RESPONSE OF CLIFFORD CHANCE LLP TO THE CALL FOR CONTRIBUTIONS ON COMPETITION POLICY SUPPORTING THE GREEN DEAL

Clifford Chance LLP welcomes the opportunity to respond to the Call for Contributions on Competition Policy supporting the Green Deal. Our comments below are based on the substantial experience of our lawyers of advising on EU State aid, merger control and antitrust laws for a diverse range of clients, and across a large number of jurisdictions. However, the comments below do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

PART 1: STATE AID CONTROL

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.

1. The current State Aid guidelines for Environmental Protection and Energy ("**EEAG**"), applied in combination with the General Block Exemption Regulation ("**GBER**")[1] and the 'de minimis' Regulation,[2] directly influence the design of national support measures by EU Member States in order to retain conformity with the State aid rulebook.

2. The criteria laid down in the GBER and EEAG have ensured that many Member States reformed their national support schemes for electricity generation based on renewable energy sources, with the progressive mandatory use of premium and competitive bidding processes for granting aid.[3]

3. Whilst the Sustainable Europe Investment Plan envisages several changes to the current EEAG, in order to support the European Green Deal's policy objectives, revisions to the State aid rulebook should focus on permitting aid that facilitates de-carbonisation or other positive environmental outcomes (e.g. zero pollution society or a circular economy) rather than merely restricting aid for projects that have a negative environmental impact.

4. With opportunities to expand renewables production across Europe, Member States might be encouraged to co-operate on cross-border projects through amendments to the State Aid rulebook. The revised rulebook should also reflect key sustainability principles such as "energy efficiency first" and "waste hierarchy". A few specific examples where the current rules do not sufficiently support the greening of the economy are set out below.

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[1] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

[2] Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid.

[3] Centre on Regulation in Europe, Report on State aid guidelines for environmental protection and energy (EEAG): review process, possible changes and opportunities (2020).

Hydrogen

5. Since 2014, the energy landscape in Europe has radically changed and the current EEAG do not cover hydrogen or low-carbon gases. Given the very broad scope of the use of hydrogen, it could be included in the infrastructure as well as the generation adequacy sections.

6. More specifically, the definition of energy infrastructure in paragraph 31 of Part 1 covers transmission infrastructure outlining the power, gas, oil and CCS sectors only. Nevertheless, given that the existing gas infrastructure could be used to transport hydrogen, while several EU gas TSOs have already announced their plans to inject hydrogen into the gas grid (*i.e.*, blending), the present definition could explicitly refer to hydrogen / low carbon gases.

7. In addition, the definition of hydrogen / low-carbon gases should be based on GHG emission performance to enable the scale-up of the most promising technologies to foster energy system decarbonisation in the EU.

Adequacy / Harmonisation with Electricity Regulation

8. The revised EEAG should be fully in line with the Electricity Regulation and to this end specific mention of the Regulation could be included for the avoidance of doubt and reminding Member States, for example, of the criteria with respect to capacity mechanisms set out in the Regulation. The new guidelines should consider the role of storage and its contribution to the grid stability and system flexibility and at the same time recognise the limits on vertical integration described in Articles 36 and 54 of the recast Electricity Market Directive (EU) 2019/944.

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?

a. 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?)

<u>Notification phase</u>

"Do no significant harm" principle

9. Although the Taxonomy Regulation applies primarily to private investments, and there is no direct legal link to the State aid regime, for the sake of coherence and consistency it would be necessary to use a harmonised definition of 'sustainable development' which would provide that the recipient undertaking shall follow the precautionary principle of 'do no significant harm'. This principle also underpins the EU Green Deal strategy. The relevant communication explicitly refers to the 'do no harm' green oath upon which all EU actions and policies should be premised.

10. Pursuant to the Taxonomy Regulation, while contributing to one environmental objective, the activity must not significantly harm any of the other five environmental objectives which are the following: (i) climate change mitigation; (ii) climate change adaptation; (iii) sustainable use and protection of water and marine resources; (iv) transition to a circular economy, waste prevention and recycling; (v) pollution prevention and control; (vi) protection of healthy ecosystems. It must also not be in breach of minimum safeguards set out in various international conventions, guidelines and standards on human rights.

11. The Commission's State aid assessment could be based on the technical screening criteria to be established progressively by the Commission and an assessment of compliance with the minimum human-rights related safeguards. For example, assuming the finalised criteria for climate change mitigation and adaptation are similar to those set out in the report of the Technical Expert Group published on 9 March 2020,. for instance, a hydro power plant can be considered a climate mitigation activity which at the same time influences local flora and fauna and eco-systems, due to the changes in the water flows or land use. Application of the Technical Screening criteria could determine whether this effect would be significant or not, for example through the carrying out of Environmental Impact Assessment as required by the criteria.

