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Corporate Sustainability, Environmental Justice, and Competition Law: Developing a Proactive Mechanism for Sustainable Societies

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ABSTRACT

We cannot overstate the monumental nature of the environmental challenges we face today. It is however unfortunate that the authorities face a constant struggle to tackle the problems. Hence, to effectively tackle the challenges, it has become imperative that a wider range of actors play their role to prevent wide-scale degeneration. Such actors could include not only NGOs but also business entities. The problem however is that the involvement of business entities could raise conflict of interest issues especially if the so-called environment-saving measures offend some economic rules such as competition law. This means that efforts must be made to manage the relationship between the two public goals – in other words, to maximise possible environmental benefits derivable from good corporate initiatives without compromising the integrity of economic rules. The paper, therefore, clamours that seemingly anti-competitive conducts which have positive environmental effects be considered acceptable in deserving cases. Indeed, it is not unusual to hear about instances where competition authorities have accepted environmental policy arguments in competition cases. As such, the proposition to accommodate environmental protection arguments in competition cases is not revolutionary. The paper however seeks to enrich the theoretical justification by emphasising the necessity of encouraging business actors to be proactive in addressing environmental challenges and ultimately on the necessity to give greater regard to environmental policy, especially when compared with economic rules such as competition law

The analytical exercise in this paper extends beyond consequentialist public policy justifications. Rather, it adopts an ingrained approach by asserting an inherent idea of justice – specifically, environmental justice.

To link the intrinsic claim of environmental justice to external societal pulses, the paper aligns the claim for justice with society's preference. The idea of preference, for this purpose, is nested in Sen's capability approach. The paper delineates the contexts and

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scope of potential claims with the aim of avoiding abuse and limiting frictions between the goals of competition and environmental policies.

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I. INTRODUCTION

Environmental challenges can have a devastating effect on the lives of people globally. Such potential problems have been well recognised. As such, authorities around the world continue to make efforts to solve them. However, public authorities are often overwhelmed by the enormity of the task. Hence, in recent times, much has been said and done to encourage the participation of other actors. In regimes such as the EU, the role that can be played by private actors in addressing environmental challenges has long been recognised. Most of these private stakeholders are NGOs. However, there is an increase in the level of participation by corporate entities[2] – such activities often form part of business entities' corporate social responsibility (CSR).

In recognition of the role of private actors in tackling sustainability challenges, there are recent talks especially in Europe about how sustainability considerations can feature in competition law assessments. The European Commission had in 2019 published a reflection paper titled 'Towards a Sustainable Europe by 2030'. In this paper, the Commission recognised the role of competition policy as a tool towards achieving distributive justice.[3] This is in an effort to firmly link competition to sustainability. More explicitly, the paper asserts that '[s]ustainable competition depends on prices that reflect the true costs of production and use — internalising externalities'[4] moreover, there are a host of measures that would soon be adopted by the Commission which would aim at achieving sustainable competition.[5] Further, A noteworthy initiative from the national authorities is that of the Dutch Authority on Consumer and Market (ACM)'s guidelines on sustainability agreements which was published in January 2021 which

[2] PWC, 'Redefining business success in a changing world CEO Survey'19th Annual Global CEO Survey / January 2016 [https://www.pwc.com/gx/en/ceo-survey/2016/landing-page/pwc-19th-annual-global-ceo-survey.pdf]. It must however be emphasised that even committed organisations are struggling in their effort to achieve 'net zero'. See PWC, 'Redefining business success in a changing world CEO Survey'25th Annual Global CEO Survey / January 2022 [https://www.pwc.com/gx/en/ceo-agenda/ceosurvey/2022.html].

[3] European Commission, "Reflection paper - Towards a Sustainable Europe by 2030" 26

[4] Ibid, 25.

[5] See European Commission, Press Release - Competition: Commission outlines contribution of competition policy and its review to green and digital transition, and to a resilient Single Market (November 2021) https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6101

opened up the scope for a 'rule of reason' approach and a deliberative disposition towards undertakings acting in good faith.[6] There are others who have amended their laws to exempt some agreements which may otherwise be restrictive due to their sustainability benefits.[7] In the same light, some authorities have proposed the use of sandbox in other to shield companies with legitimate sustainability interests from the risk of running afoul of competition rules.[8] Other organisations that have aired their views on this pressing issue include the OECD[9] and the International Chambers of Commerce (ICC).[10]

In light of the preceding paragraph, this paper seeks to promote a more prominent role for corporate entities in implementing or spearheading schemes that impact positively on the environment. This idea is by no means new as there are a number of green business literature addressing similar issues.[11] Moreover, some government authorities have taken steps to facilitate proactive engagements by business entities through for example the provision of certifications and through encouraging corporations to pledge to act sustainably.[12] However, while most of the present literature address the issue by analysing; the need for corporations to get involved, the manner of involvement required or desired, and the impact of corporate involvement, this paper seeks to address the scope of corporate involvement with the aim of maximising environmental sustainability by focusing on the tensions between the pursuit of environmental progress and the regulation of economic activities. Where business entities are enabled to take proactive actions aimed at promoting environmental sustainability, they may take steps that extend beyond their social activities as such steps may directly relate to the entity's main business model. The potential problem that arises from such extended scope of

[6] Dutch Authority of Consumer and Markets, "Second Draft Guidelines: Sustainability agreements Opportunities within Competition Law" (January 2021) [https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf].

[7] Viktoria Robertson, "The New Sustainability Exemption in Austrian Competition Law" (October 29, 2021). Journal of European Competition Law & Practice (Forthcoming), Available at SSRN: https://ssrn.com/abstract=3957551 or http://dx.doi.org/10.2139/ssrn.3957551

[8] Hellenic Competition Commission, "Public consultation: Proposal for the creation of a sandbox for sustainability and competition in the Greek market" [https://www.epant.gr/en/enimerosi/sandbox.html]

[9] OECD, "Environmental Considerations in Competition Enforcement: Background Paper by the Secretariat" (November 2021) [https://one.oecd.org/document/DAF/COMP(2021)4/en/pdf].

[10] ICC, "Competition Policy and Environmental Sustainability" (November 2020) [https://iccwbo.org/content/uploads/sites/3/2020/12/2020-comppolicyandenvironmsustainnability.pdf].

[11] E.g. J Sneirdon, 'Green is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance' (2009) 94(3) *Iowa Law Review;* M Cherry and J Sneirson, 'Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster' (2011) *85(4) Tulane Law Review 983*; Eccles, R, I Ioannou, G Serafeim, 'The Impact of Corporate Sustainability on Organizational Processes and Performance' (2014) 60(11) Management Science 2835-2857; J Sneirson, 'The Sustainable Corporation and Shareholder Profits' (2011) 46 Wake Forest Law Review 541; T Lyon and J. Maxwell, 'Corporate Social Responsibility and the Environment: A Theoretical Perspective' (2008) 2(2) Rev of Environmental Economics and Policy 240-260.

