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CLIMATE CHANGE, SUSTAINABILITY AND COMPETITION LAW IN THE UK

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Abstract

Climate Change is an existential threat. Competition law must be part of the solution and not part of the problem. My previous papers on this drew on the constitutional provisions of the EU treaties and remarks by leaders such as Commissioner Vestager to show how competition law need not stand in the way of urgent action and co-operation by the private sector to fight climate change. This new paper builds on this to show how climate change and sustainability can (and must) play a part in UK competition law. We must build on the CMA's commitment in its annual plan to prioritise climate change and to support the transition to a low carbon economy. It also shows how we can learn lessons from the Covid 19 crisis and apply these to the climate crisis.

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

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

You could also join the Inclusive Competition Forum ("ICF") which we have recently established: [\[www.inclusivecompetition.org\]](http://www.inclusivecompetition.org)

1. INTRODUCTION

Over the last year I have written and spoken extensively about Climate Change, Sustainability and Competition Law. For a number of reasons until now this has been entirely focussed on EU law. First, EU law is what I have spent most of the last 40 years studying, teaching and practising as a lawyer. Secondly, many of the principles discussed have a read over for other competition law regimes--especially those (like the UK) based on EU law. Thirdly, in economic, climate change and competition policy terms, the EU is vastly more important than that bit of Europe in which I happen to live (the islands just to the north of the French coast-variously know as Great Britain or the United Kingdom). But, fourthly, for so long as I was in denial about Brexit, it was less important to focus narrowly on UK competition law as in many cases EU law would apply.

It's now time to change that and attempt to see how climate change and sustainability can play a part in UK competition law. I would say up front that, in the absence of the clear constitutional provisions in the EU treaties, which mandate taking into account sustainability and environmental protection when implementing EU competition law, this is more complex. This article is therefore a first attempt to "dip a toe in the water". It is intended to start a discussion and I would welcome your ideas-especially positive ones as to how we can move forward on this.

My views on how climate change and sustainability must be taken into account in applying EU competition law are set out in a number of papers, particularly in that recently published in the Oxford Journal of Antitrust Enforcement.² These are summarized in section 2 below.

EU competition law continues to apply in the UK until the end of the (so-called) transition period. At the time of writing this is 31 December, 2020 although it seems sensible and possible (particularly in view of Covid 19) that this will be extended. It is not the purpose of this article to discuss the transition period, speculate on a potential future deal between the UK and EU, or to consider the multiple jurisdictional, procedural, substantive and practical questions to which this gives rise.³ I will only refer to these to the extent that they may be relevant to the interpretation of UK competition law in the context of climate change and sustainability.

²"Climate Change, Sustainability and Competition Law" [<https://lnkd.in/gNVZcVN>] . If you would like to read something shorter see also my paper on this topic in the CPI Antitrust Chronical of July, 2020 (which contains a collection of papers on "Antitrust and Sustainability") or my short piece on "Consumer welfare, sustainability and competition law goals", Concurrence No 2-2020, Art No 93496. See also excellent papers by Jordan Ellison "A Fair Share: time for the carbon defence?" [18 March, 2020, ssrn.com, sol 3] and Maurits Dolmans "Sustainable Competition Policy" [Competition Law Policy Debate, Vol 5 Issue 4 & Vol 6 Issue 1, March, 2020]

³ Those interested in this should look at the many guides produced by leading law firms. The most recent I have read is that from Ashurst of 28/3/20: "The transition period and a potential future deal: Brexit's practical impact on competition law". Those with a cold towel to hand could also look at the "European Union Withdrawal Act 2018" ("Withdrawal Act"), the European Union (Withdrawal Agreement)Act 2020, and the "Competition (Amendment etc) (EU Exit) Regulations 2019" (" The Competition Exit Regulations").

The structure of this paper is as follows. Section 2 summarises my views on, climate change, sustainability and competition law focussing on EU law. Section 3 looks at UK policy in this area and attempts to put it into a wider legal framework. Section 4 looks at UK antitrust (ie Chapters 1 and 2 of the Competition Act 1998-the UK equivalents of Articles 101 and 102 TFEU). Section 5 looks at UK merger control and Section 6 at market investigations. Section 7 rebuts some of the objections levied against taking sustainability into account in competition policy. Finally, Section 8 draws some conclusions, makes some concrete proposals for action (similar to those made in an EU context) and looks at some new ideas as to how the UK might embed sustainability into competition policy (not least of which is applying some of the lessons from the Covid 19 crisis to the climate crisis).

2. EU LAW

2.1. Summary

We face a ‘climate emergency’ in which ‘business as usual’ is not an option and in which a rapid move to more sustainable development is vital. Tragically, there is clear evidence that at the moment competition law (and, more importantly, misplaced fear of competition law) is having a chilling effect on urgent and necessary cooperative action by companies to fight climate change⁴This is particularly the case where a company acting unilaterally would incur increased costs which it could not recoup adequately from its customers and would thus incur a “first mover disadvantage”⁵.

Need competition law have this chilling effect?

My paper on EU law argues, no. Competition law need not be part of the problem and can be part of the solution. As Commissioner Vestager put it at a recent conference in Brussels where she recognised the need for collaboration between companies in this area: ‘every one of us –including competition enforcers-will be called on to make a contribution’.

The ‘constitutional’ provisions of the EU Treaties require sustainability and environmental protection to be taken into account when implementing **all** of the EU’s policies and activities. We need to get away from arcane and narrow concepts (such as a narrow focus

⁴ *I have witnessed this many times myself in over 35 years of practice as a competition lawyer; a recent survey of business by Linklaters points to this; and the European Parliament has noted that a narrow approach to competition law has “increasingly been considered an obstacle to the collaboration of smaller market players for the adoption of higher environmental and social standards” [see its annual report on competition policy, 2018].*

⁵ *For example, if one car manufacture increases its emission standards; one washing machine manufacturer increases the energy efficiency of its machines; or a light bulb manufacturer phases out bulbs with a short life, necessary as these initiatives are, they may not be viable if only done unilaterally by individual firms. As Commissioner Vestager has recognised, “sometimes business can respond to that demand [for more sustainable products] even better, if they get together”. Of course, it is not always necessary for firms to cooperate. Where the goal could be met equally well by unilateral action then cooperation would not be justified (this is the “proportionality” principle or “no more restrictive than necessary” rule). However, given the urgency of action to fight climate change the burden on companies to show that cooperation is necessary should not be set too high (as has been recognised by the CMA in its guidance in the context of the covid crisis--See for example, para 3.4 (c) of CMA 118 (cited in footnote 69 below)..*

on short-term price effects) and get back to what the treaties (and their equivalents in national jurisdictions) actually say. It's not so much the law that needs to change but our approach to it.

It is hoped that my papers will embolden legal and economic advisors and competition enforcers to take a more robust approach and thus facilitate much needed collaboration to tackle climate change.

My main concern and focus is on Article 101 TFEU but my papers also consider more briefly how sustainability could or should be taken into account under Article 102 TFEU and in merger control under the European Merger Control Regulation ("EUMR").

2.2. The "Constitutional" Provisions.

The key provisions for present purpose are Article 3 of the Treaty on European Union which sets out the EU's objectives (or goals) and refers, among other things, to the "well-being" of citizens, the environment and sustainable development, and Articles 7, 9 and 11 of the Treaty on the Functioning of the EU ("TFEU"). Critical here is Article 11 which says that:

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

This applies to **all** the EU's policies and activities: there is no exception for competition law. Article 37 of the EU Charter on Fundamental Rights essentially repeats this.

2.3. Agreements promoting sustainability need not be caught by Article 101 TFEU

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

- (1) Some agreements are unlikely to restrict competition at all;
- (2) Take the view that sustainability agreements essentially fall outside Article 101(1) completely (the "Albany" route⁶);
- (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);
- (5) Make more use of the more generous treatment of standardisation agreements (essentially a variant on (1) and (4) above).

My principal concern is that fear of competition law is inhibiting much needed cooperation to fight climate change and the move to a low carbon economy. My paper for the JAE therefore discusses each of these in some detail (see fn 2).

⁶ In the Albany case [*Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*. Case C-67/96. ECR 1999 I-05751], the European Court of Justice ("ECJ") essentially decided that Article 101 does not apply to collective bargaining.

