

**European Commission's 'Call for Contributions'
Competition Policy supporting the Green Deal**

1. Executive Summary

- 1.1 We welcome the opportunity to respond to the 'Call for Contributions'¹ and we support the European Commission's ("**Commission**") aim of gathering ideas and proposals from stakeholders to establish ways in which competition policy can be harnessed to achieve the European Union ("**EU**") Green Deal objectives. We note that the overarching goal of the Green Deal is for Europe to be the first climate neutral continent by 2050, but in addition to environmental objectives, the Green Deal also encompasses economic, social and technological goals, to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy.²
- 1.2 We agree with the Commission's assessment that competition between companies has a part to play in achieving the Green Deal objectives, for example by allocating scarce resources efficiently. However, we caution the Commission not to pre-judge that competition is always the solution, especially when trying to achieve unprecedented systemic change rapidly across the entire EU (and global) economy.
- 1.3 This response sets out Slaughter and May's³ views on the questions posed in the 'Call for Contributions'. Our views have been informed by conversations with some of our clients, representing a broad range of industries, including aviation, energy production, mining, engineering, packaging, telecoms, technology, pharmaceutical, FMCG, and asset management. The response does not, however, claim to represent any of our clients' views, and indeed some of our clients may decide to submit their own responses.
- 1.4 This response focuses predominantly on the anti-trust rules, as we consider that it is in this area that the most uncertainty exists currently for our clients regarding the relationship between competition policy and the Green Deal objectives. In summary we consider that:
- (i) Where possible companies are taking unilateral action to achieve sustainability goals. This is true across industries. Competition, therefore, has a part to play in achieving the Green Deal objectives. This is especially true where there is a willingness from customers to pay more for, or share the cost of, greener and more sustainable alternatives.
 - (ii) In some instances unilateral action is not capable of delivering the changes required to achieve the Green Deal objectives, or will not deliver them fast enough to avoid significant environmental and social harm. Cooperation and collaboration is therefore necessary between companies. This is especially the

¹ https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf

² Given the breadth of the Green Deal objectives we refer to sustainability goals and sustainability objectives interchangeably with the Green Deal objectives in this response. Recognising that 'sustainability' is a multifaceted term encompassing both environmental, social and economic factors.

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case where a paradigmatic shift is required by an industry to meet the Green Deal objectives, for example where the core product needs to fundamentally change, but there is currently no commercially viable sustainable alternative available. It is not sufficient to wait for regulation to drive changes, companies want to move faster and have ambitions to do so.

- (iii) The actual or perceived risk of breaching competition laws is currently restricting the willingness of companies to cooperate to achieve sustainability objectives; even where such cooperation may ultimately be compatible with competition laws. Whether legally founded or not, anti-trust risks slow down the speed of sustainability initiatives. For example, by putting in place an additional hurdle, and/or reducing the willingness of companies to participate, and/or because companies reach different conclusions on what is lawful. Ultimately anti-trust risks can therefore contribute to the failure of sustainability initiatives.
- (iv) In some instances the types of cooperation needed to meet the Green Deal objectives will restrict competition, however they will also create significant environmental and social benefits to the EU. In addition to providing guidance on the features of sustainability agreements that will not restrict competition, it is necessary for the Commission to confirm when sustainability agreements that do restrict competition can fall outside of the scope of Article 101(1) of the Treaty on the Functioning of the European Union (“TFEU”). We consider that this could either be when (i) a restriction is limited and ancillary to, or objectively necessary for, the obtainment of an agreement and thereby of a Green Deal objective or (ii) because of the application of Article 101(3) TFEU. With regard to the application of Article 101(3) TFEU in particular, the Commission must confirm that all benefits (including those to wider society) and not just those accruing to direct consumers can be included in the assessment.
- (v) The Commission must act swiftly to provide further guidance (in different forms) on how EU competition laws and policy should be interpreted by companies in light of the Green Deal and broader sustainability objectives. Failure to provide guidance promptly will mean that the actual or perceived risk of breaching competition law continues to restrict collaborations between companies, slowing the obtainment of the Green Deal objectives and ultimately worsening the climate crisis.
- (vi) As the world’s leading competition regulator, the Commission has a great opportunity to positively influence other competition regulators’ approaches, not just in the EU but also around the world. Leaving too little flexibility to take into account sustainability benefits when interpreting competition law could have a significant, long lasting, negative effect across the world, as other regulators adopt the Commission’s position. By setting out a clear pro-sustainability position in its guidance, enforcement priorities, decisional practice, and in forums such as the International Competition Network, the Commission can lead the world’s competition regulators in contributing to the fight against climate change. As Executive Vice President Vestager has noted: “[t]o succeed, everyone ... will have to play their part – every individual, every public authority. And that includes competition enforcers” (emphasis added).

