INTERNATIONAL BAR ASSOCIATION
ANTITRUST COMMITTEE
SUSTAINABILITY WORKING GROUP

RESPONSE TO THE EUROPEAN COMMISSION'S CALL FOR CONTRIBUTIONS ON COMPETITION POLICY SUPPORTING THE GREEN DEAL

20 November 2020

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1. INTRODUCTION

1.1 On 13 October 2020, the European Commission ("**Commission**") published a call for contributions about how competition rules and sustainability policies work together ("**Call for Contributions**"). The Call for Contributions followed the announcement by Margrethe Vestager, Executive Vice-President of the Commission, of her intention to launch a European debate on how EU competition policy can best support the Green Deal[1], the EU's plan to make the EU's economy sustainable.[2]

1.2 The IBA is the world's leading international organisation of legal practitioners, bar associations and law societies. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world.

1.3 The IBA has a membership of more than 80,000 individual lawyers from across the world and has considerable expertise in providing assistance to the global legal community. The IBA recognises the global challenge posed by the climate crisis and the need for the legal profession to play a leading role in addressing this challenge and in supporting responsible governance. On 5 May 2020, the IBA adopted a Climate Crisis Statement[3] that includes five resolutions recognising the role that lawyers can and must play in combatting the climate emergency.

1.4 In addition, the IBA is collaborating with the United Nations Environment Programme, a leading global environmental authority, on the development of an environmental law training programme for private legal practitioners. The programme will cover, for instance, the drafting of environmental laws, prosecuting and defending environmental crimes, and public interest litigation.[4]

1.5 The Antitrust Committee of the IBA ("**IBA Antitrust Committee**") comprises international antitrust practitioners from jurisdictions throughout the world. It is cognisant of the reflection process on how competition laws and sustainability policies may work together across the globe. To facilitate its engagement on these issues, the IBA Antitrust Committee has formed an *ad hoc* Working Group drawing from different disciplines of competition law and focusing exclusively on sustainability ("**Working Group**").

1.6 The following comments as well as responses to the questions in the Call for Contributions have been prepared by the Working Group. In the past, the Commission has taken into consideration input from the IBA Antitrust Committee, and the Working Group hopes this submission will prove useful to the Commission.

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[1] https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en
[2] https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en
[3] Please refer to https://www.ibanet.org/Article/NewDetailPreview.aspx?ArticleUid=625855dc-7086-4e14-b730-77d3d8a27923 for further details on the IBA's Climate Crisis Statement.
[4] Please refer to https://www.unenvironment.org/news-and-stories/story/un-environment-partners-international-bar-association-start-environmental for further details on the collaboration between the IBA and the United Nations Environment Programme.

2. PART 1: STATE AID CONTROL

2.1 In October 2020, the Commission published a Staff Working Document[5] concluding that the EU's State aid framework was still fit for purpose, but recognising that certain rules could be clarified or revised in line with the EU's policy and legislative focus on the environment. In mid-November, the Commission issued an invitation for comments on the revision of the Guidelines on State aid for environmental protection and energy and the interplay of the Guidelines with the Green Deal[6], with the expectation that revised Guidelines will be open for public consultation during 2021 and shall ultimately enter into force on 1 January 2022. It is understood that the Commission also intends to consult on other State aid rules that may play a key role in the implementation of the Green Deal, such as the Framework for research, development and innovation State aid, the Communication on important projects of common European interest and amendments to the General State aid block exemption regulation ("**GBER**") in light of the Green Deal.

2.2 The consultations and potential amendments are welcome and may assist in the implementation of the Green Deal, though there is a risk that in the interim the State aid regime may not be operating in a manner which fully supports the "green shift" that may be desirable during a period of anticipated economic recovery supported by the Recovery and Resilience Facility ("**RRF**"). If the Commission wishes to support this "green shift", it should streamline the approval process for State aid which supports the Commission's Green Deal while the consultation and revision process is underway.

Q1. What are the main changes you would like to see in the current State aid rulebook to make sure it fully supports the Green Deal? Where possible, please provide examples where you consider that current State aid rules do not sufficiently support the greening of the economy and/or where current State aid rules enable support that runs counter to environmental objectives.

2.3 Given the above, the Working Group considers that funding under the RRF for verifiable green projects that fully align with the Green Deal should be considered exempt from the notification and approval requirement up to certain maximum amounts (which should be above the current maximum limits under the GBER).

2.4 For aid in excess of these maximum amounts, or aid for other projects with a green focus, the framework and approval process should be streamlined as far as feasible.

