**Draft 26/09/2019**

# CLIMATE CHANGE, SUSTAINABILITY AND COMPETITION LAW

## Climate Change is an Existential Threat:

## Competition Law must be part of the solution and not part of the problem

**Simon Holmes***

* Judge ("member") at the UK's Competition Appeal Tribunal, legal advisor to the environmental NGO, ClientEarth, and Visiting Fellow at the Centre for Competition Law and Policy, Oxford University.
(The views expressed here are personal and cannot be attributed to any institution with which Simon is connected)

## SECTION 1
## CLIMATE CHANGE: THE MORAL IMPERATIVE

It is increasingly accepted that we face a 'climate emergency' and that 'business as usual' is not an option. I am not going to go into the science and evidence for this but simply take this as a fact and the starting point for my analysis of its implications for competition law. [1] What has this got to do with competition law? Well, very little and a lot.

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

And so too when we look at competition law many say competition law is not a panacea for all the ills of the world and that we have other tools – most obviously regulation.

And all these people are right.

BUT, 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 <u>a lot</u> 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 paper 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.[2]

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

The most obvious examples 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 (see endnote 25);
- Attempts to encourage more sustainable chicken production (endnote 55); and
- Agreements to increase the collection of plastic waste (endnote 25)

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

- rejected (e.g. "Chicken of Tomorrow" see endnote 55)
- not pursued either:

- after consideration of the competition law risks; or
- not even considered for fear of the potential competition risks.

Indeed, on the day I sign off on this paper, a vital initiative to prevent depletion of fish stocks in one of the world's most important fishing areas risks being de-railed as on major buyer is afraid to sign up citing competition law risks. No wonder more and more of us are getting angry and frustrated!

Often all that is needed is some robust advice. 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.[3]

Some issues will be more difficult than this (but not impossible): e.g. agreements to pay a fair and sustainable price to poor farmers.[4]

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 considered in Sections 5 and 6 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).

## SECTION 2
## MY APPROACH

My goal in this article is to look at what can and must be done within the context of EU law as it is.

What do I mean by that?

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

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

As a lawyer practising competition law for 35 years, I had to advise clients based on the likely attitude of the competition authorities and help them carry out a risk assessment. While I often encouraged them not to be too risk averse, my professional duties still obliged me to take full account of recent decisions of the authorities and guidelines (even if I felt these were wrong).

Now I am able to stand back and look again at what the treaties actually say. If what the competition authorities are doing / saying (whether in decisions or in guidance) is not consistent with the treaties, I will argue that they are legally wrong. If more than one approach is consistent with the treaties then what the authorities say may not be illegal but I argue they can, and should, adopt the interpretation that is most favourable to the climate emergency and sustainability challenges that we face.

Where the Court of Justice of the European Union ("CJEU") takes a view that I do not consider to be consistent with the treaties my position is more nuanced. As a judge, I must respect the CJEU as the ultimate arbitrator of EU law. As an academic, I would argue that the CJEU is wrong and can, and should, change its view.

The issues in this paper are all discussed on the basis of my reading of the EU treaties as they stand. However, such is the importance of the climate emergency that we face, if competition law continues to be a barrier to urgent initiatives to combat climate change, then the law should either be "clarified" (e.g. by means of Commission guidance); amended within the scope of the existing treaties (e.g. by means of a block exemption); or (as a last resort) the treaties should be amended (e.g. to amend the relationship between the environmental / sustainability provisions and the competition provisions or to add specific provisions dealing with climate change).

So what do the treaties say? What are the goals of competition law? And, what are the implications for sustainability issues – particularly in the area of agreements but also abuse of dominance and mergers?

## SECTION 3
## THE GOALS OF COMPETITION LAW AND THE "CONSTITUTIONAL" PROVISIONS OF THE TREATIES

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

As a practitioner, I must confess I rarely looked at these. I just relied on what I "knew" (or thought I knew) to be the position from experience and from the Commission's guidelines and decisions. I could have told you roughly what Article 2 of the Treaty of Rome said but unprompted I would not have had a clue what Article 11 of the TFEU said (and I suspect I was not alone in this ignorance). Well, I was wrong – so let's put that right.

### Treaty on European Union – Article 3

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

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

**Article 3(5)** says:

"it shall contribute to … the <u>sustainable</u> development of the earth" and to "free and <u>fair</u> trade."

(emphasis added)

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

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

Furthermore, as we shall see this is written into the competition provisions of the treaty – most notably in Article 101(3). And, before anyone suggests this is all too difficult, and there is too great a risk of inconsistent outcomes (especially in a decentralised system), this is also the case with narrow price centric so-called "economic" considerations. Again, we will come back to this in considering Article 101(3) in Section 4.

### 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 <u>all</u> of its objectives into account".[5]

(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 <u>must</u> 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.[6]

**EU Charter on Fundamental Rights – Article 37**

**Article 37** says:

"A high level of environmental protection and improvement of the quality of the environment <u>must</u> be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development". (emphasis added)

Failure by the competition establishment to focus on the "constitutional" provisions of the treaties reflects a failure to note, and take proper account of, the move from a mere "Economic Community" (under the EEC or European Economic Community) to the much broader concept of a European "union" with the establishment of the European Union on 1 November 1993 – and everything that that entails for a wide range of social, political, economic and sustainability goals.[7]

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

## CONSUMER WELFARE

First, a question: where does this term appear in either the constitutional or competition provisions of the treaties? Answer: nowhere

At this point, I could write a lot about the 'Chicago' school, neo-liberalism etc. – but others have done this eloquently.[8]

I will, however, make two points.

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

Secondly, if consumer welfare were the correct legal standard, then it would not be a bad one if looked at afresh. This invites two questions: what is a 'consumer' and what is 'welfare'? Taking the second of these first.

Which bit of the word 'welfare' do some lawyers, economists, academics and competition officials not "get"?

A quick google of the meaning of the term "welfare" tells us that welfare is about "the health, happiness and futures of a person or group". Among other things it is synonymous with "well-being and good health" ("bonheur"; "confort"; "bien-être"). 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.

So why have we let the Chicago school take us down a road where virtually the only things that matter are short-term price effects?

As one writer put it, this approach is in danger of turning us into "moral zombies and economic sociopaths" making "decisions in a moral vacuum" [9].

If the law required this, that would be bad enough. But to adopt this approach when the law does <u>not</u> require it is morally reprehensible.

Like the Emperor Nero, we are fiddling while Rome is burning. We are squabbling over technocratic issues while climate change gathers frightening momentum.

Before turning back to the road leading to a proper interpretation of the goals of competition law and interpretation of the competition provisions of the treaty, it is worth noting three points:

Firstly, it is interesting that a natural reading of the word "welfare" fits very well with both:

a) The Sustainable Development Goals ("SDGs")[10] third goal: "Good Health and Well-being"; and
b) Emerging concepts of measures of national well-being (such as "happiness") instead of, or as a complement to, GDP.

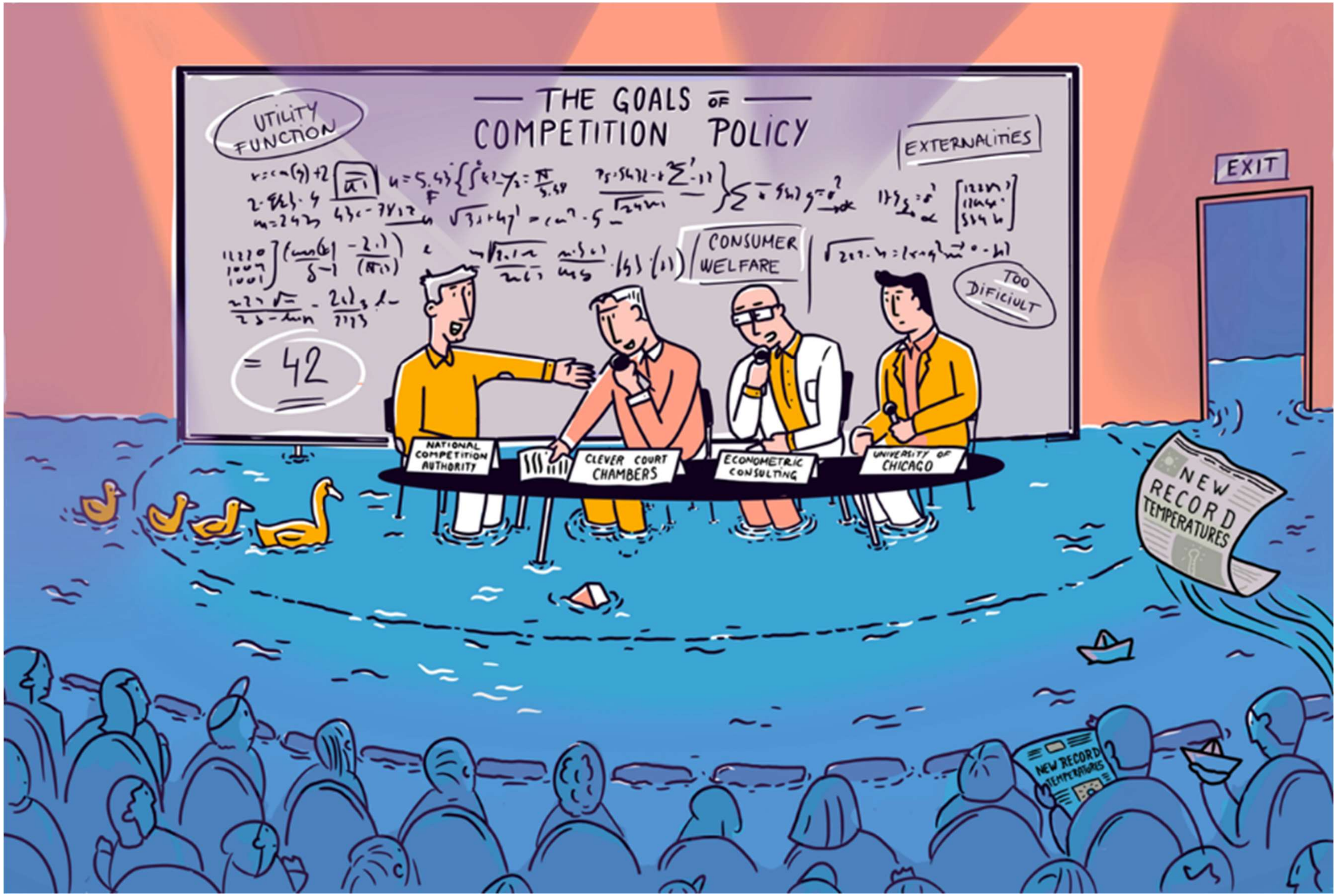
To the extent competition law allows us (and it does) it makes sense to interpret it in a manner consistent with the SDGs, to which we have signed up and in line with the more progressive thinking on the economy as a whole.[11]