2.4. Abuse of Dominance.

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, there is no reason, in principle, why it could not be used more widely to attack practices which are seen as unfair from an economic, political, social, environmental or moral point of view. One example might be the depressingly low prices paid by some retailers (or other intermediaries) to farmers for their produce⁷. Such use is likely to be rare and this would be as a complement to, not as a substitute for, regulatory action (which, in most cases, would be the first choice policy tool).

b. Shield

Exceptionally, sustainability issues might also be used more as a “shield” against Article 102 where a dominant company engages 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 might otherwise have been considered to be abusive.

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

2.5. Mergers.

My papers look at how environmental and sustainability issues should be taken into account under the EUMR-whether as a factor leading to a deal being cleared or blocked. I suggest that there are five ways in which sustainability and climate change issues can, and should, be taken into account in the assessment of mergers under the European system of merger control:

- (i) In the substantive assessment of the merger under Article 2 of the EU Merger Regulation (“EUMR”);
- (ii) When considering “efficiencies” under the EUMR;
- (iii) When considering “remedies”. In particular, I suggest that more use could be made of remedies to deal with harms caused by otherwise efficiency enhancing deals.
- (iv) Under Article 21(4) of the EUMR; and
- (v) When mergers are reviewed under national competition law.

Each of these is discussed in the JAE paper cited in fn 2.

⁷ While there are good social reasons for supporting some producers, there is also a sustainability/climate change angle. Low prices encourage an excessive use of scarce resources and some low prices (eg for bananas, coffee or cocoa) are discouraging many sustainable land use practices.

3. UK POLICY AND A POSSIBLE LEGAL FRAMEWORK.

3.1 The CMA's annual plan 2020/2021

a. Climate Change

I was delighted to see that the UK competition authority, the Competition and Markets Authority (“CMA”), included climate change in its latest annual plan for this first time⁸.

The CMA intends to exercise its functions with regard to 6 “strategic objectives”. One of these (in relevant part) is as follows:

“Climate change-supporting the transition to a low carbon economy. We will develop our understanding of how climate change affects markets and consider how, when exercising our functions, we can act in a way that supports the transition to a low carbon economy”.

The plan has a further page which elaborates on this. The most relevant part for present purposes reads:

*“We will communicate better to ensure that **businesses engaged in sustainability initiatives** know how to comply with competition law and **do not unnecessarily shy away from those initiatives on the basis of unfounded fears of being in breach of competition law**”⁹ (emphasis added).*

What can we take from this?

- a. First and foremost this is a high level recognition by the CMA that competition law and policy *is* relevant to climate change;
- b. Logically, to the extent that the law allows, the CMA should take the above into account in all its work, not only when applying competition law but also when deciding which cases to bring and, even more importantly, in deciding which cases *not* to bring; and
- c. It should inspire and embolden the CMA (and the UK government) to consider any necessary amendments to UK competition law and issue guidance (written and oral) to business (see further, proposals for action in Section 8 below).

b. Vulnerable Consumers

The CMA could also build on its stated aim to protect “vulnerable consumers”. Just as vulnerable consumers are the most likely to be ripped off by loan sharks, or to be exploited in bereavement, they are also the most likely to be affected by climate change whether it is because they live in houses with poor insulation, with no outdoor space, or along heavily polluted roads.

⁸ CMA 112. March 2020, Annual Plan. I note that the French “Autorite de la Concurrence” has also made sustainable development one of its “priority actions” for 2020.[see, for example, “Accords de Paris et Urgence Climatique: Enjeux de Regulation”. Mai, 2020 at page 16].

⁹ It also (quite rightly) makes it clear that the CMA will use its powers (including consumer protection powers) to correct false “green” claims.

In its latest Annual Plan protecting vulnerable consumers is the first stated of the CMA's "strategic objectives" in line with the UK government's latest "strategic steer" to it.¹⁰ The CMA says it will "promote the consumer interest in a holistic way" and will "use all our tools", not only to protect consumers but to "prevent harm accruing". This is excellent and, if used with imagination, is a strong base to ensure that competition law does not (at the very least) stand in the way of action to protect the environment and fight climate change which will harm, not only consumers in general, but hit vulnerable consumers hardest.

3.2 The Legal Framework

Clearly the CMA has to apply the above policy in accordance with the law. For antitrust this is primarily the Competition Act 1998 (CA '98) and for mergers and market investigations the Enterprise Act 2002 ("EA '02") (see sections 4, 5 and 6 below).

Under EU law it is clear that the equivalent provisions (Article 101 and 102 TFEU) have to be interpreted and applied in accordance with the "constitutional" provisions of the EU treaties which say that sustainability "must" be taken into account when implementing the competition law provisions of the TFEU (see section 2 above). Unfortunately, there is nothing equivalent to these "constitutional" provisions in UK law¹¹. The question therefore arises as to whether there are any other sources of law that might require climate change to be taken into account in applying UK competition law or, at the very least, be an aid to interpreting it in a way that is sympathetic to climate change and sustainability (consistent with the CMA's "strategic objective" set out above).

Potential candidates might be: The UK Climate Change Act; the Paris Agreement on climate change and human rights law. How, if at all, might these be relevant?

a. The Climate Change Act 2008

The Climate Change act 2008 (as amended in 2019) commits the UK government by law to reducing greenhouse gas emissions by at least 100% (net zero) by 2050. It also requires the government to assess the risks and opportunities from climate change for the UK and to produce a climate change risk assessment every 5 years.

While the CMA's annual plan is very much "in the spirit" of this act, the Climate Change Act does not have any "constitutional" status and cannot (at least on its own) override the terms of the competition legislation.

b. The Paris Agreement.

Under the Paris Agreement of 2015, the EU (on behalf of all member states-which included the UK at the time), along with some 160 other countries, made pledges to reduce emissions up to 2030 (to hold the increase in global average temperatures to

¹⁰ Department for Business, Energy & Industrial Strategy, July 2019, "The Government's Strategic Steer to the Competition and Market's Authority"

¹¹ But see the proposals in Section 8.10 and 8.11 below

well below 2 degrees C above pre-industrial levels and to pursue efforts to limit warming to 1.5 degrees C).¹²

The problem with the Paris Agreement for present purposes is that it is an international agreement and the UK has what is called a “dualist” approach to international agreements. This means that they do not have any direct affect in the domestic law of the UK unless translated into domestic legislation which has this affect. Thus the Paris Agreement cannot (at least on its own) directly affect UK competition legislation.

c. The Heathrow Airport Decision

In the Heathrow Airport Decision the Court of Appeal held that the government’s approval of a third runway at Heathrow airport was unlawful as the government had failed to take into account its firm policy commitments on climate change under the Paris Agreement.¹³ Does this provide a basis for finding competition decisions of the CMA or of UK courts unlawful if they do not take into account commitments under the Paris Agreement?

Unfortunately, my conclusion is no (but I would love someone to prove me wrong). I am no planning law expert but my reading of the judgment is that it is based narrowly on specific provisions of planning law which require the minister making the relevant decision to take into account “government policy” and the government’s commitment to the Paris Agreement was held to part of “government policy”.¹⁴ Unfortunately, I am not aware of anything analogous in competition law to the above obligations in planning law (but, again, please show me that I am wrong on this).

d. Exclusion from the Competition Act

Exceptionally, one possibility might be to use the UK government’s powers to exclude an agreement, or agreements of a particular description (either generally or in specified circumstances) from the prohibition on anti-competitive agreements in CA ’98. This is where the relevant minister is satisfied that this is “appropriate” to:

“avoid a conflict between [UK competition law] and an international obligation of the UK”¹⁵.

It is clear that the Paris Agreement (and other agreements relating to climate change) are international obligations of the UK¹⁶. It is also clear that, if competition law prohibits agreements which would make a substantial contribution to reducing UK emissions of greenhouse gases, this makes it more difficult for the UK to meet its commitments under the Paris Agreement to reduce these emissions. It cannot therefore be excluded that circumstances may arise that would make exclusion of certain agreements

¹² Neither the Paris Agreement nor the commitments under the UK Climate Change Act are affected by the UK leaving the EU.

