Competition Policy supporting the Green Deal

Baker McKenzie response to the call for contributions

1. Executive summary

Part 1: State aid

1.1 Significant amounts of State aid will be required to support the implementation of the Green Deal if the Union is to reach its climate goals. The challenge is two-fold: it relates to timing and substance.

1.2 On timing, at least until the State aid rules have been revised to support the implementation of the Green Deal and Europe's recovery more generally, the Commission should fast track the approval process for Green Deal State aid.

1.3 A Green Deal & Recovery Temporary Framework for swift state aid approval for green deal projects (as well as digitisation and other Recovery and Resilience Facility (**RRF**) projects) could provide a flexible interim solution. It could be modelled on the present Covid-19 Temporary Framework. This would help kick-start the green transition and increase the Union's chances of meeting its climate goals. The Framework might also apply to digitisation aid to support the twin-transition and Europe's recovery under the Recovery Plan for Europe more generally.

1.4 On substance and in response to the consultation's four questions on how the State aid rulebook could better support the implementation of the environmental and climate policies, i.e. the Green Deal:

1.5 First, we consider that funding under the RRF and other EU funds that is earmarked to be spent on green projects should be considered to be well targeted and exempt from the notification and approval requirement. It should benefit from significantly increased applicable maximum aid amounts and maximum aid intensities, including for aid intensive projects by large undertakings. Where State aid notification and approval remain necessary, approval under the guidelines should be facilitated, particularly for energy and environmental aid but also for research development and innovation aid.

1.6 The revised State aid rulebook should also clarify that support for infrastructures, which are essential for the green transition (e.g. hydrogen and electric charging infrastructures), does not distort competition and does not affect trade between Member States under certain conditions. It should also include generous rules for green energy storage and green hydrogen production as well as for related industrial research and experimental development. Finally, it should allow Member States to match subsidies available or provided in third countries to keep and attract green research development and innovation and green production in the Union as well as to equalise other cost advantages of non-EU locations.

1.7 Second, in our view, a reduction of currently acceptable State aid and State aid measures is not appropriate, particularly given that non-EU competition in third countries is not subject to reasonably equivalent subsidy prohibitions or control. The current State aid rules take into account the contribution of the respective aid to a legitimate policy objective and ensure that State aid is well targeted. Consequently, projects that have a negative environmental impact but do not violate Union law and comply with the current State aid rules should continue to be able to benefit from compatible aid.

1.8 The negative environmental impact of a measure or project is to be considered and if need be addressed by the Member State in compliance with applicable Union law. Where applicable Union and/or national environmental legislation allows for the implementation of a project that has a negative environmental impact only on condition of certain protective measures being implemented, Member States should be allowed to grant additional aid to take these necessary measures to prevent the negative environmental impact.

1.9 Third, we consider that more State aid to support environmental objectives should be allowed for projects making a significant contribution to the green transition by significantly increasing the maximum aid intensities and maximum aid amounts under both the General Block Exemption Regulation (**GBER**) and the guidelines.

1.10 Fourth, we believe that the EU Taxonomy would be an appropriate starting point to define positive environmental benefits, by reference of all sustainability criteria of Regulation 2020/852. In addition, Member States should remain able to support any other projects with well-documented environmental benefits, whether by reference to the EU Taxonomy or otherwise.

Part 2: Antitrust

1.11 We set out below a number of hypothetical sustainability agreements/objectives in respect of which clearer guidance on the non-applicability of Article 101(1) or the applicability of Article 101(3) would be useful so that businesses are not deterred from entering into agreements that have positive consumer benefits.

1.12 As will be apparent from this list, it is our view that the "risks" arise, less from reaching a conclusion that cooperation is illegal, and more from perceptions about how the rules apply, or because of the lack of certainty about how the rules would be applied at EU level and indeed across the EU and further afield.

Sustainability agreements where there is no impact on competition

- A binding commitment to meet sectoral targets which do not mandate how individual companies meet that target
- Agreements between competitors where they commit to respect laws and agree to demand legal compliance from suppliers and other business partners
- A joint commitment to modify the terms of business with non-compliant entities
- Information exchange on anonymously provided business partner compliance with ESG rules/laws, including systems to conduct due diligence and monitoring of third parties, e.g. joint mapping of harvesting locations and deforestation incidents
- Sharing of good practices, systems and tools to risk assess, control or monitor business activities from a sustainability perspective

Agreements which develop new demand and are therefore likely outside of Article 101(1)

- Agreements which help create new markets by jointly creating resources and demand, e.g. collective demand for the development of a product mature enough and facilities which are large enough for scaled production
- Collective commitments to buy, e.g. to create necessary demand for farmers to start planting more diverse crops and to develop technological expertise

Sustainability agreements which have only de minimis impact

- Harmonization of packaging formats to facilitate recycling
- Joint commitments to ensure living wages for workers
- Joint incentives for suppliers/producers to switch to use more sustainable farming methods or to confine agriculture to certain areas (e.g. already cleared land)

Examples of legitimate environmental aims which deserve an effects (not 'by object') analysis

- Binding minimum environmental standards which go beyond national laws/regulations
- Restrictions which result in a temporary or permanent moratorium, e.g., fishing, halting deforestation
- Agreements to impose a fixed levy which is passed on to consumers in order to drive collection/recycling and innovation in these activities – see ACCC ‘ examples, e.g. Battery Stewardship[1]

1.13 We agree that the Commission can usefully provide clarifications and comfort about when certain types of sustainability agreements will fall outside of Article 101(1) or benefit from Article 101(3).We suggest the following measures, which are explained in more detail in section 3 below.

(a) There is **a need for international leadership by the Commission**, particularly because of the risk of a fragmented legal approach to a topic which is by its nature of wide geographic significance. It is not satisfactory to wait until there are cases and precedents before acting. Lack of certainty means that positive arrangements do not get started.

(b) The Commission should ensure that **guidelines and enforcement in relation to sustainability projects refer to, and are influenced by, Treaty obligations** such as Article 11 of the TFEU which states that “environmental protection requirements must be integrated into the definition of the union policies and activities, in particular with a view to promoting sustainable development”. The fact that there are several such Treaty obligations does not remove the need to do this.

(c) **Greater transparency is needed in relation to work/thinking carried out by the Commissio**n. We would like to see prioritisation criteria which mention sustainability goals; the sharing of guidance which is given to business behind the scenes; decisions on inapplicability; a refreshed and even relaunched approach to informal guidance and potentially the use of a regulatory sandbox.

(d) Given that government policies in this field are, and should be, fast-moving, they will frequently be introduced by flexible policy instruments rather than by legislative compulsion. **Corporate action conforming to government policies, at least where these are clear and precise, should benefit from a state action defence even in the absence of actual compulsion.** The extent of the defence, which need not necessarily be absolute should at least be sufficient to ensure that no resulting coordination can be considered a ‘by object’ infringement.

