ETUC Submission to the European Commission Call for Contributions on Competition Policy supporting the Green Deal and Sustainable Development

The European Trade Union Confederation (ETUC) represents 90 national confederations from 38 countries with 45 million members, across all sectors, including also 10 sectoral European Trade Union Federations. The ETUC is a recognised social partner to the EU under the Treaties.

The ETUC supports the European Green Deal, and strongly believes in the need of this EU flagship initiative to guide further policy developments across all policy fields to enable the EU to reach climate neutrality. For the ETUC, it is equally clear that EU climate action must entail a strong social dimension, to promote a just transition and the creation of quality jobs.

Mainstreaming sustainable development in EU policy making and actions require economic, social and environmental considerations to be put on an equal footing and to be assessed with the same level of detail and accuracy. UN Sustainable Development Goal 8 on Decent Work aims to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all. Clearly, social and environmental issues can never be seen as opposite interests. Europe cannot be either green or social – it has to be both. In this context, it should also be recalled that the sustainability goals of the UN 2030 Agenda are indivisible.

For the same reasons, the ETUC is calling for a revision of the EU legal framework on competition, with a view to promote a fairer, more inclusive and sustainable competition policy. In this regard, EU competition law must also respect and protect social, workers' and trade union rights, and contribute to the creation of quality employment, fairness and upward social convergence. It is high time the EU rethinks its policy framework on competition to make sure it does not stand in the way of environmental and social progress.

To set out the broader constitutional legal framework under which EU competition law operates, it is worth recalling the fundamental values, principles as objectives of the Union, as defined by the Treaties. Pursuant to Article 3 TEU, the Union shall promote the well-being of its peoples and "work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment." "In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health", as set out by Article 9 TFEU. Similarly, Article 11 TFEU stipulates that "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development."

These programmatic provisions of the Treaties, together with the Charter of Fundamental Rights of the European Union, are binding on EU competition law in the same way as on any other EU policy area. In accordance with Article 7 TFEU "The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers." In other words, the EU competition policy framework must be interpreted and applied accordingly, in order to ensure greater policy coherence with

regard to the interplay between different EU policy areas, including the relation between climate, labour and competition law.

Flagship initiatives such as the Sustainable Development Goals, the European Pillar of Social Rights and the European Green Deal must be mainstreamed throughout the competition policy cycle, from the design of the competition policy framework, to the enforcement of competition rules and the monitoring of compliance. Similarly, these policy considerations should be mainstreamed throughout the three competition law instruments: State aid control, antitrust rules and merger control.

1. State aid control

It is crucial that EU rules on State aid fully respect and promote sustainable development. They must not prevent the EU and its Member States from achieving the objectives set by the Green Deal and the new Industrial Strategy for Europe. Achieving the objective of –55% GHG emissions by 2030 and carbon neutrality by 2050 will require massive changes in technologies and industrial processes in a short period of time. Therefore, State aid rules must provide public authorities with an enabling framework, contributing to a green and socially just transition within the internal market, stimulating sustainable investments in environmentally friendly solutions and quality jobs. Public funds should not be used to support undertakings, productions or innovations contributing to environmental or social dumping. Greater environmental sustainability should be pursued by always ensuring quality employment, job security and a socially just transition.

Against this background, it is regrettable that the Commission's 'Temporary Framework to support the economy in the context of the coronavirus outbreak' has not imposed any clear-cut obligations or limitations to use state aid granted due to the COVID-19 pandemic in a way that would further the EU's sustainability goals. There is indeed an urgent need to save jobs and businesses, and for the EU's recovery it will be even more important to aim for a 'levelling up' in terms of access to good quality employment and climate-friendly industries. Therefore, bailouts for companies should be delivered in a way that enables governments to influence corporate behaviour going forward, e.g. by taking equity shares in exchange for its support, thereby using its influence to ensure that company resources are used responsibly and fairly. It is imperative that such State aid leads to positive changes in corporate priorities and practice.