Secondly, a fresh look at the term 'welfare' avoids getting hung up over false choices between seemingly contrasting approaches: e.g. between consumer welfare on the one hand and "fairness"; "well-being"; or public interest considerations on the other.[12]

Thirdly, my criticism of the narrow price centre approach to "consumer welfare" is not a criticism of economics or economists (well, not all of them). As Kate Raworth's "Doughnut Economics" reminds us, 'economics' originally meant the "art of household management" and throughout most of history the subject has been concerned with broader social and political concerns (as the term “political economy” clearly suggests).[13] The ‘neo-liberal’ approach with its narrower focus on financial considerations (and in the context of competition economics, short-term price effects) is a relatively new phenomenon.[14] As Vaclar Smil has put it: ”the fundamental problem is that economics has become so divorced from fundamental reality……until economics returns to the physical rules of human existence, we’ll always be floating in the sky and totally detracted from reality” [15]. Meanwhile the planet continues to heat up.

Precisely what should be the goals of competition policy is the subject of extensive literature and endless debate. What is clear, however, is that consumer welfare, in the narrow sense of consumer surplus, appears nowhere in the treaties and at most should only be part of a much wider set of goals focusing on both the competitive process and the core goals of the treaty set out above, including for present purposes, sustainability.[16]

Rather than consider further the goals of competition in the abstract, I turn now to a more specific consideration of 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).


THE GOALS OF COMPETITION POLICY
UTILITY FUNCTION
EXTERNALITIES
CONSUMER WELFARE
TOO DIFICIULT
= 42
EXIT
NATIONAL COMPETITION AUTHORITY
CLEVER COURT CHAMBERS
ECONOMETRIC CONSULTING
UNIVERSITY OF CHICAGO
NEW RECORD TEMPERATURES
NEW RECORD TEMPERATURES

**SECTION 4**

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

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

A number of excellent articles and books have been written discussing the scope of these provisions – in particular, the extent to which so-called "non-economic" or "public interest" factors can be taken into account (and a number of these specifically consider environmental issues and sustainability agreements).[17] These typically discuss the cases of the European Courts, the decisions of the European Commission and various guidelines issued by the Commission (particularly the 2004 Exemption Guidelines and the 2010 Horizontal Guidelines).[18]

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

a) preventing conflicts between the policy to be integrated (e.g. here, environmental policy) and the relevant sectoral policy (here, competition policy) – which he calls the "first form of integration"; and
b) integrating the two by means of a balancing exercise – which he calls the "second form of integration".

He draws a further distinction between "supportive" and "preventative" integration. Supportive integration means applying the sectoral rules so as to allow measures that are beneficial for the policy which is to be integrated (here, environmental policy). Preventative integration means application of the sectoral rules (here, competition policy) to avoid harm to the policy to be integrated (here, environmental policy).[19]

In my view, the constitutional provisions of the treaty require us to take the "maximalist view", the "second form of integration" and both the "supportive" and "preventative" integration approach.[20]

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

i. if we are serious about tackling the existential threat posed by climate change there is a political, economic and moral imperative to maximise the possibilities for allowing (and thus encouraging) arrangements to tackle climate change. Now is not the time to be timid;
ii. We have the legal tools to do this. Not only do the 'constitutional' provisions of the treaties require this (as discussed in Section 3 above) but there is plenty of authority from the CJEU[21] in support of this and a number of examples in the Commission decisions to embolden us;
iii. My hope is that a better understanding of the legal possibilities (and legal requirements) should encourage the development of agreements to tackle climate change and other

sustainability issues and diminish the dark shadow that competition law currently casts over potential collaboration.[22]

There are various ways in which environmental or sustainability agreements[23] might escape the prohibition on anti-competitive agreements. Different people will favour different routes (I too have my preferences). However, while an anathema to many lawyers, the key point is that vital progress on sustainability is supported, not impeded, by competition law: how it is done is very much a secondary consideration.

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

(1) Some agreements are unlikely to restrict competition at all;
(2) Take the view that sustainability agreements essentially fall outside Article 101(1) completely (the "Albany" route);
(3) See sustainability agreements as falling within the ancillary restraints / objective necessity doctrine (a less radical version of (2));
(4) Some sustainability agreements fall within Article 101(3) (generally my preferred route);
(5) Make more use of the more generous treatment of standardisation agreements (essentially a variant on (1) and (4) above).

## 1. **Agreements that do not Restrict Competition**

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

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.[24]

There are a number of sustainability agreements which the Commission has accepted fall outside Article 101(1). Good examples are the JAMA and KAMA agreements concerning emission reductions among car producers but which did not impose a precise obligation as to the methods of achieving this.[25] More importantly, there are probably thousands of sustainability agreements which have been self-assessed as not falling within Article 101(1).[26] It is important not to lose sight of this when considering the next sections.

## 2. **The "Albany" Route**

In the Albany case, the European Court of Justice ("ECJ")[27] essentially decided that Article 101 does not apply to collective bargaining. In one sense the Albany case is just one of several cases applying the ancillary restraints / objective necessity doctrine considered at 3 below. I separate it out for two reasons:

a) The ECJ relied very heavily on the need to construe the "constitutional" provisions of the treaty with Articles 85(1) [now 101(1)] "as an effective and consistent body of provisions". It noted that the "social policy objectives pursued by [collective] agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking to adopt measures to improve conditions of work and employment”.

The court held that “it therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty”.

Exactly the same reasoning could be applied to sustainability agreements as for collective agreements in the workplace. Indeed, arguably, the argument is stronger for sustainability agreements given the express references to the “protection and improvement of the quality of the environment” and to “sustainable development” in the “constitutional “provisions of the TFEU.

b) 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.

   My own personal preference is generally to see appropriate agreements being exempted under Article 101(3) – and subject to the proportionality test which it contains.[28] However, for those who take a narrower view of Article 101(3) (or for agreements that do not clearly meet the four conditions of Article 101(3)), the Albany judgment potentially provides a clear cut and authoritative way of finding a sustainability agreement to fall outside Article 101(1) completely.

3. **The Ancillary Restraints / Objective Necessity Route**

There have been a number of cases[29] 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”).[30]

In principle, there is no reason why this approach should not be taken in the case of sustainability agreements such that proportionate restrictions inherent in a sustainability agreement, without which the Agreement would not have been concluded (cF Albany), and restrictions necessary to carry out an environmental regulatory task (cF Wouters) would fall outside Article 101(1) entirely.

I would add two comments here:

a) The application of these doctrines to environmental agreements has not yet been tested in the courts. While this may be seen by some as a difficulty, it is also an *opportunity* which should be grasped to minimise the extent to which competition law risks compromising vital action to tackle climate change.
b) In reality, many of these decisions can be seen as a policy decision reflecting how sympathetic (or otherwise) the court was at the time to the “public interest” issue in question. As environmental, sustainability and climate issues go up the political agenda the more likely it is that they will be treated sympathetically (like anti-doping rules) and less likely that they will be seen as something that must meet the conditions of Article 101(3) if they are to escape the prohibition of Article 101 (like the restructuring of the Irish Beef Market).[31]

## 4. **The Exemption Route: Article 101(3)**

Unless it is clear that a sustainability agreement does not fall within Article 101(1) then, in my view, the most obvious way for it to escape the prohibition of that provision is for it to be exempted under Article 101(3).

As mentioned at the beginning of this Section 4, much has been written about what can, and what cannot, be taken into account under Article 101(3).[32] As discussed in Section 3, much of the difficulty arises from an unnecessary focus on a (narrowly conceived) "consumer welfare" test which leads many writers to ask unnecessary questions such as, can "non-economic" or "public interest" issues be taken into account?[33]

My approach 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.[Is that really such a radical approach?]. Article 101(3) requires an agreement to meet each of four conditions to be exempt. I will consider each in turn.

