Fair Trade Advocacy Office Submission on Competition Policy Supporting the Green Deal

This document has been prepared by the Fair Trade Advocacy Office ("***FTAO***") in response to the European Commission's ("***Commission***") Call for Contributions on Competition Policy Supporting the Green Deal ("***Call for Contributions***"). The FTAO also organised a an invitation-only workshop on 27 October 2020 in relation to the Call for Contributions with the participation of other civil society organisations, academics and practitioners.[1] The responses below incorporate the inputs provided by the sustainability and competition law experts who participated in the workshop.

The EU's legal and political framework leaves no doubt that competition policy must play an active role in the EU's efforts to achieve its sustainability objectives. Under the European Green Deal, "[a]ll EU actions and policies should pull together to help the EU achieve a successful and just transition towards a sustainable future"[2] – a reaffirmation of Article 11 of the Treaty on the Functioning of the EU ("***TFEU***") and Article 37 of EU Charter on Fundamental Rights ("***Charter***"). In general, under the Treaties, the sustainable development of not just Europe but of the earth is an EU objective, and the EU must "ensure consistency between its policies and activities taking all of its objectives into account".[3]

Furthermore, the EU is committed to the implementation of the UN's 2030 Agenda for Sustainable Development and the Sustainable Development Goals (***"SDGs"***),[4] which integrate "in a balanced manner the three dimensions of sustainable development – *economic, social and environmental*. The 2030 Agenda is also *indivisible*, in a sense that it must be implemented as a whole, in an integrated rather than a fragmented manner, recognizing that the different goals and targets are closely interlinked."[5] (emphasis added) In contrast, the Call for Contributions might be interpreted as creating a hierarchy among the EU's sustainability goals by singling out environmental sustainability. This approach runs the risk of undermining the interconnectedness between the people and the planet but also between the EU's policies and commitments. The Covid-19 crisis has also demonstrated how the destruction of nature, the deforestation as well as the climate and health crises are all interrelated, and share the exploitation of people and planet as a

[1] The Workshop was held under the Chatham House Rule, therefore the identities of the participants are not disclosed.
[2] Commission Communication on the European Green Deal (COM(2019) 640 final) (***"European Green Deal"***) p 19.
[3] Article 3 of Treaty on the EU (especially Articles 3(3) and 3(5)) and Article 7 TFEU respectively.
[4] See e.g. EU Commission Press Release, Sustainable Development: EU sets out its priorities, 22 November 2016, https://ec.europa.eu/commission/presscorner/detail/en/IP_16_3883
[5] DG Environment, "The 2030 Agenda for Sustainable Development and the SDGs" https://ec.europa.eu/environment/sustainable-development/SDGs/index_en.htm#:~:text=The%202030%20Agenda%20is%20also,and%20targets%20are%20closely%20interlinked.

common root cause.[6] Therefore, the FTAO's response to the Call for Contributions takes into account all sustainability goals of the EU, and not just environmental sustainability.

This document is structured in three parts: (i) Antitrust, **(ii)** Merger Control, **(iii)** State Aid.

I. Antitrust – Article 101 TFEU

The FTAO published in June 2020 its Position Paper on Cooperation Agreements for Sustainability (***"Position Paper"***), providing actual and theoretical examples and calling upon the Commission to address the need for legal certainty to encourage genuine multi-stakeholder sustainability agreements involving competitors. The responses below reflect the Position Paper as well as the FTAO's views on recent developments regarding sustainability agreements and Article 101 TFEU.

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).

- *Why cooperation and not unilateral action?*

It will often be difficult for companies to implement sustainability initiatives unilaterally when they might face free-rider problems and/or first-mover disadvantage, since such initiatives usually increase costs. The former problem occurs, for example, when a company unilaterally invests in efforts to introduce detergent refill stations in supermarkets and promote refill stations to consumers, from which other brands might benefit later on without incurring the additional introduction and promotion costs. The latter problem occurs especially when a company commits to stop offering less sustainable but cheaper products. Such a decision might result in a substantial loss of customers especially in markets where consumers are price-sensitive or where there is little scope for product differentiation.[7] Multi-stakeholder cooperation, for example among competing detergent producers and supermarket chains, might resolve these issues.

- *Why cooperation and not legislation?*

Many sustainability objectives of the EU can be achieved through legislation. However, legislative action is not always desirable or effective. As indicated by the UK competition authority regarding environmental agreements, "agreements between firms may be particularly appealing to policy makers as they may help achieve policy goals without the requirement of government legislation or explicit regulation."[8] Similarly, the Circular Economy Action Plan prioritises industrial efforts before regulation in the case of printers

[6] "Build Back Fairer Statement" (25 September 2020), p 1 https://fairtrade-advocacy.org/wp-content/uploads/2020/09/Build-Back-Fairer-Statement-_-final.pdf

[7] Monti and Mulder, "Escaping the clutches of EU competition law - Pathways to Assess Private Sustainability Initiatives" E.L. Rev. 2017, 42(5), 635-656, p 636.