Much can already be done under the existing State aid regime, yet even more needs to be done to reach the ambition of a fully sustainable internal market. State aid rules must not stand in the way of governments to support transitional changes and to act with determination for a greener and more social Europe.

As Member States grant aid, they have to observe EU rules on State Aid. In this regard it is also worth recalling the duty of cooperation which stems from Article 4(4) 3 TEU, whereby "The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives." The EU legal framework must support Member States in ensuring a phase out of environmentally harmful subsidies. In this regard, subsidies directly or indirectly supporting businesses which rely e.g. on environmentally harmful subsidies represent a telling example of how the current application of State aid rules neither contribute to the aims of the Green Deal, nor to the protection of public health or workers' occupational health and safety.

In this context, it should also be noted that the transition to a climate neutral and circular economy will impact some regions and sectors more than others. Regions highly dependent on coal and other energy intensive industries will be particularly affected. In such cases, it should be made sure that state aid rules and competition policies do not result in massive lay-offs, but instead contribute to help and support workers in transition. A revision of the EU State aid rules therefore needs to take developmental, cohesive, and territorial differences between Member States and regions into account.

Although the use of State aid must be complemented by an increased European investment capacity and solidarity mechanisms to avoid deepening the divide among Member States and to ensure fair competition in the internal market, the introduction of special regimes for granting State aid to the benefit of regions under the Just Transition mechanism could be considered, including for pursuing social development and supporting quality employment meeting sustainability objectives. When it comes to direct funding, any governance structure must include effective partnership involving also social partners. Workers must be given a voice, to ensure State aid contribute to the common interests of all.

When assessing the compatibility of an aid with the EU legal framework, due regard must be given to social and environmental considerations as part of the common interest balanced against potential negative effects on trade and competition. In this regard, it can never be considered in the common interest to support competitiveness based on poor social and environmental standards or tax evasion, as it only creates a race to the bottom. State aid rules should only support industries and businesses contributing to a level playing field. The more alternative measures that exist or the less safeguards and commitments towards environmentally and socially positive actions that a beneficiary of State aid is able to provide, the stricter the compatibility assessment should be.

Rather than “green bonuses”, which might deepen the divide between Member States depending on their internal capacities to generate public funding, State aid rules should aim to introduce green and social conditionalities in the form of a *sustainability duty*, thereby avoiding public funding of damaging or counter-productive projects. Member States should not only avoid State aid measures which could lead to environmental or social harm, but State aid should actively aim to support improved compliance with environmental and social legislation and standards. Above all, the ‘do no harm’ and ‘precautionary’ principles should apply to EU State aid policy. Conversely, State-sanctioned environmental and social dumping within the internal market should amount to illegal State aid and be challenged by means of judicial review.

The revision of the EU policy framework on State aid should make full use of the sustainable taxonomy system introduced by the Taxonomy Regulation 2020/852, as it enables investors to redirect funding towards more sustainable technologies and businesses. It reduces the fragmentation resulting from market-based initiatives and national practices as well as prevents "green washing".

Beyond this system, also other sustainability objectives, such as social objectives, should be taken into account. In this regard, inspiration could be drawn from social clauses under the Public Procurement Directive 2014/24. It should be ensured that State aid is not granted to economic operators which do not respect the fundamental right to collective bargaining or engage in social dumping. State aid must be conditional upon businesses putting in place fair pay and employment plans through trade union recognition and collective agreements.

2. Antitrust rules

In order to promote more inclusive and sustainable development, it must be ensured that the EU competition policy framework, including its rules on antitrust, contributes to the promotion of sustainable business practices, inclusive markets and the protection of vulnerable actors, including workers. In this regard, the Commission Guidelines on horizontal cooperation agreements do not reflect the need for EU competition law to take into account social and sustainability objectives expressed by Article 3 TEU as well as Articles 9 and 11 TFEU.