(e) **Clearer guidance is needed on when sustainability agreements would not engage Article 101(1) including because of legitimate public interest considerations.** As regards the latter, the Commission may understandably refrain from a blanket exemption of all such agreements but should at the least confirm that it will be taken into account as an element of a case by case analysis.

(f) **The Article 101(3) Exemption Guidelines should be updated** to make it clear there is no legal requirement for a mathematical weighing up of pro and anticompetitive effects to show a net benefit to consumers in a single market.

(g) **Guidance is needed on when the exemption criteria are met for sustainability projects**. This should cover:

- **Qualitative benefits** (since sustainability agreements may increase cost)

[1] https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/battery-stewardship-council

- **When and how 'shadow prices' (values that indicate the harm of, among other things, polluting emissions and greenhouse gas emissions) can be used to as quantify negative externalities** (as promoted by the ACM in its draft guidelines)
- **A broader view of relevant consumers which fits within the case law,** e.g. so as to include consumers who benefit from environmental improvements
- **A longer term view when considering 'consumer willingness to pay'**
- **More examples of when restrictions in the sustainability context may be indispensabl**e (e.g. binding standards)

Part 3: Mergers

1.14 Environmental and sustainability considerations have their place in the current merger assessment framework under the EUMR. In the context of a substantive assessment, the Commission can consider sustainability when defining the relevant market. Furthermore, sustainability can be taken into account when assessing whether a transaction is compatible with the EUMR according to Article 2 (1)b. An appropriate place to consider environmental and sustainability objectives is within the assessment of efficiencies. We realize, however, that efficiencies have been of limited importance in the case law under the EUMR and unless the approach to efficiencies is reconsidered and made more flexible, we believe that the recognition of environmental and sustainability objectives will be inherently difficult. Notably the economic tools used until now will not be able to assist regulators (and lawyers) in claiming efficiencies, as these will be hard to quantify. New economic tools and methodologies will have to be developed to provide guidance on how non-price and non-cost based benefits can be quantified.

1.15 We believe that further regulatory proposals to take into account the choice of environmentally friendly products and/or technologies for consumers are not required. Should the Commission seriously consider amendments of the EUMR, we would strongly suggest undertaking a robust and detailed empirical study first. Only once and if a consistent body of EUMR cases demonstrating clear sustainability-based Type I errors[2] has been identified should further legislative changes be considered.

1.16 We believe that EU merger control would benefit from further simplification which would have positive repercussions on the achievements of sustainability goals. For example, we notice that the burden under the simplified regime is still substantial for the companies concerned, particularly in those cases where corporate documents are still required to be provided. We would therefore recommend the Commission to consider in more detail whether certain transactions with no or little impact in the EU could not be wholesale exempted from formal notification.

[2] I.e. the prohibition of mergers that are not leading to a significant impediment of effective competition.

FULL RESPONSE TO THE CALL FOR CONTRIBUTIONS

1. Introduction

1.1 We welcome the invitation to provide thoughts on how to remove obstacles for companies seeking to support Green Deal objectives and fully support the idea of a conference to bring together the views of different stakeholders.

1.2 We also commend the Commission for addressing the challenge in a holistic manner, exploring the roles to be played by each of state aid, antitrust and merger control in driving greener outcomes.

1.3 While competition policy has a tried and tested role in achieving sustainable outcomes by driving technological advances, it is difficult to ignore the fact that it also favours static efficiencies in terms of the lowest short-term cost solutions which may drive out more sustainable options. The current era of strong competition law enforcement (in the West at least) has coincided with the period during which we have seen the greatest and fastest-escalating degradation to the planet.

1.4 Our contribution is not so much about how to achieve sustainability goals using competition law instruments but rather how to enable companies to achieve sustainability goals without being unduly hindered by competition law of the perception of it.

1.5 The European Commission is particularly well placed to find this path given Treaty requirements to take into account environmental protection when applying the competition provisions.[3] While the Treaties obviously contain many priorities, we do not think that this should preclude the Commission from taking into account sustainable development goals when it is faced with sustainability agreements.

1.6 The Commission has previously shown its alignment with environmental aims, even before the current environmental 'constitutional' provisions were included in the treaties in their current form. For example, in the late 1990s, the Commission explained that "when [it] examines individual cases, it weighs up the restrictions of competition arising out of an agreement against the environmental objectives of the agreement and applies the principle of proportionality in accordance with Article [101(3)]. In particular, improving the environment is regarded as a factor which contributes to improving production or distribution or to promoting economic or technical progress'[4]. The CECED case mentioned below is another example of taking into account environmental considerations within the framework of the law.

1.7 We consider that genuine leadership is needed - to work through the different policy options but also to coordinate as far as possible the approaches of competition authorities in Europe and further afield. A fragmented approach would be problematic for competition authorities and business alike, and the uncertainty may mean that initiatives that are in the consumer benefit are not properly explored.

1.8 We consider that competition authorities have a role to play, as evidenced by actions taken during the Covid-19 pandemic. Many authorities quickly introduced a range of solutions, from tailored guidelines to public interest exclusions, to help return markets to their equilibria. While interventions were temporary and narrow in scope, the rapid responses are proof that competition authorities can be a part of the solution without exposing themselves to accusations that they were bounced into serving vested interests.

Overall, we think that a number of steps can be taken to ensure that competition policy plays a role in facilitating, not blocking, the path to a greener EU economy. It is also the perfect time for the Commission to meet its desire

[3] Of particular relevance are Articles 3(1) (3) and (5) of the Treaty on European Union and article 7, article 9 and Article 11 of the TFEU. In particular, Article 11 says: "environmental protection requirements must be integrated into the definition of the union policies and activities, in particular with a view to promoting sustainable development".

[4] European Commission, 'XXV Report on Competition Policy' (Brussels/Luxembourg, 1995).

to be a global leader and to ensure that real competition law concerns do not hold up necessary progress, and that unfounded competition law concerns are not used to conceal from stakeholders an indifference to environmental damage.

2. Part 1: State aid control

2.1 Commissioner Vestager announced in January 2020 that to help reach the Union's climate goals the new State aid rules "*will give governments more room to support companies to decarbonise and electrify production.*"[5]

2.2 Since then, the Commission has acknowledged that the existing State aid rulebook requires significant revision to be able to support the implementation of the Green Deal,[6] including most recently in the announcement of inception impact assessment for the revision of the guidelines on State aid for environmental and energy 2014-2020.[7] The revision of the State aid rules is critical for the timely implementation of the Green Deal, but also for Europe's wider recovery.[8]

2.3 The State aid rules most relevant for supporting the Green Deal are scheduled for consultation in Q4 2020 or the first half of 2021 and adoption in the second half of 2021. These include the Framework for research, development and innovation State aid, the Guidelines for environmental and energy State aid, the Communication on important projects of common European interest and amendments to the General State aid block exemption regulation in light of the Green Deal.