**CONDITION 1: Improvements & Progress**

The most important of these for present purposes is the first one. 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).

Four things are immediately apparent:

i) Again, there is no reference to "consumer welfare";
ii) "Economic" progress is only one of four separate ways in which an agreement may meet the criteria of this condition (note the disjunctive "or");
iii) Even if one focuses just on the "economic" criterion, many sustainability agreements will fall within this. For example, is it not "economic" progress if an agreement leads to the production of an engine that costs €1,000 with half the emissions of its predecessor which also cost €1,000? In my view, yes – and it is not necessary to establish that, but for the agreement, the less polluting engine would have cost €2,000 (in any case, this is clearly 'technical' progress).
iv) There is no reference here to "pro-competitive effects". Many lawyers and economists (myself included) lapse into saying that Article 101(3) allows one to balance the "pro-competitive effects" against the "anti-competitive effects" identified under Article 101(1). While this is sometimes a useful shorthand (certainly when advising lay clients) it can be both lazy and misleading. In important or difficult cases it is essential to *focus on what Article 101(3) actually says*.

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

a) the constitutional requirement that "environmental protection requirements <u>must</u> be integrated into the … implementation of [all] the Union policies and activities" (Article 11 TFEU); and
b) 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"[34]; and

c) clear and helpful decisions of the Commission such as the much discussed CECED washing machine case.[35]

**CONDITION 2: Fair Share for Consumers**

The second condition which must be complied with for an agreement to be exempt under Article 101(3) is that the agreement allows:

"consumers a fair share of the resulting benefits".

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

**(A) Consumers?**

"Consumer" could be read narrowly to mean just the actual or potential purchaser of the particular goods in question.[36] However, there are a number of reasons why this would be wholly unsatisfactory:

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) In this sense it must be recognised that consumers have wider interests than their narrow financial ones (concerned with more or better goods at ever lower prices);[37]
iv) If there were any doubt about this then one should yet again recall the constitutional requirement that "environmental protection requirements <u>must</u> be integrated into the … implementation of [all] the Union policies and activities" (Article 11). To interpret the concept of "consumers" narrowly would run counter to this. Not only does this mean it cannot be correct as a matter of law, it would be contrary to the political, economic and moral imperative to do everything we (lawfully) can to combat climate change (let us not lose sight of this!)
v) Happily, the Commission has often (but not always) recognised 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 [economic] benefits accrued to individual purchasers".[38] 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".

A further question, in the context of the fight against climate change, is whether *future* consumers can be taken into account? Happily, the Commission's 2004 Exemption Guidelines give a clear and positive answer (but with some discounting for the fact that these benefits are in the future).[39] This is most welcome as the need to consider future generations (future "consumers") is central to the very concept of sustainability whether it is the effect of an agreement on climate change or other environmental issues such as the need to preserve biodiversity and an ecosystem compatible with sustaining a global food system.[40]

Whether consumers outside the EU can also be taken into account is less clear. Regrettably the correct legal answer is probably not[41]. That said, the benefits of many environmental agreements will not be limited to a particular geographic area such as the EU so the issue may not arise in such cases.

**(B) Fair Share of the Resulting Benefit?**

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

(i) First, some boring technical points. The condition does not suggest that consumers must benefit from a lower price. It does not even suggest that the consumer's benefit need take the form of a 'fair' price. It speaks more generally of a "fair share of the resulting benefit" which is clearly a flexible concept capable of taking into account wider sustainability concerns. Furthermore, nothing here suggests that it is necessary to quantify and reduce these to narrow financial considerations.

(ii) The Commission has helpfully recognised this in its 2004 Exemption Guidelines specifically noting that:
The benefits to consumers can:
- "take the form of qualitative efficiencies such as new and improved products creating sufficient value for consumers to compensate for the anti-competitive effects of the agreement, including a price increase" (paragraph 102).
- "any such assessment necessarily requires value judgment. It is difficult to assign precise values to dynamic efficiencies of this nature" (paragraph 103).
- "in many cases it is difficult to accurately calculate" the benefits to consumers such that it is only necessary to provide "estimates and other data to the extent reasonably possible, taking into account the circumstances of the individual case".
- Furthermore, this is the case even when an agreement results in increased prices for consumers (paragraph 104).

(iii) The Commission accepts that the environmental qualities or characteristics of a product are parameters of competition. For example, the Commission is investigating whether 5 German manufacturers colluded "not to improve their products, not to compete on quality" by limiting the "development and roll-out of emission cleaning technologies for new diesel and petrol passenger cars" and they "denied consumers the opportunity to buy less polluting cars".[42] If environmental factors are a relevant parameter of competition it must be a factor relevant to their customers (indeed, the above statements by the Commission implicitly confirm this). If this is the case, it is logical to accept that improvements in these environmental factors is of benefit to consumers for the purpose of the assessment under Article 101(3).

(iv) The question also arises whether it is just the perception of a particular group of consumers of the environmental / sustainable benefits that needs to be assessed (the approach taken in the "Chicken of Tomorrow" case – see endnote 55). While this is superficially attractive, there is a strong case for taking a wider view:
- which 'consumers' views are to be taken into account? As discussed above, this may be purchasers of particular goods or society as a whole;
- the constitutional provisions of the treaty make it very clear that environmental protection and sustainable development are clear benefits for the Union (and therefore

for consumers) and it "only" remains to be assessed whether these benefits exceed the harm from the anti-competitive effect of the agreement (the "balancing" or "proportionality" principle).

(v) Finally, in considering what is a "fair share" of benefits 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? These sort of questions are relevant whenever we are doing a balancing act or applying the principle of proportionality (for example in Condition 1 of Article 101(3) or when assessing "abuse" under Article 102 (See Section 5 below).

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. For example, the Dutch competition authority (the ACM) looked at an agreement to close down 5 coal plants in the context of a government led initiative to promote sustainable growth and a switch to green energy. It concluded that this would raise energy prices and harm consumers and that the environmental benefits of the agreement were insufficient to offset the harm (see" Can Collusion Promote Sustainable Consumption and Production by Maarten Schinkel and Yossi Spiegel). Did the ACM attach the right weight to reducing emissions and improved air quality in that case?

**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[43] is an expression of the proportionality principle in EU law. Although I am aware that its application has led to a number of environmental agreements failing to be exempt from Article 101,[44] I consider the proportionality principle to be an important check on the broad approach (which I advocate) to the environmental improvement and progress of the first condition of Article 101(3). It also invites consideration of less restrictive ways of achieving sustainability goals. Take the example of one of the more difficult sustainability goals; paying sustainable prices to suppliers of agricultural products. Rather than buyers agreeing to pay a minimum price to suppliers, they might consider agreeing to set up a fund to help their suppliers in various ways – thus remaining free to agree their purchase prices individually.

**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.[45]

While I, again, consider this to be an important check on any potential misuse of Article 101(3), it is rarely going to prevent a sustainability agreement meeting the conditions of Article 101(3) and so do not propose to discuss it further.[46]

5. **The Standardisation Approach**

At the beginning of this Section 4 on Article 101, I suggested that one way in which more sustainability agreements might escape the prohibition of Article 101 (or do so more easily) might be to frame them as standardisation agreements.[47]

There is no specific regulation or exemption for standardisation agreements, and they would either need to fall outside Article 101(1), or meet the exemption conditions of Article 101(3), to escape the prohibition of Article 101. However, I mention them here for three reasons:

(i) Many sustainability agreements take (or could take) the form of standardisation agreements. For example, it seems likely that many of the animal welfare objectives might have been achieved in the "Chicken of Tomorrow" case if the arrangements had been framed as a standardisation agreement (see endnote 55);
(ii) The Commission's 2010 Horizontal Guidelines contain a specific chapter on standardisation agreements and make a number of helpful comments (including giving an example of an environmental agreement meeting the condition of Article 101(3) and noting that even agreements involving high market shares may still escape Article 101 completely).[48]
(iii) Several commentators have suggested that environmental agreements have a greater chance of complying with Article 101 if constructed and assessed as standardisation agreements.[49]

## 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.

(i) First, we have to apply the law as set out in the treaties. If that is difficult, so be it.
(ii) It is a dereliction of our duty as citizens (whether as lawyers, economists, judges or competition enforcers) to shy away from that which is important and focus on what is (often wrongly) perceived to be easy.[50]
(iii) In any case, it can be incredibly difficult and complex to assess even short-term price effects. Anyone who thinks otherwise has either never been faced with hundreds of pages of conflicting econometric evidence (I have) or is deluding themselves (or perhaps both!).
(iv) The balancing of (often conflicting) interests is not easy but it is exactly what courts and competition authorities already do. The principle of proportionality (mentioned several times already) is a good illustration of this. This balancing requirement is even written into the third condition of Article 101(3) (generally referred to as the "no more restrictive than necessary" test).[51]
(v) While we may often disagree with them in individual cases, competition authorities and courts are increasingly well-equipped to carry out this sort of balancing act. Not only is an assessment of evidence (both qualitative and quantitative) at the core of their work, the authorities and courts are employing people with increasingly diverse backgrounds and skill-sets (i.e. not only lawyers and economists but those with backgrounds in finance, psychology, IT and a wide range of businesses and industries).[52]
(vi) In any case, taking into account the full range of factors required by the treaties (i.e. more than the narrowly conceived consumer welfare effects) is anything but a "less economic" approach. On the contrary, it is an approach which is far more in tune with the original (and better) meaning of "economics" (see the discussion under "consumer welfare" in Section 3 above). It also 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.[53] There is no more reason to ignore

these techniques than there is to ignore any other efforts to quantify the effects of an agreement (or merger, alleged abuse, etc.).

