20 November 2020

Competition Policy supporting the Green Deal

Call for Contributions

Input from the In-House Competition Lawyers' Association (ICLA)

<u>Introduction</u>

1. The In-House Competition Lawyers' Association ("ICLA") is an informal association of in-house competition lawyers across Europe, Asia and America. There are currently more than 450 members based in different countries around the globe. The Association does not represent companies but is made up of individuals as experts in the area of competition law. Because of their role, in-house competition lawyers have a clear interest in a simple and straightforward competition law regime that prioritises legal certainty, minimises costs, and does not represent a disproportionate demand on businesses' time and resources. This submission represents the position of ICLA and does not necessarily represent the views of all its individual members.

2. ICLA is grateful for the opportunity to contribute to the discussion on how competition policy can support the Green Deal. These issues are of utmost importance and urgency.

3. In our response, we will focus on Parts 2 (antitrust) and 3 (merger control) of the call for contributions document and the questions raised therein.

<u>Contribution</u>

Part 2: Antitrust rules

<u>Summary</u>

4. ICLA encourages further clarifications and comfort be given by the European Commission ("EC") on the assessment of agreements that serve the objectives of the Green Deal.

5. Climate and environment emergencies call for "specific treatment" in the form of (i) separate guidance and the return of comfort letters, and (ii) a slightly reoriented consumer welfare analysis.

20 November 2020

<u>Question 1</u>: 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).

Example 1:

6. Greening leather supply chains is difficult for one business, unless a significant part of the supplier's customers align to bring standards up. Tanneries may not be able to make the necessary investments to improve processing practices without investment from their customers. Such investments are however unlikely to be made by one customer given that competing businesses would benefit from these (free-riding). A concerted effort is needed, which may require agreement on purchasing terms. Absent such concerted effort, incentives are difficult to allow one brand owner to materially improve its supply chain. Similarly, different (environmental) requirements given to suppliers is impractical for suppliers and means that a lowest common denominator approach may be the result which is the opposite of what customers and suppliers want.

Example 2:

7. The aviation industry is seeking to reduce its environmental footprint. Old aircraft decommissioning and replacement by more environmentally compliant planes could help achieving Green Deal objectives. Decisions by individual companies are unlikely to be sufficient to achieve the scale needed to attain the industry's carbon-neutral growth target and may in any event lead to a first-mover disadvantage to the detriment of the business which opted for the transition to more environmentally compliant aircraft. It is unclear whether and the extent to which competing businesses could join forces to set up and implement a strategy in this regard. Agreements to replace old aircraft by cleaner alternatives could lead to higher prices for passengers. Such agreements could also, however, favor the replacement of the most inefficient capacity with more environmentally compliant capacity and thus contribute to the Green Deal objectives.

Example 3:

8. Another example relates to data sharing and data pooling between competitors for the purpose of identifying manufacturing processes that are less harmful to the environment or seeking system optimization. These data sets may include commercially sensitive information. The implementation of safeguards such as reliance on third parties or the addition of clean teams or black boxes often translate into layers of complexity which can be a project killer (especially for greening projects that are sometimes seen as being capable of cutting as non-essential). In the telecoms sector, telecom operators are increasingly using Big Data and AI applications to optimize system performance to make networks as sustainable and cost-efficient as possible. The data transmitted by smart meters is used for the targeted implementation of energy efficiency solutions, such as the application of standby mode to limit energy consumption when traffic is slowed down. Businesses would benefit from additional guidance on how to assess bona fide joint environmental actions.

Example 4:

9. The aviation industry is of the view that Sustainable Aviation Fuel (SAF) is a game changer as it can cut life-cycle emissions by about 80%. The problem is that there is not enough SAF being produced today. To

encourage the development of SAF on a global scale, airlines could joint efforts and commit to buying certain volumes, thus stimulating investment in the production and supply of SAF in different regions of the world. Such a joint purchasing exercise raises questions related to, e.g., risks of oligopsony power. Another question is whether airlines could decide to only procure SAF that meet certain emissions standards, even if such standards go beyond legal minimum requirements?