2.4 This timeline is very ambitious but still risks delaying the implementation of the Green Deal, while financing is becoming available quickly. For instance, financing under the Recovery Plan for Europe, most notably under the Recovery and Resilience Facility ("RRF") is supposed to become available already in the first half of 2021. Member States must earmark at least 37% of its funding on the implementation of the Green Deal, and are supposed to commit 70% of the €312.5 billion in grants under this Facility in 2021 and 2022. Consequently, Member States have already started the planning process, supported by the Commission.

2.5 Thus, how State aid control can support the implementation of the Green Deal in times of recovery has both a timing and a substantive dimension. Making this work will require innovation and exceptional speed on the part of Member States and industry. In addition, meeting this exceptional challenge requires an exceptional response from the Commission in revising and applying the State aid rules.

2.6 To avoid State aid rules to remain or become an obstacle rather than to support well-targeted State aid in support of the green transition and recovery more generally, the Commission should fast track the approval process for Green Deal State aid, particularly while the revision of the State aid rules remains ongoing. Substantive State aid control will need to be recalibrated significantly to avoid State aid control being singled out as a main factor delaying or even preventing the implementation of the Green Deal at Member State level. This will also require greater transparency on the part of the Commission regarding the interpretation and application of the State aid rules.

2.7 A Green Deal & Recovery Temporary Framework for swift State aid approval for green deal projects (as well as digitisation and other RRF projects) could provide a flexible interim solution through the end of 2021 (or as long as the relevant State aid rules have not been updated). Such a Framework would avoid State aid approval from becoming a roadblock to the green transition and enable the Commission

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[5] Commissioner Vestager, Speech 30 January 2020, State aid and a green, digital future, Conference of Europe Ministers of the German Länder, Brussels, 30 January 2020, available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/state-aid-and-green-digital-future_en.

[6] See e.g. Commissioner Timmermans' remarks at *The European Green Deal at the core of EU recovery, EuroCommerce, online event,* 9 November 2020.

[7] Ares (2020)6636736 of 12 November 2020: "*Furthermore, the announcement of the Green deal requires a wider and deeper review of the EEAG in particular in the two areas mentioned below*".

[8] Carles Esteva Mosso, Speech 15 October 2020 at "GCR Interactive: State aid" as reported by MLex

to develop precedent quickly, which could in turn inform the revisions. Modelled on the present Covid-19 Temporary Framework, it could be updated and expanded as and when appropriate based on initial experience and feedback from Member States. This would help kick-start the green transition and increase the Union's chances of meeting its climate goals. The Framework might also apply or be extended to digitisation aid to support the twin-transition and Europe's recovery under the Recovery Plan for Europe more generally. Initially, a Green Deal & Recovery Temporary Framework might enable Member States to extend existing schemes and adopt new schemes that fall under the current General Block Exemption Regulation but allow for increased aid amounts and intensities for the implementation of green deal and other projects covered by their national RRF plans.[9]

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

1. ***What are the main changes you would like to see in the current State aid rulebook to make sure it fully supports the Green Deal? Where possible, please provide examples where you consider that current State aid rules do not sufficiently support the greening of the economy and/or where current State aid rules enable support that runs counter to environmental objectives.***

2.8 Funding under the RRF (which is earmarked under applicable methodology for climate tracking of green projects) should be considered to be well targeted and exempt from the notification and approval requirement. This will ensure that the current State aid rules fully support the implementation of the Green Deal.

2.9 Exemptions should be available generally or at least up to maximum aid amounts and/or maximum aid intensities which should be well in excess of the limits under the current GBER, for instance in case of aid intensive projects by large undertakings. Where State aid notification and approval remain necessary, approval under the guidelines should be facilitated, particularly for energy and environmental aid but also for research, development and innovation aid. This might be achieved by, for instance:

- Considering the first four general assessment criteria to be met for green transition aid under the RRF. These are: contribution to a well-defined objective of common interest, need for State intervention, appropriateness of the aid measures, and incentive effect;
- Increasing the maximum aid intensities for green transition aid under the Facility by plus 50% (including aid for eco-innovation but excluding renewable energy and cogeneration) but for large enterprises not above 90% following the increase.
- Allowing Member States alternatively to apply the so-called funding gap approach regarding proportionality of the aid rather than prescribing maximum aid amounts based on extra costs of investments compared to a theoretical alternative investment that is less environmentally friendly. This would be justified in light of the Green Deal objectives where investments present an important way to reduce the carbon footprint of the installations concerned and help achieve climate neutrality.[10] Such an approach would also be in line with the Commission's "*Sustainable Europe Investment Plan European Green Deal Investment Plan*" Communication.[11]

2.10 The revised State aid rulebook should also clarify that support for infrastructures, which are essential for the green transition (e.g. hydrogen and electric charging infrastructures), does not distort competition

[9] Swift approval would be available for Member States existing or new GBER schemes that provide significantly higher total aid amounts and maximum aid intensities for projects that qualify for RRF funding based on the Member State's national plans. For instance, maximum aid amounts might be doubled and maximum aid intensities increased by 50% (but capped in all cases at 90% for large companies and at 100% for all others). This should apply across all aid categories, including regional aid to support recovery.
[10] See also the Commission decision of 6 November 2020 in SA.55433 RES district heating projects in Romania.
[11] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Sustainable Europe Investment Plan, European Green Deal Investment Plan, Brussels, 14.1.2020, COM(2020) 21 final, see section 4.3.1.

and does not affect trade between Member States and, thus, is not subject to State aid control provided the following conditions are met:

- The infrastructure operation is vertically unbundled;
- Third-party access is ensured, and
- Tariffs are regulated.

This would be in line with the Commission's approach, for instance, for district heating infrastructure in the Commission's "*Sustainable Europe Investment Plan European Green Deal Investment Plan*" Communication.[12]

2.11 The State aid rulebook should include generous rules for green energy storage and green hydrogen production as well as for related industrial research and experimental development.

2.12 The updated State aid rulebook should allow Member States

- to match subsidies available or provided in third countries to keep and attract research, development & innovation as well as production that support the green transition in the Union; and
- to equalise other cost advantages of the non-EU location.

2.13 This equalisation and matching should be possible on the conditions that (a) the subsidies and advantages are identified and well documented (b) they are available to the beneficiary or its competitors in the non-EU country and (c) the resulting aid would not unduly distort competition and trade in the internal market.

2. If you consider that lower levels of State aid, or fewer State aid measures, should be approved for activities with a negative environmental impact, what are your ideas for how that should be done?

2.14 We do not consider a reduction below currently acceptable State aid levels or a reduction of acceptable State aid measures appropriate, particularly given that non-EU competition in third countries is not subject to reasonably equivalent subsidy prohibitions or control. We note that this would not support implementation of the Green Deal. In addition, permissible State aid under the GBER and the Commission's existing State aid guidelines and frameworks will continue to be compatible under Article 107 TFEU.

2.15 Where the Commission considers that State aid for activities with a negative environmental impact exists and should be terminated as quickly as possible, we would suggest that the Commission and the respective Member State explore what termination would require. This should include issues such as the phase-out time that would be reasonably necessary, financial compensation or necessary incentives, and to what extent the Union might be able to support this.

