20 NOVEMBER 2020

JOINT OBSERVATIONS AND SUGGESTIONS BY CMS COMPETITION & EU GROUP AND CMS CONSUMER PRODUCTS SECTOR GROUP

COMPETITION POLICY SUPPORTING THE GREEN DEAL

A. FOREWORD ON CMS

CMS is ranked as a Top 10 Global Law Firm. With approximately 4,800 CMS lawyers and 75 offices worldwide, we advise private and public sector clients in over 70 cities in 43 countries. CMS is organised around industry sector groups and practice area groups.

CMS Competition & EU Group is one of the largest competition teams in Europe and offers the most widespread pan-European coverage. With more than 225 competition lawyers based in 35 countries, we are a one-stop solution for clients from a very wide range of industries across Europe and beyond, through our strong and growing teams in China, Latin America and Africa. Today's CMS lawyers are continuing a successful track record of more than 50 years' experience, covering hundreds of competition law cases, including many landmark cases before EU and national courts and competition authorities. For more information please refer to our website[1].

'CMS Antitrust Associates' is an initiative targeting our junior and senior level associates as well as counsels from all offices to provide a platform for the younger generation, boost collaboration and foster innovation at all levels within the CMS Competition & EU Group, both internally and externally.

CMS Consumer Products Sector Group assists companies to create, deliver, and sell their goods, protecting their innovations and market position every step of the way. Our Group comprises 150+ active members from all fields of law relevant to the Consumer Products sector and across all CMS jurisdictions.

B. INTRODUCTION

Gradually raising awareness of environmental issues and the emphasis on the objective of sustainable development by public institutions have been particularly echoed in the area of consumption.

"Sustainable consumption" was defined at the international symposium of experts organised in Oslo in 1994 as "the use of services and products that meet essential needs and contribute to improving the quality of life while minimising the quantities of natural resources and toxic materials used, as well as the quantities of waste and pollutants throughout the life cycle of the service or product, so that the needs of future generations can be met". The objective set at the time was already clear: subjecting consumption to a sustainability criterion.

The UN adopted a broader approach in its 2030 Agenda for Sustainable Development which includes three dimensions of sustainability: economic, social and environmental[2].

Everyday consumption activities have increasingly been perceived as creating strains on the sustainability of our developed economies in the longer term: increase in resources used or incorporated in fast-moving consumer goods (FMCG), quantities of energy required, production processes, pollution, and end-of-life management. The image

[1] https://cms.law/en/int/global-reach/international/expertise/competition-eu
[2] For details and an overview of all 17 goals please see: https://sustainabledevelopment.un.org/post2015/transformingourworld.

commonly conveyed is that of an economic development fuelled by consumption but engaged on a trajectory that accentuates these harmful strains on the environment and that therefore hardly meets the rising demands of more “sustainability”.

The FMCG sector is particularly impacted and is at the heart of these concerns. The sector (both at supplier and at retail level) has already embarked upon the sustainable consumption train, through the promotion of organic, fair trade and local products, through development of systems increasing reuse and recycling, or through applying the requirements of eco-design *inter alia* to reduce the use of plastics or packaging, but the challenges of ensuring a sustainable future are likely to require further innovation.

In December 2019 the Commission reiterated its commitment to address climate and environmental challenges as a top priority of our generation through the European Green Deal for the European Union (EU) and its citizens. As underlined by the Commission, the EU has the collective capacity to transform its economy and society and to lead it on a more sustainable path. This new growth strategy aims to transform the EU into a fair and prosperous society with a modern, resource-efficient and competitive economy with no net greenhouse gas emissions by 2050 and in which economic growth is dissociated from resource use.

In order to achieve this, the Commission said that "*all EU actions and policies will have to contribute to the European Green Deal objectives*".

