COMPETITION POLICY SUPPORTING THE GREEN DEAL

Contribution from Simon Holmes, Judge at the UK Competition Appeal Tribunal and Visiting Professor at Oxford University.[1]

A. INTRODUCTION

Over the last 18 months I have spoken and written widely about climate change, sustainability and competition law. In particular I have been arguing that competition law need not be an impediment to vital action to fight climate change but can be part of the solution[2]. I therefore commend the Commission's new initiative on competition policy supporting the Green Deal and welcome this opportunity to contribute (both now and, hopefully, at the conference envisaged for the New Year).

My views and proposals have been set out in a number of speeches and detailed papers, most notably that on "Climate Change, Sustainability, and Competition Law" published in the Oxford Journal of Antitrust Enforcement in April[3]. I recently provided a high level over view of where my thinking has got to for the OECD Roundtable on Sustainability and Competition Policy at which I am speaking on 1 December. For your convenience, this can be found in the link below:

https://one.oecd.org/document/DAF/COMP/WD(2020)94/en/pdf

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[1] Simon is also an adviser to the NGO, ClientEarth; a strategic Adviser to Sustainable Public Affairs; a member of the Competition Commission of the International Chamber of Commerce (ICC); a member of the international advisory board of the LDC (Instituto de derecho de la competencia); an associate member of the UCL Centre for Law, Economics, and Society (CLES); and a founding member of the Inclusive Competition Forum ("ICF").Before "retiring" Simon was a competition lawyer in private practice with major international law firms. All views expressed here are persona and cannot be attributed to any institutions with which Simon is connected.

[2] This was kicked off at a conference in April 2019 hosted by the Economic and Social Committee and we followed this up with a major *conference in October 2019 on "Sustainability and Competition Policy, bridging the two worlds" at which Commissioner Vestager was our keynote speaker.*

[3] *"Climate Change, Sustainability and Competition Law" [* ***https://lnkd.in/gNVZcVN****] .*
If you would like to read something shorter see also my paper on this topic in the CPI Antitrust Chronical of July, 2020 (which contains a collection of papers on "Antitrust and Sustainability") or my short piece on "Consumer welfare, sustainability and competition law goals", Concurrence No 2-2020, Art No 93496.
See also: Climate Change and Sustainability under UK Competition Law published by the European Competition Law Review (ECLR) https://www.law.ox.ac.uk/sites/files/oxlaw/cclp_working_paper_cclpl51.pdf
I would also highly recommend excellent papers by Jordan Ellison "A Fair Share: time for the carbon defence?" [18 March, 2020, ssrn.com, sol 3] and Maurits Dolmans "Sustainable Competition Policy" [Competition Law Policy Debate, Vol 5 Issue 4 & Vol 6 Issue 1, March, 2020]

B. THE COMMISSION'S QUESTIONS.

My OECD note focusses on cooperation between businesses rather than on mergers, abuse of dominant position, state aid or public procurement[4]. All these are important and can play a role in combatting climate change but my immediate concern is to show that competition law is inhibiting vital collaborative efforts to fight climate change and support the European Green Deal—and that it need not do so.

For the same reason it is the Commission's questions on Antitrust Rules to which I wish to reply (as a complement to the above note and cited papers).

Before doing so I would emphasise **3 points** that are frequently misunderstood:

i). Like the Commission I see competition policy as a complement to regulation which will often (even usually) be the most appropriate tool (but regulation is all too often too slow coming, too limited geographically, and lacking in ambition: business is often ready and willing to go further);

ii). Secondly, often businesses can compete on the sustainability of their products (which is an aspect of quality) but they will often suffer from a "first mover disadvantage" (increased costs that they cannot recover from consumers) and the level of sales of such products (even if commercially viable) may not be sufficient to change things on the scale that the Green Deal requires;

iii). Thirdly, we are talking about genuine efforts to fight climate change and support the green deal and the full force of competition law should apply if this is misused. This must not, however, be used as an excuse for inaction on the part of the competition community[5]. The distinction is usually clear cut: agreements to reduce the life of a light bulb, or not to compete on environmental characteristics, are almost certainly going to be illegal; agreements to reduce emissions, or increase the life of light bulbs, are unlikely to be illegal[6]-and the parties to any such genuine arrangements should certainly not be at risk of fines (even if on the particular facts it was found that the arrangements did not get through all the legal hoops).