[8] OFT Contribution to the OECD Policy Roundtable on Horizontal Agreements in the Environmental Context 2010, p 98. This is the current regulatory climate in the EU, with efforts to simplify legislation, avoid overregulation and reduce regulatory burdens (eg REFIT).

and consumables.[9] Furthermore, EU legislation or intervention from EU authorities may not be effective if the EU's sustainability objectives necessitate taking action outside its borders. As stressed repeatedly by the Commission, sustainability cannot be achieved without global mobilisation and the EU positions itself as the leader on the global sustainability path.[10] The global dimension of the EU's sustainability goals requires, for example, that carbon emissions[11] and other forms of environmental damage outside the EU by European entities adhere to the EU standards regardless of local regulations. In the same vein, the goal to achieve living incomes and living wages cannot be limited to the borders of the EU, least of all in value chains of which the EU single market is part.[12] Outside the EU, due to enforcement hurdles and especially when ILO conventions and other international commitments are not enforced, multi-stakeholder cooperation (which may involve competitors) may be the only or the most effective way to deal with sustainability issues.

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…)?

The current competition regulation and policy framework does not provide enough legal certainty for multi-stakeholder cooperation agreements aimed at achieving legitimate sustainability goals.[13] This does not only concern businesses, but also civil society organisations who may not have the means to ask for competition law experts' advice on what is permissible.[14] For example, a recent study by the Fairtrade Foundation, incorporating a series of interviews with businesses, retailers and industry experts including not-for-profit organisations, presents evidence that "an unclear legal landscape around potential collaboration in relation to low farm-gate prices restrict[s] progress towards working collaboratively to secure living wages and incomes across supply chains."[15] The report notes that for the interviewees, it is not clear when the Article 101(3) TFEU exemption would apply to collaborations for sustainability and that "further clarity from competition authorities on how a pre-competitive collaboration on the issue of low farm-gate prices would be assessed under competition law would greatly aid progress."[16]

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[9] Commission Communication on a new Circular Economy Action Plan for a cleaner and more competitive Europe (COM/2020/98 final) (***"Circular Economy Action Plan"***), p 6.

[10] European Green Deal, p 20 (see in particular the "Green Deal diplomacy") and p 22. See also the UNFCCC preamble: "*States have (…) the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.*"

[11] See "carbon leakage" in the European Green Deal, p 5.

[12] For example, when cocoa is imported to the EU for use in chocolate production. On how competitive pressure to drive down prices may lead suppliers to turn to producers abroad where sustainability regulations are laxer, see Stucke and Ezrachi, *Competition Overdose* (HarperCollins 2020), Chapter 2.

[13] European Parliament resolution of 31 January 2019 on the Annual Report on Competition Policy (2018/2102(INI)), para 49.

[14] Fairtrade Foundation "Competition Policy and Sustainability: A study of industry attitudes towards multi-stakeholder collaboration in the UK grocery sector" (April 2019), interview with Bart Vollaard, p 16.

[15] ibid, p 14.

[16] ibid.

Furthermore, a clear EU-wide legal framework is also needed to avoid divergent approaches to Article 101 TFEU across Member States (***"MS"***). The Commission's interpretation of "consumer welfare" in a way that excludes sustainability from Article 101(3) TFEU[17] is only shared by few NCAs and it is not binding, since there is still no clear endorsement by the EU Courts.[18] The CJEU has also paved the way for the integration of sustainability into the EU's competition policy.[19] At the MS level, in addition to case law[20], Hungary has already codified that sustainability must be taken into account in the application of the national equivalent to Article 101(3) TFEU.[21] The Dutch Competition Authority's proposal for Guidelines on Sustainability Agreements is also an important development.[22] These developments signal a move toward a positive obligation to take into account sustainability in Article 101 TFEU enforcement, which would be in line with the Treaties.

As the Commission is currently reviewing its horizontal cooperation block exemption regulation and guidelines, explicitly incorporating multi-stakeholder sustainability agreements involving competitor cooperation into the Guidelines on Horizontal Cooperation Agreements (***"HGLs"***)[23] would be a step in the right direction to facilitate and encourage genuine multi-stakeholder sustainability agreements involving competitors, while making clear that sustainability cannot be invoked as a smokescreen for anti-competitive behaviour. A separate section on "Sustainability Agreements" should be added to the revised HGLs in the spirit of the 2001 HGLs' section on environmental agreements but going beyond its limited scope.[24]

The new section on "Sustainability Agreements" should set out in particular: (i) the cases where a sustainability agreement is not likely to restrict competition within the meaning of Article 101(1), and (ii) the conditions under which a sustainability agreement that may restrict competition can nonetheless benefit from an exemption under Article 101(3) TFEU. Below are examples of cases where a multi-stakeholder sustainability cooperation is not likely to restrict competition. Article 101(3) TFEU conditions for exemption are discussed in response to the next question.

