framework with the European Commission and within the European Competition Network and in other international fora. Hopefully this will lead to a common approach towards sustainability agreements.

4. Do all sustainability agreements inherently restrict competition or do some fall outside of Article 101 TFEU and equivalent provisions?

The draft Guidelines identify several categories of agreements that may fall outside of Article 101, for the reason that they are pro-competitive or competition-neutral. One of these categories concerns covenants by which companies bind themselves to comply with laws abroad in the field of e.g. labor rights or the protection of the environment, and for which the companies, for example, jointly organize oversight by an independent body. Another category concerns agreed codes of conduct promoting environmentally-conscious or climate-conscious practices. These often involve joint standards and certification labels about the use of raw materials, production methods, etc. With regard to such codes, the participation criteria must be transparent, and access must be granted on the basis of reasonable and non-discriminatory criteria. In addition, it should remain possible for participants to use alternative standards or certification labels of equal standing, and also to sell products that fall outside of such codes.

5. Sustainability agreements pursue long-term societal goals which may sometimes lead to short-term price increases. How do you reconcile this within the context of antitrust enforcement?

Our mission is to make markets work well for people and businesses, now and in the future. We believe competition law is not only focused on short-term prices. It also pursues long-term welfare goals. Take merger control and theories of harm based on innovation. They clearly have a long-term perspective, just like our sustainability Guidelines. So antitrust enforcement can and should always have a short-term and a long-term perspective in order to stay relevant and legitimate. The challenges our societies are facing are simply too complex to look at short-term price effects only.

SUSTAINABILITY AS A QUALITY DIMENSION OF COMPETITION: PROTECTING OUR FUTURE (SELVES)

BY CRISTINA A. VOLPIN[1]

1 OECD Competition Division (Paris), cristina.volpin@oecd.org. The present note expresses the author's personal views. It does not reflect the position of the Organisation for Economic Co-operation and Development, or any of its Member Countries. I am grateful to Ruben Maximiano for discussions on the ideas developed in this article and to Ana Sofia Rodrigues, Andrea Amelio and Sean Greenaway for insightful comments.

What is common to the greatest number has the least care bestowed upon it.
Aristotle, The Politics and the Constitution of Athens

I. THE INTERPLAY BETWEEN SUSTAINABILITY AND COMPETITION POLICY

While the first UN Conference on Environment took place in Stockholm already in 1972, only in more recent years has climate change become perceived as an existential threat by the international community.[2] In 2015, all United Nations Member States adopted the 2030 Agenda for Sustainable Development, calling governments to take action for the implementation of strategies aimed at achieving 17 Sustainable Development Goals ("SDGs"). Among other goals, the SDGs include promoting sustainable agriculture, providing affordable and clean energy, and fighting climate change.[3] One year later, in 2016, the Paris Agreement entered into force.[4]

The European Union ("EU") is at the forefront of this international response. Discussions around the compatibility of competition and green growth goals have been ongoing in Europe at least since the introduction of sustainable development as an overarching objective of EU policies in the Treaty of Amsterdam in 1997. Even before, the intersection between competition and sustainability had surfaced in a few cases (*Exxon/Shell*[5] and *Philips/Osram*[6]), and was later explored by the European Commission in the landmark case *CECED*[7] in 2000, followed by *DSD* in 2001.[8] Article 11 of the TFEU now provides for the integration of environmental protection obligations into EU policies and, according to the European Green Deal, the EU objective is to become climate-neutral, with net-zero greenhouse gas emissions, by 2050.

Against the backdrop of a broader policy debate on the sustainability of our free market economy model, where calls for "fairer" competition outcomes also emerge,[9] the question arises of whether the objectives of environmental protection and competition are at odds. Many raise doubts on whether sustainability may be considered under the consumer welfare standard and whether, in particular, competition authorities are well placed to take it into account when they are analyzing anticompetitive practices or transactions.[10]

Drawing from European Commission cases, this article shows that, in some instances, the impacts on sustainability of conduct or a transaction can be accounted for by competition authorities, either as price effects or, as the case may be, as non-price effects (quality, choice or innovation). This approach does not require broadening the consumer welfare standard, but rather adjusting the traditional analytical tools to measure the full economic effects of a conduct or transaction, including its impact on sustainability. The article, therefore, departs from the belief that sustainability considerations should be always treated as public policy concerns outside of the competition enforcement framework.

The article starts with a brief introduction on the specific supply and demand market failures that may affect markets with significant environmental impacts (Section II). It then discusses the possible complementary role of competition to regulation in these markets (Section III). Section IV and V explain how such impacts may be subsumed under the price and non-price competitive assessment. The article concludes by sketching some of the main practical challenges that may follow from adopting this approach within the EU legal framework and shows that they are not insurmountable (Section VI).[11]

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2 William J. Ripple, Christopher Wolf, Thomas M. Newsome, Phoebe Barnard, William R. Moomaw, and 11,258 Scientist Signatories from 153 Countries, "World Scientists' Warning of a Climate Emergency," 70 *Bioscience* 1 (2020) https://academic.oup.com/bioscience/article/70/1/8/5610806.

3 UN Sustainable Development Goals (2015) https://www.un.org/sustainabledevelopment/sustainable-development-goals/.

4 189 countries have thus far joined the Paris Agreement, United Nations Framework Convention on Climate Change (2016) https://sustainabledevelopment.un.org/content/documents/17853paris_agreement.pdf, which aims, inter alia, at "holding the increase in the global average temperature to well below 2° C above pre-industrial levels" and "foster[ing] climate resilience and low greenhouse gas emissions development."

5 European Commission, Decision of May 18, 1994, *Exxon/Shell*, IV/33.640, OJ L144, http://data.europa.eu/eli/dec/1994/322/oj.

6 European Commission, Decision of December 21, 1994, *Philips/Osram*, IV/34.252, OJ L378, http://data.europa.eu/eli/dec/1994/986/oj.

7 European Commission, Decision of January 24, 1999, CECED, IV.F.1/36.718, OJ L187, http://data.europa.eu/eli/dec/2000/475/oj.

8 European Commission, Decision of September 17, 2001, *DSD*, COMP/34493, 2001/837/EC, https://ec.europa.eu/competition/antitrust/cases/dec_docs/34493/34493_63_6.pdf, para. 148.

9 Maurice E. Stucke and A. Ezrachi, Covid-19 and Competition – Aspiring for More than our Old Normality, *Journal of Antitrust Enforcement* (2020) https://doi.org/10.1093/jaenfo/jnaa031, p. 3.

10 See, among others exploring this issue, E. Loozen, Strict competition enforcement and welfare: A constitutional perspective based on Article 101 TFEU and sustainability, 56 *Common Market Law Review* 5 (2019) pp. 1265 – 1302.

11 This article focuses on the analysis of effects of conduct and transactions within the competitive assessment and does not analyze the application of the State action and legitimate objective doctrine in relation to sustainability considerations.

II. THE MARKET FAILURES CHARACTERISING MARKETS WITH ENVIRONMENTAL IMPACT

Markets with environmental impacts may be characterized by a number of market failures, affecting demand and supply.[12] An important one in this context is the cost externalities market failure, whereby the negative externalities on the environment of production and distribution are not integrated into the product price. Other market failures, such as consumer biases and other linked supply-side market failures, which are particularly relevant for the non-price elements of competition, are explored below.

A. Consumers' Behavioral Biases in Relation to Products with Environmental Impact

In several markets, consumers' purchasing choices may not be considered as complete expressions of their willingness to pay for more sustainable products. By these is meant eco-friendly, biodegradable, recyclable, fair-trade sourced or, more generally, products with lower environmental impact. Some behavioral biases may affect the interplay between the supply and demand in many business-to-consumer markets, but also in some business-to-business markets. The consequence may be that companies have reduced incentives to invest in greener inputs, processes or technologies.

One first important behavioral bias affecting people's perception of the climate emergency is hyperbolic discounting.[13] Events that may or will happen in the future have less influence on people's decision-making. Since many people consider that the consequences of climate change may not affect them directly or may do so only very remotely, making the choice between bearing an individual cost today and contributing to individual and collective benefit in the future is a complex assessment.[14]

A second bias is that, even when consumers have all necessary information, they may tend to simplify their decision-making, using heuristics to reduce the processing of information to one or two parameters, the more apparent ones (like price) typically being given more weight, sometimes leading to suboptimal decision-making.[15] To exacerbate the problem is the difficulty for consumers to inform themselves and correctly assess the environmental footprint of the products they buy. This footprint may characterize certain parts of the product but not others, and there may be significant heterogeneity between, for instance, the eco-friendliness of the product itself (namely, its way of production) and that of its packaging, transport and distribution processes. For many products, this information is difficult to weigh against other elements, like price, performance, or durability.

A third bias derives from the coordination failure. Even those consumers that may be well-informed on product environmental footprints may decide to opt for less eco-friendly and lower price alternatives thinking that their sacrifice and contribution to the environment as individuals is minimal or will not make any significant difference. This diffusion of responsibility leads to consumers shifting the costs of their decision-making onto the community.[16]

Finally, a *status quo* bias may affect consumers' willingness to pay even when new more sustainable products or technologies are offered. This bias may undermine the efforts of a company taking the initiative to internalize the costs of the negative environmental externalities of its production process, for instance, due to the fact that consumers are used to the "usual" price and do not want to incur in what they perceive as a loss.[17]

12 The Netherlands Authority for Consumers and Markets, Vision Document – Competition and Sustainability (2014) https://www.acm.nl/en/publications/publication/13077/Vision-document-on-Competition-and-Sustainability, pp. 11-12.

13 Shane Frederick, George Loewenstein & Ted O'Donoghue, Time Discounting and Time Preference: A Critical Review, 40 *Journal of Economic Literature* 2 (2002) http://www.jstor.com/stable/2698382, pp. 351-401.

14 Matthew Wilburn King, How Brain Biases Prevent Climate Action, BBC, March 8, 2019, https://www.bbc.com/future/article/20190304-human-evolution-means-we-can-tackle-climate-change.

15 Oxera, Behavioural Economics and its Impact on Competition Policy (2013) https://www.oxera.com/wp-content/uploads/2018/03/Behavioural-economics-and-its-impact-on-competition-policy-1.pdf, pp. 12-13.

16 Jahel Mielke and Gesine A. Steudle, Green Investment and Coordination Failure: An Investors' Perspective (2018) https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/42745/file/mielke_diss.pdf, pp. 78 ss.

17 Simon Dietz and Frank Venmans, The Endowment Effect, Discounting and the Environment, *Journal of Environmental Economics and Management* 97 (2019) https://doi.org/10.1016/j.jeem.2019.01.010 pp. 67-91. Some of these biases are also described by Jordan Ellison, A Fair Share: Time for the Carbon Defence? (2020) https://ssrn.com/abstract=3542186 and Maurits Dolmans, Sustainable Competition Policy, 5-6 *Competition Law and Policy Debate* 4-1 (2020) p. 8.

B. Other Supply-Side Market Failures in Relation to Products with Environmental Impact

A possible consequence of biases on the demand side of certain markets with an environmental impact may be that these markets are unlikely to cater for the willingness to pay of a limited number of consumers that are less subject to biases or more informed.[18] In certain markets with environmental impact, there may be, therefore, low incentives for companies to meet the expectations of those fewer, more "sophisticated" consumers, particularly when it requires high R&D investments or high fixed sunk costs.

As regards the development of new technologies and the creation of new markets, companies may also face the first mover disadvantage in relation to innovation with environmental benefits. After having invested significant resources in "educating" people about the environmental benefits of their products or in developing niche products that respond to higher standards, they still risk losing market shares to competitors that did not make that effort.

III. COMPETITION POLICY AS PART OF THE SOLUTION

There are a number of potential solutions to these market failures. Some of these market failures can be addressed suitably by means of regulatory initiatives. Environmental regulations and other policy measures, like carbon taxation, emission trading schemes, State support,[19] the conditioning of State aid or other state measures to the respect of environmental obligations and other forms of support to clean technology, are all fundamental to fight climate change. Various consumer protection initiatives aimed at correcting information asymmetry, such as the imposition of labelling obligations, can also play an important role, and so do some private initiatives, like certification schemes.
These initiatives, however, may not be sufficient. Many of these measures may be slow and expensive to implement and some of them may have only marginal impact.[20]

The response to the COVID-19 pandemic showed that competition can be part of a wider integrated policy response. In particular, it showed that, when there is a market failure resulting in a disconnect between demand and supply, competition policy may have a role to play. This was done, inter alia, by allowing appropriate and necessary private initiative responses in a speedy way and by carefully examining the factual circumstances of the case to avoid any anticompetitive distortions.[21]

Similarly, there seems to be no reason to consider that competition policy should not also play a role in helping to address the market failures characterizing some markets with environmental impact. The climate emergency too is a crisis and one that frames the economic and legal context in which businesses move. The possibility of considering dynamic effects under competition law, which regulation is unlikely to capture swiftly, makes it a relevant tool alongside targeted regulatory initiatives, to help address some of these market failures.

Importantly, the integration of sustainability considerations in the competition analysis as direct or indirect economic effects enables competition authorities to assess them both for the purposes of allowing or prohibiting an agreement or a transaction.

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18 Grant Murray, Sustainability and Competition Law: So What is Allowed?, Baker McKenzie, June 10, 2020, https://viewpoints.bakermckenzie.com/post/102g97t/sustainability-and-competition-law-so-what-is-allowed.

19 It should be noted, however, that Government support for production and consumption of fossil fuels amounted to 478 billion USD in 2019 in 77 world economies and that some countries are orienting state aid to fossil fuel and connected industries during the COVID-19 crisis. See OECD, Rising fossil fuel support poses a threat to building a healthier and climate-safe future, June 5, 2020, https://www.oecd.org/fossil-fuels/data/.

20 Dolmans, fn. 17, p. 12.

21 OECD, Co-operation between Competitors in the Time of Covid-19 (2020) https://www.oecd.org/daf/competition/Co-operation-between-competitors-in-the-time-of-COVID-19.pdf.

IV. IS SUSTAINABILITY SUCH STUFF AS OTHER PUBLIC POLICY CONSIDERATIONS ARE MADE ON?

Distinct from other public policy considerations going beyond consumer welfare and economic efficiency, there are two main reasons why sustainability considerations can be integrated into the competitive assessment, without any broadening of the consumer welfare standard.

The first reason is that the effects of a given form of conduct or transaction on sustainability may be economic and affect consumer welfare as traditionally interpreted. They may have an impact on prices or on a non-price dimension of competition.[22] The protection of sustainability may, therefore, be aligned with the basic objective of competition to promote efficient market outcomes in the form of lower prices, higher quality products, more choice and innovation.[23]

On the one hand, sustainability, in some markets and for some products, may be protected by way of preserving competition on prices. This seems to have been, for instance, the case in the *Aurubis/Metallo*[24] acquisition, where the European Commission considered whether the increased buyer power of the merged entity would have allowed it to lower prices for copper scrap. Among other consequences, this would have led to a reduction of the incentives and ability of collectors of copper scrap to invest and collect this input. As noted by the now Executive Vice-President Margarethe Vestager, "[a] well-functioning, competitive copper recycling industry is key to meet the future needs of European industry and to limit the impact on the environment."[25] The European Commission, therefore, seems to have acknowledged the potential impact of the merger on sustainability in this case.

On the other hand, sustainability may be a non-price dimension of competition affecting the dynamic effects of a given form of conduct or transaction. Lower environmental impact, in other words, may equal more quality, more choice or more innovation.

An agreement whereby competitors limit the level of quality or innovation on sustainability of their products may infringe Article 101 TFEU. The European Commission is currently investigating whether some car manufacturers may have agreed not to compete on the development of technology to clean emissions of petrol and diesel cars.[26]

Another example is that of a "sustainability-killer" acquisition, where company A is an established market player with a polluting, "old-school" production business model planning to merge with company B, which sells a greener version of the same product. If the internal documents of company A showed that the plan post-merger were to exploit the economies of scale and reduce costs by combining production lines and eliminating the greener line of production, leading to lower prices for the less eco-friendly product, a focus on price effects would not allow to consider this dynamic effect on sustainability in terms of lowered quality and choice. The merger would then be cleared due to its positive impact on prices.

A second, connected, reason is that, given that sustainability considerations may be part of the economic effects deriving from the environmental impact of a practice or transaction, the analysis and quantification of these effects is possible under a traditional, albeit adjusted, competition analytical framework. An assessment of the effects on sustainability of competition restrictions may therefore be relatively amenable to measurement and quantification.

The two Sections that follow focus on the practical aspects of the analysis of sustainability considerations as a non-price dimension of competition.

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22 See, for instance, Simon Holmes, Climate Change, Sustainability, and Competition Law, *Journal of Antitrust Enforcement* (2020) https://academic.oup.com/antitrust/article-abstract/doi/10.1093/jaenfo/jnaa006/5819564, p. 19.

23 OECD, Public Interest Considerations in Merger Control (2016) http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)3&docLanguage=En, p. 4.

24 Press Release by the European Commission, M.9409, *Aurubis/Metallo Group Holding*, May 4, 2020, https://ec.europa.eu/commission/presscorner/detail/en/IP_20_801.

25 Press Release by the European Commission, M.9409, *Aurubis/Metallo Group Holding*, November 19, 2019, https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6305.

26 See, for instance, European Commission, Press Release, *Car Emissions*, AT.40178, April 5, 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2008.

V. SUSTAINABILITY AS A NON-PRICE DIMENSION OF COMPETITION

In some cases, it is not possible to capture the impact on sustainability of a given form of conduct or transaction by assessing merely its price effects, and the impact on prices and the impact on sustainability may go in different directions.