¹³ *R (on the application of Plan B Earth) and others v Heathrow Airport Ltd and others* [Case nos: C1/2019/1053 and others].

¹⁴ The minister was not required to follow that policy so long as it was “taken into account”. Still less, did the court itself express any view as to the compatibility or otherwise of a third runway with the Paris Agreement.

¹⁵ Competition Act 1998, Schedule 3, paragraph 6.

¹⁶ This is clear from the Heathrow case cited at fn 13

“appropriate”. It is likely that these circumstances will be exceptional, and the exclusion order would have to be tightly drawn, but we need all the tools we have to fight climate change and this possibility should not be overlooked. That said, if and when the need arose, it would be much better to have an exclusion order(s) making express provision for climate change and sustainability (see section 8 at point 8 b which discusses the use of exclusion order powers in the context of Covid 19 and the lessons this provides for the climate change crisis).

e. The Urgenda Decision.

In December 2019, the Dutch Supreme Court delivered a landmark judgment in the Urgenda case.¹⁷ In this it ruled that the Dutch state was required to reduce, by the end of 2020, its emission of greenhouse gases by at least 25% compared to 1990.

The court first recognised the “*dire consequences*” of climate change and that this “*will jeopardise the lives, welfare and living environment of many people all over the world, including in the Netherlands*”.

Next it looked at 2 key provisions of the European Convention on the Protection of Fundamental Freedoms (ECHR). Article 2 protects the right to life and Article 8 protects the right to respect private and family life. Under the case law of the European Court of Human Rights (ECtHR), a contracting party is obliged by these provisions to “*take suitable measures if a real and immediate risk to people’s lives or welfare exists and the state is aware of that risk*”¹⁸. This includes “*environmental hazards that threaten large groups or the population as whole, even if the hazards will only materialise over the long term*”. Furthermore, Article 13 ECHR requires national courts to provide effective legal protection.

The court recognised the international consensus that there was an “*urgent necessity*” to reduce emissions and that every state must “*play its part*”. The Netherlands had said it would reduce its emissions by 25-40% by 2020 and it was no longer open to it to reduce these unilaterally to 20%-- which would only create much greater risk down the line.¹⁹

The Dutch Constitution required the Dutch Courts to apply the provisions of the ECHR in accordance with the interpretation of the ECtHR. The supreme court upheld the Dutch court of appeal’s judgment that the state’s policy on greenhouse gas reduction “*is obviously not meeting the requirements pursuant to Articles 2 and 8 ECHR to take suitable measures to protect the residents of the Netherlands from dangerous climate change*”. The Dutch government was therefore ordered to reduce greenhouse gas emissions by 25% by the end of 2020. How it does so is up to it.

¹⁷ *Supreme Court of the Netherlands, Number 19/00135 of 20 December, 2019*

¹⁸ This is consistent with several other judgments of the ECtHR to the effect that, while it “*would be inappropriate for the Court to adopt a special approach to environmental protection by referring to a special status of environmental human rights*”, “*Article 8 could include a right to protection from severe environmental pollution*”. See *Hatton v UK* of 8 July 2003 at para 96 and the registry summary (which concerned Heathrow Airport) and *Lopez Ostra v Spain* of 9 December, 1994.

¹⁹ *Unless the state explained how a future acceleration in the reduction would be feasible and effective-which it had not done.*

f. Human Rights in the UK

Human Rights are primarily protected in the internal legal order of the UK by the Human Rights Act of 1998 (HRA '98). This was passed to give effect to rights under the ECHR and these include the rights under Articles 2 and 8 which were the basis of the Urgenda decision considered above. Furthermore UK courts and tribunals (like the Dutch courts) must take into account the jurisprudence of the ECtHR.

While, the HRA '98 may not be a “constitutional” provision as such, it has many similar effects – some of which could potentially affect the application of competition law in the context of the climate emergency. In particular:

(i). Section 3(1) provides that *“so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights”*.

This clearly applies to all competition legislation including the CA '98 and the EA '02 and to its application by the CMA, sectoral regulators and all UK courts and tribunals. Thus an interpretation of any of these provisions that runs counter to convention rights (for example Articles 2 and/or 8) would be unlawful.

(ii) This is also clear from Section 6(1) which states that *“it is unlawful for a public authority to act in a way which is incompatible with a Convention right.”*

(iii) Finally, Section 4 provides that if a court *“is satisfied that [any] provision [of primary legislation] is incompatible with a Convention right, it may make a declaration of that incompatibility.”*

While point (iii) above seems unlikely to be relevant to any part of UK competition legislation, points (i) and (ii) would seem to put the UK courts in a very similar position to those of the Dutch courts. Thus, if a decision were made by any part of the UK state, including the CMA and sectoral regulators, that was inconsistent with the UK's international obligations (eg under the Paris agreement) or with its commitments under the Climate Change Act to the extent that either Article 2 or 8 was engaged, then that decision would be open to challenge under the HRA'98.

It is to be hoped that it will be rare that a decision will have such an effect but the Urgenda case shows how powerful the Article 2 and 8 rights can be in the context of the climate emergency. Furthermore, I see no fundamental difference between the Netherland and the UK in this respect-especially as some recent cases have shown how the UK Supreme Court is prepared to defend fundamental rights and freedoms in the face of executive overreach.²⁰

Perhaps the most important point is that we (ie courts, the CMA and competition law advisors) should not be afraid to interpret and apply UK competition law provisions in a

²⁰See, for example, R (on the application of Miller) v The Prime Minister and others, 24 September 2019. [2019] UKSC 41.

manner that is consistent with both our stated policy and our international commitments on climate change.

The above should be borne in mind when considering the role that climate change and sustainability play under UK antitrust (Section 4 below), in merger control (Section 5 below) and in market investigations (Section 6 below).

4. ANTITRUST-AGREEMENTS AND ABUSE OF DOMINANCE

In my papers on EU law (as summarised in Section 2 above), I drew on the constitutional provisions of the EU treaties and interpreted Articles 101 1 and 102 TFEU in the light of them to :

- (i) Set out 5 ways in which sustainability agreements (particularly those to fight climate change) might escape the prohibition in Article 101 on anti-competitive agreements;
- (ii) Suggested that (exceptionally) Article 102 might be used as a “sword” to tackle unsustainable practices such as unfair purchase prices paid to farmers; and that
- (iii) Sustainability considerations might sometimes provide a defence (“objective justification”) to an allegation that a particular practice was an abuse of a dominant position.

Given that UK law does not have (at least not directly) the same “constitutional” provisions on sustainability and environmental protection as EU law, is the position different under UK antitrust law? Happily my answer is “no”-it need not be different.

- (i) First and foremost the Chapter 1 prohibition on anti-competitive agreements and the Chapter 2 prohibition on abuse of dominant position in the CA '98 are (for all relevant purposes) identical to Articles 101 and 102 TFEU.
- (ii) Secondly, although I argue that Articles 101 and 102 must be interpreted in the light of the constitutional provisions of the EU, much of the case for taking into account sustainability and climate change under EU law follows from a straight forward reading of the competition provisions themselves. For example:
 - The reference to “improving production”, “improving distribution” and to “technical progress” in the first condition of the exemption provision is in Article 101(3) TFEU itself (and in its equivalent in Section 9 CA'98); it is not read into Article 101(3) as a result of the constitutional provisions; and
 - “Unfair purchase ..prices” are referred to in Article 102 TFEU (and its equivalent in the Chapter 2 prohibition in CA '98) and again are not read into Article 102 as a result of the TFEU's constitutional provisions.

Consistent with this, most competition decisions of the Commission and of the courts have not needed to draw on the constitutional provision of the TFEU but are based directly on the competition provisions themselves.²¹

²¹ This holds true even for progressive decisions such as that of the European Commission in the *CECED* case where the Commission held that an agreement to improve the environmental performance of washing machines was exempt from Article 101(*CECED*, OJ 2000 L187/47).

