A sustainable future: how can control of monopoly power play a part?

Part 1. Monopoly power: a barrier to a sustainable future

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This article, published in three parts over successive issues of the E.C.L.R., looks at monopoly power as a barrier to a sustainable future and asks how we can use competition policy (particularly art.102 Treaty on the Functioning of the European Union (TFEU) and merger control) more intelligently in the light of climate change and growing market concentration. It looks at both how competition policy can be used as a "sword" to attack power and unsustainable practices, and how it can avoid impeding sustainable initiatives (sometimes acting like a "shield").

Before diving into the "competition law bubble" and the technical analysis, the first part of the article published today sets the scene with a brief look at the climate crisis and then at the evidence of vastly increased market concentration and power—and the growing evidence of the economic, social and political harms to which this is giving rise.

Part II of the article will go on to look at how art.102 TFEU could be used more effectively to tackle unsustainable practices.

Part III will look at how merger control could be used more intelligently as a way of tackling market power and unsustainable business practices—both before they arise (as a result of a merger) and as a way of preventing such power or practices being exacerbated by a merger.

In doing so it will look at how this might *already* be done under existing law and then makes some suggestions as to how the law could be updated to recognise the scale of the problems that we face—both in terms of the climate crisis and excessive market power. In particular, we will propose that that climate change and environmental sustainability considerations be built into merger control regimes and/or that the burden of proof be changed.

In this article we set out a number of ideas (some radical, some, less so). We certainly do not presume to have all the answers, but we do want to stimulate a debate and push readers to step outside the competition bubble and re-visit old ways of doing things in the light of the climate crisis and growing evidence of market concentration and power.

Preface

As we started writing this article, hundreds were dying from floods in Belgium and Germany. Zhengzhou in China had had a year's rainfall in one day, and southern Europe and the west of North America were suffering record (and lethal) heat and wildfires. Since then, things have only got worse with record temperatures recorded here in Europe and widespread and lethal floods in Pakistan.

Don't worry, this is *not* an article about climate change—or even sustainable development. However, before getting into our little competition law bubble and diving into the question of whether (and, if so, how) control of monopoly power can play a part in a sustainable future, it's important to remind ourselves *why* the question is so important.

The answer is quite simply that humanity faces an existential crisis and we need to re-assess as a matter of urgency every aspect of our lives and available policies and tools, to see, whether, and, if so how, they can play a part in avoiding catastrophe. Just as "no man is an island", no law or economic policy is (or should) be hermetically sealed and considered without reference to its social, economic and, in this case, its physical context.[1]

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[1] On this see Ariel Ezrachi, "Sponge" (2017) 5 *Journal of Antitrust Enforcement* 49.

The most up-to date and authoritative framing of that context is the report issued by the Intergovernmental Panel on Climate Change (IPCC) on the impacts of global warning.[2] Without wanting to fall into what Michael Mann calls "doomism",[3] here are a few basic facts to keep in mind in deciding whether we should update our thinking to take account of the crisis—or just stick with the same old approach that has brought us to where we are today:

- While the Paris Agreement of 2015 says emissions need to be kept well below 2 degrees—and 1.5 degrees if possible—the IPCC report forecasts 1.5 degrees being reached by the mid-2030s;[4] and we are heading for 3 degrees at best.
- 1.5 degrees still means more frequent and extreme heat waves and flooding; and 2 degrees means "heat extremes would more often reach critical tolerance thresholds for agriculture and health" with intense rainfall, flooding and drought.
- Without "deep" cuts to emissions taking place "immediately" global temperature is likely to exceed 3 degrees this century (a catastrophe) and if emissions do not fall, we are on track for 4 to 5 degrees (apocalyptic).
- Avoiding this is not impossible but requires "immediate, rapid and large-scale reductions" in emissions—of which there is no sign to date. Instead, we are seeing ambitious promises (usually for some distant future date like 2050) such as "net-zero"[5]—and, with limited exceptions, very little concrete near term plans and action.

Limited progress was made at COP 26 with Climate Action Tracker calculating that by the end of the century global mean temperatures will increase by 2.7 degrees on current policies; by 2.4 degrees if current NDC (nationally determined contribution) targets to 2030 were met; and by 1.8 degrees on a best case scenario.

Time is running out and this action is required now.[6] The warming is not linear and there is a real risk of, abrupt, irreversible and catastrophic "tipping" points at any time—the most likely causes being the melting of the ice caps and/or a (related) movement in the Gulf Stream.[7]

The scientists have spoken, and the consensus is unequivocal: we need rapid and concrete action to cut emissions (and of course it is not just emissions: soil, water, nitrogen—many vital natural cycles are in a dire state of decline and possibly collapse as planetary boundaries are approached and breached). Governments, financiers, business and national and international institutions need to act *now*.[8]

This is the context in which we write this article. What this context requires is that we, within the competition law and economics community, must revisit the assumptions we make about how business operates and how competition policy regulates that business conduct. Indeed, much of this article urges that we move away from what pure theory tells us about the performance of markets with a certain market structure or about the incentives of business to compete. Instead, we must look at the reality of how business actually operates, and the impact of competition policy not just on "competition" but on business—and its track-record in the above context—more broadly.

Neither competition policy, nor control of monopoly power, are *the* answer but they can and must be *part* of the answer. The IPCC makes it clear that every fraction of a degree makes a huge difference, so everyone and every policy must play a *part*. That is why the question

[2] IPCC, "Climate Change 2022: Impacts, Adaptation and Vulnerability" (27 February 2022) available at: *https://www.ipcc.ch/report/ar6/wg2/*. The report was produced by hundreds of the world's leading climate scientist and was approved by 195 member governments. From this it is clear that previous reports, far from being alarmist, were unduly conservative and optimistic. See also Daniel Quiggin et al, *Climate change risk assessment*, 2021 (Chatham House, 2021).

[3] Michael E. Mann, *The New Climate War: the fight to take back our planet* (Melbourne: Scribe Publications, 2021).

[4] Sadly, this is supported by the Climate Action Tracker which reported in September 2021 that only Gambia was on course to deliver climate action that is in alignment with a 1.5 degree pathway. It estimates that current efforts will see emissions be roughly the same in 2030 as now, whereas by 2030 the recommendation is that they should be half what they are now. Put another way, the world is emitting twice as much as required by the 1.5 limit.

[5] Terms such as "net zero" are generally poorly understood and leave much wriggle room. One study commissioned by an organic dairy brand in the UK found just 4% of people surveyed felt they understood what the term "net zero" means, available at: *https://wickedleeks.riverford.co.uk/news/environment-ethics-net-zero-organics/majority-people-dont-understand-green-terms*. More fundamentally, we need to go to "Zero" emissions not just "Net Zero". Net Zero pledges assume that there are no limits to the extent to which we can each compensate our own emissions with reductions or increased carbon removal by someone else. Not only is this unrealistic and assumes someone else will deal with the problem, there are numerous difficulties with the concept of carbon offset (particularly the issues of "additionality" and "permanence"—issues beyond the scope of this paper). Furthermore, even getting to Zero is not enough on its own. That's because some irrevocable climate change has already happened, and because, even if the world was to stop all its carbon emissions today, the effects of the emissions that have already happened will continue to make themselves felt for decades. Keir Starmer, "Britain could be taking the lead in tackling the climate crisis. Where's the ambition?" (3 August 2021), available at: *https://www.theguardian.com/commentisfree/2021/aug/03/britain-climate-crisis-where-ambition-cop26-tories-labour-green-recovery-plan?CMP=Share_iOSApp_Other*.

[6] Mathew Lawrence and Laurie Laybourn-Langton, *Planet on Fire* (London: Verso, 2021): "The pathway to a liveable and humane future — is so steep it is almost vertical. There are few, possibly no, historical examples of societies successfully undertaking such fundamental, transformative action in so little time".

[7] This is all the more likely in view of the negative "feedback loops" which we have created: e.g. from the melting ice caps resulting in not only rising sea levels, but reduced reflection of light/heat and accelerated melting; increased methane release from melting permafrost (accelerating that melting); and increased emissions from wildfires and forest destruction.

[8] For further informed analysis of climate change see, for example, the IPCC report of October 2018; the Climate Change Committee (CCC) report of June 2021 on "Progress in adapting to Climate Change" of June 2021; and "COP Explained-the UN Climate Change Conference, 2021", available at: *https://ukcop26.wpenginepowered.com/wp-content/uploads/2021/07/COP26-Explained.pdf*, p.8; Committee on Climate Change, "Net Zero: The UK's contribution to stopping global warming" (2019), available at: *https://www.theccc.org.uk/publication/net-zero-the-uks-contribution-to-stopping-global-warming/*, pp.8, 13; Jonas Åkerman et al, "Low-carbon scenarios for long-distance travel 2060" (2021) Transportation Research Part D 99 103010, p.5; Valérie Masson-Delmotte et al, "Global Warming of 1.5◦C: An IPCC Special Report on the impacts of global warming of 1.5?C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty", IPCC (2019), available at: *https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_Low_Res.pdf*. Some good books on climate change include Mann, *The New Climate War: the fight to take back our planet* (2021) and Mike Berners-Lee, *There Is No Planet B* (Cambridge: CUP, 2019).

posed here is so important: how can control of monopoly power play a part in the fight against climate change and in ensuring a sustainable future? As the article elaborates, the relevance of this question stems from the relatively unexplored relationship—within the competition law and economics literature—of monopoly power and climate harm, through the vectors of (i) political power (e.g. lobbying, subversion of democracy, insulation from regulation and the ability to co-ordinate political strategies in concentrated markets) and (ii) economic power (e.g. bargaining power or leverage over nature and communities that comes with more traditional "market power"). Competition law has little to say on these topics and yet, having overseen substantial consolidation of industry across the board and across the world, it has arguably made a substantial contribution to these vectors of power.

This article is structured as follows:

- Part I, published, today considers whether monopoly power is a barrier to a sustainable future, concluding that using broader concepts of power than currently used in competition law allows us to recognise a broader set of harms of monopoly power, including those that promote an unsustainable future.
- Part II will consider the desirability and potential of using competition law to tackle unsustainable practices as abuses of monopoly power.
- Part III will explore how and whether merger control could be used to promote sustainability, including some radical proposals to prevent ecological crisis by the inclusion of explicit climate change and environmental sustainability considerations and ideas to change the burden and standard of proof.
- Part IV will provide a summary and conclusions, including some suggestions for changes to merger control.

The purpose of this article is to open a debate. We introduce various ideas and concepts that have yet to be meaningfully explored within the literature. We encourage others to take up this challenge. There is a rich and important research agenda here, with which we sincerely hope the academic and policy community will engage seriously—and soon.

Part I: Monopoly power: a barrier to a sustainable future

A. Concentration, power and the role of competition law

If we accept we face a climate crisis, how can control of monopoly power play a part in averting that crisis and ensuring a sustainable future?

This invites a number of questions. For example, what is power and why is it a problem? What sort of power are we concerned about in competition policy[9] and why might that be a barrier to a sustainable future? What measures to tackle that power could play a part in enabling a sustainable future?

It is a fundamental feature of democracies that power should never be too concentrated in one person or institution and should be subject to constraints. From at least 1688 the United Kingdom (UK) parliament assumed powers to limit the powers of the crown and the United States (US) constitution contains an elaborate system of checks and balances. This principle applies at least as much (if not more) to private power as to public power. This idea has been reflected in laws and regulations since time immemorial; was very much the thinking behind the US Sherman Act of 1890;[10] and has been reflected in competition laws around the world ever since—most notably the European Union (EU)'s outlawing any "abuse" of a "dominant position" in art.102 of the Treaty on the Functioning of the EU (TFEU). Indeed, it is a primary duty of government to control private sector power.[11] If it is clear that public and private power must be controlled, the questions are: what sort of power is competition law concerned with? Is that power of concern from a sustainability point of view? How, and to what extent, can and should this power be constrained? The last of these questions will be addressed in our forthcoming publications of Parts II and III, so we turn now today to the first two. Competition law is fundamental to a successful and sustainable capitalist system. As US President Biden put it: "Capitalism without competition isn't capitalism; it's exploitation".[12] However, for many years competition enforcement has been minimal in jurisdictions like the US and in most jurisdictions it has been primarily concerned with a relatively narrow range of issues—largely the price and quality of the goods and services available to consumers.[13] However, in recent years there has been increasing recognition that competition policy is very relevant to a wide range of issues of concern in society. These include the effect of market power on:

[9] We refer in this article to competition policy and competition law as these are easily understood terms but this encompasses antitrust policy/law.

[10] As Senator Sherman put it in the debate on the Sherman Act: "If we will not endure a king as a political power, we should not endure a king over production, transportation, and sale of any of the necessities of life. If we would not submit to an emperor, we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity". US Justice Douglas made a similar point in *US v Colombia Steel* 334 U.S. 494 (1948): "Power that controls the economy…should be scattered into many hands…that is that is the philosophy and command of the Sherman Act".

[11] As Barry Lynn of the Open Markets Institute put it when President Biden announced a raft of initiatives to strengthen US antitrust enforcement on 9 July 2021, in Open Markets briefing note of 23 July 2021: "the president embraced the original idea [of America]-that government exists to break and harness power…liberal democracy demands an eternal vigilance against all concentrations of corporate power and control".

[12] Biden's speech when announcing the executive order to strengthen US antitrust (see fn.65).

[13] And in recent years reflected in the so-called "consumer welfare" standard.

- politics, with large companies exercising power akin to political power[14] and threatening democracy;[15]
- the share of income going to labour and growing inequality;[16]
- monetary policy;[17]
- gender imbalances;[18]
- racial issues;[19]
- international development and incomes across global supply chains;[20] and
- the avoidance of so-called "negative externalities"[21]—i.e. the ability of companies to avoid certain costs of their activities and offload these onto society, thus distorting competition, with competitors that are either paying these costs or not generating them in the first place.[22] Notable examples are the generation of greenhouse gases (GHG) and the pollution of land and rivers: these are very much costs to society but they are ignored in conventional book keeping. (This is therefore an issue to which we will return in Part I(B), below.)

One of the main reasons for increasing concern about all these issues and the concomitant increase in the relevance of competition policy is the vast increase in industrial concentration which we have witnessed in the last few decades. We see this in the number of industries dominated by only a few players (e.g. agricultural inputs and processing, groceries retail, banking and financial services, asset management, pharmaceuticals, newspapers) and by the sheer scale of some companies—particularly in "tech" with Apple and Alphabet each having passed the trillion dollar valuation threshold.

Furthermore, there is a growing body of evidence linking this increase in concentration with the issues identified above and, most notably, a decline in competition and increasing market power. The nature and scale of the problem has been recently spelt out very clearly by the International Monetary Fund (IMF), which stated that: "Corporate market Power has increased significantly among publicly listed firms in advanced economies since the early 1980s. Market concentration has risen, firm's mark-ups over (marginal) costs have increased by about one third, and profitability has doubled". The IMF links this to "a broad-based decline in business dynamism-including a falling share of economic activity accounted for by young firms".[23] This is also shown clearly in the work of scholars like De Loecker and Eeckhout. They show that corporate mark ups; profit rates and the valuation of companies (relative to sales) have all gone up dramatically in the last 40 years or so.[24] This shows clearly that markets are not (at least not always) "self-correcting". It also suggests, not only that "great industrial consolidations are inherently undesirable" as US Judge Learned Hand believed, and that we have what US Justice Douglas has called "the problem of bigness"[25] and which Supreme Court Justice Louis Brandeis called "the curse of bigness" (a claim taken up by contemporary anti-monopolists including "Neo-Brandeisians" such as Tim Wu),[26] but that we also

[14] See notably the seminal article by Zephyr Teachout and Lina Khan in 2014: "Market Structure and Political Law; a Taxonomy of Power" (2014) 9 *Duke Journal of Constitutional Law & Public Policy* 37. "When large companies in uncompetitive markets undertake [certain activities], the power they levy is government-like" (at 41).

[15] See, for example, Barry C. Lynn, "Liberty From All Masters" (Penguin Random House, 2020); Shoshana Zuboff, "The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power" (London: Profile Books, 2019).

[16] See Ioana Marinescu and Eric A Posner, "Why has Antitrust Law Failed Workers?" (2020) 105 *Cornell Law Review* 1343; and Sean F Ennis, Pedro Gonzaga and Chris Pike, "Inequality: a Hidden Cost of Market Power" (2019) 35(3) *Oxford Review of Economic Policy* 518. Jan Eeckhout estimates that the reduction in labour share due to increased concentration amounts to a loss of 9–10% of GDP *per year*. Jan Eeckout, *The Profit Paradox* (Princeton: Princeton University Press, 2021). The Balanced Economy Project calculates that this is the equivalent of workers being 6 *trillion* dollars out of pocket, each year. Nick Shaxson, "Europe's monopoly problem", The Counterbalance (22 June 2021), available at: *https://thecounterbalance.substack.com/p/europes-monopoly-problem*. See also Ariel Ezrachi, Amit Zac, Christopher Decker and Carola Casti, "The effects of competition law on inequality—incidental by product or a path for societal change?" (2021) 55 *Working Paper of the Oxford Centre for Competition Law and Policy*. In particular, the latter shows a correlation between weak competition law enforcement and a reduction in labour share (of income). See also Rana Foroohar, Biden puts workers ahead of consumers", *Financial Times* (1 August 2021), available at: *https://www.ft.com/content/5df8fa3a-30f7-4389-9a07-53af54e4ccf2*.

[17] Romain Duval, Davide Furceri and Marina M. Tavares, "Taming Market Power Could (also) Help Monetary Policy", IMF blog (21 July 2021), available at: *https://www imf.org/en/Blogs/Articles/2021/07/21/taming-market-power-could-also-help-monetary-policy*.

[18] See Estefania Santacreu-Vasut and Chris Pike, "Competition Policy and Gender" OECD Background Paper (6th November 2019), available at: *https://ssrn.com/abstract 3487471* and the OECD portal on "Gender inclusive competition policy" available at: *https://www.oecd.org/competition/gender-inclusive-competition-policy.htm*.

[19] Jeremie Greer and Solana Rice, "Anti-Monopoly Activism: Reclaiming Power through Racial Justice, March 2021 by Liberation in a Generation" (March 2021), available at: *https://www.liberationinageneration.org/wp-content/uploads/2021/03/Anti-Monopoly-Activism_032021.pdf*.

[20] See Tomaso Ferrando and Claudio Lombardi, "EU Competition Law and Sustainability in Food Systems: Addressing the Broken Links", Fair Trade Advocacy Office Briefing Paper (February 2019), available at: *https://www.responsibleglobalvaluechains.org/images/PDF/FTAO_-_EU_Competition_Law_and_Sustainability_in_Food Systems_Addressing_the_Broken_Links_2019.pdf* and Ioannis Lianos, Dennis Davis and Alexey Ivanov (eds), *Global Food Value Chains and Competition Law* (Cambridge: Cambridge University Press, 2021).

[21] Environmental economist Herman Daly held that "we classify [certain costs incurred] as 'external' costs for no better reason than because we have made no provision for them in our economic theories". Herman Daly, *Steady State Economics* (Washington: Island Press, 1992).