[12] See J Sneirdon, 'Green is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance' (2009) 94(3) *Iowa Law Review.*

actions is that such initiative may be subjected to economic regulatory scrutiny. An economic area in which such friction is likely is competition law and policy. Hence, in instances where the pursuit of sustainability aims intersect competition rules, this paper seeks to balance competing policy objectives by maximising possible environmental benefits derivable from good initiatives without compromising the integrity of economic rules.

Indeed, many competition authorities may be comfortable with pursuing environmental goals. Some have even clearly incorporated sustainability within their competition policy. Nevertheless, more needs to be done to facilitate environmental sustainability given the heightened level of environmental concerns the world is faced with. This would mean that unlike the standard approach of subordinating environmental issues to competition concerns, environmental considerations should be given a strong (or equal) weight when seeking to balance these policy objectives. Such an approach would require that conducts which might presently be ruled anticompetitive even by open-minded authorities may well be vindicated if it is shown to further the cause of environmental sustainability.

The paper, therefore, seeks to develop a theory of sustainability nested on the concept of environmental justice. The imperativeness of pursuing justice stems from the assumption that it aligns with broader societal preferences. However, 'environmental justice' is quite a nebulous concept. As such, to address this concept within its appropriate context, this paper links the idea of environmental justice to Sen's capability approach.

Depending on the circumstance in which it is applied, the proposed theoretical approach can indeed have radical effects. Unfortunately, the presence of such potent justification for business conduct could lend itself to abuse. This possibility makes it imperative that we delineate the contexts and scope of potential claims to avoid abuses and limit frictions between the goals of competition and environmental policies. Hence, the foregoing notwithstanding, this paper is an attempt to re-characterise the scope of a competition problem.[13] Rather, the proposition can only have implications for how operational terms such as 'restriction,' 'abuse,' 'monopolisation' and so on are defined and interpreted.[14]

To substantiate the arguments proffered in this paper, references would be made to relevant competition law provisions and cases. Specific reference to laws would however only be for

[13] For an argument regarding the distinctiveness of economic competition, see A Al-Ameen, *Antitrust: The Person-centred Approach* (Springer, 2014) 47-51.

[14] It is well known that the meaning of competition law concepts depends on the paradigm and the context in which they are addressed. E.g., the concept of 'restriction' in EU competition law has changed over the years. See S King, Agreements that Restrict Competition by an Object under Article 101(1) TFEU: Past, Present and Future (PhD Thesis, LSE, 2015).

illustrative purposes. Hence, though much of the illustrations in this paper is based on the EU, the proposition is by no means insignificant for other regimes.

The paper is divided into five parts. It starts with a brief background on the ideas underlying the paper. Part 2 ascertains the scope for environmental considerations in competition cases. Part 3 aligns and analyses the relevant environmental precepts within the competition context. Part 4 evaluates the rationales that could justify the pursuit of environmental justice especially when it intersects with competition law. Here, the focus is placed on Sen's Capability Approach. Part 5 contains the conclusion.

II. BACKGROUND ON THE ENVIRONMENT AND THE PURSUIT OF JUSTICE

Reports show that a 'perfect storm' of environmental problems is imminent.[15] Unless the risk is appropriately assessed and addressed, it appears that a range of environmental problems resulting from climate change and ecological degradation may usher in the so-called 'human predicament.[16] Concerted efforts are therefore needed to prevent wide-scale degeneration. An obvious way to address such monumental problems is by implementing environmental laws and policies on a global scale. Such efforts have indeed been undertaken globally. However, direct regulatory measures have in some cases been inadequate.[17] As such, to fill this void, voluntary initiatives have been and continue to be deployed.

The private actors that are often involved in sustainability initiatives include not only the NGOs but also business entities. However, where such private actors act in their capacity as business entities, the potential for conflicts emerge between environmental policies and economic rules (i.e. competition law). In such situations, managing the tension should be the primary focus. It is in this spirit that this paper seeks to stress the scope of environmental protection in competition cases. However, the clamour for greater recognition of environmental protection

[15] See e.g., J Beddington, Food, energy, water and the climate: a perfect storm of global events? (2008) <http://webarchive.nationalarchives.gov.uk/20121212135622/http:/www.bis.gov.uk/assets/goscience/docs/p/perfect-storm-paper.pdf > Last accessed 15 March 2017;
J Beddington's speech at the GovNet Sustainable Development UK 2009 event <https://www.gren.org.uk/resources/Beddington'sSpeechatSDUK09.pdf > Last accessed 15 March 2017; Population Institute, '2030: The "Perfect Storm" Scenario' <https://www.populationinstitute.org/external/files/reports/The_Perfect_Storm_Scenario_for_2030.pdf> Last accessed 15 March 2017.

[16] P Ehrlich and A Ehrlich 'Solving the Human Predicament' (2012) 69 Int Journal of Environmental Studies 557–565.

[17] See e.g., M Livermore and R Revesz, 'Rethinking Health-Based Environmental Standards' (2014) NYU Law and Economics Working Papers. Paper 351; K Singleton-Cambage, 'International Legal Sources and Global Environmental Crises: the inadequacy of principles, treaties, and custom' (1995) 2 ILSA Journal of Int'l & Comparative Law 171-187*;* G Rose, 'Gaps in the Implementation of Environmental Law at the National, Regional and Global Level' (First Preparatory Meeting, World Congress on Justice, Governance and Law for Environmental Sustainability, UNEP, Kuala Lumpur, 12-13 October 2011)

within competition law is not made for its sake or simply to achieve some prescriptive environmental policy objectives. Rather, the synergy is being sought for higher purposes – the need to achieve environmental justice. It is however noteworthy that though environmental justice is a virtue worthy of being pursued, initiatives underpinned by justice could gain even more legitimacy when they reflect the people's preference. As such, the paper contends that achieving environmental justice in competition law is paramount because of the need to reverse (or avoid potential) injustice and thus give effect to the people's preferences.