(iii) At present, Section 60 of the CA '98 requires the CMA ,other sectoral regulators, and UK courts to interpret UK antitrust law consistently with EU law except when there is a relevant difference which would seem unlikely (or only very rarely) to be relevant in the case of climate change and sustainability issues;

(iv) Article 60(A) of the CA'98 says that after the transition period (currently ending on 31 December, but which may be pushed back), the CMA and UK courts must generally ensure that there is “no inconsistency” between UK competition law and pre-Brexit EU competition law: ie the TFEU and judgments of the European Court.²² Furthermore, (for better and for worse) the CMA and courts must “have regard” to relevant decisions and statements of the Commission.²³ Again this suggests that there is no reason for a difference of approach under EU and UK antitrust law to climate change and sustainability.

(v) It is possible that the above feature of Section 60(A) will be amended but, unless it actually prohibits taking into account decisions of the European courts and the Commission (and, absent a coup by Nigel Farage and Jacob Rees Mogg, that is not going to happen) there are good reasons to expect that the interpretation of UK and EU provisions in this area will remain very closely aligned (at least insofar as is relevant for consideration of climate change and sustainability). In particular;

- UK courts regularly look for inspiration from other legal systems;
- In this case the relevant legal provisions are identical;
- In many instances the particular issue may be looked at by both the UK and EU authorities in “parallel proceedings” (and they will often co-ordinate their investigations); and
- Most competition officials and many UK judges have spent their professional lives steeped in EU law and will not quickly “unlearn” their EU heritage (the present author being but one example).

(vi) The CMA's inclusion of climate change in its latest annual plan as a “strategic objective” (Section 3.1 above) does not suggest that the CMA is intending to downgrade the role of climate change and sustainability in UK antitrust. Indeed, it signals quite the opposite--an intention to give a much greater priority to climate change considerations. When in an optimistic mood I even hope that the CMA may take a more progressive approach in line with its latest annual plan and embolden the Commission to do so.

(vii) Finally, it is hoped that the UK competition authorities will, at the very least, be emboldened in their decisions by the Climate Change Act, the UK's international obligations (legal and moral) under agreements such as the Paris Agreement and in extreme cases will be mindful of the UK's obligations under the ECHR as a result of the Human Rights Act 1998 (see Section 3.2 above).

²² There are some exceptions to this set out in section 60(A) (7) of the CA'98 but there is no obvious reason why these should be relevant to sustainability and climate change considerations (and , if they are, these cases will be rare).

²³ See Section 60 (A) CA'98 as inserted by para 23 of the Competition Exit Regulations (see footnote3).

5. MERGER CONTROL

While EU and UK competition law on agreements and abuse of dominance (considered above) are, for most relevant purposes, identical, there is a greater difference in the rules applicable to mergers.

First the basic legal tests in EU and UK merger control are slightly different. The key test under the EU merger control regulation (“EUMR”) is whether or not the merger is likely to result in a “significant impediment to effective competition” (“SIEC”). Under UK law the question is whether or not the merger is likely to result in a “substantial lessening of competition” (“SLC”). In practice, in most cases they are virtually identical²⁴.

Secondly, there is no equivalent in UK law to Article 2(1) (b) of the EUMR in UK law. This includes in the assessment criteria the “development of technical and economic progress provided that it is to the consumer’s advantage and does not form an obstacle to competition”.

Thirdly, the EUMR (like the antitrust rules considered at 4 above) is grounded in the constitutional provisions of the EU treaties for which there is no direct UK equivalent (although, as we have seen in Section 4, this is less of an obstacle than it might appear to be at first sight).

That said, as, after the transition period, in many instances both the European Commission and the CMA will be looking at the same merger in “parallel proceedings”, and exchanging ideas and information on the deal, it is possible that the approach of the Commission could influence that of the CMA (and vice versa). However, even if this were the case, this would be a very indirect and unsatisfactory way of taking into account sustainability concerns in UK merger control. Furthermore, the Commission has so far been very reluctant to take account of such concerns.²⁵

We therefore need to look at other ways to take into account sustainability concerns in UK merger control. I see **5 potential candidates**:

a. Quality and Innovation.

An important element of competition is competition on quality and innovation. Many of the effects of mergers most relevant to sustainability in general, and climate change, in particular, are likely to fall within this head. For example, if a merger is likely to lead to the production of more sustainable products (eg less polluting products or goods using fewer natural resources) then those goods can be seen as being more innovative and of a higher quality.

²⁴ As is implied by the CMA in para 1.16 of its “Merger Assessment Guidelines” where it notes that “the underlying economic approach to assessment carried out by the [CMA] is generally similar to that carried out by the European Commission” [*Merger Assessment Guidelines of September 2010 of (the then) OFT and Competition Commission. OFT 1254*].

²⁵ See for example the Bayer/ Monsanto merger discussed in “*Competition Merger Brief*” (2018) 2/2018 6.

b. Efficiencies

The CMA recognises that “efficiencies arising from a merger may enhance rivalry, with the result that the merger does not give rise to an SLC”.²⁶ For example, if the merged entity can produce products using fewer natural resources that is a clear “efficiency”. It would help, however, if the CMA updated its guidance in this area to reflect such factors and sustainability issues more generally.

c. Relevant Customer Benefits.

The CMA may decide not to open a detailed investigation into a merger if:

“any relevant customer benefits in relation to the relevant merger situation concerned outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition concerned”²⁷

A benefit is a “relevant customer benefit” if it is a benefit to “relevant customers” in the form of

- (i) “lower prices, higher quality or greater choice of goods or services in any market in the UK “; or
- (ii) “greater innovation in relation to such goods or services”²⁸.

A number of points are interesting here:

- As noted above, many effects of mergers relevant to sustainability may result in goods which are of a higher quality or in greater innovation and thus be capable of being a relevant customer benefit.
- The CMA expressly notes that these benefits are not limited to efficiencies affecting rivalry²⁹;
- Account can be taken of benefits to consumers in markets other than where the SLC is found (ie it is wider than the Commission’s view of EU law). This is particularly helpful in the context of environmental benefits (eg it’s not just the buyers of goods in a particular market who benefit from cleaner air if their production results in less pollution and the emission of fewer greenhouse gases)³⁰;

²⁶ See Section 5.7, “Efficiencies” in the Merger Assessment Guidelines cited in fn 24 above

²⁷ EA ‘02, section 22(2) (b).

²⁸ EA ‘02, section 30(1) (a).

²⁹ Para 5.7.3 of the Merger assessment Guidelines (FN 24).

³⁰ This is consistent with the approach taken by the CMA’s predecessor (the “OFT”) in the “Supply of Fuel Oils Case” where in an exemption decision it held that “**the public, and hence consumers generally**, will benefit from the fuel oil allocation process during an oil fuel emergency because priority will be given to users who are concerned with providing emergency services, maintaining public safety and a safe environment, running public services, supplying food, running transport systems and providing fuel and power” [Case CP/1730-00/S of 25/10/2001 at para 64]. The French Autorite de la Concurrence has also stated clearly that in merger control it takes into account the “environmental dimension” when considering consumer welfare [see paper cited in footnote 8 at page 10].

- “Relevant customers” includes future customers³¹. Again this is helpful as the benefits of less polluting production methods or less polluting goods will be felt, not only by us but by our children and grandchildren; BUT
- The concept of “relevant customers” is limited to the parties’ customers and their customers down the chain.³²

The last point is a serious obstacle to the utility of the relevant customer benefits exemption as currently drafted. Under EU law there is a good argument that the “consumers” who must get the “advantage” of the technical or economic progress to which a merger may give rise are a much wider group than just the direct purchasers (and their customers down the line)³³. Unfortunately, this argument does not work in UK merger law in the face of an express statutory provision to the contrary (Although, again, I would love to be proved wrong).

One simple option would be to provide a much broader definition of “relevant customers”. For example it could be extended to cover all customers in a substantial part of the UK.

However, in my view, it would be much better to include a new provision dealing with climate change and sustainability analogous to that for relevant customer benefits. This could be done by adding a new sub-clause to Section 22 (2) of the EA ‘02 expressly relieving the CMA from a duty to refer a merger to a detailed investigation if:

“the climate change or sustainability benefits of the relevant merger situation concerned outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition concerned”.

The judgment as to whether or not to make open a detailed investigation would remain with the CMA but it would no longer be under a “duty” to do so in the above circumstances (as under the customer benefits provision).

d. Public Interest

Under the EA ‘02, the government can intervene in a merger where certain “specified” “public interests” are at stake. If they are, the minister takes the ultimate decision as to whether the CMA conducts a detailed investigation into the merger and takes the ultimate decision whether to block it or clear it, either conditionally or unconditionally-in each case on the advice of the CMA³⁴.