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1.5 We would welcome the opportunity to discuss this important issue further with the Commission.

2. Anti-trust question 1: Please provide actual or theoretical examples of desirable cooperation between firms to support Green Deal objectives that could not be implemented due to EU antitrust risks. In particular, please explain the circumstances in which cooperation rather than competition between firms leads to greener outcomes (e.g. greener products or production processes).

2.1 As the Commission is aware, the underlying logic of EU competition law is that competition can deliver positive outcomes, including in the form of innovation and choice and fair prices for consumers.⁴ However, the fact that “*climate change and environmental degradation are an existential threat to Europe and the world*”⁵ demonstrates that competition is also delivering significant negative outcomes for the environment, consumers and global citizens.

2.2 Indeed, the 2006 Stern Review described climate change as “*the greatest market failure the world has ever seen*”⁶, and the scale of this market failure is evident from the fact that 14 years later climate change forecasts have worsened and competitive markets have not delivered comprehensive solutions. In light of this, it is necessary to consider whether cooperation rather than competition between companies could lead to greener outcomes. We welcome the Commission’s willingness to consider this in its ‘Call for Contributions’.

Commercial rationale limiting unilateral action

2.3 Our clients have highlighted the importance of sustainability objectives in their industries. Where possible they are taking unilateral action to achieve sustainability objectives. Indeed, they want to compete and to gain a competitive advantage by providing more sustainable products and services than their competitors.

2.4 In some instances, there is a strong commercial rationale for companies to increase the sustainability of their products and services (absent any legal or regulatory requirements to do so). This may be the case where doing so reduces production costs or leads to only marginal cost implications. It may also be the case where there is strong pressure from their customers and/or end consumers, or where there is a strong willingness from customers to pay more for more sustainable options. In these instances it is clear that competition between companies has the potential to deliver the Green Deal objectives.

2.5 However, it is important to recognise that this is not always the case. Especially when adopting a more sustainable approach is not currently, and is not forecast to become,

⁴ The Commission’s website states that “[t]he EU’s rules on competition are designed to ensure fair and equal conditions for businesses while leaving space for innovation, unified standards, and the development of small businesses. The European Commission monitors and investigates anti-competition practices, mergers and state aid to ensure a level playing field for EU businesses, while guaranteeing choice and fair pricing for consumers.” (https://europa.eu/european-union/topics/competition_en)

⁵ https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en

⁶ Stern Review Report on the Economics of Climate Change, Summary of Conclusions page viii (available at https://webarchive.nationalarchives.gov.uk/20100407172811/http://www.hm-treasury.gov.uk/stern_review_report.htm).

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financially sustainable and therefore commercially viable. This may occur when there is no customer willingness to pay more for more sustainable alternatives (or indeed the full environmental cost of their current consumption) and, for example when:

- (i) A sustainability initiative would add additional costs without improving the core product (e.g. providing greater reporting on environmental costs).
- (ii) Significant capital expenditure is required, e.g. in research and development to invent new technologies, with no certainty of success or return on investment.
- (iii) Adopting a more sustainable approach (e.g. by using more sustainable raw materials or production methods) would increase a company's costs and create a 'first mover disadvantage' (i.e. where the company adopting the sustainable approach is undercut by rival companies that have not done the same).

2.6 Indeed, the lack of a strong commercial rationale will limit when unilateral action will deliver sustainability objectives. In these instances, unless a more cooperative approach can be adopted it will threaten the achievement of sustainability goals.