This declared will of the Commission finds support in the TFEU: Article 11 of the Treaty on the Functioning of the European Union states that environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development. Environmental protection and sustainability are intrinsically linked. While competition policy will not supersede environmental laws, what is at stake here is how EU competition rules can support the Green Deal in order to enhance, rather than hinder, sustainability initiatives of the private sector.

There is indeed room to make competition law more sustainability-friendly, e.g. by encouraging State aid facilitating green investments; by ensuring merger control identifies situations in which a potential mergers between companies could negatively impact consumers by reducing their choice of environmentally-friendly products and/or technologies; by implementing antitrust rules in a way that does not unduly hamper virtuous cooperation while sanctioning coordinated restrictions on the development or deployment of clean technologies.

Yet the EU still lacks established guidelines on how this can be achieved.

Many respondents to the Commission’s evaluation of the Horizontal Block Exemption Regulations and Horizontal guidelines, notably stakeholders active in the sector of FMCG, have already voiced the need for more serious consideration of environmental issues and for specific guidance on joint sustainability initiatives in order to avoid companies being paralysed by the uncertainty of whether their intended “green” cooperation may be considered prohibited on grounds of Article 101(1) without possible exemptions under Article 101(3) of the TFEU.

With the new specific consultation, the sector is definitely seeing the opportunity for the Commission to explicitly allow for cooperation around sustainability, and to set out clear guidance in order to support a sustainable society.

Even though sustainability may be a broader issue, our contribution will be primarily focused on cooperation intended to address climate change and the need to achieve a low-carbon economy (the Green Deal aims to make the EU carbon-neutral by 2050), as well as animal welfare.

C. OBSERVATIONS AND SUGGESTION BY CMS

CMS would like to set out below joint observations and suggestions by the CMS Competition & EU Group and the CMS Consumer Products Sector Group on Antitrust and Merger Control supporting the Green Deal. CMS Antitrust Associates have played a central role in compiling this document.

CMS would also be happy to take part in any additional stakeholders' consultation in case they are organised by the Commission in the upcoming period.

PART 1: Antitrust rules

As input to the debate on how antitrust policy and environmental and climate policies work together – and how they could do that even better, please consider the following questions:

1. **Please provide actual or theoretical examples of desirable cooperation between firms to support Green Deal objectives that could not be implemented due to EU antitrust risks. In particular, please explain the circumstances in which cooperation rather than competition between firms leads to greener outcomes (e.g. greener products or production processes).**

Different sectors have indicated that collaborations are required in order to more quickly and efficiently achieve a low-carbon economy in accordance with the Green Deal. Member States can further be held responsible under national law to fulfill their responsibilities under the Paris Climate Agreement. Shared intentions within the different sectors to pursue the aims under this agreement should be considered to fall outside the scope of the cartel prohibition in its entirety.

In the past, envisaged collaborations between market players to achieve energy neutrality were not implemented or amended due to national and EU antitrust risks, sometimes identified in informal guidance provided by the authorities. This concerned, for example, initiatives between regional housing associations and construction and/or installation companies to build energy neutral houses at short notice in the context of which expertise, knowhow and material would have been shared and which required a certain scale for it to mitigate the economic risks. The same applied to projects concerning the renovation of existing and outdated rental houses owned by housing associations in accordance with sustainable guidelines. Both projects required scalability which would have allowed for greener outcomes. However, while the authority may have accepted the relevance of such sustainability initiatives, it primarily considered the impact on competition without explicitly taking the potential environmental considerations into account.

Another example is the consideration of a coordinated closing of coal-fired power stations in the Netherlands. The limitation of production would lead to positive environmental and welfare-related effects. However, generally, a limitation of production may also lead to a (limited) price increase. In the guidance provided by the respective authority, the welfare and/or environmental effects were quantified with reference to the national emission ceiling and avoidance of additional costs for other measures or with reference to the expected damage to the health of residents. Equal weight was then given to the price increase and to the benefits to the environment meaning that, in the event that these benefits did not outweigh the price increase, the initiative would be deemed to breach antitrust rules.