2.16 Where a Member State decides that harmful activity is to be terminated, e.g. where operating licences, concessions, etc. allowing such activity are revoked before their scheduled end, this may involve appropriate compensation for any damage incurred, including lost revenues. Where this is the case and termination contributes to Green Deal objectives, the Commission should clarify that such compensation is considered compliant with State aid rules and is exempt from notification (regardless of national law standards of expropriation).

2.17 We note in this context that activities of energy intensive users do not *per se* have a negative environmental impact. More importantly, the effects of the Green Deal on energy charges and the resulting effects on energy intensive users must be taken into account when revising the State aid

[12] See section 4.3.3.

rulebook. Availability of exemptions from energy charges will continue to be very important for these users.

*a. **For projects that have a negative environmental impact, what ways are there for Member States or the beneficiary to mitigate the negative effects? (For instance: if a broadband/railway investment could impact biodiversity, how could it be ensured that such biodiversity is preserved during the works; or if a hydro power plant would put fish populations at risk, how could fish be protected?)***

2.18 Where projects that have a negative environmental impact do not violate Union environmental or other Union law and are otherwise compatible with the internal market under existing State aid rules, the existing State aid rules should continue to apply. The State aid rules take into account the contribution of the respective aid to a legitimate policy objective and ensure that State aid is well targeted. This is sufficient.[13]

2.19 The negative environmental impact of a measure or project is to be considered and if need be addressed by the Member State, e.g. in the planning and permitting process at national, regional or local level in compliance with applicable Union law, including the Fauna, Flora, Habitat Directive (Council Directive 92/43/EEC) and the Birds Directive (Directive 2009/147/EC).

2.20 Where applicable Union and/or national environmental legislation allows for the implementation of a project that has a negative environmental impact only on condition of certain protective measures being implemented (compensation of nature lost, etc.), Member States should be allowed to grant additional aid to take these necessary measures to prevent the negative environmental impact. The costs related to these measures should be recognised explicitly as eligible costs that can benefit from a maximum aid intensity of 100% and are not taken into account when calculating the maximum allowable aid amount for the supported project.

3. If you consider that more State aid to support environmental objectives should be allowed, what are your ideas on how that should be done?

a. ***Should this take the form of allowing more aid (or aid on easier terms) for environmentally beneficial projects than for comparable projects which do not bring the same benefits ("green bonus")? If so, how should this green bonus be defined?***

2.21 More State aid to support environmental objectives should be allowed for projects making a significant contribution to the green transition. For such projects the existing maximum aid intensities and maximum aid amounts should be increased. A project should be considered to make a significant contribution to the green transition if it meets the criteria of Article 3 (a) and (b) of Regulation 2020/852,[14] but without needing to comply with the technical screening criteria to be established by the Commission for sustainable investment. For these projects, the maximum aid intensities under existing State aid rules should be increased by 50% (up to a maximum of 90% for large enterprises and 100% for SME).[15] Also, the maximum aid amounts under existing State aid rules should be at least doubled for these projects (including for large investment projects). In addition, Member States should be able to choose in each case between the funding gap approach and the increased maximum aid intensities and amounts available.

[13] See also C-594/18 P *Hinkley Point*, ECLI:EU:C:2020:742, para. 20 et seq.
[14] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ L 198, 22.6.2020, p. 13–43.
[15] Example: 90% aid intensity for large enterprise for environmental investments going beyond Union standards currently now eligible for a maximum aid intensity of 40% and after the proposed 50% increase this would be 90% for large enterprises. Likewise, following a 50% increase the new maximum aid intensity would be capped at 90%, up from currently 50%.

b. ***Which criteria should inform the assessment of a green bonus? Could you give concrete examples where, in your view, a green bonus would be justified, compared to examples where it would not be justified? Please provide reasons explaining your choice.***

2.22 As set out above in response to Question 3.a, projects making a significant contribution to the green transition should be eligible for a green bonus.

4. ***How should we define positive environmental benefits?***

a. ***Should it be by reference to the EU taxonomy and, if yes, should it be by reference to all sustainability criteria of the EU taxonomy? Or would any kind of environmental benefit be sufficient?***

2.23 The EU Taxonomy should be the starting point, by reference of all sustainability criteria listed in Article 9 of Regulation 2020/852. In addition, Member States should remain able to support any other projects with well-documented environmental benefits, whether by reference to the EU taxonomy or otherwise.

3. Part 2: 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).

3.1 We set out below a number of hypothetical sustainability agreements/objectives in respect of which clearer guidance on the non-applicability of Article 101(1) or the applicability of Article 101(3) would be useful so that businesses are not deterred from entering into agreements that have positive consumer benefits.

3.2 As will be apparent from this list, it is our view that the "risks" arise, less from reaching a conclusion that cooperation is illegal, and more from perceptions about how the rules apply, or because of the lack of certainty about how the rules would be applied at EU level and indeed across the EU and further afield.

Sustainability agreements where there is no impact on competition

- A binding commitment to meet sectoral targets which do not mandate how individual companies meet that target
- Agreements between competitors where they commit to respect laws and agree to demand legal compliance from suppliers and other business partners
- A joint commitment to modify the terms of business with non-compliant entities
- Information exchange on anonymously provided business partner compliance with ESG rules/laws, including systems to conduct due diligence and monitoring of third parties, e.g. joint mapping of harvesting locations and deforestation incidents
- Sharing of good practices, systems and tools to risk assess, control or monitor business activities from a sustainability perspective

Agreements which develop new demand and are therefore likely outside of Article 101(1)

- Agreements which help create new markets by jointly creating resources and demand, e.g. collective demand for the development of a product mature enough and facilities which are large enough for scaled production
- Collective commitments to buy, e.g. to create necessary demand for farmers to start planting more diverse crops and to develop technological expertise

Sustainability agreements which have only de minimis impact

- Harmonization of packaging formats to facilitate recycling
- Joint commitments to ensure living wages for workers
- Joint incentives for suppliers/producers to switch to use more sustainable farming methods or to confine agriculture to certain areas (e.g. already cleared land)

Examples of legitimate environmental aims which deserve an effects (not 'by object') analysis

- Binding minimum environmental standards which go beyond national laws/regulations

- Restrictions which result in a temporary or permanent moratorium, e.g., fishing, halting deforestation
- Agreements to impose a fixed levy which is passed on to consumers in order to drive collection/recycling and innovation in these activities – see ACCC ‘ examples, e.g. Battery Stewardship[16]

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…)?

3.3 We agree that the Commission can usefully provide clarifications and comfort about when certain types of sustainability agreements will fall outside of Article 101(1) or benefit from Article 101(3). Our suggestions are set out below.

a) Greater transparency is needed

3.4 We know that the Commission gives guidance to business on sustainability-related questions from time to time. It would be extremely helpful if the Commission could share its learnings from this area – for example in the form of occasional papers by staff as is the case with the Merger Brief.