One possible solution is to consider the negative externalities of a practice or a transaction with an environmental impact (i.e. the costs of carbon emission, water pollution, deforestation, etc.) as an increase in price borne by all consumers, to be added or weighed against any other price effects that may derive from it. For instance, competition authorities could prohibit a merger if it "can demonstrably be expected to increase carbon emissions appreciably (which would be equivalent to a price increase to all consumers for the product in question) […]."[27]

This approach seems to have been adopted by the European Commission in the past. For instance, in *CECED*, the European Commission exempted an agreement between competitors aimed at stopping production and import into the EU of the least energy-efficient washing machines. In the analysis of the economic efficiencies deriving from the agreement, the European Commission took into account the collective environmental benefits of the agreement, in addition to individual economic benefits in the form of savings on electricity bills from the more efficient machines.

In this case, the European Commission *quantified* the negative externalities avoided by the agreements, i.e. "the saving in marginal damage from (avoided) carbon dioxide emissions […] sulphur dioxide […] and nitrous oxide," concluding that the "benefits to society brought about by the CECED agreement appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines."[28]

Analogously, when examining the effects of the *Philips/Osram*[29] joint venture agreement for the production and sale of lead glass tubing for lamps, the European Commission observed that "[t]he use of cleaner facilities will result in less air pollution, and consequently in direct and indirect benefits for consumers from reduced negative externalities."

While the internalization of the negative externalities concerning a common resource is a traditional solution adopted to address "tragedy of the commons"– type problems, like the climate emergency, it may raise some issues as regards the interpretation of the notion of "consumer." Taking into account the increase in costs due to environmental externalities in the market definition may also raise a few operational difficulties. In addition, significant challenges may arise when assessing and quantifying certain sustainability considerations the measurement of which is less standardized than that of carbon emission (e.g. loss of biodiversity).

Another viable and complementary approach is that of considering sustainability as a non-price dimension of competition. It is well-established that product quality, intending by this term to encompass all dynamic effects on competition including choice and innovation, is an important parameter of competition.[30] It is also recognized that a decrease in quality, choice or innovation can be as harmful to competition as an increase in price.

This approach may be applied not only when sustainability is a feature of the product or an intrinsic characteristic linked to its ingredients, process or components, but also when consumers could be reasonably deemed to consider it as a dimension of quality, choice and innovation.[31] One could consider, therefore, that less polluting or more sustainable production or distribution processes are also an element of quality and part of the direct or indirect economic benefits of a practice or transaction. This is the same as deeming products that are safer or less harmful to the health of the consumers or those around them of higher quality. In other words, it would be possible to consider as elements of quality sustainability considerations that may not immediately benefit consumers, but that they could be considered to prefer, also taking into account the consumer biases described in Section II. This is acknowledged by the European Commission in the Horizontal Co-operation Guidelines in relation to standardization agreements, where it notes that: "Standards on, for instance, quality, safety and environmental aspects of a product may also facilitate consumer choice and can lead to increased product quality" (para. 308).

27 See, for further details on this approach, Dolmans, fn. 17, p. 12.

28 *CECED*, fn. 7, para. 56.

29 *Philips/Osram*, fn. 6, para. 27.

30 European Commission's Contribution to OECD, The Role and Measurement of Quality in Competition Analysis (2013) http://www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf, p. 80: "irrespective of how the exact boundaries between product quality, product variety and innovation are defined, all three form part of a wider category of dynamic effects on competition – effects that are recognised as relevant for the analysis of competitive effects under EU competition law."

31 See, in relation to this aspect in the context of Article 101(3) TFEU, Julian Nowag, Environmental Integration in Competition and Free-Movement Laws, Oxford University Press (2016) p. 232.

Take, for instance, a consumer opting for a mobile phone with lower radiofrequency SAR (specific absorption rate) measurements. The radio frequency energy emitted by the phone may not affect its performance and may or may not represent a danger to health in the long-run, affecting the individual, the family or whoever may be in regular proximity. Even if it may not directly affect the performance of the phone, a lower radiofrequency SAR level offered for the same price would be likely to be considered a parameter of quality, choice or innovation in a competitive assessment. Yet, the evidence of the negative effects of radiofrequency energy seem to be more controversial than the negative effects of carbon-emission on human health and livelihood. In addition, these effects are just as remote and diffuse.

It should thus be possible to consider that sustainability, eco-friendliness, biodegradability, recyclability, fair-trade source, or lower environmental impact of products may integrate the preferences of consumers and be a quality dimension of competition, in spite of their effects being reflected on (or also on) the community, and not just on the individual consumer.

Whether consumers value sustainability as a dimension of quality of a product may be a factual question to be assessed based on the specific circumstances of the case.[32] This kind of reasoning seems to have been adopted, for instance, by the Dutch competition authority in the Chicken of Tomorrow case, where it tried to determine whether consumers preferred price and choice over increased animal welfare and environmental benefits. The Dutch competition authority endeavored to assess, by means of conjoint analysis, the consumers' willingness to pay for an improvement of the chicken breeding conditions and the environmental impact of the processed meat.[33]

As mentioned above, however, consumers' behavior may not be a full expression of their preferences on sustainability in a specific market due to a number of behavioral biases that may affect markets with environmental impact. When this is the case, consumers may not be offered the low prices and the level of quality, choice, and innovation on sustainable products that they would benefit from if these biases were not present.

Competition authorities might have to take into account these market failures in the design of the investigation and subsequent competitive assessment for a fuller understanding of the elasticity of the demand and of the market dynamics. This would, inter alia, add legitimacy to the choice of the competition authority to consider sustainability as a parameter of competition and avoid the perception of a paternalistic super-imposition of the judgment of the competition authority in its interpretation of consumer welfare over that of consumers.

In this regard, it should be noted that competition authorities already take into account behavioral biases when analyzing a market,[34] on the grounds that: "The impact of consumer biases on demand elasticity can be factually important in individual competition cases [...] Biases are in this sense part of the integral assessment of the economic effects in competition cases."[35]

Further, the analysis of non-price effects is increasingly gaining importance in the decisional practice of the European Commission, especially with regard to the assessment of effects on innovation in merger control.[36] An approach that takes into account dynamic effects is, therefore, aligned with this trend of considering effects that may manifest themselves in wider timeframes than the traditional 3 to 5 years. Innovation theories of harm are also relevant and should be considered in the context of sustainable products and processes, and those that affect the choice and quality of such products via green-field or incremental innovation.

In this context could be also read the reference that the European Commission made, when assessing the effects of the *Dow/DuPont* concentration, to the importance of innovation in crop protection not only for farmers and consumers, but also given its impact on food, environmental safety, and human health.[37]

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32 See, Holmes, fn. 22, p. 26: "The revealed preference 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)" and Nowag, fn. 32, p. 233.

33 The Netherlands Authority for Consumers and Markets, Analysis of the Sustainability Arrangements concerning the Chicken of Tomorrow, https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf.

34 See, for instance, European Commission, Decision of October 3, 2014, *Facebook/WhatsApp*, M.7217, https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf, paras. 111, 124 and 134 and European Commission, Decision July 18, 2018, *Google Android*, AT.40099, https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, paras. 787, 791, 793 and 851.

35 The Netherlands Authority for Consumers and Markets, Behavioural Economics and Competition Policy (2013) https://www.acm.nl/sites/default/files/old_publication/publicaties/11586_acm-behavioural-economics-competition-policy.pdf, p. 3.

36 European Commission's Contribution to OECD, Non-Price Effects of Mergers (2018) https://one.oecd.org/document/DAF/COMP/WD(2018)14/en/pdf, p. 6.

37 European Commission, Decision of 27 March 2017, *Dow/DuPont*, M.7932, https://ec.europa.eu/competition/mergers/cases/decisions/m7932_13668_3.pdf, para. 1980.

An example of a merger harmful to sustainability-innovation might be that of a horizontal merger between two competitors that have a significant record of innovating on sustainable aspects of production or investing significant budgets in R&D to develop green technologies or processes. The potential loss of the competitive constraints and the loss of the pressure to innovate on sustainable aspects of their product or processes should then be analyzed, to understand the impact of the transaction on future incentives to innovate on greener technologies and processes. Analogous analyses have been carried out, for instance, in hospital mergers, where competition authorities have considered in their assessment the investments in acquiring new technology.[38]

A decision of the French Competition Authority regarding a cartel in the hard-wearing floor coverings sector sanctioned cartel participants for agreeing to refrain from advertising environmental performance that went beyond a certain industry standard, thus withholding information that might have driven purchasing decisions. In addition, according to the Authority, "this agreement may have acted as a disincentive to manufacturers to innovate in order to offer their customers products characterised by better environmental performances, thereby impacting a product differentiation factor."[39]

More generally, a trend seems to be emerging in Europe of making the best use of the flexibility of the analysis of dynamic effects for the purpose of correcting market failures and advancing competitive dimensions that are considered important for consumers beyond price. The most recent example of this is the reference to the protection of consumers' choice that has been made by the German Federal Supreme Court in the Facebook preliminary proceedings,[40] which is also instrumental to protecting their privacy.

VI. CHALLENGES IN THE COMPETITIVE ASSESSMENT OF NON-PRICE SUSTAINABILITY CONSIDERATIONS

Assessing dynamic effects is complex. As noted by the European Commission, "Making a precise definition of quality for a given product is a complex task in competition investigations given the many subjective features that may contribute to a perception of quality by customers, the multi-dimensional nature of quality, and the absence of measurable variables."[41]

Giving sustainability considerations recognition as a non-price parameter of competition in the assessment of the effects or in the evaluation of the efficiencies deriving from a given form of conduct or a transaction raises a number of challenges. Two of the main ones in the EU legal framework, and possible ways to overcome them, are briefly sketched below.

First, the difficulties in measuring non-price effects make them difficult to consider in competitive assessments, which led to them being devoted limited attention by competition authorities so far. However, as mentioned above, there is a trend towards the recognition of the importance of dynamic effects on competition, in particular in the assessment of effects on innovation in the merger review conducted in the last few years by the European Commission.[42] Against this backdrop, the time seems to be ripe for assigning greater importance to non-price effects, including on sustainability.

One important challenge of analyzing non-price effects in markets with environmental impact is that price and other dynamic effects may not be aligned and, if they go in opposite directions, they would have to be balanced against one another. For instance, it may be complex to assess the anticompetitive effects of a co-operation agreement or a merger increasing prices for consumers, but also increasing quality-sustainability by providing consumers with better green alternatives for a certain product. This exercise would not, however, be unfamiliar for competition authorities.

Further, an analysis of the European Commission decisions shows clearly that qualitative evidence is often used together with quantitative evidence, and sometimes the two are contrasted.

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38 US Contribution to OECD, Non Price Effects of Mergers (2018), https://one.oecd.org/document/DAF/COMP/WD(2018)45/en/pdf, p. 5.

39 French Competition Authority, Decision 17-D-20 of 18 October 2017, https://www.autoritedelaconcurrence.fr/fr/decision/relative-des-pratiques-mises-en-oeuvre-dans-le-secteur-des-revetements-de-sols-resilients and Press Release, https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/19-october-2017-cartel-floor-coverings-sector.

40 For a commentary of the decision in English, see Rupprecht Podszun, Facebook@BGH, 23 June 2020, https://www.d-kart.de/en/blog/2020/06/23/facebook-bgh/.

41 European Commission's Contribution to OECD, fn. 31, p. 78.

42 European Commission's Contribution to OECD, fn. 37, p. 6.

As regards quantitative evidence, it is possible to conceive that some of the traditional quantitative tools could be adapted for the competitive assessment of non-price sustainability considerations. For instance, if companies can be considered to compete on sustainability, the conceptual framework of the SSNDQ might be used to determine the impact of a small but significant and non-transitory decline in sustainability ("SSNDS") to define a market. One could also imagine, as regards effects, that a similar type of analysis to upward pricing pressure could be developed. For example, diversion rations may be adjusted by adapting surveys to consider consumer biases.[43] Other instruments could be borrowed from environmental economics, such as life cycle analysis.[44]

Second, competition authorities are accustomed to measuring in-market effects and efficiencies and, in the EU legal framework, it is in principle required that effects and efficiencies of a practice or of a transaction are felt by the same consumers.

Given that the effects on environment, even when they are localized or limited in time, still tend to be cumulative (for instance, CO2 emissions, increases in temperature, etc.), there seems to be a strong case for considering the important spill-over effects going beyond a specific market or category of consumers. The integration of sustainability considerations in the competitive assessment as a non-price effect, however, seems to eliminate this issue, because any decrease in quality-sustainability would be captured with reference to the consumers in that relevant market, although the effects on sustainability might be felt by the wider community or by future generations.

In other cases, the effects may be felt only beyond the timeframe for the competitive assessment typically considered by competition authorities when considering static effects. The consideration of dynamic effects would permit to take into account effects in a longer timeframe than the one typically adopted for prices, which may be more appropriate for sustainability considerations.

Whilst this approach may allow expanding the analysis of anticompetitive harm that would not be captured by a static analysis, it may be balanced by an equally comprehensive examination of potential efficiencies.

Under the current wording of EU Guidelines, environmental benefits accruing to the community may be difficult to consider, although the ongoing revision of the Horizontal Guidelines is likely to be an opportunity to address this issue.[45] Indeed, the cautionary wording adopted by the European Commission ("in principle"; "normally") seems to soften the strict interpretation that disfavors crediting efficiencies when they are felt outside the relevant market. In the different legal framework existing at the time of the *CECED* case, the European Commission explicitly qualified the collective environmental benefit as a stand-alone counterbalancing factor for the increase in price of the product generated by the agreement that "would adequately allow consumers a fair share of the benefits *even if* no benefits accrued to individual purchasers of machines."[46]

VII. CONCLUSIONS

This paper advocates that, in some instances, sustainability considerations can be taken into account in the competition assessment as either price or dynamic effects deriving from a given form of conduct or merger, without requiring any upheaval of the way in which the consumer welfare standard is interpreted.

In certain cases, price effects and impacts on sustainability may be aligned. In other cases, in order to capture the full effects of conduct or a transaction under the consumer welfare standard as traditionally interpreted, sustainability may have to be considered as a dimension of competition, in the form of quality, choice and innovation.

This should be done by ensuring that sustainability considerations inform the design of the investigation and the analysis of conduct and merger transactions, in suitable cases. The competitive assessment on sustainability may be done by qualitative and quantitative means,

43 For instance, models could be developed along the lines of the one created for the assessment of downward quality pressure, Keith Waehrer, Online Services and the Analysis of Competitive Merger Effects in Privacy Protections and Other Quality Dimensions (2016) https://ssrn.com/abstract=2701927.

44 Life cycle analysis is an international standard scientific assessment, defined as "a methodology for integrated impact assessment in which the (environmental) burdens associated to the whole life cycle of products are quantified." See S. Sala, F. Reale, J. Cristobal-Garcia, L. Marelli, R. Pant, JRC Technical Reports, Life Cycle Assessment for the Impact Assessment of Policies (2016), https://op.europa.eu/en/publication-detail/-/publication/ff42870e-d95b-11e6-ad7c-01aa75ed71a1.

45 For instance, in the EU legal framework regime, para. 79 of the Horizontal Merger Guidelines state that efficiencies "should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur." A similar provision is set out in relation to anticompetitive agreements, at para. 43 of the Guidelines on Article 101(3), which also states that "[n]egative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market."

46 *CECED*, fn. 7, para. 56 (emphasis added).

by fine-tuning the current tools to perform the analysis in a way that allows a fuller understanding of all direct and indirect economic benefits affecting the environment, including by considering the relevant consumer biases or other market failures affecting markets with an environmental impact. This approach preserves the application of the traditional analytical framework whilst ensuring that competition between firms on sustainability is fostered.

Competition authorities thus need to be aware of the potential dynamic effects of certain conduct or transactions on sustainability, in order to consider them in their assessment, if appropriate. This will allow them to play a relevant role, alongside governments, in supporting the efficient reallocation of resources towards greener technologies.

LIVING WAGE INITIATIVES: NO REASON TO OBJECT

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I. INTRODUCTION

The International Labor Organization's constitution declares that "*universal and lasting peace … requires … the provision of an adequate living wage.*"[2] This recognition goes back as far as 1919, more than a century, yet it remains an unfulfilled aspiration for many workers in the developing world, for example on cocoa, banana, coffee or flower plantations.[3] Those buying from the plantations often express willingness to pay more for their inputs, the plain purpose being to enable the plantation owner to pay a living wage to workers – indeed, to ensure that the owner hires workers at all, rather than relying on unpaid child labor.

In that real-world sense, supportive industry initiatives seek to do good rather than to cause harm. The *effects* of joint action on pricing must be for consideration, but it needs not be axiomatic that the *object* is to limit competition. The present contribution examines the law on object infringements, as well as the practice of the European Commission ("Commission"). As will emerge, the European Court of Justice ("ECJ") has not mandated an absolutist position: indeed, recent judgments show the court limiting the object category.

This branch of the sustainability/antitrust debate is especially challenging, given the neuralgic role of price in antitrust. Commissioner Vestager, in her October 2019 speech, focused on lower-hanging fruits, notably the adoption of standards for sustainable products,[4] but the challenge of living wage initiatives also calls for similar clarity. The fear of antitrust exposure is a known limiting factor, as reflected in the UK's Fair Trade Foundation report on Competition Law and Sustainability (2019).[5] A more affirmative position from the Commission on living wage initiatives would be transformative, rather than leaving industry to seek private advice that the Commission would be unlikely to make it an enforcement priority to pursue such initiatives.[6]

Much has been written, in the newly active debate on antitrust and sustainability, about interpreting the competition rules within the wider framework of the EU Treaties.[7] Those are important arguments, but beyond the ambitions of this contribution. Rather, we focus here on clearing the way for that good work, by removing the prior concern that the object box will ensnare living wage initiatives before they ever have the chance to benefit from the new and enlightened approaches to interpretation.[8] Existing case law already embraces this narrower approach to object infringements, although it is not a message that the Commission has chosen to amplify: a larger object box makes for simpler enforcement, no doubt. But it will assist, vitally, if official guidance and comments can confirm that bona fide sustainability agreements are not object infringements, in line with Commissioner Vestager's commitment that "*competition policy should support … businesses … in helping to create markets that are sustainable.*"[9] The Commission should aim higher than the low-hanging fruit.