In cases where competition authorities have taken account of environmental factors in their competition assessment, they tended to assess the possibility of exempting conducts that would otherwise have been ruled to be anticompetitive. However, before such exemptions are granted, there are often conditions that must be met. Such case-by-case scrutiny which seeks to ascertain the merit of claims has proved attractive not the least because it helps to reduce the motivation for making baseless exemption claims (i.e., of environmental benefits). However, when put through deeper scrutiny, it becomes obvious that the present method does not fully utilise the scope for tackling environmental challenges alongside competition problems. Taking Europe as an example, as much as it is essential to prevent frivolous defences, the law must be robust enough to absorb and accommodate a broader range of sustainability ideals.[18]

Perhaps one major reason behind the inadequacy of the present approaches stems from the theoretical standpoint through which much of competition law and policy is often expressed – rights and responsibilities regarding competition and other public policy goals would, in principle, be maximised where they intersect at an equilibrium point. This pursuit of equilibrium is not controversial and should indeed be the ideal. The problem stems from the implicit understanding that the underlying parameter for the balancing exercise must be dominated by concepts of economic efficiency, however so conceived. The problem is that even the most 'accommodating' of the efficiency standards may still ignore some legitimate sustainability issues. Indeed, no serious commentator would argue that economic efficiency should be disregarded in competition law and policy. However, the imbalance in the presumptive weight between efficiency and 'other goals' need to the readdressed. Indeed, theories of economic efficiency could still be given strong consideration while a substantial weight is also given to the broader factors/benefits. As will be revealed below, the dynamics of the balancing exercise should depend on the substantive preferences of the people. To give a broad example, an agreement that reduces emission should not be sanctioned solely because

[18] J Hurić-Larsen and A Münch, 'Competition and Environmental Policy in the EU: Old Foes, New Friends?' (2016) 16(2) Journal of Industry, Competition and Trade 137–153.

there are demonstrable economic gains such as a lower electricity tariff. Rather, it could be sanctioned simply because (either expressly or impliedly,) the people have an aversion for such emission perhaps because it is bad for their health and would also unjustly burden the non-consumers public with pollution especially if they do not get any corresponding benefit.

The impetus for the paper is nested on the assumption that people prefer environmental justice and sustainability. The inferences drawn therefore is that society would desire that these concepts are absorbed into competition law. To justify this assumption, the paper also draws on logical, theoretical and empirical evidence. It situates the idea of preferences within Sen's Capability Approach (CA) – CA is preferred because it provides a genuine and realistic basis for expounding on the concept of individual preferences.

III. ENVIRONMENTAL CONSIDERATIONS IN COMPETITION CASES

The need to protect the environment has been one of the primary objects of concern for governments – running an administrative or regulatory system that adequately addresses the myriad of environmental challenges is one of the most pressing challenges facing public authorities.[19] A good indicator of this inadequacy is the UK government's inability to adequately respond to air quality concerns[20] despite the Supreme Court's chastisement in the ClientEarth case.[21] It is therefore becoming increasingly inevitable to pay more attention to other means of protecting the environment.[22] In recognition of the need for such multifaceted approaches, there is an increasing willingness to take account of environmental protection in wider law and policy fields including competition law and policy.[23] However, while there have

[19] There are various environmental regulations at the local level as well as collaborative efforts through conventions at the global level. See G Wickham and J Goodie, *Legal and Political Challenges of Governing the Environment and Climate Change: Ruling Nature* (2013).

[20] See ClientEarth, 'Judge decides UK government will face renewed legal action over air quality' 28 April 2016 website <http://www.clientearth.org/judge-decides-uk-government-will-face-legal-action-air-quality/> Last accessed 15 March 2017.

[21] R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs [2015] UKSC 28.

[22] C Watson, 'Air Pollution Needs Multi-Pronged Solution' 27-04-2015 <http://www.airqualitynews.com/2015/04/27/air-polluion-needs-a-multi-prongedsolution/> Last accessed15 March 2017.

[23] Cases such as 2000/475/EC: Commission Decision of 24 January 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case IV.F.1/36.718.CECED) (notified under document number C(1999) 5064); and EU Commission Press Release Database, 'Commission and ACEA Agree on CO2 Emissions from Cars' IP/98/734 Brussels, 29 July 1998 have signalled the direction towards environmental protection. Even more noteworthy is the political will expressed by the Dutch Ministry of Economic Affairs. See 'Minister of Economic Affairs Published a Draft Policy Rule on Competition and Sustainability for Consultation' Stabbe website (05 January 2016) <http://www.stibbe.com/en/news/2016/january/minister-of-economic-affairs-published-a-draft-policy-rule-on-competition-for-consultation> Last accessed on 15 March 2017. However, unfortunately, it appears that based on the information provided by the Ministry on the 23 June 2016, it would, after all, be making rather tamed changes. See 'New Developments Policy Rules on Competition and Sustainability' (Van Doorne website, 05 July 2016) <https://www.vandoorne.com/en/knowledgesharing/news/2016_q2/new-developments-policy-rules-on-

been some statements in favour of sustainability within the competition sphere, there is as yet no established practical framework that would demonstrate how a 'sustainable' competition regime should function. To facilitate the development of such a framework, it would be helpful to strengthen and align the conceptual ideas behind the different policy objectives. The alignment efforts are addressed below:

(A) Synergy of Concepts

To achieve genuine synergy of concepts,[24] it is imperative that the concepts through which environmental protection and competition law are to be aligned must be clear and thoroughly developed. The alignment of environmental justice and competition law is, therefore, essential. However, the concept of environmental justice is quite vague[25] as it can be deployed as a tool for different socio-political agendas. As such, it might not meet the stated requirement for a perfect synergy.[26] Similarly, the exact meaning and scope of the term 'sustainability' are far from clear.[27] Nevertheless, the value of these two concepts as philosophical stances remains strong. Given their potential value and coupled with the need to prevent the terms from turning into abused slogans, it is important to carefully delineate their scope.

In furtherance of the aim of synergising the environmental concepts, the goal of environmental justice (within the context of competition law) will be channelled through concrete environmental sustainability principles such as precautionary and proportionality principles. It is also imperative to establish a sufficient background within competition theory that would effectively accommodate the proposal made in this paper.

(B) People's Preferences as a springboard for synergies

The impetus for invoking environmental justice in competition cases is premised on the assumption that the masses prefer environmental safety and dread environmental apocalypse.[28] Moreover, introducing environmental justice would serve as a form of remedy for the victims of human-induced environmental challenges. Given that the paper seeks to rely on the people's

competition-and-sustainability/> Last accessed on 15 March 2017.

[24] For the importance of the kind of synergy sought in this paper, see P Corning, 'The Synergism Hypothesis: On the Concept of Synergy and its Role in the Evolution of Complex Systems' 21(2) Journal of Social and Evolutionary Systems 1 (1998).

[25] C Foreman, *The Promise and Peril of Environmental Justice* (Brookings Institution Press, 2000) 10-12.

[26] I Beretta, 'Some Highlights on the Concept of Environmental Justice and its Use' (2012) 17 e-cadernos CES 136-162.

[27] However, some consider this relative vagueness to be a strength. See A Ali, 'A Conceptual Framework for Environmental Justice Based on Shared but Differentiated Responsibilities' CSERGE Working Paper EDM 01-02.

[28] See J Vigdor, 'Does Environmental Remediation benefit the Poor?' in HS Banzhaf (ed) *The Political Economy of Environmental Justice* (Stanford Economics and Finance, 2012) 52.