Multi-stakeholder agreements involving competitor cooperation aimed to reduce negative externalities, such as water pollution and carbon emissions, which may lead to prices

[17] For more information, see the Position Paper, p 4.
[18] O Brook, "Sustainability agreements - Divergence in the era of decentralised enforcement" (2020) 19 Competition Law Insight, p 2.
[19] S Kingston, "The Uneasy Relationship between EU Environmental and Economic Policies, and the Role of the CJEU" (2015) UCD Working Paper in Law Criminology & Socio-Legal Studies
[20] See in particular the Dutch and French cases, O Brook "Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities" (2019) 56 CMLR 121
[21] Article 17 of the Hungarian Competition Act provides that an agreement is exempted from the national equivalent of Article 101 TFEU if it "contributes to … the promotion of technical or economic progress, or the improvement of competitiveness or of the protection of the environment".
[22] ACM Draft Guidelines "Sustainability Agreements" https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf
[23] Commission, "Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements" [2011] OJ C 11/1
[24] The scope of this section was limited to environmental agreements (as opposed to sustainability in general), and it set forth a narrow cost-benefit analysis under Article 101(3). Commission, "Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements" [2001] OJ C 003, Section 7.4.

closer to the "true price": As stressed by the European Parliament, the lowest price possible for the consumer may come at the expense of more vulnerable parties across the supply chain[25], or the environment.[26] If the Commission takes the view that such agreements may be restrictive of competition, the HGLs should then clearly set out the conditions under which they can benefit from an exemption.

Industry-wide voluntary sustainability pledges and commitments exist, and are generally not considered to be problematic under EU competition law. This scenario should nonetheless be addressed in the HGLs, and an exemption route should also be clearly set out for cases where voluntary pledges are not sufficient to achieve the intended sustainability goals and therefore binding agreements might be more effective.

Right to collective bargaining for the false self-employed, including gig economy workers: Although EVP Vestager clearly stated that "nothing in the competition rules stops […] platform workers from forming a union,"[27] currently, EU competition law does not provide sufficient clarity on the right to collective bargaining of the false self-employed. This practice might be considered risky from an antitrust standpoint, as the Danish Competition Council recently prohibited minimum fees for freelance domestic workers that was the result of a collective agreement between a Danish domestic work platform (*Hilfr*) and a union.[28]

The *Hilfr* decision is at odds with the CJEU's *FNV Kunsten* decision[29] which allowed collective bargaining for the "'false self-employed', that is to say, service providers in a situation comparable to that of employees". The European Committee of Social Rights of the Council of Europe had also previously held that "Where providers of labour have no substantial influence on the content of contractual conditions, they must be given the possibility of improving the power imbalance through collective bargaining" in a case concerning certain kinds of entertainment industry workers and freelance journalists in Ireland.[30] This decision recognised the right to collective bargaining for the false self-employed and fully dependent self-employed, and that the national equivalent of the Article 101(1) TFEU prohibition in these cases would be "excessive" in a democratic society.[31] Furthermore, there are now more and more cases around the world classifying platform workers as employees, such as the recent French Court of Cassations decision on Uber drivers and the Spanish Supreme Court decision on Glovo riders.[32]

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[25] European Parliament, para 79.
[26] True Price Foundation, "A Roadmap for True Pricing - Vision Paper - Consultation draft" (2019) https://trueprice.org/a-roadmap-for-true-pricing/
[27] Margrethe Vestager, Competition and sustainability, 24 October 2019, https://wayback.archive-it.org/12090/20191129200524/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-sustainability_en
[28] https://www.en.kfst.dk/nyheder/kfst/english/decisions/20200826-commitment-decision-on-the-use-of-a-minimum-hourly-fee-hilfr/; see also https://www.socialeurope.eu/collective-bargaining-rights-for-platform-workers
[29] Case C-413/13 – *FNV Kunsten Informatie en Media v Staat der Nederlanden*
[30] Irish Congress of Trade Unions (ICTU) v Ireland (Complaint No.123/2016), para 38.
[31] ibid para 98.
[32] Cour de Cassation Ruling n°374 – 4 March 2020 (Appeal n° 19-13.316); Tribunal Supremo Ruling 805/2020 in case 4746/2019 – 23 September 2020.