2 Preamble to the ILO Constitution.

3 According to the World Bank, 10.7 percent of the world's population still live in extreme poverty. See the UK's Fair Trade Foundation report on Competition Law and Sustainability - A Study of Industry Attitudes Towards Multi-Stakeholder Collaboration in the UK Grocery Sector (2019. The report shows that one of the major reasons for this is the gap between average incomes in the agricultural sector and living incomes in virtually all countries where extreme poverty is prevalent. The same report identifies price paid to producers as the main problem: farmers continue to be squeezed at the start of the supply chain. Some governments have tried to address the issue by imposing a national minimum wage, but these attempts have been unsuccessful. The report is available at:https://www.google.com/search?q=UK%E2%80%99s+Fair+Trade+Foundation+report+on+Competition+Law+and+Sustainability+-+A+Study+of+Industry+Attitudes+Towards+Multi-Stakeholder+Collaboration+in+the+UK+Grocery+Sector+(2019)%2C&rlz=1C1GCEB_enGB885GB886&oq=UK%E2%80%99s+Fair+Trade+Foundation+report+on+Competition+Law+and+Sustainability++-+A+Study+of+Industry+Attitudes+Towards+-Multi-Stakeholder+Collaboration+in+the+UK+Grocery+Sector+(2019)%2C&aqs=chrome..69i57.10719j0j4&sourceid=chrome&ie=UTF-8.

4 Vestager Speech "*Competition and Sustainability*," GCLC and FTAO Conference, October 24, 2019, available at https://wayback.archive-it.org/12090/20191129200524/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-sustainability_en.

5 *Supra* note 3. For example, Alistair Smith from Banana Link, part of the World Banana Forum, noted that pricing at all levels of the supply chain is an issue often discussed at the World Banana Forum meetings but that competition law restricts the participants from discussing price solutions for sustainability purposes.

6 Fair Wear Foundation Competition Law Dos and Donts for FWF Members Collaborating to Pay Living Wages, available at https://api.fairwear.org/wp-content/uploads/2016/06/FWF-guidancecompetitionlawjuly15.pdf; and Arnold & Porter Opinion on The Application of EU Competition Law to the Adoption of the Living Wage Standard, available at https://api.fairwear.org/wp-content/uploads/2016/06/OpiniontoFWF-TheApplicationofEUCompetitionLawtoFWFLivingWageStandardfinal1.pdf.

7 Not least the contributions in this present CPI collection.

8 We also leave aside for purposes of this paper the point that even object violations can in principle benefit from Art 101(3) protection. Rather, our point of principle is that sustainability collaborations such as living wage initiatives should not be tarnished by an "object" characterisation.

9 *Supra* note 4.

II. INFRINGEMENTS BY OBJECT: EU LAW AND PRACTICE

Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") sets out two categories of prohibited agreements: agreements having (i) the object or (ii) the effect of restricting competition. The ECJ defined object infringements as restrictions which *"by their very nature have the potential to restrict competition within the meaning of Article 101(1)."*[10] So the agreement "*reveals in itself a sufficient degree of harm to competition for it to be considered that it is not necessary to assess its effects*."[11] Agreements which are not considered "infringements by object" can still violate Article 101(1) TFEU if they prevent, distort or restrict competition to an appreciable extent.

There are types of agreements which the Commission typically finds to be restrictive by object. This includes agreements between competitors which lead to price fixing.[12] The Commission has in the past found that agreements between competitors which involved, among others, arrangements on the purchase price of raw materials from suppliers, were infringements by object.[13]

However, the treatment of an infringement as being by object is based on decisional practice and not established by law. There should be nothing automatic about it and it should only be used with caution. The ECJ has become more and more critical about characterizing an agreement as a by-object infringement without a thorough examination: since *Cartes Bancaires*[14] the Court has consistently held that the concept of restriction by object must be interpreted restrictively.[15] This means, as the ECJ has repeatedly ruled, that an agreement must be examined in light of its content, objectives and its legal and economic context.[16] In fact, two recent ECJ rulings dealing with the notion of restriction of competition by object have clearly established that each agreement needs separate consideration, with no presumption flowing from the way other agreements were assessed.[17] Each agreement should be carefully examined on its facts, even if a similar pattern of events was previously found to amount to an infringement by object. It is the context and the circumstances in which the agreement operates that determine whether the arrangement is an infringement by object, not the formal similarities with conduct previously considered anti-competitive by object.

The ECJ recently confirmed in *Budapest Bank* that evidence about the effects of an agreement cannot be ignored when determining whether the agreement is a by-object infringement: for example, if there are indications showing that the agreement had no upwards, but maybe a downwards, effect on price levels, this has an immediate bearing on the alleged anti-competitive object of the infringement. This is because, if an agreement does not pose a sufficient degree of harm to competition, it cannot be labelled as a by-object infringement.[18] In a later ruling, *Generics UK*, the ECJ pursued a similar line of reasoning but put more emphasis, based on the facts before it, on weighing the pro-competitive effects of a particular agreement. These effects may be sufficient to negate the characterization as an infringement by object: the pro-competitive effects of an agreement can be taken into account to assess whether an alleged unlawful agreement should be characterized as an infringement by object. While pro-competitive effects of an agreement do not preclude a finding that the arrangement amounts to an infringement by object, if the pro-competitive effects are clearly established, relevant, and specifically related to the agreement and sufficiently significant, they can

10 Communication from the Commission, Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements ("Horizontal Guidelines"), OJ C 11, 14.1.2011, p. 1–72, para. 24; see for example Case C-8/08, *T-Mobile Netherlands and Others*, para. 29; C-209/07, *Competition Authority v. Beef Industry Development Society and Barry Brothers (Carrigmore) Meats* (*Beef Industry Judgment*), para. 16.

11 See for example the recent ECJ judgment in C-228/18, *Budapest Bank* (2020), para. 37.

12 There are other categories of agreements to which this applies as well, e.g. market sharing, group boycotts, etc. but for present purposes we focus on price fixing as it seems most relevant in the sustainability context of this article.

13 *Raw Tobacco Italy* case (setting of common final purchase prices and other trading conditions; *Zinc Producer Group* (involved a combination of fixed raw zinc purchase and selling prices of zinc metal). GCEU, T-217/03 and T-245/03, *Coop de France bétail et viande e.a. v. Commission* (*French B*eef) (2006).

14 ECJ, C-67/13 P, *Groupement des cartes bancaires* (2014), para. 58: "*the General Court erred in finding […] that the concept of restriction of competition by 'object' must not be interpreted 'restrictively'. The concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition.*"

15 ECJ, C-228/18, *Budapest Bank* (2020), para. 54 ; EJC, C-307/18, *Generics UK* (2020), para. 67; ECJ, C-67/13 P, *Groupement des cartes bancaires (CB)* (2014), para. 58.

16 ECJ, C-228/18, *Budapest Bank* (2020), para. 51.

17 ECJ, C-307/18, *Generics UK* (2020), para. 84, ECJ, C-228/18, *Budapest Bank* (2020); see also ECJ, C-67/13 P, *Groupement des cartes bancaires* (2014).

18 ECJ, C-228/18, *Budapest Bank* (2020), para. 82: in that case the ECJ found that there were a priori no strong indications capable of demonstrating that the interchange fee arrangement would have increased prices. According to the ECJ, there was contradictory and ambivalent evidence which the national court could not ignore when examining the by-object nature of the infringement. Based on the Commission's observations, the ECJ concluded that if there had been no interchange fee arrangement, the level of interchange fees resulting from competition would have been higher. This was found to be a relevant fact for the purposes of examining whether the agreement restricted competition because price specifically concerned the alleged anti-competitive object of the agreement, i.e. that the agreement limited the reduction of the interchange fees and, consequently, the downwards pressure that merchants could have exerted on the acquiring banks in order to secure a reduction in service charges.

create reasonable doubt as to the degree of harm to competition caused by the agreement and therefore the classification as an infringement by object.[19]

III. SUSTAINABILITY AGREEMENTS AND THEIR OBJECTIVES

At the risk of stating the obvious, the aim of a living wage collaboration is not to restrict competition, or to alter the structure of the market, but to inject more fairness in the supply chain, and to ensure that farmers or textile workers can afford to live on their income. Of course, it is a proper and natural thing for an antitrust enforcer to wonder about the bona fides of an arrangement. The Commission might wonder whether the collaboration is purely altruistic, or what commercial advantage companies pursue. It may often be a question of corporate image, a response to shareholder pressures, ESG[20] expectations, or for branding/marketing advantage. Likely there could be multiple motivations, but none of them obviously illicit or reason to assume anti-competitive intent. The *effect* of the collaboration will remain for close examination. But as a matter of ordinary language it is hard to say that the parties have set out with the object of distorting competition.

As living wage collaborations can take various shapes, it is impossible to cover all the different possibilities in one article. We will focus below on the likely hardest case: agreements between competitors agreeing on a uniform farm-gate price. Even then there is obviously no one-size-fits-all assessment, in view of the need to take into account the legal and economic context and objectives of each agreement. However, some of the discussion points below may have broad relevance.

Agreements on farm-gate prices do include an element of agreement on price, even if they concern only the floor price for one input into a final product. Such an agreement does not completely eliminate the freedom of each firm to negotiate the purchase price with the supplier; it could however be argued, due to the structure of the supply chain for agricultural or textile products and the strong downward pressure applying to such supply prices, that a floor price would in practice lead to a uniform purchase price for the relevant input.

Even then, agreements on input prices, in the same way as any other agreement, cannot automatically be treated as by-object infringements as established by the ECJ's case law discussed above. As per the Commission's Horizontal Guidelines: agreements fixing "*purchase prices <u>can</u> have the object of restricting competition*"[21] but in line with recent jurisprudence the object infringement label cannot be applied mechanically and requires an assessment of the facts and circumstances.[22]

In the context of a living wage initiative focusing only on the harmonization of farm-gate price, this element of price fixing in itself would have to be sufficiently harmful to competition to render the agreement an object infringement. One aspect which can be used to test this is the degree of commonality of costs resulting from the agreement. The Horizontal Guidelines state that a high level of commonality of costs would allow the parties to coordinate market prices more easily.[23] However, in many sectors in which living wage initiatives would likely be implemented, the price of the raw product accounts for a (very) limited part of the price of the resulting intermediate product, even less by comparison to the final product. As such, an agreement on the price of the raw product will only neutralize competition on one element of costs, which in most cases will be a minor element of costs. For instance, the price paid to coffee beans growers represents approximately 10 percent of the wholesale cost of coffee, and less than 1 percent of a coffee cup sold in a café.[24]

In *Budapest Bank*, referred to above, the ECJ found that an agreement fixing one element of the costs did not necessarily restrict competition by object. Although such an agreement offsets one aspect of competition and may therefore constitute a restriction of competition by object, this in itself is insufficient to conclude that the agreement has the object of restricting competition.[25] Absent other elements tending to confirm the reality of an anticompetitive objective, the effects of the initiative then need to be assessed.[26]

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19 ECJ, C-307/18, *Generics UK* (2020), paras. 107-108.

20 Environmental, social, and governance.

21 *Ibid.* para. 206.

22 In many cases where the Commission or the ECJ found that an agreement on input prices constituted an infringement by object, such provisions were part of more complex agreements including other provisions restrictive of competition, market sharing for instance, making it easier to identify an anticompetitive objective. See, e.g. T-217/03 and T-245/03, *French Beef* (2006).

23 Horizontal guidelines, para. 36.

24 Financial times, From bean to cup, what goes into the cost of your coffee?, Chelsea Bruce-Lockhart and Emiko Terazono, June 4, 2019, available here : https://www.ft.com/content/44bd6a8e-83a5-11e9-9935-ad75bb96c849.

25 ECJ, C-228/18, *Budapest Bank* (2020), para. 65.

26 The limited significance of the input subject of the agreement would also allow to distinguish many living wages collaborations from previous cases where an agreement

The ECJ indeed suggested that the referring court should take into account the fact that the aim of the agreement was distinct from pure price fixing. Asked for clarification on whether a partial harmonization of one element of the selling/purchasing price constituted an infringement by object, the ECJ suggested that the agreement will fall outside the object box if it can be demonstrated that the agreement was aiming not to set up a minimum price but to achieve a balance between divergent interests of the parties, to ensure that the costs related to the use of the products, in this case the use of credit cards, were covered. An agreement between suppliers of raw agricultural products and intermediaries, whereby all the parties agree a minimum selling/purchase price in order to ensure that the production costs are covered and that the supplier will be able to sustain its activity in the long term, could be assessed in a similar manner.

In the same vein, and in line with the *Generics UK* judgment, clearly established, relevant, specifically related to the agreement and sufficiently significant pro-competitive effects can cast a sufficient shadow on the aims of the agreement to move it out of the by-object box. Living wage collaborations could invoke one quite straightforward pro-competitive objective: ensuring a long-term supply of the relevant products. For example, following basic economics principles, if it is not sustainable for a supplier to produce one type of product, because the selling price it can achieve is too low, the supplier will at some point stop the production. If the reason behind the low resale price is a lack of demand from consumers for such product, it may not be such a bad outcome; the supplier will switch to producing some other product that is in higher demand. However, with regards to agricultural products, the specificities of the supply chains lead to a situation where the farm-gate price is completely disconnected from the consumers' desire for the product; and their willingness to pay for it. For instance, although the trading price of one kilo of coffee is around 2.3 euros,[27] the retail price varies between 10-12 euros for standard pre-ground coffee to more than 70 euros for coffee pods.[28] Similarly, the kilo price of cocoa beans average around 2 euros,[29] compared to approximately 10-15 euros in supermarkets and close to 100 euros for fine chocolate.[30] While it is clear that processing is needed for the raw product to reach the consumer, this demonstrates at least that there is consumer demand – and willingness to pay – for such products. (And nobody, certainly not the authors, would want to be deprived of coffee or chocolate in the future because the farmers all decided to shift to other activities.) This is not a hypothetical risk; there are many reports of cocoa or coffee farmers abandoning farms in Latin America and Africa.[31]

Moreover, although the ECJ case law does not require a direct connection between the agreement and consumer prices,[32] for the agreement to be able to prevent, restrict or distort competition in Europe and fall within the by-object box,[33] it would have to be able to, at least, indirectly impact the resale price of the product on the downstream market. A similar approach was previously taken by the Commission in the *Zinc Producer Group* case when assessing an agreement on the purchase price of zinc concentrates. To conclude that the agreement had the object of restricting competition, it stated that "*the decisive point is that the agreed producer price was always used as a basis for the actual prices stipulated in [downstream contracts].*"[34] In the context of complex supply chains, the countervailing buyer power of retailers (for example) is a key element to take into account. In such a situation, intermediary undertakings (processors for instance) agreeing on the input price of one raw product may not have the ability or the incentive to pass the increase on to their customers. The parties to the agreement will then still try to improve their product offering by competing on other elements of the on-sale price rather than the price of the particular input. So potential harm to competition brought by the agreement would be less straightforward. Alternatively, an increase in the input price may be absorbed by the supply chain. This is another basis to establish that the agreement is a true sustainability initiative and not a covert anticompetitive agreement: an increased input price which cannot be passed on runs counter to the pure financial interests of the parties.

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on the input price, or an element thereof, was qualified as a by-object infringement. For instance, in *T-Mobile*, the remuneration of the dealers was called a "*decisive factor*" of the price paid by the end-user (ECJ, C-8/08, *T-Mobile Netherlands* (2009), para. 37). In the *Raw Tobacco Italy* case, the raw tobacco was described by the Commission as a "*significant input*" of the downstream activities of the parties.

27 International Coffee organisation, Coffee daily prices, May 2020

28 Based on sample observations in France, DMEPP, Café: Comment le choisir? Quel est le prix du café? Comment préserver son budget?, May 2, 2020, https://dmepp.com/prix-du-cafe.

29 International Cocoa Organisation, daily price of cocoa beans June 2020, https://www.icco.org/statistics/cocoa-prices/daily-prices.html.

30 Based on sample observations in Belgium.

31 See for instance Financial Times, The abandoned farms behind the global coffee craze, 20 May 2019, Emiko Terazono, Jude Webber in Mexico City and Andres Schipani, https://www.ft.com/content/5009be96-7569-11e9-be7d-6d846537acab; NPR, Why The World Might Be Running Out Of Cocoa Farmers, July 3, 2015, Eliza Barclay, https://www.npr.org/sections/thesalt/2015/07/03/419243305/why-the-world-might-be-running-out-of-cocoa-farmers.

32 ECJ, C-8/08, *T-Mobile Netherlands* (2009), para. 39.

33 *Ibid*, para. 43.

34 Commission, IV/30.350, *Zinc Producer Group* (1984), para. 66.

The above reasoning could be transposed in whole or in parts to other types of living wage collaborations. And it some cases some additional arguments could be put forward. For instance, in the hypothesis of agreements between competitors to pay producers of raw products a fixed "living wage" premium on top of a freely negotiated price for the supply, the element of price fixing would then not be so straightforward. As recently recalled by the ECJ, when an agreement standardizes only one aspect of the cost, an assessment is needed to conclude that the agreement falls within the scope of indirect price fixing.[35]

Any industry initiative will of course need to be structured with sufficient safeguards to avoid any spill-over coordination on price setting going beyond farm-gate prices, any sensitive information exchange, any further unlawful collaboration. If it does not do so, the agreement may still rightfully be treated as a by-object infringement. These matters will of course be equally relevant in the assessment of effect, but getting them wrong risks failing even before that hurdle.

IV. CONCLUSION

The goal of this article is in no way to argue that all agreements between competitors on input prices, and claiming sustainability benefits, should be shielded from competition law enforcement. The limited, but important ambition, is to vindicate the truth that they are not inevitably condemned to infringe by object. The question of effect remains, but allows for a more nuanced approach. In this way, true living wage initiatives may flourish in ways that we have not seen to date.