Examples of necessary cooperation

2.7 It is not possible to provide a complete list of sustainability initiatives where cooperation rather than competition between companies would lead to greener outcomes. However, based on discussions with our clients we have identified the following non-exhaustive scenarios:

- (i) Cross industry or industry-wide cooperation to research and develop new sustainable technologies or processes that do not currently exist and would require significant capital expenditure to invent and develop. This may include agreeing to focus investment on specific nascent technologies or specific alternative fuel pathways.
- (ii) Cooperation between all industry players to agree to adopt new sustainable technologies that already exist but which are commercially unproven. It may also be essential to ensure a level playing field by eliminating any first mover cost disadvantage.
- (iii) Cooperation to facilitate the transition to a circular economy by, for example, companies agreeing to switch to using common materials and/or establishing necessary support services (e.g. collection or recycling services).
- (iv) Cooperation between companies at the downstream level of a supply chain to put collective pressure on their suppliers to offer greener products / inputs. This may involve 'market-making' to incentivise upstream suppliers. It may also involve agreeing to purchase only sustainable products from upstream suppliers and to cease purchasing non-sustainable products (in some industries this may require downstream companies to cease purchasing altogether from certain upstream suppliers until the suppliers switch to supplying sustainable products).

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- (v) Cooperation to adopt binding environmental targets for all industry players to ensure a level-playing field and to ensure that adopting more sustainable approaches do not put companies at a competitive disadvantage. This may necessarily require sharing of sensitive information to monitor compliance.
 - (vi) Cooperation to agree standardised environmental labelling of products. This may be underpinned by agreements on consistent reporting methodologies.
 - (vii) Cooperation to maximise the efficiency of an industry's supply chains e.g. collaborations between suppliers and customers to share shipping capacity.
- 2.8 Whether or not the above listed scenarios would be found to restrict competition if implemented today would depend ultimately on the specific facts of each case. However, it is clear to us that, before entering into any such collaborations, our clients would need comfort that doing so is lawful. The message we are hearing from them is that, in the absence of any clear guidance or decisional practice, the perceived risk of breaching competition law is currently restricting their willingness and that of their peers, to explore whether it is even possible to enter into such collaborations, despite their laudable objectives.
- 2.9 Indeed, the lack of clear guidance makes it even harder for companies to cooperate, as different companies may adopt very different interpretations of what is and is not lawful. Where companies are not aligned on what they can and cannot even discuss and/or agree, this makes it extremely difficult to achieve the cooperation and consensus decision-making required to achieve certain sustainability goals.
- 3. Anti-trust question 2 - Should further clarifications and comfort be given on the characteristics of agreements that serve the objectives of the Green Deal without restricting competition? If so, in which form should such clarifications be given (general policy guidelines, case-by-case assessment, communication on enforcement priorities...)?**
- 3.1 In our view, there is a strong need for the Commission to provide guidance on the characteristics of agreements that serve the Green Deal objectives without restricting competition, and also on how sustainability agreements that do restrict competition can fall outside of the scope of Article 101(1) TFEU (see further our response to Question 3 below).
- 3.2 In our response to Question 1 we have identified examples of cooperation between companies that are not being pursued due to the risk of breaching competition law. The fear of breaching competition law, whether legally founded or not, results in companies taking a cautious approach. This caution is exacerbated by the lack of clear guidance as to when cooperation to achieve sustainability objectives will and will not breach competition law, and on what type of breaches the Commission will focus its enforcement efforts. Our view is that the Commission must fill this vacuum and provide companies with the clarity and comfort they need to quickly and unambiguously decide whether or not it is lawful for them to enter into sustainability initiatives.

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- 3.3 In this section we have provided views on the different forms that guidance could take. These are not dealt with in order of importance or indeed preference, but according to the relative legal certainty each form of guidance provides. It is important to note, however, that we consider that these different options are not mutually exclusive. Indeed, the Commission should be doing everything in its power to assist companies to achieve the Green Deal objectives and could adopt all of them in some form.

Block exemptions

- 3.4 We note that the 'Call for Contributions' states that *"[a]greements pursuing sustainability objectives may also in principle enjoy the benefit of the Commission's block exemption regulations (BERs) so long as they do not contain hard-core restrictions and when the joint market shares of the parties to the agreement do not exceed specific thresholds."* However, it is important for the Commission to recognise that the scale of the challenges that the Green Deal objectives seek to overcome necessitates, in some instances, cooperation by all industry participants or by all significant market participants. The market share thresholds of the existing BERs therefore limit their applicability to important sustainability agreements.

- 3.5 If the Commission is considering implementing a new BER targeted specifically at sustainability objectives, then the Commission should consider whether to apply a higher market share threshold or indeed dispense with one altogether and use alternative criteria to determine eligibility. The Commission could also consider whether market share thresholds in existing BERs should be increased or dispensed with when applying those BERs to sustainability agreements.