Example 5:

10. Infrastructure sharing agreements are a usual and effective way for telecom operators to deploy networks across Europe due to their procompetitive effects: substantial efficiencies, costs-savings, reduction of environmental impact, co-investments; as well as the benefits for consumers: increase coverage, innovation, high quality and speeder networks. In the process of digitalization, ultra-fast fibre and 5G networks have become key to drive the de-carbonization of economies while at the same time reducing the emissions of the digital sector (enablement effect). The huge investment required for network deployment with ambitious expectations from public authorities and consumers regarding roll-out timing and coverage make key the cooperation among telecom operators to ensure business sustainability, improve efficiency of energy consumption, reduce environmental impact and satisfy high quality connectivity demand in accordance with regulatory obligations.

Example 6:

11. Other instances where partnering with competitors could lead to substantial benefits from an environment perspective are in relation to aircraft or ground operations. Thus, an agreement between airlines to fly slower could impact the quality of the service to passengers but also lead to the optimization of, e.g., fuel efficiency. Another example relates to the sharing of ground-based facilities among competitors, which could lead to a reduced use of Auxiliary Power Units (APUs) through substitutes and have a positive impact on the environment (reduction of CO_2 and NO_x) and fuel consumption.

***Question 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…)?**

12. The Green Deal provides an action plan to "*boost the efficient use of resources by moving to a clean, circular economy and to restore biodiversity and cut pollution.*"[1] The EU aims in particular to be the first climate-neutral continent by 2050.

13. It is unquestionable that the EU ambitious Green Deal targets will not be achievable without individual businesses taking their share of responsibility and without the possibility for these businesses to discuss and implement various forms of environment-conscious or climate-conscious agreements.

14. Two key points are worth mentioning at this stage:

    (i) In many cases, the pursuit of environment-conscious or climate-conscious objectives by one single business is likely to create a first-mover disadvantage. Why be a pioneer and invest,

[1] European Commission, *A European Green Deal – Striving to be the first climate-neutral continent*, https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en#actions

e.g., in green production processes if your competitors can easily undercut you as a result? The fear of competitive disadvantage hinders the development of sustainability initiatives.[2]

(ii) Ambitious targets call for ambitious projects, some of which may only be achievable through joint mobilization, including collaborative efforts among private businesses. Competition law (or at least certain concepts or principles attached to it) may hamper (or may be perceived as hampering) joint industry efforts aimed at achieving sustainable objectives. Yet, competition law must be part of the solution[3], not part of the problem.

15. Responses to the Covid-19 pandemic by antitrust authorities around the world have shown that extraordinary circumstances may call for loosening[4], or at least a more flexible approach towards, rules governing certain types of collaboration to ensure the attainment of specific objectives.

16. Climate change and environmental degradation are emergencies; (European) competition authorities cannot stand idly. ICLA encourages further clarifications and comfort be given by the EC on the assessment of agreements that serve the objectives of the Green Deal, to turn legal possibilities into environment-conscious or climate-conscious business opportunities and concrete realities for European citizens.

Comfort

17. The EC has a wide margin of discretion regarding whether to open an investigation into a possible infringement of competition law. In cases where there is a high likelihood that joint industry efforts would not fall under Article 101(1) TFEU or at least be exempted under Article 101(3) TFEU, relevant parties

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[2] See, e.g., D. Soto Abril, Antitrust, Sustainability and Living Wages/Living Incomes, CPI Antitrust Chronicle, July 2020: "*A study by the Fairtrade Foundation UK on industry attitudes towards multi-stakeholder collaboration in the UK grocery sector found that the fear of competitive disadvantage is among the main contributors why market actors are not acting unilaterally on sustainability issues, in particular on paying and influencing higher prices to producers. Through a series of interviews with businesses, brands, retailers and industry experts, the Fairtrade Foundation revealed that collaboration amongst companies and industry actors is necessary to ensure businesses commit to paying living wages and incomes. The respondents to the survey believe that collaboration among the economic actors is necessary to achieve key benefits for both the producers and consumers while effectively also embodying the real environmental costs of products. It is – once again – stressed that the first-mover disadvantage is a real issue.*"

[3] Competition law should also be relied upon to prevent abuses by businesses which (i) use specific types of green collaboration as, e.g., a cover to collude more widely than necessary to achieve climate- or environment-related objectives, or (ii) seek to jointly limit the development of, e.g., cleaner technologies or greener production processes.