As argued above, there is important reason for the Commission to confront these issues head-on in the various sets of upcoming guidelines and guidance, in particular the revamped Horizontal Guidelines[36] and the new guidance on collective action.[37] It should call out not only the more obviously benign forms of sustainability cooperation, but also the challenging ones. Environmental concerns are rightly much in mind, but so too must be other sustainability goals, including living wage initiatives – in particular living wage initiatives, given their neuralgic connection to price. The draft Dutch guidelines[38] which were issued just as this paper was going to press are admirable in their clarity that firms following the guidance will not be exposed to fines, and refer in numerous places to living wages – but do not tackle the "object" question.

Collectively the Commission, together with NCAs such as the Dutch, may in this way move towards the objectives set out in 1957, and still proclaimed in the fourth sentence of the preamble of the TFEU, "*steady expansion, balanced trade and fair competition*."

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35 ECJ, C-228/18, *Budapest Bank* (2020), para. 62.

36 On-going evaluation of EU competition rules on horizontal agreements between companies, final report expected in the first quarter of 2021.

37 DG COMP website, in the context of the Farm to Fork initiative, it is anticipated that "to encourage collective cooperation and ensure that the threat of non-compliance with competition rules does not stand in the way of any sustainability initiatives, the Commission will issue guidance on the scope of collective action permissible under EU competition rules," https://ec.europa.eu/competition/sectors/agriculture/overview_en.html.

38 Netherlands Competition Authority, Draft guidelines, Sustainability agreements – Opportunities within competition law, published for consultation on July 9, 2020, available here https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf.

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

BY SIMON HOLMES[1]

1 Judge ("member") at the UK's Competition Appeal Tribunal, legal advisor to the environmental NGO, ClientEarth, Academic Visitor at the Centre for Competition Law and Policy, Oxford University, and Associate Member of the UCL Centre for Law, Economics and Society. (The views expressed here are personal and cannot be attributed to any institution with which Simon is connected.) A fuller version of this paper was published in the Oxford Journal of Antitrust Enforcement: https://www.linkedin.com/posts/siholmes_i-was-delighted-to-see-that-my-paper-on-climate-activity-6655838191830085633-9HBf. My paper looking at "Climate Change, Sustainability and UK Competition Law" will be published in the July edition of the European Competition Law Review (ECLR). A blog looking at the Lessons from the COVID-19 crisis for the climate crisis in this area is available here: https://www.law.ox.ac.uk/sites/files/oxlaw/lessons_from_covid_19.pdf. 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. My email address is: Eusebius.Holmes@icloud.com. You could also join the Inclusive Competition Forum ("ICF") which we have recently established: [www.inclusivecompetition.org].

I. INTRODUCTION: CLIMATE CHANGE – THE MORAL IMPERATIVE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Treaty on European Union – Article 3

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

Article (1)

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

Article 3(3)

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

Article 3(5) says:

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

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

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

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

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

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

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

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

Article 7 says:

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

Article 9 says:

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

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

Article 11 says:

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

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

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

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

A. The Consumer Welfare Detour

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

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

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

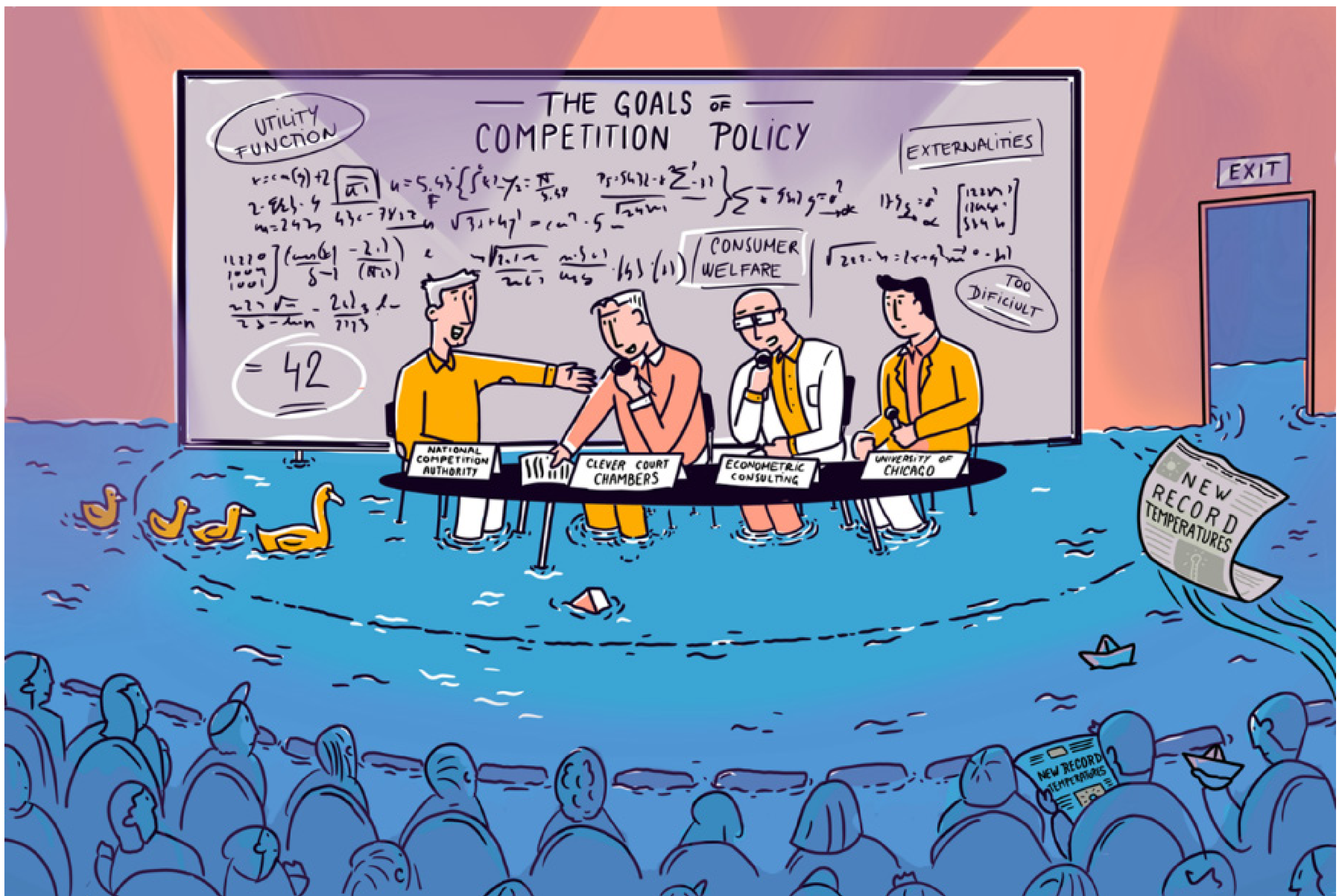
These concepts seem capable of encompassing concerns such as:

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

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

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

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



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

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

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

My primary points are threefold:

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

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

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

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

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

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

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

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

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

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

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

c) it gives rise to genuine market creation.

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

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

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

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

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

The Exemption Route: Article 101(3)

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

CONDITION 1: Improvements & Progress

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

Three things are immediately apparent:

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

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

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

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

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

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

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

12 XXV Report on Competition Policy.

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

CONDITION 2: Fair Share for Consumers

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

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

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

CONDITION 3: No More Restrictive Than Necessary

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

CONDITION 4: No Elimination of Competition

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

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

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

15 These reasons include:

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

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

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

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

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

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

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

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

III. ABUSE OF DOMINANCE[20]

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

A. Article 102 as a "Sword"

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

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

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

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

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

B. Sustainability as a "Shield"

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

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

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

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

22 For a discussion of these issues see Chapter 9 of Greening EU Competition Law and Policy by Suzanne Kingston – particularly at pages 304-312. She identifies three categories of "objective justification": (1) where a dominant company takes "reasonable steps" to protect its commercial interests; (2) if the efficiencies justify the conduct such that there is "no net harm to consumers"; and (3) legitimate public interest grounds.

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

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

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

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

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

(v) Refusing to grant access to an essential facility to a user who intends to use the facility for environmentally unfriendly purposes (e.g. denying access to diesel vehicles

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

Dominant companies should not be discouraged from "doing the right thing" or trying to make a contribution to combat climate change for fear of the competition law consequences. This is important as dominant companies are often (not always) multinationals which have the economic clout to make a real difference.

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

IV. MERGERS

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

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

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

(iii) When considering "remedies";

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

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

A. The Substantive Review of Mergers Under Article 2

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

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

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

– provided this was done on a non-discriminatory basis): i.e. as a defence to an allegation of refusal to supply.

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

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

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

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

B. Environmental Factors as "Efficiencies"

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

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

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

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

C. Remedies[30]

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

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

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

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

D. Article 21(4) of the EUMR

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

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

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

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27 See Recital 23 of the EUMR.

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

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

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

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

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

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

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

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

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

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

E. National Merger Control

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

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

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

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

V. IS IT ALL TOO DIFFICULT?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. SOME CONCLUSIONS

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

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

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

A. Positive Statements by Competition Authorities

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

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

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

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

(d) Strategic steers from government to competition authorities.

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

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

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

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

B. Test Cases in Court

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

C. Publication of Legal Opinions

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

D. Updating Guidelines and Notices

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

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

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

E. Guidance on Competition Authorities' Priorities

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

F. Block Exemptions

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

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

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

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

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

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

G. Changes to the Law

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

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

H. Lessons from the COVID Crisis

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Are clearly in the public interest;

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

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

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

CMA 118 of 25, March, 2020.

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

I. More radical changes? (Treaty Changes?)

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

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

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

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

48 Nothing here is intended to detract from the need to introduce legislation on the environment, sustainability and climate change. Competition law is no panacea and certainly no substitute for legislative and other administrative action. Indeed, when it is clear that competition law is <u>not</u> 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).

EU COMPETITION LAW & THE GREEN DEAL: THE CONSISTENCY ROAD

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The EU roadmap for making the economy sustainable by reducing greenhouse gas emissions to net zero by 2050 and by at least 50 percent by 2030 (the "Green Deal")[2] is already affecting European Union ("EU") antitrust policy and enforcement.

My main argument is that the European Commission ("Commission") is already minded to tailor its competition enforcement to the Green Deal. In turn, the Green Deal legislation, and in particular the EU Green Taxonomy Regulation, offers quantitative thresholds to allow a proper balancing of sustainability benefits and anti-competitive effects to possibly exempt cooperation between competitors targeted at sustainability.[3]

This note is addressed to lawyers, who I argue already have the tools for advising corporations that they may cooperate to fight climate change whilst remaining in compliance of competition rules. The EU Competition Commissioner has observed that: "*it is important that companies know about the opportunities which they already have to work together for sustainability. There is a certain level of conservatism in the advisory industry.*"[4]

I. WHAT HAS COMPETITION POLICY GOT TO DO WITH SUSTAINABILITY?

The two worlds of competition policy and sustainability are predicated as being distant. What are the actual cooperation initiatives that companies would like to pursue and what is the stance of the Commission?

A. Clash Between Competition Rules and Sustainability?

Sustainability under the EU Green deal requires not only public regulation and support, but also mobilizing private investments.[5] In turn, private investments require coordinated action due to the misalignment of social and individual incentives (the polluter benefits from its activity but imposes the cost on the society in a classic tragedy of commons) and the first-mover disadvantage (the first green investor will increase its costs allowing those that do not follow to gain shares in the market).

On the other hand, competition policy is about individual companies remaining independent to avoid restricting competition between them, under Article 101(1) of the Treaty on the Functioning of the EU ("TFEU"). In turn, "*restrictions of competition … lead to a reduction in consumer welfare, because consumers have to pay higher prices.*"[6] Competition violations may be exempted when they "*generate objective economic benefits so as to outweigh the negative effects*" under Article 101(3) TFEU.

Competition policy would focus solely on consumer welfare (and not on societal benefits), on the short-term (and not on the EU Green Deal 2030 or 2050 targets), on economics and price-related effects (and not on sustainability objectives such as climate change mitigation). Is it really the case that competition law represents an obstacle for sustainability action?

2 Commission's communication, The European Green Deal, December 11, 2019.

3 I use the word "sustainability" to refer to actions targeted at the six EU environmental objectives under the EU Green Taxonomy Regulation: climate change mitigation, climate change adaptation, sustainable use and protection of water and marine resources, transition to a circular economy, pollution prevention and control, protection and restoration of biodiversity and ecosystems.

4 Commission's Executive Vice-President Margrethe Vestager, Sustainability and Competition Policy conference, 23 October 2019 (phrase added at delivery, see https://www.youtube.com/watch?reload=9&v=7mpWAOhkQbY).

5 Commission's communication, A New Industrial Strategy for Europe, March 10, 2020: "*mobilising private investment ... is acutely important where there are market failures, especially for large-scale deployment of innovative technologies.*" An EU study, "Links between production, the environment and environmental policy," 2019, available at https://ec.europa.eu/environment/enveco/economics_policy/, shows the inadequate private financing as a key barrier for low-carbon technologies.

6 Commission's 101(3) Guidelines of 2004, paragraphs 21, 13 and 33; and Horizontal Cooperation Guidelines of 2011, paragraph 269.

B. Survey of Sustainable Collaborative Initiatives

Cooperation between companies may advance sustainability. Economists,[7] business leaders[8] and European Union legislation[9] have confirmed that.

We surveyed a pool of the largest Fortune 500 firms,[10] and made some interesting findings. First, most companies assessed have a dedicated sustainability or environment, social and governance ("ESG") report, indicating devotion of resources (probably due to regulatory obligations).

Second, examples of direct cooperation between two or more companies on sustainability initiatives were few, for example:

- two global energy companies agree to study hydrogen mobility in China;
- three food companies cooperating with farmers in the areas of milk production and coffee and cocoa growing;
- structural partnerships for sustainable urban mobility.

Third, in most sectors the individual initiatives were similar. For instance, in the automotive sector all players recognize electrification as a goal, the technology sector prioritizes waste reduction and recycling; and in retail the goal to reduce packaging is ubiquitous. This would seem to call for sharing of best practices, information and costs.

Fourth, most firms find state that any sustainable activities involving cooperation would preferably occur in a "pre-competitive" phase, for example a food company outlines that "*where collaboration is needed to move the needle on an industry-wide issue, we engage with relevant partners ... to identify pre-competitive solutions.*" Others are keen to clarify that they adapt their sustainable approach "*by doing business fairly and with integrity.*"

Finally, collaborations often take place within the framework of new or existing industry-wide organizations or within their direct supply chains. To provide context, one leading online retailer is a member of 23 separate sustainability-oriented organizations, while a leading energy company is partner to 17 differing environmental sustainability organizations.

C. A Review of Competition Policy is Already Happening

While we have shown above how private initiatives have a role to play in addressing climate change, regulation remains an important tool: in the words of EVP Vestager "*we don't need new competition rules to make this possible … we also have the power, as a society, to put regulations in place that can make our economy more sustainable,*"[11]

At the same time, the EU itself has recognized that the competition framework needs updating. "*As Europe sets out on its recovery path and speeds up the twin transitions, we should ensure that competition rules remain fit for today's world. To make this happen, the Commission is currently reviewing the EU competition framework.*"[12]

The Commission is "on the job" to make its competition enforcement fit in the current climate (pun intended).

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7 Francisco Gomez-Martinez, Sander Onderstal & Maarten Pieter Schinkel, "Can Collusion Promote Corporate Social Responsibility? Evidence from the Lab," April 16, 2019, Amsterdam Law School Research Paper.

8 "The Urgency of Collaboration, with Paul Polman," podcast, University of Pittsburgh Center for Sustainable Business, May 1, 2020.

9 Commission's communication, A New Industrial Strategy for Europe, March 10, 2020: "*where identified as necessary, the approach of industrial alliances could be the appropriate tool. This has already shown its benefit in the area of batteries, plastics and microelectronics.*"

10 Fortune, Global 500 2019, https://fortune.com/global500/2019/search/. We focused on 35 firms; the three highest ranked firms in each industry sector within the top 100. We assessed the latest Sustainability/ESG report of each company (when available) to find examples of individual or collaborative sustainability initiatives. The data set is available with the author.

11 Margrethe Vestager, "Competition and sustainability," (October 24, 2019) available at https://wayback.archive-it.org/12090/20191129200524/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-sustainability_en.

12 Commission's communication, Europe's moment: Repair and Prepare for the Next Generation, May 27, 2020.

II. YES, WE LEGALLY CAN

The legal basis to allow green cooperation in compliance with competition policy is to apply the consistency principle to avoid contradictions amongst the EU constitutional, Green Deal, and competition rules.

A. EU Constitutional Rules

The EU Treaties themselves recognize sustainable development and environmental protection thus conferring to them the highest protection in the EU hierarchy of norms.[13]

Competition policy is a tool to achieve the EU's aims as defined in Article 3 of the Treaty of the EU ("TEU"): "*the Union shall ... work for the sustainable development of Europe based on balanced economic growth and price stability ... it shall contribute to peace, security, the sustainable development of the Earth.*"

Also: "*environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities*" (Article 11 TFEU; see also Article 37 of the EU Charter of Fundamental Rights, which has the same primary-law value as the Treaties).

However, other EU Treaty clauses concern other, equally important objectives, such as equality between men and women, animal welfare, employment and social protection. Why then the focus on sustainable development? Article 11 TFEU is clear: environment protection "must be integrated."[14] Today, environmental protection is the highest EU priority through the Green Deal rules.

B. EU Green Deal Rules

The European Union has the target to reduce greenhouse gas emission to net zero by 2050, and to at least 50 percent compared to 1990 levels by 2030.[15] This is because the EU has committed itself to the 2015 Paris Agreement adopted under the United Nations Framework Convention on Climate Change and its long-term goal to keep global temperature increases to well below 2°C above pre-industrial levels, by ratifying it in 2016.

That's not only a vision, it is a set of directly applicable rules, for example an EU Regulation establishing the framework for achieving climate neutrality ("European Climate Law").[16] The EU is reassessing its existing policy instruments to ensure their consistency with its 2030 and 2050 emission-reduction objectives.