The “specified considerations” of public interest are set out in Section 58 of the EA ‘02. At present the only one of potential relevance to climate change and sustainability is “national security”. This might for example capture considerations of sustainable energy supplies. However, in most cases where a merger raises sustainability concerns, the public interest

³¹ Enterprise Act, Section 30(4) [This point sits oddly with the point made above that account can be taken of benefits to consumers in markets other than where the SLC is found].

³² Enterprise Act, Section 30(4).

³³ See EUMR Article 2(1)(b) and the discussion of “consumers” who must get a “fair share” of the resulting benefits of an agreement if it is to benefit from an exemption under Article 101(3) in Section V, exemption route, condition 2, in my JAE article cited in fn 2. See also the discussion of this in Jordan Ellison’s paper on a “fair share” (also cited in fn 2).

³⁴ See, in particular, Sections 45 and 54 of the EA ‘02.

concerns currently specified are unlikely to be relevant meaning that the UK government would have no power to intervene.³⁵

It would therefore be preferable if “sustainability and climate change” were expressly added to Section 58 as “specified considerations”³⁶. Again, it must be emphasised that this would not compel any action by the government (still less the CMA). It would simply give the government the legal *possibility* to intervene (on the advice of the CMA-and perhaps others such as the Environment Agency and/or the Committee on Climate Change) and then to decide whether or not to make a decision based on climate change/sustainability considerations (again on the basis of expert advice)³⁷

e. Remedies

Another positive way forward might be to make greater use of remedies and (in appropriate cases) 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.³⁸In this context note that, where the CMA finds that a merger has resulted (or may be expected to result) in an SLC, it is “*required to decide whether action should be taken to remedy, mitigate or prevent the SLC or any adverse effects resulting from the SLC*” (emphasis added). Furthermore, the CMA can either take action itself or recommend that action be taken by government, regulators or other public authorities.³⁹ This could therefore lead to action by a range of other bodies to mitigate any negative effects on the environment such as local authorities or the Environment Agency. Again this would be consistent with the CMA’s strategic objective of “*supporting the transition to a low carbon economy*” (as per its Annual Plan discussed at 3.1 above). It would also be consistent with the CMA’s legal obligation “*to have regard to the need to achieve as comprehensible a solution as is reasonable and practicable*”.⁴⁰

6. MARKET INVESTIGATIONS

The other area where UK competition law differs from (and goes beyond) EU competition law is in the possibility to carry out market investigation references (“MIR”s) and take a range of remedial action following them. **3 aspects** of this merit comment: the adverse

³⁵ From a substantive point of view the MIBA /Zollern case illustrates how this might work (although the legal process in Germany is different). This is a decision of the German Economics Ministry in August 2019 to allow the Miba/ Zollern joint venture that had previously been blocked by the BKA (the German Federal Cartel Office). The minister ruled that the positive effects of the transaction for the environment and climate protection outweighed the competitive disadvantages of the merger (citing noise reduction, reduced fuel consumption and, more generally, climate protection and a sustainable environment policy) [*Ministerial approval Miba/Zollern, August 20, 2019-<http://www.dkart.de/ministerial/>*]

³⁶ This can be done by ministerial order and would not require primary legislation (EA ‘02, Section 58 (3)).

³⁷ In this context it is noteworthy that the OFT (the predecessor to the CMA) has in the past expressly noted that “environmental considerations” could be added into the legislation as a specified public interest consideration. [OECD Roundtable, on horizontal Agreements in the Environmental Context 2010 at para 3.3 (page 112)].

³⁸ On this see Section VII Mergers, Remedies in my JAE Article cited in fn 2.

³⁹ See CMA Merger Remedies, 13 December, 2018 [CMA 87] at para 3.2 and EA02 Sections 35 and 36.

⁴⁰ See CMA 87 (cited at fn 39) at para 3.30 and EA02 Section 73(3).

effect on competition (“AEC”) test; the public interest possibilities; and the broad scope of outcomes/remedies.

a. The “AEC” test

The UK market investigation regime allows the CMA:

*“the opportunity to assess whether competition in a market is working effectively, where it is desirable to focus on the **functioning of the market as a whole** rather than on a single aspect of it or the conduct of particular firms within it”⁴¹ (emphasis added).*

Furthermore, this regime has been extended to give the CMA the power to carry out “cross-market” investigations where the concerns exist in more than one market. The CMA has recognised that this is particularly useful where the “sources of consumer....detriment have the potential to affect competition adversely across multiple distinct markets”.⁴²

This is a very flexible tool and allows the CMA to investigate features of markets which may give rise to anti-competitive effects but which are not easily caught by the traditional competition rules considered above. The concerns which the CMA looks into are very wide ranging, often industry wide, and the “overarching framework allows the investigation to tackle adverse effects on competition (AECs) from any source”. In practice the CMA is looking to see if there is a “well-functioning market” (or markets).⁴³

On the face of it this looks like the ideal tool to look at broad ranging issues involving the interactions between sustainability and competition which are often not market specific and certainly wider than individual companies. This possibility merits much more detailed consideration but one example might be the way in which the failure of many prices to reflect true costs of production (by excluding so-called “externalities”) may be distorting competition between competitors. For example, a company using green energy may be bearing 100% of its energy costs whereas its competitor using a “dirty” fuel is off loading some of its costs onto society. How is this a “well-functioning market” in which competition is not distorted?⁴⁴

b. Public Interest

⁴¹ Guidelines for Market investigations: their role, procedures, assessment and remedies, April, 2013, at para 18 [CC3 (Revised).]

⁴² Enterprise and Regulatory Reform Act 2013, section 13; EA ‘02, Sections 131(2A) and (6) and CMA 3, Market Studies and Market Investigations: supplemental guidance on the CMA’s approach”, July, 2017 at para 2.36.

⁴³ CC3 (see fn 41) at paras 19 and 30. More technically the CMA is required to decide “whether any feature , or combination of features, of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services in the UK or a part of the UK” [EA ‘02, section 134(1)]

⁴⁴ The 2013 version of the CMA’s guidelines (CC3 referred to in Fn 41) fails to recognise this commenting at para 19 that “the focus of an investigation is always on competition” [which is correct, subject to the “public interest” issue discussed below) but sustainability is an aspect of competition (quality, innovation etc) and competition is distorted by sustainability considerations (eg by inconsistent approaches to the costs of pollution). The guidance is therefore wrong when it suggests that “there may be other problems in the market- for example, “externalities”, such as air or water pollution, the cost or benefit of which is not transmitted through prices-which fall outside the ambit of a market investigation”. I would invite the CMA to update this in the light of its “strategic objective” of fighting climate change and “supporting the move to a low carbon economy (see Section 3.1 a above and the CMA’s Annual Plan discussed there).

Since 2013, the relevant government minister can also ask the CMA to look into certain specified “public interest” considerations alongside the competition issues.⁴⁵ The *“intention is to bring the public interest markets regime into line with the public interest mergers regime and to provide a more holistic and expert assessment of the competition and public interest issues together”*⁴⁶

This makes sense as it gives the UK

“the option of drawing on the CMA’s investigative expertise to look across markets cases at issues that relate to competition and go wider, rather than having to create independent inquiry bodies”.⁴⁷

Again this seems to provide an ideal mechanism for the CMA to look into issues in markets with potentially adverse effects on climate change, sustainability and competition in a “more holistic and expert” way. Furthermore the minister has express powers to appoint a public interest expert to advise the CMA⁴⁸. This might be, for example, someone from the Environment Agency or the Committee on Climate Change.

There is, however, one snag. The regime only applies to “specified” public interest considerations. At present the only one specified is national security. While this may exceptionally be relevant (eg in relation to energy supply) the climate change emergency cries out for “climate change and sustainability” to be specified as a public interest consideration.⁴⁹ This would be consistent with the CMA’s strategic objective in relation to climate change and “supporting the transition to a low carbon economy” (Section 3.1 above).

c. Remedies.