Subject to the above I would respond briefly to the antitrust questions as follows.

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[4] The more detailed papers cited in footnote 3 also cover abuse of dominance and mergers. My UK paper also looks at how the UK Market Investigation Regime could be relevant (with an obvious read over to any new EU Competition Tool).

[5] We don't ban trade associations or visits to a restaurant by competitors because they might discuss inappropriate matters! The law bites when the law is infringed.

[6] Subject to the scrutiny in the usual way. On fining, see para 61 of the draft Dutch Guidelines on Sustainability Agreements discussed in the reply to question 3 below.

Q1. EXAMPLES.

Most of the instances of cooperation that I have seen are not cases which I consider infringe Article 101 when that provision is properly interpreted with regard to the "constitutional" provisions of the EU treaties, the jurisprudence of the European courts and, above all, the wording of Article 101 itself.[7]
What I have seen many times is that the sort of cooperation that is vital if the Green Deal is to succeed is impeded, delayed or done in a less ambitious way for FEAR of competition law (even if that fear is, in my view, unfounded).
From early 2000 and onwards I did work helping the UK to improve its rate of re-cycling, reduce the amount of plastic packaging used, and reduce food wastage. This often required cooperation between retailers and suppliers. It is not enough for one retailer to work with several suppliers on systems to reduce packaging and increase re-cycling as the systems the suppliers put in place may not work in other retailers. It is not enough for one supplier to work with several retailers on this for similar reasons: retails may find the systems they would put in place would not work for other suppliers. What is often needed is cooperation (with all the usual safeguards) between retailers and suppliers to put industry systems in place. Much progress was made in this area[8] but progress was certainly slower and less ambitious that it could have been because of concerns over the possible application of competition law.

Another example is efforts to ensure that fish stocks are not depleted. In one instance, I was involved with an initiative involving all major suppliers of a type of fish and most major retailers by which they agreed only to source that fish in a sustainable manner. One major retailer declined to sign up fearing that a competition authority might characterise the arrangement as a collective boycott of suppliers sourcing fish in an unsustainable manner. Looking at the detailed safeguards in the system it was clear that that would not be an appropriate characterisation of the arrangement-and I was satisfied that the risk of enforcement action was minimal. Again, it was a misplaced FEAR of competition law that was impeding the sort of cooperation that is vital if the Green Deal is to succeed and Europe is to develop in a sustainable manner.
Talking to European businesses (for example as a member of the International Chamber of Commerce (ICC)'s Global Competition Commission) I am aware that across many industries there are many examples of situations where cooperation between businesses is vital (but where there is a risk that they may be caught-or perceived to be caught-by competition law) but which should be allowed to proceed (either because they should not be caught at all or because they should be exempt).

[7] See the detailed analysis of this in my JAE paper of April, 2020 cited in footnote 3 (as summarised in my OECD paper cited above).
[8] See, for example, the Courtaulds initiative in the UK.

Many such example have been brought the Commission's attention in the course of its consultation on the Horizontal Guidelines. I would particularly draw to your attention the examples included in the submission by Unilever. For your convenience, these examples are provided to the Commission with this reply.

Q2. CLARIFICATION

Yes, there is an urgent need for clarification and comfort to be given as to:

- The sort of agreements that the competition authorities are not likely to challenge (as a matter of enforcement priorities);
- The sort of agreements/provisions that are likely to escape the Article 101(1) prohibition completely;
- The sort of agreements that, if caught by Article 101(1), are likely to meet the conditions of Article 101(3);and
- The circumstances in which the authorities will not impose fines --even if an agreement is, on examination, caught by Article 101(1) and is not exempt under Article 101(3).

The best way of doing this is by **guidance** on enforcement priorities, and on the approach to Article 101(1) and 101(3) in the context of cooperation agreements to fight climate change or otherwise support the Green Deal. In this respect the competition authorities could draw on the commendable approach which they took to Covid 19. If we can do this to fight one (hopefully short term) crisis why can't we show the same resolve in the face of an existential threat like climate change? [9].

This should be supplemented by **regular statements from the Commission** on the basis of real life experience of cases brought to it (whether this takes the form of a press release, speech or, exceptionally an Article 10 Decision [10] is a secondary consideration) [11]. At present there is a serious asymmetry: business hears (quite rightly) what *cannot* be done but rarely hears what *can* be done. This needs to be rectified as quickly as possible.