3.5 The importance of the issues could make this an ideal area for use of Article 10 of Reg 1/2003 (Finding of Inapplicability) to provide needed clarity on permissible activity, given the community public interest engaged.

3.6 The Commission could also clarify the basis on which these informal questions should be brought to it and the circumstances in which the Commission may consider informal guidance under Reg 1/2003 to be a viable option. Indeed, this would be a good time to relaunch/revamp the Notice on informal guidance[17] which should also explain what protections, if any, are available for the companies in terms of confidentiality etc.. This kind of guidance would have a beneficial knock-on effect in other competition law jurisdictions. The Commission has the opportunity to lead the way – and before there are conflicting approaches across the EU and further afield.

3.7 Prioritisation criteria which explain when sustainability agreements are unlikely to be pursued under Article 101(1) would also be helpful – perhaps by reference to the circumstances outlined below (where we do not think Article 101(1) is even likely to be engaged).

3.8 We also encourage the Commission to reconsider the attitude to government-promoted/sponsored action in the field of sustainability policies. The general rule (reflected in paragraph 22 of the Horizontals Guidelines) is strict and only state compulsion can provide a defence. Given that government policies in relation to sustainability are, and should be, fast-moving, they will frequently be introduced by flexible policy instruments rather than by legislative compulsion. Corporate action conforming to government policies, at least where these are clear and precise, should benefit from a state action defence even in the absence of actual compulsion. The extent of the defence, which need not necessarily be absolute, should at least be sufficient to ensure that no resulting coordination can be considered a ‘by object’ infringement.

b) Clearer guidance is needed on when sustainability agreements will not fall within Article 101(1)

Because the restrictions are necessary and proportionate to a public interest objective

[16] https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/battery-stewardship-council

[17] Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) OJ 2004 C 101/78.

3.9 The Commission should address (either in the new Horizontal Guidelines or separately) the relevance of the *Wouters*[18] and *Meca-Medina*[19] case law of the European Courts for sustainability agreements – i.e. explain under which conditions legitimate public interest considerations would remove sustainability agreements from the scope of Article 101 TFEU.

3.10 We appreciate the challenges of translating the *Wouters/Meca-Medina* case law into guidance for a potentially indefinite variety of case scenarios, and the Commission would understandably refrain from a blanket exemption of all such agreements from Article 101 TFEU without further substantive assessment. That said, established European case law leaves no doubt that legitimate public interest considerations may exclude the application of Article 101 TFEU. We believe that the Commission should reference this body of case law in the Guidelines, even if only to indicate that it will be taken into account as an element of a case by case analysis.

<u>Because the agreements do not impose individual obligations</u>

3.11 Guidelines should clarify that, where there is no precise individual obligation placed on the parties, or where the parties are only loosely committed to contributing to the attainment of a sector-wide environmental target, the agreement is not caught by Article 101(1). That is because of the discretion that is left to the parties as regards the means technically and economically available to attain the joint objective. It would however be useful to explain what is meant by "loose" – e.g. a sectoral or regional aim which is wider than any relevant market?

3.12 Guidelines should also reference and identify the key element of illustrative cases: *ACEA, JAMA/KAMA*[20] and *CEMEP*[21] where the Commission concluded that horizontal commitments given by a sector did not fall within Article 101.

<u>Because of the non appreciable size of any increase in cost and/or the low likelihood of any appreciable pass-on to consumers</u>

3.13 Guidance is needed on when sustainability efforts will not have an appreciable effect on competition. Market share thresholds are unlikely to be helpful given that sustainability agreements usually require scale and therefore widespread take-up.

3.14 Instead, it would be helpful to focus on when increase in cost would not be expected to raise concerns about a price increase whether because of its size or because highly competitive conditions in the upstream market mean that any price increase would be unlikely to be passed on to consumers.

3.15 Sustainability aims/targets are typically complemented by other joint initiatives, e.g., investment in suppliers/payment of incentives to farmers etc. It would therefore be very helpful for the Commission to cover these sorts of arrangements and explain when such cooperation will not have an appreciable impact on competition because of, say, a low degree of commonality of costs or why a consolidated fund should be considered for making these sorts of payments.

c) <u>Clearer guidance is needed on when standards adopted for sustainability goals will escape Article 101(1)</u>

3.16 Standards can be used to drive more environmentally accountable or ethical outcomes at various levels of the supply chain. The current guidance on when standardisation would fall outside Article 101(1) is helpful but some extra guidance is needed, especially because current guidance seem more concerned with technological standards. The Commission should describe the kinds of standards which are, by

[18] Case C-309/99 - Wouters and others, Judgment of 19 February 2002.
[19] Case C-519/04P - Meca-Medina and Majcen v Commission, Judgment of the Court of 18 July 2006.
[20] Case COMP/37.634 JAMA and Case COMP/37.612 KAMA (1999), Commission Press Release IP/99/922, 1 December 1999.
[21] CEMEP (2000), Commission Press Release IP/00/508, 23 May 2000.

their nature, unlikely to fall within Article 101 – for example, standards for logistics, distribution or packaging.

3.17 In some cases, genuine progress and change is only likely to be achieved through standards that are taken up by large parts of the market or where those standards are mandatory. While an informal EU 'safe harbour' for standards is certainly helpful, more clarity is needed on where the boundary lies between a voluntary and a mandatory standard. We do not think it is correct to treat a popular standard which has been voluntarily adopted as a de facto binding industry standard. It would also be helpful if the Commission could explain its approach to standards that are only mandatory for those willing to participate. Would this sort of arrangement be outside Article 101(1) subject to a market coverage threshold?

3.18 More guidance would also be useful to explain how the 'unrestricted participation' and 'transparency' requirements (in paras 281 and 282 of the Horizontal guidelines) should be met in markets with multiple levels – from farmer/processor to trader, retailer and end customer. This should refer to the theory of harm, e.g. foreclosure or price increase/quality reduction etc. Intuitively, an agreement which is made or socialised across multiple levels in the market seems less likely to raise competition issues. The Commission should explain whether this is a valid factor in its analysis.

d) Clarity is needed on when benefits resulting from sustainability agreements can be factored into an Article 101(3) self-assessment

A wide range of benefits are relevant under Article 101(3) and there is no need for mathematical weighing

3.19 The Commission needs to clarify its approach to the benefits that can be taken into consideration under Article 101(3). 'Economic' progress is only one of four separate ways in which an agreement may meet the criteria of this condition. There is therefore no need to translate all improvements and progress into 'economic' terms - and still less reason to reduce them to narrow financial considerations. The Commission has in the past acknowledged a wide range of environmental benefits when carrying out competition law assessments.[22]

3.20 The debate in this area is further clouded by para 85 of the Article 101(3) Guidelines which says that "the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement".

3.21 We are not aware of any legal requirement for a net benefit. The Horizontal Guidelines reference *Consten v Grundig*[23], but adopt a very wide interpretation. The Court of Justice only stated in that judgment that the improvement within the meaning of the first condition of Article 101(3) must show appreciable objective advantages of such a character to compensate for the disadvantages which they cause in the field of competition. The Court did not specify that there must be net advantages at the level of consumers, nor that the consumers in each affected market must be assessed in isolation.