However, the lack of EU-wide clarification on whether collective bargaining for the false self-employed is allowed under the competition law runs the risk of resulting in divergent approaches at the MS level. The Commission, as part of its initiative[33] on collective bargaining for the self-employed, would have to take into account these challenges and developments Not only employees but also of self-employed workers shall enjoy their fundamental right to engage in collective bargaining and enjoy protection under collective agreements. Fundamental rights should not be made conditional upon competition rules, since establishing minimum working conditions does not amount to price fixing or anti-competitive business behaviour. Competition law in itself is not sufficient to effectively address power imbalances within labour intensive platforms, and therefore it should not stand in the way of collective bargaining and labour law to remedy such imbalances between platforms and individual providers of labour. In this context, further cooperation between DG EMPL and DG COMP might also be warranted.

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?).

As mentioned above, explicitly incorporating multi-stakeholder sustainability agreements involving competitor cooperation into the HGLs with a new section on "Sustainability Agreements" would be a way to develop the current enforcement practice to accommodate restrictive agreements in pursuit of sustainability objectives.

The Article 101(3) analysis of "Sustainability Agreements" should in turn start with the question whether the sustainability benefits of the agreement outweigh the restrictions of competition,[34] and take into account that:[35] The first condition ("improving the production or distribution of goods or promoting technical or economic progress") does not mention "efficiency", nor is it limited to "economic progress". Therefore, it should encompass a wider scope of social benefits, such as environmental quality, enjoyment of human rights, and improvement of social conditions, within and outside the EU.

Furthermore, the second condition ("allowing consumers a fair share of the resulting benefit") does not limit the 'consumers' to the individual purchasers in the relevant market(s).[36] Neither does it limit the concept of "benefit" to prices or other quantifiable

[33] https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1237

[34] Nowag, "Competition Law's Sustainability Gap? Tools for an exemption and Brief Overview" Lund University Legal Research Paper Series, October 2019, p 5. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3484964

[35] Below discussion has been directly adapted from Holmes, "Climate change, sustainability, and competition law" (2020) 8 JAE 354 and Nowag, *Environmental Integration in Competition and Free Market Laws* (OUP 2016). Under Article 101(3), there is also the possibility of introducing a block exemption regulation for multi-stakeholder sustainability agreements.

[36] As opposed to HGLs, para 43. Indeed, the Commission had adopted a broader approach in *CECED*, indicating that the "environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines." ([1999] L187/47OJ 2000], para 56)

benefits.[37] Indeed, as the European Parliament has stressed, "consumers have interests other than low prices alone, including animal welfare, environmental sustainability, rural development and initiatives to reduce antibiotic use and stave off antimicrobial resistance, etc."[38]

As a result, even agreements that result in a price increase for European consumers should be able to benefit from an exemption if the sustainability benefits, such as living wages for farmers or the eradication of child labour, are clearly substantiated. Overall, the analysis of the first two conditions should not be based on a monetary cost-benefit analysis or other types of economic quantification that render the integration of sustainability into competition law very difficult, if not impossible.[39] The Dutch Competition Authority's proposal for Guidelines on Sustainability Agreements is criticised in this regard:[40] Even though the draft guidelines acknowledge that sustainability benefits cannot always be quantified, such as in cases of animal welfare, they still refer to "value assignment", including a consumers' willingness-to-pay analysis when assessing qualitative improvements, even though this is not a requirement.[41] The relevant Example 6 in the draft guidelines on pig welfare is reminiscent of the controversial "Chicken of Tomorrow" case, in which the ACM did not give its greenlight to a cooperation agreement targeted to increase poultry welfare, since it found, after a willingness-to-pay analysis, that there would be a € 0.64 negative effect on consumer surplus.[42]

Needless to say, only *genuine* sustainability agreements should be permissible. "Greenwashing", as well as smokescreens hiding cartels, are valid concerns for policy makers and they should be weeded out. To that end, the third and fourth conditions ("indispensability" and "no substantial elimination of competition") can function as a check against the misuse of Article 101(3) TFEU for the sole benefit of the parties, including greenwashing.[43]

Furthermore, **standardisation agreements** for sustainability should also be clearly addressed in the revised HGLs[44], either under the section on standardisation agreements or under sustainability agreements.[45]