Private businesses and their investments have an important place in the EU Green Deal.[17] The EU is adopting a regulation setting out an EU-wide classification system, or "taxonomy," which will provide businesses and investors with a common language to identify those economic activities which are considered environmentally sustainable ("EU Green Taxonomy Regulation").[18]

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13 For a comprehensive account, see Simon Holmes, "Climate change, sustainability and competition Law," Journal of Antitrust Enforcement, April 13, 2020.

14 Only the industrial policy article in the Treaty expressly prohibits "*any measure which could lead to a distortion of competition*" (Article 173(3) TFEU). Please read Julian Nowag, Environmental Integration in Competition and Free-Movement Laws, OUP 2016.

15 Commission's communication, A Clean Planet for All, November 28, 2018.

16 Commission's proposal, March 4, 2020, awaiting adoption.

17 Commission's President Von der Leyden, My agenda for Europe, October 9, 2019: "*we need to tap into private investment by putting green and sustainable financing at the heart of our investment chain and financial system.*"

18 Commission's proposal as adopted by the Council, April 1, 2020, awaiting adoption.

C. EU Competition Rules

Let us remind ourselves that the Commission considers different "*parameters of competition on the market, such as price, output, product quality, product variety and innovation.*"[19]

Article 101(1) TFEU states that "*shall be prohibited … agreements … which have as their object or effect the prevention, restriction or distortion of competition.*" Any assessment of cooperation that could constitute a competition restriction needs to take into account all its objectives as well as its economic or legal context.[20]

Article 101(3) TFEU states that "*the provisions of paragraph 1 may … be declared inapplicable in the case of … any agreement … which contributes to improving the production or distribution of goods or to promoting technical or economic progress.*" Competition restrictions may become permissible even when they pursue non-competition objectives.[21]

For the balancing of anti- and pro- competitive effects under Article 101 TFEU, some commentators think the EU Commission is too focused on consumer welfare or on prices.[22] The law in reality allows businesses to argue also for qualitative efficiencies such as new and improved products[23] as well as long-term efficiencies.[24] For example, benefits within the meaning of Article 101(3) TFEU can occur also "*through increased quality or other benefits*" (paragraph 86).

Regarding which consumers the Commission should consider in its balancing act, some language refers to in-the-market consumers, which is not ideal for sustainability-related assessment, where the perspective is broader.[25] However, there is already language that can help convince enforcers to exempt sustainability efforts: "*wider efficiency enhancing effects within the relevant market, for example because it leads to a reduction in industry wide costs, these additional benefits are also taken into account*"; "*society as a whole benefit where the efficiencies lead … to more valuable products and thus to a more efficient allocation of resources.*"[26]

Finally, regarding the calculation of efficiencies, the Commission recognizes that, for non-cost or qualitative efficiencies, "*it is difficult to assign precise values to dynamic efficiencies of this nature*" and encourages companies to simply "*substantiate their claims by providing estimates and other data to the extent reasonably possible, taking account of the circumstances of the individual case*" such as the availability of new and improved products (paragraphs 103 and 104).

19 Commission's 101(3) Guidelines, paragraph 16 and footnote 84; and 102 Enforcement Priorities Guidance of 2009, paragraph 11.

20 *Budapest Bank*, April 2, 2020, paragraphs 67-69.

21 *Metro SB-Großmärkte*, October 25, 1977, paragraphs 21 and 43 (employment); *SPO*, February 21, 1995, paragraphs 242-57 (construction sector situation).

22 Consumer welfare is not a term used in the EU Treaties, nor is it significantly used in the EU case law: it was used for the first time by an Advocate General about the economics of the pharmaceutical industry in 2004, and the Court of Justice used it later sporadically, for example to argue it is for a dominant company to show that the efficiency gains from the conduct under consideration counteract any likely negative effects on competition and consumer welfare.

23 Commission's 101(3) Guidelines refer to: "*efficiencies of a qualitative nature … may … be of equal or greater importance than cost efficiencies*"; "*new or improved goods or services* [example of the safer tyre]"; "*consumer pass-on can also 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*" (paragraphs 59, 69, 70, 102).

24 *Ibid*: "*take into account the initial sunk investments made by any of the parties and the time needed and the restraints required to commit and recoup an efficiency enhancing investment*"; "*substantiate any projections as to the date from which the efficiencies will become operational*" "*in the application of the balancing test … it must be taken into account that competition is an important long-term driver of efficiency and innovation*" (paragraphs 44, 58, 92).

25 Ibidem: "*consumers must receive a fair share of the benefits with that same relevant market [or] group of consumers … benefiting from the efficiency gains are substantially the same*"; "*the concept of consumers encompasses all direct or indirect users of the products covered by the agreement … customers of the parties to the agreement and subsequent purchasers*" (paragraphs 43, 84, 104); see also the Horizontal Cooperation Guidelines, paragraph 329 specifically on environmental standards.

26 Ibidem, paragraphs 53, 85. See also the case law on dual-sided markets, for example *Mastercard*, May 24, 2012, paragraph 228.

D. Principle of Consistency

The consistency principle in EU law demands that competition policy and EU Green Deal do not contradict each other. It is set out in Article 7 TFEU: "*the Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.*"[27] It can be seen as an element of the rule of law, which is one of the EU common values set out in Article 2 TEU: all members of a society are equally subject to the law.[28]

The consistency principle is a manifestation of the good administration principle, now embodied in Article 41 of the EU Charter of Fundamental Rights. In recent years the "Better Regulation" agenda aims at EU laws which are backed up by the views of stakeholders, using the tool of impact assessments, which in turn consider the "coherence" of each option with the overarching objectives of EU policies.[29]

The Green Deal today is the EU's highest priority, representing a new integration phase of the Union, like the Single Market has been for several years. Not only is the Green Deal democratically mandated by the European Parliament, it is also "hard" law, namely primary legislation (both the Treaty and the Charter) as well as secondary legislation such as the European Climate Law or the EU Taxonomy Regulation.

Indeed, the draft European Climate Law reads: "*all EU actions and policies should pull together to help the EU to achieve a successful and just transition towards climate neutrality and a sustainable future*" and that "*by 2023, and every 5 years thereafter, the Commission shall review … the consistency of Union measures with the climate-neutrality objective*".

For example, the European Parliament has been calling for consistency of competition rules with the EU Green Deal.[30] The Commission itself has already started following this consistency road.

III. THE CONSISTENCY ROAD

The Commission is already including sustainability in its competition rules. One may advocate for future competition enforcement that takes sustainability into account, considering the Commission's stance on environmental standards, and relying on the quantitative threshold of the EU Green Taxonomy Regulation.

A. On the Road: Horizontal Cooperation Guidelines and Farm-to-fork Strategy

The Commission has already started its "green" review of the competition law framework. For example, the current review of the Horizontal Cooperation Block Exemption Regulation and Guidelines will likely trigger the (re-)insertion of a new chapter on sustainability agreements in the revised Guidelines. According to the factual summary of the various stakeholders' contributions in the public consultation:[31]

- "*Sustainability agreements were mentioned … as an area where guidance was lacking … Respondents replying with 'yes'* [42 out of 77] *considered that sustainability agreements (or 'environmental agreements' or 'social equity arrangements') deserved a specific section outside the examples given in the standardisation chapter*"; and

- "*the most important development according to respondents (25 responses* [out of 77]) *is climate change and the corresponding challenging environmental and sustainability goals … 11 respondents believed that the antitrust policy as laid down in the HBERs and HGL is not sufficiently aligned with the Commission's climate policy.*"

27 *Front Polisario*, December 10, 2015, paragraphs 149-58.

28 See also Article 13 TEU "*the Union shall have an institutional framework which shall … ensure the consistency, effectiveness and continuity of its policies and actions*" and the remedy in Article 256(3) TFEU: "*where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the Court of Justice for a ruling.*"

29 Commission's staff working document, Better Regulation Guidelines, July 7, 2017.

30 European Parliament's resolution, Annual Report on Competition Policy, January 31, 2019: "*European Court of Justice interprets article 101 of the TFEU as taking into account the different aims of the Treaties; … the narrow interpretation of Article 101 of the TFEU ... has increasingly been considered an obstacle to the collaboration of smaller market players for the adoption of higher environmental and social standards*" and "*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*" (paragraphs 49 and 79); and motion on the same topic, February 25, 2020, calling for guidance on the EU merger control test so that "*in cases of mergers, the Commission does not only look at prices, output and innovation but also pays attention to the social and environmental costs*" (paragraph 45).

31 Available at https://ec.europa.eu/competition/consultations/2019_hbers/HBERs_consultation_summary.pdf.

By the same token, the Commission's "Farm to Fork Strategy" envisages "*clarifying the competition rules for collective initiatives that promote sustainability in supply chains*" and that it encourages "*the possibilities for cooperation within the common market organisations for agricultural products and fishery and aquaculture products*."[32] The actions indicated are the the "*clarification of the scope of competition rules in the TFEU with regard to sustainability in collective actions*" for Q3 2022 and a "*legislative initiatives to enhance cooperation of primary producers to support their position in the food chain*" for 2021-22.

"And yet it moves."

IV. GREEN DEAL AS THE NEW EU IMPERATIVE

The Green Deal is the new EU imperative.

The Court of Justice has found that a competition restriction does not violate competition rules when it is objectively necessary to a public policy objective. Most commentators have referred to cases such as *Wouters* (ethics of the legal profession)[33] *Meca-Medina* (organisation of sports)[34] *Albany* (improvement of conditions of work and employment),[35] or *Brentjens* (sectorial social solidarity).[36]

I prefer to refer to the case law on the single market imperative. "*The Treaty, who preamble and content aim at abolishing the barriers between States … could not allow undertakings to reconstruct such barriers. [Article 101] is designed to pursue this aim.*"[37]

Because market integration was and is a primary aim of the EU project, it also became an EU competition policy requirement, targeting practices that would otherwise be considered unproblematic.[38] The EU Green Deal is and will be an EU commitment and aim that will inform competition policy as well (possibly in a reverse manner, for example by exempting cooperation that would otherwise be problematic).

The EU competition law framework already allows restrictions which are objectively necessary for reasons of health or safety, which is very much relevant for the Green Deal: "*hardcore restrictions may exceptionally be objectively necessary … and fall outside Article 101(1) for reasons of safety or health.*"[39] This is also known as the ancillary-restraint doctrine: "*directly related and necessary to the implementation of a main non-restrictive transaction and proportionate to it.*"[40]

A. Past Cases on Sustainability

Authorities have already been including non-economic factors in their assessment, though to a limited extent.[41] For example, the Commission has referred to the avoidance of environmental risks in the assessment of joint ventures between competitors under the former EU notification regime in place before 2004.[42]

32 Commission's communication, A Farm to Fork Strategy, May 26, 2020.

33 *Wouters*, February 19, 2002, paragraph 110.

34 *Meca-Medina*, July 18, 2006, paragraph 45.

35 *Albany*, September 21, 1999, paragraph 52.

36 *Brentjens*, September 21, 1999, paragraph 60.

37 *Consten and Grundig*, July 13, 1966, page 340.

38 EU Treaty's Protocol No 27 on the internal market and competition (which forms an integral part of the Treaties under Article 51 TEU).

39 Commission's 101(3) Guidelines, paragraph 2; Vertical Guidelines, paragraph 60; and 102 Enforcement Priorities Guidance, paragraph 28.

40 101(3) Guidelines, paragraph 29.

41 Or Brook, Struggling with Article 101(3) TFEU: Diverging approaches of the Commission, EU Courts, and five competition authorities, 1 November 2018, Common Market Law Review.

42 Commission decisions of December 23, 1992, IV/33.814 - Ford Volkswagen (joint venture for the development and production of a multi-purpose vehicle in Portugal); December 21, 1994, IV/34.252 - Philips-Osram (joint venture for the manufacture and sale of lead glass tubing for lamps); May 18, 1994, IV/33.640 - Exxon/Shell (chemical production joint venture); January 16, 1998, IV/C-3/36.494 - EACEM (commitment by a large part of the members of the European Association of Consumer Electronics Manufacturers to reduce energy consumption by televisions and video recorders); September 17, 2001, COMP/34493 - DSD and others (German system for the collection and recovery of sales packaging), October 16, 2003, D3/35470 - ARA and D3/35473 - ARGEV, ARO (Austrian collection and recycling system for packaging).

In the post-2004 decentralized era of EU competition enforcement, where businesses can no longer notify their arrangements to the Commission, the decisional practice of national authorities have also dealt with sustainability:

- In 2010 certain Nordic competition authorities published a joint report encouraging the analysis of the potential costs of reduced competition versus the environmental economic benefits.[43]

- Other authorities have declared climate action amongst their objectives.[44]

- The Dutch Competition Authority ("ACM") has committed not to taking action against sustainability arrangements if the stakeholders engage with it.[45]

It is true that national enforcers have not taken sustainability-related factors into account in their assessment,[46] or in any case they clarified that the consumers must benefit from the arrangements under review.[47] Most commentators refer to a Dutch decision blocking an initiative among supermarkets, slaughterhouses and farmers to replace regularly-produced broiler chicken with more sustainable alternatives in order to raise animal welfare.[48]

However, sustainability is by definition "trans-boundary" (which is a term used by most EU Green Deal legislation), and it may be sensible in these early stages that larger *fora* offer guidance on the relationship between competition policy and sustainability, such as the EU, the European Competition Network, the International Competition Network or the OECD (this last organization is organizing a sustainability and competition round table in December 2020).

B. Sustainability Standards

EVP Vestager recently stated that "*businesses can … get together to agree standards for sustainable products … without breaking the competition rules.*"[4]

The current Horizontal Cooperation Guidelines recognize that "*standards on … environmental aspects of a product may also facilitate consumer choice and can lead to increased product quality [or] innovation*" and offer examples: washing machine makers agreeing to no longer manufacture energy-inefficient products; or standardised packaging (paragraphs 329 and 331).

In some circumstances standard-setting falls outside the scope of Article 101(1) altogether.

These standards, however, may need to be binding and not just voluntary. While the Horizontal Cooperation Guidelines indicate that "*restrictions in a standardisation agreement making a standard binding and obligatory for the industry are in principle not indispensable*" (paragraph 318), we interpret the applicable legal test for an exemption to be that the standard should not cover more than is necessary to ensure its aim, leaving the participating companies competing on all other competition parameters.

For instance, the Commission cleared a commitment on reducing emissions from new passenger cars sold in the EU by the Association of Japanese Automobile Manufacturers (JAMA) and the Association of Korean Automobile Manufacturers (KAMA) because the companies remained "*free to develop and introduce new CO2-efficient technologies independently and in competition with each other.*"[49]

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43 Competition Policy and Green Growth, October 2010.

44 UK Competition and Markets Authority ("CMA") annual plan, January 23, 2020: "*we can act in a way that supports the transition to a low carbon economy.*"

45 ACM's press release of December 2, 2016, Basic principles for oversight of sustainability arrangements. A Dutch legislative proposal to foster competitors' collaboration towards sustainability goals is under way, see https://zoek.officielebekendmakingen.nl/dossier/35247.

46 Judgment of the Dusseldorf Higher Regional Court of March 15, 2017, paragraph 335, upholding the competition authority (Bundeskartellamt)'s decision finding that the Baden-Württemberg state had infringed competition law by engaging with private and public forest owners, holding that sustainability concerns such as forests management, climate, water balance or clean air could not be taken into account under Article 101(3).

47 The Bundeskartellamt has been assessing sustainability initiatives (for example, Tierwohl which is an industry association bringing together companies from the agriculture, eat-processing and food retail industries to promote animal welfare), clarifying that the consumer has to benefit too (see recent Annual Reports of the Bundeskartellamt in the section on the 2nd Decision Division).

48 ACM's analysis of January 26, 2015, "Chicken of Tomorrow," where the 101(3) exemption was not offered because the benefit to consumers was valued at €0.64/kg less than the additional cost to consumers. See also the ACM's analysis of September 26, 2013 on the closure of five coal power plants.

49 Commission's press release of December 1, 1999, Commitments by Japanese and Korean Car Manufacturers to reduce CO2 emissions, IV/F-2/37.634 - JAMA and IV/F-

The current Horizontal Cooperation Guidelines contain some helpful guidance: "*standards only covering minor aspects or parts of the end-product are less likely to lead to competition concerns*" (paragraphs 293); "*if the use of standard terms is binding, there is a need to assess their impact on product quality, product variety and innovation*" (paragraph 306) and "*possibility cannot, however, be ruled out that making standard terms binding may, in a specific case, be indispensable to the attainment of the efficiency gains generated by them*" (paragraph 320).

We trust the upcoming revised Horizontal Guidance will clarify how companies can use standardisation (and R&D)[50] to reach (even binding) sustainability objectives, without any spill-over effects.

C. Without Green-Washing

At the same time, sustainability should not be the excuse for businesses to cartelize or otherwise engage in conduct that goes beyond a specific and measurable climate-change-related activity (that is, green-washing, which is defined as "*the practice of gaining an unfair competitive advantage by marketing a financial product as environmentally friendly, when in fact basic environmental standards have not been met*").

The Commission heavily fined laundry detergent powder competitors which would have agreed to keep the price unchanged and excluding specific types of promotions during the implementation of an environmental initiative targeting dosage and weight reduction of laundry products and corresponding packaging material;[51] or truck makers which would have coordinated on timing and on passing on costs of emission technologies for trucks compliant with newly introduced environmental standards.[52]

In a pending case the Commission has adopted the preliminary view that automotive OEMs would have colluded to restrict competition on the development of technology to clean the emissions of cars. The Commission clarified that "*the [investigated] behaviour is to be distinguished from forms of cooperation between companies aimed at improving product quality and innovation which do not raise concerns under EU competition law.*"[53]

D. Relying on the EU Green Taxonomy Regulation for Quantification

There is a solution to avoid green-washing: the EU Green Taxonomy Regulation.

Sustainable investment is defined as investment in activities that contribute to one of six environmental objectives: climate change mitigation, climate change adaptation, sustainable use and protection of water and marine resources, transition to a circular economy, pollution prevention and control, protection and restoration of biodiversity and ecosystems.