[22] See Simon Holmes, "Climate Change, Sustainability and Competition Law" by (2020) 8(2) *Journal of Antitrust Enforcement* 354; and Michelle Meagher, *Competition is Killing Us: How Big Business is Harming Our Society and Planet—And What to do About it* (London: Penguin Random House, 2020).

[23] Ufuk Akcigit et al, "Rising Corporate Market Power: Emerging Policy Issues", IMF Staff Discussion Notes SDN/21/01 (March 2021), available at: *DOI:10.5089 9781513512082.006*. See, in particular pp.5, 7 and 16.

[24] See for example, Jan De Loecker and Jan Eeckout, "Global Market Power", US National Bureau of Economic Research (NBER) Working Paper Series (WP 24768) (2018), available at: *https://www.nber.org/system/files/working_papers/w24768/w24768.pdf*; Eeckout, *The Profit Paradox* (2021) and Thomas Philippon's 2019 book *The Great Reversal: How America Gave Up on Free Markets* (Cambridge, Mass: Harvard University Press, 2019). See also (a) Council of Economic Advisers, "Benefits of Competition and Indicators of Market Power Issue brief", April 2016, available at: *https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea _competition_issue_brief.pdf*; (b) G. Grullon, Y. Larkin and R. Michaely, "Are US industries becoming more concentrated?" (2019) 23(4) *Review of Finance* 697; (c) Jan De Loecker, Jan Eeckhout and G Unger, "The rise of market power and the macroeconomic implications" (2020) 135(2) *The Quarterly Journal of Economics* 561; (d) F. Diez et al, "Global Declining Competition" IMF Working Paper WP/19/82 (2019); and (e) the UK government's consultation on "Reforming Competition Policy" of July 2021 at paras 1.23 to 1.29 ("Market Power and the state of competition in the UK").

[25] See *US v Alcoa* 148 F.2d 416 (2d Cir. 1945) and *US v Colombia Steel Co* 334 US 495 (1948).

[26] See Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (New York: Columbia Global Reports, 2018).

have a problem with *power*. And, as signalled above, this is something which competition law is (or ought to be) very concerned about.

What is power?

It should also be clear by now that we are not *just* concerned about power in the technical sense of most existing competition laws (e.g. a "dominant position" of the sort covered by art.102 TFEU)—although we are concerned about that (as we will see particularly in Part II). Michelle, a co-author of this article, has referred elsewhere to the "excessive power standard" which seeks to identify excessive power contrary to the public interest.[27] Teachout and Khan have said that, while they use terms like "dominant", "monopolistic" and "oligopolistic", their use of these terms is "consciously imprecise". They are concerned about "the forms of power born of size and concentration" and with the "general spirit" of monopoly rather than (just) with particular meanings as interpreted by existing law.[28] We happily adopt the same approach. If this seems vague (and it is—deliberately so), we would make *four important points*. First, it is not just academics who are looking beyond the narrow confines of existing competition laws and related technical definitions, but governments and competition authorities. We see this in the numerous proposals around the world to tackle the power of big tech, including radical proposals, more or less well-progressed, to create new institutions beyond and complementary to competition law, including the UK's new Digital Market's Unit and the EU's new Digital Markets Act regime. We also see it in policy and consultation documents. A recent example is the UK government's discussion of "market power" which makes clear that market power is not just "the ability for a supplier to profitably raise and maintain prices above the competitive level" but also "the ability for a firm to influence the conditions in a market".[29] It is also what underlies competition laws (or quasi-competition laws) in many countries, notable examples being the UK's market studies and market investigations regimes (MIR) looking at "adverse effects on competition;[30] French and German laws on relative market power and economic dependency;[31] the EU regime around Unfair Trading Practices in business-to-business relationships in agrifood supply chains, and the "unfair methods of competition" referred to in s.5 of the US Clayton Act, which Lina Khan (the new chair of the Federal Trade Commission (FTC)) has recently made clear should not be limited to the "likely anti-competitive effects" standard of the Sherman Act but should apply to a broader range of conduct.[32]

Second, the fact that there are concerns about size and power extending beyond the confines of current interpretations of competition laws does not mean that we cannot make more effective use of the laws we already have (as will be discussed in Parts II and III). For one thing, this may help us re-examine current orthodoxy and look again at the original meaning and purpose of those laws.[33] In addition, if despite that, the interpretation of the existing definitions of monopoly/dominant position remain narrow so that they are not capturing all forms of harmful power, we should not be afraid to use them boldly (and, for example, take a more robust approach to exploitative abuses). Again, we will return to this in Parts II and III shortly. Third, the current breadth of concepts that could reasonably be associated with a new approach to power in competition law, and the practical need for authorities to be able to identify objective indicia of those categories of power should not deter experimentation: it did not deter many competition authorities from adopting a highly amorphous concept—consumer welfare[34]—as a guidepost a few decades ago, although many have argued that in doing so they chose the wrong proxies (consumer prices) to measure it. Fourth, we would expect the importance of the question of "with what kinds of power competition policy must concern itself" to be directly proportionate to the intensity of research directed at that question. Teachout and Khan's refocusing on the "general spirit" of monopoly shows just how far we have come (or strayed) from the visceral concerns with concentrated power that provoked the Sherman Act. In the meantime, there has been very little research into questions of power within antitrust,[35] especially in the era of ideas dominated by Robert Bork's *The Antitrust Paradox*. If the concepts must remain imprecise for a little longer to accommodate

[27] Michelle Meagher, "Adaptive Antitrust", ABA Spring Meeting (24 March 2021), course materials.

[28] See Zephyr Teachout and Lina Khan in 2014: "Market Structure and Political Law; a Taxonomy of Power" (2014) 9 *Duke Journal of Constitutional Law & Public Policy* 7, 40 and 42.

[29] See fn.24 above.

[30] For example, the UK's Competition and Market Authority (CMA) launched a market study into Apple's and Google's "effective duopoly" over mobile ecosystems but action against these companies is not dependant on a formal finding of a duopoly in the sense of the UK's Chapter 2 Prohibition (the equivalent of art.102 TFEU).

[31] The relevant provisions of German Law that prohibits conduct of undertakings with relative or superior market power, addressing situations of abuse of economic dependence, s.20 of the Act against Restraints of Competition (Competition Act-GWB), available at: *http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb html#p0100*; and respective provisions from French competition law, articles art.L 420-2(1,2) of the French Commercial Code (FCC), available at: *https://uk.practicallaw thomsonreuters.com/7-572-2047?transitionType=Default&contextData=%28sc.Default%29#co_anchor_a120188*.

[32] US FTC open meeting of 1 July 2021.

[33] And in this context it is worth noting that existing competition laws often seem to be concerned about fairly wide concepts of power. For example, the concept of dominance was defined in the context of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (Regulation No 4064/89) as: "a situation where one or more undertakings *wield economic power* which would enable them to prevent effective competition from being maintained in the relevant market by giving them the *opportunity to act to a considerable extent independently of their competitors, their customers and, ultimately, of consumers*" [emphasis added, speaks to a wider concept of power].

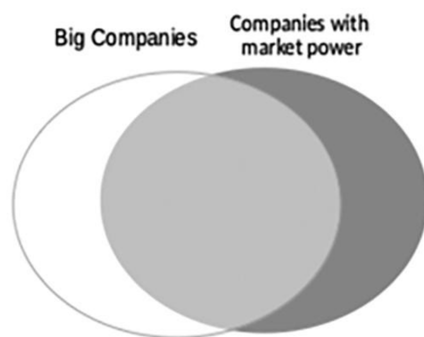
[34] See ABA Antitrust Law Section Report of the Task Force on The Future of Competition Law Standards, 2021, for an overview of just how much diversity there is of opinion, still, amongst antitrust experts as to the precise contours of one of the most foundational concepts of modern competition law.

[35] Some exceptions include Zephyr Teachout and Lina Khan in 2014: "Market Structure and Political Law; a Taxonomy of Power" (2014) 9 *Duke Journal of Constitutional Law & Public Policy* 37; Ioannis Lianos and Bruno Carballa, "Economic Power and New Business Models in Competition Law and Economics: Ontology and New Metrics" CLES Research Paper Series 3/2021, March 2021; Michelle Meagher, *Competition is Killing Us: How Big Business is Harming Our Society and Planet—And What to do About it* (2020).

the development of new concepts then so be it. The academic discomfiture with conceptual vagueness will (we hope) stimulate further inquiry. To be clear: we do not propose to offer a new theoretical or operational concept of power. Such an effort would require its own paper—indeed we believe developing a new concept of power within competition law and (political) economics should form the centre of new research agenda within the discipline. This is well beyond the scope of this article.

The link between power and size

The biggest companies are most relevant to our inquiry and there is some (if not a total) link between bigness, power, dominance and climate change. First, it has been estimated that just 100 companies are responsible for over 70% of global industrial greenhouse gas emissions since 1988[36]—and these companies are likely to be big ones. Just from a regulatory efficiency point of view it makes sense to focus on such companies rather than on a very long tail of small ones. (The same may be true of other ecological crises and we can anticipate some overlap in the identity of the "top 100" across each.) Secondly, those companies are likely to have the greatest potential to make *positive* contributions on sustainability issues (so, as we will discuss in Part II how they are treated under competition law matters). Thirdly, there is in any case likely to be substantial overlap between big companies and those holding a dominant position or monopoly as defined by the relevant competition laws (such as art.102 TFEU)—and even more so when considering the broader concept of power in the sense discussed above.[37] While small companies can (in certain circumstances)[38] be found to have a dominant position, in big picture terms we are less concerned about them—particularly when considering global issues such as climate change. This can be represented diagrammatically as follows:



"The problem of bigness" and market power

1. We are primarily concerned with the central grey area as these are big companies with market power.
2. For present purpose we are less concerned about the black area on the right-hand side as, while these companies have market power, they are relatively small.
3. We remain concerned about the "big" companies in the white area on the left-hand side as, while they may not be held to have market power they may have significant effects on the market, significant potential to conduct unsustainable business practices and (equally important) significant potential to rectify them/do good—all of which may push them into the grey area at any given time.
4. Clearly the wider the concept of market power adopted in competition policy terms the greater the ability of competition law to influence these big companies (i.e. the greater the grey area relative to the other areas).

Consumer welfare, output and growth

In addition to considering broader concepts of power, we must also consider the alarming possibility that the prevailing paradigm of competition law conflicts with a sustainable future at a deeper and more fundamental level. It is increasingly well-recognised that the "Chicago Antitrust" way of looking at the world gave rise to a singular preoccupation with a narrow concept of consumer welfare and of low consumer prices. One corollary of this is that consumer welfare-led competition policy operates within a "maximum output" paradigm.[39] It is precisely because mergers and bigness give rise to the tempting possibility of economies of scale (i.e. lower per unit costs) and thus increased output that makes such "efficiencies" a potential defence to the acquisition or exercise of monopoly power. A policy of maximising output, though, runs directly counter to the species-level necessity of reducing resource use, emissions, and waste products. Again, some further context is helpful:

- Climate change, ecological crisis, ecosystem collapse: these are consequences of population growth and growth in physical throughput of resources. At current rates, population numbers, material-use tonnage, energy consumption, incomes, and

[36] Paul Griffin, "The Carbon Majors Database—CDP Carbon Majors Report 2017", CDP (July 2017).
[37] See interesting work being done by on the link between size/market capitalisation and market power, especially in the digital sector. See, for example, Finn Hagemann, Vincent Winterhager and Leonard Baum, "Revisiting Dominance Indicators" (May 2021), available at: *https://osf.io/5ng9f/?view_only=eb9e6761cbdd4910bf3748ba7af41754*.
[38] There are many instances where companies have been found to have a "dominant position" in niche markets under EU competition law—and to have "abused" it (see for example cases concerning the supply of spare parts for a finished product such as *Hugin Lipton* (*Hugin Kassaregister AB v Commission of the European Communities* (22/78) EU:C:1979:138; [1979] 3 C.M.L.R. 345)).
[39] Indeed, John Newman has shown that output, as opposed to price, was the true focus of Chicago antitrust thinkers. See John Newman, "The Output-Welfare Fallacy: A Modern Antitrust Paradox" (2022) 107 Iowa L. Rev. 563.

solid, liquid, and gaseous emissions are currently *doubling* every generation or two.[40]

- We are fast running out of key resources critical to modern life, technology, civilisation and life on earth. Experts believe that we have already passed the point of "peak oil", "peak phosphorous" and production of a wide variety of mined resources, from copper and tin to lithium and chromium, are on the verge of decline. It may seem that this is a good thing: we are exhausting resources but that will spur us to find replacements. It is true that we would do well to manage without oil, for example, but phosphorous is essential to fertilising soil and supporting agriculture, and there are currently no known substitutes (apart from those offered by regenerative or agroecological farming methods which vastly reduce the dependence on chemical inputs, but which also move away from production at current industrial scale). We are already breaching "planetary boundaries", as memorably visualised in Kate Raworth's *Doughnut Economics*:[41] in 2015, a set of researchers led by Johan Rockström at the Stockholm Resilience Centre identified that healthy boundaries for four of the nine essential ecological processes for life on earth had already been breached.[42]
- As early as 50 years ago, experts predicted that exponential growth in consumption could lead to dire consequences. In 1972, a group of leading experts in the "Club of Rome" produced the *Limits to Growth* report based on research at the Massachusetts Institute of Technology (MIT) which modelled collapse of the world population by the end of the 21st Century (but beginning as soon as the 2020s) following continued, unabated economic growth and resource use. The report was highly controversial. While many accepted that exponential growth could not continue indefinitely, others argued that human ingenuity would kick in to continuously expand the boundary of civilisational development. The Green Growth agenda and the favoured model of growing the world economy to reduce inequality (rather than redistributing current wealth) both take this latter view and ignore the possibility that there may be any limits to growth.
- Of course, "economic growth", "increased gross domestic product (GDP)" and "increased consumption", as measured in pounds, dollars or euros, does not necessarily mean increased materials use. It is possible to "decouple" growth from material throughput as we enjoy more virtual and resource-light products and services. Unfortunately, most such decoupling to date has been relative rather than absolute, and therefore nothing near the level of decline in materials use that would be needed to avoid the most stark scenarios.[43]
- One of the unfortunate dynamics at play is the "rebound" or "backlash" effect, whereby increasing material use efficiency tends to make things cheaper, which in turn encourages greater consumption.[44] Such dynamics work against absolute resource use reduction. As one UK All-Party Parliamentary Group on Limits to Growth report states: "it is clear that if economic growth continues at predicted rates, the task of fully decoupling emissions from growth is a ferociously difficult one. Since the middle of the 20th Century, the global economy has expanded at around 3.65% each year. If it were to continue to expand at the same rate, it would be more than 200 times bigger in 2100 than it was in 1950."[45]
- All of this points to the need to take seriously calls for a "steady state" or "degrowth" economy—or, at the very least, strike an equitable balance between reduced growth, re-distribution and decoupling growth from material throughput.

This perspective is echoed by a recent report by the Organisation for Economic Co-operation and Development (OECD) called "Beyond Growth: Towards a New Economic Approach".[46] The report identifies three elements of a much-needed new economic narrative:

[40] For more on the link between economic growth and material resource use, see Darrin Qualman, "Civilization Critical: Energy, Food, Nature, and the Future" (Black Point, Nova Scotia: Fernwood Publishing, 2019).

[41] Kate Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st-century Economist* (London: Random House, 2017).

[42] J. Rockström et al, "Planetary boundaries: exploring the safe operating space for humanity" (2009) 14(2) *Ecology and Society* 32.

[43] Tim Jackson and Robin Webster, "Limits Revisited: a review of the limits to growth debate", UK All Party Parliamentary Group (April 2016), available at: *https://limits2growth.org.uk/wp-content/uploads/Jackson-and-Webster-2016-Limits-Revisited.pdf*.

[44] In economics this is sometimes known as the "Jevons paradox" or "Jevons effect"—Jevons being a 19th century economist who noted that technological improvements that increased the efficiency of coal use led to increased consumption of coal. See, for example, the book review by Diana Bauer and Kathryn Papp, "The Jevons Paradox and the Myth of Resource Efficiency Improvements" (18 March 2009), available at: *https://www.researchgate.net/publication/26844563_Book_Review_Perspectives_The_Jevons_Paradox_and_the_Myth_of_Resource_Efficiency_Improvements/link/5926f71faca27295a800d3b6/download*.

[45] All-Party Parliamentary Group on Limits to Growth, April 2016, p.14.

[46] OECD (2020), "Beyond Growth: Towards a New Economic Approach", New Approaches to Economic Challenges, OECD Publishing, Paris, available at: *https://doi.org/10.1787/33a25ba3-en*.

- "A new conception of economic and social progress—a deeper understanding of the relationship between growth, human wellbeing, a reduction in inequalities and environmental sustainability, which can inform economic policymaking and politics."
- "New frameworks of economic theory and analysis—a richer basis of understanding and evidence on how economies work, and new tools and techniques to help policymakers devise policy."
- "New approaches to economic policy—a wider set of policy and institutional reforms, based on the new frameworks and analysis, to achieve the new social and economic goals."

This new approach calls into question much of the economic framework on which modern antitrust is predicated. It is also consistent with calls to move away from our obsession with GDP. For example, the World Economic Forum has recognised that GDP is no longer an accurate measure of growth (i.e. it fails on its own terms) and proposed a scorecard made up of four dimensions that need to be brought into balance: prosperity, the planet, people and the role of institutions.[47] Similarly several countries have introduced measures of wellbeing as an alternative, or instead of, GDP.[48]

How should competition policy respond in this context? We offer the following *five reflections*:

- Given the consequences of environmental collapse—a massive fall in population, productivity, and industrial output—it is hard to imagine a greater threat not just to humankind but to markets. A competition policy that promotes never-ending maximum output sows the seeds for the destruction of markets as we know them.
- In the light of the pressing need for a rapid and massive reduction in resource use, competition frameworks must reassess the connection between output and welfare. Greater output does not always lead to greater welfare,[49] especially given the above context.
- We should also revisit such core concepts such as "efficiency" and adapt them for this context. It would be more useful, for example, to consider material resource use efficiency and not just cost saving efficiencies that have the potential to reduce price and increase output, bearing in mind, however, the risk of rebound and backlash if prices fall.[50]
- Species-saving technologies have a huge role to play in creating a sustainable future and mitigating against our unsustainable past and present. It is right that competition policy focuses now so heavily on innovation. But the type of innovation and the pathways of innovation matter.[51] Only some technologies will help us, many may be neutral and some actively detrimental. It must be recognised that not all claims to innovation-stimulating mergers and deal-making can be credited.
- The problem of inequality is inextricably linked to that of climate progress: if the cost of transition to a sustainable future falls disproportionately on the poor then they will (rightly) resist it and the agenda will fail. Market power—which, especially when it raises prices, acts as a tax on the majority and transfer to wealthy capital owners and shareholders—contributes to this dynamic.[52]

The limits to the recent consumer welfare approach to competition policy is being increasingly recognised by competition authorities. Lina Khan (the new US FTC chair) argues that "focusing on consumer welfare disregards the host of ways that excessive concentration can harm us-enabling firms to squeeze suppliers and producers [and] endangering system stability".