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[37] As confirmed by the Commission in its Article 101(3) Guidelines, which also (theoretically) encompass cases where there is a price increase for the consumers (paras 94, 102-104).
[38] European Parliament, para 79.
[39] Position Paper, p 5.
[40] F Costa-Cabral, "Competition law and sustainability: Dutch authority makes headway with draft guidelines" (9 October 2020) https://europeanlawblog.eu/2020/10/09/competition-law-and-sustainability-dutch-authority-makes-headway-with-draft-guidelines/
[41] paras 33 and 53 & Example 6
[42] https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf In Example 6, too, a willingness-to-pay analysis is conducted and the price increase that the consumers agree to does not cover the costs they would incur due to the agreement. The agreement in the example therefore also fails to receive the ACM's greenlight.
[43] Holmes, p 28-29.
[44] HGLs include an example on environmental standards but the revised HGLs should go beyond a mere example and discuss sustainability standards in more detail.
[45] For the sake of completeness, Article 101(3) TFEU is not considered to be the only way forward regarding cooperation agreements for sustainability. See eg different options explored by Holmes, especially the *Wouters* and *Albany* routes (pp 370-371), referring to the CJEU decisions in C-309/99 – *Wouters* [2002] and C-67/96 – *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999]) Monti

Finally, as mentioned above, as per the 2030 Agenda and the SDGs, the three dimensions of sustainability, ie economic, social and environmental sustainability are indivisible. However, the Call for Contributions, by asking the question "How can the pursuit of Green Deal objectives be differentiated from other important policy objectives such as job creation or other social objectives?" seems to create a hierarchical distinction between different sustainability objectives of the EU. The FTAO considers problematic the distinction made between "environmental-damage agreements" and "other sustainability agreements" in the Dutch Competition Authority's proposal for Guidelines on Sustainability Agreements.[46] In any case, it should not be the task of a competition authority to create a hierarchy among different sustainability goals.

II. Merger control

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?

The recent large-scale mergers in the agri-food sector provide clear examples of mergers that could be harmful to consumers by reducing environmentally friendly products and/or technologies. As noted previously by the FTAO, a letter that IPES-food sent to EVP Vestager during the Bayer/Monsanto merger review[47] discussed an increased concentration in the seeds and fertiliser sector (already particularly concentrated) may not only be detrimental to farmers (as intermediate consumers of the products sold by Bayer and Monsanto) but also to final consumers in terms of availability, innovation and research and development. For example, two studies cited in the letter looked at the seed industry in different European countries showing that private plant breeding has narrowed its focus to fewer species and that the diversity within species may also have declined. Similarly, research conducted at the University of Illinois in 2016 (also cited in the letter) concluded that not a single new species has been introduced into the European food system since the era of large-scale mergers began. On the contrary, numbers show that the dominant companies in this highly concentrated sector devote at least 40% of their R&D expenditures to just one crop—maize.[48]

However, ensuring consistency between the EU's sustainability objectives and competition law enforcement would have to go beyond a consumer-centric reduction of choice and/or innovation analysis which is the mainstream approach at the EU level today. This point is discussed further below.

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had also considered whether there should be an Article 101(4) to explicitly integrate "other [Union] objectives" into Article 101 (G Monti, "Article 81 EC and Public Policy" 39 CMLR 1057).

[46] ibid para 39

[47] IPES-FOOD, Letter to Commissioner Vestager — DG Competition, Concerns: Bayer AG acquisition of Monsanto (6 October 2017) http://www.ipes-food.org/_img/upload/files/IPES-Food_Bayer-Monsanto%20merger.pdf

[48] For more information, see Addressing the Broken Links, pp 27-31. See also J Nowag, "Sustainability & Competition Law and Policy – Background Note" for the OECD, para 58, highlighting in particular the study on the Bayer/Monsanto merger by Lianos and Katalevsky, "Merger Activity in the Factors of Production Segments of the Food Value Chain: A Critical Assessment of the Bayer/Monsanto merger", Centre for Law, Economics and Society Policy Paper Series 2017/1, https://www.ucl.ac.uk/cles/sites/cles/files/cles-policy-paper-1-2017.pdf

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?

Below are various ways in which merger enforcement can be brought in line with and contribute to the sustainability objectives of the EU:

The merging parties' ***buyer power***, including ***monopsony power*** must be systematically analysed. This is crucial in mergers that take place in sectors already impacted by power asymmetries across value chains, such as agri-food sectors[49] and textile, garments, leather and footwear (***"TGLF"***) value chains. In these sectors, complex oligopolies not subject to any sustainable countervailing buyer power by upstream producers or suppliers may already be operating in ways similar to monopsonies. The Horizontal Merger Guidelines[50] provide the grounds for the analysis of the merging parties' buyer power, even if there is no positive obligation to analyse buyer power.[51] Furthermore, even if increased buyer power may be put forward as an "efficiency" in the form of cost reductions and therefore lower prices to the consumers, regard must be had to whether such "cost reductions" might be passed on to more vulnerable actors in the supply chain and result in general in social and environmental risks. This could happen, for example, if, post-transaction, the production is moved to countries with less robust environmental and labour protections.