Furthermore, there have been a number of cases where competition authorities have used various quantitative techniques in sustainability cases, the best known being the Commission's CECED[54] case and the decision of the Dutch Competition Authority in the "Chicken of Tomorrow" case.[55] While there is a place for quantitative techniques, there is no prerequisite to use them and estimates and/or a value judgment are often more helpful (see the discussion above of a "fair share for consumers" and the Commission's comments in its 2004 Exemption Guidelines).

(vii) It is sometimes suggested that taking into account issues such as the environmental impact of an agreement (or, indeed, a merger) will lead to the "politicisation" of the process. First, there is no more reason for the process to be "politicised" in the sense of competition authorities' independence being compromised than at present. Second, to the extent that what is meant is that the authorities will receive submissions from a wider range of interested parties (e.g. Environmental NGO's) then that is a welcome development. Large corporates spend millions on lawyers, economists, accountants and lobbyists (quite legitimately) arguing their case before authorities. If a wider range of interests are taken into account that can only "level the playing field" and be for the better – particularly bearing in mind the goals of the treaties discussed in Section 3 above).

(viii) Some have suggested that taking the concept of "fairness" into account in competition analysis is not practical. Certainly, it has its limitations. However, as Commissioner Vestager has said, fairness is about the "social rationale" of competition principles and not their application in individual cases. Certainly, it does not follow that just because something is "not fair" that competition law is infringed (but then it is not the case that anything that restricts competition infringes competition law). However, fairness is certainly something to take into account when balancing different factors and when applying the principle of proportionality. It is also a useful sense check when looking at the result of any competition analysis. Does this seem fair? Does it look right? If nothing else, it might be a prompt to look again at the analysis[56].

(ix) 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) or the prudent solution (e.g. where it is difficult to get consensus and/or everyone comfortable with the competition implications of initiatives concerning price or giving rise to significant commonality of costs).[57]

## SECTION 5
## ABUSE OF DOMINANCE

I will deal more briefly with Article 102 TFEU which concerns the abuse of a dominant position (usually by large companies) as it is less central to the day to day tension between competition law and climate change (at least under the current competition law framework).[58]

Nevertheless, there are circumstances where it may be possible to use Article 102 to attack certain practices which are objectionable from a sustainability point of view and/or which are damaging to the environment (i.e. using it 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. as a "shield"). I will consider each in turn:

### 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,[59] 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.

While this paper has generally focused on the relationship between competition law and the environment / climate change, Article 102(a) provides an opportunity to consider the use of competition law to tackle other non-sustainable practices such as the depressingly low prices paid by some retailers (or other intermediaries) to farmers for their produce. There is, of course, an environmental / climate change aspect to this in that such low prices encourage an excessive use of scarce resources and low prices (e.g. for bananas, cocoa, coffee) are discouraging many sustainable land use practices.[60]There is also an obvious political / social / economic / moral angle. What is "fair" about a price if a farmer cannot afford to feed his/her children?[61]

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

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

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

(i) we are not considering any fancy new or innovative category of abuse (à la Astra Zeneca[62]) but the very first category of abuse set out in Article 102 itself (a provision that has not changed since 1957). Furthermore, the concept of fair trade lies not only at the historic heart of competition law and antitrust,[63] it is expressly written into the constitution of the EU. For example, Article 3(5) of the Treaty on European Union states clearly that one of the EU's objectives is to "contribute to … the sustainable development of the earth" and to "free and <u>fair</u> trade" (emphasis added).

(ii) Consistent with this Article 39 TFEU states that one of the key objectives of the Common Agricultural Policy ("CAP") is to "ensure a fair standard of living for the agricultural community" and that "supplies reach consumers at reasonable prices" (and note it says "reasonable" prices not "low" prices). Indeed, Article 42 TFEU makes it clear that (*inter alia*) the competition rules only apply at all to trade in agricultural products to the extent that "account [is] taken of the objectives set out in Article 39".

(iii) Yes, it is difficult to determine what is a "fair" purchase price (what is a reasonable mark-up?). Yes, the competition authorities and courts are (quite rightly) reluctant to become price regulators. But, authorities and courts already condemn selling prices both as excessively *high* (an "exploitative" abuse)[64] and as unacceptably *low* (whether as predatory or otherwise exclusionary).[65] These issues are difficult (and authorities and courts should only intervene with care) but the conceptual issues raised by unfair purchasing prices and unfair selling prices are very similar. Just as the law has developed around what is an unfairly high ("excessive") selling price, or unfairly low ("predatory") selling price, so too could rules be developed to determine what is an unfairly low purchase price.[66]

(iv) I am not suggesting that purchase prices negotiated by retailers should be attacked on a regular basis. First, the issue only arises if a purchaser holds a dominant position (either individually or, exceptionally, collectively) – which is rarer than people often realise.[67] Second, just as it is difficult to establish that a selling price is "excessive"[68] or predatory it is likely to be difficult to establish that a low purchase price is "unfair". For these reasons it is likely that where there is a systemic problem (e.g. the low prices paid by the global north to producers in the global south for primary products such as cocoa, coffee or bananas, the issue will generally be better tackled through legislation.)[69]

(v) We are not alone. In particular, concerns have been expressed by the European Parliament's Economic and Monetary Affairs Committee over unfair and unsustainable low prices paid to farmers:

- "the concept of a "fair" price should not be regarded as the lowest price possible for the consumer, but instead must be <u>reasonable</u> and allow for the <u>fair remuneration</u> of all parties along the food supply chain".
- "consumers have interests other than low prices alone, including animal welfare, environmental sustainability …"
- "greater account [should] be taken of the value of 'public goods' in food pricing".
- "EU competition policy [should] look beyond the lowest common denominator of 'cheap food'".
- "the <u>costs of production must be taken fully into account</u> when agreeing prices in contracts between retailers / processors and producers with the intention of ensuring <u>prices that at least cover costs</u>".

(emphasis added)

Paragraph 78 of the 2018 Annual Report on Competition Policy.

Note also that this approach is entirely consistent with the natural meaning of consumer welfare discussed in Section 3 above.

(vi) Another ( more radical) way of tackling this issue might be to treat the subsequent *selling* price as predatory; i.e. after taking into account all the upstream costs of production and supply (as discussed in endnote 66) but otherwise applying the usual rules on predatory pricing (as, for example, set out by the CJEU in Akzo).[70]

(vii) It is also worth noting that national competition regimes have acknowledged the need to tackle abuses by suppliers. For example, the Italian Competition Authority has been given power to punish conduct resulting in "an unwarranted exercise of bargaining power on the demand side".[71]

(viii) Although space does not permit a fuller analysis, one could see Article 102 being used as a "sword" to attack a wide range of breaches of international standards including the exploitation of child labour, environmental depravation, human rights, etc. In many instances, the most obvious way to deal with these issues is by regulation but, in principle, there is no reason why Article 102 should not "plug the gaps". Not only would such use be consistent with the CJEU's acceptance that the categories of abuse are not closed[72] but 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. Furthermore, 3 of the 4 types of abuse listed in Article 102 are exploitative rather than exclusionary. This is hardly surprising given that competition law and policy is supposedly concerned with protecting consumers (and this regardless of whether a "consumer welfare" standard is espoused). Is it not time to re-think the balance and tackle more "exploitative abuses"?

**B. Article 102 as a "shield"**

Article 102 could also be used more as a "shield" where a dominant company (or exceptionally companies which are collectively dominant) engage in proportionate behaviour to tackle environmental or climate change issues which might otherwise be considered to be abusive (and there is no way of achieving these objectives in a way that is less restrictive of competition): i.e. there is an "objective justification" for behaviour which is *prima facie* abusive.[73]

There is a strong case for this when Article 102 is read in the light of the constitutional provisions of the treaties considered in Section 3 above. In particular:

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

Although there are few decided cases of direct relevance the following might be instances where environmental considerations might provide an "objective justification" for conduct that might otherwise be abusive:

(i) charging a higher price in order to cover environmental costs or re-invest in environmental protection[74]: i.e. as a defence to allegations of <u>excessive pricing</u>;

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

(iii) making the purchase of one product from the dominant company conditional on the purchase of another environmentally friendly product (e.g. sale of a printer conditional on the purchase of recyclable toner cartridges)[75]: i.e. as a defence to an allegation of <u>tying</u>.

(iv) Offering exceptionally low prices to generate trial of a new environmentally friendly product: i.e. as a defence to an allegation of predatory pricing.
(v) Refusing to grant access to an essential facility to a user who intends to use the facility for environmentally unfriendly purposes (e.g. denying access to diesel vehicles – provided this was done on a non-discriminatory basis): i.e. as a defence to an allegation of refusal to supply.[76]

What I hope the above examples illustrate is that it should not be necessary for a dominant company to justify its actions on the basis of its own commercial (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 often (not always) have the economic clout to make a real difference.[77]

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

## SECTION 6
## MERGERS

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

(i) In the substantive assessment of the merger under Article 2 of the EU Merger Regulation ("EUMR");[78]
(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.