For each environmental objective, the EU Taxonomy Regulation lays down technical screening criteria for determining whether economic activities contribute substantially to that objective. These criteria (Article 19):

- consider both the short- and long-term impact of a given economic activity;
- are quantitative and contain thresholds;
- build upon Union labelling, certification and standards;
- are based on conclusive scientific evidence and the precautionary principle ex Article 191 TFEU;
- take into account the potential market impact of the transition to a sustainable economy;
- cover all relevant economic activities within a specific sector to avoid distorting competition in the market; and
- are easy to use and be set in a manner that facilitates the verification of their compliance.

2/37.611 - KAMA.

50 Horizontal Cooperation Guidelines, paragraph 149.

51 Commission decision of April 14, 2011, case 39579 - *Consumer Detergents*.

52 Commission decisions of July 19, 2016 and 27 September 2017 in case AT.39824 - *Trucks*.

53 Commission's press release of April 5, 2019, case AT.40178 - *Car Emissions*.

Businesses and their counsel will be able to appreciate whether they can proceed with their conduct, measuring against these technical screening criteria. By the same token, the Commission's Directorate for Competition will be able to measure the sustainability scope of arrangements that it is asked to advice on or that investigates.

V. CONCLUSION

Both the Commission and private companies have tools today to assess how sustainability-related conduct and investment can be initiated in compliance with competition rules.

Lawyers can already advise in this direction. The Fairtrade Foundation recently published a set of interviews showing that business executives may see competition law as a barrier to sustainable collaborative efforts.[54] Advisors can offer constructive advice for companies to reach their green goals, for example by suggesting a standard that leaves the companies competing on other parameters, or by participating for the entire works of a trade association to explore the nuances of information exchanges between competitors.

In addition, while this note does not focus on State aids, one cannot not mention how the EU Commission it is also aligning its State aid and Green Deal policies.[55]

Finally, the Commission is open to discuss: "*if companies come to us and they say 'this we want to do', we'd be happy to look at it, and … tell you about the results*."[4] The Commission has several tools in its toolbox: inapplicability decisions (under Article 10 of the EU Procedural Regulation 1/2003); guidance letters (under the 2004 EU Notice on the matter) or comfort letters (under the 2020 Temporary Framework). Coronavirus-dedicated mailboxes of competition authorities could be maintained in future months also for sustainability initiatives.[56]

While authorities need to have proof that business initiatives are not covering illegal actions (green-washing), the Green Deal legislation is offering the needed benchmarking and measurement, and EU competition policy is moving to the right direction. Sound advice can already be offered now.

54 "Competition Law and Sustainability: A study of industry attitudes towards multi-stakeholder collaboration in the UK grocery sector," January 29, 2019

55 Not only is the Commission amending its State aid framework in light of EU Green Deal, reviewing in the next months its Environmental and Energy guidelines, its Emission Trading System guidelines and its Communication on Important Projects of Common European Interest. The Commission is also embedding green objectives in its State aid compatibility assessment (see the Second Amendment to the Temporary Framework on recapitalization, May 8, 2020: "*large undertakings shall report on how the aid received supports their activities in line with EU objectives and national obligations linked to the green and digital transformation*"; see also the green commitments required by France for its the State aids to Renault and Air France) as well as EU recovery plan (see the EU Communication of May 27, 2020 linking EU funds to a large scale renovation wave and renewable energies).

56 Gianni De Stefano, Covid-19 and EU Competition Law: Bring the Informal Guidance On, May 5, 2020, Journal of European Competition Law & Practice.

ANTITRUST, SUSTAINABILITY AND LIVING WAGES/ LIVING INCOMES

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1 CEO of Fair Trade International.

I. INTRODUCTION

> "*Most people in the industry recognise that we need collaboration to achieve meaningful progress on key sustainability goals. There has been tremendous effort by many players to work together to achieve the sort of progress we need [...]. However, the lack of clarity around competition law continues to prevent any meaningful progress on the issue of low farm-gate prices, which is a major issue in our sector* [cocoa] *and beyond. This really restricts further progress being made on other issues such as living incomes and wages.*"[2] – Sophi Tranchell, former CEO of Divine Chocolate, a Fairtrade Certified company

Sophi Tranchell's statement raises a key issue which is echoed by a number of the stakeholders who have participated in the European Commission's public consultation on the Horizontal Co-operation Agreements Guidelines (the Horizontal Guidelines): is EU competition law resulting in, or being perceived as, an obstacle to attain legitimate policy goals? To what extent are the EU antitrust rules perceived as a burden to sustainable initiatives? And, if so, is this unavoidable or can this undesired effect be mitigated?

Trade and the functioning of businesses have an impact on the enjoyment of human rights. Since competition policy plays an important role in shaping the EU's economy and the action of our businesses, it seems evident that it has also an impact on human rights. In this context, the Fair Trade Movement has been looking at the question of competition law and sustainability for years, on the premise that some of the biggest challenges the world faces require companies to work together. These include the provision of adequate living wages, which according to the preamble to the Constitution of the International Labor Organization is one of the conditions for universal and lasting peace based on social justice.[3]

Coordinated action is often perceived as the key element to unblock the progress towards poverty eradication and other sustainability goals. "We need to sit around the table and align on what the biggest battles are and align strategically on what needs to happen on a bigger level and then individually each of us can take a piece of the puzzle" was stressed by a global chocolate company in an interview with the Fairtrade Foundation in the UK.[4] However, having competitors sitting around a table discussing prices with no safeguards shall, of course, be avoided. In no way would it be desirable to open the door to retailers or brands increasing their power over consumers or producers by opening loopholes in the law. On the other hand, the reality is that many of the meaningful cooperation agreements that aim to achieve legitimate policy goals do have an impact on prices; and that certain conversations in which *low farm-gate prices*, working conditions or production methods are discussed might be the only way forward, or at least the only one that will lead us to reaching the objective before it's too late.

Competition law cannot solve all the problems we are facing, but at the same time we need to ensure that competition law is not used as an excuse to do nothing: why is EU's competition law relevant for sustainability initiatives and how could it be part of the solution and not part of the problem?

II. HOW HAS COMPETITION LAW BECOME RELEVANT FOR SUSTAINABILITY DRIVEN COOPERATIVE INITIATIVES?

In Europe's internal market, competition is the mechanism that ensures innovation, a wide variety of products and services at the lowest price possible to the consumers. "Competition puts businesses under constant pressure to offer the best possible range of goods at the best possible prices, because if they don't, consumers have the choice to buy elsewhere. In a free market, business should be a competitive game with consumers as the beneficiaries."[5] Thus, it is competition law that prevents restrictions on and distortions of competition to enable the proper functioning of the Union's internal market "as a key driver for the well-being of EU citizens, businesses and society as a whole."[6]

On the other hand, a competition law that focuses exclusively on consumers risks disregarding the impact of certain initiatives and practices in society as a whole. Fueled by the continuous struggle for businesses to produce optimal quantities at the lowest possible costs, it does not only exert downward pressure on prices, but is also likely to lead to unsustainable business practices, which trickle down to the producers who often face working conditions that do not assure a decent standard of living for their families.

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2 Long & Taylor (2019): p. 12. Competition Law and Sustainability. A study of industry attitudes towards multi-stakeholder collaboration in the UK grocery sector.In: https://www.fairtrade.org.uk/Download.ashx?id=%7BEE9F8B75-8FFA-4E38-B87B-82BBE23A3D7C%7D.

3 URL: https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO, last seen 25/05/2020

4 Long & Taylor (2019): p. 12.

5 URL: https://ec.europa.eu/competition/consumers/what_en.html, last seen May 5, 2020.

6 URL: https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy, last seen May 21, 2020.

An increasing number of companies seek to do business in a way that mitigates their impact on people and the planet. But to create a sustainable positive impact, they most likely have to cooperate, as being a sole first mover often brings a decisive economic disadvantage. For companies it will often be difficult to implement sustainability initiatives unilaterally when they might face free-rider problems and/or the first-mover disadvantage since such initiatives usually increase costs. The former problem occurs, for example, when a company invests in marketing to diffuse information on the importance of fair trade, which might increase the sales of other fair-traded product sellers who have not incurred any additional costs. The latter problem occurs especially when a company commits to stop offering less sustainable but cheaper products. Such a decision might result in a substantial loss of customers especially in markets where consumers are price-sensitive or where there is little scope for product differentiation.[7]

While certain companies have already taken unilateral steps towards providing for living incomes/living wages in their supply chains. Given their market share, it is these larger players that need to take action to turn fair and sustainable production and consumption patterns into mainstream. A study by the Fairtrade Foundation UK on industry attitudes towards multi-stakeholder collaboration in the UK grocery sector found that the fear of competitive disadvantage is among the main contributors why market actors are not acting unilaterally on sustainability issues, in particular on paying and influencing higher prices to producers. Through a series of interviews with businesses, brands, retailers and industry experts, the Fairtrade Foundation revealed that collaboration amongst companies and industry actors is necessary to ensure businesses commit to paying living wages and incomes. The respondents to the survey believe that collaboration among the economic actors is necessary to achieve key benefits for both the producers and consumers while effectively also embodying the real environmental costs of production. It is – once again – stressed that the first-mover disadvantage is a real issue.[8]

In situations where there is an increasing willingness among economic entities to collectively implement more sustainable measures such as ensuring living incomes for farmers and producers, the current EU antitrust framework and enforcement might act as a deterrent, as agreements between competitors on prices, including low farm-gate prices, are likely to be illegal, and the conditions under which exemptions can be granted, in light of Article 101(3) are unclear.

In light of the EU's current policy objectives and political commitments, there is no doubt that competition policy must play an active role in its efforts to achieve sustainability objectives. The EU is committed to the implementation of the UN's 2030 Agenda for Sustainable Development and the European Green Deal. As the European Commission's ("EC's") Communication on the European Green Deal reads "all EU actions and policies will have to contribute to the European Green Deal objectives. The challenges are complex and interlinked. The policy response must be bold and comprehensive and seek to maximize benefits for health, quality of life, resilience and competitiveness."[9]

It would be contradictory if the EU's competition law framework acted as or was perceived as an unreasonable burden against any multi-stakeholder cooperation agreements that aimed to achieve legitimate sustainability goals, such as environmental sustainability, improved social standards or the achievement of living incomes or living wages. However, the fact is that, at the moment, the lack of clarity, coupled with the narrow interpretation of Article 101(3), is perceived as an "obstacle" against sustainability initiatives.[10]

The banana sector, that has been at the forefront of the debate, has established a working group, the World Banana Forum, to aim at taking into consideration the cost of producing sustainably and what measures could be undertaken collectively by the stakeholders throughout the chain to guarantee remunerative prices leading to a living income to farmers who are at the origin of the whole production. While great progress has been made in some areas, there has been notably less progress on the issues of low wages and incomes. Similar challenges are faced by the cocoa industry, in which when interrogated by a group of NGOs about the difficult situation in which many farmers find themselves and the environmental impact of their way of sourcing cocoa, many cocoa buyers and processors said to be amenable to agreeing on higher supply prices, but also admitted being extremely wary of falling foul of competition laws and therefore could not see any way to proceed with formal or informal talks.[11] "Price is the big elephant in the room no one dares to talk about," was stressed by Arjen Boekhold, co-founder of "Tony's Chocolonely," an enterprise producing and selling chocolate following fair trade practices.[12] The industry laments that the boundaries of Article 101 are unclear and do not seem to support a reading that favors dialogue among competitors, even when such efficiencies might be created.

7 Monti & Mulder, 'Escaping the clutches of EU competition law - Pathways to Assess Private Sustainability Initiatives' E.L. Rev. 2017, 42(5), 635-656, p 636. See also the interviews in the FT Report on Competition Law and Sustainability in the UK Grocery Sector, p 12.

8 *Cf.* Long & Taylor (2019): p. 6.

9 Communication on the European Green Deal https://ec.europa.eu/info/sites/info/files/european-green-deal-communication_en.pdf.

10 Fair Trade Advocacy Office (2020): Position Paper on EU Competition Law and Cooperation Agreements for Sustainability.

11 *Ibid.*

12 Tomaso (2019): URL: https://fairtrade-advocacy.org/wp-content/uploads/2019/04/FTAO-Briefing-note-Competition-Law-and-Sustainability_Addressing-the-Broken-Links.pdf, last seen May 21, 2020.

III. THE WAY FORWARD: CREATING LEGAL CERTAINTY

A strong EU competition law framework that ensures a properly functioning market can be aligned with the vision and objectives of the EC's Communication on the European Green Deal. Competition policy plays an important role in shaping the EU's economy and the decisions taken by our businesses. As such, it should be sensitive to the fact that it is not only competition, but also necessary collaboration that fosters sustainability. More clarity and guidance on the quality and breadth of sustainability collaborations would encourage positive behavior in the markets and would greatly aid progress.[13]

The EC has committed in the Communication on the Farm to Fork Strategy to "clarifying the competition rules for collective initiatives that promote sustainability in supply chains,[14] which will be a step in the right direction provided that it is aligned with the comprehensive and global approach of the Green Deal.

To provide companies with more clarification in the application of EU competition law, the EC has published various guidelines on the applicability of Article 101 over the past few years. The ongoing review of the Horizontal Guidelines represents a unique opportunity to address the challenges described earlier and ensure that the role of the private sector can be used as leverage to achieve the EU policy objectives. If the Horizontal Guidelines include clear provisions on cooperation aimed at facilitating sustainability-driven agreements, we will be unleashing the potential of the private sector to contribute to achieving the EU's policy goals. The EC could incorporate a section on "Sustainability Agreements" into the revised Horizontal Guidelines in the spirit of 2001 Horizontal Guidelines section on environmental agreements.[15] This new section should go beyond environmental sustainability and offer clarity to actors willing to implement initiatives aiming to, for example, mitigate poverty, eradicate child labor or strive for living incomes or living wages in developing countries.

Competition rules applicable to horizontal agreements should take greater account of non-monetary values when the lawfulness of an agreement is being assessed. The EC should therefore be in a position to outline its assessment framework for a range of non-price efficiencies which are capable of creating a broader range of benefits for consumers and citizens, for example, environmental quality, enjoyment of human rights and positive impacts on sustainable development and social conditions in the EU and in developing countries.

Safeguards will of course always be needed. Not just any collaboration among competitors should be allowed with the excuse of "promoting sustainability," and in the context of sustainability-driven collaborative agreements, the enforcement of competition law to prevent hidden cartels remain as important as in any other field. The Horizontal Guidelines should facilitate meaningful cooperation while setting the conditions and the safeguards to prevent "Greenwashing" screens hiding cartels.

This article argues for a competition law that considers the long-term sustainability of supply chains alongside consumer interests. Addressing imbalances of power in global supply chains, inequalities and environmental degradation is urgent, and the private sector can be a contributor to solve many of these challenges. Enhanced clarity on the applicability of Article 101 would make this possible by ensuring that companies that are willing to tackle sustainability issues are not discouraged from acting and facilitating the upscaling of already-existing good practices.

13 *Cf.* Long & Taylor (2019): p. 14.

14 Communication. A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system https://ec.europa.eu/info/sites/info/files/communication-annex-farm-fork-green-deal_en.pdf.

15 Fair Trade Advocacy Office (2020): Position Paper on EU Competition Law and Cooperation Agreement for Sustainability.

THE ANTITRUST CAR EMISSIONS INVESTIGATION IN THE U.S. – SOME THOUGHTS FROM THE OTHER SIDE OF THE POND

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I. INTRODUCTION

The actions of companies inevitably play a central role in tackling climate change. Similarly, the Paris agreement and the United Nations' Sustainability Goals embodied in the UN Resolution 70/1[2] foresee substantial action by the private sector. To produce environmentally relevant effects, companies may occasionally be required to collaborate, which is where antitrust or competition law[3] comes into the picture. Many countries have seen industry-led initiatives setting up complex schemes aiming at making industries or markets more sustainable. In the midst of a climate change crisis and such efforts could and should be part of the global climate change solution. Yet, an antitrust investigation by the US the Department of Justice ("DOJ") launched against a voluntary commitment of Ford, Honda, BMW and Volkswagen regarding emissions standards highlights possible antitrust risk that such initiatives face.

This article was written during and after the DOJ's investigation to determine whether an agreement between Ford, Honda, BMW and Volkswagen to comply with emission standards set out by the state of California was illegal under U.S. antitrust regulations. The case was recently dropped by the DOJ, with the exact reasons for doing so remaining unclear. Despite the end of this investigation, it reignited discussions about the role of competition law where companies act to promote a public good.

This article takes a look at the DOJ's investigation and explores how such a case would be handled under the EU's legal framework. First, it briefly provides the background of the U.S. case, including some political implications and the regulatory landscape in the U.S. regarding emission standards and corporate collaboration. Second, it explains how the case would most likely be handled under in the U.S., before it turns to the EU framework. In this context, the paper focuses on scope and balancing under EU competition law. In general, it highlights the EU's approach to such sustainability initiatives. Although the case was dropped it is important to start a discussion concerning desirable approaches to industry collaboration.

II. THE CAR EMISSION STANDARDS CASE

It is best to understand the U.S. antitrust case concerning the car emission standards against its broader regulatory context. This context is marked by a fight between California, which has traditionally had more stringent emission standards for cars – in effect setting the national standard –, and the federal agencies under the Trump administration, who aim at introducing less stringent standards.

When the Trump administration and its Environmental Protection Agency ("EPA") proposed to roll back greenhouse gas emissions standards nationally and limiting California's possibilities to enact stricter standards, California reacted. The California Air Resources Board ("CARB") drafted a stricter yet non-binding emission standard for California and four major carmakers voluntarily agreed to comply with it.[4] Following this announcement, the U.S. DOJ was quick to inform that the federal government was concerned that the it may "violate federal antitrust laws" and "result in legal consequences given the limits placed in federal law on California's authority."[5] Shortly thereafter, the DOJ launched an antitrust investigation into the participating car makers Ford, Honda, BMW and Volkswagen.[6]

On the regulatory level, the proposal was passed and the Trump administration revoked California's authority to set its own emissions limits and instead introduced a nation-wide "One National Program Rule." The One National Program Rule allows the federal government to provide a nationwide uniform fuel economy and greenhouse gas emission standards for cars and other vehicles. The matter has now also reached the courts.