These examples show that at the moment EU antitrust rules do not provide for clear rules on how to quantify environmental effects, nor do they allow for a quality-based approach.

Further examples include potentially sensitive information sharing about ‘green’ projects (e.g. windfarms): intended location of future projects, results of R&D and technical aspects (e.g. wind data) that would allow other market players to shorten the development time, avoid overlap and allow for scalability. The lack of scalability in collaborations could lead to projects not being deemed economically viable despite having a substantial positive impact from an environmental point of view.

Guidance is also expected on cooperation which:

- is mandatory rather than voluntary. This could be the case with respect to a cooperation for the management of a type of waste that is particularly detrimental to the environment (e.g. plastic packaging), in which involvement of the whole sector would be mandatory in order to reach a sufficient scale to achieve ambitious recycling targets at EU or country-level. The obligation to partake in the cooperation could either result from private agreements or from administrative constraints.
- involves an element of price-fixing (e.g. price of the various phases of the waste management process (collection, compaction, recycling) would be aligned; or contributions that would need to be levied on prices, e.g. to support a sustainability fund).

2. **Should further clarifications and comfort be given on the characteristics of agreements that serve the objectives of the Green Deal without restricting competition? If so, in which form should such clarifications be given (general policy guidelines, case-by-case assessment, communication on enforcement priorities…)?**

Mere enforcement priorities do not signal strongly enough to businesses that the Commission intends to promote green cooperation to bring about a positive contribution to consumer welfare.

In fact, many of our clients recognise that lawmakers alone will not be able to solve the issues quickly and efficiently enough. Industry initiatives to achieve sustainability goals are therefore necessary and increasingly more common. At the same time, sustainability initiatives (e.g. to enhance animal welfare or to achieve ambitious goals for the recycling of plastic products) tend to increase costs which could ultimately lead to higher consumer prices. In addition, the need to avoid first mover disadvantages at a time when funds available for investing will be made scarce by the post-pandemic crisis inevitably leads to the question of how companies may team up with competitors to achieve sustainability goals.

Considering that sustainability is one of the most important political goals of the Union and of the industry, it is important to put in place a framework that ensures that sustainable business initiatives are not hindered by competition law. This would be achieved by giving businesses as much legal certainty as possible on how the Commission intends to assess the sustainability benefits of a cooperation.

This framework could be two-fold:

- **Tool 1:** A specific section on sustainability agreements could be added to the revised guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements (Horizontal Guidelines) that would specifically address sustainability initiatives. This section would detail *inter alia* how to achieve joint R&D for producing more sustainable products or better waste management without falling foul of antitrust law or how far one can go with agreeing on environmental standards.

  This new section would be expected to give clear guidance about initiatives to enhance green (or sustainable) production and distribution standards, e.g. to enhance animal welfare, improve environmentally-friendly production, reduce carbon emissions, reduce consumption of energy and natural resources or improve waste management and recycling.

  We suggest considering creating a safe harbour for such initiatives which, however, would not be based on market share thresholds since most sustainability initiatives will need to cover the entire market.

  In addition, the Horizontal Guidelines should set out principles on the exemption of any such initiatives under Article 101(3) TFEU. In their practice, competition authorities in the EU (in particular the ACM in the Netherlands and the Bundeskartellamt in Germany) have developed different approaches with regard to the application of the individual conditions under Article 101 (3) of the TFEU, which in our view not consistent. This is particularly true for the requirement of consumer benefit. The guidelines should recognize that, with regard to CO2-

reduction, the benefits to all consumers are to be taken into account, not only the benefits of the direct and/or indirect consumer affected by the agreement[3].

- **Tool 2:** Following the example of what has been put in place to guide companies faced with the Covid-19 pandemic, the Commission could institute a period during which it would agree to provide informal guidance, via comfort letters, on cooperation to promote sustainability.

