OPENING REMARKS OF PROFESSOR SIMON HOLMES MODERATOR OF THE OPENING PANEL INTRODUCING THE WEBINAR.

1. Sustainability and competition law.

Sustainability comes into competition law both as a positive and a negative factor.

Positive Factor.
For example, it is positive when it is seen as a benefit or "efficiency" in merger control. Secondly, it can be the justification for businesses to work together to make their industry more sustainable and fight climate change ("A sustainability cooperation agreement"). Thirdly it can be an "objective justification" for the conduct of a dominant company (thus avoiding being condemned for an abuse of that dominant position).

Note that sustainability can be positive in 2 ways. First, in the normal sense of that term: for example, the use of fewer natural resources or more sustainable inputs. However, it also includes the removal or reduction of a "negative externality": eg harms/costs that are otherwise picked up by society. The most important example is an agreement or conduct that results in a reduction in greenhouse gases.

Negative Factor
However, sustainability can also be a negative factor in the competition law assessment. First it can amount to a "merger harm" : for example, where a merger causes environmental damage (making it more likely that a deal may need to be blocked or will require remedies). Secondly an agreement not to compete on some environmental aspect (where it is a parameter of competition) is just as much an infringement of the prohibition on anti-competitive agreements as price fixing or market sharing. Thirdly, in some cases unsustainable conduct by a dominant company can amount to an abuse of that dominance. The example suggested was where a dominant company dumps its waste in a river or on land- thus avoiding the costs of disposing of that waste responsibly.

2. References to sustainability harms and benefits by competition authorities.

Reflecting the above there are a growing number of references to environmental/sustainability benefits and harms in the guidelines produced by competition authorities around the world. Examples include:

A. Chapter 9 on "sustainability cooperation agreements" in the European Commission's Horizontal Guidelines of June 2023.

B. The European Commission's draft Merger guidelines of April, 2026 (with detailed references to Merger benefits and sustainability benefits (eg para 299).

C. The European Commission's Article 102 guidelines on exclusionary conduct of September 2026 contains a whole chapter (5) on "objective justification" and includes examples of what can amount to a sustainability benefit (eg paras 217 and 218).

D. National competition authorities have also made numerous references to sustainability benefits and harms. For example, the UK CMA's Green Agreement Guidance of October 2023 broadly follows

the approach of The European Commission‘s Horizontal Guidelines but has a “more permissive approach“ for “Climate Change Agreements”.

Australia produced sustainability guidelines in December 2024 and its public interest and “net benefits“ approach is very flexible and suitable for examining sustainability agreements (see the excellent paper by Dominique Ogilvie and her colleagues at the ACCC).

Japan also produced guidelines on sustainability in April 2024 and again this is used to assist sustainability initiatives (see the excellent paper by Kenta Suzuki of the JFTC).

Last, but not least, the French Autorite de la Concurrence, while following The European Commission‘s guidelines, has announced a “porte ouverte“ inviting businesses to come to it with specific projects and has given helpful guidance in several of these.

3. Assessment of the benefits and harms.

The competition authorities have, however, not given much detailed guidance as to how to quantify sustainability benefits and harms. The Dutch draft guidelines of 2021 had some discussion of this (including references to the social cost of carbon). More specifically the Dutch and Greek authorities commissioned a “Technical report on sustainability and competition“ in January 2021. However, overall there is little detailed guidance on quantification which is one reason why today’s conference is so welcome.

The authorities have, however, made it clear that it is not always necessary to *quantify* the benefits and harms: not everything of value in life can be reduced to numbers. We saw this in the European Commission’s exemption guidelines back in 2004 and again in the Dutch draft guidelines of 2021. It is very clear that a qualitative approach is still acceptable and appropriate in many cases. This is clear from both the European Commission’s draft Merger Guidelines and its Article 102 Guidelines this year. For example, the Commission says (in para 227) of the 102 Guidelines that:

“*a precise quantitative analysis may be excessively difficult or practically impossible for certain qualitative and longer-term efficiencies. In such cases, the dominant undertaking must at least describe in detail the nature of the efficiencies and why they lead to a clearly identifiable objective and verifiable positive impact on consumers (not just a marginal one) by providing, to the extent possible, an estimate of the magnitude of the claimed benefit “.*

It is also illustrated in the informal guidance given by some competition authorities. A good example is the guidance given by the CMA to WWF in March,2024. In this the CMA accepted that it could not “exclude the possibility of some harm to competition or consumers arising“. However it considered that “the risk of significant harm to competition or consumers appears likely to be very low“. Furthermore, they considered that there were “credible reason reasons to believe that the proposal would produce relevant environmental benefits that could be capable of offsetting any harmful competitive effects“. This “light touch review“ is commendable in the circumstances.

4. Difficult legal issues remaining.

There are a number of outstanding, difficult and controversial issues remaining. For example, what sort of benefits count? The Commissions references in both the sustainability cooperation agreements guidance and in the draft merger guidelines is helpful referring to “use value benefits”,

"non-use value benefits" and "collective benefits" (see paras 571-591 of the Horizontal Guidelines and paras 319 to 321 of the Draft Merger Guidelines). The more difficult question is: which of those benefits count? Only those accruing to consumers in the market ("in-market" consumers)? Both consumers within and outside the market ("out of market" consumers)? All consumers in the country (as in the UK in the case of a climate change agreement)? Or all citizens? (broadly the Australian approach).

A final question is will these technical difficulties really matter in practice or will competition authorities find ways to approve (for example) a highly beneficial sustainability agreement where there is little evidence of real competitive harm? Perhaps the approach of the CMA in the WWF case points to a way forward?

5. Negative externalities.

Simon concluded with strong words and warnings in relation to taking into account negative externalities. The term "negative externality" is something of a misnomer. The pollution caused by a production process is just as much a cost as the cost of the raw materials or labour. The difference is that accounting conventions leave out the costs of pollution (leaving them for society to pick up) whereas the other two costs are included in the accounting books.

A competition policy that ignores externalities rewards value extraction and *ignores* value destruction. Without taking into account externalities competition policy/law/economics is not analysing markets, prices or competitive effects on the basis of true costs.

It is therefore very important to discuss and refine methodologies for taking into account externalities– particularly the assessment of the positive value of efforts to remove such externalities such as initiatives which reduce greenhouse gases (whether this is in the context of a sustainability cooperation agreement, a merger, or the conduct of a dominant company).

If only for this, today's workshop is most welcome and my thanks go to the French competition authority for organising it.

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