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preferences as the basis for incorporating environmental justice into competition law, it becomes important to expound on the ingrained values present in environmental justice and how those values (mixed together with other important values such as economic competition) align with the preference of the people. To ascertain the preference of the people, we must carefully distant ourselves from narrow views on what amounts to human preferences (i.e., profit maximisation as the natural preference of the economic man). Rather, we should deploy a more realistic, eclectic, adaptable and grassroots ideology of human preferences. The foremost adaptable concept in this regard is Sen's capability approach. It is particularly suitable given its broadness and openness to conceptual and empirical analysis.

It must be conceded that the actual preference of the people is not easily discernible as such preferences would depend on the circumstances in individual cases. Therefore, the paper provides only a general analysis of how societal preferences could potentially link environmental justice and competition law. This is achieved by establishing the likely benefits of specific environmental initiatives and then assessing the degree to which such benefits are likely to shape the public's preference for sustainability and environmental justice. The next step would then be to assess the extent to which such preference is likely to be maintained where the pro-environment initiative raises competition concerns.

The conceptual basis in support of the assumption regarding societal preferences is indeed general. Nevertheless, it is perhaps sufficient because it is trite to assume that people would naturally prefer to protect the environment especially given the overwhelming evidence of the potential socio-economic impact of environmental problems. Moreover, there are a good number of theoretical and empirical studies that link trade liberalisation to the rise in pollution.[29] Some studies also show the great imbalance in the allocation of environmental risk when free trade intensifies.[30] Though some of these studies were conducted primarily in the context of international trade, it is possible to extrapolate from their findings and draw possible parallels with activities bordering on market competition. It is therefore only logical to assume that where the public are equipped with relevant information, their reaction would be to take environmental justice seriously. Moreover, if the policies formulated by democratically elected

[29] This is premised on the pollution haven hypothesis and the environmental Kuznets curve (EKC). See N. Shafik, 'Economic development and environmental quality: an econometric analysis'(1994) 46 Oxf Econ Papers 757–773; T Selden, D Song, 'Environmental Quality and Development: Is There a Kuznets Curve for Air Pollution Emissions?' (1994) 27(2) Journal of Environmental Econs and Mgt 147–162; G Grossman, A Krueger 'Economic growth and the environment' (1995) Quarterly Journal of Econs 353–357.

[30] G Grossman and A Krueger, 'Environmental Impacts of a North American Free Trade Agreement' in P Garber (ed) *The U.S.-Mexico Free Trade Agreement* (The MIT Press; 2nd ed, 1994); L Gale, and J Mendez, 'A Note on the Relationship between Trade, Growth, and the Environment' (1998) 7 Int Rev of Econs and Finance 53-61.

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authorities are, at least in principle, a reflection of the people's preference, then one can also say that there is an increased awareness and preference for sustainability as countries are beginning to make more concrete policy commitments to environmental sustainability even though their competition policies.[31] For example, the Netherlands issued a policy document that emphasised its intention to firmly apply sustainability factors when implementing its competition laws and policies. Further, the authorities in Spain would readily overturn a ruling of anti-competition if such conduct can be justified on environmental protection grounds.[32]

Furthermore, direct empirical studies seem to suggest a broad preference for environmental protection by the people in the UK. For example, a sustainability report provided by Defra[33] shows that over 95 per cent of people in Britain are aware of global warming and people are in some ways proactive in limiting its effect. The majority also think the issue concerns all, not just a narrow few. People also expect governments and businesses to take proactive steps to stem climate change. Further, people tend to expect exemplification by governments and businesses.[34] Such proactive measures might indeed appear to conflict with competition rules and there is no evidence to suggest that people would alter their preference if such conflicts arise.

(C) Linkage between Competition Law and the Environment

There have indeed been few occasions where the goals of environmental protection and competition law have intersected. Fortunately, those instances have been synergetic rather than chaotic.[35] However, some of these 'productive' interlinks between the two areas have come at a cost – trade-offs are often inevitable. For instance, a market-based environmental protection scheme[36] may place a limit on the number and range of suppliers of a product. This might compromise competition.[37] Nevertheless, any negative effect may be stemmed if adequate

[31] The example of Netherlands and Spain. Also, South Africa has a general policy on sustainability enshrined in its constitution.
[32] M Gehring, 'Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law' (2006) 15(2) Rev. of European Community & Int. Environmental Law 172–184.
[33] Department of Environment, Food and Rural Affairs, UK.
[34] A Thornton, Public attitudes and behaviours towards the environment - tracker survey: A report to the Department for Environment, Food and Rural Affairs. (2009).
[35] For example, making particular reference to the area of energy supply, Gehring notes that there are several areas where competition enforcement aligns very well with environmental goals. See M Gehring, 'Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law' (2006) 15(2) Rev. of European, Comparative and Int. Environmental Law 172–184.
[36] M Gehring 'Sustainable Competition Law' CISDL Working Paper: 'Competition Law and Sustainable Development' (Legal Experts Panel Conference. Cancun, 2003); H Pacini, M Diaz and M Dolores, G Valéria and I Benohr, 'Environmental and Competitive Performances: An Exploratory Note' (2013) 36(3) World Competition 409–424.
[37] Report from the Nordic competition authorities, 'Competition Policy and Green Growth: Interactions and challenges' No. 1/2010.

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efforts and safeguards are in place to minimise the potential impact of those schemes. In such cases, the negative effects of the scheme on the market structure may be excused.

It is not unusual for a regime to stem economic rules to give effect to environmentally friendly schemes. The German authority, for example, decided to introduce a guarantee for small producers of renewable energy. When the scheme was challenged partly because it offended state aid rules, the EU Court of Justice approved the scheme because of the environmental benefit is generated.[38] Further, in the case of Vindkraft, the EU court-approved Sweden's green electricity scheme even though it had the potential to offend the rules on the free movement of goods.[39]

However, despite clear instances that indicate complementarities between economic law (including competition law) and environmental protection goals, not everyone has been convinced of the role of environmental policy initiatives in competition cases. Sceptics have often sought to convey their concerns sometimes through pseudo empirical means.[40] Unfortunately, such sceptics have received much attention from established authorities. The EU Commission, for example, altered its approach towards sustainability when it published its 2010 horizontal agreement guidelines. The earlier 2001 horizontal guidelines affirmed the importance of environmental protection in the assessment of agreements.[41]

One of the arguments often made against environmental assessment within competition cases is that it would dilute competition policy and lead to market failures.[42] Hence, conducts that might impact both sustainability and competition law should be treated separately.[43] In response to such critique, it must be noted that synergies between environmental protection and other areas of law occur more frequently than the antagonist would want to concede. There are in fact clear evidence that environmental issues are treated in other areas such as international law, trade law, investment law and humanitarian law.[44] Moreover, there is no obvious reason why competition law should be different especially if issues are considered

[38] *PreussenElektra AG v Schleswag AG* (C-379/98), E. C. R I-2099, [2002] Celex No. 698J0379, Mar 13, 2001. Also see cases such as Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG) - Case C-343/95; CECED case supra note 14.