Comfort letters

- 3.6 We welcome the flexibility that the Commission has shown in response to the COVID-19 pandemic in its use of comfort letters. The use of comfort letters in response to the COVID-19 pandemic reflects the need for companies to obtain case-specific comfort when responding quickly to a crisis.

- 3.7 Although the full effects of global warming are not yet being felt across Europe, it is essential that we treat global warming as a climate crisis nonetheless. In this context, and given the fundamental and systemic changes that are required to tackle the climate crisis and to obtain the Green Deal objectives, we consider there is a real need for a mechanism through which companies can obtain case-specific comfort on their proposed collaborations.

- 3.8 Our clients have, however, raised two reservations about obtaining case-specific comfort from the Commission:

- (i) Speed – our clients' main reservation about obtaining case-specific comfort is the potential for it to slow down entering into cooperation agreements (thereby potentially undermining their chance of success). In particular, there are concerns around the speed at which the Commission would make any decisions (especially on novel issues) and the additional burden that protracted discussions could place on companies. This concern could easily be resolved by the

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Commission setting out clear timings within which it will endeavour to respond to individual assessment requests.

- (ii) Confidentiality – although some companies welcome additional publicity about their sustainability efforts, some of our clients have concerns about the fact that comfort letters are publicly available. While the publication of comfort letters does potentially provide helpful guidance to other companies assessing their own sustainability initiatives, this should be balanced against the fact that it may dissuade other companies from using the process (ultimately undermining the attractiveness of the process). This concern could be resolved by ensuring there is an opportunity for confidentiality redactions before comfort letters are published or by anonymising them.

- 3.9 In addition to the more formal comfort letter option the Commission may also consider creating a mechanism whereby companies can quickly obtain informal guidance. This could take the form of short meetings where companies could consult with the Commission on specific proposals at an early stage. This would have the benefit of enabling companies to determine if there is any scope to proceed with collaboration initiatives before making material investments (whether time, resources or funds). The clear benefit to the Commission of this approach is that it would enable it to take an active role in shaping collaborations at the outset, thereby limiting the risk of them harming competition, as opposed to being reactive to problematic collaborations at a later stage. Providing an additional informal approach alongside any more formal comfort letter process should provide more opportunities for the Commission to take such an active role.

Guidance / Guidelines

- 3.10 As previously noted, we consider that there is an urgent need for the Commission to provide guidance to companies on the characteristics of agreements that serve the Green Deal objectives without restricting competition, and also on how sustainability agreements that do restrict competition can fall outside of the scope of Article 101(1) TFEU.
- 3.11 We welcome the Commission's announcement that it is considering the need to provide guidance on sustainability agreements as part of its review of its Horizontal Co-operation Guidelines.⁷ However, we have concerns with this approach as compared to providing stand-alone guidelines on sustainability agreements. In particular, we consider that providing stand-alone guidelines has the following advantages:
- (i) Decoupling the provision of sustainability guidance from the Commission's process for updating its Horizontal Block Exemptions Regulations and accompanying Horizontal Co-operation Guidelines should enable the Commission to provide sustainability guidance sooner. In particular, the ACM's

⁷ <https://ec.europa.eu/competition/antitrust/news.html>

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Draft Guidelines on Sustainability Agreements⁸ may provide a useful precedent for the Commission.

- (ii) The Commission would have freedom of both format and length, allowing it to provide detailed guidance, both on the principles that should be applied and through specific worked examples.
- (iii) Guidance is required on both horizontal and vertical agreements, and indeed some cross-industry collaborations may require both forms of agreements to be successful. Stand-alone guidelines could contain both, rather than splitting guidance between the Commission's Horizontal Co-operation Guidelines and Guidelines on Vertical Restraints.⁹
- (iv) It will send a clear message to companies and other competition regulators that sustainability objectives need to be prioritised. In particular, as the world's leading competition regulator, any guidance that the Commission publishes will be replicated and inform the approaches taken by other regulators across the world. This will significantly increase the positive impact of such guidance. In our view, this replication is much more likely to happen if the sustainability guidance is stand-alone, rather than integrated into the Horizontal Co-operation Guidelines.