3.22 While there may be instances where putting an economic value on a benefit may be useful in carrying out a proportionality analysis, this should not restrict the application of Article 101(3). We observe from

[22] The Commission relied on a reduction in air pollution and energy use, as well as the prospect of the development of lead-free materials. Philips-Osram (Commission Decision of 21 December 1994 (IV/34.252 - Philips-Osram) OJ [1994] L 378/37, paras 25-27); and see EACEM, XXVIIIth Report on Competition Policy (1998), p 15; it acknowledged a reduction in the use of raw materials and the volume of waste products, together with the environmental benefits of eliminating the transport of a particular hazardous substance. Exxon/Shell (, OJ 1992 L37/16, para 38. Commission Decision of 18 May 1994 (IV/33.640 - Exxon/Shell) OJ [1994] L 144/20, paras 76-68 and 71). In Ford/Volkswagen, the development of a product with reduced or eliminated environmentally hazardous materials, low emissions and fuel consumption, and increased recyclability was viewed as beneficial. Commission Decision of 23 December 1992 (IV/33.814 - Ford Volkswagen) OJ[1993], OJ L 20/14, para. 26.

[23] Consten v Grundig [1966] ECLI:EU:C:1966:41

the October 2019 conference that the Commission acknowledges that Article 101(3) balancing is "not restricted to a mathematical exercise of clearly identified price/profits". This needs to be reflected in the Guidance.

<u>Clearer guidance is needed on how to show qualitative benefits</u>

3.23 Since sustainability initiatives may increase rather than reduce cost, the Commission should provide greater clarity on when qualitative (rather than cost) efficiencies may arise as a result of sustainability efforts. That should include product characteristics (e.g. biodegradability) but also the way in which goods are produced. For example, the condition in which animals are farmed or the manner in which crops are grown can form part of the product's quality dimension.

3.24 This is acknowledged by the OFT in its 2010 OECD submission where it notes that, "… environmental qualitative efficiencies may arise where extra value is created for consumers. …". However, the OFT also went on to say that ".. such benefits would only be classed as direct economic benefits if consumers value these factors as part of the quality dimension of the product or service."

3.25 We do not consider consumer willingness to be the only or best test for the following reasons:

- At times, it may be necessary to assess the genuine interest of consumers by taking into account behavioural biases, such as irrationally preferring small immediate benefits, such as a small reduction in the price, above much larger but later benefits, such as no depletion of a certain resource (i.e. by correcting the expressed preferences for hyperbolic discounting).
- Willingness to pay studies take no account of long-term improvements/efficiencies. The introduction of more sustainable practices and technologies frequently comes with more or less temporary cost increases that, especially where the sustainability gain is substantial, businesses may be forced to pass on to consumers until the initial investment has paid itself off.
- Game-changing environmental technological advances may depend not only on significant investment but also on companies coordinating their demand to encourage upstream market players to develop, introduce, permanently improve and scale the new technology. The aim of this is of course to make the new technology cheaper and ultimately mainstream and to create an infrastructure that can effectively respond to increased demand for more sustainable products.

3.26 As a result, rather than focus exclusively on the stated preferences of current consumers, the Commission should adopt a more long-term approach. At the least, the Commission should adapt the 'willingness test' to include cases where the parties anticipate and project that consumers will value the improvements in the future.

<u>Updated guidance is needed on the markets in which the efficiencies may be realised (for a 101(3) assessment)</u>

3.27 Environmental agreements are clearly intended to have significant widespread positive effects. The lack of clarity (and even logic) about which markets/consumers can be taken into consideration is preventing companies from pursuing laudable goals.

Narrow approach to 'out of market' efficiencies needs to be updated

3.28 The EU Exemption Guidelines explain in paragraph 43 that the assessment of efficiencies flowing from restrictive agreements must be made in the relevant markets to which the agreement relates. It goes on to say that "[n]negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market. However, where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same".

3.29 This appears to be an unduly narrow approach in the light of the EU jurisprudence:

- The Court of First Instance pointed out in *Compagnie Générale Maritime* that: "[f]or the purposes of examining the merits of the Commission's findings as to the various requirements of Article 85(3) of the Treaty and Article 5 of Regulation No 1017/68, regard should naturally be had to the advantages arising from the agreement in question, not only for the relevant market, …, but also, in appropriate cases, for every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement. Both Article 5 of Regulation No 1017/68 and Article 85(3) of the Treaty envisage exemption in favour of, amongst others, agreements which contribute to promoting technical or economic progress, without requiring a specific link with the relevant market"[24].

- In *Mastercard*, the Court acknowledged that "the appreciable objective advantages to which the first condition of Article 81(3) EC relates may arise not only for the relevant market but also for every other market on which the agreement in question might have beneficial effects"[25].

- This of course fits with the approach in *Groupement Cartes Bancaires*, where the Court noted that "[i]n order to assess whether coordination between undertakings is by nature harmful to the proper functioning of normal competition, it is necessary, …, to take into consideration all relevant aspects – having regard, in particular, to the nature of the services at issue, as well as the real conditions of the functioning and structure of the markets – of the economic or legal context in which that coordination takes place, it being immaterial whether or not such an aspect relates to the relevant market.".[26]

3.30 It also makes sense to take this wider view of relevant consumers/benefits given that Article 101(3) does not only relate to improvements in the production or distribution of goods but may equally concern agreements relating much more generally to technical or economic progress where there may be no easily identifiable group of purchasers.

3.31 Environmental benefits fall within the first condition and these often benefit society as a whole not just a narrow group of purchasers. The Commission has recognized this—the clearest example being its *CECED*[27] decision where it explicitly acknowledged that it was taking into account the 'collective environmental benefits' of the agreement: the 'environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers'.

3.32 This is consistent with the recognition in paragraph 85 of the Commission's 2004 Exemption Guidelines that 'society as a whole benefits where the efficiencies lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources'.

3.33 As a result, we call for recognition that efficiencies impacting other markets and indeed the common good/society as a whole can be recognised.

3.34 However, we appreciate the Commission may prefer some limiting principles. This could come from recognising when consumers in different markets are linked by a sufficient degree of commonality. In *Star Alliance*, for example, the Commission took into account 'out of market efficiencies' which it said was justified by the facts of that case such as its finding of a 'considerable commonality' between consumers on different markets.[28]

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[24] Compagnie générale maritime and Others v Commission of the European Communities [2002] ECLI:EU:T:2002:50
[25] MasterCard, Inc. and Others v European Commission [2012] ECLI:EU:T:2012:260
[26] Groupement des cartes bancaires (CB) v European Commission [2014] ECLI:EU:C:2014:2204
[27] Commission decision of 24 January 1999, (Case IV.F.1/36.718 CECED) OJ [2000] L 187/47, p. 47–54.
[28] https://ec.europa.eu/competition/antitrust/cases/dec_docs/39595/39595_3012_4.pdf (para 58 and footnote 43)

3.35 The Commission should therefore take the opportunity to return to and clarify, in light of case, law, the notion of when markets are "related". We would argue that consumers need not be "substantially" the same (as is clear from the Commission's approach in *CECED*).