[4] In Norway, the United Kingdom and Australia, several transport companies were granted a temporary exemption from the prohibition against anticompetitive agreements, thus allowing these companies to coordinate their schedules to maintain a minimum service for citizens (MLex, SAS and Norwegian given three-month exemption from Norway's antitrust laws, 18 March 2020; MLex, Isle of Wight ferry services competition rules suspended due to Covid-19, says UK government, 27 March 2020; MLex, Regional Express, Virgin Australia, Qantas Airways to coordinate on regional flight routes, 26 March 2020). New Zealand's competition authority issued guidelines to authorize agreements between businesses or individuals that are anticompetitive but are otherwise in the public interest, recognizing "that in some circumstances collaboration between businesses is much less likely to harm competition and that cartel provisions can form part of arrangements that have pro-competitive or benign competitive effects" (MLex, New Zealand companies face new competition guidelines to govern Covid-19 collaboration, 1 May 2020).

should be able to get some comfort (whether formal or informal) from the EC that it will apply its administrative priorities and not intervene.

18. In April 2020, the EC addressed a letter providing comfort under Article 101 TFEU for certain cooperation practices aiming at responding effectively to some of the challenges faced by the pharmaceutical industry as a result of the Covid-19 outbreak. ICLA is of the view that climate change and environmental degradation call for the exceptional (probably temporary) return of comfort letters allowing cooperation between businesses to tackle climate and environment emergencies and effectively contribute to the Green Deal, and offering recommendations on how to establish safeguards to limit antitrust exposure.

19. In the press release accompanying the EC guidance on allowing limited cooperation among businesses during the pandemic, the EC indicated that, in many cases, oral guidance given to companies was enough.[5] ICLA is however of the view that comfort letters would be more effective in addressing novel and/or unique questions. To the extent that guidance is indeed provided (see section below) and case law is developing, the EC's approach towards specific types of collaboration will become clearer and the need of comfort letters will likely decrease over time. Yet, as things currently stand, guidance in the form of comfort letters would certainly be a welcome development.

Guidance

20. Formal or informal comfort require the parties to engage with the EC. Such engagement requires, however, the parties to have, e.g., a Memorandum of Understanding signaling the willingness of the parties to move forward with some sort of cooperation. Yet, few individual businesses reach that stage. Many joint climate- or environment-related projects – or rather ideas – are abandoned at inception phase, because of fear of competition law implications.

21. As indicated above, businesses (will) play a crucial role in attaining the Green Deal objectives. They need clear guidance (e.g., in the form of a Communication on environment-conscious or climate-conscious agreements) setting out the main criteria that the EC will follow in assessing such cooperation projects and in setting its enforcement priorities in this regard.

<u>Question 3</u>: 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 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?).

22. In most cases, bona fide environment-conscious or climate-conscious agreements, aimed at stimulating innovation or enhancing product quality or production processes, will promote competition. However, the mere fact that an environment-conscious or climate-conscious agreement seeks to realize Green Deal objectives does not rule out that the agreement can be anti-competitive.

23. ICLA does not call for a revolution but is indeed of the view that the climate and environment emergencies call for "specific treatment" in the form of (i) separate guidance and the return of comfort letters (see

[5] Press release IP/20/618, 8 April 2020.

above), and (ii) a slightly reoriented consumer welfare analysis of environment-conscious or climate-conscious agreements.

24. ICLA shares the view that other authors[6] have already expressed, "*we face a climate emergency* [and] *we have a moral imperative* […] *to take action whenever and wherever we can.*"[7] The pursuit of Green Deal objectives therefore calls for a wider inclusion of, and more clarity on, climate and environment-related considerations in the interpretation of Article 101(3) TFEU.

25. To benefit from an exemption under Article 101(3) TFEU, an agreement must meet four cumulative conditions:

    (1) The agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress;

    (2) Consumers get a fair share of the resulting benefit;

    (3) The agreement is necessary to achieve these benefits and does not go beyond what is necessary;

    (4) The agreement does not lead to the elimination of competition in a substantial part of the market.

26. ICLA is of the view that not much "change" is required in relation to conditions 1, 3 and 4. Bona fide environment-conscious or climate-conscious agreements call however for a more progressive approach to condition 2.

Condition 1: The agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress

27. Improving the environment has already been recognized by the EC as a factor which contributes to improving production or distribution or to promoting economic or technical progress.[8]

28. Environment-conscious or climate-conscious agreements will meet the first condition of Article 101(3) TFEU if the parties can substantiate the claimed benefits either qualitatively or quantitatively.[9]

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[6] See, for example, S. Holmes, Climate change is an existential threat: competition law must be part of the solution and not part of the problem, CPI Antitrust Chronicle, July 2020; M. Dolmans, Sustainable Competition Policy, CLPD, Vol. 5, Issue 4 and Vol.6, Issue 1.