Communication on enforcement priorities

- 3.12 There is an urgent need for companies across all industries to act to achieve the Green Deal objectives. Companies will therefore need to make decisions quickly and may not always fully appreciate the competition law implications of these decisions (especially in the absence of clear guidance). This is especially the case when companies are seeking to work together to achieve aims that are overwhelmingly positive for society. It is therefore important for the Commission to publicly recognise that there is a difference between (i) companies accidentally breaching the law when pursuing positive societal aims; and (ii) companies knowingly or recklessly breaching competition law or indeed using sustainability as a smokescreen for anti-competitive aims (so-called 'greenwashing').
- 3.13 We consider that the Commission should focus its enforcement priorities on the second category of agreements. This is especially the case as not only would such agreements lead to consumer harm by being anti-competitive, they may also lead to wider societal harm by misleading consumers on the environmental credentials of any related goods or services.
- 3.14 With regard to the first category of agreements, we consider that the Commission should adopt a similar policy to that outlined by the ACM in paragraph 62 of its Draft Sustainability

⁸ <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf>

⁹ If the Commission decides to adopt stand-alone sustainability guidelines and also provide guidance in its Horizontal Co-operation Guidelines and/or Guidelines on Vertical Restraints, then it will be necessary to ensure the guidance is entirely consistent or otherwise specify which should take precedence.

Guidelines.¹⁰ Specifically, where any Commission guidance has been followed in good faith as much as possible, but the Commission later finds that an agreement is incompatible with EU competition law, the Commission should work with the relevant companies to agree any adjustments necessary to achieve compatibility. In these cases, the Commission should not impose fines, in recognition of the fact that the companies involved were seeking to benefit rather than harm European society. This approach should also apply to agreements that have been discussed with the Commission in advance (e.g. through a comfort letter process), if the Commission did not at that stage identify any risks.

4. Anti-trust question 3. 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?).

4.1 Taking into account the severity of global warming, we consider that there must be circumstances in which the pursuit of the Green Deal objectives justify agreements that restrict competition.

4.2 In some instances, such agreements should be deemed to fall outside of the scope of Article 101(1) TFEU because any restriction is limited and clearly either ancillary to, or objectively necessary for, the obtainment of an agreement that materially contributes to achieving a Green Deal objective. This should apply where the agreement could not be reached without the restriction, and the restriction (or harm caused by it) is limited and proportionate in the context of the agreement's positive contribution. Guidance is needed from the Commission confirming that this approach is acceptable.

4.3 In other instances, where the restriction on competition is more significant, a more detailed assessment will be necessary to determine whether the benefits of a sustainability agreement to the environment and wider society outweigh its restrictive effects on competition. As explained in more detail below, we consider that the existing framework provided by Article 101(3) TFEU can be used for this purpose. However, it is necessary for the Commission to explicitly confirm that it is possible to include wider 'out of market' benefits when assessing the application of Article 101(3) TFEU to such agreements.

Allowing consumers a fair share of the resulting benefit

4.4 Article 101(3) TFEU provides that Article 101(1) TFEU will only be declared inapplicable where any agreement, decision or concerted practice *inter alia* "contributes to improving

¹⁰ <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf>

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*the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit”.*¹¹

- 4.5 The traditional application of the ‘fair share’ analysis is that:
- (i) Only ‘in market’ benefits are counted i.e. only the benefits accruing to the consumers in the market impacted by the relevant agreement should be taken into account. The logic underpinning this is that these consumers are exposed to any negative effects due to the restriction of competition; and
 - (ii) A fair share means that these consumers should be fully compensated for any negative effects (whether economically through price reductions or through other non-price factors such as quality improvements), i.e. the net effect of the agreement should be neutral for the consumers.
- 4.6 The traditional application of the ‘fair share’ analysis is not fit for purpose given the nature of the market failure that the Green Deal objectives seek to address. Specifically, greenhouse gas emissions and other forms of environmental pollution are negative externalities. They have caused a market failure because currently consumers benefit from the consumption of goods and services, but do not pay the full environmental costs of this consumption. Instead these costs are imposed on everyone else. The current approach to Article 101(3) TFEU assumes that consumers are paying this full cost, and therefore any agreement that increases the cost of consumption can only be exempt if it proportionally increases the benefits to consumers as well.
- 4.7 Applying the existing approach, any agreement that results in a consumer paying a larger share or even the full environmental costs of their consumption (or the costs of avoiding this harm by either offsetting or switching to less harmful production methods) is unlikely to sufficiently benefit the consumer for the purpose of Article 101(3) TFEU. How can it when the *status quo* is that consumers currently only bear a fraction of these costs? It is therefore necessary to broaden the scope of benefits that can be taken into account when applying Article 101(3) TFEU and take into account wider benefits to society, as for many sustainability agreements these wider benefits will materially outweigh the benefits and harms to the direct consumers. Furthermore, it is necessary to consider benefits arising over longer timeframes than the costs against which they are being balanced, as ultimately the benefits may accrue the most to those that have not yet been born.
- 4.8 If the Commission is serious about achieving the Green Deal objectives, it is essential that it provides clear guidance confirming that wider ‘out of market’ benefits can be included in any Article 101(3) TFEU assessment. Indeed, the Commission is obligated to adopt this approach in light of the environmental obligations in Article 3 of the Treaty on European Union.