Public consultations and road-mapping

12. The Commission could request that the beneficiary provide information about consultations carried out with all relevant environmental, nature conservation and water bodies as well as the local communities. This is required in the case of applications by promoters of Projects of Common Interest for funding for works and studies under the Connecting Europe Facility.

13. Moreover, the beneficiary could be required to provide the Commission with an early planning and "road-mapping" of the various environmental assessments to be considered and environmental requirements to be met given the complexity of environmental assessment procedures for such projects (at either the planning or permitting phases) and of the environmental issues to be addressed. This plan could be an important segment of the post-clearance monitoring described below.

Post-clearance monitoring

14. If the grant of aid receives clearance from the Commission and the project in question has a negative environmental impact, there could be a mechanism monitoring the compliance of the project with the relevant environmental legislation during its implementation (e.g. similar to the role of a monitoring trustee in the implementation of remedies).

15. As the Commission cannot be directly involved in overseeing the implementation of a project, the parties could appoint a trustee to monitor the project development and its compliance with the EU and national environmental legislation under the supervision of the Commission. The monitoring trustee could report to the Commission, by submitting periodic reports. Alternatively, it could be the relevant national authorities reporting to the Commission compliance of the project with the environmental protection legislation in its implementation and operation phase.

Q3 If you consider that more State aid to support environmental objectives should be allowed, what are your ideas on how that should be done?

16. We consider that Member States and public authorities will need more flexibility to grant State aid in order to achieve the ambitious goals of the European Green Deal. As a general rule, we recommend that the amount and assessment criteria for such aid should be harmonised with existing sustainable finance policy instruments where possible, to ensure that State aid continues to serve as an enabling framework for sustainable investments and reaching environmental goals.

    a. 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?

17. We agree that Member States should be afforded flexibility to grant more aid for environmentally beneficial projects, than for comparable projects which do not bring the same benefits. However, as before, such aid should be limited to the minimum needed to achieve the environmental protection or energy objective aimed for in order to maximise the efficiency of public funds.

18. To determine the proportionality of State aid measures in favour of environmental protection, the GBER and EEAG state that the aid must correspond to the net extra cost necessary to meet the objective compared to the counterfactual (less environmentally friendly) scenario in the absence of aid and must not exceed set maximum aid intensities. However, particularly for revenue-generating projects, failing to account for future cash flows can underestimate the amount of aid necessary to make environmentally beneficial projects viable investments. As an alternative to the current method, we consider that State aid should be regarded as proportionate if it does not exceed the "funding gap", which is the difference between the expected positive and negative cash flows over the lifetime of an investment discounted to their current value (after accounting for any applicable counterfactual scenario). In our view, this change in approach would encourage private investments in environmentally beneficial projects and help to achieve the objectives of the Green Deal.

19. The primary benefit of the funding gap approach is that Member States and public authorities could "price in" the environmental benefits of projects, which are currently overlooked by the private sector. In addition, by accounting for positive and negative cash flows over the lifetime of an investment relative to the counterfactual scenario (rather than investment costs alone), the funding gap method could reduce the profit incentives of private investors to engage in alternative, less environmentally friendly activities. However, to maximise the efficiency of public funds, Member States and public authorities would need to demonstrate necessity and an incentive effect of the aid to ensure it is only granted to address genuine funding gaps (*i.e.* the proposed beneficiary has exhausted all other funding options, including from private sources).

20. With regards to renewable energy, the use of competitive tenders has proved to be highly beneficial and has contributed to sharp reductions in renewable energy prices. In some cases, we note that renewable energy projects (such as the construction of

offshore wind farms) have gone ahead without State aid of any kind. As a result, we recommend expanding the scope of competitive bidding processes, wherever possible.

b. 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.

21. We support the notion that proposed State aid measures should be eligible for a green bonus upon the satisfaction of certain criteria. Where possible, we consider that such criteria should be determined with reference to existing EU standards on sustainability and environmental protection. We recommend that projects satisfying the definition of "sustainable" under the Sustainable Finance Taxonomy Regulation (*i.e.* making a substantial contribution to specified environmental objectives without significantly harming the other objectives, in compliance with minimum safeguards and technical screening criteria) should generally be eligible for a green bonus.

22. Moreover, projects should be assessed based on whether they are included in the National Energy and Climate Plan ("**NECP**") and / or the Territorial Just Transition Plan of the relevant Member States, given that both these Plans would be already assessed and approved by the European Commission based on the Green Deal principles.

23. Incorporating existing EU standards into the assessment of green bonuses would be the most beneficial approach, as it would harmonise State aid rules with other policy instruments specifically designed to re-allocate private funds towards sustainable investments. In our view, this would maximise legal and commercial certainty for all stakeholders by codifying the criteria that: (i) businesses should meet when seeking public and private funding for environmentally beneficial activities, and (ii) Member States and public authorities should consider when preparing State aid proposals, thus reducing the risk that State aid proposals will be blocked or overturned by the EU courts.