B. Are dominant firms good or bad for sustainability?

There is an open question, and one that has attracted only limited research energy, as to whether dominant firms or firms with market power are good or bad for sustainability agendas.

[47] World Economic Forum, "Move over GDP-time for a new measure of economic growth" (2021), available at: *https://www.weforum.org/agenda/2021/05/gdp-new-measure economic-growth/*.

[48] For example, the UK's Office of National Statistics (ONS) measures its national rate of wellbeing and New Zealand has started designing its entire budget around wellbeing priorities (Eleanor Ainge Roy, "New Zealand's world-first 'wellbeing' budget to focus on poverty and mental health", *Guardian* (14 May 2019), available at: *https://www theguardian.com/world/2019/may/14/new-zealands-world-first-wellbeing-budget-to-focus-on-poverty-and-mental-health*). See also Tim Jackson, *Prosperity without Growth* (London: Earthscan, 2009) and Kate Raworth, *Donut Economics* (Hartford, Vermont: Chelsea Green Publishing, 2017); and William D. Nordhaus and Edward C. Kokkelenberg (eds), *Nature's Numbers: Expanding the National Economic Accounts to Include the Environment* (Washington, DC: The National Academies Press, 1999).

[49] See Newman, "The Output-Welfare Fallacy: A Modern Antitrust Paradox" (2022) 107 Iowa L. Rev. 563.

[50] Perhaps mindful of this, the exemption provision of the TFEU (art.101(3)) does not refer narrowly to "efficiencies" but refers to the much wider term "benefits" in the second condition for an exemption and sets out what form those benefits can take in the first condition. Austrian law has recently gone further and now explicitly recognises benefits which "make an essential contribution to an ecologically sustainable and climate neutral economy" (Austrian Competition Act s.2(1) as amended, September, 2021).

[51] For a discussion of "toxic innovation" see Ariel Ezrachi and Maurice E. Stucke, *How Big-Tech Barons Smash Innovation—and How to Strike Back* (HarperBus, 2022).

[52] See further the papers cited in fn.24.

One argument, most firmly put forward by Mark Roe, a law professor at Harvard, is that firms with excess rents due to monopoly power have more capacity to allocate those rents towards sustainability purposes.[53] In contrast, Roe argues, firms in competitive industries cannot deviate from profit maximisation, except in the narrow circumstances in which doing good facilitates financial performance.

Roe cites a range of studies showing that this argument is borne out by the evidence.[54] Roe also outlines four mechanisms by which sustainable corporate purpose "pushes its way" into corporations.

i. "Large firms attract political attention. Large firms with market power attract even more political attention. And firms with large rents have more reason to avoid political animosity so they can retain those rents, which the polity could confiscate". In other words, big, powerful firms do good so as to avoid a backlash which might reduce their rents.[55]
ii. "The monopoly firm affords executives more slack than the competitive firm and that slack can make managers more responsive to purpose pressure".
iii. Diverging goals amongst shareholders weaken the influence of "pro-profit" investors.
iv. By boosting employee morale and consumer acceptance, pursuing corporate social responsibility can boost firms' profitability, thus causing firms to adjust their activities.

Roe also points to lack of consensus in the literature, with some evidence that points in the opposite direction.[56]

Marios Iacovides and Chris Vrettos have argued (and have attempted to show empirically) that there is a nexus between market power and unsustainable business practices.[57] (This seems consistent with current concerns about the relationship between power in digital markets and both anticompetitive practices and wider harms to society). While there may remain some doubt as to whether dominant companies (as the term is currently understood) are responsible for any more unsustainable practices than firms of equivalent size,[58] any such doubts do not detract from the need to focus competition policy on big corporations and concentrated industries—at least when considering the fight against climate change and sustainability issues.We would also add the following *seven observations*:

1. The principles of shareholder value and profit maximisation force many firms to seek market power and to avoid social *and* environmental costs of production, distribution and consumption. Both are forms of rent seeking. Subject to being nudged by stakeholders, governments, or sometimes shareholders, we might expect firms to engage in both, if they can.
2. Roe does not acknowledge the harms of economic power that are outlined in this first Part of this article, and thus ignores the possibility that any public benefits accruing from the actions of a supposedly benevolent monopolist may be cancelled out by the harms of the monopoly itself. In other words, the monopolist may have rents to spend on doing good, but it matters how those rents were earned.
3. We cannot assume that firms that "do more CSR" are actually more sustainable, not least because they may do good in some areas and bad in others.[59] The planetary boundaries approach reveals that there are many thresholds that must be maintained at healthy levels in order to avoid environmental collapse.
4. In some cases, corporate social responsibility agendas are designed to remedy precisely the harms caused by the same companies in the exercise of their power. Is boosting and expanding their power into new domains—environmental rehabilitation, gender and racial equity and so on—compatible with meeting those challenges? Or is it a corporate power grab?[60] Where structural imbalances of power are part of the cause, remedial action by monopolists may be an insufficient solution.

[53] Mark J. Roe, "Corporate Purpose and Corporate Competition", European Corporate Governance Institute, Law Working Paper No. 601/2021 (August 2021).
[54] Roe, "Corporate Purpose and Corporate Competition", European Corporate Governance Institute, Law Working Paper No. 601/2021, pp.18–23.
[55] This is consistent with a new paper by economists at one of the leading competition economic consultants, Oxera. This identifies a number of sustainability "spillovers" between firms that can generate both socially and privately beneficial co-operation: Helen Jenkins, Nicole Rosenboom and Timo Klein, "When to give the Green light to green agreements", Oxera Agenda (September, 2021), available at: *https://ssrn.com/abstract=3959762*.
[56] Roe, "Corporate Purpose and Corporate Competition", European Corporate Governance Institute, Law Working Paper No. 601/2021, p.20, p.22.
[57] Marios Iacovides and Chris Vrettos, "Radical for whom? Unsustainable Business Practices as abuses of dominance" in Simon Holmes, Dirk Middelschulte and Martijn Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (Concurrences, Institute of Competition Law, 2021).
[58] While Iacovides and Vrettos's research is interesting, the finding that dominant companies are also responsible for negative environmental impacts etc. is hardly surprising as many (not all) firms found to have a dominant position are large multinational firms which have the most impact on so many things (good and bad). Furthermore Dirk Middelschulte has challenged the methodological soundness of their underlying assumptions that dominant companies are more likely to engage in unsustainable practices: "they draw this conclusion from a set of 176 Commission Decisions -85% of cases relate to the mining/energy sector, which leaves a mere 27 cases for all other industries, a weak basis for statistically significant conclusions that 'it seems to be characteristic of all economic sectors' and that 'dominant undertakings systematically contribute to ecological breakdown'", Middelschulte and Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (2021), p.217, fn.16.
[59] An obvious example is the oil industry. On the one hand it is doing some great work on renewables but it continues to invest heavily in new oil extraction (with investment in the latter far exceeding investment in the former).
[60] Joel Bakan, "The New Corporation: How 'Good' Corporations are Bad for Democracy", Harvard Law School Forum on Corporate Governance (9 September 2021), available at: *https://corpgov.law.harvard.edu/2021/09/09/the-new-corporation-how-good-corporations-are-bad-for-democracy/*.

5. Firms with rents have discretion over how they are allocated. They may, as Roe argues, choose to allocate them towards stakeholders and towards sustainability objectives. Or they may not. It is up to them. Entrusting the task of saving humanity from itself to commercial enterprises that often grew big and powerful by focusing primarily on profit-making, without insisting upon strong democratic oversight and levers for enforcement, is risky.[61] At the very least we may expect slow progress towards urgent goals as many companies seek to make the most of the current paradigm before shifting, at their convenience, to the next—and we can expect them to allocate some portion of their excess rents towards lobbying accordingly.[62]
6. Although monopolists with textbook market power are predicted to reduce output and therefore reduce material resource use, emissions, pollution and so on, the reality is more complex.[63] Firms with the sort of power of concern in this paper may be able to choose the level of output, material resource use, emissions, pollution etc. that maximises their profit. Even if output reduces, firms may opt for more polluting production methods or a more polluting product, and consumers will have few alternatives in a monopolised market. Firms that develop economies of scale may expand production. Firms with economic and political power may also be more ambitious in, not just the scale of activities, but in the footprint of those activities, and may have the power to shape their regulatory environment to facilitate this. They may be able to externalise costs in ways not available to smaller less powerful firms. Firms with excess rents build up war chests that enable them to fight attempts to impose liabilities on them: they can dedicate resources to paying fines and contesting litigation, whilst continuing with unsustainable business models. These can be treated as a cost of doing business.[64] Indeed, the historic focus on prices may mean that we narrowly categorise some markets as competitive, because they are competitive *on price*, but the constituent firms, either individually or collectively, may still have substantial power to externalise *costs* onto society.
7. It may be of note that the industries that have historically contributed most to the climate crisis tend to be highly concentrated: agrifoods and of course fossil fuels are two examples. There are of course many concentrated industries with a less clear contribution towards climate change, although each of banking, tech and pharmaceuticals, as three more examples, can be said to have at least indirect links.

C. Conclusion for Part I

We conclude that we have a problem with monopoly power; that it is a barrier to a sustainable future and that this is something which competition policy needs to address.

There are, of course, issues that lie outside the scope of current competition law. Where this is the case, and where competition law could potentially make a valuable contribution, our laws should be updated so that they can tackle them, and there are strong signs that governments and competition authorities around the world are prepared to do so. For example:

- new laws and institutions around the world to tackle the power of big tech;
- the appointment of Lina Khan to chair the US FTC; Jonathan Kanter to lead the antitrust division of the US DOJ; and Tim Wu as an advisor to President Biden;

[61] Michelle Meagher, "Fifty years of shareholder value have swollen monopoly power", *Financial Times* (13 September 2020), available at: *https://www.ft.com/content/de8b9a1c-df69-44e5-b571-81f4651de050*; Michelle Meagher, "Shareholders won't be the ones that save us", Letter, *Financial Times* (9 October 2019), available at: *https://www.ft.com/content/f5fbd398-e9bd-11e9-a240-3b065ef5fc55*; Michelle Meagher, "We can't rely on corporations to reform themselves—we must challenge their power", *OpenDemocracy* (26 September 2019), available at: *https://www.opendemocracy.net/en/oureconomy/we-cant-rely-on-corporations-to-reform-themselves-we-must-challenge-their-power/*.

[62] For example, Exxon Mobil lobbyists were caught in 2021 admitting (or even boasting) that its public support for a carbon tax was a public relations ploy and that behind the scenes they were working to fight climate science "aggressively" through shadow groups (Lawrence Carter, "Inside Exxon's playbook", *Unearthed.greenpeace.org* (30 June 2021), available at: *https://unearthed.greenpeace.org/2021/06/30/exxon-climate-change-undercover/*). Similar criticisms can (and should) be directed at banks. See, for example, ClientEarth, "North Sea oil field development show's banks' hypocrisy over climate" (14 September 2021), available at: *https://www.clientearth.org/latest/latest-updates/news/north-sea-oil-field-development-shows-banks-hypocrisy-over-climate/*.

[63] For a fuller discussion, see Michelle Meagher, *Competition is Killing Us: How Big Business is Harming Our Society and Planet—And What to do About it* (2020), pp.65–67.

[64] Many felt that for decades the tobacco industry treated defending cancer lawsuits as a cost of doing business. A similar view can be taken in relation to Google's on-going battles with competition authorities over its business models. Note that the European Commission's €2.4 billion fine on Google in the AT.39740—*Google Android* case is only 5–6 days profit for Google.

- the raft of measures announced in July 2021 by President Biden;[65] and
- recent reports proposing a radical update to UK competition and consumer policy.[66]

However, for the most part *we already have the basic legal tools* that we need. We do, however, need to use them more intelligently, and move away from some of the narrow ways of thinking that have crept into the mainstream in the last few decades. The competition establishment has suffered myopia or tunnel vision for too long. We must update our thinking in the light of the existential threat posed by climate change and the growing evidence of the harms being done by increased concentration and corporate/market power. In doing so some may be surprised to find that we get closer to the original purpose of our competition laws—on both sides of the Atlantic.

In the following Parts, we will turn to the two most prominent ways of tackling market power and unsustainable business practices:

- using competition law to tackle unsustainable practices as abuses of monopoly (Part II); and
- using merger control to intervene before the problem arises or gets out of hand (Part III).[67]

[65] The 72 initiatives announced by President Biden on 9 July 2021 address many of the big issues of recent competition cases (e.g. competition in seeds and other inputs for the agrochemical industry; pay for delay/reverse payments; and retail concentration); some that governments and competition authorities are still trying to decide how best to tackle (e.g. data issues; dominant internet platforms and killer acquisitions); and some that have yet to come to the fore in Europe (e.g. labour market issues such as non-competes and monopsony concerns).

[66] See UK's Department for Business, Energy and Industrial Strategy, "Reforming Competition and Consumer Policy" (20 July 2021), available at: *https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy* and the Penrose Report that preceded it ("Power to the people: independent report on competition policy" (16 February 2021), available at: *https://www.gov.uk/government/publications/power-to-the-people-independent-report-on-competition-policy*.

[67] The UK's Market Investigation Regime (and those elsewhere) is not discussed in this paper, although such MIR investigations can make (and have made) a valuable contribution towards curbing market power. As the IMF has put it "greater use of market investigations with appropriate remedies … could curb growing risks caused by incumbent market leaders" (Akcigit et al, "Rising Corporate Market Power: Emerging Policy Issues", IMF Staff Discussion Notes SDN/21/01 (March 2021)). See also Simon Holmes' article, "Climate Change, Sustainability and Competition Law in the UK" [2020] E.C.L.R. 384, 392.

A sustainable future: how can control of monopoly play a part?

Part II. Using competition law to tackle unsustainable practices as abuses of monopoly power

Simon Holmes

Michelle Meagher*

☞ Climate change; Competition policy; EU law; Market power; Monopolies; Sustainability

This is the second part of our three-part article which looks at monopoly power as a barrier to a sustainable future and asks how we can use competition policy (particularly art.102 Treaty on the Functioning of the European Union (TFEU) and merger control) more intelligently in the light of climate change and growing market concentration.

Before diving into the "competition law bubble" and the technical analysis, Part I published in [2023] E.C.L.R. 16 set the scene with a brief look at the climate crisis and then at the evidence of vastly increased market concentration and power—and the growing evidence of the economic, social and political harms to which this is giving rise.

This second part looks at how art.102 TFEU could be used more effectively to tackle unsustainable practices.

In the third part to be published we will go on to look at how merger control could be used more intelligently as a way of tackling market power and unsustainable business practices—both before they arise (as a result of a merger) and as a way of preventing such power or practices being exacerbated by a merger. In doing so we look at how this might *already* be done under existing law and then make some suggestions as to how the law could be updated to recognise the scale of the problems that we face—both in terms of the climate crisis and excessive market power. In particular, we propose that that climate change and environmental sustainability considerations be built into merger control regimes and/or that the burden of proof be changed.

In this article we set out a number of ideas (some radical; some, less so). We certainly do not presume to have all the answers, but we do want to stimulate a debate and push readers to step outside the competition bubble and re-visit old ways of doing things in the light of the climate crisis and growing evidence of market concentration and power.

Conclusion for Part I

In Part I we concluded that we have a problem with monopoly power; that it is a barrier to a sustainable future and that this is something which competition policy needs to address. There may be some issues that lie outside the scope of current competition law but, for the most part *we already have the basic legal tools* that we need to tackle market power and unsustainable business practices: art.102 (the subject of this Part II) and merger control (which will be the subject of Part III).

Part II: Using competition law to tackle unsustainable practices as abuses of monopoly power

In this Part II, we focus on the role that abuse of dominance provisions could play in supporting action for a more sustainable future. In our view there is more scope to use these provisions than is often appreciated (and less of a tension between competition law and sustainability goals than some may suggest).

We focus on European Union (EU) law and specifically on art.102 Treaty on the Functioning of the European Union (TFEU) which prohibits "any abuse" of a "dominant position".[1] While this may seem like a narrow perspective, the national competition laws of many countries (not only in Europe but around the world) are modelled on EU law—with many containing identical wording. Furthermore, even laws which use different words (such as s.2 of the US Sherman Act) are generally trying to tackle the same fundamental problem—the control of market power and negative effects on the economy, society (and we would add the planet).

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[1] Article 102 TFEU provides that: "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as may affect trade between Member States". It goes on to give some (non-exhaustive) examples of abuses (which we consider further below).

Before diving into the details of art.102, it is important to place the analysis in its proper context—and particularly in the light of the discussion in Part I in the previous issue of E.C.L.R. We would emphasise the following *five points*:

1. As discussed in Part I, whatever one's views on the extent to which "dominant" companies (or companies with wider market power) are responsible for climate change and unsustainable business practices, it should be accepted that, other things being equal, big companies are likely to have a bigger impact on the market/planet than small ones and are more likely to have a "dominant position"—or at least market power. However, we do not need to agree on this to recognise that, if we have the tools to mitigate the impact of such companies on climate change (or other unsustainable practices) we have a *duty* to use them. Not only is this a moral duty but it makes sense from a basic efficiency of time and resources perspective given the urgency of the task. In this context it is also worth recalling that there is no requirement in EU law to show a causal relationship between the dominant position and the abuse.[2]
2. If we felt that the concept of a dominant position captured circumstances where there was no real market power of concern, we would instinctively (and rightly) take a cautious approach to the concept of abuse. However, the opposite is also true. If, as we hope we have shown, there is widespread (harmful) market power out there, which is not necessarily caught by the narrower concept of a dominant position, then we should not be afraid to take a more robust approach to the concept of an abuse.[3] To be clear we are in no way suggesting we should step outside the ambit of the legal prohibition in art.102 TFEU, only that we need not be unduly timid in interpreting it.
3. Those with the greatest power have the greatest responsibility to use it properly. This holds true in life generally but also in art.102 where the EU courts have often made it clear that the "special responsibility" of a company with a dominant position depends on the "degree of dominance" held by that company.[4] Again, the clear message is: *in the face of extreme market power we need not feel the need to take a restrictive approach to challenging its abuse*.
4. To determine the correct approach to abuse we must not lose sight of what art.102 was supposed to (and can) achieve. How can we decide whether something is an "abuse" if we have lost sight of the purpose of the prohibition? As Iacovides and Vrettos argue,[5] we have got so trapped in a narrow (so-called) "more economic approach" or narrow so-called "consumer welfare" standard that "competition lawyers [and economists] are unable to think outside its narrow market confines".[6] As they rightly argue, by "accepting that unsustainable business practices can be abuses of a dominant position…we focus on what we as a society and Article 102 TFEU care about". As Simon has argued elsewhere,[7] none of this is as radical as it might seem at first (superficial) sight. As Iacovides and Vrettos conclude "our approach is about more competition, just not the toxic kind. It is a call for refocusing competition policy and reconnecting concepts such as 'abuse' with the general goal of the system of EU competition law. Our proposals are activist, but they are certainly not radical". We agree.

[2] See, for example, *AstraZeneca AB v European Commission* (T-321/05) EU:T:2010:266; [2010] 5 C.M.L.R. 28.