2 "Transforming our world: the 2030 for Sustainable Development" (2015) available at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf.

3 We use the term competition law and antitrust interchangeably.

4 See Office of Governor Gavin Newsom, "California and Major Automakers Reach Groundbreaking Framework Agreement on Clean Emission Standards" (July 25, 2019) available at https://www.gov.ca.gov/2019/07/25/california-and-major-automakers-reach-groundbreaking-framework-agreement-on-clean-emission-standards/. https://www.competitionpolicyinternational.com/DoJs-probe-into-four-automakers-impartial-investigation-or-politicization-of-antitrust/#_edn2.

5 Shephardson, David "*U.S. launches antitrust probe into California automaker agreement*," Reuters (September 6, 2019). Available at https://www.reuters.com/article/us-autos-emissions/u-s-launches-antitrust-probe-into-california-automaker-agreement-idUSKCN1VR1WG.

6 Wayland, Michael "*DoJ launches antitrust probe over California emissions deal with automakers*," CNBC (September 6, 2019). Available at https://www.cnbc.com/2019/09/06/DoJ-launches-antitrust-probe-over-auto-emissions-deal-with-california-wsj-reports.html.

On the one hand California and some likeminded states and cities have launched proceedings challenging the EPA's One National Program Rule and government's auto emissions policy.[7] California's argument is that the Clean Air Act of 1970 provides them with the authority to write air pollution rules that go beyond the federal government's.[8] On the other hand, nine environmental groups sued the Department of Transportation and the DOJ for their efforts to block the environmentally friendly CARB agreement.[9] The issue quickly became political. The Trump administration argued that the automakers and California violated federal antitrust law. Congressional Democrats, along with House Speaker Pelosi, believe that the DOJ investigation is politically motivated, and the CARB agreement itself does no harm (rather, the opposite).[10]

III. U.S. PERSPECTIVES

While it is unclear why the DOJ dropped the investigation, Makan Delrahim declared that: "Even laudable ends do not justify collusive means [. . .]."[11] Yet, a number of reasons have been suggested. As Hovenkamp notes, the initial aspect one has to consider is whether this is the kind of agreement that could be considered a conspiracy. A car maker that individually agrees to follow a proposal from the state of California might not constitute an antitrust violation. Antitrust only becomes relevant the car manufacturers need to have agreed with each other.[12] However, even if this were the case, the car manufactures might rely on the *Parker*[13] immunity for acts approved by a state.[14]

Similarly, Petrosyan argues that the car manufacturers have a strong defense against any allegations of federal antitrust law violations even if the car companies' agreement is found to be anticompetitive.[15] His main points also relate to the state-action doctrine, or *Parker* immunity, and to the right to petition the government. These establish the principle that state and municipal authorities are immune from federal antitrust lawsuits for actions taken pursuant to a clearly expressed state policy that, when legislated, had foreseeable anticompetitive effects.[16] As such, this immunity also includes private entities as long as the state put sufficient safeguards to ensure that the private entities pursue state's goals rather than their own. Moreover, the *Noerr-Pennington*[17] doctrine allows companies to petition the government in their favor, even if anticompetitive effects result from such government action. Thus, Petrosyan argues that even though the agreement might generally raise antitrust concerns, the involvement of the State of California changes the analysis in favor of the car manufacturers.

According to Hovenkamp,[18] a point to consider beyond antitrust's state action doctrine relates to standards. He argues that a court would have to see the agreement for what it is: a standard setting agreement, a ubiquitous element of the U.S. economy which have been upheld numerous times regarding safety measures. For example, the National Fire Protection Association contains 50,000 companies and organizations that draft model codes for state and local governments to enact.[19] Lastly, he points out the fact that the automakers hold approximately 26 percent of the market for new car sales in the U.S., and the same percentage of the Californian market. Hence, the firms do not dominate the market and any standard between them should be treated even more leniently.[20]

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7 Petrosoyan, Grant "*DoJ's probe into Four Automakers: Impartial Investigation or Politization of Antitrust?*," Competition Policy International (October 29, 2019). Available at https://www.competitionpolicyinternational.com/DoJs-probe-into-four-automakers-impartial-investigation-or-politicization-of-antitrust/#_edn2.

8 Gendron, Marie "*U.S. launches antitrust probe into California Automaker Agreement*," The Street (September 8, 2019). Available at https://www.thestreet.com/markets/u-s-launches-antitrust-probe-into-california-automaker-agreement-15080868.

9 Petrosoyan, *supra* note 7.

10 *Ibid*.

11 See Delrahim, Makan, "DOJ Antitrust Division: Popular ends should not justify anti-competitive collusion" (USA Today, September 12, 2019) available at https://eu.usatoday.com/story/opinion/2019/09/12/doj-antitrust-division-popular-ends-dont-justify-collusion-editorials-debates/2306078001/.

12 Hovenkamp, Herbert "*Are agreements to Address Climate Change Anticompetitive?*" (September 2019). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3451931.

13 *Parker v. Brown*, 317 U.S. 34 (1943).

14 Hovenkamp, *supra* note 12.

15 Petrosoyan, *supra* note 7.

16 *Parker v. Brow*n, 317 U.S. 34 (1943).

17 Stemming from the cases *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

18 Hovenkamp, *supra* note 12.

19 See for example *A list of NFPA Codes & Standards* available at https://www.nfpa.org/Codes-and-Standards/All-Codes-and-Standards/List-of-Codes-and-Standards; Hovenkamp, supra note 12.

20 Hovenkamp, *supra* note 12.

Although the exact reasons for ending the investigation remain unclear, one of the crucial elements seems the State action defense as the Californian regulator seems to have had the ultimate control over the standard.

IV. THE VIEW FROM ACROSS THE ATLANTIC

So far, we have seen some comments on the U.S. law related aspects. The European Union's approach and messaging with regard to environmental protection or sustainability agreements and competition law contrasts remarkably to Attorney General Delrahim's "[n]o goal, well-intentioned or otherwise, is an excuse for collusion or other anti-competitive behavior that runs afoul of the antitrust laws."[21] The EU's friendly approach to horizontal collaboration can not only be seen in communications, but also in case law, guidelines and seems well encapsulated by a recent comment of Commissioner Vestager:

> [B]usinesses have a vital role, in helping to create markets that are sustainable in many different ways. And competition policy should support them in doing that. [...] We know that *sometimes*, businesses can respond to that demand even better, if they get together to agree standards for sustainable products. And as you know [...] they can do that, without breaking the competition rules; just as long as they design those agreements so they don't harm competition and consumers. (emphasis added)[22]

The different approach and focus are particularly visible with regard to car emissions. The EU has also launched a car emission investigation. However, the EU investigation does not relate to an agreement that would have reduced emissions, as the U.S. emissions case does. Instead, the Commission is probing whether car makers have conspired in the context of the Diesel emissions scandal to "limit the development and roll-out of emission cleaning technology for new diesel and petrol passenger cars."[23]

From an EU competition law perspective a case like the U.S. car emission standards case would be approached differently: in the EU there would be a high likelihood that such a case would not be caught by competition law in the first place. Even if it were to be subject to the prohibition of Article 101(1) TFEU, there is still the likelihood that such a scheme would be allowed on balance. Thus, we divide our brief exploration of how a case like the DOJ antitrust probe would be handled in the EU into questions of a) scope and b) balancing.[24]

A. Would a DOJ type of case be within the scope of Article 101(1) TFEU?

Commissioner Vestager's speech seems to suggest that EU competition law should support businesses in their work towards sustainability, and that sustainability agreements among competitors are or can be desirable, as long as they do not infringe competition rules[25]. There are a few areas in EU law where agreements such as the U.S. car emission standards case would not be subject to EU competition law. These seem to be primarily so-called loose commitments and certain forms of standard setting.[26]

While loose commitments together with the chapter of the environmental agreements have been deleted from the 2010 Horizontal Guidelines, the 2001 Horizontal Guidelines contained a helpful section on the topic. These explained that an environmental agreement would be unlikely to restrict competition if there were no precise individual obligations for the parties involved or if the parties commit only "loosely" to a

21 As stated by Delrahim in an opinion piece published by USA Today, *supra* note 11.

22 Commissioner Vestager "Competition and sustainability" Speech GCLC Conference on Sustainability and Competition Policy, Brussels (October 24, 2019) https://wayback.archive-it.org/12090/20191129200524/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-sustainability_en (accessed February 13, 2020).

23 See Commission Press Release (April 5, 2019) relating to case AT.40178 https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2008 (accessed February 13, 2020).

24 This distinction is developed in J. Nowag, *Environmental Integration in Competition and Free- Movement Laws* (Oxford University Press 2016) 1-15.

25 As the Commissioner also made clear, it is important that environmental protection or sustainability agreements are not uses as a cover for cartels or other classical restrictions of competition.

26 Surprisingly maybe the U.S. car emission standards case would not be considered to fall under the State action defense in the EU. As these is not available in the case of voluntary action but only where the State forces compliance, see Joined Cases C- 359/ 95P and C- 379/ 95P *Commission and France v. Ladbroke Racing* EU:C:1997:531.

sector-wide target.[27] This statement in the guidelines goes back to cases like *ACEA*,[28] *JAMA* and *KAMA*.[29] In *ACEA* and similar cases — *JAMA* and *KAMA* — the agreement among the major car producers aimed at reducing the average CO^2 emissions of passenger cars. The important element was that the agreement did not impose a precise obligation on producers regarding the method to achieve this aim, giving them freedom in choosing how to meet the target. Hence, the argument was that "new CO^2 efficient technologies [would be developed] independently and in competition."[30] Thus, EU competition law contains a kind of *de minimis* rule for such cases. Cases are not caught by the prohibition when the inherent restriction on the parties' ability to act freely in the market does not reach threshold of a restriction of competition. While the precise details of the U.S. emission standard case remain unknown it may well be that the U.S. car emission standards case would provide sufficient flexibility in how the companies meet each year's emissions goal to fall under this category, as long as parties do not set up precise individual obligations and compliance controls.

A second important category of cases that do not fall within the scope of Article 101(1) TFEU are standard setting agreements. Such standard setting formats broaden the opportunities for competitors to collaborate. The 2010 Horizontal Guidelines contain a chapter on standardization agreements. Such agreements are in general more leniently assessed than other horizontal agreements as they are presumed to play an important role for technical innovation.[31] Although standards often have a technical focus, the same lenient approach applies to standards with an environmental focus. These also fall under the standardization framework in the 2010 Horizontal Guidelines.[32] The Commissioner in her speech highlighted some of the important elements:

> [I]t's important that every business that wants to take part in defining the standard has a chance to get involved. And every business has to have a fair and equal right to use the standard – so that, for example, any product that meets the requirements for a sustainability label should be able to use that label.[33]

This reasoning – with focus on transparency, accessibility and fairness – is in line with what the 2010 Horizontal Guidelines proclaim. Standard setting agreements that have unrestricted participation, transparent procedures, no obligations to comply, and that comply with the fair, reasonable and non-discriminatory conditions are within the standard setting safe harbor, and thereby outside of Article 101 TFEU.[34] Finally, one might highlight that the involvement of the government does not change the nature of the assessment in the EU.[35]

As far as details are known, the U.S. car emission standards case involved car manufactures voluntarily agreeing to meet the more stringent environmental and emissions standards set by CARB. As such, the terms seem to be set officially by the CARB and thus fit the transparency criterion. Moreover, other car manufactures are not hindered to adopt the standard.[36] As the deal is voluntary and does not set an obligation to comply – and there are also no immediate concerns regarding discrimination or fairness – it seems that such a deal might be well within the EU's safe harbor for standards. In fact, for the legality under EU competition law the involvement of California would not make much of a difference as the same conditions apply to government induced standards as to industry induced ones.[37]

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27 Nowag, *supra* note 24; 2001 Horizontal Guidelines (140), para 185.

28 European Commission, *XXVIIIth Report on Competition Policy 1998* (Office for Official Publications of the European Communities 1999), 151; European Commission, *Commission Press Release* (IP/98/865).

29 XXIXth Report on Competition Policy, *supra* note 28, 160.

30 XXIXth Report on Competition Policy, *supra* note 28, 151.

31 2010 Horizontal Guidelines, para 308. This is developed in A. Teorell, *A Company's Guide to Environmental Action*, 43-53 (2019), available at http://lup.lub.lu.se/student-papers/record/8976734.

32 See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/01 para 257 and 329-330.

33 Commissioner Vestager's speech on Competition and Sustainability, presented at the GCLC Conference on Sustainability and Competition Policy, Brussels (October 24, 2019). Available at https://wayback.archive-it.org/12090/20191129200524/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-sustainability_en.

34 2010 Horizontal Guidelines, para 280.

35 See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/01, para 330.

36 See https://www.gov.ca.gov/2019/07/25/california-and-major-automakers-reach-groundbreaking-framework-agreement-on-clean-emission-standards/.

37 See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/01, para 330. Also note the difference between U.S. and EU state action defense, see Nowag, *supra* note 24.

B. What kind of balancing would apply if a DOJ type of case would be within the Scope of Article 101(1) TFEU?

If an agreement is within the scope of Article 101(1) TFEU, EU law foresees a number of possibilities that lead to a balancing exercise between the restriction of competition and redeeming factors. In this sense, the balancing might be compared to the U.S. rule of reason, yet important differences remain. First, balancing in the EU would as a matter of principle also be available in the case of hardcore restrictions.[38] Second, *not* all elements of the balancing are carried out in form of an economic assessment. In particular, Article 101(1) TFEU contains a so-called European Rule of Reason.[39] Moreover, in cases where an undertaking or a group of undertakings have been entrusted with a specific task, the balancing under Article 106(2) TFEU does not involve a detailed economic analysis of the pro and anti-competitive effects. While both of these routes remain available in EU competition law, the more commonly available route in form of an efficiency defense under Article 101(3) TFEU is also plausible.

Whenever an assessment is made under Article 101(3) TFEU any procompetitive effects need to be assessed. As part of a net effect evaluation, the quality improvement that the car manufacturers' arrangement might bring about is to be considered and balanced against the restrictions of competition. Even adopting a rather narrow view looking only at the consumer welfare gain for the current final individual consumers an agreement such as the U.S. car emission standards can provide consumer welfare benefits. In particular, any welfare gain for the current individual final consumer in form of quality improvements of the relevant product are seen as consumer welfare benefits.[40]

Qualitative improvements are also those that relate to the environmental quality of the product. An improvement of quality is established by any material or immaterial differences between products that the consumers value[41] and can be established with regard to environmental differences of otherwise homogeneous products.[42] This approach to quality is also supported by the European Court of Justice which held that even physically identical products can be treated differently if their environmental quality differs.[43] Improved quality is a traditional efficiency gain that is taken into account within the well-established framework of competition law cases. Thus, in the EU context, any quality improvement derived from the car manufactures agreement to adhere to environmental and emissions standards set by CARB would need to be considered in the context of the overall competition law analysis of the agreement. Whether these improvements would be sufficient to tilt the balance is a factual question and would need to be answered in the individual case.

V. CONCLUSION

This brief paper examined the U.S. antitrust case concerning the car emission standards adopted by a number of car manufacturers where they agreed to voluntarily comply with California's more stringent emission standards. The paper first briefly outlined the case and the broader regulatory landscape in the U.S. regarding emission standards as well as some of relevant comments on the assessment under U.S. antitrust law. It then turned to explaining how such a case would most likely be handled under the EU framework. It highlighted how the messaging and focus in the EU as regards to competition and sustainability seems rather different to the U.S., before it explored in more detail the legal situation.

From the EU perspective it would be questionable whether such an arrangement would be subject to competition law in the first place, since such agreements might be considered loose commitments. Loose commitments might limit the overall commercial freedom of the parties involved. But as not all limitations of commercial freedom are restriction of competition to the extent that Article 101 (1) TFEU would be engaged. Similarly, standard setting agreements are not subject to the prohibition of Article 101 (1) TFEU when they comply with the EU's safe harbor criteria for standards. However, even when an agreement such the car emission standards case would be subject to Article 101 (1) TFEU, it would not mean that such a behavior is automatically prohibited. Instead a detailed assessment would be required to examine whether any benefits in terms of quality outweigh the competitive harm.

38 As the text of 101 TFEU itself makes clear, all agreements that fall within the scope of Article 101(1) can benefit from the 101(3) TFEU exception.

39 On this concept and its operation with regard to matters of environmental protection, see Nowag, *supra* note 24, 215-224.

40 See Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), 33.

41 While the exact criteria of how to measure and treat such improvements in competition law are not always easy to establish, see OECD, "The Role and Measurement of Quality in Competition Analysis" (2013) DAF/COMP(2013)17. A practical assessment in the context of animal welfare is the Dutch Chicken of Tomorrow Case, see "ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow'" dated January 26, 2015 https://www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainability-arrangements-concerning-the-Chicken-of-Tomorrow/ (accessed February 13, 2020).

42 See Nowag, *supra* note 24, 232-234.

43 Case C-2/90 *Commission v. Belgium* EU:C:1992:310, para 33.

While the U.S. case needs to be understood in the broader context of the struggle over emission standards in the federal system of the US, the closure of the case by the DOJ has to be welcomed. One the one hand, the closure of the case means that dangers for comity are averted. It would have gone against the core of comity considerations to find that the car manufactures violated competition law where this seems to be diametrically opposed to long standing and settled practice and case law in the EU. On the other hand, it also has to be welcomed from an internal U.S. perspective. Where the (pro)claimed aim of U.S. antitrust law is to ensure consumer welfare, the relevant standard should be whether actual consumer harm exists and whether such harm is outweighed by quality improvements. From the prospective of the consumer standard, U.S. antitrust law should not (ab)use antitrust to protect the (Trump administration's) federal regulator's authority against the voluntary compliance with more stringent standards suggested by a (Democrat) Californian regulator.