3.36 Instead, we would argue that some degree of overlap should suffice. It should not be necessary for the 'group of customers affected by the restriction and benefiting from the efficiency gains to be 'substantially the same' so long as they at least overlap or if those affected by the restriction are a subset of those enjoying the benefits.

Evaluating quantitative benefits

(a) The Commission should also explain when and how benefits of environmental agreements can be expressed in monetary terms. We note that the ACM refers to "environmental prices" or "shadow prices" which are values that indicate the harm of, among other things, polluting emissions and greenhouse gas emissions.

3.37 The Commission should explain when it would take into account externalities in this way and how parties present this information. We note that the ACM refers to Dutch materials on Cost-Benefit Analysis.

3.38 On a related point, we note that the Commission's 2004 Exemption Guidelines confirm that future benefits are relevant (albeit with some discounting for the fact that these benefits are in the future). This is certainly appropriate as the need to consider future generations (future 'consumers') is central to the very concept of sustainability. However, when discounting for future benefits, the Commission should also consider future costs which may be increasing.

e) **More explicit guidance is needed on when the indispensability criterion is met**

3.39 Guidance would be useful on when the Commission is satisfied that a sustainability agreement does not impose on the parties restrictions that are unrelated or unnecessary to the fulfilment of its objective benefits.

3.40 The Commission has been through this thought process in relation to sustainability benefits. In *CECED* [29] the Commission was satisfied that industry-wide targets, information campaigns and ecolabels would not have been a viable way of achieving the same objectives as the restrictions under consideration. However it would be useful if the Commission could share its thinking in relation to other justifications. This could include:

- where a restriction is needed in order to overcome a first-mover disadvantage (e.g. by avoiding free riding on investments to set up a label)
- to achieve economies of scale to set up and monitor a standard
- to align and focus parties' sustainability efforts
- where individual businesses – even with strong buying power – lack the necessary leverage to induce systemic changes required in the supply chain

[29] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32000D0475

4. Part 3: Merger control

Question 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?

3.1 We are not aware of any evidence suggesting that approved mergers have "slipped through the net", and harmed consumers by reducing their choice of environmentally friendly products and/or technologies. Whilst such situations may exist, we believe that the current framework for assessment under the EU Merger Regulation (the "EUMR") already offers a solution to remedy such problems. Indeed, recent the decisional practice of the Commission indicates that the merger control assessment already takes into account sustainability concerns.

3.2 In the context of a substantive assessment, the Commission can consider sustainability when defining the relevant market. For example, environmentally friendly products can be distinguished both on the demand-side and on the supply-side. An example of this can be found in *Korsnas/Assidoman Cartonboard,* where the Commission considered whether White/Brown liquid packaging cartonboard predominantly used in Europe was a narrower and separate market based on "lower cost and environmental considerations".[30] This was also the case, for example, in *Aleris/Novelis,*[31] where the EC considered that lightweight aluminium used for the production of fuel-efficient vehicles with reduced emissions could be considered to form a separate product market.[32] With consumer choices moving towards environmentally friendly products and/or technologies, as well as regulatory requirements increasingly emphasizing environmental qualities of products and technologies, we expect this tendency to delimit market definitions based on environmental grounds to increase.

3.3 Furthermore, sustainability can be taken into account when assessing whether a transaction is compatible with the EUMR. According to Article 2 (1)b of the EUMR, the "*development of technical and economic progress provided that it is to the consumers' advantage and does not form an obstacle to competition*" is a criterion in the substantive assessment of mergers under the EUMR. In addition, EU merger control has to take into account the fundamental objectives of the EU as provided for in Article 3 of the Treaty on the European Union and includes "*work*[ing] *for the sustainable development of Europe*" and ensuring "*a high level of protection and improvement of the quality of the environment*". The practical outcome of the application of these principles can be seen in recent important decisions. For example, in *Aurubis/Metallo Group Holding*[33], Commissioner Vestager explicitly referred to the European Green Deal in a press release, stating that a "*well-functioning circular economy in copper is important to* ensure *a sustainable usage of resources in the context of the European Green Deal. This is why we carried out an in-depth investigation of the merger*".[34]

3.4 As a consequence, we believe that the current EUMR framework is already capable of taking into account sustainability factors and that further regulatory proposals to take into account the choice of environmentally friendly products and/or technologies for consumers are not required. Should the Commission seriously consider amendments of the EUMR for this purpose, we would strongly suggest undertaking a robust and detailed empirical study first. Only once and if a consistent body of EUMR cases demonstrating clear sustainability-based Type I errors[35] has been identified should further legislative changes be considered.

[30] EC, decision of 12 May 2006, M.4057 - *Korsnas/Assidoman Cartonboard*, para 17.
[31] M.9076 – *Aleris/Novelis* (decision not yet published), EC press release IP/19/5949.
[32] Similarly, in the EC, decision of 5 May 2015, M.7292 – *DEMB/Mondelez/Charger OPCO*, the Commission considered whether non-conventional produce including organic-grown coffee, could form a separate market from conventional coffee. The Commission has also considered whether standard or non-standard (certified and/or traceable) cocoa beans could form separate product markets. (M.7510 – *Olam/ADM Cocoa Business* (decision of 10 June 2015).
[33] EC, decision of 4 May 2020, M.9409 – *Aurubis/Metallo Group Holding*.
[34] EC, press release IP/20/801.
[35] I.e. the prohibition of mergers that are not leading to a significant impediment of effective competition.

Question 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?

3.5 As explained above, we believe that environmental and sustainability considerations have their place in the current merger assessment framework under the EUMR. However, to the extent that a concentration cannot have any negative impact on competition, but have potentially adverse effects on the environment and sustainability, we believe that other regulatory tools (e.g. environmental approval procedures at national level) should take care of such concerns. It should be recalled that the EUMR is a competition-based tool for controlling the structure of markets.

3.6 In the alternative situation, (i.e. where a concentration may be important for the protection of the environment and the promotion of sustainability, but potentially leads to a significant impediment of effective competition ("SIEC")), we believe that there is currently little room in the toolbox of the Commission to overcome such concerns.

3.7 It should be recalled that efficiencies brought about by a concentration may counteract the effects on competition, and in particular the potential harm to consumers that it might otherwise have.[36] An appropriate place to consider environmental and sustainability objectives therefore is within the assessment of efficiencies. Whilst we will discuss this in more detail below, it is - from a merely practical perspective - important to note that not a single concentration was cleared on the basis of efficiencies that outweighed a SIEC since the adoption of the EUMR.[37] We consider that the Commission's approach to efficiencies is restrictive as important elements, such as long-term fixed cost savings in industries with long investment cycles, are not recognized.