  Comfort letters could serve as a powerful tool in order to accelerate the transition into "greener" competition law. Due to the fact that there is still only a small amount of case law available in this field, companies may refrain from sustainable cooperation, or chose "milder" and potentially less effective forms of cooperation, if they face the risk of violating competition law. As a result, companies (including the lawyers advising them) may not make use of the full potential of sustainable cooperation. Providing companies with the possibility of comfort letters, as a transitionary tool until other tools (as described above) have been elaborated or in addition to the tools above, would encourage companies to propose innovative solutions and present to the Commission real-world examples which would help to identify the relevant criteria for admissible cooperation.

  Comfort letters should be published in order to ensure transparency and equal treatment, to foster legal certainty and to support quicker implementation into legal practice.

  The Commission could decide to make this informal guidance available for an initial period of 5 years, renewable if the Commission deems it appropriate.

In addition, several guidelines could be completed with clear references to environmental externalities:

- For instance, paragraph 2 of the Horizontal Guidelines describes various potential benefits of horizontal agreements but refers only to economic benefits. We suggest clarifying that this also includes further consumer welfare benefits, e.g. enhanced sustainability of products or of their production/distribution/waste management process.
- We also note that the Commission's 2004 Guidelines on the application of Article 81(3) of the Treaty (101(3) TFEU) currently only contain vague statements regarding environmental externalities. However, it should be noted that the current version of the Guidelines already recognises the benefits for society as a whole if fewer resources are used for the production of goods (paragraph 85).

3. **Are there circumstances in which the pursuit of Green Deal objectives would justify restrictive agreements beyond the current enforcement practice? If so, please explain how the current enforcement practice could be developed to accommodate such agreements (i.e. which Green Deal objectives would**

[3] Comp. ACM Case 13.0195.66, *Chicken of Tomorrow* and Bundeskartellamt 2017 case in relation to the *animal welfare label*.

warrant a specific treatment of restrictive agreements? How can the pursuit of Green Deal objectives be differentiated from other important policy objectives such as job creation or other social objectives?)

We understand that competition policy is neither the only nor the main cause preventing a greener economy and that some substantial objectives of the Green Deal may only be achieved through regulation. To the extent that regulation is in place, such objectives would fall outside of the scope of competition law. However, we consider that for most of the Green Deal objectives, regulation by itself will be insufficient or inadequate, and companies should be encouraged to innovate and, to some extent, cooperate.

It is most likely that businesses' incentives to cooperate will be the strongest for projects that reflect a strong consumer demand, such as projects supporting the environmentally or animal-friendly production of food, sustainable consumer products, or the production of more energy-efficient vehicles and devices. In these examples, any first mover disadvantage may be low (or there may even be first mover advantages) because consumers may be willing to pay a surcharge for "greener" products.

First mover disadvantages may, however, be more prominent where the consumer's willingness to pay more is lower, i.e. in particular with regard to Green Deal objectives which are less attractive to consumers, e.g. where detrimental effects to the environment may be more long-term, difficult to explain or further away from the perception of the end consumers. For example, restrictions on stop-over flights through remote locations may help the environment but are likely to be an unpopular choice for budget travellers as they are typically cheaper. First mover disadvantages for airlines not offering such cheap alternatives could be substantial.

Nevertheless, even in cases of stronger first mover disadvantages, we consider the current legal framework and enforcement practices not to be of much concern in cases where the main goal of a cooperation is focused on innovation and R&D (e.g. to develop entirely new products) or where cooperation or the use of sustainability standards is optional and non-binding. However, in cases where the sustainability goals to be achieved are less popular for consumers, binding agreements (covering a large share of the market) will be needed. For such binding horizontal agreements, regarding less popular choices for consumers and covering a substantial share of the market, we consider the deterring effect of the current competition enforcement practice to be the strongest.

However, as far as we understand it, an appropriate (and maybe modified) interpretation of the legal framework currently in place would make it possible to implement such agreements in compliance with competition law.