I will comment on each of these in turn.

### 1. The Substantive Review of Mergers under Article 2

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

The language here is similar to that in Article 101(3) discussed in Section 4 above and, for essentially the same reasons, not only can, but must, take into account (where appropriate) environmental and sustainability issues. As previously argued this is very clear from the "constitutional" provisions discussed in Section 3 above, a view confirmed by recital 23 of the EUMR which says that "the Commission must place its appraisal within the framework of the achievement of the fundamental objectives referred to in the [constitutional provisions] of the treaties".[79]

This should work both ways. Most obviously it 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"). Logically, but more controversially (and, certainly more exceptionally), it can play a part in coming to a conclusion that a deal should be blocked – or only cleared subject to remedies (i.e. the merger "would significantly impede effective competition" – i.e. there is a SIEC).[80]

I argue that this works both ways as Article 2 of the EUMR is completely neutral on this point. Unlike Article 101 TFEU, Article 2 of the EUMR is not in two parts. It does not say "if there would be a SIEC a merger may nevertheless be cleared if there is compensatory technical or economic progress", etc. On the contrary, whether or not there is "technical or economic progress", etc. is a factor which the Commission "should take into account" in making its "appraisal of the concentration" as to whether it is "compatible with the common market" – i.e. in making the initial determination as to whether there is, or is not, a SIEC.[81] Indeed, in paragraph 76 of the Horizontal Merger Guidelines, the Commission says it "performs an overall competitive appraisal of the merger" and that this includes taking into account the "development of technical and economic progress".[82]

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

(i) the Commission tends to analyse factors such as environmental benefits under the heading "efficiencies" (discussed at Part 2, below)" : ie they are essentially taken into account *after* a *prima facie* finding of a SIEC (i.e. as if it were a two-part test à la Article 101).

(ii) Merger control is a prospective analysis and it is necessary to analyse the likely future effects of a merger. While this is a matter of evidence and proof on a case by case basis, I expect it will be easier to satisfy a competition authority or court of the likely environmental benefits of a merger than of the likely future environmental harms.[83]

(iii) Probably reflecting the above, the Commission recently made some comments hostile to taking into account environmental and climate change factors as a basis for challenging the Bayer / Monsanto deal.[84]

The above said, there is considerable evidence suggesting that mergers rarely achieve the claimed benefits[85] and there is increasing concern over rising levels of concentration in many industries (and some markets).[86] While this is a vast and controversial topic beyond the scope of this paper, I would only note here that we should probably be less afraid of "false negatives" (resulting from blocking a deal or clearing it subject to wide-ranging conditions) than we have been in the past (particularly bearing in mind how few deals are actually blocked).[87]

**2. Environmental Factors as "Efficiencies"**

As mentioned above, the Commission tends to analyse (positive) environmental factors as "efficiencies" to see if they might "counteract the effects on competition, and in particular the potential harm to consumers, that [the merger] might otherwise have had".[88]

At paragraphs 78 to 88 of its Horizontal Merger Guidelines, the Commission sets out the three cumulative conditions that "efficiency claims" must satisfy if they are to lead to a merger being cleared: they have to benefit consumers, be merger-specific and be verifiable. A few brief words on each:[89]

(a) Benefit Consumers[90]

As argued in considering the second condition of Article 101(3) in Section 4 above, environmental benefits and action to combat climate change are clear consumer benefits and should be taken into account under the EUMR for the same reasons – with appropriate weight being given to both the legal requirements of the constitutional provisions of the treaties and the moral imperative to fight climate change.

(b) Efficiencies must be "merger specific"

In the Commission's words this means the efficiencies must be "a direct consequence of the notified merger and cannot be achieved to a similar extent by less anticompetitive alternatives".[91] This last element is similar to the "no more restrictive than necessary" consideration in Article 101(3)[92] and can be seen as an expression of the proportionality principle. It is an important (and I would suggest legitimate) limitation on the extent to which environmental concerns can 'justify' a merger as there may well be less restrictive means of achieving the same environmental objectives.

(c) Efficiencies must be "verifiable"[93]

> To the extent that this simply means that the Commission must be "reasonably certain that the efficiencies are likely to materialise" this is a legitimate limitation on the extent to which environmental factors can justify a merger. That said, given that many environmental benefits (and even more so initiatives to combat climate change) may take some time to materialise (and can be difficult to quantify) it is important: (i) to avoid taking an overly narrow financial approach (and that estimates and value judgments are made);[94] and (ii) that the overriding objectives of the treaty (as set out in the "constitutional" provisions) are kept in mind.

This prompts a concluding criticism of the approach to environmental factors as "efficiencies". As mentioned above, the Commission proceeds *as if* there was a two-part test: i.e. first a finding of a competition problem; second a finding of "efficiencies" that might counteract this. The problem with this approach is that it appears to switch the burden of proof: "it is for the notifying parties to show to what extent the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger, and therefore benefit consumers".[95] While it is accepted that it is for the parties to provide relevant facts and other evidence in relation to the assessment of the appraisal of the deal under Article 2 of the EUMR, the overall legal burden of proof still lies with the Commission if it is to block a deal.[96]

**Remedies**

Many mergers are approved on a conditional basis – i.e. subject to the acceptance of remedies by the competition authorities.[97] 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.[98]

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 minimised.

It might be helpful for guidelines to be drawn up to deal with such remedies, most obviously in the Remedies Notice – see endnote 98). Indeed, these might be similar to the Commission's guidelines on "efficiencies" discussed at point 2 above in that they should:

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

Such an approach would be consistent with the "balancing act" and the principle of proportionality discussed in Section 3: 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.

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

(i) Remedies to deal with likely negative environmental effect of a merger would often (but not always) take the form of a so-called "behavioural" remedy (e.g. a commitment not to introduce certain 'bad' environmental practices of the acquirer into the business of the target). The Commission has repeatedly stated a preference for more "structural" remedies saying that they will accept "non-divestiture remedies such as behavioural provisions, only in specific circumstances".[99] In practice, however, the Commission has often accepted behavioural remedies (particularly as part of a package of remedies).[100] Furthermore, whether or not a remedy is accepted depends, not on the form it takes, but whether (in combination with any other elements of the remedy package) it does, or does not, eliminate the concerns identified in the course of the appraisal of the concentration.[101] The more this appraisal takes proper account for environmental and sustainability considerations (in accordance with the constitutional provisions of the treaties), the more likely it is that a remedy including environmental or other sustainability concerns will be appropriate. [102]

(ii) It is established Commission practice that, before remedies can be offered and accepted, "it is the responsibility of the Commission to show that a concentration would significantly impede competition" and that the Commission "is not in a position to impose unilaterally any conditions to an authorisation decision".[103]

    In practice, the position is much more fluid and the parties will often offer a remedies to deal with anticipated or expressed concerns of the Commission. It remains the case, however, that the eventual conditional clearance will state that a SIEC was initially found but that the concerns identified were removed by the remedies offered. Arguably, however, this is not necessary under the EUMR.

    Article 8(2) of the EUMR simply states that "where the Commission finds that, following modification by the undertakings concerned [i.e. by the offer of remedies] a notified concentration fulfils the criterion laid down in Article 2(2) [i.e. that there is no SIEC] … it shall issue a decision declaring the concentration compatible with the common market".

    There is no pre-requirement in the EUMR itself that a SIEC is found <u>before</u> the remedy is taken into account, only that there is no SIEC, <u>after</u> taking into account the remedy.[104] This suggests the Commission has a greater discretion to accept remedies than is sometimes felt to be the case.

(iii) While the above may be controversial, what is already well accepted is that the Commission has more scope to accept remedies in phase 1 of the EUMR as these are designed to remove the "serious doubts" about the merger that the Commission has at the end of phase 1.[105] For this reason, remedies offered in phase 1 (to avoid a phase 2) may be more extensive than those which might have been considered necessary at the end of a phase 2.

### 3. Article 21(4) of the EUMR

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

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

(i) they might fall within one of the current "legitimate interests" – most likely "public security" (e.g. the need to ensure a secure and sustainable supply of energy).
(ii) a member state could apply to the Commission to have an environmental / sustainability / climate change concern "recognised" by the Commission as a legitimate interest. This should have a very good chance of being recognised by the Commission given that it is required by Article 21(4) (third paragraph) to carry out an "assessment of its compatibility with the general principles and other provisions of community law". This must include consideration of the constitutional provisions of the treaties which require that environmental protection and sustainable development "must" be taken into account in all Union policies and activities (see Section 3 above).
(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. In this sense it is a potential complement to Article 2 of the EUMR which I have suggested is more likely to lead to a merger with *positive* environmental effects being cleared than to one with *negative* effects being blocked (see point 1 above).

**4. 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.[106] Indeed, some (e.g. Spain) contain express reference to environmental issues.

Unlike measures taken by member states under Article 21(4) EUMR (point 4 above) mergers, which are not reviewed under the EUMR but under national rules, can (if national law permits) either be blocked notwithstanding an *absence* of competition concerns or be allowed *despite* competition concerns. A striking example of 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).[107]

It is also noteworthy that various regimes outside the EU allow for a wider range of issues (particularly social and sustainability concerns) to be taken into account. The best known (and, arguably, the most progressive) of these is South Africa.[108]

## SECTION 7
## 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 (much of that was done in the 1990s[109] – relatively unnoticed – at least by many competition lawyers and economists).