The CMA has an extremely wide range of options at the end of an investigation⁵⁰. The only point I would make here is to note that these are much wider than those of the CMA (or European Commission) after an antitrust or merger investigation. Not only may it make orders or accept undertakings under its competition powers, but it can use its consumer protection powers or make recommendations that remedial action be taken by others such as government, regulators and public authorities. This latter option may often be relevant where climate change and sustainability are concerned (and I hope I have been careful to emphasize that competition law is only part of a bigger picture and that regulation -or other regulatory action-is often more appropriate than competition enforcement). MIRs are a flexible tool to help determine which is the most appropriate course of action in any given case.

⁴⁵ EA02, Section 139.

⁴⁶ ERRA 2013, Explanatory notes at para 264. On public interest considerations in a merger context see further section 5 d above.

⁴⁷ CMA 3 (fn 42) at para2.20.

⁴⁸ See ERRA 2013 explanatory notes at para 270.

⁴⁹ This can be done by ministerial order without the need for primary legislation [EA02 Section 153]. This would be consistent with my call for climate change and sustainability to be specified as a public interest consideration in the UK merger regime (see section 5 d above).

⁵⁰ See CC3 (fn 41) paras 69 to 86 and Annex B.

7. “YES WE CAN!” OR, IS IT “ALL TOO DIFFICULT?”

Sadly, even some of those who appear to be concerned about climate change, sometimes suggest that it is “too difficult” to take into account wider issues than 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-fold⁵¹. In particular:

- (i) First, we have to apply the law as set out in the relevant legislation. If that is difficult, so be it.
- (ii) It is a dereliction of our duty as citizens to shy away from that which is important and focus on what is perceived to be easy.⁵²
- (iii) In any case, it can be incredibly difficult and complex to assess even short-term price effects.
- (iv) The balancing of (often conflicting) interests is not easy but it is exactly what courts and competition authorities already do.
- (v) Competition authorities and courts are increasingly well-equipped to carry out this sort of balancing act.
- (vi) It is in my view a “less economic approach”. Taking into account the full range of factors required by the treaties is an approach which is far more in tune with the original (and better) meaning of “economics” and provides opportunities to take account of the considerable development in environmental economics in recent years such as new techniques for the valuation of the benefits from environmental resources and initiatives.⁵³

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

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

8. SOME CONCLUSIONS AND PROPOSALS FOR ACTION

Although, the position under EU and UK competition law is subtly different, I have found nothing in UK law that undermines my conclusion that the current narrow approach to (or view of) competition

⁵¹ For a fuller rebuttal of the naesayers arguments see Section 7 of my JAE paper on “Climate Change, Sustainability and Competition law” cited in fn [2]

⁵² 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].

⁵³ For an interesting discussion of these issues see chapter 5 of Suzanne Kingston’s “Greening of EU Competition Law and Policy”. There have been a number of cases where competition authorities have used various quantitative techniques in sustainability cases, the best known being the Commission’s CECED case [CECED.OJ 2000 L187/47] and the decision of the Dutch Competition Authority in the “Chicken of Tomorrow” case [See, for example, pages 26-28 of Ioannis Lianos, *Polycentric Competition Law*].

law is certainly not inevitable and is, in many respects, illegal.⁵⁴ 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 private sector initiatives to combat climate change. In other words: competition law is part of the problem.

The good news is that a great deal can be done without a change to the law. Essentially, what is needed is a change in the way that competition law and economics are viewed and sometimes applied. We need to look at our competition laws afresh and think again about what economics is really about.

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

1. Positive Statements and action by Competition Authorities.

Top of my list is more positive statements from the competition authorities as to what can be done without infringing competition law (and learning the lessons from the Covid 19 crisis for the climate crisis -see further point 8 below). At present there is a serious and damaging asymmetry: business hears (quite rightly) what cannot be done but rarely hears what can be done. Such positive statements can take many forms. For example:

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

(b) Press releases where the authority indicates that it does not see a problem with a particular initiative (or at least that it does not intend to take action (sometimes a good steer is given behind closed doors but it would be helpful to publicise this constructive approach)⁵⁵;

(c) Decisions confirming that an agreement does not infringe the Chapter 1 prohibition (or Article 101(1)) or that it meets the exemption conditions in Section 9 of the Competition Act '98 (or of Article 101(3)). Article 10 of Regulation 1/2003 expressly provides for the Commission to make such decisions but in the 15 years since it came into force not one such decision has been made. The CMA can give confidential, informal advice and there is a possibility for it to issue non-binding written opinions (but has done so only once) or a “short-form opinion” providing guidance (but, so far, this appears to have been under used)⁵⁶. It seems that the US has made better and more frequent use of its “Business Review Letters”.

(d) Strategic steers from government to competition authorities. In the UK prioritising climate change and a move to a low carbon economy in line with the CMA’s latest Annual Plan (see Section 3.1 a above) should now be included in the UK government’s annual strategic steer to the CMA (see footnote 10);

⁵⁴ It is not suggested here that the CMA has, in fact, taken illegal decisions. It is more that its approach leads business and the competition community to believe it would impede lawful cooperation to fight climate change. Again we come back to fear being the real enemy here.

⁵⁵ Some helpful examples of this were given by speakers from the Belgian and German competition authorities at a conference held in Brussels on 24 October, 2019 in Brussels.

⁵⁶ The French Autorite de la concurrence has recognised that, through its decisions and opinions, it can bring about a competition framework favouring behaviour by firms which allows them to respond to the challenge of climate change [see paper cited at footnote 8 at page 13].

(e) The CMA should include (or at least mention) in its annual “Impact Assessment” of its work, initiatives that it has taken in line with its climate change commitments and its “strategic objective” of “supporting the transition to a low carbon economy”. In particular, this could include action that it has *not* taken so as to allow vital private sector collaboration on climate change and sustainability to proceed without being impeded by competition law. It is recognised that it is probably difficult to quantify these impacts but the CMA’s impact assessments refer to much of its best work indicating that these have (quite rightly) been excluded from its quantified estimates of the impact of its work⁵⁷; and (f) One of the CMA’s duties is to make recommendations on regulatory, policy, or legislative matters and their implications for competition and consumers.⁵⁸ Whenever the CMA’s work identifies climate change or other sustainability issues where judicious use of competition law is *not* the appropriate or adequate approach (as will often be the case) it could make appropriate recommendations to the government and/or the relevant agency (eg the Environmental Protection Agency). Examples might be private sector efforts to tackle an environmental problem which the CMA cannot “bless” as they fail the “no more restrictive than necessary” requirement for an exemption but where it is clear that action is needed. This might be the case, for example, where attempts are made by retailers to pay a sustainable living wage to suppliers and less restrictive solutions such as setting up a support fund leaving retailers free to compete on these input costs fail to achieve the desirable objective).

In this context the call from Commissioner Vestager, and other national competition authorities (eg in Germany and the Netherlands), to bring cases to them is welcome. It would be good to have a similar call from the CMA. It is incumbent on business, their advisors and NGOs concerned about climate change and sustainability to respond to such invitations.

2. Test Cases in Court.

To the extent that the competition authorities are unwilling to give positive guidance then companies and NGOs should look to the courts for affirmative rulings (ie confirming that a particular agreement does *not* infringe competition law).

3. Publication of Legal Opinions.

Companies receiving, or lawyers giving, positive advice about initiatives to combat climate change (or other issues concerning the environment or economic/social injustices) could seek to publicise this wherever client confidentiality permits⁵⁹.

4. Updating Guidelines and Notices.

Modernising competition law guidelines to reflect the realities of a world where climate change is an existential threat. **3 examples** in a UK context would be:

- The CMA’s guidance on “Agreements and concerted practices” of December, 2004;

⁵⁷ See, for example, the CMA’s impact assessment, 2018/19 of 18 July, 2019.

⁵⁸ See the UK government “strategic steer” cited at fn 10].

⁵⁹ See, for example, the “Application of EU Competition Law to the Adoption of the Living Wage Standard” by Arnold and Porter LLP.