Employers' monopsony power, which can have a downward pressure on wages, should also be taken into consideration in the merger assessment. This option was explored in depth by the OECD in its 2019 Background Note on Competition Concerns in Labour Markets[52], including a Downward Wage Pressure for labour market harms.[53]

The Commission is also able to influence the ***direction of innovation*** through merger control enforcement especially in areas where the need for less harmful products is already recognised, as was the case in *Dow/DuPont*. In this merger, the Commission analysed whether the concentration would have a negative impact on the development of active ingredients that are "better suited to avoid potentially harmful consequences for human and animal health as well as for the environment" and that could replace the active ingredients in the Commission's "candidates for substitution" list for plant protection products.[54] This approach can also be adopted in future cases.

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[49] The Unfair Trading Practices Directive addresses buyer power in the agricultural and food supply chain, but it does not concern the creation or further consolidation of buyer power through concentrations (Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain [2019] OJ L 111/ 59). At any rate, its scope is limited to the agricultural and food supply chain.

[50] Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/03

[51] See paras 61-63 regarding "Mergers creating or strengthening buyer power in upstream markets"

[52] https://one.oecd.org/document/DAF/COMP(2019)2/en/pdf

[53] S Naidu, EA Posner and G Weyl (2018), "Antitrust Remedies for Labor Market Power", *Harvard Law Review*, vol 132, https://harvardlawreview.org/wp-content/uploads/2018/12/536-601_Online.pdf. See also VI Daskalova, "Regulating the New Self-Employed in the Uber-Economy: What Role for EU Competition Law" (2018) *German Law Journal* 19, 461-508.

[54] As required by Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC. See *Dow/DuPont*, paras 1980-1981.

Another example would be the analysis of the effects of the merger on ***employment***. Despite the existence of the "Acquired Rights Directive"[55] which provides that the transfer of an undertaking "does not in itself constitute grounds for dismissal"[56], the planned lay-offs at Bayer in Europe following the Bayer/Monsanto merger raised the question whether the Acquired Rights Directive provides sufficient protection for employees after mergers. It should also be noted that over the past 30 years there has been a remarkable growth in the number of atypical labour relationships, which involve various forms of false self-employment, labour hire through agencies, and more recently, gig work, as discussed above in the context of Article 101 TFEU. These are also the workers most affected by the current Covid-19 crisis.[57] The case of mergers affecting workers in such atypical labour relationships is also worrying, since these workers would arguably not be covered by the provisions of the Acquired Rights Directive anyways.

Article 21(4) of the EU Merger Regulation ("***EUMR***") could also be a possible step to integrate sustainability into merger control enforcement. As previously noted by Lianos, "Although public interest considerations do not explicitly form part of the substantive test of EU merger control, Article 21(4) EUMR includes a legitimate interest clause, which provides that Member States may take appropriate measures to protect three specified legitimate interests: public security, plurality of the media and prudential rules, and other unspecified public interests that are recognised by the Commission after notification by the Member State."[58] The increasing interest in sustainability by the NCAs across MS could lead MS to apply to the Commission under Article 21(4) in order "to claim an additional legitimate interest, such as the protection of small-scale farming as a structural element of the national economy, employment, biodiversity, the right to food or socio-environmental sustainability of the food chain"[59], or sustainability in general, on the basis of relevant national legal instruments.

In the ***agri-food sector***, the merger analysis should encompass, inter alia, alternative practices (not only competing products), the repercussions on non-conventional agriculture, the impact on non-patented seeds and their use, the implications for biodiversity, the modification of the incentives to shift towards ecological production or conventional agriculture, and the link between concentration, monoculture, use of fertilisers and the health conditions of both farmworkers and consumers.[60]

Aside from the large-scale consolidations in the agri-food sector, one area that currently goes under the radar is the ***acquisitions of digital agriculture start-ups by larger conglomerates***. As the Bayer/Monsanto merger has shown, the parties had built their

[55] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses

[56] Acquired Rights Directive, Article 4.

[57] See OECD Employment Outlook 2020, https://www.oecd-ilibrary.org////sites/1686c758-en/1/3/1/index.html?itemId=/content/publication/1686c758-en&_csp_=fc80786ea6a3a7b4628d3f05b1e2e5d7&itemIGO=oecd&itemContentType=book#section-d1e912

[58] Ioannis Lianos, "The Bayer/Monsanto merger: a critical appraisal", Report created for the German Bundestag, 26 June 2018, p 43.

[59] Addressing the Broken Links, p 32.

[60] Addressing the Broken Links, p 30.

digital agriculture divisions mainly through acquisitions.[61] As the agritech startup scene thrives, partially due to investor interest during the Covid-19 pandemic[62], acquisitions of agritech startups by established players should be more strictly monitored by the Commission as well as the NCAs. Since EVP Vestager announced that the Commission plans "to start accepting referrals from national competition authorities of mergers that are worth reviewing at the EU level – whether or not those authorities had the power to review the case themselves"[63], this mechanism should also work as a way to scrutinise competitively important acquisitions of startups in agritech that do not trigger the national or EU notification thresholds.