In assessing horizontal agreements, greater account should be taken of non-monetary values and non-price efficiencies capable of creating a broader range of direct or indirect benefits for not only consumers, but also for workers and citizens. Such societal benefits may be linked to social progress and the environment. The current guidelines are a step in the right direction in particular regarding environmental standardisation agreements, but further considerations with regard to quality efficiencies are necessary. More importantly, the guidelines in their current form completely overlook certain types of sustainability agreements, in particular as regards the promotion of social and ethical standards as well as the respect for human rights.

Existing Commission guidelines do not offer sufficient legal certainty for cooperative agreements aimed at achieving environmentally and socially sustainable policy objectives and fairness throughout value chains. Permissible sustainability agreements could e.g. allow for an industry wide standard to agree on the use of raw materials that were not produced involving child labour, as this would clearly contribute to a more sustainable consumption. It would not only contribute to a more ethical consumption, but also to the promotion of human rights and decent work. Similarly, cooperation between competitors may contribute to a green and socially just transition, protecting the environment and the climate while also contributing to retraining, up-skilling and the sustained creation of quality employment.

In the light of these considerations, a potential Commission approach of Green Deal objectives as “differentiated from other important policy objectives such as job creation or other social objectives” is problematic, as the very sustainable development goals of the UN Agenda 2030 are indivisible. There can be no hierarchisation of sustainability objectives. EU rules and guidelines on antitrust must promote a just transition that goes hand in hand with economic, green and social considerations. Mitigating negative externalities of environmental damage is not enough. Social progress cannot be considered limited to only certain groups of people or sectors, but as such lies in the common interest of all, in line with the objectives of the Treaties.

The starting point should be that sustainability agreements are inherently positive in character unless any appreciable negative impact on competition is demonstrated, which outweighs its benefits in terms of sustainability. By way of example, the objectives of a possible agreement may not be attainable by any of the actors acting unilaterally, nor in some cases by public authorities, since they might require taking action outside of the EU, such as joint efforts to improve working conditions in third countries. Moreover, it is clear that the promotion of many social and environmental objectives requires systemic change to have wider effects.

Evidently, a positive approach to sustainability agreements must not allow for “sustainability washing”. The permissibility of agreements must always verify that the positive impacts and objectives in question cannot be achieved more effectively through genuine competition under market conditions or e.g. through sectoral legislation in the relevant policy field. Agreements must not be more restrictive than what is necessary. Nevertheless, it must also be recalled that a *de minimis* application of Article 101 TFEU may applied to cooperation agreements which do not appreciably restrict competition.

Furthermore, even in case an agreement had the effect of restricting competition, it may still be permissible under Article 101(3) TFEU, on the condition that it generates significant efficiencies in terms of e.g. quality of the final product (e.g. ethically, linked to decent working conditions and production methods, or for instance the improvement of public health through reduced use of toxic pesticides) or for the purpose of securing a long-term supply on European territory.

The appreciation of permissible sustainability agreements also raises important questions regarding the application of the "consumer welfare" standard under Article 101(3) TFEU. The current interpretation of this concept is too narrow, and does not sufficiently allow competition authorities to take into account environmental and social considerations.

In order for EU competition policy to support sustainable development, it must take a broader focus than consumers alone as the ultimate beneficiaries of competitiveness, primarily protecting and promoting consumer interests such as price and quality. An excessive focus on efficiency goals or "consumer-willingness-to-pay" analysis risks undermining the overarching policy goals set out by the Treaties. This is particularly true when it comes to positive environmental and climate aspects, or social progress, including e.g. the promotion of human rights, decent work, just transition and social inclusion.

Above all, Article 101(3) TFEU underlines that the benefits should be distributed fairly. Not all sustainability benefits are quantifiable in monetary or non-monetary terms and not all positive effects will benefit everyone directly. The direct benefits of individual consumers cannot outweigh greater societal benefits in the general interest, although they may sometimes also be more indirect. A broader interpretation of the personal scope of the consumer interest may as well include future consumers or workers as consumers.