3.8 Unless the approach to efficiencies is reconsidered and made more flexible, we believe that the recognition of environmental and sustainability objectives will be inherently difficult. The only other solution under the current EUMR in such a scenario would therefore be a conditional approval decision, which would eliminate the competition concerns by imposing a remedy - but this would potentially threaten the attainment of the environmental and sustainability objectives aimed at by the parties. A "political" mechanism overriding either a prohibition or a conditional approval decision in support of the environmental and sustainability objectives, such as that available in Germany (the Ministerial Authorization), by which prohibition decisions of the Bundeskartellamt can be overruled, is not foreseen under the EUMR.

<u>Efficiencies as a tool to achieve the Green Deal objectives</u>

3.9 Article 2(1) of the EUMR allows for efficiencies to be taken into account as part of the assessment of a merger. Efficiencies can counteract negative competition effects, so that on balance a merger may not significantly impede effective competition.[38] It follows that notifying parties could claim efficiencies to successfully clear an otherwise potentially anticompetitive merger. In short, environment and sustainability could weigh in the competitive assessment, and counterbalance any anticompetitive concerns, e.g. a price increase.

[36] C, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Horizontal Merger Guidelines")*, [2004] OJ, C 31/5 at 76-78.

[37] However, in *UPS/TNT* the Commission considered efficiency claims raised by UPS but ultimately concluded these did not outweigh SIEC in the various affectednational markets. For this reason, the concentration was ultimately prohibited (EC, decision of 30 January 2013, M.6570 – *UPS/TNT Express*). Please note, however, that the Commission accepted effiencies arguments in the abovementioned *Korsnas/Assidoman Cartonboard* case based on cost, personnel and production savings - though the Commission also found that the concentration was unlikely to raise non-coordinated effects concerns based on the presence of significant competition from capacity-unconstrained Stora Enso, significant countervailing buyer power and growing competition from outside the EEA.

[38] EUMR, recital 29.

3.10 In order to have efficiencies considered in the substantive review of a merger, three conditions must be satisfied: the efficiencies must (i) benefit consumers; (ii) be merger-specific; and (iii) be verifiable.[39] We strongly believe that any efficiency considered in a merger review should by necessity be merger-specific. We will therefore only focus on the other two tests.

3.11 With regard to the first test, i.e. the "benefit to consumers", the Commission's Horizontal Merger Guidelines state that "*efficiencies should be substantial and timely, and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur.*"[40] Under the current rules, efficiencies have to be generated in the same relevant market(s) where competition concerns arise. A potential deviation in approach could be to accept efficiencies also in different markets. An example could be a merger leading to price increases or reduction of innovation, hence detrimental to consumers, but also bringing about a significant reduction in the CO2 emissions of the manufacturing process.

3.12 Positive *social* externalities (such as decreased levels of pollution) could therefore be considered even if they were not specific to the relevant market(s) where competitive concerns arise. However, while it would be uncontentious that such efficiencies would benefit consumers and the community, they may be difficult to prove.

3.13 A deal's impact on the environment and sustainability can be hard to quantify.[41] It may therefore be difficult to assess whether the claimed efficiencies are likely to materialise, and are substantial enough to counterbalance potential consumers' harm. A reduction of CO2 emissions may materialise (with a reasonable degree of certainty), but it will never be certain. Similarly, it will take time before any similar efficiency can occur, and this will by definition add uncertainty to the merger review. Regulators should therefore consider a longer timeframe for any efficiency assessments.

3.14 The economic tools used until now will not be able to assist regulators (and lawyers) in claiming efficiencies, as these will be hard to quantify. New economic tools and methodologies will have to be developed to provide guidance on how non-price and non-cost based benefits can be quantified (i.e. given economic value that can then be taken into the assessment).[42] There is otherwise a risk that any efficiency assessment will end up being political in nature.

<u>No clearly identified need for sustainability-driven clearance mechanism</u>

3.15 We do not currently see any need to introduce a mechanism overriding prohibition decisions of the Commission, such as the Ministerial Authorization in Germany.

3.16 Firstly, we do not see a clearly identified need for such an instrument. The number of prohibition decisions under the EUMR is relatively low, with 30 prohibition decisions in just over 30 years. In addition, we are not aware of any criticism about the lack of sustainability considerations in past prohibition decisions. Secondly, unlike the situation in Germany (where a Minister overrules the decision of a higher federal authority within the Ministry's portfolio), a European override mechanism would imply the Commission overruling itself on the basis of different considerations. Alternatively, the decision should be allocated to another EU institution, possibly the European Parliament.

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[39] EC, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Horizontal Merger Guidelines")*, [2004] OJ, C 31/5 at 76-78.
[40] *Ibid* at 79.
[41] Horizontal Merger Guidelines at para 86.
[42] Note, we recall that in the Commission's assessment of various airline alliances, the Commission allowed a quantification of time-savings for passengers, in which time itself was given an economic value. Emissions allowances are already traded. It is not inconceivable that other environmental and sustainability objectives can be given an economic value.

Procedural improvements

3.17 We welcome the Commission's past initiatives concerning simplification.[43] We believe that the amendments successfully reduced the number of transactions with little or no impact in the EU that had to be notified under the normal procedure.[44] We believe, however, that the burden under the simplified regime is still substantial for the companies concerned, particularly in those cases where corporate documents are still required to be provided under Section 5(3) of the Short Form CO. We would therefore recommend the Commission to consider in more detail whether certain transactions with no or little impact in the EU could not be wholesale exempted from formal notification. Candidate cases for such treatment would be full-function joint venture companies set up outside of the EEA for off-shore wind projects (a large number of such projects have been notified to the Commission without issues).[45]

3.18 We have been made aware of the upcoming consultation of the Commission regarding simplification of the merger procedure. This should shed more light on the cases where simplification could also help to implement the Green Deal to the benefit of sustainability.

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[43] Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings Text with EEA relevance OJ L 336, 14.12.2013, p. 1–36.

[44] The proportion of simplified cases in the period 2004-2013 was at 59% for all notified cases on average; the proportion following the implementation of the simplification package was increased to 69% in 2014 and was constantly above that level until 2019 (77%).Commission Staff Working Document accompanying the Report on Competition Policy 2019 of 9 July 2020, COM(2020) 302 final, p. 17-18.

[45] For example, Case M.9535 - *Jera/Macquarie/Swancor/Formosa 2*, which concerned Formosa 2: the construction and operation of the Formosa 2 offshore windfarm located off the coast of Miaoli County, in North-West Taiwan. We note also the finding of the Court of Auditors in its Special Report published on 18 Nov. 2020 *The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight* at p. 24: Around 25 % of the simplified notifications submitted between 2010 and 2017 concerned cases where large companies acquired joint control over another company (joint venture) with limited or no current or planned future commercial activities in the EU. For example, a large EU company creates a joint venture with a company in Asia but the joint venture will only be active on markets in Asia. However, such transactions do not normally raise any competition concerns for the internal market.