Overall, ***strengthened cooperation with other Directorates-General***, such as DG AGRI, DG EMPL and DG ENV during a merger review could help ensure that merger control is in line with the EU's sustainability principles. ***Behavioural remedies*** could also be used more frequently to address sustainability issues that result from a merger.

The legal basis to ensure that the Commission's merger policy is in line with the EU's sustainability objectives is already provided in the Treaties.[64] Based on the relevant Treaty provisions, the Commission could also **(i)** announce that it will explicitly take into account the EU's sustainability objectives in the merger review in order to clearly set out the direction of enforcement in the future[65], and/or **(ii)** codify this into soft law as a "positive duty" for the Commission – either into existing guidelines or as a separate set of guidelines setting out how sustainability would be factored into the merger control analysis.[66]

III. State Aid

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.

[61] Case M.8084 – Bayer/Monsanto (21 March 2018). See eg paras 2473, 2479, 2526, 2531.

[62] C Hall, "Sustainable Food Supply Chain Begins With Startups On The Farm" (Crunchbase News, 28 October 2020)

[63] https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en

[64] Article 3 of Treaty on the EU (especially Articles 3(3) and 3(5)), Articles 7 and 11 TFEU, and Article 37 of the Charter. See also preamble 36 of EU Merger Regulation: "The Community respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles."

[65] This could be done in a way similar to EVP Vestager's recent announcement on the Commission accepting "referrals from national competition authorities of mergers that are worth reviewing at the EU level – whether or not those authorities had the power to review the case themselves." https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en

[66] In addition to the scenarios provided in this document, an efficiency defence type of scenario could also be envisaged in the context of sustainability. This would entail the clearance of a merger if its contributions to the EU's sustainability objectives outweigh the anti-competitive effects emanating from the merger.

A "sustainability burden"[67] ie state aid with sustainability obligations attached, should become part of the State aid rules, especially in sectors of an environmentally damaging nature such as aviation and fossil fuels or sectors with a history of social or environmental abuses such as TGLF. A sustainability burden is especially needed now in the Covid-19 recovery efforts to ensure that the European economy is built back fairer, since returning to "business as usual" after the pandemic would reinforce the inequalities and unsustainability of our current system.[68]

Indeed, the subject of State aid with "green" conditions is frequently discussed in relation to the Covid-19 crisis: The Commission's "Temporary Framework to support the economy in the context of the coronavirus outbreak" (***"Temporary Framework"***) does not impose any sustainability burdens on State aid recipients, except for an obligation on the large enterprises, in scope of the yearly publication requirements, to also provide "information on how their use of the aid received supports their activities in line with EU objectives and national obligations linked to the green and digital transformation, including the EU objective of climate neutrality by 2050." In the same vein, MS are not required to impose any sustainability measures on state aid recipients.

There has been controversy due to the lack of a green conditions in the Temporary Framework, especially seeing the amount of aid allocated to sectors like aviation that have a significant carbon footprint.[69] Motta and Peitz also warned against state aid measures in response to Covid-19 that might go against the EU's environmental goals, such as vouchers for the purchase of cars running on fossil fuels.[70] EVP Vestager responded to the calls for green conditions by indicating that the Commission did not have the legal authority to impose green conditions in scope of the Temporary Framework.[71]

However, prior to the second amendment to the Temporary Framework, stricter green conditions for state aid recipients were reportedly considered. As explained by the Chair of the European Parliament's Committee on the Environment, Public Health and Food Safety Pascal Canfin, the Commission had two options "on the table":[72]

- "'A weak one' asking EU countries to merely stick to climate and environmental commitments when supporting ailing companies.
- A second option, requiring governments to sign 'green transition pacts' with companies receiving bailout cash."

However, no such requirement was adopted. The Commission indicated in the second amendment of 8 May 2020 to the Temporary Framework that "Member States can decide