[7] See, for example, S. Holmes, Climate change is an existential threat: competition law must be part of the solution and not part of the problem, CPI Antitrust Chronicle, July 2020.

[8] See, e.g., XXVth Report on Competition Policy (1995), paragraph 85 and Commission decision of 24 January 1999 in Case IV.F.1/36.718. CECED, paragraphs 47-48 and 50: "*The agreement is designed to reduce the potential energy consumption of new washing machines by at least 15 to 20 %* […]. *Washing machines which, other factors being constant, consume less electricity are objectively more technically efficient. Reduced electricity consumption indirectly leads to reduced pollution from electricity generation. The future operation of the total of installed machines providing the same service with less indirect pollution is more economically efficient than without the agreement* […]. *The agreement is also likely to focus future research and development on furthering energy efficiency beyond the current technological limits of category A, thereby allowing for increased product differentiation amongst producers in the long run.*"

[9] See, e.g., Autoriteit Consument en Markt, Draft Guidelines – Sustainability agreements: Opportunities within competition law.

Condition 2: Consumers get a fair share of the resulting benefit

29. The Guidelines on the application of Article 101(3) TFEU provide that the assessment of the "*benefits flowing from restrictive agreements is in principle made within the confines of each relevant market to which the agreement relates*" (paragraph 43, our emphasis) and 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*" (paragraph 85, emphasis added).

30. ICLA is of the view that the definition of "consumers" shall not be limited to the direct purchasers or users of the products or processes at issue in the environment-conscious or climate-conscious agreements.

31. A key problem with, e.g., carbon emissions is that they involve negative externalities, imposed by a consumer on its fellow and future citizens.

32. These **negative externalities cannot be ignored** and call for the notion of "consumers" to include (i) current and future purchasers or users, (ii) direct or indirect purchasers or users, and even (iii) the "society".[10]

33. Furthermore, they necessitate a slightly different, progressive, approach to the concept of "fair share." As indicated in the Autoriteit Consument en Markt's draft guidelines on sustainability agreements, "*it can be fair not to compensate users fully for the harm that the agreement causes because their demand for the products in question essentially creates the problem for which society needs to find solutions.*"

34. ICLA is of the view that, in the case of bona fide environment-conscious or climate-conscious agreements, the fact that the society at large enjoy benefits such as carbon emission reductions should lead to a **presumption** that the society is getting a fair share of the benefits pursuant to Article 101(3) TFEU.

Condition 3: The agreement is necessary to achieve these benefits and does not go beyond what is necessary

35. The parties to the agreement will have to demonstrate that the restrictions at issue make it possible to perform the activity in question more efficiently than would likely have been the case in the absence of the restrictions concerned.

36. This third condition also invites thought to be given by businesses on potentially less restrictive ways of achieving Green Deal objectives.

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[10] See Commission decision of 24 January 1999 in Case IV.F.1/36.718. CECED, paragraph 56: "*The Commission reasonably estimates the saving in marginal damage from (avoided) carbon dioxide emissions (the so-called "external costs") at EUR 41 to 61 per ton of carbon dioxide. On a European scale, avoided damage from sulphur dioxide amounts to EUR 4000 to 7000 per ton and EUR 3000 to 5000 per ton of nitrous oxide. On the basis of reasonable assumptions, the benefits to society brought about by the CECED agreement appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines. Such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines*" (our emphasis). See also M. Dolmans, Sustainable Competition Policy, CLPD, Vol. 5, Issue 4 and Vol.6 Issue 1: "*an agreement to reduce pollution may increase prices, but reduce the same consumers' healthcare costs and increase their life expectancy and quality of life by more than the extra amount they pay for the cleaner products.*"

Condition 4: The agreement does not lead to the elimination of competition in a substantial part of the market

37. It is expected that most environment-conscious or climate-conscious agreements will meet this condition as it is expected that the parties involved will continue to compete on key parameters.

Additional comments

38. Joint industry efforts about climate and environment sometimes have an impact beyond the borders of the European Union. ICLA encourages the EC to actively engage in discussions in international fora, with relevant regulators and competition authorities, to explore how best to consider climate and environment in their policies and enforcement practice.