The Court of Justice of the European Union has not in any way confirmed a restrictive interpretation of the "consumer welfare" standard. On the contrary, the Court has notably opted for a broader approach. In *Compagnie Générale Maritime*, it held that "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 […] without requiring a specific link with the relevant market" (C-T- 86/ 95, § 343).

As regards social considerations more specifically, in *Remia* the Court held that "the provision of employment comes within the framework of the objectives to which reference may be had pursuant to [Article 101(3) TFEU] because it improves the general conditions of production" (C- 42/84, § 42). In *Metro*, it found that "the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and to this end certain restrictions of competition are permissible, provided they are essential to the attainment of those objectives and do not result in the elimination of competition" (C-26/76, § 21). In *3F v Commission*, the Court highlighted that the "Community has not only an economic but also a social purpose, the rights under the provisions of the Treaty on State Aid and competition must be balanced, where appropriate, against the objectives pursued by social policy" (C-319/07 P, § 58). In other words, sustainable development considerations should be taken into account, and there is no reason not to.

On a different note, it must be underlined that EU competition policy and rules on antitrust must be limited to anti-competitive business practices alone. Whereas competition law aims to tackle power imbalances *between* undertakings, labour law and collective bargaining is the correct

policy instruments to address power imbalances *within* undertakings. Consequently, EU competition rules in support of sustainable development must never stand in the way of collective bargaining, workers' rights and decent conditions.

Collective agreements must be considered to fall completely *outside* the scope of competition law. Self-employed workers and other non-standard workers, including those working in the platform economy, are not undertakings. Trade unions are not cartels, and wage-setting is not price-fixing. Labour is not a commodity.

Collective bargaining is the exclusive competence of social partners. The regulation of working conditions and collective agreements falls completely outside the scope of competition law, including the competences of National Competition Authorities and DG Competition of the European Commission. Collective bargaining is a universal fundamental right of all workers, including those working in the platform economy. Competition law must be interpreted in the light of fundamental rights, for the purpose of fully excluding collective agreements from the remit of Article 101 TFEU and national competition rules.

Collective agreements derive from social dialogue and collective bargaining and are the result of negotiations between trade union organisations and an employer or employers' association. They represent labour and management respectively for the purpose of improving working conditions through minimum standards. Collective agreements are not agreements between undertakings resulting in anti-competitive business practices.

Policy incoherence between labour and competition law cannot be solved by introducing additional or intermediate categories, granting some workers more limited rights and protection than others. Workers working in the platform economy cannot be isolated and treated differently from other workers. Similarly, self-employed workers must not be prevented from joining a trade union, accessing collective bargaining or enjoying protection under collective agreements.

For all these reasons, the Commission should issue interpretation guidance, to confirm that collective agreements are fully *excluded* from the scope of Article 101 TFEU and national competition rules, regardless of the status of the workers covered by those collective agreements.

3. Merger control

Sustainable development considerations – both social and environmental – should equally play a more prominent role when it comes to the EU legal framework on merger control. Through mergers and acquisitions undertakings may expand their business or specialise, enter new markets or strengthen their managerial power. Competitive advantages stemming from a merger may have important positive or negative effects on sustainable development considerations for product, services and labour markets.

For the purpose of adequately assessing mergers, sustainable development concerns must be mainstreamed into the definition of relevant markets. The assessment may e.g. look into how a potential merger could affect the choice of environmentally friendly products, services or technologies. However, this assessment would have to go beyond the conventional assessment of choice and innovation, to also include e.g. effects on alternative (but not necessarily competing) markets or practices, possible disincentives to shift towards ecological production methods or technologies, or effects on biodiversity or public health.