Indeed, Green Deal objectives should be considered by the Commission based on its obligations under Article 11 of the TFEU ("*Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development*") and Article 37 of the Charter of Fundamental Rights of the EU ("*A high level of environmental protection and* *the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development*").

In some cases, sustainability agreements may be considered not to restrict competition law in the first place based on the application of the rule of reason. The Commission should clarify when, if at all, this situation may arise.

Yet what is primarily at stake is the integration of the objectives of the Green Deal in Article 101(3) TFEU which provides for the inapplicability of the prohibition of 101(1) TFEU to agreements/decisions/concerted practices which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not impose restrictions which are not indispensable or eliminate competition in respect of a substantial part of the products in question.

Several questions in relation to the application of 101(3) TFEU should be clarified:

- It should be made clear that the pursuit of Green Deal objectives, and particularly the improvement in sustainability, qualifies as an *efficiency gain*, be it as an "*improvement of production/distribution*" or as "*technical/economic progress*".
- Considering the purely economic logic adopted by some national competition authorities (see the *Chicken of Tomorrow* case referred to above), it would appear necessary to clarify that the "*resulting benefit*" for consumers does not have to be the traditional reduced price or increased quality or choice but can also be a more sustainable economy (by including future generations of consumers in the equation). It should be recognised that the "*resulting benefit*" for consumers may be a larger benefit to society and that consumers may have to pay a higher price for a more sustainable product.
- The condition of absence of *elimination of competition in respect of a substantial part* of the products or services concerned should also be interpreted in a way that takes into account the fact that the achievement of Green Deal objectives is likely to require pan-industry cooperation. This should not be considered as a problem insofar as co-operators continue to compete on more traditional competitive factors such as price or quality.

Conversely, businesses appear to be insufficiently aware of the fact that the prohibition of 101(1) TFEU is not limited to price-fixing or market sharing but can also concern the environmental characteristics of products where these are an essential parameter of competition (see, e.g. the French *Autorité de la concurrence* decision 17-D-20, *Floor covering* – It was found that market players, through an agreement signed under the aegis of their trade association, had renounced the right to compete freely on the basis of the merits of their respective products with regard to environmental criteria by imposing an environmental communication based only on the average values and by refraining from communicating on the basis of individual environmental data based on the specific performance of each company. This agreement came at a time when the environmental performance of floor coverings was becoming one of the main criteria for choosing general contractors and distributors, and when the sensitivity of customers, intermediaries and end users to the environmental performance of floor covering products, particularly with regard to VOC emission values, was becoming increasingly important. Therefore, by prohibiting the parties to the agreement from communicating about individual values, the agreement affected one of the essential parameters of competition).

We do not consider the Green Deal objectives to fall into the same category as other important policy objectives (also referred to as the "slippery slope" argument). One of the main goals of sustainability is the internalisation of externalities which is an economically well-founded and approved principle. Competition law promotes the efficient use of resources in general; sustainability objectives merely extend the scope of resources to be assessed and demands the inclusion of externalities into the competitive assessment. Other policy objectives (such as job creation or other social objectives), as important as they are, miss this more direct link to efficiencies which is why they are typically better dealt with by regulation and therefore excluded from a competition law assessment altogether.

PART 2: Merger Control

As input to the debate on how merger policy and environmental and climate policies work together – and how they could do that even better, please consider the following questions:

1. **Do you see any situations when a merger between firms could be harmful to consumers by reducing their choice of environmentally friendly products and/or technologies?**

Scenarios where a merger could potentially result in reducing consumers' choice of environmentally-friendly/sustainable products and/or technologies might *inter alia* arise when:

- <u>A large enterprise acquires an emerging innovative "green" target</u> (e.g. in the areas of IT/tech) thereby (a) potentially changing its "green" business or (b) discontinuing its innovative projects/products in development for the purpose of eliminating future competition with the large enterprise's existing products ("*killer acquisitions*"); or
- <u>two large competitors of "green" products/technologies merge</u> thereby (a) reducing incentives for innovation/further development of such products/technologies (of their own or by others) or (b) forcing smaller competitors out of the market.