[39] Case C-573/12 Ålands Vindkraft AB v Energimyndigheten. On the relationship between competition rules and other non-economic justifications such as free movement, see S Enchelmaier, '"Mandatory Requirements" under Art 101(3) TFEU? The Complementary Relationship between EU Competition and Free Movement Law' (2012) 11(3) Competition LJ 182.

[40] E.g., for a critique of the unsubstantiated assumptions in R Bork's Antitrust Paradox, see P Brietzke, 'Book Review: Robert Bork, The Antitrust Paradox: A Policy at War with Itself' (1979) 13(2) Valparaiso University Law Review 403-421.

[41] See G Monti, 'Article 81 EC and public Policy' (2002) 39 Common Mkt Law Rev 1065.

[42] OECD, 'Policy Roundtable: Competition Policy and Environment' OECD/GD(96)22 (1995) 6-8.

[43] Ibid.

[44] Y Kerbrat and S Maljean-Dubois (eds) *The Transformation of International Environmental Law* (Harts 2011).

from a governance standpoint. Indeed, Kingston noted in this regard that '… any attempt to draw a 'bright line' separating the two areas would be inefficient, unrealistic, and would infringe the principle of good governance, detracting from the effectiveness and ultimately the legitimacy of … law.'[45] In this light, therefore, there has been notable claims in support of a broader scope for accommodating environmental considerations in competition cases.[46] Further, Vebber has carefully assessed the links between voluntary agreement and competition law.[47] He has also sought to make a case for sustainability in competition law albeit within the narrow context of EU provisions.[48] Also focusing on the EU, Kingston berates the ominous omission of environmental policy considerations in the 2010 Guidelines on Horizontal Cooperation Agreement. The need for a more robust approach is also highlighted by Townley who gave an example of a legitimate sustainability claim which might not be exempted – that is, a claim for exemption on the basis that an otherwise anticompetitive act is likely to generate a good amount of sustainability benefits that are to accrue in future.[49] However, regardless of the scholarly opinions, if the text of specific competition law were to be interpreted solely through narrow lenses such as consumer welfare, any exemption claims that does not sufficiently establish that some benefits would pass to direct consumers would be invalidated.

It is noteworthy that even as authorities continue to fraternise with the term 'consumer welfare', they might after all not interpret the concept too narrowly. A broader definition of 'consumer' will increase the scope for greater synergies between competition law and sustainability.[50]

However, environmental protection should in no way be used as a tool for facilitating blatant and sinister anticompetitive practices. It would thus be naïve to deny the fact that environmental protection goals can be relied on to perpetuate unjustifiable anticompetitive practices; one must be alive to the reality that perpetrators of anticompetitive practices can, in the pursuit of their own ulterior motives, seek to exploit environmental ideals.[51] It is, therefore, essential that the

[45] S Kingston, Greening EU Competition Law and Policy 113 (Harts, 2011).
[46] Ibid.
[47] HHB Vebber, 'Voluntary Agreements and Competition Law' (2000) 79 Nota Di Lavoro .
[48] HHB Vedder, *Competition Law and Environmental Protection in Europe; Towards Sustainability?* (Europa Law Publishing, 2003).
[49] C Townley, 'Inter-Generational Impacts in Competition Analysis: Remembering Those Not Yet Born' (2011) 11 ECLR 580.
[50] See I Maher, 'Transnational Legal Authority in Competition Law and Governance: Commonality and Networks' in G Handl, J Zekoll, and P Zumbansen (eds) *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* 411–38 (Martin Nijhoff Publishers, 2012); I Maher, 'Competition Law Fragmentation in a Globalizing World' (2015) 40(2) Law & Social Inquiry 553–571.
[51] See the OECD (1995). See also *IAZ International Belgium and others v Commission of the European Communities* - Joined Cases 96-102, 104, 105, 108 and 110/82 and Amino Acids (2001) OJ L-152/24. One of such approaches is 'greenwashing'. See M Cherry and J Sneirson, 'Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing after the BP Oil Disaster' (2011) 85(4) *Tulane Law Review 983.*

system is robust enough to avoid frivolous claims of environmental benefits.

IV. ALIGNING ENVIRONMENTAL FACTORS AND PRINCIPLES

While attempting to incorporate environmental factors in competition analysis, we must be able to guard against cynical claims by developing principled concepts imbued with sufficient contents and contexts that effectively address environmental protection concerns. The following therefore attempts to establish such a robust conceptual framework:

(A) Environmental Justice and Environmental Principles Aligned

The concept of environmental justice has been developed as a means of questioning established environmental norms and principles. Through its gestation period, the concept has drawn on multiple notions of justice to address issues that have fundamental implications for equality, equity, and fairness. For example, environmental justice has been directed towards the pursuit of distributive justice through the claim for the equal distribution of environmental harm.[52] It has also been addressed through procedural justice[53] as well as for propagating the need to recognise pluralism and diversity.[54] This paper, however, favours the broader scope proposed by scholars such as Bullard[55] and Turner.[56] In their works, these scholars applied the idea of environmental justice to stress the inviolable right of the individual to be protected from environmental harm. This is to be achieved by avoiding or limiting environmental degradation. Further, environmental justice has been substantiated through a claim for 'productive justice' and also 'ecological justice.' In contrast to mere distributive justice, we should pursue productive justice by targeting those decisions that expose society to risks before they are implemented.[57] As an extension of the concept of productive justice, ecological justice looks beyond the impact on humans. Instead, it considers the corresponding right to the environment at large – humans, nonhumans and plants included.[58]

Prior to the development of the concept of environmental justice, environmental protection

[52] See e.g., R Bullard, *Dumping in Dixie, Race, and Environmental Quality* (Routledge, 2000).
[53] M Hourdequin, *Environmental Ethics: From Theory to Practice* (2015); C Gonzalez, 'Environmental Justice in International Environmental Law' in S Alam, J Bhuiyan, T Chowdhury, E Techera (eds) *Routledge Handbook of Handbook of International Environment Law* (Routledge, 2013).
[54] P Simms 'On Diversity and Public Policymaking: An Environmental Justice Perspective' (2012-2013) Sustainable Dev Law and Policy 14-59.
[55] R Bullard, 'Environmental Justice in the 21st Century: Race Still Matters' (2001) 49 Phylon 151-171.
[56] R Turner and D Wu, 'Environmental Justice and Environmental Racism: An Annotated Bibliography and General Overview Focusing on U.S. Literature, 1996-2002' (Workshop on Environmental Politics, Institute of International Studies, University of California, Berkeley, 2002).
[57] R Bullard, J Agyeman, and B Evans, 'Joined-up Thinking: Bringing Together Sustainability, Environmental Justice, and Equity' in R Bullard, J Agyeman, and B Evans (eds) *Just Sustainabilities: Development in an Unequal World* (MIT Press, 2012) 60.
[58] S Glotzbach, 'On the Notion of Ecological Justice' (Univ of Lüneburg Working Paper Series in Economics No. 204 May 2011).

issues have been addressed and analysed through arcane principles such as the precautionary principle, prevention principle, sustainability principle, and the 'polluter pays' principle (PPSP principles).[59] Though environmental justice focuses on a different dimension of environmental issues (i.e. equality), claims pursued through this means sometimes align with one or more of the PPSP principles. Thus, given that the concept of environmental justice is relatively vague,[60] it might not be farfetched to say that its successful adaptation to competition law would depend on the extent to which it aligns with one or more of these PPSP principles.[61] An effort would thus be made to align them.