Essentially, what is needed is a change in the way that competition law and economics are applied. We need to remind ourselves constantly that competition (or, indeed the study of economics) is not an end in itself but a means to an end, a means to achieve other goals.[110] We therefore 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.

Whether we are lawyers, economists, academics, competition officials or judges, we need to ask ourselves whether the competition work we are (or have been) doing is really achieving what we want it to achieve? It may be achieving many of the things that we endorse (tackling harmful cartels and flagrant abuses of power, and approving some efficiency enhancing mergers) but if it is also endorsing (directly or indirectly) environmental degradation and unsustainable practices and standing in the way of vital action to fight climate change then it has to change – and it can.

As argued throughout this paper, the most urgent change needed is to how we think about competition and economics; to get away from a range of arcane, technocratic and unhelpful concepts (such as a narrow focus on short-term price effects); and to get back to what our treaties (and their equivalents in other jurisdictions) actually say.[111]

That said, we live in a conservative, risk-averse culture and it will also be necessary to 'nudge' the establishment in the right direction. A number of writers and reports have made detailed proposals in this regard[112] but I would mention just five:

(i) Modernising guidelines to reflect the realities of a world where climate change is an existential threat. Two examples would be:
   - Including in the successor to the 2010 Horizontal Guidelines, a chapter on climate change, sustainability and the environment (to facilitate collaborative action in these areas);[113]
   - Including in the Merger Remedies Notice, guidance on remedies to deal with the collateral damage of mergers that might otherwise be blocked if such remedies are not put in place.[114]

(ii) 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[115]

(iii) If guidelines are not sufficient to get urgent collaborative action going,[116] 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).

(iv) 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 positive example would be to add a reference to the environment, sustainability and climate change as a "legitimate interest" in Article 21(4) of the EUMR.[117]

(v) As a last resort, we could amend the treaties to make even clearer the need to take environmental and sustainability issues into account when applying the competition provisions (and perhaps add an express reference to climate change).

If these, and no doubt other,[118] changes are made then competition law can cease to be "part of the problem" and become "part of the solution".

POST SCRIPT

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

## ENDNOTES

**SECTION 1 – CLIMATE CHANGE: THE MORAL IMPERATIVE**

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

[2] Kate Raworth, "Doughnut Economics: seven ways to think like a 21st century economist."
Michelle Meagher, "Competition is Killing us."

[3] 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") noted that "the narrow interpretation of Article 101 of the TFEU by the Commission's horizontal guidelines has increasingly been considered an obstacle to the collaboration of smaller market players for the adoption of higher environmental and social standards" (paragraph 48).
See also "Competition Law and Sustainability. A Study into Industry Attitudes towards Multi-Stakeholder Collaboration in the UK Grocery Sector". This noted that:

- "market actors will not act unilaterally on sustainability issues due to a fear of competitive disadvantage that could result from an increase in their cost base".
- "fear of an unfavourable ruling under competition law is a deterrent to a significant number of retailers from collaborating on sustainability issues, particularly on issues of low incomes and wages in the supply chain".
- "there is likely to be direct, long-term consumer benefit from multi-stakeholder collaboration for sustainability purposes, for example, by reducing the risks of a collapse of production due to extreme weather".

[4] But see further Endnote 26 below. See also the discussion in Section 5 on using Article 102 as a "sword" to attack unfair purchase prices.

**SECTION 3 – THE GOALS OF COMPETITION LAW AND THE "CONSTITUTIONAL" PROVISIONS OF THE TREATIES**

[5] The importance of this point is emphasised in paragraph 7 of the Parliamentary Report ( see endnote3) which: "underlines the fact that competition rules are treaty based and, as enshrined in Article 7 of the TFEU, should be seen in the light of the wider European values underpinning Union legislation regarding social affairs, the social market economy, environmental standards, climate policy and consumer protection; takes the view that the application of EU competition law should address all market distortions, including those created by negative social and environmental externalities."

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

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

[8] Most leading textbooks include a discussion of the goals of competition law. For a classic exposition of the Chicago school of competition theory see R. Bork, "the antitrust paradox: a policy at war with itself". Bork refers

to a revolution in antitrust law that transformed it from a "social policy" to "merely law" (I am tempted to say "merely economics" but that would be doing economics a disservice).
For a more recent discussion, see Ariel Ezerachi, "Sponge", [2017 Journal of Antitrust Enforcement, Volume 5, Issue 1] and Ariel Ezerachi and Maurice Stucke, "The Fight over Antitrust's Soul" [2017 Journal of European Competition Law Practice, Volume 9, Issue 1].

[9] Thomas J Horton "Fairness and Antitrust Reconsidered: An Evolutionary Perspective", McGeorge Law Review, Vol. 44, Issue 4, January 2014.

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

[11] There is an interesting parallel here. Just as Kate Raworth argues in Doughnut Economics (endnote 2) that we shall be agnostic about growth, and that GDP should be a possible incidental by-product of the pursuit of wider [more sustainable] goals, so too writers like Maurice Stucke argue that 'consumer surplus should be a by-product of a competitive process that provides economic opportunity and freedom ["Should Competition Policy Promote Happiness?" Maurice Stucke: http://papers.ssrn.com].

[12] See, for example, Horton (endnotes 9) and Townley (Endnote 17).

[13] See endnote 2. For an account of how the original and more holistic approach to economics has changed, see Jonathan Aldred "License to be Bad – how economics corrupted us" (e.g. at Chapter 1).

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

[15] See Vaclav Smil "Growth Studies" and the Financial Times, September 14/15,2019 "The Limits of Humanity" at page 10.
[16] Progressive authors have articulated this in slightly differing terms but these authors would all agree that this goes beyond what Maurice Stucke calls the "mindless pursuit of accumulating cheap products". Stucke focuses on "the happiness literature" and, while accepting that this does not provide an analytical framework for analysing routine antitrust issues he concludes that this "literature suggests that competition policy in industrial wealthy countries would be more efficacious (in terms of increased well-being) in promoting economic, social, and democratic values, rather than simply promoting a narrowly defined consumer welfare objective" (see endnote 11).

While Stucke focuses on "happiness" and well-being, others, such as Horton, focus on "fairness" concluding that "a workable antitrust fairness standard can be developed and applied" (see endnote 9). While not written into Commission guidelines his work finds a strong echo in multiple speeches and press releases by Commissioner Vestager. A focus on fairness (at least in terms of outcomes) also helps ensure that the business community and the wider public sees the competition authorities and their work as legitimate.

The European Commission in its 2004 Exemption Guidelines says the "aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources" (para. 35). Although I would object that consumer welfare is not in the treaties this seems reasonably workable so long as (a) "consumer welfare" is read in its natural meaning (as discussed above) and (b) the term "efficient allocation of resources" encompasses sustainability (e.g. the renewability of those resources) as it would on a natural reading and, in particular, when interpreted in the light of the 'constitutional provisions' considered above.

**SECTION 4 – ARTICLE 101. NEED AGREEMENTS PROMOTING SUSTAINABILITY BE CAUGHT BY ARTICLE 101 AND, IF THEY ARE, SHOULD THEY BE EXEMPTED?**

[17] Some good examples include:

- 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;
- Environmental Integration in Competition and Free-Movement Laws by Julian Nowag;
- Is There (Still) Room for Non-Economic Arguments in Article 101 TFEU Cases by Chris Townley;
- A Company's Guide to Environmental Action by Alexandra Teorell [(2019) JurMO2. 20191];
- The Interface between Competition and Regulation in EU Law by Cyril Ritter (unpublished);
- Struggling with Article 101(3) TFEU: diverging approaches of the Commission, EU Courts and Five Competition Authorities by Or Brook [CMLR 56: 121-156, 2019].

[18] For example, the European Commission's "Guidelines on the application of Article 81(3) of the Treaty" (2004) (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").

[19] See endnote 17.

[20] Subject always to the qualifications set out within the competition provisions themselves – notably the third and fourth conditions of Article 101(3). See further discussion of these conditions in Section 4.

[21] As Suzanne Kingston has concluded, "overall the CJEU has demonstrated itself to be a constitutionalist actor which is serious about the requirement to achieve real, substantive integration of environmental protection requirements into the EU's economic policies, as required by Article 11". It has "used what can be termed a "close look proportionality analysis" closely examining [that] the purported environmental aims were actually being realised, and in the least restrictive manner".
["The uneasy relationship between EU environmental and economic policies, and the role of the CJEU", Suzanne Kingston, UCD Working Paper in Law, Criminology & Socio-Legal Studies. Research Paper No. 13/2015.]

[22] Many others share my concern. See, for example, the concerns expressed by the Economic and Social Committee of the European Parliament and in the study into industry attitudes to multi-stakeholder collaboration referred to in endnote 3.

[23] Paragraph 179 of the European Commission's 2001 Horizontal Guidelines defined environmental agreements as "agreements by which parties undertake to achieve pollution abatement, as defined in environmental law, or other environmental objectives … in particular those set out in Article 174 of the Treaty [of the EC]". This provision is now Article 191 of the TFEU and states that Union policy on the environment shall contribute to the pursuit of the following objectives:
- preserving, protecting and improving the quality of the environment;
- protecting human health;
- prudent and rational utilisation of natural resources;
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combatting climate change."