[3] In this context we note the International Monetary Fund's (IMF) conclusion in its paper (at p.24) on "Rising Corporate Market Power": Ufuk Akcigit et al, "Rising Corporate Market Power: Emerging Policy Issues", IMF Staff Discussion Notes SDN/21/01 (March, 2021): "the effects of corporate power can be partly mitigated by enforcing restrictions on the abuse of a dominant position *more* actively" (emphasis added). We also note President Biden's statement, in the Executive Order announced by President Biden on 9 July, 2021, that "This order affirms that it is the policy of my Administration to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony", i.e. a statement to enforce existing law. Note also that he is concerned not just with monopoly and monopsony but also more generally with "excessive concentration of industry" and "abuses of market power".

[4] See, for example *Microsoft Corp v Commission of the European Communities* (T-201/04) EU:T:2007:289; [2007] 5 C.M.L.R. 11 at [775]. It is also clear that many cases of abuse of dominance have concerned so-called "super dominance" with market share of 70, 80 or even 90%. See, for example, *Intel Corp v Commission* (C-413/14 P) EU:C:2017:632.

[5] Marios Iacovides and Chris Vrettos, "Radical for whom? Unsustainable Business Practices as abuses of dominance" in Simon Holmes, Dirk Middelschulte and Martijn Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (Concurrences, Institute of Competition Law, 2021).

[6] Iacovides and Vrettos ask a very pertinent question: "a market logic may work, but do we really want everything to be filtered through that logic if that is only possible because we contort concepts (eg consumer welfare) and tests that were devised in a different time and on the basis of discredited assumptions and failed ideologies?"

[7] Simon Holmes, "Climate Change, Sustainability and Competition Law" (2020) 8(2) *Journal of Antitrust Enforcement* 354.

5. None of this should suggest that the concept of abuse is a static one. Quite the contrary: it needs to be considered in the light of current economic, social and environmental priorities.[8] Right now the number one priority for the EU (and, indeed, the world) is the fight against climate change. This is reflected in the EU's Green Deal and numerous statements by all EU institutions. While we must stay within the limits of what art.102 says, we cannot close our eyes to this political, economic and, indeed, existential imperative.

It is against that background that we now turn to the two ways in which art.102 is most relevant to climate change and unsustainable business practices:

- using art.102 as a "*sword*" to attack unsustainable practices; and
- recognising sustainability as a potential "*shield*" against accusations that genuine practices to mitigate climate change or increase sustainability are an "abuse" of a dominant position.[9]

1. Article 102 as a "sword" to attack unsustainable practices

Before diving into the detail of specific unsustainable practices that may infringe art.102 (and the examples given within that provision itself) it is again important to understand the context and the general purpose and meaning of the prohibition. *10 points*, in particular, should be borne in mind:

1. The classic definition of an "abuse" is that given by the CJEU in the *Hoffman La Roche* case: it is conduct "through recourse to methods different from those which condition *normal* competition in products or services"[10] (emphasis added). Exactly what this means is far from clear,[11] but we would suggest there should be *two guiding principles*.
   First, what is "normal" may change over time and should reflect society's values at the time the assessment of potential abuse is made (disposing of chemicals in a river may have been "normal" and acceptable in the 1960s but is not now). Secondly, abuses should be as consistent as possible with what an ordinary citizen would consider to be an abuse: it is odd (to say the least) that loyalty rebates which *reduce* prices and which are widely given by companies regardless of their size are (generally) condemned as an "abuse" if given by a dominant company, but charging exorbitant prices for a product, or paying a supplier so little that they can't feed a family, is something which many in the competition law bubble have difficulty seeing as an "abuse". Anyone outside that bubble would probably come to the opposite conclusions and we should not be afraid to call out abuses which fit with our innate sense of what an abuse of power is.[12]
2. Probably the most obvious disconnect, between the competition bubble and both the person in the street and the original meaning of art.102, is the former's focus on "*exclusionary*" abuses (such as loyalty rebates) and the paucity of cases brought against "*exploitative*" abuses. This is bizarre.[13] Not only are three quarters of the examples of abuses given in art.102 itself exploitative, but exploitative abuses fit more easily with our innate sense of what is "fair" and what an "abuse" of power really is.[14] This is important in the current context as most instances of unsustainable activities will be exploitative, rather than exclusionary, in nature.

[8] What may have been the top priorities in 1957—the date of the Treaty of Rome that first set out what is now art.102 TFEU—(or even 1979 when the *Hoffmann La Roche* case set out the classic definition of an abuse) such as the establishment of a "Common Market" and the potential exclusion of competitors (especially from other Member States) are not necessarily our top priorities in 2021 (or at least not our only ones). Of course, these still include a system of healthy competition etc., but this is not inconsistent with our overall priority of combatting climate change with all available tools.

[9] Article 102 can also be used as a "sword" to attack steps taken (or purportedly taken) in the name of sustainability if they are anti-competitive—either in the sense of "green washing" or because, on analysis they fall foul of art.102. A sustainability motive, or simply being in the environmental sector, is no defence against art.102. An example of the latter is the so-called "Green Dot" case (*Der Grune Punkt - Duales System Deutschland GmbH v Commission of the European Communities* (C-385/07 P) EU:C:2009:456; [2009] 5 C.M.L.R. 19). On this see Suzanne Kingston in *Greening EU Competition Law and Policy* (Cambridge: Cambridge University Press, 2011), at pp.312 to 318 and Christopher Thomas, "Exploring the Sustainability of Article 102" in Holmes, Middelschulte and Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (2021).

[10] *F Hoffmann La Roche & Co AG v Commission of the European Communities* (85/76) EU:C:1979:36; [1979] 3 C.M.L.R. 211 at [91].

[11] The argument is often somewhat circular. Having decided that a practice is an abuse it is held not to be "normal competition". Nor does the term "competition on the merits" really take the analysis any further for the same reason.

[12] Our point here is not to challenge the loyalty rebate cases like *Intel* (*Intel Corp v Commission* (C-413/14 P) EU:C:2017:632), or to argue for more intervention generally against high prices—although that may be warranted—but simply to make the point that we should be careful not to lose touch with the basic idea of what an "abuse" is. There may be instances where an abuse is complex/technical and not easily understood by non-experts (loyalty rebates and self-preferencing are probably examples of this) but these should be the exceptional cases—and certainly not blind us to the more obvious abuses that stare us in the face.

[13] It is however understandable in the context of a prevailing so-called "free market" ideology premised on the idea that as long as there is sufficient competitive pressure, and competitors are not excluded from participating in the market, there will be no opportunity for abuse of dominance or exploitation because dominance, if ever held, will be fleeting. Hence, the focus on exclusion on the assumption that this forestalls a need to target exploitation directly.

[14] This is consistent with the "travaux preparatoires" of the Treaty of Rome (the predecessor to the TFEU and which first set out what is now art.102 TFEU) which indicated that the intention behind art.102 was primarily to sanction exploitative abuses. See P. Akman, "Searching for the Long Lost-Soul of Article 82 EC" (2009) 29(2) *Oxford Journal of Legal Studies* 267, 271.

There are some tentative signs of a renewed interest in exploitative abuses (and indeed beyond) both in the area of big tech—in particular in relation to platform and ecosystem power[15]—and in the number of excessive pricing cases brought by national competition authorities across Europe in recent years.[16]

3. Many of the reasons for a reluctance on the part of competition authorities to make full use of art.102's potential are not relevant to the power and sustainability concerns which this article focuses on. For example, while it can be argued (not always correctly) that the market will correct in the case of excessive prices, the same cannot be said for unfairly low purchase prices.[17] Furthermore, potential concerns over the risk of harm through intervention when no underlying harm exists ("false positives") are vastly outweighed by the risk of not intervening when harm is being done ("false negatives") in the face of climate change—particularly given the uncertainties of tipping points and recognition that much of the damage being done is irreversible.

4. In principle, it should not matter how an abuse is classified: something either is, or is not, an abuse; the examples in art.102 are just that—examples; and the European courts have consistently held that the categories of abuse are not closed.[18] In practice, it is often easier to convince a conservative competition establishment that an unsustainable practice is an abuse if it falls within a well-established category ("box ticked"), but equally we should not feel obliged to try to squeeze an unsustainable practice into a particular box into which it does not fit easily but which is clearly abusive. Not only is this not required as a matter of law, but it helps to ensure that art.102 continues to evolve and proves itself capable of dealing with the most pressing issues of our time. If it does not, it will seem increasingly arcane and risks becoming increasingly irrelevant.[19] Commissioner Vestager has recently recognised this very clearly: "I would encourage all colleagues in the enforcement community to be willing to explore the boundaries, and not shy away from novel theories of harm…".[20]

5. On the face of it, art.102 would seem inherently well suited to attack unsustainable and exploitative actions by dominant (and often "super-dominant") companies. Furthermore, there is nothing in the jurisprudence of the European courts that we can see to suggest to the contrary.[21] The question therefore is not so much, is it possible to use art.102 to attack these practices, but *is there the will to do so?* This means a willingness by civil society and injured parties to bring cases to the attention of the competition authorities (or courts)—and a willingness by the latter to take the cases on and look at art.102 with a fresh pair of eyes.

6. There is a *strong legal case* for factoring in environmental and other sustainability factors when considering whether conduct does, or does not, amount to an abuse when art.102 is read (as it must be) in the light of the "constitutional" provisions of the treaties.[22] In particular:
   - the goals in art.3 of the Treaty on European Union of a "high level of protection and improvement of the environment" and "the sustainable development of the earth"; and
   - the clear requirement in Article 11 TFEU that "environmental protection requirements *must* be integrated into [*all* EU] … policies and activities" (emphasis added).

7. It is interesting that art.102 does not contain a general requirement that the abuse must have an adverse effect on competitors,[23] which makes the general focus on exclusionary, rather than exploitative, abuses all the more odd. In fact, art.102 does not explicitly require there to be an

[15] See Ioannis Lianos and Bruno Carballa, "Economic Power and New Business Models in Competition Law and Economics: Ontology and New Metrics", *CLES Research Paper Series 3/2021*, March 2021.
[16] See, for example *Pfizer-Flynn v CMA*, 18 December 2015—and subsequent appeals.
[17] Contrary to textbook economic thinking, if poor farmers, for example, face low prices, they may not produce less—instead they are likely to try to produce more, to offset the shortfall in income, and feed their families.
[18] See for example, *AstraZeneca AB v European Commission* [2010] 5 C.M.L.R. 28.
[19] This was a widespread view of US antitrust prior to its recent boost under President Biden and FTC chair, Lina Khan.
[20] Commissioner Vestaeger, "Fairness and Competition Policy", 10 October, 2022 (Speech/22/6067).
[21] If, contrary to our view, the Court of Justice of the European Union (CJEU) were to take a different view, it would be open to competition authorities not constrained by the CJEU's (future) judgments to take a different view. An obvious example would be the ability of the UK's CMA (post-Brexit) to take a more progressive approach to the UK's Chapter 2 prohibition (which is in the same terms as art.102 TFEU) and tackle unsustainable practices by dominant companies. Didn't someone once say that the UK should "take back control"?
[22] On which see Part IV of Holmes, "Climate Change, Sustainability and Competition Law" (2020) 8(2) *Journal of Antitrust Enforcement* 354.
[23] There is a requirement that "trading partners" be placed at a "competitive disadvantage" in the example of an abuse set out in art.102(c) dealing with discrimination (a point confirmed by the CJEU in cases like *Meo*: *MEO - Servicos de Comunicacoes e Multimedia SA v Autoridade da Concorrencia* (C-525/16) EU:C:2018:270; [2018] 4 C.M.L.R. 25). This does not, however, apply to art.102 as a whole.

effect (let alone adverse effect) on competition—only that it "may affect trade between Member States". We should not, however, read too much into this given that the provision should be read in context, and it is to be found in the chapter of the TFEU headed "Rules on Competition". While this almost certainly means an unsustainable practice which has absolutely nothing to do with competition cannot amount to an abuse, it does, in our view, suggest there is more scope for finding an unsustainable practice to be an abuse so long as there is some reasonable nexus to the competitive structure of the market or competitive process.

8. There is also no *general* requirement in art.102 that the practice must prejudice consumers for it to amount to an abuse.[24] This suggests to us that injury to other stakeholders such as suppliers or employees (or perhaps the environment) is sufficient for a practice to amount to an abuse.[25] At the very least it suggests that art.102 is not just concerned with consumers' direct or short-term interests but that the abuse may consist of damage to consumers' longer-term interests—whether through the weakening of the structure of competition or, we would argue, in terms of the practices' impact on the planet and the environment in which those consumers live and breathe.

9. Notwithstanding the points made at 7 and 8 above, it is clear that many or most unsustainable practices with which we are likely to be concerned *will* affect competition and affect competitors and/or prejudice consumers. Indeed, most such practices will have most of the characteristics of other well-established categories of abuse and competition law violations. For example, those dominant companies which avoid paying the true price for inputs or offload costs onto third parties and society, whether by paying unfair prices to suppliers, dumping waste in rivers, avoiding tax liabilities, or polluting the atmosphere, or which delay introducing more sustainable products or fail to open up their product ecosystems to more sustainable alternatives or components, or refuse to license new green technologies on fair terms, are:
    - gaining an unfair competitive advantage over rivals which are not doing so;
    - raising barriers to entry and excluding sustainable competitors (and these competitors may be just "as efficient" in financial terms—and perhaps more efficient in natural resource and planetary terms—as the dominant company—it may be just that those competitors are not engaging in the same unsustainable practices);[26]
    - potentially reducing incentives to innovate (why bother innovating to reduce costs if you can cheat the system?); and
    - not engaging in "normal competition" or "competition on the merits".

10. One final point. The approach which we advocate is in no way inconsistent with the so-called "more economic" approach (even if we have some doubts about that approach generally). On the contrary:
    - it is an approach which is far more in tune with the original (and better) meaning of "economics";[27]
    - when the Commission beefed up its economic capabilities in the early noughties, it was largely in response to criticisms of its (relative) lack of these capabilities in some earlier cases. Nothing in that made (or makes) it inevitable that our approach to competition law and economics should focus on a narrow "Chicago" version of the consumer welfare standard or neoclassical price theory—and certainly does not require or permit an unduly narrow approach to art.102; and

[24] Although this is a requirement in the example of an abuse given in art.102(b) concerning "limiting production, markets or technical development". See more generally, Pablo Colomo, "Anticompetitive Effects in EU Competition Law" (2021) 17(2) *Journal of Competition Law & Economics* 309.

[25] It also means that there is nothing equivalent in art.102 itself to the requirement in art.101(3) TFEU that consumers must get a fair share of the benefits of an agreement if it is to be exempt from the prohibition in art.101(1) on anti-competitive agreements.

[26] As Iacovides and Vrettos point out, in assessing whether the competitors are "as efficient" as the dominant company it would not seem appropriate to make the comparison based upon the dominant company's costs as these are artificially suppressed by the very abuse complained of—consistent with the recognition that prices that are a result of market power cannot be a proper baseline for the conduct of the SNNIP test-to avoid the so-called "cellophane fallacy" (see Iacovides and Vrettos, "Radical for whom? Unsustainable Business Practices as abuses of dominance" in Holmes, Middelschulte and Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (2021)).

[27] For an account of how the original and more holistic approach to economics has changed, see J. Aldred, *License to be Bad-How Economics Corrupted Us* (London: Allen Lane, 2019), e.g. at Ch.1.

- our approach to competition policy and sustainability provides *more*, not less, scope for the intelligent use of economics—especially environmental economics.[28]

We turn now to a couple of the *examples of abuses contained within article 102 TFEU itself*.

Unfair prices and conditions (article 102(a) TFEU)

Article 102(a) 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 there is no reason, in principle, why this could not be used more widely to condemn unsustainable practices which are unfair from an economic, political, environmental or climate change point of view.

Unfair purchase prices

An example is the incredibly low prices paid by many retailers and intermediaries to farmers for their produce (e.g. bananas, coffee and cocoa)—prices which do not enable those farmers to feed their families; do not cover the true costs of production; can lead to an excessive use of scarce resources[29] (land, water, etc); and often discourage the development of more sustainable methods of production. To those brought up in the competition bubble this might seem radical, but looking at the wording and purpose of art.102(a) afresh, with its clear focus on fairness[30] and on all aspects of prices and trading terms it can quickly be seen that it is not. It's not easy but, if we can challenge unfair *selling* prices for being too *high* ("*excessive pricing*") or for being too *low* ("*predatory pricing*") why not challenge depressingly *low purchase prices*? And, as we have already pointed out, markets are hardly likely to "self-correct" in the case of *low* (as opposed to *high*) prices.[31]

Predatory pricing

Often selling prices are unsustainably low because they do not reflect the *true* costs of production.[32] Obvious examples are where some of the costs of production have been off loaded onto society (e.g. in the form of carbon emissions not captured or effluent not treated and dumped on land or in rivers), the so-called "negative externalities". Another example is where the prices paid for inputs (whether raw materials like cocoa or exploitative labour) are unsustainably low (i.e. because they do not reflect the true costs of purchasing those inputs).

In these instances, the prices might be shown to be predatory once the "true" costs of production are properly taken into account (but otherwise applying the usual tests for predation as set out by the courts in cases like *Akzo*[33]). Again, this is not easy (but nor have historic predatory pricing cases been) and merits further consideration—especially by environmental economists. Those looking for research projects, please take note.