- It's "Merger Assessment Guidelines" of September, 2010;⁶⁰and
- Updating the CMA's MIR guidelines to reflect its Annual Plan with a strategic objective of taking climate change into account (see fn 41)

Although, UK law will cease to apply directly in the UK after the transition period, as shown above (particularly in Sections 3 and 4) the interpretation of EU law and its application by the Commission and other national competition authorities and courts will continue to be relevant and influential in the UK. Furthermore, EU law continues to apply in the UK during the transition period and we don't really know when that will expire (in whole or in part). I would therefore mention **three examples** where modernising EU guidelines is very important even from a narrow UK perspective:

- Including in the successor to the EU's 2010 Horizontal Guidelines⁶¹, a chapter on climate change, sustainability and the environment (to facilitate collaborative action in these areas);
- Updating the EU's Exemption Guidelines-in particular to clarify, and hopefully expand, the range of consumers taken into account when assessing whether consumers get a "fair share of the benefits" when looking at the exemption criteria of Article 101(3)⁶².
- Including in the EU 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 place⁶³.

5. Guidance on Competition Authorities' Priorities.

Competition authorities should set out clear guidelines (or "enforcement priorities") to help companies understand better when action is likely to be taken (and when it is not likely to be taken) in relation to sustainability arrangements.⁶⁴ The inclusion of climate change in the UK competition authority (CMA)'s annual plan for 2020/2021 is therefore very welcome (see Section 3.1 above). It would also be helpful if this was reflected in the "Prioritisation Principles for the CMA" next time this is updated.⁶⁵

⁶⁰ See Section 5 b, c and d above.

⁶¹ "Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements" [2011] OJ C 11/1.

⁶² "Guidelines on the Application of Article 81 (3) of the Treaty" [2004] OJ C101/97. See further the discussion in my JAE paper at Section V, exemption route, Condition 2 and in Jordan Ellison's paper on fair share (both cited in fn2).

⁶³ "Notice on Remedies Acceptable under Council Regulation (EC) No 139/2004. See also the discussion in my JAE paper (cited in fn 2) at Section VII, Mergers, remedies.

⁶⁴ 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".

⁶⁵ April 2014, CMA 16. Again, on prioritisation by competition authorities see "lessons from Covid 19" in Section 8 below at point 8.

6. Block Exemptions.

If guidelines are not sufficient to get urgent collaborative action going, then block exemptions should be considered⁶⁶. The most obvious example would be a new block exemption for a defined category of sustainability agreements (certainly encompassing environmental protection and climate change issues but possibly other issues relevant to a more sustainable future). We should not, however, be too ambitious. If we try to include too many things there is a danger that it is seen as “all too difficult” and nothing is included. Either that or what is included is too conservative to be useful as it is trying to cover too many varied things. Given the climate emergency I would advocate a liberal but clear focus on arrangements to fight climate change.

7. Minor Changes to the Law.

Relatively minor changes to the law itself. For the most part it should not be necessary to change any primary acts of UK competition law (i.e. the Competition Act '98 or the EA '02). **Two examples** of legal changes in a UK context, might be:

- specifying “climate change and sustainability” as public interest considerations in Sections 58 and 153 of the Enterprise Act (see sections 5 d and 6 b above); and
- inclusion in Section 22 (2) of the Enterprise Act of a new exception to the CMA’s duty to refer certain mergers to a detailed investigation where the climate change /sustainability benefits outweigh the competition effects (see section 5c above). (This would seem to require primary legislation)

8. Lessons from Covid 19

The Coronavirus crisis has shown how governments and competition authorities around the world have been able and willing to act in a crisis-and the UK government and the CMA have been no exception. If we can do this to fight one (hopefully, short-term) crisis why can’t we show the same resolve in the face of an existential threat like climate change? As President Macron put it “*no one hesitates to make very profound, brutal choices when it’s a matter of saving lives. It’s the same for climate risk*”⁶⁷ John Naughton goes further; “*one way of looking at the Coronavirus crisis is as a dry run for the really existential crisis that’s on its way further down the line-catastrophic climate change.*”⁶⁸

The obvious parallel in the current context has been the relaxation of the competition rules to ensure that competition law does not “impede necessary cooperation between businesses to deal with the current crisis and [to] ensure security of supplies of essential products and services”⁶⁹. This is much what I and others have been calling for to ensure that competition law (or, more frequently, fear of competition law) does not stand on the way of vital action by business to fight climate change (and, as already noted, Commissioner Vestager has recognised that “sometimes business can respond to that demand [for more sustainable products] even better, if they get together”.

⁶⁶ In the UK such block exemptions can be made under section 6 of the '98 Act.

⁶⁷ Financial Times, 17 April, 2020, page 21.

⁶⁸ John Naughton, Observer, 18 March, 2020.

⁶⁹ “CMA approach to business cooperation in response to Covid-19”, 25 March, 2020, CMA 118. The European Commission has also taken rapid and extra-ordinary measures to approve state support to industry in the face of Covid 19, but that is outside the scope of this paper.

There are 2 strands to this “relaxation” of competition law in the face of this crisis: the CMA (and other authorities around the world)’s approach to cooperation in response to Covid-19, and the UK government’s exclusion of certain agreements from competition law.

a. CMA’s Approach

The first strand is a statement by the CMA as to its enforcement priorities and approach to the exemption provisions of Section 9 of the CA ’98 and Article 101 (3) of the TFEU.

The CMA recognises the vital role business is playing to tackle the consequences of Covid 19. It says it:

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

The CMA will not take enforcement action where measures to coordinate action taken by businesses:

- (a) *Are appropriate and necessary in order to avoid a shortage, or ensure security, of supply;*
- (b) *Are clearly in the public interest;*
- (c) *Contribute to the benefit or wellbeing of consumers;*
- (d) *Deal with critical issues that arise as a result of the Covid -19 pandemic; and*
- (e) *Last no longer than is necessary to deal with these critical issues”*

One only needs to change a few words (most obviously “Covid -19 pandemic” to “climate crisis” and you have a draft blue print for valuable guidance to businesses trying to fight climate change and to assist in the move to a low carbon economy. Point (a) might be drafted along the following lines: *“appropriate and necessary measures in order to combat climate change and to facilitate the transition to a low carbon economy”*⁷⁰. This would be in line with the CMA’s “strategic priority” set out in its latest annual plan of climate change and “supporting the transition to a low carbon economy”⁷¹.

One superficial difference is the repeated reference in the CMA’s statements to “temporary measures”. However, this is only an expression of the proportionality principle and that exemptions from competition law must be “no more restrictive than necessary”. The Covid -19 pandemic is a crisis- but, hopefully, a temporary one so it is right that measures should be temporary. Alas the climate crisis is not “temporary”: it is the biggest challenge facing humanity over the coming decades. Measures taken to fight climate change should also be “no more restrictive than necessary” and, indeed, should not “last longer than is necessary to deal with these critical issues” (it’s just that, sadly, this time period is likely to be much longer in many instances).

The CMA’s guidance contains clear warnings that it’s new approach to the Covid-19 crisis “does not give a *free pass* to businesses to engage in conduct that could harm consumers in other ways”. Quite

⁷⁰ *This might be refined and narrowed as experience and/or research identifies those instances where concerns over competition law are having the worst impact on cooperative action to combat climate change.*

⁷¹ *CMA 112, March 2020, Annual Plan, pages 3 and 17.*

right-and similar warnings should be included in guidance to fight climate change and support the move to a low carbon economy.

But with that qualification informal guidance offered on a regular basis (whether in writing or orally) would be of immense help in the fight against climate change permitting or encouraging necessary cooperation between market players. Such guidance in the context of the climate crisis might cover, for example, technical standards improving environmental processes or products, open knowledge-sharing platforms, joint procurement of recycled materials, and agreements to increase the recyclability of products or to reduce use of plastic packaging etc.⁷²

The benefits for the climate and us all as citizens are self-evident but the authorities would also gain useful insights into novel and valuable forms of co-operation. This would help the CMA *“develop our understanding of how climate change effects markets and consider how, when exercising our functions, we can act in a way that supports the transition to a low carbon economy.”*⁷³

b. Exclusion from UK competition law

The CA '98 contains a relatively little known provision for an agreement, or agreements of a particular description, to be excluded from the Chapter 1 Prohibition on anti-competitive agreements (either generally or in specified circumstances) where the relevant minister is satisfied that there :

*“are exceptional and compelling reasons of public policy why the Chapter 1 prohibition ought not to apply”*⁷⁴

The government has issued several orders excluding certain types of agreement from the Chapter 1 Prohibition to ensure the supply of food and essential grocery products and exempting certain types of coordination between competitors to tackle problems arising from the Covid -19 crisis⁷⁵.