Q2. If you consider that lower levels of State aid, or fewer State aid measures, should be approved for activities with a negative environmental impact, what are your ideas for how that should be done?

2.5 While the Working Group considers that the State aid framework can and should be revised to provide further support for initiatives that support the Green Deal, the Working Group does not view it necessary to revise the framework to block or restrict aid for projects which may have a negative environmental impact. The current State aid regime as it stands can ensure that aid is for legitimate policy objectives, and any additional scrutiny from a sustainability perspective should be dealt with through environmental regulations and sector-specific regulations (such as specific regulations for the civil aviation or energy industries) at both an EU and Member State level.

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[5] https://ec.europa.eu/competition/state_aid/modernisation/fitness_check_en.html

[6] https://ec.europa.eu/info/news/commission-invites-comments-revision-guidelines-state-aid-environmental-protection-and-energy-2020-nov-12_en

2.6 To the extent that the Commission does revise State aid measures in a manner which requires significant changes or the termination of projects with a damaging environmental impact, the Commission would need to provide detailed guidance on their expectations around the winding down and/or termination process from a timing and cost perspective.

Q2a. For projects that have a negative environmental impact, what ways are there for Member States or the beneficiary to mitigate the negative effects? (For instance: if a broadband/railway investment could impact biodiversity, how could it be ensured that such biodiversity is preserved during the works; or if a hydro power plant would put fish populations at risk, how could fish be protected?)

2.7 The State aid framework can play a role in ensuring that aid aligns with a legitimate policy objective, but the Working Group does not envisage the framework being used further to mitigate the negative effects of projects. As noted above, the negative environmental impact of particular projects should largely be tackled using EU and Member State environmental or sector-specific regulations, as well as through other elements of the Member State's domestic legal system (e.g. planning permission, mandatory due diligence requirements, product regulation).

Q3a. If you consider that more State aid to support environmental objectives should be allowed, what are your ideas on how that should be done? Should this take the form of allowing more aid (or aid on easier terms) for environmentally beneficial projects than for comparable projects which do not bring the same benefits ("green bonus")? If so, how should this green bonus be defined?

2.8 As noted in response to Q1, the Working Group considers that the State aid framework should be streamlined and simplified for aid that supports environmental objectives and which closely aligns with the Commission's Green Deal. As part of such revisions, the Working Group considers that the maximum aid amounts should be higher for environmentally beneficial projects than for comparable projects that do not bring the same benefits.

Q3b. Which criteria should inform the assessment of a green bonus? Could you give concrete examples where, in your view, a green bonus would be justified, compared to examples where it would not be justified? Please provide reasons explaining your choice.

2.9 As noted in response to Q3a, the Working Group considers that aid that supports environmental objectives and which closely aligns with the Commission's Green Deal would justify a "*green bonus*."

Q4a. How should we define positive environmental benefits? Should it be by reference to the EU taxonomy and, if yes, should it be by reference to all sustainability criteria of the EU taxonomy? Or would any kind of environmental benefit be sufficient?

2.10 The Working Group considers that the EU Taxonomy is an illustrative, but not exhaustive, method of defining positive environmental benefits. The State aid framework should allow Member States to make reasoned determinations regarding the definition of positive environmental benefits.

3. PART 2: ANTITRUST RULES

3.1 There are increasing calls for industry-wide environmental initiatives in line with the Green Deal objectives that could potentially raise antitrust concerns, such as voluntary agreements to impose a "tax" on the use of non-green materials or agreements to phase out or boycott non-green materials or processes. Such initiatives could give rise to serious antitrust concerns, as they could be viewed as hardcore cartels designed to fix prices or restrict output, raise rivals' costs and/or potentially foreclose downstream or upstream market access or otherwise be viewed as agreements which may affect competition in circumstances where the application of Article 101(3) TFEU is unclear. However, some of these

initiatives may contribute to the Green Deal objectives and the Commission may consider it preferable to allow them.

3.2 In addition, some of the Green Deal objectives are unlikely to be achieved unless a sufficient portion of the market players participate. This is due to (i) "path dependency" issues linked to established industry standards, processes and practices, which make an industry-wide change difficult unless a critical mass of the players agree; (ii) significant negative externalities that a single or a small group of companies would likely be unable and unwilling to internalize; and (iii) the fact that often change on an industry-wide level is required to order to convince consumers of the efficacy of the change.