Other unfair trading conditions

Wherever a dominant company imposes unsustainable practices on a customer or supplier there is no reason why these could not be condemned as an abuse. One example (outside the area of pricing) might be requiring a supplier to produce a product in an environmentally damaging way.[34]

Although, in the past, exploitative cases have tended to relate to pricing practices, there is nothing in art.102 to suggest that that should be the case, quite the contrary: it explicitly refers to "other" unfair trading terms.[35] Furthermore, some of the reasons for the low level of enforcement action against exploitative pricing practices do not apply (or are less relevant) in the case of non-pricing practices; for example, the enforcer does not risk becoming a price regulator and (as we have seen) the market is less likely to self-correct in relation to abuses which do not concern excessive prices. Indeed, many of the criteria identified in the cases when assessing "unfairness" in art.102(a) can be readily seen in the case of the sort of unsustainable practices with which this article is concerned: they are often "unnecessary"; "disproportionate" "unilaterally imposed" etc.[36]

Limiting the production of products or services (article 102(b) TFEU)

Article 102(b) TFEU prohibits as an abuse: "limiting production, markets or technical development to the prejudice of consumers". Suzanne Kingston provides

[28] See also "Climate Change, Sustainability and Competition Law" (fn.22) at pp.9–11 and point (vii) on pp.45 and 46.
[29] See, for example, fn.17.
[30] Commissioner Vestaeger has repeatedly focused on the central role of "fairness" in EU competition policy—for example in her 10 October 2022 speech on "Fairness in Competition Policy": "protecting competition is about efficiency, but not only. Fundamentally, it is a question of fairness" (Speech/22/6067).
[31] For a fuller discussion of this see Simon's article on "Climate Change, sustainability, and competition law" cited in fn.22 at pp.31 to 34. Another example is the unsustainable production of meat discussed by Iacovides and Vrettos (Iacovides and Vrettos, "Radical for whom? Unsustainable Business Practices as abuses of dominance" in Holmes, Middelschulte and Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (2021), p.101).
[32] For an excellent discussion of "true costs" and "true pricing" see True Price Foundation, "A Roadmap for True Pricing. Vision Paper—Consultation draft" (2019), available at: *https://trueprice.org/vision-paper-a-roadmap-for-true-pricing/*. This article includes some helpful ideas on how to determine a "true price" in terms of: which external costs should be taken into account; how negative externalities should be quantified; and how to "monetise" them.
[33] *Akzo Nobel Chemicals Ltd v European Commission* (C-550/07 P) EU:C:2010:512; [2010] 5 C.M.L.R. 19.
[34] For example, in industrial farming: seed suppliers insist on GM seeds that have a much greater yield, but which require much more water and also chemical fertilisers which degrade the soil.
[35] Another example could be exploitative data requirements, e.g. *https://journals.sagepub.com/doi/abs/10.1177/0003603X21997028*. See also, Cristina Caffarra, Gregory Crawford and Johnny Ryan, "The antitrust orthodoxy is blind to real data harms", VoxEU (22 April 2021), available at: *https://cepr.org/voxeu/blogs-and-reviews/antitrust orthodoxy-blind-real-data-harms*.
[36] See Ambika Vadehra, "Exploitative Data Harvesting as an Article 102 TFEU Violation", Thesis (July 2021) available at: *https://ora.ox.ac.uk/objects/uuid:8b753186 -027a-417a-8b7e-69a2f2cb4b10*, p.59 (to be published).

some interesting examples of practices by a dominant company which are damaging from a sustainability perspective that might constitute such abuses:[37]

- limiting the ability of third parties to develop environmentally friendlier production method or products;[38]
- failing to satisfy a clear demand for an environmental service [or product];[39] or
- be extremely inefficient in refusing to use an environmentally friendly technology thus increasing environmental costs.[40]

Such examples may seem novel to some but that is not a problem either as a matter of law or policy. The courts have consistently made it clear that the categories of abuse are not closed[41] and, as discussed above, the climate crisis requires us to think afresh, re-visit old ideas, and use all the tools we have available.

2. Using sustainability as a "shield"

The second way in which sustainability and monopoly power interact is the potential for sustainability considerations to act like a "shield" against accusations that genuine efforts to fight climate change or prevent unsustainable practices amount to an abuse under art.102.

Environmental considerations are sometimes seen as a "defence", or as an "objective justification", for conduct by a dominant company that might otherwise be considered to amount to an abuse.[42] However, in our view this should not be necessary: something either is, or is not, an abuse and unlike art.101 TFEU[43] there is no two-part test set out in art.102.

As noted at point 6 in Part 2 above, there is a *strong legal case* for factoring in environmental and other sustainability factors when considering whether conduct does, or does not, amount to an abuse when art.102 is read (as it must be) in the light of the "constitutional" provisions of the treaties.[44]

There is an equally strong *moral and logical* case. If conduct is genuinely intended to combat climate change, reduce environmental damage or otherwise contribute to sustainable development, it is difficult to see how, as a matter of common sense and language, that it can be seen as an "abuse" that the law intended to prohibit. There may be exceptions to this, but these will be rare. Indeed, in these cases it is likely that the conduct was not genuinely intended to reduce environmental harm, or it was done in an anti-competitive manner.[45]

There is a further *practical reason* why it's better to take account of sustainability factors in the initial assessment of a potential abuse rather than as an "objective justification" or as a "defence". In the former case it is for the competition authority to establish the abuse; in the latter case there is (an evidential) burden of proof on the dominant company to establish the objective justification. Since there is no two-part test in art.102 (unlike art.101), the Commission continues to bear the burden of proof throughout and therefore it makes sense for the assessment to form part of the analysis of the alleged harm.[46]

Although there are few decided cases of direct relevance, the following might be instances where environmental (or other sustainability) considerations may lead to the conclusion that conduct that might at first sight be potentially abusive, is not:

- charging a higher price in order to cover environmental costs or reinvest in environmental protection:[47] i.e. to counter allegations of "excessive pricing";
- charging different customers different prices according to the use to which the product is put—e.g. how environmentally friendly it is (e.g. whether products are recycled or the energy efficiency of the downstream production process); i.e. to counter allegations of "discriminatory pricing";
- 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):[48] i.e. to counter an allegation of "tying".

[37] See Kingston, *Greening EU Competition Law and Policy* (2011), p.325. Suzanne Kingston is now a judge at the General Court of the EU.

[38] By analogy to cases like *Cooperatieve Vereniging Suiker Unie UA v Commission of the European Communities* (40/73) EU:C:1975:174; [1976] 1 C.M.L.R. 295.

[39] By analogy to cases Commission Decision of 12 April 1999 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty and Articles 53 and 54 of the EEA Agreement (Cases No IV/D-1/30.373—P & I Clubs, IGA and No IV/D-1/37.143—P&I Clubs, Pooling Agreement) [1999] OJ L125/12.

[40] By analogy to cases like Commission Decision of 21 October 1997 relating to a proceeding pursuant to Article 90(3) of the EC Treaty regarding the tariffs for piloting in the Port of Genoa [1997] OJ L301/27.

[41] *AstraZeneca AB v European Commission* [2010] 5 C.M.L.R. 28.

[42] On this approach sustainability would be an "objective justification" for conduct which is prima facie abusive where a dominant company (or exceptionally companies which are collectively dominant) engage in proportionate behaviour to tackle environmental or climate change issues (and where there is no way of achieving these objectives in a way that is less restrictive of competition). See, for example, the excellent discussion of this in Kingston, *Greening EU Competition Law and Policy* (2011), pp.304 to 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.

[43] Article 101 (1) TFEU prohibits anti-competitive agreements etc and art.101(3) sets out the conditions under which they may be exempt from that prohibition.

[44] On which see Part IV of "Climate Change, sustainability and competition law" (fn.22).

[45] See, for example the "Green Dot" case: *Der Grune Punkt - Duales System Deutschland GmbH v Commission of the European Communities* [2009] 5 C.M.L.R. 19.

[46] In practice, the difference may not be enormous as it will always be important for the dominant company to convince the authority of the objective facts relevant to the sustainability benefits of its conduct and (in reality) of its genuine motives.

[47] 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 Part A above on art.102 as a "sword").

[48] 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.

- Offering exceptionally low prices to generate trial of a new environmentally friendly product: i.e. to counter an allegation of "predatory pricing".[49]
- 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. to counter an allegation of "refusal to supply".

Some concluding remarks on the "shield"

It is well established that a dominant company can take "reasonable steps" to protect its own *commercial* interests if they are attacked by rivals so long as the actual purpose is not to "strengthen this dominant position and abuse it" and its actions are proportionate to the threat which it faces.[50] If this is the case in relation to commercial interests, then, a fortiori, a dominant company should be able to take such steps where its motives are *not* those of commercial gain at all.

It is sometimes objected that it is not for private companies to take action in the public interest and that such matters should be left to the public authorities.[51] It's hard to believe that such arguments could still be raised in 2023 in the face of a climate emergency (and the political weakness which was all too evident at COPs 26 and 27) where we need to engage all the resources of the public and private sector to combat climate change (as is well recognised by the European Commission—particularly in relation to the Green Deal[52]). Yes, we need regulation, but it is often limited in scope or geographic reach and is often slow in coming or simply not ambitious enough to fight climate change (and combat unsustainable practices) on a sufficient scale or at the necessary speed (not least because some companies and trade associations lobby against it).[53]

As a matter of law, it is clear that the concept of "abuse" is an "objective concept" and does not depend on the motives of the dominant company. In practice, whether sustainability initiatives are genuine or not is very relevant. It will be very rare that enforcement action will be taken against a company where the evidence (e.g. internal documents) shows clearly that that company was genuinely doing something for sustainability reasons.[54]

Dominant companies should not be discouraged from "doing the right thing" or trying to make a contribution to combat climate change for fear of the competition law consequences. This is important as dominant companies are often (not always) large multinationals which have the economic clout and the potential to make a real difference.[55] While we are right to be alert to the possibility of some companies "green washing"[56] 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 art.102 to act as a "shield" may, in some circumstances assist with this. In this way our laws governing monopoly power can play a part in ensuring a sustainable future (rather than being an obstacle to it).

[49] Suzanne Kingston suggests two ways in which environmental considerations may be relevant to accusations of predatory pricing. "In the first place, evidence that the intention of the dominant undertaking pricing above AVC but below ATC was genuinely pursuing environmental protection aims in so doing should mean that the conduct is not considered abusive. This follows from the Akzo test itself without needing to consider the effects of Article 11 TFEU. In the second place, evidence that a dominant undertaking pricing below AVC was genuinely pursuing legitimate environmental protection aims, and that there is no less restrictive way of achieving these aims, should rebut the AKZO presumption of abuse" (see Kingston, *Greening EU Competition Law and Policy* (2011), pp.322–323).

[50] E.g. *United Brands* (27/76) EU:C:1978:22 at [189].

[51] See cases like *Hilti AG v Commission of the European Communities* (T-30/89) EU:T:1991:70; [1992] 4 C.M.L.R. 16 at [118]. However, in such cases one has the suspicion that the public interest arguments (re safety) were added on once its anti-competitive tying conduct was attacked. See also the Commission's 2009 Guidance on art.82 (now art.102 TFEU): Communication from the Commission—Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7.

[52] See, for example, the European Commission's policy brief of 10 September 2021, "Competition Policy in Support of Europe's Green Ambition" (the "Green Deal Policy Brief"): "In order to reach the goals set out in the European Green Deal, everyone, *private and public*, must play their part. This includes competition enforcers" (emphasis added).

[53] See Chris McGreal, "How a powerful US lobby group helps big oil to block climate action", The *Guardian* (19 July 2021), reporting that: "Critics accuse Shell and other major oil firms of using API [the American Petroleum Institute] as cover for the industry. While companies run publicity campaigns claiming to take the climate emergency seriously, the trade group works behind the scenes in Congress to stall or weaken environmental legislation".

[54] This may be contrasted with cases where the public interest considerations appear to have been added on after the event (see fn.51 above) or where the actions amount to fairly orthodox anti-competitive conduct (as per Green Dot: *Der Grune Punkt - Duales System Deutschland GmbH v Commission of the European Communities* [2009] 5 C.M.L.R. 19). Note also the Commission's acknowledgment at para.559 of its draft horizontal guidelines of 1 March, 2022 that "the fact that an agreement genuinely pursues a sustainability objective may be taken into account in determining whether the restriction in question is a restriction by object or a restriction by effect within the meaning of Article 101(1)".

[55] See, for example, the Business Roundtable, "Statement on the Purpose of a Corporation" (August 2019), available at: *https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationwithSignaturesOctober2022.pdf* (Business Roundtable represents US companies with a market cap of trillions of dollars). Their statement includes a commitment to: "dealing fairly and ethically with our suppliers"; and to "protect the environment by embracing sustainable practices across our businesses". In itself this is to be commended but we still need to hold these companies to account. For example, That said, a recent "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). There are currently 3,500 certified B Corps in more than 70 countries. See "About B Corps", available at: *https://bcorporation.net/faq-categories/about-b-corps*. For a discussion as to whether "companies [are] right to abandon the shareholder first mantra?" see the *Financial Times* edition of the 26th of August 2019 from p.11 onwards. See also Andrew Hill, "The Limits of the Pursuit of Profit", *Financial Times* (24 September 2019); and Michelle Meagher, "We can't rely on corporations to reform themselves—we must challenge their power", OpenDemocracy (26 September 2019). It also matters how companies earn the rents that they then have the discretion over returning to society; if earned by monopolistic means with the accompanying harms then there may be no net benefit. See Denise Hearn and Michelle Meagher, "Stakeholder Capitalism's Next Frontier: Pro or Anti-monopoly?", American Economic Liberties Project and Balanced Economy Project (27 April 2022), available at: *https://www.economicliberties.us/our-work/stakeholder-capitalisms-next-frontier/*.

[56] See, for example, CMA new Green Claims Code, "Green claims code: making environmental claims", available at: *https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims*.

Conclusion on abuse of dominance and sustainability

In this Part 2 we have argued that there is more scope to use abuse of dominance provisions (such as art.102) than is often appreciated (and there is less tension between competition law and sustainability goals than is sometimes suggested).

In particular, competition lawyers and authorities should not be afraid to re-visit the fundamental purpose of these provisions. When this is done, it will often be clear that unsustainable conduct by dominant companies is an "abuse" such that art.102 can be used as a "sword" to attack them.

Conversely, there is scope to recognise sustainability as a "shield" against (false) accusations that genuine practices to mitigate climate change or to pursue sustainability goals are an abuse of dominant position.

In this way the laws governing abuse of dominance can help take action for a sustainable future—and play an active part in ensuring that future (rather than being an obstacle to it).

Next time

In the third part of this article, to be published in a future issue of E.C.L.R., we will consider how merger control can also play its part in this.

A sustainable future: how can control of monopoly power play a part? Part III: Using merger control to intervene before the problem arises or gets worse

Simon Holmes

Michelle Meagher*

Climate change; Competition policy; EU law; Market power; Merger control; Monopolies; Sustainability

This is the third part of our three-part article which looks at monopoly power as a barrier to a sustainable future and asks how we can use competition policy (particularly art.102 Treaty on the Functioning of the European Union (TFEU) and merger control) more intelligently in the light of climate change and growing market concentration.

Before diving into the "competition law bubble" and the technical analysis, Part I published at [2023] E.C.L.R. 16 set the scene with a brief look at the climate crisis and then at the evidence of vastly increased market concentration and power—and the growing evidence of the economic, social and political harms to which this is giving rise. Part II published at [2023] E.C.L.R. 61 looked at how art.102 TFEU could be used more effectively to tackle unsustainable practices.

This third part looks at how merger control could be used more intelligently as a way of tackling market power and unsustainable business practices—both before they arise (as a result of a merger) and as a way of preventing such power or practices being exacerbated by a merger. In doing so it looks at how this might already be done under existing law and then makes some suggestions as to how the law could be updated to recognise the scale of the problems that we face—both in terms of the climate crisis and excessive market power. In particular, we propose that that climate change and environmental sustainability considerations be built into merger control regimes and/or that the burden of proof be changed.

In this article we set out a number of ideas (some radical—some, less so). We certainly do not presume to have all the answers, but we do want to stimulate a debate and push readers to step outside the competition bubble and re-visit old ways of doing things in the light of the climate crisis and growing evidence of market concentration and power.

Conclusion for Part I

In Part I we concluded that we have a problem with monopoly power, that it is a barrier to a sustainable future and that this is something which competition policy needs to address. There may be some issues that lie outside the scope of current competition law but, for the most part, we already have the basic legal tools that we need to tackle market power and unsustainable business practices: art.102 (the subject of Part II) and merger control (the subject of this Part III).

Summary and conclusions

We conclude this three-part article with a summary and some conclusions.

Part III: Using merger control to intervene before the problem arises or gets worse

In this Part III we look at the possibility of using merger control as a way of tackling market power and unsustainable business practices—both before they arise (as a result of the merger) and as a way of preventing such power or practices being exacerbated by a merger.[1] We will look at how merger control can be used to challenge market power and unsustainable practices (potentially leading to a deal being blocked or remedies being required) and at how sustainability might be a positive factor (making it more, not less, likely that a deal will be approved).

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[1] Simon has already written on how sustainability and climate change issues can be taken into account in mergers under both EU and UK law. See Simon Holmes, "Climate Change, Sustainability and Competition Law" (2020) 8 JAE 354 and Simon Holmes, "Climate change, sustainability and competition law in the UK" [2020] E.C.L.R. 384. Two excellent articles on environmental sustainability and merger control are included in Simon Holmes, Dirk Middelschulte and Martijn Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (Concurrences, Institute of Competition Law, 2021): Nicole Kar, Emma Cochrane and Bella Spring, "Environmental Sustainability and EU Merger Control: EU Competition Policy's Dark Horse to support Green Investment" and Alec Burnside, Marjolein De Backer and Delphine Strohl, "Can Environmental Interests Trump an EUMR Decision". See also Ch.10 on EU merger policy in Suzanne Kingston, *Greening EU Competition Law* (Cambridge: Cambridge University Press, 2011).

We are very aware how politically and ideologically sensitive this area is given the trillions of euros/pounds/dollars spent on deals and the vast and highly profitable industry that not only feeds off it but actively encourages it. It is therefore important, before looking in detail at this issue, to place the analysis in its proper context and, in particular, in the context of the issues discussed in Part I. In particular, the following *12 points* are pertinent:

1. Climate change is an existential threat and we need to use all available policy tools to combat it. If merger control can help in this regard (as we believe it can) then we can and must use it. This moral imperative also makes political sense in the light of the European Union's (EU) priorities as reflected in the EU Green Deal and the new EU Climate Law—and national equivalents (such as the United Kingdom's Climate Change Act).
2. The sheer scale of the recent increase in concentration and related increase in corporate and market power, means (at the very least) that we should be vigilant and take every opportunity allowed by the law to control that power. This is clear from the important International Monetary Fund (IMF) paper on "Rising Corporate Market Power" referred to in Part I of this article. Note, in particular:
    - "while not the main driver, the rise in mergers and acquisitions (M&A) by dominant firms has contributed to rising market power and declining business dynamism";
    - "these findings suggest that competition authorities should be increasingly vigilant when enforcing merger control to ensure that these effects do not become more harmful in the future";
    - "M&As by dominant firms are associated with lower business dynamism at the industry level, with acquiring firms increasing their market power following the transaction and competitors' growth and research and development taking a hit"; and
    - "Evidence suggests that M&A s can act as a drag on growth, especially when they involve dominant firms".[2]
3. The overwhelming weight of academic evidence is that mergers rarely bring about their supposed benefits[3] and in particular lead to *higher* rather than lower prices for consumers[4] and, as we have seen in Part I, increased concentration and market power cause (or at the very least, are associated with) a range of harms to society, most relevantly for present purposes, harm to the environment and other unsustainable practices. There are hopeful signs that this is increasingly recognised by competition authorities—including those in the United States (US).[5] There is therefore a strong argument that from a public policy perspective, mergers should not be encouraged and (at least the largest ones) should only be allowed if they bring overwhelming *public* (and not just private) benefits, including progress in averting ecological catastrophe. The ability or privilege of merger is extremely valuable. Once this is recognised, the grant of approval to merge can be seen as a powerful inducement and reward that could be used in a more targeted way.
4. Despite the above three critical points, relatively few deals are looked at by competition authorities and, of those that are, very few are blocked or cleared subject to remedies. Of about 15,000 deals a year in Europe about 400 or so are notified to the Commission under the European Union Merger Regulation (EUMR)[6] and only about 0.4% of those notified have ever been blocked[7] (and, yes, we have got the decimal point in the right place). In case it be thought that the deals being cleared only concern relatively small companies, we must remind ourselves that the EUMR only

[2] See Ufuk Akcit et al, IMF Staff Discussion Note, "Rising Corporate Market Power: Emerging Policy Issues" [SDN/21/01] (March 2021), especially at pp.5, 7 and 19.