  The European Commission has already dealt with such scenarios accordingly:

  - In the *Aurubis/Metallo* case, the European Commission found that as the merger would bring together the two largest purchasers and refiners of copper scrap in Europe, it might reduce incentives for recyclers to collect and sort copper scrap. Further, lower prices for copper scrap as a consequence of the merger could translate into higher costs for industrial manufacturers[4] which will be at least partially passed along the vertical chain and would therefore eventually negatively affect final consumers[5].

- In the *Aleris/Novelis* case[6] regarding aluminium automotive body sheets (i.e. metal sheets used in vehicles' body structure and closures), the European Commission held that the "*use of light materials, such as aluminium, allows car manufacturers to produce vehicles that are more fuel-efficient and reduce emissions*". Thus, "*European industrial customers need to be able to source aluminium automotive body sheets at competitive prices.*"[7]. As a result of the planned transaction, the merged entity would have had very high market shares by controlling a very significant proportion of the manufacturing capacity for aluminium automotive body sheets in the EEA. The limited number of smaller remaining competitors active in the market would not have been able to defeat a price increase[8].

In such cases, clearance may be achieved by offering (behavioural/structural) remedies, which, besides removing competition concerns, also address such environmental concerns (e.g., in the *Aleris/Novelis* case cited above, the parties to the merger offered to divest Aleris' entire aluminium automotive body sheet business in Europe).

2. **Do you consider that merger enforcement could better contribute to protecting the environment and the sustainability objectives of the Green Deal? If so, please explain how?**

CMS takes the view that, in addition to "traditional" competitive factors, merger control rules could and should, up to a certain extent, also consider sustainability aspects (such as whether a merger will help to produce more green energy or reduce CO^2 emissions) to encourage and reward positive measures/initiatives by companies in the field of environmental protection and sustainability.

For this purpose, the European Commission and national competition authorities ("**NCAs**") should apply merger control rules in order to contribute to the objectives of the Green Deal This could be done *inter alia* as follows:

a. "Green" factors as part of the (product) market definition?

When defining product markets, it might, at least to a certain extent, be feasible to also apply sustainability considerations in the future:

In this regard, the question might arise of whether a "non-green" product and a "green" (i.e., organic, recycled) product which would usually be regarded as

[4] Who would get less revenue from the scrap generated by their production process.
[5] See Case COMP/M.9409 – *Aurubis/Metallo Group Holding*, Commission decision of 4 May 2020, paras 392 – 395 and 404. Cf. also the press release following the decision in phase I of 19 November 2019, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6305.
[6] See Case No COMP/M.9076 – *Aleris/Novelis*, Commission decision of 1 October 2019.
[7] Cf. the press release following the decision in phase I of 25 March 2019 on the website of the European Commission (IP/19/1835), available at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1835.
[8] Cf. the press release following the decision on conditions & obligations of 1 October 2019 on the website of the European Commission (IP/19/5949), available at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_5949.

interchangeable/substitutable by reason of product characteristics, prices and intended use could form a distinct product market as a consequence of such sustainability considerations. This could be the case in particular as a consequence of (i) consumer-side substitutability, as consumers increasingly include sustainability considerations in their purchase decisions (whether the product has been manufactured in an environmentally-friendly manner, etc.) and thus might perceive the "*green*" product as fulfilling different needs from the "*non-green*" product or (ii) sustainability/environmental considerations of the competition authorities themselves:

- For example, in the *DEMB/Mondelez/Charger OPCO* case, the market investigation found that consumers might not necessarily switch between conventional and non-conventional coffee (i.e. organic, fair trade and other certified coffees) where there is a small but permanent price increase as some consumers might perceive non-conventional coffee as fulfilling different needs from conventional coffee, such as the need for "*an organic product which is perceived as healthier or the need to feel more environmentally sustainable or to contribute to sustainable development*". Ultimately, the European Commission left the market definition open, in particular with regard to supply-side substitutability[9].
- Accordingly, as regards PET, the European Commission has, for example, considered a possible distinction between virgin PET (i.e. PET directly produced from raw material) and recycled PET (i.e. PET produced from the collection of used PET bottles and other PET products). The Commission held that the number of applications, technical and regulatory measures to some extent may limit the use of recycled PET as compared to virgin PET. However, it was acknowledged at the same time that both virgin PET and recycled PET are to a large extent substitutable, ultimately leaving the exact product market definition of PET resin open[10]. The UK Competition Authority held that PET resin forms a distinct product market which did not ought to be segmented further into virgin or recycled PET[11]. However, in both cases sustainability considerations were not part of the respective authority's assessment.
- In the *Aleris/Novelis* case[12], there are strong indications that environmental reasons played a part in the European Commission's market definition when defining a separate product market for aluminium automotive body sheets (cf. above).

However, CMS takes the view that competition authorities should refrain from defining markets excessively on the basis of sustainability considerations by systematically considering that "*green*" products/services form a separate product market from the "*non-green*" product/service where the "*green*" and "*non-green*" products are to a large extent substitutable

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[9] See Case No COMP/M.7292 – *DEMB/Mondelez/Charger OPCO*, Commission decision of 5 May 2015, paras 55 – 59.
[10] See Case No COMP/M.7484 – *Plastipak/APPE*, Commission decision of 11 June 2015, paras 12 – 15.
[11] OFT decision of 4 October 2007 – Anticipated acquisition by La Seda de Barcelona S.A of Amcor PET Packaging Europe, para 9.
[12] See Case No COMP/M.9076 – *Aleris/Novelis*, Commission decision of 1 October 2019.

from the perspective of the consumer and/or supplier. Otherwise, defining markets based (increasingly) on sustainability considerations instead of competitive factors could result in narrow market definitions. This would ultimately be to the detriment of companies offering such "*green*" products or services. Rather, sustainability considerations should only be taken into account when defining markets as a competitive factor with regard to consumer-side substitutability.

As far as it can be seen, this approach is in line with most of the (published) case law of the European Commission.

b. *"Green" factors as part of the competitive assessment?*

As regards the competitive assessment itself, the question arises as to whether (potential) environmental benefits of a contemplated transaction (e.g. a joint venture to promote the development of hydrogen mobility towards CO^2 neutral transport) may be taken into account within the efficiencies test as counteracting the negative effects on competition.

However, in order for efficiencies to be considered under the EUMR, it is required that they:

(i) *benefit consumers* (the burden of proof that efficiencies are being passed on to the consumer is on the parties to the merger):

As for environmental benefits, there are arguments that consumers can benefit indirectly because they can profit from a reduction in CO^2 emissions in the form of an improved quality of living or product innovation resulting from more sustainable products, etc. However, the "benefit for consumers" criterion as such might be too narrow to (additionally) consider sustainability considerations. Further, under the Horizontal Merger Guidelines, the efficiency benefits for consumers should be realised *in time*.[13] This might be challenging as regards environmental benefits as it is not easy to predict in advance when exactly they will take place.

(ii) *are merger specific*, i.e. they must be a direct consequence of the notified transaction and not be capable of being achieved to a similar extent by less anti-competitive alternatives; and

(iii) *are verifiable*, i.e. it must be reasonably certain that the efficiencies will materialise and be substantial enough to counteract the potential harm to consumers.

Section 9 of the form CO requires concrete documentary evidence of consumer benefits: this legal test might at first not be a perfect fit for proving environmental/sustainability benefits for consumers. Indeed, cases where the parties' claims were sufficiently substantiated with evidence and accepted by the Commission usually concern 'objective' factors such as cost savings[14]. Therefore, it would be helpful to apply the "verifiable" criterion less strictly when assessing environmental/sustainability benefits for consumers.