Similarly, the definition of relevant markets must take due account of labour market considerations, including potential positive or negative effects on the rates and quality of employment as a result of an envisaged merger. By way of example, different categories of workers within the same company do not necessarily belong to the same segment of the labour market, as they might have different options to switch jobs. Similarly, the relevant labour market may be defined with regard to time and space, depending on the workers' possibilities and/or willingness to relocate and/or commute. In other words, a geographic market can be defined as the area in which workers could find a similar job at reasonable costs. Whereas the geographic market for a product may be broad, however, the labour market may be narrower, or vice versa.

Notably, the Court of Justice of the European Union has also given regard to social criteria in its assessments of mergers. The Court in *CCE de Vittel* assessed the duty of the Commission to include social criteria in its assessment of mergers and stated that "primacy given to the establishment of a system of free competition may in certain cases be reconciled, in the context of the assessment of whether a concentration is compatible with the common market, with the taking into consideration of social effects of that operation if they are liable to affect adversely the social objectives referred to in Article 2 of the Treaty. The Commission may therefore have to ascertain whether the concentration is liable to have consequences, even if only indirectly, for the position of the employees in the undertakings in question, such as to affect the level or conditions of employment in the Community or a substantial part of it" which "requires the Commission to draw up an economic balance for the concentration in question, which may, in some circumstances, entail considerations of a social nature". "the position of the employees of the undertakings which are the subject of the concentration may in certain cases be taken into consideration by the Commission when adopting its decision" (T-12/93, § 38-40).

The merger assessment of economic progress should comprise an explicit duty of competition authorities to examine economic as well as environmental and social impacts of the merger. The acquiring undertaking should fully report on Environmental, Social and Governance (ESG) matters. It should also make clear forward-looking statements and binding commitments about the impact of the merger on jobs, investment and the environment. This would be particularly important in cases where the acquiring undertaking has a worse track-record. The acquiring company should demonstrate its compliance with relevant standards, such as the Paris Agreement, OECD Multinational Guidelines and the UN Guiding Principles on Business and Human Rights. If the undertaking which is subject to the acquisition is not compliant with such standards, the acquiring undertaking should commit to a roadmap for bringing the acquired undertaking into compliance.

Beneficial positive sustainability effects must be verified as stemming from the mergers, once again, considering the "consumer welfare" interest in its broadest sense. Any negative impacts on sustainability stemming from the merger should be subject to remedies and conditional approval. Should the merger assessment demonstrate adverse effects on sustainable development, or in case the acquiring undertaking would not be able to commit to remedies effectively addressing such sustainability concerns, the merger should be blocked.

As regards the design and imposition of behavioural remedies, a sustainability duty should be introduced to address potential concerns or risks that may result from a merger. Such conditionalities should also be linked to employment levels and job quality, democracy at work including workers' information, consultation and participation rights as well as the full respect of the fundamental right of workers to bargain collectively and ensure full compliance with applicable sectorial collective agreements and working conditions.

The likelihood of employer monopsony power must equally be examined within the framework of merger control, to ensure socially fair outcomes without prejudice to the sustainability of the sector. If the merger in question will concentrate considerable power to a few undertakings in the sector, there is a clear risk of monopsony power which may result in downwards pressure on working conditions and wages – within the undertaking as well as in the sector. Such negative effects run counter to the social dimension of sustainable development concerns and have to be prevented already within the framework of the merger assessment, as well as closely monitored. In this context, it must once again be recalled that competition law alone cannot effectively remedy such negative effects of employer monopsony powers, but this power imbalance can only be addressed by collective bargaining, including at sectoral level.

Finally, more sustainable rules on merger control should not only contribute to fairer outcomes of mergers, but also ensure fairer and more inclusive merger processes. Notably, a clear right of consultation should be introduced for relevant stakeholders such as workers' representatives and trade unions to state their opinion in the process and attend merger hearings. Similarly, workers and trade unions should be properly involved and consulted when it comes to the design of effective and sustainable behavioural remedies. Ultimately, social partners may also bring an added value when it comes to defining the relevant market and assessing relevant merger impacts in the labour market.