While these exclusion powers should be used sparingly, there can be no doubt that the climate crisis can provide “exceptional and compelling reasons of public policy” to exclude agreements from the Chapter1 prohibition in appropriate cases.

In most cases a realistic approach to the application of the prohibition an anti-competitive agreements (whether under Chapter 1 CA'98 or Article 101(1)), and to the exemption provisions (in Section 9 CA '98 or under Article 101(3)) should enable business to take vital collaborative action to fight climate change and help the move to a low carbon economy. However, where, for whatever reason, this is not possible (eg the action needed is considered to be “more restrictive than necessary”) then consideration should be given to use of these exclusion powers. They should, of course, be tightly drawn and contain appropriate anti-abuse provisions, but let’s hope it doesn’t take another public health crisis, for the government and the competition establishment to consider their use.

c. On-line working

⁷²For examples of necessary cooperation on climate change and how fears of competition law is inhibiting this see Section II of my JAE paper referred to in footnote2. See also Jordan Ellison’s paper on the “carbon defence”, also cited in footnote2.

⁷³ See footnote 8 above.

⁷⁴ Schedule 3, paragraph 7 of the Competition Act 1998.

⁷⁵ One of these orders concerns the dairy sector and specifically refers to activities where the purpose is to “limit the environmental impact” of milk disposal.[Competition Act (Dairy Produce) (Coronavirus) (Public Policy Exclusion)Order 2020]

Not a legal point, but it has to be noted that one potential lesson from the Covid 19 crisis in the context of competition law is that we can communicate more through the range of meeting platforms that we are using throughout this crisis. In particular we should all think twice before getting on a plane to speak at/attend competition law conferences.

d. Political shift?

A whole literature will emerge, and a forest of papers will be written, about how the experience of Covid 19 will change the political landscape in favour of a more humane form of capitalism. I will limit my comment to an observation of president Macron at the height of the crisis. *“When we get out of this crisis people will no longer accept breathing dirty air. People will say...I do not agree with the choices of society where I’ll breathe such air, where my baby will have bronchitis because of it. And remember you stopped everything for this Covid thing but now you want me to breathe bad air”*⁷⁶.

Against this background, is it really too much to ask the competition authorities for a little breathing space (pun intended) for business to cooperate to rid us of dirty air?

9. State Compulsion Defence?

Another possibility might be to widen the state compulsion defence as we see the state preferring to encourage private sector solutions over cumbersome regulation. Although, this would need to be very carefully thought through, it could potentially enable government policies to be implemented in a quicker and more flexible manner⁷⁷.

10. UK Future Generations Act

One more radical idea would be for the UK to pass a “Future Generations Act”⁷⁸. This has been proposed on a cross party basis and the idea is to transform how we think, plan and budget by embedding sustainability at the heart of policy making. All politicians and public decision makers would have to weigh the impact of their decisions on future generations. I don’t pretend to know exactly how this would apply to decisions of the competition authorities but I certainly see no reason why they should be exempt. At the very least it would be a key factor in the CMA’s enforcement priorities and should inform their consideration of the exemption provisions in Section 9 of the CA ’98 and Article 101(3) TFEU.

11. Embedding Climate Change and Sustainability?

An alternative (or complement) to a future generations act might be to amend the climate change act to require climate change and sustainability issues to be considered before any law, regulation or certain decisions of public bodies could be made (perhaps an extension of the current requirements for environmental impact assessments?). Again, detailed work would need to be done to decide exactly how this would fit with the decision making processes in competition law but there is no reason why this would not be feasible.

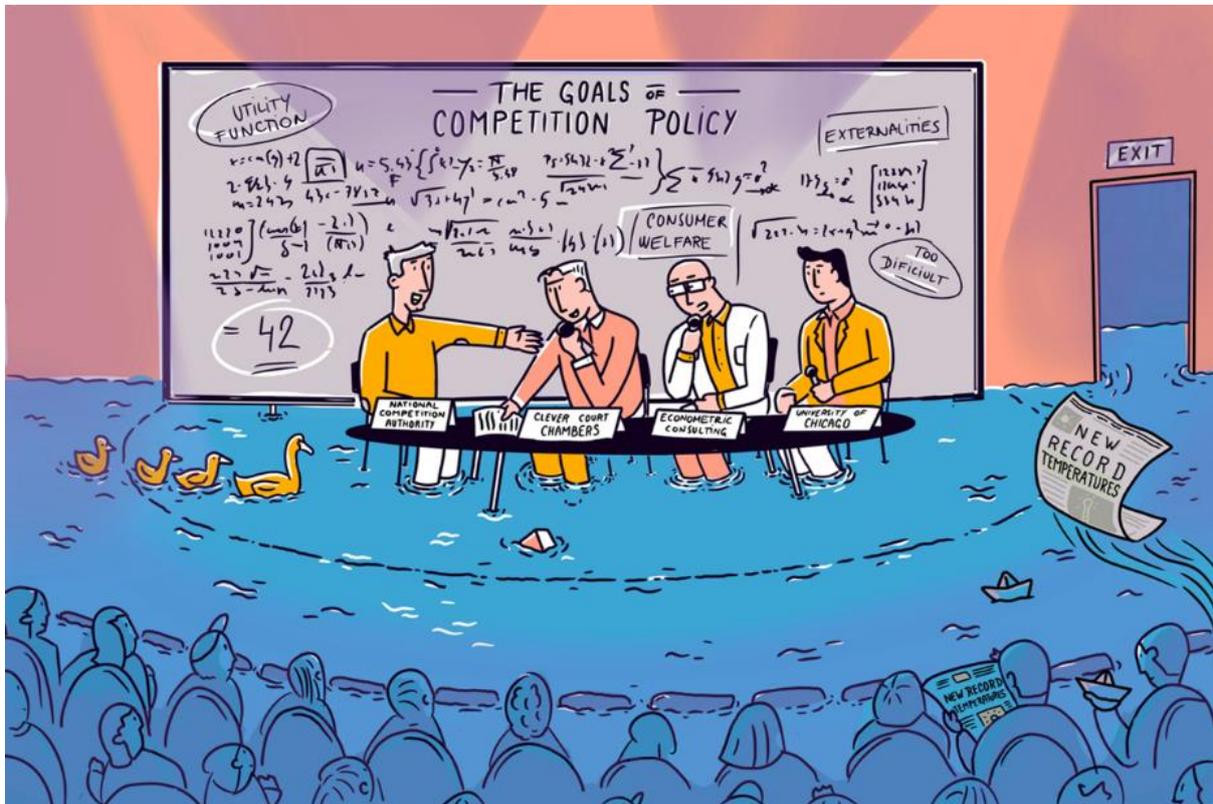
⁷⁶ See fn 66

⁷⁷ I have not done any work on this but am aware that the defence is wider in the US than in Europe (as we see in the Californian emissions standards case).

⁷⁸ This was proposed by Lord Bird and passed its second reading in the House of Lords on March 13, 2020. Caroline Lucas (leader of the UK Green Party) is presenting the cross-party case for it in the House of Commons. The Welsh Assembly passed the “Well-being of Future Generations Act” in 2015. This put the UN’s sustainable Development Goals (SDGs) at the heart of decision making and established a Future Generations Commissioner to ensure that no public body, including the Welsh government, makes a decision whose costs will fall on future generations.

12. Conclusion

If these, and no doubt other,⁷⁹ changes are made then competition law can cease to be “part of the problem” and become “part of the solution”. OR, once again to borrow a phrase from Barrack Obama, “Yes we can” take account of climate change and sustainability when applying competition law in the UK.



⁷⁹ Nothing here is intended to detract from the need to introduce legislation on the environment, sustainability and climate change. Competition law is no panacea and certainly no substitute for legislative and other administrative action. Indeed, when it is clear that competition law is not the problem (or the answer, even after all changes discussed here), this can act as a catalyst for legislative action (an example being the EU's new rules on unfair trading practices). The CMA has an opportunity and, indeed, a duty to make recommendations to the UK government to this effect in the light of its “strategic objective” of “supporting the move to a low carbon economy”.