[13] European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004/C 31/03, para 79.
[14] European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004/C 31/03, para 80.

On this basis, it might be challenging for sustainability considerations to be taken into account within the efficiencies test or considered as grounds for justifications as a competitive factor. However, the fact that consumers/society as a whole being interested in and benefiting from a certain "green" product or service may be considered on different grounds:

c. "Green" factors as grounds for public interest criteria (rather than justification under a competition law assessment)?

In our view, the wider concept of public interest is capable of considering environmental benefits of a merger:

For example, in the famous *Miba/Zollern* case[15] the German Minister of Economics and Energy granted a ministerial approval (*Ministerialerlaubnis*) for a joint venture previously prohibited by the Federal Cartel Office for environmental policy reasons because the positive effects of the merger for the environment and climate protection outweighed its competitive disadvantages. It was found that the slide bearings of the joint venture play an important role in achieving the energy turnaround and environmental policy goals which also contributes to maintaining a competitive middle class and thereby qualify as an overriding public interest[16].

Pursuant to section 42 of the German Act against Restraints of Competition (GWB), the Minister of Economics and Energy may authorise a merger which was previously prohibited if the restriction of competition in the individual case is (i) outweighed by the overall economic advantages of the merger, or if (ii) it is justified by an overriding public interest. However, such an instrument is applied very restrictively and is not known to the EU merger control regime[17].

Although in general it might be questionable whether environmental/sustainability aspects should overrule competitive factors, introducing uniform standards for the recognition of environmental aspects as public policy reasons within the EU would be helpful. Further, the question arises as to whether balancing such public interest criteria against competitive aspects should be conducted by a political body (as in the *Miba/Zollern* case), the legislator or the enforcer itself.

d. "Green" factors as part of the merger control procedure?

Following the closure of many physical competition authorities' offices to the public due to the current coronavirus crisis, the European Commission as well as many NCAs[18] have limited paper-based submissions or at least encouraged the submission of merger filings and their annexes in electronic form. In the view of CMS, this is a very welcome development and should

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[15] BMWi, decision of 19 August 2019, case no. IB2-20302/14-02, *Miba/Zollern*.
[16] Cf. also the press release on the website of the German Federal Ministry for Economics of 19 August 2019, available at https://www.bmwi.de/Redaktion/DE/Pressemitteilungen/2019/20190819-altmaier-ministererlaubnis-im-verfahren-miba-zollern.html (in German only).
[17] However, under Art 2 para 1 b), the Commission is required to take into account "*development of technical and economic progress, provided that it is to consumers' advantage*" when assessing mergers as regards to efficiencies which also relates to factual issues. Cf. *Thomas* in Immenga/Mestmäcker, *Wettbewerbsrecht*[6], Bd 3, Sec 42 GWB para 6.
[18] For example, in Austria, filings as of 31 October 2020 must be submitted via WEB ERV (paper-based submission is only available where there are technical difficulties).

be encouraged further in the future (i.e. by setting an EU-wide standard encouraging/regulating electronic submission).

e. Positive impact on non-EU Member States (especially EU enlargement countries)?

Some MEPs were suspicious that the green deal might force European producers to transfer their facilities to non-EU Member States , where costs are lower and regulations and sanctions are less severe. However, the opposite situation has actually transpired in practice: EU legislation has a virtuous impact on other countries – e.g. Turkey, as an EU enlargement country, adopts the EU practices. Turkey adopted decisions where environmental considerations played an important role in line with the Commissions' relevant product markets' analysis concerning organic products[19].

[19] Cf. https://www.rekabet.gov.tr/Karar?kararId=287e858b-e81a-402e-b247-a8fcdc77a55a and https://www.rekabet.gov.tr/Karar?kararId=b5c1d73b-b4fc-41f4-bde0-a2297460c39c.