I am wary of doing this by means of a **block exemption** for cooperation agreements to support the Green Deal. In theory that would be the best approach. However, I fear that any such block exemption would be very narrowly drawn (particularly as the Commission does not yet have extensive experience of such cooperation). There is therefore a risk that any such block exemption does more harm than good in that business will tend to assume (often wrongly) that anything outside the block exemption risks infringing Article 101 and being subject to enforcement action.

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[9] See further the discussion of this under "Lessons from Covid 19" on page 396 of my UK paper cited in footnote 3.

[10] Article 10 of Regulation 1/2003 gives the Commission power to take decisions finding that an agreement does not infringe Article 101 TFEU.

[11] I appreciate that is, to a great extent, dependent on business bringing cases to it-and I am certainly encouraging them to do so. In the absence of "real life" examples, it would be good if the Commission were to set out some hypothetical examples.

There may be some scope for a block exemption for a particular category of cooperation agreement such a standardisation agreements. However, if a block exemption attempted to cover cooperation agreements supporting the green deal more widely, it should be made very clear that many other agreements are likely to escape Article 101(1) or be exempt under Article 101(3) on a case by case basis (and this should be accompanied with guidance-similar to that which accompanies the VABER at present)[12].

Q 3 BEYOND CURRENT ENFORCEMENT PRACTICE

Taking the last question first, **there are compelling legal, economic, political and moral reasons to differentiate between cooperation to fight climate change and support the green deal from other policy objectives** (however laudable they may be):

- First, climate change is an existential threat and of a different order of concern to all the other issues (important as they may be[13]). There is a **moral and economic imperative** to mobilise all policy tools to combat this;
- Secondly, that is precisely why the EU has (quite rightly) launched the Green Deal and both the Commission and the European Parliament have made that their no 1 priority. That means there is a **political reason** to single out cooperation to achieve Green Deal objectives.
- Thirdly there is a **good legal basis** for this:
  *Article 11 TFEU makes it clear that "environmental protection" **must** be taken into account when applying **all** EU policies to promote sustainable development. There is no exception for competition policy[14];
  *Article 191(2) TFEU mandates that EU policy on environmental sustainability should be based on the "precautionary principle" and requires that the EU takes all appropriate measures to prevent risks to the environment *"by giving precedence to the requirements related to the protection of those interests over economic interests".*[15]
  *In the light of the EU's commitments under the Paris Agreement, Articles 2 and 8 of the EU Charter on Fundamental Rights (as rightly interpreted by the Dutch

[12] See also Section IX "Some Conclusions and Proposals for Action" in my paper in the JAE referred to above. There is a fuller (and more recent) discussion of this in my ECLR paper on "Climate Change, sustainability and competition law in the UK" (which includes a section on "Lessons from Covid-19").Both are cited in footnote 3.
[13] These other issues should be assessed on their own merit on a case by case basis applying the law in an open minded way to see if the relevant legal test is met (eg to see if there is an "improvement", "progress" or customer "benefit" in the sense of Article 101(3)). The key point is that, whatever the difficulties may (or may not) be in taking into account other issues and concerns (such as job creation or social objectives) these must not be seen as a reason (or used as a pretext) for not taking into account climate change concerns (where the treaties permit or require this).
[14] Article 11 says:" Environmental protection requirements **must** be integrated into the definition and interpretation of the Union policies and activities, in particular with a view to promoting sustainable development" (emphasis added). See also Article 3(1);3(3) and 3(5) of the Treaty on European Union; Articles 7 and 9 TFEU; and Article 37 of the EU Charter on fundamental Rights.
[15] Joined Cases T-74/00 etc—Artegodan of 26 November, 2002 at 184.

Supreme Court in the Urgenda Case) the EU could be in breach of its international obligations if it did *not* integrate climate change and environmental protection into competition policy.[16]

I turn now to the **first two questions in this Q3**.

Yes, there are "circumstances in which the pursuit of Green Deal Objectives would justify restrictive agreements"[17] beyond current enforcement practice. This does not imply that we need a change in the law. In most cases it is simply a question of applying the law as set out in the treaties as interpreted by the CJEU. In particular in we need to heed the actual wording of Article 101(3) and apply it as it is written noting, for example, that the first condition of Article 101(3) does not just refer to promoting "economic" progress but also to "improving production", "improving distribution" and promoting "technical progress"—all elements that can easily accommodate many cooperation agreements in support of the Green Deal.