[3] See, e.g., Bruce A. Blonigen and Justin R. Pierce, "Evidence of the Effects of Mergers on Market Power and Efficiency" (2016) *National Bureau of Economic Research* No w22750, available at: *http://dx.doi.org/10.17016/FEDS.2016.082*. This found mergers and acquisitions "significantly increase mark-ups on average but have no statistically significant average effect on productivity".

[4] John E. Kwoka, *Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy* (Cambridge, Mass: MIT Press, 2014).

[5] For example, James Kanter (antitrust chief at the US DOJ) said, during the trial that led to the Penguin Random House/Simon&Schuster deal being blocked, that price was not the only concern when challenging a deal: "we should care about the welfare of workers…the effects on innovation…[and]…the free flow of ideas-ideas which are critical to the political discourse in a thriving democracy" MLex (10 November 2022).

[6] Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1.

[7] In the 30 years from 1990 to 2020 the Commission received 8,083 notifications of mergers, of which only 30 were blocked (0.4%). A further 474 were cleared subject to "commitments" (remedies)—i.e. about 6% [source: European Commission]. While some of these will have been looked at under national merger control rules, this has scarcely affected the picture described above in respect of the GAFAMs.

applies to deals with a "Community Dimension"[8] and generally to deals by the world's very biggest companies. The "GAFAM" (Google, Amazon, Facebook, Apple and Microsoft) have also escaped scrutiny (they have acquired more than a 1,000 firms in the last 20 years and only one has been blocked—with some 97% not been looked at, at all, by *any* competition authority).[9]

In the light of this, a strong case can be made that we have a serious problem of *under-enforcement*. As the IMF has recently put it: "competition authorities need to be vigilant due to the growing risks of under enforcement in merger control" and "if competition policy is appropriately balanced, there will be some false positives ex post (blocking a few deals that might not have harmed competition) to avoid too many false negatives (allowing deals that should have been blocked)".[10] There are some signs that this reluctance to challenge mergers may be changing. For example, Lina Khan wrote recently that "I believe the antitrust agencies should more frequently consider opposing problematic deals outright" (as opposed to letting them through subject to structural remedies that "may prove inadequate in the face of an unlawful merger").[11]

5. It is also important to bear in mind the scale of, and growth in, M&A activity.[12] As one indication, in 2019 private equity had over $2 *trillion dollars* of so-called "dry powder", that is money that was looking for immediate investment in acquisitions.[13] There followed a record breaking increase in global deal values post pandemic in 2021, but private equity still had a record $2.3 trillion in dry powder at the end of 2021.[14] Money on this scale has to go somewhere and a significant proportion will go towards buying interests in corporate assets, often consolidating those assets with others that are already owned or partially owned. This is the kind of money that if channelled in ways *unhelpful* to the climate agenda could undo many of its gains. Just think how much society (and the planet) would benefit if (at least some) of that money was channelled in ways *helpful* to the climate agenda.

6. At the risk of being too philosophical, it is also important to remind ourselves that the entities we are talking about here are legal fictions—as that is what a corporation is, a legal fiction—it has no direct physical existence, no soul, and no human rights in any real sense.[15] The right to incorporate is a right that brings enormous privileges, notably limited liability. But we forget all too easily that it is a right granted *by* society that comes with corresponding obligations

[8] The primary threshold for the EUMR to apply to a merger is that the parties involved have a combined worldwide turnover of at least €5 billion and that they each have an EU wide turnover of at least €250 million (art.2(1) EUMR) i.e., the firms involved have to be pretty big and most deals are pretty big.

[9] See Tommaso Valletti and Hans Zenger, Increasing Market Power and Merger Control (2019) 5(1) *Competition Law & Policy Debate* 26, available at: *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3387999*. See also the Furman Report at p.12: Report of the Digital Competition Expert Panel (UK), "Unlocking Digital Competition" (March 2019). The one deal that has been blocked is the Facebook/Giphy deal which the UK CMA ordered to be unwound (CMA Decision of 30 November 2021, available at: *https://assets.publishing.service.gov.uk/media/61a64a618fa8f5037d67b7b5/Facebook__Meta__GIPHY_-_Final_Report_1221_.pdf*).

[10] We would emphasise that we are not in any way anti-merger as such. Our point is simply that over enforcement is simply not an issue in current merger control. We would also add that the appetite for mergers exacts an enormous drain on agency resources and that the balance has tipped quite heavily towards a presumption of a "right to merge". New proposals to redress that balance are welcome. See for example John Kwoka and Spencer Weber Waller, "Fix it or Forget It: A 'No-Remedies' Policy for Merger Enforcement", *CPI Antitrust Chronicle*, August 2021 (arguing that agencies should not accept any behavioural remedies and should only consider the structural remedies package offered upfront by the merging parties at time of notification—if this is insufficient to meet antitrust concerns raised during the review process then the deal should be automatically blocked). Other proposals include reviving the FTC's "prior approval" rule, whereby parties presenting problematic deals to competition agencies that are eventually blocked, after substantial use of public resource, should be banned from presenting new alternative deals for the same assets in the future, Federal Trade Commission, "FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers", Press Release (25 October 2021), available at: *https:/www.ftc.gov/news-events/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive*.

[11] David McLaughlin, Julie Johnsson, and Anthony Capaccio, "FTC's Khan Urges Blocking More M&A as Lockheed Deal Looms", *Bloomberg* (12 August 2021). Note also Khan's comments at a conference on 6 December, 2022; "There are a whole set of instances in which there are somewhat stale economic theories that are embedded in the antitrust laws…I'm looking…to make sure that the laws are actually reflecting commercial and market realities": Flavia Fortes and Serafina Smith, "US FTC looking to ditch 'stale' economic theories, Khan says, denying 'fishing expeditions' on mergers", MLex (6 December 2022). We have also heard similar comments at conferences from heads of competition authorities: former CMA chief executive, Andrea Coscelli in the UK has acknowledged that the CMA has not enforced mergers as much as it should have done (and that many of the problems that we face result from mergers) and the Commission's Olivier Guersant has referred to the "under enforcement" of merger control.

[12] James Fontanella-Khan, "Global dealmaking set to break records after frenzied summer", *Financial Times* (5 September 2021).

[13] See Javier Espinoza, "Private equity races to spend record $2.5tn cash pile", *Financial Times* (27 June 2019). See also Joyce Guevarra and Drew Wilson, "Half a trillion dollars of dry powder held by 25 PE firms", S&P Global Market Intelligence (24 August 2021), available at: *https://www.spglobal.com/marketintelligence/en/news-insights latest-news-headlines/half-a-trillion-dollars-of-dry-powder-held-by-25-pe-firms-66172037?fbclid=IwAR3C2FzoDFjcQEOuKFB 4kkuGfP9GN3n1gP5LPCX3rErqUfWcTYESXzhs6w*.

[14] See PWC, "M&A reached record heights in 2021 and deal momentum is set to continue in 2022: PwC analysis" (25 January 2022), available at: *https://www.pwc.com gx/en/news-room/press-releases/2022/global-m-and-a-industry-trends-2022-outlook.html#:~:text=Heading%20into%202022%2C%20PE%20has,for%20M%26A%20activity 20in%202022*.

[15] It is clear that, as a matter of law, corporations have "human rights" within the meaning of the European Convention on Human Rights (ECHR) (see, for example Protocol 1). While there are good reasons for such rulings, they are themselves a legal fiction.

to society[16] (and those rights can be revoked).[17] The rights we choose to give corporations can not only change over time to reflect society's priorities, but can be made subject to conditions—again something that may change over time.[18]

7. There is no positive "right" to merge. Indeed, when corporations were first invented they were generally not allowed to merge—corporate charters tightly circumscribed permissible activities and restricted horizontal and especially vertical consolidation.[19] Firms were incorporated for specific public purposes and brought into existence for limited periods of time until that public purpose was discharged (although many corporations, such as one of the very first—the East India Company—managed to prove useful enough to the Crown and state to exist for hundreds of years). In case it be thought that is just an idea from the depths of history, Zephyr Teachout and Lina Khan remind us of several initiatives in the US in the second half of the 20th century which would have seriously limited the ability of corporations to merge.[20] The corporation is a creature of the state and thus its ability to merge used to be (and could be again) made contingent on public benefit.

8. There is similarly no "right" to be "big". Although bigness itself is not currently a ground for antitrust liability, neither antitrust law nor corporate law create a "right to bigness". Bigness, as we have discussed, can be associated with various harms, and at the very least warrants scrutiny. In the US, Elizabeth Warren's Accountable Capitalism Act[21] would have gone further by creating federal (as opposed to the existing state-level) charters for companies with over $1 billion in revenue and a responsibility to create public benefit.[22] Zephyr Teachout has proposed automatic loss of limited liability for companies over a certain size.[23] Alongside other factors, size is one component of the "gatekeeper" designation being developed for Big Tech in the EU.

9. All this should make us question the recent reluctance to take a more robust approach to mergers and the consolidation of corporate power. And this questioning is not just from an academic fringe, it is gaining traction within governments and competition authorities (as illustrated by the appointment of Lina Khan as FTC Chair and President Biden's recent executive orders[24]) and lawyers within the most blue chip of firms.[25]

10. The very reason for having merger control at all is so that we can intervene in a market *before* a problem arises—or before it gets any worse (so-called "ex ante" intervention). If this were not the case we could let everyone get on and merge and then try and deal with the problems after the event using conventional competition law tools like arts 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) (so-called "ex post" intervention).[26]

[16] See Michelle Meagher, "Corporate Law, Antitrust, and the History of Democratic Control of the Balance of Power" in Julian Nowag and Marco Corradi (eds), *The Intersections between Competition Law and Corporate Law and Finance* (Cambridge: Cambridge University Press, forthcoming 2023).

[17] Some commentators have proposed the winding up of fossil fuel companies in the public interest, on the basis of provisions in insolvency law. See Ewan McGaughey and Mathew Lawrence, "The Green Recovery Act", Common Wealth (July 2020), s.21; Meagher, *Competition is Killing Us: How Big Business is Harming Our Society and Planet—And What to do About it* (2020).

[18] See in this context the initiative announced by Margrethe Vestager for a new derogation under the Common Agricultural policy: "agreements to improve sustainability in agriculture beyond what the law requires will be exempt from the competition rules—so long as those agreements don't restrict competition more than is necessary." Margrethe Vestager, "Competition policy in support of the Green Deal", Speech (10 September 2021), available at: *https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal_en*. See also EC, "Commission invites comments on draft Guidelines for Sustainability agreements in Agriculture", IP/23/102 (10 January 2023), available at: *https://ec.europa.eu/commission/presscorner/detail/en/ip_23_102*. Note that within corporate law, the entire basis of the "responsible business", "stakeholder capitalism" and "CSR" movements has been to redefine the corporation's obligations to society (and to shareholders).

[19] For more detail, see Meagher, "Corporate Law, Antitrust, and the History of Democratic Control of the Balance of Power", in Nowag and Corradi (eds), *The Intersections between Competition Law and Corporate Law and Finance* (forthcoming 2023).

[20] "In 1968, a White House Antitrust Force recommended limiting mergers for companies with more than $500m in sales or $250m in assets. In 1972, Senator Hart proposed a 'no fault' de-concentration bill that would have limited mergers of companies with over $2 billion assets (close to $6 billion in today's dollars)". See Zephyr Teachout and Lina Khan, "Market Structure and Political Law; a Taxonomy of Power" (2014) 9 *Duke Journal of Constitutional Law & Public Policy* 37, 67 and articles cited in their fnn.134 to 136.

[21] Accountable Capitalism Act, 115th Congress (2017–18) s.3348.

[22] The Act would have permitted the federal government to revoke the charter of such a corporation if the company has engaged in repeated and egregious illegal conduct. See *https://www.warren.senate.gov/newsroom/press-releases/warren-introduces-accountable-capitalism-act*.

[23] Zephyr Teachout, "Corporate Rules and Political Rules: Antitrust as Campaign Finance Reform", *Fordham Law Legal Studies Research Paper* No. 2384182 (January 2014). Teachout proposes in the alternative a size threshold beyond which the FTC and DOJ can sue to breakup firms. This seems the better approach as there are many activities which benefit society which require scale and which would be less likely to be undertaken in the absence of some limitations on liability (e.g. the development of drugs). Better to have the possibility of removing limited liability as a stick to discipline corporations.

[24] The 72 initiatives announced by President Biden on 9 July 2021 address many of the big issues of recent competition cases (e.g., competition in seeds and other inputs for the agricultural industry; pay for delay/reverse payments; and retail concentration); some that governments and competition authorities are still trying to decide how best to tackle (e.g. data issues; dominant internet platforms and killer acquisitions); and some that have yet to come to the fore in Europe (e.g., labour market issues such as non-competes and monopsony concerns).

[25] See for example in Kar, Cochrane and Spring, "Environmental Sustainability and EU Merger Control: EU Competition Policy's Dark Horse to support Green Investment" in Holmes, Middelschulte and Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (2021), e.g. at p.118: "The traditional narrow, price-focused interpretation of the consumer welfare standard in competition law is becoming increasingly outdated".

[26] This was the approach in the EU until 1989. It was realised that this did not work and the predecessor to the current EUMR came into force in 1990.

11. In the discussion of abuse in Part II of this article, we did not need to agree on the precise extent to which dominant companies are particularly responsible for climate change and unsustainable business practices to appreciate that, if we have tools to mitigate their impact on climate change (and other unsustainable business practices), we have a *duty* to use them—and that this makes sense from an efficiency perspective.[27] Similarly, we don't need to agree whether the power which the merging parties have has been acquired through good or bad means, or whether it is a reflection of historic under-enforcement by competition authorities, to recognise that the existence of that power is very relevant to our approach to merger control.[28]
12. In the light of climate change there are numerous initiatives that are bringing sustainability to the top of the corporate agenda[29] and it seems likely that sustainability will play an increasingly important role in investment decisions and deal making. This means, not only that we must clarify our approach to sustainability and merger control, but we have an opportunity to make sure that merger control makes a real contribution in this area.[30]

It is against the background set out above that we must consider *how* merger control can play its part in building a sustainable future by helping control market power and reducing the risk of unsustainable business practices. How can sustainability issues be taken into account in merger control either as a factor contributing to a deal being cleared, blocked, or cleared only subject to remedies?

Our comment at the outset applies with particular force here. While we set out a number of ideas, we do not presume to have all the answers, but hope to stimulate a constructive debate and push those in the competition bubble to step outside it and (re)connect with the realities of market power and climate change.

Our focus will be on EU (and UK) merger control as that is where our experience and expertise lies. We hope, however, that those working in other jurisdictions will find that many of the ideas set out here resonate in their countries.

In other papers, Simon set out various ways in which climate change and sustainability issues could be taken into account in the assessment of mergers under the EUMR and in the UK.[31] The key points from these are summarised in Part IIIA below, and they are updated and developed in the light of subsequent views expressed by competition authorities and other writers.[32] This analysis is essentially based on EU/UK law as it stands today.

In Part IIIB we go on to set out some more radical proposals which would require a change of law. These include the inclusion of explicit climate change and sustainability considerations in merger control and ideas to change the burden and standard of proof in mergers. In the light of the points discussed above, and particularly the existential threat of climate change and the vast increase in corporate power, we think these ideas merit serious consideration (and not just by academics but by governments, competition authorities and responsible businesses).

A. Current law

There are at least *six ways* in which sustainability and climate change issues can already be taken into account under the current EU (and UK) systems of merger control—either as a positive factor making it more likely that a deal will be cleared, or as a negative factor making that less likely (or that remedies will be required):[33]

i) in the substantive assessment itself;
ii) when considering "efficiencies";
iii) when considering remedies;
iv) under national law (when the EUMR does not apply);
v) as a factor outside competition law (as a "legitimate" or "public" interest or as part of foreign direct investment control); or
vi) under art.102 TFEU (or national equivalents) as an abuse of dominant position where the merger has not been

[27] We note that Jan Eeckhout argues that while market power is not necessarily the main cause of symptoms such as the massive six trillion decline in the annual global labour share (there are other candidates, such as globalisation and technological change), antitrust/competition policy is the main solution. See The Counterbalance, "Europe's monopoly Problem" (22 June 2021), available at: *https://thecounterbalance.substack.com/p/europes-monopoly-problem*.

[28] As Tommaso Valletti and Hans Zenger have put it: "For better or worse, merit-based market power is still market power. Secular increases in mark-ups therefore do have important implications for the assessment of prospective mergers, irrespective of whether their origin is benign or not": Valletti and Zenger, "Increasing Market Power and Merger Control" (2019) 5(1) *Competition Law & Policy Debate* 26.

[29] We see this in the growth of ESG funds; the EU Green Deal (and equivalents in countries like the US and UK); and in the EU Taxonomy Regulation (which sets out an EU-wide classification system to identify those economic activities which are considered to be "environmentally stainable" and provides benchmarks against which dealmakers and authorities can measure the impact of sustainability projects): Regulation 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation 2019/2088 (Taxonomy) [2020] OJ L198/13; and in the EU's sustainable finance disclosure regulations and guidance (e.g., Regulation 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L317/1 which came into force (in part) on 10 March 2020).

[30] Kar, Cochrane and Spring, "Environmental Sustainability and EU Merger Control: EU Competition Policy's Dark Horse to support Green Investment" in Holmes, Middelschulte and Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (2021) discuss a potential "virtuous circle" by which more merger cases with sustainability objectives or benefits push the Commission to conclude on key issues, such as its approach to the efficiency assessment. This much needed certainty over the assessment framework could, in turn, encourage merging parties to pursue their own green investment agendas.

[31] See the papers referred to in fn.1 above.

[32] See, e.g. the articles referred to in fn.1 above.

[33] As mentioned above, these are discussed in Simon's articles: Holmes, "Climate Change, Sustainability and Competition Law" (2020) 8 JAE 354 and Holmes, "Climate change, sustainability and competition law in the UK" [2020] E.C.L.R. 384.

subject to an ex-ante merger control assessment under the EUMR or national merger control regimes.[34]

We comment on the first five of these in turn:

(1) The substantive assessment

In our view there is no obstacle to taking account of sustainability issues when assessing whether or not a merger would, or would not, "significantly impede effective competition" (SIEC)—which is the substantive test in merger control under the EUMR, or whether it may (or may not) lead to a "substantial lessening of competition" (SLC), which is the substantive test under UK competition law—and, not coincidently, under US merger control. (For present purposes there is no significant difference between the SIEC and SLC tests).

This is particularly clear from art.2(1)(b) EUMR, which includes in the substantive SIEC assessment criteria the "development of technical and economic progress provided that it is to the consumers' advantage".

