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Editorial: Exploring New Horizons in the Sustainability
and Competition Law Debate

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This issue is based on contributions to the CLaSF workshop held on the 23rd of September 2022 in València. While this issue of the *CompLRev* with only two contributions might seem rather brief, the relative paucity in number of articles is more than compensated by their novel and innovative nature. These papers on the topical debate address two areas that are rarely discussed in the context of sustainability and competition.

Juan David Gutiérrez & Sebastián Solarte's paper provides insights into how developing countries in Latin America are handling the interaction between sustainability and competition law. The paper focuses on deforestation in the Amazon basin (specifically Bolivia, Brazil, Colombia, Ecuador, and Peru) and its relationship with competition law. While highlighting the potential for developing a sustainable competition law for this area, it explains the current challenges and limitations. For example, competition law seems not relevant in the early stages of the supply chains for timber, minerals, agriculture, and livestock in the Amazon basin. These are characterised by the informal nature of the markets, in other words the predominance of informal businesses which may also overlap with illegal activity. For example, gold mining is prohibited in many parts of the Amazon and it is thus informal businesses that are engaged in that trade.

The paper argues that competition law can play a role in promoting initiatives addressing deforestation. Yet, competition laws and agencies have not been particularly flexible in this area. Cases from Brazil and Colombia may even show a rather hostile approach to arguments based on environmental protection. The paper also demonstrates how certain interest groups have used the threat of competition law actions against private initiatives. These are initiatives aimed at increasing environmental sustainability but which could have harmed the proceeds that these interest groups made from the informal and sometimes illegal business activities.

The paper also highlights some of the particular challenges that these states – and many other states of the Global South – face: a lack of effective control over their territory which allows non-state actors to exploit natural resources with devastating effects on nature.

The second paper by Johannes Persch is focused on a jurisdiction that appears frequently in the debate, the EU. However, it pushes the debate in new directions. It

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proposes that competition law should be used to actively promote sustainability. This task should be achieved by what I have previously called preventative integration.¹ This means extending the scope of competition law prohibitions to prevent unsustainable business actions and similarly limiting the scope of exemptions where exemptions would result in unsustainable outcomes.

Persch's paper, first, highlights a central problem in the interaction between competition law and sustainability, namely that competition law interventions are often aimed at increasing output. This increased production, even where it involves more environmentally efficient production, leads to more consumption of resources and higher CO₂ emissions. The paper invites us to re-think this approach and focus less on the efficiency per unit produced but to consider whether overall less resources are consumed/lower levels of CO₂ are emitted.

Through its pro-enforcement approach, the paper suggests that competition law should be applied in a way that incentivises, or even requires, companies to behave more sustainably. This approach should be taken even where it leads to sacrificing some output increases. It explores different areas of EU competition law such as Articles 101 and 102 TFEU and the EU Merger Regulation and sets out an interpretation of competition law that requires companies to demonstrate that their anti-competitive conduct does not lead to additional environmental harm. In other words, the paper proposes that while competition can harm the environment, competition law needs to ensure that anti-competitive practices do not lead to environmental harm.

The two papers are excellent and important contributions to the emerging field of sustainability and competition law.

Juan David Gutiérrez & Sebastián Solarte's contribution provides coverage and insights from the Global South, and South America in particular, which have so far been absent from the debate. This absence is even more striking given the disproportionate impact that the sustainability and competition law debate can have given the South American continent contains the Amazon rainforest and is an area of the world where sustainable development is highly relevant.

The paper not only highlights that this debate has not yet really taken hold at the level of agencies and courts in Latin America, but also contributes to the debate by providing two important examples of issues central to the debate. On the one hand, the paper shows how the threat of bringing competition law actions might be used to block sustainability initiatives by certain actors that benefit from unsustainable practices. In other words, it provides an example of the chilling effect that the lack of clarity in this area can produce. Moreover, to say it in a more direct manner: the paper provides evidence of how competition law can be (ab)used as a tool to protect unsustainable businesses and business practices.

¹ See Julian Nowag, *Environmental Integration in Competition and Free-Movement Law* (2017 OUP) 7ff; Julian Nowag 'Competition law's sustainability gap? Tools for an Examination and a Brief Overview' (2022) *Nordic Journal of European Law* 150-152.

On the other hand, the paper also highlights a problem that is often overlooked by critics of private sustainability initiatives. The argument that the State and not private parties should address sustainability matters faces real challenges in the context of the Global South. In these States the law and reality seem further apart than in the Global North. Many States in the Global South face a lack of effective control over their full territory which allows non-state actors to extract rents from natural resources with devastating effects on ecosystems. For example, gold mining is already prohibited in the Amazon. But it still takes place, mainly as informal and illegal business activity. In the context of a reality where States lack the means for effective law enforcement, more serious engagement with the issue of public versus private sustainability tools and their effectiveness is needed.

Johannes Persch's paper makes a serious and well thought-out contribution to the question of preventative integration. It shows how the idea of preventative integration and Simon Holmes' lovely metaphor of competition law as a sword are not always substitutes. The sword metaphor² seems to describe a more limited situation, focused on the way in which competition law or sustainability is used. Preventative integration is more outcome focused. It involves extending the scope of competition law prohibitions to prevent unsustainable business actions, and similarly limiting the scope of exemptions where they would result in unsustainable outcomes. Persch's paper potentially gives us a better way to phrase this: a stricter application of competition law to achieve sustainability, or a pro-enforcement approach to competition law to achieve sustainability.

In my previous work, I have been rather critical of the potential for preventative integration due to risks regarding competences and the risk of the competition authority acting as a de facto legislator in environmental matters.³ Persch's work shows how the debate has developed and suggests tools which previously may have been difficult to conceive. His paper makes thoughtful proposals. These limit the risks and convince me of the need to moderate my previous stance substantially.⁴ A second major contribution of Persch's paper is the astute observation regarding the CO₂ efficiency of production. While innovation fostered often by competition and competition law may be a great tool to achieve greater CO₂ and environmental efficiency, we should not lose sight of the broader sustainability goal. Accordingly, one may ask, what is the value of a CO₂ reduction of 10% per unit if, at the same time, the total number of units produced increases by 80%?

Overall, the authors are to be congratulated on their excellent papers which highlight that CLaSF has – once again - brought together excellent scholars to develop new and significant contributions to competition law academic scholarship.

² Simon Holmes, 'Climate change, sustainability and competition law' (2020) 8 *Journal of Antitrust Enforcement* 355.

³ See (n 1).

⁴ Yet, one still needs to be mindful not to over-step the line.