3.3 The Commission's 2011 Horizontal Cooperation Guidelines took the view that environmental agreements should be assessed as a form of standardization agreement.[7] Even though many types of cooperation that would support the Green Deal objectives can qualify as a form of standardization agreement, there are also types of cooperation that do not fall squarely into the definition of a standardization agreement.

Q1. Please provide actual or theoretical examples of desirable cooperation between firms to support Green Deal objectives that could not be implemented due to EU antitrust risks. In particular, please explain the circumstances in which cooperation rather than competition between firms leads to greener outcomes (e.g. greener products or production processes).

3.4 There are several types of agreement which support Green Deal objectives, but which risk not being implemented because of actual or perceived antitrust risks. The examples below are illustrative and not exhaustive of the types of agreements that may be included.[8]

(a) Standardization agreements concerning the environmental performance of products or production processes. These agreements include agreements to set green targets for goods or services, or the imposition of a "tax" on the use of non-green materials. These agreements could raise concerns under Article 101(1) TFEU as they could indirectly foreclose suppliers of non-environmentally friendly materials. Examples include:

(i) Agreements among apparel manufacturers to only buy from cotton producers that respect high environmental and labor standards;

(ii) Agreements among automotive manufacturers to only use recycled or recyclable materials for certain car components;

(iii) Agreements among food manufactures to reduce unhealthy ingredients (sugar, salt, trans fats etc);

(iv) Agreements by FMCG manufactures to only buy from low-carbon certified producers;

(v) Agreements among manufacturers to reduce CO2 emissions (beyond existing regulations);

(vi) Agreements to replace virgin plastics with recyclable plastics;

(vii) Agreements in general between companies with a fair and clear objective to preserve the environment; and

[7] EC, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* at 257.

[8] Several of these examples are based on Unilever's submission to DG COMP on sustainability cooperations between competitors & Article 101 TFEU.

(viii) Agreements to share good practices from a sustainability perspective.

(b) Agreements to not purchase from suppliers who do not use "green" or energy efficient technology or practices. This type of arrangement could be viewed as a collective boycott; a hardcore restriction under Article 101(1) TFEU. Examples include:

(i) Agreement among industry participants to only use recyclable plastics, at the exclusion of PVC or other plastics that cannot be recycled;

(ii) Agreement among industry participants not to buy fish from fisheries that do not abide by specific sustainability / biodiversity goals; and

(iii) Agreement among industry participants not to buy from, or to modify terms with, suppliers and other business partners who do not commit to respect environmental laws and regulations.

(c) Agreements to phase out less green products. This type of arrangement could be viewed as a horizontal price fixing / output reducing cartel. Examples include:

(i) Agreement to phase out less efficient washing machines (*CECED*, Case IV/F.1/36.718, 1999);

(ii) Agreements among utilities to shut down inefficient coal-fired plants *(Energiekkoord*, ACM, 2013); and

(iii) Agreement among manufacturers of low voltage motors to reduce/phase out sales of less energy efficient engines.

3.5 While companies can find competitive and commercial reasons to pursue the above environmentally-friendly actions on an individual basis, a single industry player may face difficulties undertaking them alone given the potential for negative externalities. The possibility that first movers would face a significant "first mover disadvantage" (on the basis of the additional costs that an individual company would have to bear) can mean that sustainable products or initiatives instigated by a single industry participant do not enter the market in the first place (or survive only in expensive, niche segments of the market). Indeed, a purely "market based" approach could result in those cases in the continued use of non-green materials, with the resulting harm to the environment. A collaborative approach amongst industry participants, on the other hand, could reduce the extent to which such materials continue to proliferate in the production process.

3.6 Against this background, the Commission may therefore in furtherance of the Green objectives take a broader view of the consumer welfare standard and efficiencies under Article 101(3) TFEU, and specifically allow "out of the market" efficiencies, such as clean air, decrease in deforestation, decrease in pollutant emissions, etc. to be included in the analysis, even if they do not directly benefit the consumers or users that are affected by the agreements in questions. This is the approach acknowledged by the Netherlands Authority for Consumers and Markets ("**ACM**")'s draft sustainability guidelines, which clearly state that, with regard to agreements designed to reduce environmental damage, it should be possible to take into account benefits going beyond direct users.[9]

3.7 The Working Group therefore recommends that, if it were to further the Green Deal objectives, the Commission, in its efficiencies assessment, should also take into account (i) the benefits for the next

[9] *Draft Guidelines for Sustainability Agreements, Opportunities within competition law, ACM* ("**ACM Sustainability Guidelines**") at 40

generation,[10] (ii) good faith estimates of the environmental benefits; and (iii) the existence or establishment of mechanisms for achieving the anticipated environmental benefits, among others.