This language is similar to that in art.101(3) TFEU and on a natural reading is capable of including sustainability as a parameter of competition (either as a positive factor or a negative one). A number of factors support this view, including:

- Recital 23 of the EUMR makes it clear that "the Commission must place its appraisal within the framework of the achievement of the fundamental objectives in the [constitutional] provisions of the treaties"—which include sustainability.[35]
- 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 goods (e.g., less polluting products or goods using fewer resources) then those products can be seen as being both more innovative and of a higher quality.
- This is clearly recognised in the Competition and Markets Authority's (CMA) latest "Merger Assessment Guidelines"[36] which state (at para.8.21) that "what constitutes higher quality, greater choice or greater innovation will depend on the facts of individual cases. It might be, for example, that benefits in the form of environmental sustainability and supporting the transition to a low carbon economy are relevant customer benefits in some circumstances. A merger may lead to some benefits that customers may value (such as a lower carbon footprint of the firm's products)"; and which states (at para.8.22) that "the CMA is able to take into account a broader range of efficiencies and benefits from a merger to consumers and to society more generally".[37]
- This makes sense, as Kar, Cochrane and Spring put it: "If authorities are willing to consider changes in quality—adjusted prices (to account for changes in quality), why should they not also consider changes in social-cost adjusted prices (improvement in environmental quality being an improvement in social cost)?"[38]

While it is clear to us that the sustainability of products are relevant factors in the competition assessment, this does not mean that it will be decisive in the assessment. For example, if more sustainable products only come at a higher price, this will have to be considered as part of the overall assessment (clearly, there are opportunities for further analysis here).

(2) Efficiencies

The European Commission tends to analyse (positive) environmental factors as "efficiencies" to see if they might "counteract the effects on competition, and in particular the harm to consumer, that [the merger] might otherwise have had".[39]

[34] This was proposed by AG Kokott in her Opinion of 13 October 2022 EU:C:2022:777 in the *Towercast* case, available at: *https://curia.europa.eu/juris/documents.jsf?num=C-449/21* or "AG opinion in Towercast supports ex-post application of abuse of dominance rules to non-notifiable mergers" (2022) 10 *VBB on Competition Law* Vol 3, available at: *https://mcusercontent.com/80a2795e9aa8aacac0c148b3b/files/ff210b9b-0895-fa1e-8f51-82cbf5d9cff8/VBB_on_Competition_Law_Volume_2022_No._10.pdf?utm_source=VBB+Insights+Mailing+List&utm_campaign=3c52893fb9-EMAIL_CAMPAIGN_2022_05_17_01_55_COPY_02&utm_medium=email&utm_term=0_eab2e3333c-3c52893fb9-#page=3*. This is not discussed further here pending the judgment of the Court of Justice of the European Union (CJEU) in this case.

[35] See, for example, art.3 of the Treaty on European Union and art.11 TFEU referred to in section IIB above.

[36] CMA, "Merger Assessment Guidelines" (18 March 2021), CMA129, available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051823/MAGs_for_publication_2021_--_.pdf*.

[37] The CMA made these comments in the context of the Enterprise Act 2002 concept of "relevant customer benefits", but in our view they explain very clearly why and how these factors are relevant parameters of competition—which could be taken into account in the substantive assessment of a merger under EU or UK merger control (and, probably, any other system of merger control).

[38] See Kar, Cochrane and Spring, "Environmental Sustainability and EU Merger Control: EU Competition Policy's Dark Horse to support Green Investment" in Holmes, Middelschulte and Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (2021), p.130. They also argue that changing the existing approach to recognise that harm to the environment that will not be addressed by the market should be recognised as a competitive harm—and give some interesting examples, see p.127.

[39] See the discussion in the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (Horizontal Merger Guidelines) [2004] OJ C31/5 at paras 76 to 88.

At para.78 of its Horizontal Merger Guidelines, the Commission sets out three cumulative conditions that such "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.[40]

It is clear to us that many sustainability gains will amount to an "efficiency". For example, if the merged entity can produce products using fewer natural resources that is a clear efficiency. Furthermore, viewing such sustainability benefits as efficiencies has the advantage of "working with the grain" of the Commission's historic approach.[41]

However, there are *four reasons* why this is not our preferred approach:

- First, it should not be necessary, as one can take account of sustainability benefits directly in the substantive assessment of the SIEC (as discussed above).
- Secondly, when looking at efficiencies, the Commission proceeds *as if* there is a two part test under the EUMR (which there is not): i.e. first a finding of a competition problem; secondly a finding of efficiencies that might counteract them.[42] This appears to reverse 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".[43] While it is accepted that the parties bear the *evidential* burden of providing relevant facts and other evidence in relation to the assessment of the deal under art.2 EUMR, the overall burden of proof lies squarely with the Commission.
- Related to the above, there are *no* cases where the Commission has approved an otherwise anti-competitive deal solely on the basis of off-setting efficiencies—let alone environmental efficiencies.
- The efficiency approach is asymmetric: i.e. in theory it could enable sustainability factors to lead to a clearance of a deal that might otherwise be blocked, but it does not provide a means by which a deal causing substantial environmental *harms* could be blocked (or only cleared subject to remedies).[44] There is no such problem if sustainability issues are looked at as part of the "overall assessment of the foreseeable impact of the merger in the light of [all] the relevant factors and conditions",[45] i.e. as part of the substantive SIEC assessment discussed above.

(3) Remedies

Simon has argued elsewhere that under the EUMR there is more scope to use remedies to take account of the potential negative effects of a merger from a sustainability perspective than is often realised.[46] Furthermore there is probably even more scope for this under UK merger law.[47]

In brief, this more holistic approach could potentially allow genuinely efficiency-enhancing mergers to proceed (e.g., capturing economies of scale and/or scope) while mitigating their harmful effects from a sustainability perspective (e.g., abating pollution impacts and social costs).

We see recent support for this in the CMA's approach to "relevant customer benefits" (RCBs) under UK law. For example the CMA has noted that in one case "to the extent that efficiencies existed, these would be eliminated if full divestiture had been required [the equivalent of blocking the deal], but possible relevant customer benefits would not be affected by the chosen … remedy" (i.e. the use of remedies preserved both the efficiencies and the customer benefits of the deal).[48]

While some take a more restrictive approach to the possibilities for accepting remedies at the end of a phase 2 investigation under the EUMR, most would accept that there is more scope for such remedies at the end of phase 1 as these are designed to remove "serious doubts" about the merger at that stage and avoid a phase 2 investigation. Such remedies could remove any "serious doubts" about the environmental (or other sustainability) effects of the deal (or the impact of such effects on competition).[49]

Nevertheless, we accept that remedies often fail to achieve the intended compensatory effects and there may be substantial risk of this in relation to sustainability remedies, especially if they involve ongoing conduct remedies and monitoring by competition authorities.[50]

[40] See further Holmes, "Climate Change, Sustainability and Competition Law" (2020) 8 JAE 354, 392. See also the discussion in Kingston, *Greening EU Competition Law* (2011), pp.332–340.

[41] Furthermore, the Commission's chief economist has said that the Commission has set up a team to look further at so-called "green efficiencies": i.e., what sort of efficiencies might be taken into account and how they might be measured. See MLex Market Insight (18 November 2020).

[42] There is a two-part test under art.101 TFEU but not under the EUMR. See also the discussion in Part II of this article, published at [2023] E.C.L.R. 61 at section 2, of art.102—which also does not have a two-part test.

[43] Paragraph 87 of the Horizontal Merger Guidelines.

[44] For an analysis of how the Commission could deal with all competition related sustainability concerns under the EUMR see an article in the *Journal of Antitrust Enforcement*, Elias Deutscher and Stavros Makris, "Sustainability Concerns in EU Merger Control: from output-maximising to polycentric innovation competition" (2022) *Journal of Antitrust Enforcement*, at *https://doi.org/10.1093/jaenfo/jnac019*.

[45] Paragraph 32 of the Horizontal Merger Guidelines.

[46] See Holmes, "Climate Change, Sustainability and Competition Law" (2020) 8 JAE 354, 393–395.

[47] See Holmes, "Climate change, sustainability and competition law in the UK" [2020] E.C.L.R. 384, 392.

[48] See CMA, "Merger Assessment Guidelines" (18 March 2021), CMA129, at 8.26 and 8.27.

[49] For further discussion of the acceptability of sustainability remedies see Kar, Cochrane and Spring, "Environmental Sustainability and EU Merger Control: EU Competition Policy's Dark Horse to support Green Investment" in Holmes, Middelschulte and Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (2021), pp.133 to 135.

[50] On this see also the comments of Lina Khan (US FTC chair) referred to in Part III point 4 above and in fn.11.

(4) National law

Where a merger does not fall within the EUMR, it may be reviewed under the national merger control rules of one or more Member States. These rules may take into account environmental and sustainability factors to a greater (or lesser) extent than under the EUMR.[51] Indeed, some (e.g., Spain) contain express reference to environmental issues.[52]

Under national rules, mergers can (if national law permits) either be blocked notwithstanding an *absence* of narrower competition concerns, or be allowed *despite* such competition concerns. A striking example of the latter is a decision of the German Economics Ministry in August 2019 to allow the Miba/Zollern joint venture that had previously been blocked by the German Federal Cartel Office. The minister ruled that the positive effects of the deal for the environment and climate protection outweighed the competitive disadvantages of the merger (citing noise reduction, reduced fuel consumption and, more generally, climate protection and a sustainable environment policy).[53]

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.

(5) Review outside competition law

So far we have looked at the ways in which sustainability issues can be taken into account within existing *competition* law: i.e. how these competition laws can play a part in controlling monopoly power to ensure a sustainable future.

We now look briefly at how some existing laws adjacent to competition law could also play a part: foreign direct investment (FDI) and "legitimate" or "public" interests.

(a) Foreign Direct Investment (FDI). The authors in the excellent articles cited in fn.2 all conclude that FDI rules may play a part. Burnside, De Backer and Strohl conclude that "there appears to be ready scope for sustainability objectives (at least some of them) to be invoked within national FDI screening mechanisms".[54] Kar, Cochrane and Spring suggest that "although the focus to date [of FDI controls] has been on technological sovereignty and domestic governments protecting public health and essential goods and service providers, similar motivation may yet emerge in relation to domestic sustainability innovators, given the growing driver of sustainability as a competitive parameter".[55]

This might either be as a new specific head under national FDI rules or perhaps as an aspect of public health concerns given the numerous ways in which environmental issues affect public health (emissions being only the most obvious example).[56]

(b) "Legitimate interests" (where a deal falls within 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 art.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 art.21(4):

- 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).
- A Member State could apply to the Commission to have an environmental/sustainability/climatechange concern "recognised" by the Commission as a legitimate interest. Particularly in the light of Recital 23 EUMR, this should have a good chance of being recognised by the Commission, given that it is required by art.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;[57] and

[51] The EU Merger Working Group, "Public Interest Regimes in the European Union—Differences and Similarities in Approach" (Report) (10 March 2016), available at: *https://ec.europa.eu/competition/ecn/mwg_public_interest_regimes_en.pdf* 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".

[52] Article 10 of the Law 15/2007 of 3 July on the Defence of Competition (Competition Law), which sets out the main substantive and procedural rules of merger control in Spain, contains a non-exhaustive list of grounds of public interest, including the protection of the environment.

[53] Maximilian Konrad, "Ministerial Approval Miba/Zollern: A Green Industrial Policy For Medium-Sized Companies", D'Kart Antitrust Blog (20 August 2019), available at: *https://www.d-kart.de/en/blog/2019/08/20/ministererlaubnis-miba-zollern-gruene-industriepolitik-fuer-den-mittelstand/*.

[54] See Burnside, De Backer and Strohl, "Can Environmental Interests Trump an EUMR Decision" in Holmes, Middelschulte and Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (2021), pp.149 to 152.

[55] See Kar, Cochrane and Spring, "Environmental Sustainability and EU Merger Control: EU Competition Policy's Dark Horse to support Green Investment" in Holmes, Middelschulte and Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (2021), p.137.

[56] On how climate change affects health see, for example IPCC, "Human Health: Impacts Adaptation and Co-Benefits", available at: *https://www.ipcc.ch/site/assets/uploads 2018/02/WGIIAR5-Chap11_FINAL.pdf.*

[57] See art.11 TFEU referred to in Part II(2)(b) published in [2023] E.C.L.R. 61.

- Article 21(4) EUMR could be amended to include an express reference to environmental protection, sustainability and/or climate change.[58]

We would add *two comments* here:

- Burnside, De Backer and Strohl make a powerful case for a wider notion of legitimate public interests under art.21(4)[59] in the light of four factors: first, the exceptions provided by the EU treaties to the "four freedoms",[60] such as "public security"; second, experiences of Member States allowing state intervention under domestic merger control to protect a wider range of public interests; third, that public interest and public security concepts evolve over time;[61] and finally that the growing use of FDI screening will likely lead to a widening of the notion of legitimate interests to include at least the factors listed in art.4 EU FDI Regulation.[62]
- Article 21(4) is asymmetric in that it 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 art.21(4) is a potential complement to the "efficiencies" route discussed above, which can only lead to a merger with positive environmental effects being *cleared* (rather than to one with negative effects being blocked).

(c) "Public interest" under national law (where a deal falls outside the EUMR) National laws often provide for the protection of public interests as part of merger control. Some of these apply when a deal falls within the EUMR for consideration of the competition law aspects (and art.21(4) considered above applies to the non-competition law aspects). Where a deal falls outside the EUMR and national competition law is applicable, any relevant national rules on public interest protection can be applied directly. These also have the potential to include sustainability issues—either as a separate head or as an aspect of some existing head such as "national security" or "public health" (and the considerations discussed above would generally be relevant to this issue under national law).

B. Updating the law—some more radical approaches

We now turn to some more radical ideas to make competition law a more effective tool in getting to grips with the growth in corporate power, and play a bigger part in the fight against climate change and ensuring a sustainable future.

We can already hear howls of protest from the multi-trillion M&A industry (and competition authorities stuck in historic ways of approaching merger control). However, we have a saying that "desperate times require desperate measures". While we remain optimists, we do despair at the lack of sufficient action in the face of the climate crisis and the rigidity of so much of the thinking in mainstream competition law (and economic) circles. Certainly, the points made in Part I, and the factors set out at the beginning of this Part III, make a strong case that more needs to be done—and can be done—by intelligent use of merger control.

If everyone agreed with all our views on the ways in which current competition (and adjacent) laws could be used, then more radical solutions might not be necessary (or would be less necessary). However, we are realists (and former competition law practitioners) and realise that this is certainly not the case. We therefore conclude that we need to give urgent consideration to updating our laws to match the scale of the problems that we face—hence the need for some more radical ideas. More than ever, these are ideas to stimulate debate and do not presume to provide definitive answers. Here are *three ideas* to consider.

(1) Dealing with "killer acquisitions"

For many years it has been clear that, under current thresholds giving competition authorities jurisdiction to review mergers, many valuable transactions have escaped scrutiny completely.[63] These thresholds are largely turnover-based and were only ever intended to be rough

[58] See further the discussion in section IIIB(i)(c) below. In this context it is also noteworthy that at p.112 of its submission to the 2010 OECD Report (fn.3) the OFT noted that, although the UK merger regime provides for ministers to intervene in mergers to protect certain public interest issues, the current list of issues does not include environmental concerns but that these "could be added to the list by legislation".

[59] See Burnside, De Backer and Strohl, "Can Environmental Interests Trump an EUMR Decision" in Holmes, Middelschulte and Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (2021), pp.146 to 149.

[60] The free movement of capital and labour and the freedom to establish or provide services set out in arts 28 to 66 TFEU.

[61] It is clear that climate change is a major source of instability—for example in food security and biodiversity loss (as noted in the EU's "Farm to Fork Strategy" (Communication—A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system COM/2020/381 final, p.4). This was also highlighted by the Covid-19 crisis (shortages of PPE etc).

[62] Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union [2019] OJL79I/1. Article 4 includes references to critical infrastructure (including energy, transport, water and health), critical technology and the supply of critical inputs (including energy, or raw materials as well as food security).

[63] For example, the Furman Report noted that Amazon, Apple, Facebook, Google and Microsoft made nearly 250 acquisitions in the five years preceding the report with *none* being subject to review by a single competition authority, *Furman Report* (2019) at p.91. See also, "FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies" (September 2021), available at: *https://www.ftc.gov/news-events/press-releases/2021/09/ftc-report-on-unreported-acquisitions-by-biggest-tech-companies*.

proxies for the size and potential significance of deals. With deals valued at several billion dollars escaping scrutiny completely,[64] it is clear that the jurisdictional criteria are inadequate. If an acquiring company places a value of a billion plus dollars on a target company, on what rational basis can it be suggested that that transaction is of no potential interest or concern to a competition authority?

In recent years such acquisitions have been a particular concern in big tech and big pharma with the potential motive for the deal being to "kill" off future competition or technologies and consolidate the acquiring firm's market power.[65] However, as sustainability becomes a more important parameter of competition (and firms need to respond to "green" regulation) one can anticipate powerful companies acquiring smaller producers of greener products. Indeed, the EU's Green Policy Brief noted concerns expressed in its consultation on competition and sustainability that

> "incumbent companies with a strong market position that do not pursue environmentally friendly business strategies, could engage in 'killer' acquisitions of an undertaking active in 'green' innovation. This is even more of a concern if, as may well be the case, most of the 'green' innovation is carried out by smaller players and [such deals] could fall below the usual notification thresholds at the level of the EU and of the member states."[66]

One argument is that, as with acquisitions in big tech and pharma, this is not necessarily a bad thing: it may be that the established player can apply the acquired "green" technology to its larger portfolio and there is a net gain from a sustainability point of view. However, an acute concern in the climate change context is the risk that valuable technologies may be squashed if they conflict with the commercial technology pathways and marketing strategies of big, incumbent firms. The point here is not that such deals should be blocked, but that they should not escape scrutiny by competition authorities.[67] The solution is incredibly simple: adding a transactional value criterion to existing jurisdictional thresholds.[68]

(2) New climate and sustainability criteria in merger control

Notwithstanding everything discussed in Part IIIA above, we have concluded that *now* is the time to include more explicit references to climate change and sustainability in the EUMR. *Three suggestions* are set out below, starting with the most obvious and then moving on to some approaches that would be more radical, but which would make merger control a more effective instrument in support of the Green Deal and the fight against climate change

(a) Efficiencies As discussed above, parties to a merger may evidence efficiencies resulting from the merger that may "counteract the effects on competition and, in particular the potential harm to consumers that it might otherwise have".[69] This could be amended so that the Commission could clear a deal where the "climate change or sustainability benefits counteract the effects on competition".[70]

This approach has *two advantages*.

First, it may not need a legislative change as the "efficiencies" policy is largely set out in administrative guidelines. Secondly, the efficiency regime is well understood and we would therefore be "working with the grain" of the current approach.

[64] Facebook paid $19 billion to buy WhatsApp in 2014 but the deal was not caught by the EUMR turnover thresholds (the Commission only looked at it as it was referred to them by Member States to do so).