I am not aware of a definition of 'sustainability agreements' and am aware that for some sustainability agreements might include a wider range of issues (for example, reflecting the UN Sustainable Development Goals). For me, a sustainability agreement is one that contributes to sustainable development. The Brundtland Commission defined sustainable development as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs". This is a broad concept but in this paper I am generally using the terms environmental and sustainability agreements interchangeably.

[24] Although the 2001 Horizontal Guidelines have been replaced by the 2010 Horizontal Guidelines, arguably they can be used to interpret the latter where they do not contain sufficient guidance. If the EU is serious about being a world leader in tackling climate change it is to be hoped that when the Commission updates the 2010 Horizontal Guidelines a chapter on sustainability agreements is not only included but sets out a clear roadmap that encourages their development. This would be consistent with the request by the Economic and Social Committee of the European Parliament in its 2018 Annual Report on Competition Policy where (at paragraph 48) it says that "the Commission should create legal certainty on the conditions under which collective

arrangements … for the purpose of sustainability … would be assessed under competition law, and encourage such initiatives within competition policy."

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

[26] Most of these agreements will understandably avoid any reference to price. However, it is worth recalling that even agreements between competitors concerning price are not necessarily caught by Article 101(1). For example, an agreement between purchasers to pay a "fair" or "reasonable" price to farmers might escape Article 101(1) if (a) the market share of the purchasers was small and/or (b) the cost of product was a small percentage of the price of their downstream product. Consider, for example, a cup of coffee. Suppose this costs £2.50 on the high street, of this about 10p is for the coffee itself (4%). Of this 10p, only about 1p (10%) typically goes to the grower - i.e. 0.4% of the cost of the cup of coffee on the high street [Source: Allegra Strategies, International Trade Centre and Financial Times, 3 June, 2019]. However, these issues need to be analysed carefully on a case by case basis.
The difficulties are illustrated by various attempts over the years to pay a decent price to EU farmers for milk. For example, an MOU involving French cooperatives, farmers and retailers which included a minimum and maximum price was not challenged by the French competition authorities (but it concerned only one milk by type and one supermarket).
Under the Common Agricultural Policy there are general exemptions in Articles 39-42 TFEU and a number of sector specific derogations from competition law. For example, Article 149 & 150 of the CMO Regulation allows joint negotiations in the supply of milk by producers, provided that this does not concern more than 33% of the total national production [see "EU Competition Law and Sustainability in Food Systems. Addressing the Broken Links" at page 48).

[27] Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie. Case C-67/96. ECR 1999 1-05751.

[28] See Section 4 at point 4.

[29] Examples include:
(a) Albany (see Section 4, Point 2 above and endnote 27)
(b) Wouters – self-regulation of the Dutch bar (banning multi-disciplinary partnerships) [Case C309/99 Wouters [2002] ECR 1-1577].
(c) Meca-Medina – anti-doping rules in sport [Case C-519/04 [2006] ECR 1-6991]. If this case confirms the Wouters reasoning and extends it to include public health requirements, then why should it not be extended to environmental and sustainability issues? Both have a similar status on the "constitutional" provisions of the treaty (see Section 3 above).

[30] For a discussion of these concepts see Whish & Bailey, Competition Law, 9th Edition, pages 132 – 144. See also the judgment of the UK's Competition Appeal Tribunal in the Ping case at paragraphs 199 to 207 [2018 CAT 13].

[31] Contrast the approach to anti-doping rules in Meca-Medina (endnote 29 above) and to the restrictions of the Irish beef industry in Case C-209/07 Competition Authority v. Beef Industry Development Society [2008] ECR 1-8637, paragraph 21].

[32] See endnote 17 for some examples.

[33] This is not to suggest that such an approach is fatal to the argument for a proper and expansive interpretation of Article 101(3) (my point is it is not necessary to take this approach). For example, the CFI (now the General Court) held in the Métropole case that: "the Commission is entitled to base itself on all considerations connected with the pursuit of the public interest in order to grant exemption under Article 85(3) of the Treaty". [Joined Cases T-528/93 etc, Métropole Télévision v. Commission [1996] ECR II-649, paragraph 118].

[34] XXV Report on Competition Policy. Interestingly, this statement was made in 1996. If this was the position in 1996, before the current environmental 'constitutional' provisions were included in the treaties in their current form, then logically this is even more the case now.

[35] 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% 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%) 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.

[36] 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".

[37] This point is echoed in paragraph 78 of the 2018 Annual Report on Competition Policy of the European Parliament's Committee on Economic and Monetary Affairs. See point A(v) in Section 5.

[38] See endnote 35 above.

[39] See paragraphs 87 & 88 of these guidelines (cited at endnote 18).

[40] In this context see "Hunger Games: Connecting the Right to Food and Competition Law" by Ioannis Lianos and Amber Darr [https://ssrn.com>abstract=341]

[41] This is not to suggest, however, that we should not be concerned about the extra-territorial effect of pollution ( or social harms) generated within the EU, or environmental damage effectively off-shored by importing products with particularly adverse effects on the environment and climate change ( be it beef, cars or oil). It means that tools other than competition law are required; eg regulations or taking imported goods into account when designing and assessing carbon neutral targets. See also Section 5 on using article 102 as a "sword".

[42] Case number AT.407178 – Car Emissions. See Commission press releases of 18 September 2018 and 5 April 2019 ("Antitrust: Commission sends Statement of Objections to BMW, Daimler and VW for restricting competition on emission cleaning technology").

[43] 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 in Section 4 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".

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

[45] 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".

[46] For a discussion of this, see Suzanne Kingston at pages 287-292 (cited in endnote 17).

[47] Paragraph 252 of the Commission's 2010 Horizontal Guidelines says: "standardisation agreements have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply".

[48] Note, for example, the following comments in these guidelines:
Paragraph 258: "Standardisation agreements generally have a positive economic effect".

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

[49] A good example is Alexandra Teorell's "Company Guide to Environmental Action" (see endnote 17). Consistent with the argument in this paper she concludes that "environmental agreements can form a solution for tackling climate change". Another example is a speech by a very senior DG Competition Official, Luc Peeperkorn, on "Sustainability Agreements: an EU Competition Law Perspective" (unpublished]. "Sustainability agreements are a form of standard-setting agreement. When assessing these agreements, the rules developed for standard-setting agreements provide a first point of reference". Both of these recent papers helpfully summarise the conditions under which they consider environmental / sustainability agreements may avoid being caught by Article 101(1) completely.

[50] As Maurice Stucke has noted: "antitrust analysis over the past thirty years overstated the importance of competitive dynamics that were easier to assess (productive efficiencies and short-term price effects) and marginalised or ignored what was harder to assess (dynamic efficiencies; systemic risk; and political, social, and moral implications of concentrated economic power)". ["Should Competition Policy Promote Happiness?" [https://www.ssrn.com]
Similarly, Commissioner Kroes has noted "we cannot just wash our hands of responsibility and say that competition law cannot or should not protect the consumer against negative medium to long-term effects just because it is difficult to assess". [Speech at the Fordham Law Institute, 23 September 2005].

[51] See the discussion of condition 3 in Section 4 above. Interestingly, the European Commission itself said in a submission to the OECD in 1976 that: "striking a balance between competition and environmental policy was:

- relatively easy [in Article 101(3)] cases applying
- the principle of proportionality"

[OECD Competition Policy and the Environment (Paris, OECD 1976 at 74).]

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

[53] For an interesting discussion of these issues see Chapter 5 of Suzanne Kingston's "Greening EU Competition Law and Policy".

[54] See endnote 35 above.

[55] In the "Chicken of Tomorrow" case chicken producers came to an agreement to improve the welfare of chickens (and to replace 'regular' chickens with the 'chicken of tomorrow'). The Dutch Competition Authority (the ACM) attempted to quantify the benefits of these improvements (based on a consumer survey) and found that the improvements came at a higher cost (1.45 eurocents per kilo) than a combination of what consumers were willing to pay (68 eurocents per kilo) and the positive environmental effects (14 eurocents per kilo) (i.e. a total of 82 eurocents). They therefore concluded that the potential advantages to animal welfare did not outweigh the reduction of consumer choice and potential price increases and the initiative was abandoned. A criticism of the economic analysis of the ACM is beyond the scope of this paper. However, I would make two observations. First, any such analysis is very sensitive to the assumptions made and the questions asked in any consumer survey. Second, it paid scant regard to the longer term interests of future consumers and society as a whole on which I note the comments of the European Commission at paragraphs 87 and 88 of its 2004 Exemption Guidelines and its approach in the CECED case referred to in endnote 35. For further discussions of the "Chicken of Tomorrow" case see pages 26-28 of Ioannis Lianos' Polycentric Competition Law (see endnote 17).

[56] For a discussion on "fairness" see Thomas Horton ( cited at endnote 9) and "Fairness in EU Policy: significance and implications", Damien Gerard [Journal of European Competition Law & Practice, Volume 9, Issue 4 April 2018 pages 211-212.]
[57] See, for example, the issues discussed in endnote 26 and the regulatory exemptions cited there.