Q2. Should further clarifications and comfort be given on the characteristics of agreements that serve the objectives of the Green Deal without restricting competition? If so, in which form should such clarifications be given (general policy guidelines, case-by-case assessment, communication on enforcement priorities?)

3.8 The Working Group submits that given the broad variety of potential sustainability arrangements, it would not be realistic or useful at this stage to adopt a Block Exemption Regulation. However, the Commission could provide further clarifications and comfort for undertakings and their advisors through detailed sustainability guidelines.

3.9 The guidelines should address the types of sustainability cooperation agreements that would fall outside the scope of Article 101(1) TFEU or agreements that would fall within the scope of Article 101(1) TFEU but qualify for exemption under Article 101(3) TFEU. The Working Group considers that this would require "sustainability" sections both in the Horizontal Cooperation and Vertical Restraints guidelines, as well as the Article 101(3) TFEU guidelines.

3.10 The guidelines should in particular focus on the following key points:

(a) What criteria does an agreement have to meet in order to be a "sustainability agreement" that benefits from the guidelines;

(b) Whether the Commission would take a more lenient approach vis-à-vis horizontal or vertical sustainability agreements to the extent that they have the object of meeting binding international, national or industry-wide targets;

(c) Whether there is any market share threshold below which sustainability agreements will be viewed as compatible with Article 101(1) TFEU based on a qualitative – rather than quantitative – assessment of the sustainability benefits. The draft ACM Sustainability Guidelines place that threshold at 30% for all the parties involved in the agreement;

(d) The criteria that the Commission will use in balancing the longer-term sustainability benefits against the short-term competition impact, both in relation to the competitive assessment under Article 101(1) TFEU and the assessment of efficiencies under Article 101(3) TFEU. More specifically:

(i) The Commission should clarify whether under the Article 101(1) TFEU assessment it will take a longer-term view of the effects of the agreement inter alia by (i) looking at the "environmental price" in assessing the effects of the arrangement (*i.e.* comparing the price resulting from the sustainability arrangement against the market price before the agreement adjusted upwards for impact on the environment); (ii) balancing the potential barriers to entry that could be created by the sustainability arrangement against the longer-term benefits to sustainability; and (iii) assessing whether the agreement would enable the parties to achieve sustainability goals that they would not otherwise have been able to achieve individually.

(ii) Under the Article 101(3) TFEU assessment the Commission could clarify the requirement that the affected consumers receive a "fair share" of the pro-competitive benefits to encompass the wider benefit to society. The Working Group strongly advises a balancing

[10] ACM Sustainability Guidelines at 36

exercise comparing the longer-term sustainability benefits against the shorter term competition impact.

(iii) The draft ACM guidelines suggest to no longer require that consumers receive a "fair share" of the benefits where (i) the agreement aims to prevent or limit an obvious environmental damage; and (ii) the agreement helps to comply with an international or national standard to prevent environmental damage to which the government is bound.[11] The Working Group recognizes that this approach might be difficult to reconcile with the wording of Article 101(3) TFEU which specifically requires that consumers enjoy a "fair share" of the pro-competitive efficiencies. However, it is suggested that the Commission has the ability to adopt a flexible approach to Article 101(3) TFEU in this manner so as to give effect to a wider reading of the term.

(e) An indication whether the Commission will provide a safe-harbor from fines for sustainability agreements that were public and made a good faith effort to follow the sustainability guidance, even if despite these good faith efforts, they turned out to have anti-competitive effects. This is particularly important for agreements between horizontal competitors, which could have an upward impact on pricing or be potentially viewed as a collective boycott.

Q3. Are there circumstances in which the pursuit of Green Deal objectives would justify restrictive agreements beyond the current enforcement practice? If so 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?

3.11 At the outset, the Working Group notes that the mere fact that an agreement pursues a sustainability objective should not be a "blank check" to enter into any form of restrictive cooperation. The new legislative framework should ensure that there is no "greenwashing", i.e. no use of environmental agreements to disguise a cartel to engage in price fixing, market allocation, output restriction or a plan to exclude actual or potential competitors.