[65] Data from Refinitiv in (September 2021) shows that tech companies have spent at least $264 billion buying potential rivals worth less than $1 billion since the start of 2021 alone, double the previous record in 2000 during the dotcom boom. An FTC study showed that tech companies had done 9,222 deals to buy start-ups worth less than $1 billion since the start of 2021 (with Apple, Facebook, Amazon, Google and Microsoft making 819 acquisitions between January 2010 and December 2019 that were not registered, as they failed to meet reporting requirements). US FTC chair Lina Khan said the study highlighted how Big Tech companies systematically used acquisitions of start-ups to eliminate future competitors: Federal Trade Commission, "Non-HSR Reported Acquisitions by Select Technology Platforms, 2010–2019" (15 September 2021), available at: *https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf?fbclid=IwAR07VuWEM3JdPxVqPuz6KmJLOHWv7P_0tqi0Df3nX43wj1VFbqnqC0Xg0cM*. Associate AG Vanita Gupta has confirmed that the US Department of Justice (DOJ) will not shy away from enforcing antitrust laws against such "killer acquisitions" (CPI, "DOJ's Gupta Expresses Firm Stance Against 'Killer Acquisitions" (14 September 2021)). For a discussion of "Killer Acquisitions", see Colleen Cunningham, Florian Ederer and Song Ma, "Killer Acquisitions" (2021) 129(3) *Journal of Political Economy* 649.

[66] EU Green Policy Brief of 9 September 2021 at p.3.

[67] The IMF has concluded that competition authorities "should also have jurisdiction over all relevant cases—including acquisitions by dominant firms of currently small, but potentially large, future competitors" (see Akcit et al, IMF Staff Discussion Note, "Rising Corporate Market Power: Emerging Policy Issues" [SDN/21/01] (March 2021)). The OECD has come to a similar conclusion: "As a priority, agencies should look to ensure that the combination of rules, and thresholds or screens that are used to prioritise their work do not screen out acquisitions that remove potential rather than actual competition constraints". The OECD also concludes that both the burden and standard of proof should be changed in the case of "killer" or "nascent" acquisitions: "In the case of nascent acquisitions the historic evidence is a less reliable indicator of future competitive constraints, and so the information asymmetries between the merging parties and the agency are more pronounced than ever. Therefore there is a particularly strong case for legislation to support enforcement by agencies creating rebuttable presumptions in regard to nascent acquisitions". The inadequacy of the current balance of probabilities test is "particularly relevant to nascent acquisitions (under both the killer and potential nascent competitor theories of harm) because the probability of harm from such acquisitions is less likely to be very clear (eg 70% +) given the nascent nature and inevitably uncertain prospect of the target firm". See OECD, "Start-ups, Killer Acquisitions and Merger Control" (2020), available at: *https://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf*, p.50.

[68] The European Commission has considered this in the past but has shied away from taking this necessary step. What the Commission has done is to clarify/expand the circumstances in which it will accept referrals of deals from member states which fall below the filing thresholds of those states (EC Press Release, Mergers: Commission announces evaluation results and follow-up measures on jurisdictional and procedural aspects of EU merger control, IP/21/1384 (26 March 2021)). See also, Andrew McLean, "A Financial Capitalism Perspective on Start-up Acquisitions: Introducing the Economic Goodwill Threshold Test", *CLES Research paper Series* 2/2020, available at: *https://www.ucl.ac.uk/cles/sites/cles/files/cles_2-2020_final_1.pdf*.

[69] EU Horizontal Merger Guidelines at para.76.

[70] Simon made an analogous suggestion in his UK paper cited in Holmes, "Climate change, sustainability and competition law in the UK" [2020] E.C.L.R. 384, 391 and 392. The UK regime allows the CMA to decide not to open a detailed phase 2 investigation where the "relevant customer benefits" outweigh the negative effects on competition. He suggested that a new provision could be included to the same effect where the "climate change or sustainability benefits" outweigh the negative effects of the merger on competition.

However, that is also the problem. As we have seen, the efficiency regime is very ineffective even when dealing with classic efficiency arguments (as efficiency arguments very rarely succeed). It would be naïve to believe that it will suddenly become effective by the inclusion of new criteria (and we cannot afford to wait 10 years for experience to demonstrate this).

Secondly, this approach would only provide a means to *approve* a deal on climate change/sustainability grounds and not a basis for *blocking* (or requiring remedies) in the face of a deal damaging for the planet and sustainability.

(b) SIEC Assessment This last problem would be avoided if it was made clear that "climate change and environmental sustainability" were issues to be taken into account in the substantive assessment as to whether the merger would, or would not, "significantly impede effective competition". This could be done in one of two ways.

First, by amending the Horizontal Merger Guidelines to make it clear that climate change and sustainability are factors in "the development of technical and economic progress" criteria contained within art.2(1)(b) and discussed in section IIIA(1) above.

Secondly (and better) by amending the assessment criteria in art.2(1) to include a new clause (c) setting out an explicit requirement for the Commission to take into account "the impact of the deal on climate change and sustainability".[71] This would be accompanied by appropriate guidance in the Horizontal Merger Guidelines.

(c) Considerations beyond competition law The above approach still has the disadvantage that the assessment of the climate change and sustainability issues would be made in what is essentially a "competition" law assessment and views (reasonably) differ as to the exact interplay between sustainability and effects on competition.

A better approach would therefore be to build on art.21(4) EUMR which deals with legitimate interests "other than those taken into consideration by this Regulation": i.e. factors *other than* competition law. At section IIIA(5)(b) above we discussed ways in which *Member States* might take account of sustainability issues. However, in the interests of a consistent approach we would now propose that a new provision be added, similar to art.21(4) EUMR, to allow (or better still, require) the *European Commission* to take "all appropriate measures to ensure that the concentration has no adverse effects on climate change and environmental sustainability". This would complement (and be in addition to) the Commission's competition assessment discussed above.

(3) Changes to the burden and standard of proof

What we have discussed so far leaves the legal burden on the Commission or national competition authority to prove that the merger is anti-competitive (and this is clearly the current legal position).[72] But why should that be the case given all the evidence in relation to the harmful effects of mergers; the relentless increase in concentration and market power discussed in Part I above; and given how very few deals are ever blocked?[73]

Perhaps the leading advocate of a change in the burden (and standard) of review is Professor Tommaso Valletti, who served as the chief economist at the European Commission from 2016 to 2019. He is acutely aware that the parties to a potential merger have the necessary information (and vast resources) to demonstrate the benefits of the merger which they allege.[74] Valletti argues not just that the burden be shifted but that parties must prove that they cannot achieve the benefits of the deal other than through the proposed merger—which is a radical shift away from the "right to merge" paradigm.[75]

It is also consistent with the third condition for an exemption under art.101(3): i.e. that the restriction(s) in question must be "no more restrictive than necessary"—the so-called "indispensability" condition.[76]

This raises *three questions*:

- For whom should the burden of proof be reversed?
- What should be the standard of review?
- What should the parties have to prove?

(a) Which Companies? We see *three options* here:

- All companies? This is the simplest—but which may be more than is necessary—and likely to meet the most resistance.

[71] This is analogous to the recent change made to Austrian competition law. Although the amendment was made in the context of the Austrian equivalent of art.101(3) (re exemptions) it specifically acknowledges that arrangements that might otherwise be prohibited under competition law may be allowed where they make "an essential contribution to an ecologically sustainable and climate neutral economy" (Austrian Competition Act s.2(1) as amended, September 2021). If that is a relevant factor when approving co-operation agreements, then why not when considering a merger?

[72] On the burden and standard of proof in an EUMR merger cases see *CK Telecoms UK Investments v European Commission* (T-399/16) EU:T:2020:217 of 28 May 2020.

[73] See fn.7 above. Also of note is that companies go to the competition authorities of their own volition, on their own timetables and solely for private benefit (and often with limited public benefit) and use up substantial agency resources.

[74] Nick Shaxson, "The European System of Monopoly … and how to fix it", *The Counterbalance* (20 April 2021), available at: *https://thecounterbalance.substack.com/p the-european-system-of-monopoly*.

[75] Tommaso Valletti, "How to Tame the Tech Giants: Reverse the Burden of Proof in Merger Reviews, ProMarket" (28 June 2021), available at: *https://promarket.org/2021 06/28/tech-block-merger-review-enforcement-regulators/*.

[76] Article 101(3).

- All companies over a certain size? This again should be simple to administer and would be consistent with many of the approaches being advocated to deal with the power of Big Tech.[77]
- All companies in the most "unsustainable" sectors—i.e. those most likely to have an effect on climate change and sustainability (e.g., energy and transport, and perhaps agrichemicals and food). This has the advantage of being focused on the most pressing areas and appeals to our sense of fairness. However, in practice, it will be very difficult to define the boundaries of these sectors.[78]

(b) What standard of review? The current standard of review is the "balance of probabilities": i.e. whether the likelihood of competitive harm is (or is not) at least 50%.[79] Valletti and Zenger argue (with some validity, in our view) that this fails to take into account the "magnitude of harm" in the event that a harmful deal is cleared, compared to that arising if a benign deal is blocked.[80] The Organisation for Economic Co-operation and Development (OECD) has come to a similar conclusion.[81] This would seem to be particularly relevant when the "harm" under consideration is climate change. Hence, Valletti and Zenger propose an alternative "balance of harms" test.

(c) What must be proved? This is the most difficult and controversial issue. We see at least four options here:

(i) *Keeping the substantive test as it currently stands*: i.e. the SIEC test as set out in the EUMR (as discussed in section IIIA(1) above) but reversing the burden of proof—i.e. moving it from the Commission to the parties, so that the parties would have to prove that the merger does *not* create a significant impediment to effective competition—this would be on the basis that mergers consolidate power and such consolidation generates the various harms discussed in Part I, including to sustainability.

(ii) *Switching the burden of proof but also changing the assessment criteria for an SIEC* to explicitly include climate change and sustainability (as discussed at section IIIB(2)(b) above), so that the parties would have to prove that the merger does not create a significant impediment to competition, including by reference to the benefits and harms to climate change and environmental sustainability.

(iii) *Switching the burden of proof in relation to the proposed addition to art.21(4) EUMR* (discussed at section IIIB(2)(c) above), such that it would be for the parties to prove to the Commission that the "concentration has no *adverse* effects on climate change and environmental sustainability".

(iv) *Requiring the parties to prove to the Commission that the "concentration will have a positive impact on climate change and environmental sustainability".* This could take the form of a rebuttable presumption that (at least for the largest companies) the merger does not help with the climate crisis: i.e. it would be up to the parties to show that this merger does help with the climate crisis (and that there are no other ways of achieving this without the merger.

Each of the above options, but especially options (iii) and (iv), are based on the premise that as a civilisation, the task we face in relation to both monopoly power and climate change is enormous. A green light to merge is highly prized for private gain, which means society (through its competition authorities) has a powerful tool enabling it either to allow only deals that do not impede that task or only those which positively support it. Looked at from a systems level perspective: we have a system that creates a lot of mergers, so regardless of whether mergers, in general, harm sustainability, controlling parties' ability to merge is potentially a very important leverage point for change, and could be potentially transformative.

Balancing (a) the realpolitik of proving the future effects of a deal on climate change and environmental sustainability; (b) the possibility of economic benefits from mergers; and (c) the urgent need to fight climate

[77] For example, the EU's Digital Market Act uses quantitative thresholds as part of its assessment of whether a core platform service is a gatekeeper. The qualitative criteria for this are presumed to be met if certain quantitative criteria are met. These include an EEA turnover of €7.5 billion/market cap or fair market value of €75 billion (Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives 2019/1937 and 2020/1828 (Digital Markets Act) [2022] OJ L265/1) (the DMA) at art.3(1) and (2).

[78] That said, several initiatives in the digital area are limited to firms which are felt to pose a particular challenge for the traditional approach to competition law. For example, the UK intends to apply a code of conduct to companies with "strategic market status" (SMS) ("CMA's Digital Market Strategy 2021 Refresh" (9 February 2021). Furthermore, even where quantitative criteria are used (as with the EU's Digital Markets Act, they are used in conjunction with, or part of, a *qualitative* assessment, see art.3(1) of the DMA).

[79] See fn.72 above.

[80] See Valletti and Zenger, Increasing Market Power and Merger Control (2019) 5(1) *Competition Law & Policy Debate* 26.

[81] "The balance of probabilities test introduces a systemic bias against challenging mergers that are expected to result in anticompetitive effects. This occurs because when the probability of harm is significant but less likely than not (eg 30-50%), but the consequential harm to consumers is high, the test [wrongly] requires clearance, while an economic risk-based analysis might advise against inaction" (i.e. the merger ought to be challenged), OECD, "Start-ups, Killer Acquisitions and Merger Control" (2020), available at: *https://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf*. The OECD conclusions on both burden and standard of proof are particularly relevant to nascent and killer acquisitions (see further section IIIB(I) and fn.67, above).

change with all available tools available, adoption of the *third* of these options (i.e. the inclusion of an obligation on the parties to show that the "concentration has no *adverse* effects on climate change and environmental sustainability") may be felt to be the most practical way forward from a political perspective.

Others may consider option (iv) to be more effective from a climate perspective.[82] It is clearly much more radical but could help direct significant flows of capital towards climate change mitigation: i.e. using the massive resources of the private sector towards resolving humanity's most pressing problem (rather than the next quick win for shareholders).

Which option we adopt is very much a matter for further discussion and analysis (those looking for relevant topics for theses and PhDs please note).

Of course the change doesn't have to happen overnight. There can and should be an "orderly transition".[83] But orderliness must not come at the cost of speed. We have quite simply run out of time.

And, yes, these suggestions are radical, but whether or not they are appropriate and proportionate has to be assessed in the light of:

- the existential climate crisis;[84]
- the incredible increase in concentration and monopoly power in recent years and its implications for a wide range of issues;[85] and
- the need to use every tool and policy available to combat these crises.

Conclusions re mergers

Our conclusions as to how we can use merger control more intelligently in the light of climate change and growing market power are included in the overall summary and conclusions for all three parts of the article set out below.

Summary and conclusions

We have grounded the analysis in this article firmly in the twin realities of the existential threat that climate change poses for humanity and the clear evidence of growing market concentration and concomitant market power. Faced with these realities neither competition policy, nor the competition establishment, can simply stand aside and hope that some other policies, or someone else, will "deal with them". Of course, competition policy can only do so much—but what it can do, it has a moral (and often a legal) duty to do. Competition policy can be a sword with which to tame market power and fight climate change and unsustainable practices, and it can make sure it facilitates or, at least does not impede, sustainability initiatives.

The preface reminds us of the extent of the climate crisis. We shouldn't need to do this in a competition law article but when we climb into our competition law bubble, and begin our technocratic competition analysis, it is all too easy to lose sight of this. EU competition law has to be looked at in the light of the mandatory requirements of the EU treaties to promote sustainable development and integrate environmental protection into *all* EU policies—including competition policy. However, this is really a legal grounding for what is a clear and wider *moral* duty: we all have to do everything within our power to fight climate change.

Part I of the article published in [2023] E.C.L.R. 16 looked at the evidence of the alarming increase in market concentration and power in recent years—and at the growing evidence of the impact this is having on a wide range of concerns in society. These include the reduction of the share of income going to labour (the stagnant wage issue); wider political and democratic issues; and the ability to dump costs on society—be it polluting the air, land or water or avoiding paying suppliers properly (so-called "externalities"). On all these (and other) issues the evidence linking these harms to market concentration and power is growing. It is therefore clear that these are issues with which competition policy is (or should be) concerned—and that it should be looking to tackle.

This article has looked at both how our *existing* competition law tools can be used to do this and at how they might be amended to be more effective given the extent of the problems excessive market power and climate change pose.

Part II published in [2023] E.C.L.R. 61 focused on EU law and specifically on art.102 TFEU which prohibits any "abuse" of a "dominant position". Again, before looking at exactly how this (seemingly technocratic) provision could be used, we set the context for the analysis looking at the nature of dominant companies and of power—and at the responsibilities to which that power gives rise. We looked carefully at what art.102 was supposed to (and can) do.

We examined how art.102 can be used as a "sword" to tackle unsustainable practices and called for it to be used against what the person in the street would naturally consider to be an abuse—most obviously "exploitative" abuses (and not just to tackle the more esoteric concerns within the competition law bubble).

We also showed how art.102 can be used as a "shield" to reduce the risk that major companies with the ability and willingness to tackle climate change and promote

[82] Option (iii) could be combined with a reversal of the burden of proof in relation to the current SIEC test as proposed at (i) above: i.e. so that the parties would have to prove to the Commission that the merger does not create a significant impediment to effective competition.

[83] Bank of England response to Huw van Steenis' report on the future of finance, "Supporting the transition to a carbon-neutral economy" (19 September 2019), available at: *https://www.bankofengland.co.uk/research/future-finance/transition-to-a-carbon-neutral-economy*.

[84] See the preface to Part I of this article: "Sustainable future: how can control of monopoly power play a part? Part 1. Monopoly power: a barrier to a sustainable future" [2023] E.C.L.R. 16.

[85] See, in particular, Part I of this article: "Sustainable future: how can control of monopoly power play a part? Part 1. Monopoly power: a barrier to a sustainable future" [2023] E.C.L.R. 16.

sustainable business practices do not get wrongly accused of abusing their power. For example, a supplier declining to supply a potential customer who will use its product in an unsustainable manner (e.g., not recycling it) is not abusing its position in the sense of art.102 ("refusal to supply" or illegal "discrimination"). On the contrary, it is doing the right thing and should not be inhibited from doing this by an unwarranted fear of being accused of abusing a dominant position.

Part III explored how we could use merger control more intelligently as a way of tackling market power and unsustainable business practices—both before they arise (as a result of a merger) and as a way of preventing such power or practices being exacerbated by a merger.

Again we set the technical analysis in its proper context—for example the sheer scale of the recent increase in concentration and market power; the evidence of the harms brought about by mergers (with few benefits); and the extent of under-enforcement in this area (deals escaping all scrutiny and the miniscule number that are blocked).

We looked first at the ways in which sustainability and climate change issues can *already* be taken into account under *current* EU (and UK) systems of merger control—both within the competition assessment itself and as a factor outside competition law (e.g., as a "legitimate" or "public" interest or as part of foreign direct investment control).

While we believe a lot can be done within the *existing* systems of merger control, we recognise that views differ on this and so went on to make three suggestions as to how our laws could be updated to recognise the scale of the problems that we face—both in terms of the climate crisis and excessive market power:

First, we need to make sure that major companies cannot gobble up potential competitors without any scrutiny at all by competition authorities (the so-called "killer acquisition" problem). For the avoidance of doubt, this is to ensure such deals do not escape scrutiny and is without prejudice to the subsequent substantive assessment.

Secondly, we suggest various ways in which climate change and sustainability could be brought clearly and explicitly into merger control. Our preferred solution is to add a new provision into the EUMR requiring the European Commission to "take all appropriate measures to ensure that the concentration has no adverse effects on climate change and environmental sustainability". This would complement (and be in addition to) the Commission's competition assessment. Similar amendments could be made in other jurisdictions.

Thirdly, we propose changes to both the burden and standard of proof in merger control. We look at: for whom should the burden of proof be reversed? (all companies; big companies; or just those in "unsustainable" sectors?); what should be the standard of review? and what should the parties have to prove? On this last point we set out various options for discussion (some more radical than others). We each have our own views, but essentially, we are trying to open a debate here and get more people seriously engaged in it. Those looking for research topics, please note.

Something needs to change in the way we apply competition law. If it does not, competition law will not be playing the part that it can (and must) play in the fight against climate change, and we will face ever more concentration and growth in market power—with all the harms that implies for our economy, our society and our planet.