¹¹ It is well documented in other sources why “*contributes to improving the production or distribution of goods or to promoting technical or economic progress*” should be interpreted widely enough to include obtaining sustainability objectives, including the Green Deal objectives and we will not recite these arguments here (see for example Simon Holmes’ article ‘Climate change, sustainability, and competition law’ - <https://academic.oup.com/antitrust/article/8/2/354/5819564#205178801>).

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- 4.9 It is important to recognise that adopting this alternative approach to the ‘fair share’ test does not require any legislative changes. Indeed, Article 101(3) TFEU does not state that consumers in the impacted market must be left no worse off. This ‘no worse off’ approach is just the interpretation that has previously been made by the Commission and other European competition authorities. It is therefore possible for the Commission to revise its interpretation to take into account ‘out of market’ benefits when applying Article 101(3) TFEU to sustainability agreements.
- 4.10 The Commission may have reservations about how to quantify ‘out of market’ benefits. We consider that any requirement to quantify benefits should be restricted to only those cases that are borderline. This is because, requiring a detailed quantification exercise will reduce the likelihood of companies relying upon Article 101(3) TFEU and, where they do, reduce the speed at which agreements are reached and implemented. In many cases it will be clear that a sustainability focused collaboration agreement will achieve significant benefits to society, so quantification should be unnecessary. Any quantification requirement should therefore be limited only to borderline cases where the anticipated price increase (or other harm to consumers) is high and the expected societal benefits are uncertain or low.
- 4.11 In the event that the Commission considers quantification is necessary, the Commission should provide guidance as to how benefits should be measured. In addition, the Commission should indicate what qualitative criteria will be relevant under this assessment, for example, weight should be given to the benefit of taking action immediately or more promptly than would otherwise be the case.

How can the pursuit of Green Deal objectives be differentiated from other important policy objectives such as job creation or other social objectives?

- 4.12 In our view it is not necessary to delineate between the approach taken to achieve the Green Deal objectives and other important social policy objectives. Indeed, often these objectives will be inherently connected under the broader theme of sustainability (see for example the UN’s Sustainable Development Goals) or already reflected in the Green Deal objectives (e.g. “*no person and no place is left behind*”).
- 4.13 Whilst the focus of the Commission’s ‘Call for Contributions’ is specifically on harnessing EU competition policy to achieve the Green Deal objectives, it is important that competition policy does not restrict companies from contributing to other social policy objectives. In this respect we consider that the approach to Article 101(3) TFEU as outlined above (i.e. ensuring that all of the benefits accruing to society can be taken into account in the assessment and not just those accruing to direct consumers), should also apply when assessing agreements aimed at achieving other social policy objectives. An example of this could be collaborations to ensure that all industry participants are paying employees a living wage (where this exceeds the legal minimum wage). We would welcome guidance from the Commission agreeing with this approach.

5. Merger Control and State aid

- 5.1 As noted above, this response focuses predominantly on the anti-trust rules, as we consider that it is in this area that the most uncertainty exists currently for our clients

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regarding the relationship between competition policy and the Green Deal objectives. This is in part due to the fact that Merger Control and State aid typically involve interaction with the Commission, whereas companies must self-assess compliance with anti-trust rules. We do, however, have the following brief comments on Merger Control and State aid.

Merger Control

5.2 The second Merger Control question posed in the 'Call for Contributions' is "*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?*" We consider that merger enforcement could better contribute to protecting the environment and achieving the Green Deal objectives. In particular, the Commission could do this by taking into account the positive and negative impacts of a merger on sustainability objectives in its assessment. For example, if a merger gives rise to an SIEC but nevertheless has the potential to create significant sustainability benefits (e.g. by leading to the closure of older more polluting factories) then the Commission should take these sustainability benefits into account when reaching its decision. For this to be effective it is essential that the Commission gives adequate weight to such environmental efficiency benefits.