3.12 The Working Group recommends that, if the Commission wishes to promote the Green Deal's sustainability objectives, they may be placed on a par with consumer welfare. This would necessarily lead to the exemption of certain agreements that are currently not compatible with Article 101 TFEU as stated in response to question 1. However, any inclusion of Green Deal objectives into the competition assessment should be done in a gradual step-by-step way to avoid the Commission and NCAs facing a multitude of unfocused or overly-broad assessments before the Green Deal objectives have had the time to be properly incorporated into the competition assessment.

3.13 The Commission has significant leeway to progressively take a more expansive approach and include sustainability considerations into the consumer welfare standard. As pointed out by the Hellenic Competition Commission's Staff Working Paper on Sustainability[12], the Commission has exceptionally taken into account in the past efficiency gains that were not generated in the specific relevant market but on "collective environmental benefits" beyond the relevant market in question.[13] In addition, the

[11] ACM Sustainability Guidelines at 38
[12] https://www.epant.gr/en/enimerosi/competition-law-sustainability.html
[13] EC, decision of 24 January 1999, Case IV.F.1/36.718.CECED) - *CECED*

Wouters[14] case law relating to legitimate public interest objectives gives the Commission a basis to exempt sustainability agreements that are necessary to achieve Green Deal objectives.

3.14 Notwithstanding the above, the Working Group believes that the Commission, in its Article 101(3) TFEU assessment, should also apply the principle of proportionality and necessity. This means that if there are less restrictive ways to achieve the same green deal objective, a more restrictive agreement might not be justified under Article 101(3) TFEU.

4. PART 3: MERGER CONTROL

4.1 The Working Group observes that sustainability issues could potentially come into play in various ways in merger control. A merger could have negative or positive effects on sustainability and negative or positive competitive effects. Where both competition policy and environmental policy objectives point to concerns about a merger transaction, the key question (in the absence of a direct regulatory regime to address sustainability in a merger context), is the extent to which the normal operation of merger control may assess sustainability outcomes as well.

4.2 The more difficult situations are those in which the policy objectives do not align: a merger could have negative sustainability effects, and yet be found not to be anticompetitive, or a merger could have positive sustainability effects, but be anticompetitive. Such occurrences may not be common and it is therefore not clear that sustainability issues should play an expanded role in merger control regimes. The Working Group cautions against the introduction into the merger control framework of a potentially complex and burdensome (for the Commission or other agencies, as well as private parties) sustainability focused regulatory regime.

Q1. 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?

4.3 The Working Group considers that a merger that would cause a reduction in choice of environmentally-friendly products can usually be addressed under the current EU merger framework. The Commission's Horizontal Merger Guidelines emphasize, besides low prices, consumer benefits such as high quality products, a wide selection of goods and services, and innovation as aspects which may be taken into account when assessing mergers.

4.4 There are indeed merger control cases, though only a few, where environmental considerations have played a role:

(a) In *Bayer/Mosanto*[15], the Commission noted that it was "*mindful of the potential implications of a possible reduction of competition caused by the Transaction on human health, food safety, consumer protection, environmental protection and climate. The Commission has, in particular, paid specific attention in its review to ensure that post-Transaction innovation in the agroindustry sector is preserved as the key for the emergence of more effective, healthier, safer and more environmentally-friendly products*."

(b) In *DEMB/Mondelez/Charger OPCO*[16], for example, the Commission considered whether non-conventional coffee, including organic-grown coffee, formed a separate market from conventional coffee.

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[14] Judgment of the European Court of Justice, judgment of 19 February 2002, C-309/99, *J.C.J Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten*

[15] EC, decision of 21 March 2018, M.8084 - *Bayer/Mosanto*, para. 3011

[16] EC, decision of 5 May 2015, M.7292 – *DEMB/Mondolez/Charger OPCO*.

(c) In *Ryanair v Commission*[17], Ryanair's argument that the acquisition would lead to cost savings on fuel was considered by the General Court but ultimately rejected due to lacking verifiability of the efficiency claims.

(d) In the recent decision in *Aurubis/Metallo*[18], Commissioner Margarethe Vestager explicitly referred to the European Green Deal in a press release, stating that a "*well-functioning circular economy in copper is important to* ensure *a sustainable usage of resources in the context of the European Green Deal. This is why we carried out an in-depth investigation of the merger*".[19]

4.5 All these decisions have in common that sustainability or environmental considerations were taken into account to the extent they were competitively relevant in terms of choice for consumers, definition of the relevant market, or efficiencies. The Working Group considers that the current EU framework for assessment of competitive effects does not, however, provide open-ended opportunities for consideration of all environmental activities or practices of the merging parties beyond the likely competitive effects in a relevant market. As will be discussed in response to the next question, the Working Group believes that, with the potential exception of efficiencies, such considerations could be dealt within a legal and institutional framework that is separate from, rather than integrated into, competition law control of mergers.