We should focus on this and not lapse into lazy short hands like "pro-competitive" factors or get lost in vague and arcane imported concepts like "consumer welfare" that are to be found no-where in the treaty[18].

Similarly, in the second condition of Article 101(3) we should focus on the "benefits" to consumers and not conflate this broad term with the narrower and more limiting idea of "efficiencies"-again a word that does not appear anywhere in Article 101(3) (important as it may be).

That said, there is one area in particular where I see important reasons to go beyond current enforcement practice and that is in the approach to the concept of the "consumers" who must a "fair share" of the "benefits" referred to in the first condition of Article 101(3) referred to above.

At times it is suggested that this means just the immediate purchases of a particular widget. However, this cannot be right for a number of reasons (set out on pages 21 and 22 of my JAE paper cited in footnote 3). In particular a much wider group of citizens benefit from environmental improvements flowing from an agreement than just the particular purchasers of an individual product (and environmental benefits have been recognised as "benefits" in the sense of condition 1 in a number of cases – most notably the European Commission's excellent decision in the "washing machine" or CECED case[19]).

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[16] Supreme Court of the Netherlands, No 19/00135 of 20 December, 2019. For a fuller discussion of this see the sections on the Paris Agreement, the Urgenda Decision and Human Rights in my paper on Climate Change, Sustainability and Competition Law in the UK cited in footnote 3 (pages 387 to 389 in the ECLR edition).

[17] The Commission correctly uses the term "restrictive agreements" and not the term "cartel" which some commentators have wrongly used (and which will almost invariably be unlawful).

[18] Useful as a concept like "consumer welfare" might be (if properly applied), the key point is that it is not the proper place to start the analysis: that is with what the law actually says. This issue is discussed in both my JAE paper (in Section IV on pages 6 to 12 and in Section V at pages 19 to 21) and in my short article on consumer welfare cited in footnote 3.

[19] CECED [1999 L187/470J 2000]

It is essential that we give proper weight to what really matters. If we do not we will ask the right questions but get the wrong answers. What weight should we put on a product (which perhaps we do not need at all) costing one eurocent less? And what weight do we put on having clean air to breathe or leaving our grandchildren a planet worth living on? [20]

The Dutch Paper

In this context I would strongly commend the draft guidelines on sustainability agreements recently published by the Dutch competition authority (ACM)[21]. In particular it makes **three excellent observations/innovations**:

- It makes a brave attempt to single out "environmental damage agreements" [22] for a more flexible treatment when it comes to the question of a "fair share for consumers" (Paras 38 to 39);
- It recognises that consumers are responsible for the environmental damage which their products cause– and that it is therefore "fair" if they are not fully compensated for any price increase that might result from an agreement designed to mitigate that environmental damage (para 41); and
- It recognises that we do not need to quantify everything in life (Paras 45 to 48). In my view economics is a very valuable tool and it can often be helpful to use all available data. However, ultimately most questions in competition law (and law more generally) are a matter of weighing up all the quantitative and qualitative evidence and coming to a judgement based upon that evidence.

If I were to make one criticism of the ACM paper it is that one of the conditions for its more flexible approach to "environmental-damage agreements" is that they help comply with "an international or national standard to prevent environmental damage to which the government is ***bound***" (emphasis added). As, in many instances, neither the EU or national governments are legally "bound" to meet a particular environmental standard (or there is some dispute as to this) it should be sufficient if the cooperation agreement contributes in an efficient manner to supporting the Green Deal.

C. CONCLUSION

I have long argued that competition policy need not be a barrier to vital cooperation to fight climate change. I therefore welcome wholeheartedly this initiative to explore how competition policy can best support the European Green Deal and I hope that my work can contribute to the Commission's thinking.

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[20] For a fuller discussion of this see "Fair Share for Consumers" at pages 21 to 28 of my paper in the JAE referred to in the Introduction to this reply and "The Carbon Defence" by Jordan Ellison (both cited in footnote 3).

[21] ACM opens up more opportunities for businesses to collaborate to achieve climate goals. Draft "Guidelines on Sustainability: opportunities within competition law".

[22] In the current context this could be replaced by the words "agreements supporting the Green Deal" or "agreements supporting Green Deal Objectives".