Part 3: Merger control

Summary

39. ICLA submits that EU merger control policy and practice should be reviewed, and if necessary, adjusted to allow European competition enforcers to better facilitate concentrations that create businesses with stronger environmental credentials.

40. Adjustments could be made to various parts of the EU merger control 'toolbox', including the EC's practice in relation to market definition, efficiencies, and remedies.

41. ICLA also encourages the EC and national regulators to proactively address the challenges that Green Deal related adjustments to EU merger control policy may pose to the system, such as increased complexity, uncertainty, and global divergence.

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?

42. ICLA shares the view that other authors[11] have already expressed, which is that the **consumer welfare standard** under EU law generally is broad enough to accommodate environmental and sustainability concerns.[12] Consumer welfare can be affected not only by short-term price effects, but also non-price effects such as an increase or decrease in quality, choice, or innovation. The increasing popularity of products focusing on sustainability (e.g., meat substitutes) is testament to the fact that environmental qualities are relevant parameters not only for choice, but also quality and innovation.

43. The ICLA also agrees with the position expressed in the consultation paper that mergers, in certain circumstances, have the potential of eliminating the pressure between firms to innovate on sustainability aspects of some products or production processes. Accordingly, mergers may affect consumer welfare by reducing consumer choice of environmentally friendly products or technologies.

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[11] See, for example, Christina Volpin, *Sustainability as a Quality Dimension of Competition: Protecting our Future (Selves)*, in: CPI Antitrust Chronicle July 2020, pages 8-18.

[12] In particular, if, as discussed in paragraph 32 above, the notion of "consumers" includes (i) current and future purchasers or users, (ii) direct or indirect purchasers or users, and even (iii) the "society".

44. An important counter-balancing factor to consider, however, is that a rapidly increasing range of external stakeholder forces (including investors, financiers and insurers) are shaping expectations for environmental and sustainability performance of companies, necessitating quality and innovation (with ancillary benefit to consumer welfare) regardless of a firm's market position or the impact on a competitor.

45. In ICLA's view, there are at least two situations where mergers can cause consumer harm:

I. Removal of an emerging, more eco-friendly competitor or supplier

46. The most obvious examples of mergers reducing choice and quality of, or innovation in relation to, eco-friendly products and technologies are acquisitions that **take out a potential new competitor developing eco-friendlier solutions than the incumbent**. Such acquisitions would prevent the eco-friendlier solution to be brought to market and, hence, would be inconsistent with the objectives of the Green Deal. However, given the growing pressure from a range of stakeholders on businesses to fulfill environmental and sustainability expectations, including when conducting M&A, we consider such outcomes to be increasingly rare.

47. Less obvious and possibly more difficult to detect are acquisitions that remove a player that does not necessarily have better environmental credentials but develops a novel product or technology that is an **important intermediate step** in the transformation of a (downstream or related) eco-friendlier product or technology. We imagine, for example, software developers, internet platforms, service providers, financiers, or suppliers of essential inputs to eco-friendly products or technology potentially falling into that bucket.

II. Anti-competitive mergers

48. More generally, mergers that are deemed to be significantly impeding effective competition based on existing standards, for example because they help create or strengthen a dominant market position, have a real potential to create outcomes that are also sub-optimal from an environmental or sustainability perspective. We see at least two scenarios here:

- First, anti-competitive mergers may reduce innovation and stifle technological process in the relevant market. As technological progress is key for achieving environmental and sustainable development goals, such mergers have the potential to be detrimental to the objectives of the Green Deal.
- Second, anti-competitive mergers can lead to price increases for essential inputs for downstream businesses developing eco-friendly and more sustainable products (e.g. lithium and other chemicals for electric car batteries). Again, such mergers could be detrimental to the objectives of the Green Deal although the impact would likely be indirect.

<u>Question 2</u>: 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?

49. Concentrations, i.e., mergers, acquisitions, and ("full-function") joint ventures, can be important accelerators of technological progress. Concentrations can increase economies of scale and make operations more cost-efficient, allowing for higher investments into research and development and provide the "balance sheet" required to sustain innovation and deploy cutting-edge technology. They can

also help prevent eco-friendly businesses models and technologies from exiting the market because of lack of scale.

50. Technological progress is essential for the development of greener production processes and products. The faster such environment-friendly transformation can take place, the better for the environment and the implementation of the Green Deal.