[67] A "green burden" was discussed by A Goizueta Zubimendi in "EU Environmental policy: lost opportunities in the Covid crisis" https://polikracia.com/eu-green-deal-covid-crisis/
[68] "Build Back Fairer Statement", p 1.
[69] Eg https://www.linklaters.com/en/insights/blogs/linkingcompetition/2020/esg/competition-and-sustainability/evolving-industrial-and-state-aid-policies-to-fuel-green-initiatives
[70] https://www.intereconomics.eu/contents/year/2020/number/4/article/state-aid-policies-in-response-to-the-covid-19-shock-observations-and-guiding-principles.html
[71] https://www.ashurst.com/en/news-and-insights/legal-updates/the-impact-of-covid-19-navigating-eu-state-aid/
[72] https://www.euractiv.com/section/energy-environment/news/eu-eyes-green-conditions-on-state-aid-to-virus-hit-firms/

to grant State aid to support green and digital innovation and investment, and increase the level of environmental protection in line with existing State aid rules". Currently, therefore, whether or not to impose such a sustainability burden is left to the initiative of MS. The Air France State aid case in which France made the aid conditional upon "climate conditions" is a welcome development[73], but this remains so far the only case in which a European airline rescue after Covid-19 came with any kind of sustainability burden, and it was in any case criticised for lack of effectiveness.[74]

The sustainability burden could be structured as a "fair transition pact" based on the previously envisaged "green transition pact", albeit not limited to environmental sustainability in scope and covering all sustainability objectives of the EU, and not temporally limited to the Covid-19 recovery period. Examples of a sustainability burden would include, for example, that undertakings in the garment industry, which is marred with human rights abuses, develop and implement a due diligence plan and to publish annual implementation reports.[75]

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?

As the CJEU recently reiterated in the *Hinkley Point* Grand Chamber ruling, "State aid which contravenes provisions or general principles of EU law cannot be declared compatible with the internal market".[76] The CJEU also confirmed that the Commission must have regard to Article 37 of the Charter and Article 11 TFEU in applying Article 107(3)(c) TFEU.[77] Based on the foregoing, the CJUE ruled that "since Article 107(3)(c) TFEU applies to State aid in the nuclear energy sector covered by the Euratom Treaty, State aid for an economic activity falling within that sector that is shown upon examination to contravene rules of EU law on the environment cannot be declared compatible with the internal market pursuant to that provision."[78] The general principles of EU law include "the principle of protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability".[79] Furthermore, the "rules of EU law on the environment" encompass not just the primary law but also the provisions of secondary EU law on the environment.[80] This ruling arguably confirms that aid measures contravening the EU's sustainability objectives cannot be exempted.

Environmental or social dumping within the EU could also fall into the sphere of illegal state aid. As previously highlighted by the FTAO[81], similar to those companies that are

[73] For example France & Air France https://ec.europa.eu/commission/presscorner/detail/en/ip_20_796
[74] Eg https://www.transportenvironment.org/publications/air-frances-bailout-climate-conditions-explained
[75] As highlighted in the European Civil Society Strategy for Textiles, EU competition law can complement legislative action in ensuring fair and sustainable TGLF value chains. https://fairtrade-advocacy.org/wp-content/uploads/2020/07/Civil-Society-European-Strategy-for-Sustainable-Textiles.pdf
[76] C-594/18 P – *Austria v Commission* (hereinafter "Hinkley Point") (22 September 2020), para 44, citing C-390/06 – *Nuova Agricast* (15 April 2008)
[77] para 42
[78] para 45
[79] para 39
[80] para 43
[81] Addressing the Broken Links, p 5.

paying less taxes and therefore are more competitive, undertakings that generate socio-environmental externalities could be asked to compensate the unfair advantage that they obtain by, for example, moving operations to MS with lower environmental protections. This could help close the divide between divergent approaches to the Green Deal among MS.

Note on the Digital Markets Act ("DMA"): EVP Vestager's speeches indicate that the "new complementary tool" to strengthen competition law enforcement to address structural competition problems that cannot be solved with the existing competition law toolbox ("***NCT***") will now be part of the DMA which the Commission is expected to adopt in early December 2020.[82] This narrowed scope of the NCT is at odds with the Inception Impact Assessment on the NCT ("***NCT Impact Assessment***") that was published on 2 June 2020, the results of the public consultation on the NCT that was open between 2 June-8 September 2020, the National Competition Authorities' contributions to the public consultation, as well as the expert studies that the Commission sought as part of the NCT Impact Assessment. Indeed, a structure-based NCT with a horizontal scope would make the NCT "future-proof and effective"[83] and could be an appropriate mechanism to solve various structural problems in the agri-food supply chains (among other markets) that the current competition law framework is unable to address. However, if the NCT is to be limited to the digital sphere, it should not merely focus on the most commonly known and scrutinised digital markets, such as search and e-commerce. Its scope should be kept broad, with a view to make the NCT future-proof in the digital sphere and address cases such as the extensive processing of farmers' data by large conglomerates which could create gatekeepers in agricultural data and increased transparency in markets due to algorithmic price setting which could lead to scenarios comparable to a monopsony.

[82] Eg Speech by Executive Vice-President Margrethe Vestager: Building trust in technology dated 29 October 2020

[83] Factual summary of the contributions received in the context of the open public consultation on the New Competition Tool, p 8