Although this specific case was dropped by the DOJ, similar cases will arise in the future as the fight against the climate crisis continues. It is important to think about how we – in the U.S., the EU, and beyond – can approach competition law and its interaction with industry initiatives that are beneficial to the environment and, by extension, to humanity.

THE DIFFICULTY OF CONVERSATIONS ABOUT SUSTAINABILITY AND EUROPEAN COMPETITION LAW

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I. INTRODUCTION

Though it has been brought forward that European competition law is hindering sustainability-focused cooperation between companies, and that, therefore, competition law should change, there is much to unpack in such a statement. Some of the legal intricacies of this unpacking is the focus of section 3 of this article (and other contributions in this CPI Antitrust Chronicle). However, I will also try to understand why a conversation on "competition law and sustainability" is often difficult (with section 2 touching upon some of the fundamental difficulties). I am focusing on the specifics *European* competition law, though similar questions might arise in other competition systems.

To start, here is a conversation, imaginary of course, between two fairly reasonable persons, who share background-knowledge of (European) competition law's intricacies. Perhaps I'll kick off the conversation with this statement:

"European competition law should acknowledge the wider range of sustainability benefits of collaborative efforts of companies. These benefits can currently only be included in the weighing of pros and cons with difficulty, if at all: it's all too much focused on a quantified analysis of effects on consumer welfare."

"Well," you answer mildly, "but competition law *is*, actually, aimed at protecting consumer welfare, you know."

I reply: "True. It is *now*. But that has not always been the case: look at its history and its older cases. The efficiencies & consumer-welfare focus, and the way that shapes the balancing exercise of Article 101(3) TFEU is the result of a choice made more than a decade or two ago."

But you counter: "But don't you agree that it is *good* that we have a well-identified focus now? Remember the Tinbergen-principle? Remember how vague the standard used to be? You, Anna, were also involved in competition law at that time."

"I am not so sure about the validity of Tinbergen's principle in our current situation. Perhaps trying to bring about a sustainable society is too important to keep stuck on it? But yes, I do remember…"

(We go off on a non-relevant tangent, reminiscing about competition law adventures twenty years ago.)

Back to the topic at hand: "Surely you must admit that using economics has served us well. It has given us predictability. I do not see why we need to change or why you would want to go back to being 'fools and knaves'…"

"I am relieved to know that it is not just me mixing in USA-based references in a European competition law discussion! And yes, it has given us a more unitary way of measuring what is *good*, even though it is couched in more neutral terms of "negative or positive effects on consumer welfare." But! I would argue that perhaps change is necessary because the current competition analyses can be callously indifferent to some very real issues: what about protection of fundamental rights, what about child labor, what about the freedom of association, what about long term ecological equilibrium?"

"Tsk!," you sputter, "I am not denying their importance, but much of this is protected in the EU. We have treaties, we have laws, and if we do not have them, we should make them!"

"Yes, yes, but not everywhere: what about treating workers at the point of origin in international supply chains well? Paying them a living wage?" Before I plunge into a longer exposé, you stop me:

"But then, what is the alternative? I see the need for a sustainable society but aren't you opening the door for political decisions? Moving onto a slippery slope? Perhaps this is not a problem for competition law to solve?"

"I agree that (some of) these are valid points: how *much* consumer welfare loss would be acceptable for a *little* sustainability gain? Should a competition authority decide on that? But on the other hand, I am not certain about the slipperiness- argument: why not explore how sustainability-benefits can be woven better into a competition analysis?"

The conversation can now veer off in different directions: perhaps a philosophical, moral, political one (section 2 explores a bit of this) or into a more legal discussion (section 3 has an overview). Section 4 provides some final remarks on the question of why "sustainability" should also be recognized as a (European) competition law problem.

II. A FEW FUNDAMENTALS TO COMPLICATE LEGAL MATTERS

There are some who deny climate change. Apparently, there are also some who do not so much deny its existence but deny it political attention, which we might call the "après nous, le deluge" – people. I am assuming that among the CPI readers there will be, at most, only a few so cynical and that many will agree that one of the most important complexities besetting our society today is, indeed, climate change. Climate change has far reaching effects, but it is set within the wider notion of *sustainability*. A look at the United Nations' Sustainable Development Goals makes the vastness of this notion clear: sustainability has a social connotation as well, and means, at least, living in ecologically sound, environmentally respectful, fair, equal, democratic, societies.

Importantly (also for competition law and sustainability conversations), the notion of and discourse on sustainability is aim-driven. It gives an overarching direction for movement: *towards* a sustainable planet, in which people live sustainably and (hopefully) also comfortably. That means that a "more" sustainable society is a society in which the sustainable developments goals are being reached. The elusive end-point of a stable sustainable society does have a touch of the utopian: we might not reach it, but it is worth our current efforts (and in this sense, one might argue, it shares a feature with some strands of economics). To realize that the endpoint is perhaps unreachable, but that moving towards it is the only viable option for humankind (unless we develop space flight fully), might lead to confusion as to what to *now* focus on. Also, I have come to suspect that this imprecision and uncertainty inherent in the notion of "sustainability," especially when contrasted with the (presumed) (mathematical) precision of economic analyses within its modelling of reality, makes the contemplation of moving away from the rationality of competition economics difficult or daunting for quite a few competition lawyers and economists.

On a more abstract level however, if it is agreed that moving towards a sustainable society is necessary, it is not difficult (though not necessarily so!) to agree that one of the many instruments to use, is law. In a democratic society legislating as a means to bring about a public interest can be seen as the "regal route." But focusing on law-as-an-instrument also means identifying where existing laws hinder reaching the sustainability endpoint and where, by way of de-hindering, existing doctrines might be helpful to move beyond that obstacle.

III. COMPETITION LAW'S DEHINDERING FOCAL POINTS (OR: THE MOST LEGAL SECTION IN THIS PIECE)

The most visible anchor point in the European competition law and sustainability debate is Article 101 TFEU. Above, the conversation focused directly on Article 101(3) TFEU, but when looking at de-hindering options it is useful to take the route of a systematic competition analysis of any agreement or collaboration. Along the way there might be some "outs," before we even get to the obstacle that Article 101(3) TFEU represents.

A. Outside the Reach of Article 101 TFEU

A first question should be whether entering into an agreement containing anti-competitive elements is the only option to reach the intended sustainability goals. Though "necessity" is also relevant in the Article 101(3) TFEU-analysis, this question should be also considered *ex ante*. Can standard-setting supply-chain agreements with independent third-party monitoring deliver the same results? Is it possible or feasible to "go at it alone" and still reach the desired outcome within the desired timeframe and with the desired scope?

Another way of staying outside the reach of Article 101 TFEU is by keeping it small: staying within the boundaries of non-appreciability. Though, to be effective in reaching the intended sustainability goals often a certain *heft* seems logical, in some instances small is feasible: local farmers agreeing to mow their pastures later in the season to give nesting birds a chance or agreeing to collectively house their seasonal workers comfortably instead of in dismal conditions, for example. Another angle is that of "Pavlov"-appreciability, which has been used to argue that though the (international) agreement might, indeed, lead to raising costs at the primary production location, the supply chain being as long as it is means that this will inevitably have a negligible effect on consumer prices.

B. Anti-Competitive, but no Infringement

A next "out" is relying on the Wouters-doctrine (or: inherent restraints doctrine, regulatory ancilliarity). The general idea of this Court-developed doctrine is not that difficult to grasp. Yes, there is restrictive agreement, but (as the Court literally notes): not all restrictive agreements are caught by the prohibition, this being so where the restriction is inherently necessary in the protection of a public interest. However, the practical usefulness – for example for concrete advice on a clients' sustainability initiative – seems more tricky. Though theoretically there are good arguments for applying "Wouters" in the realm of sustainability initiatives (it would be difficult to argue that bringing about a more sustainable planet would not be in the public interest), there is uncertainty (e.g. as to the role of government in the arrangement), also because there are not many examples to argue from. Legal development might greatly benefit by an actual sustainability case reaching the Court of Justice.

There is also "normal" ancilliarity, in which an anti-competitive clause is accepted as part of an overall non-competitive agreement. As far as I am aware, there are no published cases where this argument has been tried in a sustainability setting, but – in a certain precise setting of a concrete sustainability initiative – it might make a lot of sense.

Fitting here is also the idea of building upon case-law on the notion of solidarity and the (related) exception for collective labor agreements. I have written about this more extensively elsewhere, as have others, so I refer the reader to those.

C. Anti-Competitive, but Allowed

As mentioned already, Article 101(3) TFEU is the ground on which the sustainability & competition law conversation has mostly focused. By now quite a bit has been written on the analysis of costs and benefits in relation to sustainability initiatives. There is a bit of superfluous nagging. So, to clarify some points to get them out of the way: we do not have to discuss obvious "green washing" cases. Clearly these fall foul an Article 101(3) TFEU argument. There is also no difficulty when the "normal" routine of taking into account the benefits of a sustainability agreement leads to concluding that ultimately there is no welfare loss: especially environmental benefits can sometimes be subsumed under an Article 101(3) TFEU analysis, using generally accepted methods. This might then lead to a positive outcome with pros outweighing cons. It is outside of these cases (but including those where subsuming does not lead to benefits outweighing negative effects), that Article 101(3) TFEU may present an obstacle for sustainability initiatives. Contentious questions, mostly in relation to the first two limbs of the exception, arise. For example, as to which improvements "count," or on the certainty of benefits arising. Discussions may focus on the notion the consumer; if (and how) to account for benefits that are difficult to quantify, benefits that might accrue to future citizens, and what the notion of a "fair share" actually might mean. All of these questions can, of course, be easily answered by sticking to the "European competition law is aimed at enhancing consumer welfare"-line, but that seems to become less tenable, specifically in light of, for example, climate change mitigation's urgency. From a legal point of view, tied to these application-on-a-case questions are questions as to the meaning of past cases and judgments.

And bigger questions loom, too. Fundamentally – but, I would submit, necessarily – one might end up thinking not just about the role of economics in a legal framework, but also about ethics and morality, and politics and motives, and suddenly we are drifting away from the bare competition metrics that are (seemingly) devoid of normativity into much more uncharted territory. It is not surprising that a disconnect occurs between agreeing that yes, yes, of course sustainability is important, and the "how to" of a competition law analysis of such a sustainability initiative under Article 101(3) TFEU. The "slippery slope" argument is brought in here, as well, as is the related argument of the (non) legitimacy of competition authorities to engage in a (qualitative) weighing of pros and cons under the Article 101(3) limb. Making the conversation at this point of the analysis even more difficult is that, in contrast to (e.g.) the Wouters-doctrine, in an Article 101(3) TFEU analysis there is either no seal of a government-approved public interest initiative, or there *is* government involvement, but that fact is irrelevant. That private parties could act towards the public interest is not easily placed in the system of a competition law analysis either. At very least for competition authorities this must be an uncomfortable place to be. However, though these fundamental questions are ultimately important, I will, in section 4, try to bring the problem back to more manageable proportions.

D. Reasoning by way of Constitutional Approaches

The European constitutional setting provides a thread below all of the above, but can also be discussed more explicitly. In that, (at least) three strands appear. Firstly, there is discussion about the meaning (for competition law) of the context of the EU-Treaties, which include both competition and sustainability, about what might be inferred from the Court of Justice's case-law, and – taking that into account – what competition law's role *should* be. Early attention has been given to the integration clauses (specifically Article 11 TFEU), but also "older" discussions have been reopened on the aims of the European Union and on the, possibly, less clear-cut position of the Court of Justice on consumer welfare. Secondly, there is a younger strand that touches upon the discussions on the interplay between *international* obligations and European competition law. The Dutch might point to possible lessons from its Supreme Court *Urgenda* ruling, in which the government was held to act on its (international law based) obligations towards cutting emissions, in a setting of liability law. Where the EU is party to international agreements, and companies move forward towards reaching these goals, what then is the space for European competition law to hinder these initiatives? Thirdly, a relatively new idea is to go back to the royal route, but in an adapted fashion: in the Netherlands the legislator is trying to reconcile competition law with sustainability initiatives. It considers the option of a non-specific Act, making it possible to present societally supported companies' initiatives to the minister of Economic Affairs. After a public interest test, in which the competition authority is heard, the initiative can be made binding for all actors in that sector. Admittedly, the useful effect doctrine is casting its possible shadow, and, obviously, the legislation is geographically limited, *and* the Dutch Council of State has warned against placing too much regulatory responsibility in the hands of societal and economic actors, but: this legislation does provide a legally embedded possible way out of our conundrum, at least for some initiatives, by placing the weighing of competition concerns against sustainability concerns in the hands of a politically accountable actor.

IV. FINAL REMARKS

The conversation started in the introduction might be continued by throwing in some thoughts about the Common Agricultural Policy, the difference between state aid and antitrust perspectives, the role of technology (how about that space flight!), or on feminist perspectives on climate change (and competition law). We can discuss optimism, (too much) faith in humanity and the role of law more generally. It is very probable that we veer into something completely different and end up discussing how West Wing was really the best political (and hopeful!) TV-series ever.

Two points remain, however. First, as to sustainability-as-aim and the hesitation towards opening up a competition law analysis to the apparent non-rational, open-ended murkiness of values, perhaps it is useful to point out that none of the *above* entails throwing aboard economics, or even a focus on consumer welfare, in a standard competition law analysis. Taking sustainability seriously in a competition law framework, means that in *some cases* the analysis might (have to) be broadened. Second, this question remains: Even though we agree that it is the legislator who is best placed to weight different public interests against each other (at least in a democratic society based on the rule of law), why is sustainability a problem for competition law and (therefore) for me (and for you), as competition lawyer/economist? I have found this a vexing question, but here is my answer: Because – a little by happenstance, then by choice, then by academic inclination – I am an actor in competition law. This is my field of play. Adding to that: If the move to a sustainable society is indeed urgent, the legislator – of a Member State or the EU – is one of the many necessary actors. But not the only one, because if there are sincere sustainability-aimed initiatives between companies, and if that cooperation leads to a possible competition law issue, it follows that competition law as an institution, and those involved in its practice, *are* actors already. So, from both these angles, it seems unavoidably necessary to conclude that sustainability is an issue, also for European competition law.

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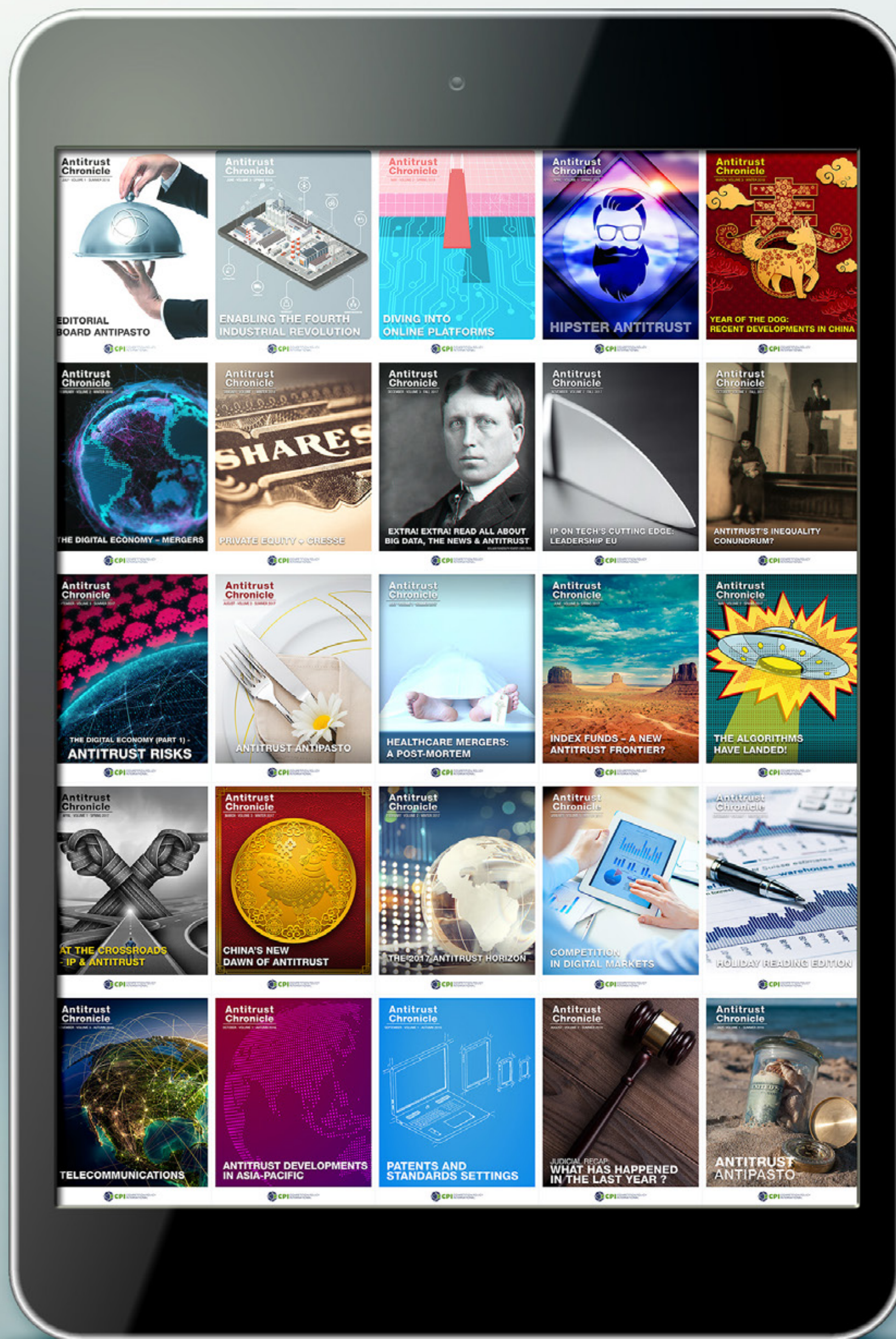

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