51. The technologies required to implement the Green Deal will be increasingly novel, untested and dependent on long-horizon R&D investment. Concentrations can also create the financial resources needed to fund such commitments.

I. Express recognition of environmental concerns

52. For these reasons, ICLA submits that merger control policy and practice should be reviewed, and if necessary, adjusted to allow European competition regulators to facilitate concentrations that create businesses with stronger environmental credentials, and both commitment and financial resources to fund the technological innovation required.

53. To achieve these goals, **ICLA advocates for clear, express recognition of environmental concerns** in the competition ruleset and relevant practice guidelines.

54. According to an OECD report of 2016, several countries already have clauses expressly permitting the state to take into account environmental concerns when reviewing M&A, e.g. Australia (foreign investment control), Spain and South Korea (merger control).[13]

55. In past merger cases, the EC seems to have already acknowledged the potential impact of mergers on the environment.[14] However, an express recognition in the EU competition ruleset and practice guidelines would emphasize the importance, and add to the legitimacy, of environmental and sustainability considerations in merger reviews.

II. Preliminary thoughts on implementation

56. The following sets out ICLA's initial thoughts on the practical aspects of integrating environmental concerns into EU merger control policy and practice.

(1) Market definition and closeness of competition

The EC could consider adjusting the guidelines on demand and supply side substitution. If the prevailing SSNIP test would be supplemented by normative criteria, products and services with evidently superior eco-friendly characteristics and sustainability features could be excluded from the definition of the relevant product market for the incumbents' products or services. This could,

[13] OECD, Public Interest Considerations in Merger Control (2016), available at: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)3&docLanguage=En, p. 4.

[14] Press Release by the EC, M.9409, Aurubis/Metallo Group Holding, November 19, 2019, https://ec.europa.eu/commission/presscorner/detail/en/ ip_19_6305: "*[a] well-functioning, competitive copper recycling industry is key to meet the future needs of European industry and to limit the impact on the environment.*" (emphasis added); IV/34.252, Philips-Osram: "*The use of cleaner facilities will result in less air pollution, and consequently in direct and indirect benefits for consumers from reduced negative externalities*" (emphasis added).

for example, facilitate joint ventures between two incumbents in the area of clean technology that would otherwise not be possible due to high market share additions or, in case of joint ventures between vertically related companies, foreclosure concerns. Alternatively, the EC could consider such normative criteria when assessing the closeness of competition between the merging parties. However, such adjustments may equally facilitate the removal of an emerging, more eco-friendly contender by an incumbent through a (killer) acquisition. Because of the ambivalent effects of any adjustments of the EC's toolbox at that level of market definition and/or closeness of competition, ICLA's preliminary view is to refrain from making such adjustments but instead focus on the assessment of efficiencies and the design of remedies as they allow for more tailor-made solutions (see immediately below).

(2) Efficiencies

When assessing whether a merger would significantly impede effective competition, the EC generally takes into account efficiencies the merger brings about, provided they demonstrably benefit consumers (ideally, on the basis of a slightly expanded consumer concept[15]), are merger-specific and verifiable. The EC, going forward, **should consider adapting its policy as regards efficiencies** to facilitate incorporating positive environmental effects in its overall competitive appraisal of the merger. Possible pathways include the following:

(i) Exempt environmental benefits from the timeliness requirement (para (83) of the Horizontal Merger Guidelines), allowing the EC to take full account of long-term climate effects; and

(ii) Relax the standard of proof for merger-specificity (para 85), and the standard of verifiability, for environmental effects (para 86) to make it easier for the EC to clear mergers based on positive environmental effects.

Such adjustments could also benefit the review of non-horizontal mergers (see para (53) of the Non-Horizontal Merger Guidelines).

(3) Remedies

The EC should consider adapting its remedies policy to cater for environmental commitments by the merging parties. Environmental commitments can include commitments to discontinue outdated technologies or unsustainable business lines, make investments into environmental R&D, implement sustainability policies and processes, make IP rights available to third partiesetc. Environmental commitments could help the EC better monitor and control that the efficiencies promised by the merging parties are realized. As environmental commitments can include long-term behavioral commitments, the EC should review its preference for divestitures and other structural remedies for environmental commitments specifically. The EC should also consider adding internal resources to allow the EC to oversee the implementation of environmental commitments over a longer period post-completion.

[15] See para 32 above.