Q2. 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?

4.6 In situations where the competitive effects and sustainability effects of a merger are conflicting, the Working Group considers that there are two main potential ways to address sustainability objectives. One involves more expansive use of the efficiencies provisions in the EUMR as a mechanism for overriding competition concerns if sustainability benefits contribute to efficiency and economic welfare. Alternatively, a broader basis for considering environmentally-based considerations could be established. Some jurisdictions have established a mechanism for doing so in the form of an override process.

Consideration of Efficiencies

4.7 If a merger is anticompetitive, but could contribute positively to sustainability goals, there may be some scope for positive environmental factors to be analyzed as efficiencies. It could then be determined whether the positive environmental factors would justify allowing the merger to proceed.

4.8 Article 2(1) of EU Merger Regulation lays out the factors to be considered when deciding whether to allow or block a merger. One of those factors is "*the development of technical and economic progress provided that it is to the consumers' advantage and does not form an obstacle to competition*" (Article 2(1)(b)). While the structure of Article 2(1) EUMR does not provide for an explicit efficiencies defence, efficiencies can be taken into account as part of the assessment of a merger pursuant to this provision. In order for the Commission to take efficiency claims into account and allow a merger on the basis of Article 2(1), three conditions need to be satisfied: the efficiencies have to (i) benefit consumers; (ii) be merger-specific; and (iii) be verifiable.[20]

4.9 As regards the first condition, the benefit of efficiencies to consumers, the Commission's Horizontal Merger Guidelines state that "*efficiencies should be substantial and timely, and should, in principle,*

[17] General Court, judgment of 6 July 2010, T-342/07 – *Ryanair v Commission*.
[18] EC, decision of 4 May 2020, M.9409 – *Aurubis/Metallo*.
[19] EC, press release IP/20/801.
[20] EC, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Horizontal Merger Guidelines")*, [2004] OJ, C 31/5 at 76-78.

benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur"[21], implying a reluctance to consider benefits in other markets than those directly affected by the merger. The Commission could increase the scope for positive sustainability effects to be considered in merger control by adopted a broader interpretation. A wider understanding could be justified under Article 2(1) EUMR, which refers to "*the structure of all the markets concerned*" as well as to the "*technical and economic progress*" without a limitation to the relevant market.

4.10 Efficiencies furthermore need to be "verifiable" so that it can be assessed whether they are "*likely to materialise*" and are expected to be "*substantial enough to counteract a merger's potential harm to consumers*". Where possible, the efficiencies should therefore be quantified.[22] Quantification, however, can pose a challenge for the consideration of sustainability aspects. In the context of sustainability benefits, the Working Group recognizes that openness to additional economic tools, including new economic theories and methodologies, may be required to fully assess the economic effects of a merger, particularly for sustainability benefits that may tend to occur mid and long-term.

Override Mechanisms

4.11 While there may be limited scope to allow mergers with sustainability benefits that are otherwise anticompetitive under the efficiencies framework, merger control is not necessarily a good instrument for addressing environmental and sustainability issues resulting from a merger. Environmental and sustainability considerations are wide ranging: some are quantifiable and may be put into an integrated economic model, whereas others are not. The Working Group notes that an override mechanism, as described below, is a possible tool for merger enforcement to contribute to the goals of the Green Deal.

4.12 An override mechanism would grant a decision-maker authority to approve an anti-competitive merger on the basis of its impact on sustainability and the environment. Such mechanisms have been established in limited situations, usually conferring decision-making powers on a politically-accountable decision-maker who is given some degree of discretion to act on broader public interest considerations. For instance, the UK Enterprise Act 2002 enables the UK Government to intervene in transactions in certain circumstances based on limited "public interest" grounds of national security, media plurality or financial stability; if the Government intervenes in this manner, then the Secretary of State, not the UK Competition and Markets Authority, becomes the final decision-maker as to whether the transaction should be cleared or prohibited.

4.13 While the Working Group can envision this type of override mechanism being established to address sustainability issues that may not align with merger control assessments under EUMR, it reiterates that these types of regulatory processes can introduce significant uncertainty and compliance/enforcement burdens. Accordingly, the Working Group believes that it would be important to conduct a cost-benefit analysis before developing this type of mechanism.

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[21] *Ibid* at 79.
[22] Horizontal Merger Guidelines at 86.