**SECTION 5 – ABUSE OF DOMINANCE**

[58] For a fascinating discussion of the wider problems with big companies and an eloquent plea for "stakeholder antitrust" see Michelle Meagher's forthcoming 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".

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

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

[61] The link between abuse of power and adequate food was shown clearly in 2010 by Olivier de Schutter who found a "direct link between the ability of competition regimes to address abuses of power in supply chains and the enjoyment of the right to adequate food" [Olivier de Schutter, "Addressing Concentration in Food Supply Chains", Briefing Note 03, December 2010, P1].

[62] See endnote 59 above.

[63] For example, the concept of fairness and fair competition was a major driver of the US Sherman Act of 1890. For a discussion of fairness and antitrust see Horton cited at endnote 9 and see Section 4 "Is it all too difficult?" at Part (viii) and endnote 56.

[64] For example, Napp Pharmaceuticals Holdings v. DG of Fair Trading [2002] EWCA CiV.

[65] See Akzo, for an example of predatory pricing [Akzo Nobel v. European Commission Case C-550/07P] and Intel for an example of exclusionary pricing [ Intel v. Commission C-413/14].

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

[67] For example, it is unlikely to reduce the difficulty of low prices paid by supermarkets in the UK for milk or by purchasers globally for bananas, coffee or cocoa. On this see also endnote 26.

[68] See, for example, the UK Competition Appeal Court's judgment in "Pfizer" [Flynn Pharma v. CMA [2018 CAT II]].

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

[70] See endnote 65 above.

[71] Article 62 of the Law 27/2012.

[72] cF Astra Zeneca (endnote 59).

[73] 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.

[74] This approach would be consistent, not only with the "polluter pays" principle, but also the approach suggested above in relation to challenging abusively *low* prices for failing to properly reflect environmental costs (see Section 5.A above).

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

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

[77] Note, for example, the "Statement on the Purpose of a Corporation" made in August 2019 by the "Business Roundtable" (representing US companies with a market cap of trillions of dollars). Their statement includes a commitment to:

- "dealing fairly and ethically with our suppliers"; and to
- "protect the environment by embracing sustainable practices across our businesses".

In itself this is to be commended. That said, the latest "Responsible Business Tracker" of UK companies found that while 86% of those surveyed had a "purpose statement" only 17% had a plan to make sure it was practised at every level ["Business in the Community: responsible business tracker"].
Another example is the so-called "B Corps", companies which have made a legal commitment to maintain certain minimum social and environmental standards (certified by "B Lab", a global not for profit organisation). As of June 2019 there were over 2,750 certified B Corporations across 64 countries.

For a discussion as to whether "companies [are] right to abandon the shareholder first mantra?" see the Financial Times 26 August, 2019 page 11 (and subsequent letters). See also "The limits of the pursuit of profit" in the Financial Times of 24 September, 2019 at page 12.

**SECTION 6 - MERGERS**

[78] Council Regulation (EC) No. 139/2004 of 20 January 2004.

[79] 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 Section 3 above and, in particular, Article 11 TFEU.

[80] 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").

[81] See endnote 80

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

[83] On this see the discussion at point 2(B) (ii) in Section 4.

[84] There was widespread opposition to the Bayer / Monsanto deal by environmental NGOs and a wider public on the basis of environmental and climate change concerns. Commissioner Vestager responded that "while these concerns are of great importance, they do not form the basis of a merger assessment", arguing that such concerns "are handled by my colleagues and national authorities and are subject to European and national rules to protect food safety, consumers and the environment and climate" [Commission letter of 22 August 2017]. I make no comment as to whether, in this particular case, she was right that these matters were best dealt with by other means but, as shown above, the idea that risks to the environment and climate "do not form [part of] the basis of a merger assessment" is contrary to Article 2 of the EUMR – especially when properly read in the light of the constitutional provisions of the treaties (see Section 3).
[Bayer / Monsanto, Commission Decision of 21 March 2018]
For a Commission perspective on this case, see "Competition Merger Brief" 2/2018 – Article 2. For a critical view of the deal, see Ioannis Lianos with Dmitry Katalevsky, "Merger Activity in the Factors of Production Segments of the Food Value Chain: A Critical Assessment of the Bayer / Monsanto merger", CLES, UCL London, Policy Paper Series: 1/2017, ISBN: 978-1-910801-13-0 (or, more briefly: "Commission must block Bayer-Monsanto Merger").

[85] See, for example, Blonigen and Pierce on the "Evidence of the effects of Mergers on Market Power and Efficiency" (US National Bureau of Economic Research, October 2016, Working Paper 22750). This found M&A "significantly increase mark-ups on average but have no statistically significant average effect on productivity". Other studies have repeatedly shown that mergers are value destroying from the perspective of the acquiring stakeholders.

[86] See, for example, "The Rise of Market Power and the Macroeconomic Implications", Jan De Loecker, Jan Eeckhout and Gabriel Unger, November 2018.

[87] For example, over the period 21 September 1990 to 31 July 2019 (over 19 years) the Commission received some 7,414 notifications of mergers of which only 30 (or 0.04%) were prohibited under Article 8.3 EUMR. A further 447 (or 6%) were cleared subject to remedies in either phase 1 or phase 2 (source: European Commission).

[88] See Recital 23 of the EUMR.

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

[90] Paragraphs 79 to 84 of the Horizontal Merger Guidelines.

[91] Paragraph 85 of the Horizontal Merger Guidelines.

[92] See Section 4, Condition 3 above.

[93] Paragraphs 86 to 88 of the Horizontal Merger Guidelines.

[94] See the discussion at Section 4, Condition 2 re: consumers receiving a "fair share of the resulting benefit" and, in particular, the extracts from the Commission's 2004 Guidelines on Article 81(3) [now 101(3)] cited there. Note also the discussion "is it all too difficult?" at the end of Section 4 above and the reference to modern environmental valuation techniques (at point (vi)).

[95] Paragraph 87 of the Horizontal Merger Guidelines.

[96] See, for example, Case T-87/05 EDP v. Commission.

[97] See Article 6(2) and Article 8(2) of the EUMR.

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

[99] See, for example, paragraph 69 of the Commission's Remedies Notice (endnote 98 above).

[100] For example, Diageo / Seagram decision of 8 May, 201-COMP/M.3779.

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

[102] Paragraphs 9 to 14 of the Remedies Notice discusses the "basic conditions for acceptable commitments".

[103] See paragraph 6 of the Remedies Notice.

[104] I am not aware of any judgment of the court on this point. There are, however, some comments by the CJEU which might suggest that the remedy can be no more extensive than necessary to remedy the competition concerns identified (see, for example, paragraphs 93 and 95 of EDP v. Commission cited in endnote 101). However, (i) the parties had accepted in that case that there was a SIEC so the court did not have to decide whether a SIEC was a pre-condition to a remedy; and (ii) any comments on Article 2 and remedies were obiter as the questions asked of the court concerned an alleged "abuse of power" and not an alleged breach of Article 2.
In this context, I also note that the CJEU (and its predecessor) has expressly confirmed in antitrust cases that the Commission is entitled to accept "commitments" under Article 9 of Regulation 1/2003 in circumstances where it would not have been entitled to impose such measures under Article 7 of Regulation 1/2003 [e.g. Case 441/07P Commission v. Alrosa, paragraphs 46 and 48-50]. A possible objection to this analogy is that the purpose of Article 7 is to bring an infringement to an end, whereas a decision under Article 9 is intended to address concerns the Commission has raised following a (so-called) "preliminary assessment" arguably analogous to the "serious doubts" which the Commission may have at the end of a phase 1 review under the EUMR – see Section 6(3)(iii) above. It is noteworthy, however, that commitments accepted under Article 9 of Regulation 1/2003 (which effectively "clear" arrangements being looked at under Article 101 or 102) are often similar to remedies which effectively "clear" a deal under the EUMR.

[105] See Article 6(2) of the EUMR and paragraph 6 and footnote 4 of the Remedies Notice.

[106] 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".

[107] *[Ministerial approval Miba/Zollern,August 20,2019-http://www.dkart.de.ministerial]*

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

**SECTION 7 – SOME CONCLUSIONS**

[109] Principally by the Maastricht Treaty of 1992 and the Treaty of Amsterdam 1999. See the resulting provisions post the Treaty of Lisbon 2009 set out in Section 3.

[110] See Section 3 – the Goals of Competition Law.

[111] Again, see Section 3.

[112] See, for example, the "Conclusions and Practical Solutions" set out at pages 50-54 of the "Addressing the Broken Links" paper cited at the end of endnote 26. In particular, this includes eight points which "recommend some practical solutions on how to embed sustainability concerns into competition law from a regulatory and enforcement perspective". These fall under 3 headings: "interpretative changes"; "institutional changes"; and "regulatory changes" (see pages 52-54). See also the four recommendations of the Fairtrade Foundation paper on "Competition Law and Sustainability. A Study into Industry Attitudes towards Multi-Stakeholder Collaboration in the UK Grocery Sector" at page 19.

[113] See further the discussion in Section 4 on Article 101 and the dark cloud hanging over much needed collaboration.

[114] See Section 6 at Point 3.

[115] 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".

[116] Or, as one colleague put it after a training session on competition law designed to help one group coming together to promote 'clean air' and another to foster sustainable fishing, "you have emboldened me to do my job!"

[117] See Section 6, Point 5.

[118] 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 – see endnote 69).