The precautionary principle is primarily aimed at harm prevention which can only be achieved if the potential risks are properly ascertained.[62] The concept of risk can be divided into two; risk assessment and risk management. The application of these two elements of risk has strong ramification for environmental justice.[63] Therefore, the prevention of harm has thus been noted as 'arguably the one part with the strongest environmental justice implication.'[64]

With regard to the principle of sustainability, though the compatibility of this principle and environmental justice has been questioned,[65] both concepts seem to align at least in light of the emergence of the term 'just sustainability' which according to Agyeman et al can be defined as 'the need to ensure a better quality of life for all, now and in the future, in a just and equitable manner, whilst living within the limits of supporting ecosystems.'[66] Also notable is the concept of common but differentiated responsibility (CBDR) which aids the equitable allocation of responsibility between developed and developing countries.[67] Environmental justice, enriched

[59] O Pedersen, 'Environmental Principle and Environmental Justice' 12 (2010) Environmental Law Review 26.
[60] O Pederson, 'Environmental Justice in the UK: Uncertainty, Ambiguity and the Law' (2011) 31(2) Legal Studies 279-304.
[61] Note however that this does not mean that environmental justice perfectly aligns with other environmental principles. There are indeed bound to be conflicts and incompatibility between them in some cases. See C Stephen, S Bullock, A Scott, 'Environmental Justice Rights and means to a Healthy Environment for all' (ESRC Global Economic Change Programme Special Briefing No 7 November 2001).
[62] Principle 15, the Rio Declaration on Environment and Development (1992).
[63] Pederson (2010), supra note 50, 26.
[64] N Kibert, 'Green Justice: A Holistic Approach to Environmental Injustice' (2001) 17 Journal of land Use and Environmental Law; Pederson (2010), supra note 50, 26. See also R Attfield, *Environmental Ethics: Overview of the 21st Century* (2nd ed, Polity, 2014).
[65] See e.g., A Dobson, *Justice and the Environment Conceptions of Environmental Sustainability and Dimensions of Social Justice* (OUP, 1998) 26. Some others have emphasised the complementarity and frictions between the two ideals. For example, J Ruhl, 'The Co-Evolution of Sustainable Development and Environmental Justice: Cooperation, then Competition, then Conflict' (1998) 9 Duke Environmental Law and Policy 161; D Hornstein, 'Environmental Sustainability and Environmental Justice at the International Level: Traces of Tension and Traces of Synergy' (1998) 9 Duke Environmental Law and Policy 291.
[66] J Agyeman, R Bullard, and B Evans (eds) *Just Sustainabilities: Development in an Unequal World* (MIT Press, 2003) 5.
[67] CISDL, 'The Principle of Common But Differentiated Responsibilities: Origins and Scope' (World Summit on Sustainable Development, Johannesburg 2002).

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by the principle of sustainability, can thus be used in the competition law context.

(B) Substantive Environmental Justice in the Competition Law Context

The reality of present-day governance is that environmental protection should not only be of interest to politicians and nongovernmental organisations (NGOs). Since the turn of the millennium, there has indeed been a sharp rise in environmental CCSR.[68] One of the reasons often presented is that companies have become more adept and politically savvy and hence, have realised that their interactions with the environment could either be a source of their success or failure.[69] They are also aware of the need to take proactive steps to protect the environment and ultimately to prevent political conflicts.[70] Furthermore, considering the pressure on public governance and regulation, there is much incentive to support private actors in their quest to mitigate environmental risks. It would therefore appear contrary to common sense for government agencies to wholly prevent or discourage companies from taking proactive steps that tackle environmental degradation and climate change. Indeed, such policy would be hard to justify especially where, at best, competition infringement decisions are merely probable (i.e., resale price maintenance[71]). It must however be noted that this assertion only holds if the companies' conducts are truly necessary for achieving the environmental aim.

Whatever the reason behind a company's CSR activities, be it for business reasons[72] or genuine altruistic reasons, their claims must match up with the reality of their conduct. Hence, while environmental justice-enhancing initiatives should be encouraged, the system should provide adequate safety measures to prevent the abuse of such laudable ideals. For example, let us assume that a set of plastic producers are alleged to be engaged in anticompetitive practice through their agreement to set production quota. They might justify their action by arguing that limiting production plays a direct role in reducing the specific environmental harm. They could substantiate their argument by alluding to empirical evidence which reveals the profound impact of their plastic products on the environment.[73] The weight that should be given to such

[68] See generally, KPMG International, 'The KPMG Survey of Corporate Responsibility Reporting 2013' <https://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/corporateresponsibility/Documents/corporate-responsibility-reporting-survey-2013-exec-summary.pdf>. Last accessed 15 March 2017.

[69] See generally Eccles, R, I Ioannou, G Serafeim, 'The Impact of Corporate Sustainability on Organizational Processes and Performance' (2014) 60(11) Management Science 2835-2857; J Sneirson, The Sustainable Corporation and Shareholder Profits (2011) 46 Wake Forest Law Review 541.

[70] T Lyon and J. Maxwell, 'Corporate Social Responsibility and the Environment: A Theoretical Perspective' (2008) 2(2) Rev of Environmental Economics and Policy 240-260.

[71] M Bennett, A Fletcher, E Giovannetti, and D Stallibrass, 'Resale Price Maintenance: Explaining the Controversy, and Small Steps Towards a More Nuanced Policy' (2011) 33 Fordham Int'l Law Journal 1278.

[72] Lyon and Maxwell, supra note 61.

[73] This analogy proceeds on the assumption that there is no government initiative to tackle this problem. For instance, such quota agreement may not be accepted in the UK as there is in existence a government-backed climate change agreement in the plastic sector. See <http://www.bpf.co.uk/energy/managing-your-cca-tp2-and-

an argument should depend on whether the authorities consider the alleged anticompetitive act as a legitimate exercise of CSR. Secondly, it should be considered whether such scheme was a self-initiated measure that has clear benefits to the environment. The perception of the authorities towards such initiative may be influenced by factors such as the novelty of the initiative and/or its potential to fill an acute void in the system. An initiative is more likely to be vindicated if it aims to solve a persistent and nagging environmental problem. The longer such void has existed without many proactive initiatives by other stakeholders, the more likely it is that such an initiative would be accommodated. In this sense, therefore, the firms' actions that help to solve a long-standing environmental problem(s) may be justified through, for example, the precautionary principle. Hence, when the conduct is scrutinised against competition rules, the specific environmental concern could thus be drawn into a broader 'rule of reason'[74] analysis of the harm and benefits.