5.3 In this regard, it would be helpful if the Commission provides clear guidance setting out:

- (i) The types of benefits that it would be willing to take into account.
- (ii) What evidence the Commission would expect from merging parties on the benefits (e.g. would the Commission expect benefits to be quantified and if so on what basis).
- (iii) How the Commission would assess the benefits in terms of weighing them against any SIEC.
- (iv) Over what timeframe the Commission would be willing to assess benefits (especially if environmental benefits take longer to materialise than traditional transaction synergies).

State aid

5.4 The Green Deal objectives are necessarily ambitious and anticipate significant changes being required to the EU economy. The Commission has recognised that to achieve the objectives will require *inter alia*, investments in environmentally-friendly technologies, providing support for industry to innovate, rolling out cleaner transport, decarbonising the energy sector, and ensuring buildings are more energy efficient.¹² All of these changes will require significant and unprecedented levels of capital expenditure, which cannot be funded by the private sector alone.

¹² https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en

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5.5 Indeed, it is clear that the capital expenditure needed to achieve the Green Deal objectives must be supported by investments from both the private and public sectors, and in this regard it is essential that the Commission ensures that State aid rules:

- (i) Incentivise and crowd-in private sector investment alongside public sector investment.
- (ii) Do not block, restrict or delay necessary green investments, whether by preventing Member States from making such investments or by placing unnecessarily burdensome procedural hurdles in the way. In particular, the time required for Member States to notify aid to the Commission and secure clearance, coupled with the suspensory effect, creates significant delay in aid being granted and green investments being made. In this regard, we welcome the recent comments by Executive Vice-President Vestager that the Commission anticipates that *“in many instances State aid rules won’t apply”* to sustainability investments, and we look forward to seeing the templates that the Commission intends to publish providing guidance on how to design investments *“so as to avoid notification”*.¹³

5.6 We support the suggestion made by Executive Vice-President Vestager that the Commission may give an incentive to governments that ‘think green’ by giving a *“green bonus”, which allows governments to use more state aid for projects that make a genuine contribution to our green goals.*¹⁴ This policy has the potential to unlock greater investments in green projects. However, it will only succeed in doing so if the Commission designs new rules or amends the existing rules, so there is sufficient flexibility to cover the wide range of investments that will need to be made to achieve the Green Deal objectives (as reflected in paragraph 5.4). This could be achieved by increasing aid intensity levels under the ‘Framework for State aid for research and development and innovation’ and/or increasing aid limits under the ‘General Block Exemption Regulation’ for aid that will provide a clear environmental benefit.

5.7 We also note Executive Vice-President Vestager’s comments that *“we could look at the possibility of firm rules, requiring that aid mustn’t undermine the Green Deal. We might refuse to approve aid that would harm the environment, or would keep polluting factories or power plants operating”*.¹⁵ In principle we fully support the Commission’s desire to focus aid on supporting the Green Deal objectives. We also consider that it is important for the Commission to take into account environmental impacts when assessing the appropriateness and proportionality of a proposed aid measure. In this regard, we

¹³ Speech by Executive Vice-President Margrethe Vestager at the State Aid High Level Forum of the Member States, 16 November 2020 (available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-executive-vice-president-margrethe-vestager-state-aid-high-level-forum-member-states_en)

¹⁴ Speech by Executive Vice-President Margrethe Vestager titled ‘The Green Deal and competition policy’, 22 September 2020 (available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en)

¹⁵ Speech by Executive Vice-President Margrethe Vestager titled ‘The Green Deal and competition policy’, 22 September 2020 (available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en)

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consider that the Commission should establish clear guiding principles for Member States, including:

- (i) Member States must be obliged to adopt the aid measure with the lowest environmental impact when assessing two (or more) aid measures that would be equally impactful and have broadly the same budgets.
- (ii) A proposed aid measure can be considered appropriate and proportionate even if there is an alternative (and equally impactful) aid measure that would have a smaller budget, if the proposed aid measure has a lower environmental impact than the alternative.

5.8 In addition, in lieu of providing aid that could harm the environment, it is important for the Commission to recognise that it may be necessary to provide alternative aid to ensure companies and industries are able to transition, swiftly, to environmentally-friendly and sustainable business models.