III. Potential practical challenges

57. The incorporation of sustainability concerns may pose certain practical challenges for merger control reviews. Any reform of the competition rules would need to anticipate those challenges and provide for the appropriate solutions. ICLA makes a few suggestions in this respect.

Increasing level of complexity

58. We imagine that assessing the green credentials of an acquirer, its operations and technologies can be a complex undertaking. Such assessment may involve intricate, and even controversial, scientific assumptions.

59. While widely available, regulators may not be able to fully rely on Environmental, Social, Governance (ESG) public ratings. They reportedly suffer from subjectivity and inconsistency.[16] Also, public ratings typically rate a company or group of companies (often listed) in their entirety, not individual business lines or technologies as may be required in the context of a merger review.

60. Competition regulators may have to make their own assessments based on data and expert opinions provided by the parties. Best practices may have to be established to ensure transparency and accountability of the review. Competition regulators may have to recruit their own expert team to assess the accuracy and credibility of the parties' submissions. Such environmental analysis needs to be framed in a way that the EU and national courts can understand and evaluate its meaning and significance. The EC would need to obtain and verify such data and conclude the analysis within the existing timeframes available under the EU Merger Regulation.

Managing uncertainty

61. We expect competition regulators to have to manage significant uncertainty when making eco-friendliness and/or sustainability a relevant, or even determining, factor in merger reviews:

    (i) Given the pace of scientific and technological progress, the assessment of the environmental advantages of one business or technology over the other can change over time. What seems as scientific consensus at the time of the review, could later turn out to be an untenable position.

    (ii) Also, a technology may bring both environmental benefits and risks (eg nuclear energy lowers carbon emissions but can pose serious public health issues in case of accidents). At the time of review, the benefits may be better understood than the risks, or vice versa.

    (iii) Lastly, merging parties may have the intent to pursue an environmental-friendly strategy, but circumstances may change post-closing so that the strategy is never implemented.

[16] For example, a 2018 study by the American Council for Capital Formation found significant disparities in the accuracy, value, and importance of ratings by rating agencies, for various reasons such as lack of standardization as well as company, industry and geographic bias. Available at: https://accfcorpgov.org/wp-content/uploads/2018/07/ACCF_RatingsESGReport.pdf (last visited on 8 Nov 2020).

Avoid inconsistency with other M&A screening regimes

62. M&A activity in the EU is subject to various, partially overlapping, screening regimes. The EC should take into account the existence of those regimes when making Green Deal related adjustments to EU merger control policy. This is to maximize the effectiveness of such policy changes and avoid inconsistent outcomes. The following screening regimes seem particularly relevant in the context of the Green Deal:

(i) Foreign Direct Investment (FDI) screening, which is particularly relevant where the acquirer is from outside of the EU / EFTA. As the example of Australia (Foreign Investment Review Board) shows[17], environmental considerations can play a role in FDI reviews and, to the extent they do at the EU or the Member States level, a certain level of harmonization and convergence should be sought.

(ii) Once implemented, EU regulation on foreign subsidies could result in another separate review mechanism for mergers and acquisitions (called "Module 2" in the relevant White Paper[18]). The EU interest test proposed in the White Paper encompasses public policy objectives such as "climate neutrality" and "protecting the environment".[19] Again, some alignment between the different tests should be sought.

(iii) Industry-specific approval requirements, e.g. for investments into credit institutions or other regulated entities, and to the extent the "fit and proper" assessment can, or in fact must extend, to environmental credentials of the acquirer under applicable laws.

Avoid international divergence

63. Mergers subject to review by the EC or, the case may be, competition authorities of the Member States, are often subject to parallel reviews outside of the EU. Effective implementation of environmental policies in merger reviews requires a **certain consensus and convergence across different jurisdictions**. ICLA encourages the EC, once a set of policies or guidance has been formulated, to engage the global antitrust community through the various platforms (International Competition Network (ICN), bilateral cooperation, international conferences) to seek alignment with other key regulators globally on environmental concerns.

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[17] See Australia's Foreign Investment Policy 2020, available at https://firb.gov.au/sites/firb.gov.au/files /inline-files/2020-foreign-investment-policy.pdf (last visited on 11 Nov 2020): "*Investments must also be consistent with the Government's objectives in relation to matters such as environmental impact.*" (emphasis added)
[18] White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final.
[19] *Ibid*, page 17.