The pertinent question that remains to be answered is how environment protection issues within competition law cases can be framed as issues of environmental justice? The way one sets out the inquiry is of paramount importance. Rather than focusing exclusively on the competitors and the consumers, it would be important to extend the scope of competition inquiry to groups that are traditionally outside the direct scope of the alleged anticompetitive conduct. Unless such a broader outlook is considered, there will be the very little substantive basis for seeking to protect the interest of seemingly remote groups that are adversely impacted by environmental problems.

Back to the analogy, where plastic is sold, the utility function of the plastic product and the proceeds of trade can be shared between the consumer and the supplier accordingly. However, the environmental risk arising from the production and usage of plastic is borne not only by these two groups but by a wider group, which could encompass the whole or a section of the society. The inequality and inequity that could result from such a market economy model are clear. Moreover, the need to pay closer attention to the interest of the broader groups is underscored by the fact that those whose activities cause the greatest harm to the environment (i.e., competitors and consumers) are the ones more likely to kick against risk-alleviating policies.[75] For example, consumers may be unsatisfied with increased costs aimed at reducing emissions despite that some reports show that a large chunk of carbon emissions are from

beyond.aspx> Last accessed 15 March 2017. This is similar to the concept of environmental agreement explained in the European Commission's Horizontal Agreement Guidelines 2001. Note though that this section is excluded from the 2010 Guidelines.

[74] Note that some scholars prefer to limit the rule of reason analysis to effect cases. See Enchelmaier (2012), supra note 30.

[75] See T Lowi, 'Risks and Rights in the History of American Government' (1990) Daedalus 18.

products and services sourced by consumers.[76]

What then is the fate of the non-consumer citizens of the present generation and the ones yet unborn? Some might say we need not bring such groups into the picture. Perhaps such an argument might stand if/when market activities have no impact on third parties. It is however difficult to disregard the interest of the groups that are unduly impacted by the activities of market participants. In fact, any such argument would seem to perpetuate injustice as non-consumers would be bound to share in the negative by-product of the utility gained by others. For this reason, it should be restated that so long as an environmental protection initiative can be justified coherently (in terms of equalising inequality) and provided that the initiative is not abused, such effort should be strongly encouraged.[77] Where the benefits are clear, much restraint should be exercised by avoiding any excessive forensic review of the genuineness of business entities' initiatives.

How might the concept of environmental justice be applied in competition cases? Using the analogy of an agreement between plastic producers, competitors might want to justify the seeming anticompetitive conduct based on claims that it will help to avoid degradation. Inappropriate disposal of plastic can be identified as the risk which needs to be tackled. If the real risk that the companies seek to avoid stems from how consumers dispose of plastic products, it becomes important whether such risk is assessed objectively or whether we should take note of the characteristics and attitude of the actual consumers of the product. It might, for example, not be sufficient to merely refer to some scientific report about the dangers of non-biodegradable plastics. In addition to this, it might be necessary to show corresponding evidence that consumers of the products are not sophisticated enough to dutifully dispose of the wastes appropriately and that other less anti-competitive measures have been unsuccessful. In other words, the test should include both objective and subjective elements.

V. SOLIDIFYING THE THEORETICAL RATIONALE FOR THE APPLICATION OF ENVIRONMENTAL JUSTICE IN COMPETITION CASES

So far, the effort has been made to situate environmental justice as a credible and theoretically sound concept. There has also been an attempt to loosely align the goal of environmental justice into competition law cases. Nesting this perspective on Sen's capability approach gives it a

[76] T Jackson, E Papathanasopoulou, P Bradley and A Druckman, 'Attributing UK Carbon Emission to Functional Consumer Needs: Methodology and Pilot Results' (RESOLVE Working Paper 01-07).
[77] See J Sneirdon, Green is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance (2009) 94(3) *Iowa Law Review.*

solid basis. However, before that basis is established, it might be beneficial to briefly proffer a rationale for environmental justice within the economic efficiency paradigm. The aim is to show that the proposition is not entirely at odds with the status quo. Rather, what it proposes is a stronger presumption in favour of environmental benefit/harm in the assessment of competition law. Assuming for the sake of argument that the best way to benefit from competition law is to apply it in its 'purest' form. It is undisputed that the 'purest' is utopian, as such, stakeholders are more likely to pursue realistic goals such as workable or effective competition. The argument, therefore, is that since competition law can only be realistically applied in its second-best format, why then restrict the scope of this already suboptimal goal and approach? In deserving cases, why not give greater weight to pressing policy issues especially if we operate on the understanding that the regulatory task (including competition law) should be directed at attaining equilibrium in the entire society?

Even though the concerns and criticisms raised by sceptics are legitimate, they have chosen an excessively cautious approach and fail to recognise the inherent deconstructability of theories. The pristine theory of competition law is virtually unattainable – the real value of a theory, therefore, lies in the overall effect it has on society. As such, an approach to competition assessment that caters for genuine societal concerns such as environmental protection is superior provided it is carefully designed to avoid the legitimate concerns raised. Moreover, as noted above, experience has since shown that specialised legislations might well be inadequate in solving the problems (in this case, environmental problems). In such scenarios, one wonders why competition policy should not take account of environmental issues.

(A) Capability Approach as a Means for Invoking Environmental Justice in Competition Cases

Away from the narrow scope of economic efficiency, Sen's Capability approach can serve as the engine for the pursuit of environmental justice through competition law because it focuses on the 'beings' and 'doings' of people as individuals. Ultimately, the approach takes account of what people value and how it shapes their idea of the 'good life'. This perspective, therefore, makes it possible to demonstrate the impact and direct applicability of environmental (in)justice in competition cases and also helps to explain why people are likely to be averse to negative environmental outcomes. With such a level of insights coupled with the uninhibited freedom attached to every individual, there should be no disputing the fact that the people are likely to show a preference for outcomes that enhance their capabilities. The 'capability' being projected here is the collective capability of the society – in principle, the capability of the

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people to enjoy the environmentally-friendly society they desire.[78]

Capability Approach in Environmental Cases

Given that it has been shown to be applicable to a multitude of fields, efforts have also been made to apply CA to competition law and policy.[79] Moreover, it has been argued that the CA is particularly suited to environmental justice.[80]

Even though CA was generally developed as a normatively neutral account, scholars have successfully stretched its application to normative contexts.[81] It is such extensions that make CA compatible with environmental justice. The compatibility is enhanced by the fact that environmental justice requires normative commitments which have been described as 'commitment to addressing inequalities resulting from the unfair distribution of environmental benefits and burdens.'[82] The application of the CA in light of the pursuit of environmental justice in competition cases is however much deeper in that it seeks to advance beyond using CA as a framework that accommodates a broad range of goals for competition law and policy. Rather, CA is deployed here to establish how claims of environmental justice and sustainability can be tied to the preference of individuals. It helps to substantiate the positive effect that may result from some seemingly anticompetitive conducts.

For example, let us assume that a group of washing machine suppliers agree to a measure partly aimed at reducing the greenhouse gas emission level. This group may be prepared to challenge any allegation of infringement because of what they might consider being a greater societal advantage derivable from the arrangement. The 'no restriction' claim in such an instance could be premised on the idea of 'just distribution' of benefit and harm in the pursuit of environmental justice. However, a mere reference to societal benefits in a general sense may sound curious and thus unconvincing unless such claims are supported by evidence. The proof can be established by showing the causal links between the benefit and the conduct. Also, the uniqueness of the outcomes must be proved. Further, so as to strengthen the evidential weight of their claim, the competitors may choose to demonstrate how their actions improve the wellbeing of specifically identifiable people. Such justification would be in line with the

[78] For more on the relationship between Capability Approach and competition law, see A Al-Ameen (2014) supra note 4.
[79] Ibid.
[80] S Roesler, 'Addressing Environmental Injustices: A Capability Approach to Rulemaking' (2011) 114 West Virginia Law Review 71.
[81] For example Marta Nussbaum. See generally M Nussbaum, *Creating Capabilities: The Human Development Approach* (Belknap Press, 2011).
[82] Roesler (2011) supra note 71, 83.

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capability approach's focus on real-world consequences and human lives.[83]

(B) Capability Approach in Environmental Cases Applied

In light of the environmental justice issues that could arise in competition cases, Sen's observation about the need for diversity is truly instructive. Typically, the failure to recognise diversity often leads to the adoption of universal metrics.[84] This approach shows that the affinity towards metrics is an obsession that distracts us from observing the real impact of actions on a diverse group. It would, therefore, be bizarre if priority is given to consumer welfare (narrowly construed) where there are clear indications that business conduct under review is likely to generate wider environmental benefit to the people within the broader society. Indeed, in this regard, Roesler states that 'in focusing on income and wealth [consumer surplus/detriment] as a means to address environmental justice, we will not guarantee those especially burdened by environmental hazards'.[85]

VI. CONCLUSION

Scholars have clamoured for initiatives to promote and encourage sustainable corporations. Some of the suggestions for facilitating the growth of sustainability-conscious Corporations include propositions to impose sustainability on corporations and to require or encourage corporations to make sustainability disclosures.[86] Other suggestions include raising awareness that sustainable business practices align perfectly with corporate laws and business growth.[87] Others have emphasised the role that can be played by investors in shaping the direction of corporations towards sustainability goals.[88] This paper has sought to develop these ideas by emphasising the role of corporate sustainability by linking it to the idea of environmental justice and also clamouring that sustainability be given prime importance even when the corporate initiative raises competition issues. It is however conceded that the viability of such a proposal would depend on the extent to which one can guard against frivolous claims of environmental benefits. It is therefore imperative to conduct further research to ascertain a

[83] Ibid, 56. The link between environmental justice and the major environmental principles has been established above. Moreover, there are direct linkages between capability approach and some of these principles. See e.g., O Lessmann and F Rauschmayer (eds), Capability Approach and Sustainability (Routledge, 2014); C Murphy, P Gardoni, 'The Capability Approach in Risk Analysis' in S Roesler, Rafaela Hillerbrand, P Sandin, and M Peterson (eds) *Handbook of Risk Theory Epistemology, Decision Theory, Ethics, and Social Implications of Risk* 979 (Springer, 2012).

[84] A Sen, *Idea of Justice* (Harvard, 2009) 261.

[85] Roesler (2011) supra note 71.

[86] Sneirson (2011) supra note 60.

[87] Ibid.

[88] G Serafeim, 'The Role of the Corporation in Society: An Alternative View and Opportunities for Future Research' (May 27, 2013). Available at SSRN: https://ssrn.com/abstract=2270579 or http://dx.doi.org/10.2139/ssrn.2270579

principled basis for determining whether environmental benefits are attainable and/or desirable in individual cases.

Once it is established that environmental justice would, in principle, be achieved in individual cases, the next step would be to show that the people would have a positive rate of return from the supposed environmental benefit within a reasonable payback period. This is essential because a decision on the justness of allegedly anticompetitive conduct cannot be entirely hypothetical – real efforts must be made to ascertain the social consequences that follow.[89] With this in mind, such businesses would have to meet a sufficient threshold of proof[90] – they would have to be conscious of instances where environmental benefits are immediately obtainable and also where the claimed benefits would take longer to materialise which might mean that they will only be of benefit to generations yet unborn. Entities wishing to make claims on the basis of sustainability can use the knowledge of the foregoing while evaluating the prospects of their scheme. Whilst sustainability claims may be vindicated regardless of the category of persons that benefit (i.e., present or future generations), there is however a greater evidential burden that must be discharged when the acclaimed benefit is to accrue in the future. It would not be sufficient in such an instance to refer to remote benefits. For example, if a potentially anti-competitive scheme has the real tendency of improving air quality in the long term through the reduction of greenhouse gas emission, it may be insufficient to merely state that cleaner air would reduce the rate of medical disorders (such as cancer) in future generations. Such argument would likely need to be supported by specific claims i.e., this may be by showing that there is a subsisting or impending health problem linked to the air quality in the identified locality and that the problem is or may create a serious health risk for the future generations.

It is imperative that the pursuit of environmental justice in competition cases should not be understood and applied in a monolithic sense. This is because what one group considers to be 'just' might be seen differently by another. Hence, authorities must decide individual competition cases that raise environmental justice issues on the basis of 'variable justice'.[91] This is because different communities might require a different level of protection which consequently would go a long way in determining whether the alleged anticompetitive act truly solves or helps to avoid an environmental problem. For example, companies that are active in a community that is prone to flooding might bear a relatively lower burden for establishing

[89] Ibid 68.
[90] What is considered 'sufficient' would depend on individual contexts.
[91] See C O'Neill, 'Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples' (2000) 19(1) Stanford Environmental Law Journal.

compliance with competition rules where such an act is targeted at controlling the flood.

Conclusively, it is hoped that the call for greater synergy between corporate sustainability and competition law through the concept of environmental justice would be greeted with a sense of responsibility and urgency. The environmental challenges that threaten our collective existence are too numerous to ignore and too dire to be relegated to an afterthought.

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