24. By contrast, we consider that adopting new and different approval criteria for environmentally beneficial projects could increase the cost and risk profile of sustainable investments. For example, environmentally beneficial projects reliant upon public and private funds would need to self-assess and demonstrate compliance with multiple different sets of criteria before obtaining approval. If the criteria for State aid approval were less detailed than the criteria of the Sustainable Finance Taxonomy Regulation, the risk of "greenwashing" (*i.e.* the risk that the Commission authorises green bonuses to less environmentally beneficial initiatives) would increase, leaving decisions subject to being overturned by the EU courts.

Q4 How should we define positive environmental benefits?

25. We consider that State aid criteria must be relatively narrowly defined in order to facilitate review, authorisation and enforcement by the European Commission.

a. 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?

26. The EU Taxonomy Regulation provides a broad and high-level assessment of sustainability. Under the Regulation, in order to be "environmentally sustainable", the activity must: contribute to at least one of the environmental objectives; cause "no significant harm" to any of the other environmental objectives; be carried out in compliance with minimum social and governance safeguards; and comply with technical screening criteria.[4]

27. Existing EU Standards provide a comprehensive and harmonised starting point for the assessment and approval of green State aid. Indeed, the EU Taxonomy Regulation may be a useful tool for the European Commission when assessing objective market conditions and the impact of a project. However, if the legislative framework exempting green State aid is too broad, there is a significant risk that public funds will be "greenwashed".

28. Any potential reform or addition to the State aid rulebook must recognise the difficult balance between ensuring that the framework is sufficiently broad in order to facilitate green initiatives, and the need for legal certainty to prevent abuse. Ultimately, therefore, we believe that the EU State aid framework should set out a benchmark of environmental criteria, while also remaining sensitive to particularities at national level, as well as furthering the ultimate objectives of the Green Deal.

29. While we do not think it would be beneficial for the European Commission to adopt a new State aid framework, we would propose that the Commission adds a new principle for the assessment of aid to its rulebook relating to sustainable development. This would be a narrower, and therefore more certain, point of reference. We would propose that this principle outlines relatively precise environmental criteria which would assist the European Commission in its assessment of green State aid, including, by way of example, "the transformation and transition in carbon intensive sectors".

PART 2: ANTITRUST RULES

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).

30. Realising the objectives of the European Green Deal will require prompt and bold action both by the private sector and governmental agencies across the EU. EU competition law will have its own role to play, mainly by removing regulatory impediments to initiatives serving Green Deal objectives (especially in industries such as energy, transportation, food production and packaging, and waste management).

31. Horizontal cooperation, in certain cases, can be a more effective way of working towards achieving Green Deal objectives compared to firms pursuing such goals individually. Collective action, especially sector-wide, reduces the risk of competitors free riding on one firm's sustainability investments or benefitting from a firm's first mover disadvantage - i.e., a firm's decision to cease environmentally damaging

[4] Article 3, Regulation (EU) 2020/852 of 18 June 2020, OJ L 198, 22.6.2020, p. 13.

methods of production, leaving more room for expansion to competitors who continue using unsustainable methods. It is up to the Commission and national competition authorities to develop a solid framework within which such cooperation can be undertaken (giving much-needed legal certainty to market participants), while ensuring the protection of effective competition.

32. A key example of horizontal cooperation would be industry-wide agreements to phase out existing unsustainable or unethical modes of production (e.g., not environmentally sustainable or endangering biodiversity) and replace them with cleaner, more sustainable production methods (e.g., reducing emissions or increasing the use of sustainable raw materials). Such cooperation is currently only partially allowed under EU competition law. On the one hand, non-binding cooperation agreements of this type – i.e., initiatives which cooperating companies are free to apply voluntarily, such as codes of conduct or industry targets – fit within the current interpretation of Article 101 TFEU. On the other hand, mandatory compliance with elements of such cooperation agreements would be likely to attract a considerable antitrust risk (especially under cartel rules), disincentivising action, despite the long-term public interest benefits. In addition, embracing sustainability as a key element of the production process often entails higher operational costs (at least in the short term) likely to be passed on to customers through higher prices, as well as reduced output.

33. Given the disproportionate focus that European competition authorities put on narrow economic elements of consumer welfare (such as price), cooperation initiatives with a negative short-term impact on price, but positive long-term benefit to qualitative consumer welfare elements, such as sustainability, clean energy, or biodiversity are challenging to support without a marked change to competition authorities' approach to the implementation of Article 101 TFEU. The required paradigm shift would inter alia require competition authorities to consider welfare-enhancing elements to cooperation agreements, not only limited to the immediate consumers of the product concerned, but also out-of-market benefits to society as a whole.

34. While the Commission has previously considered broader public interest aims when applying Article 101 TFEU,[5] this has been done infrequently and has, thus, not generated a robust framework for market participants to assess their level of antitrust risk in such cases.

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…)?

35. Further clarifications and comfort should be given to market participants on the characteristics of agreements that serve the objectives of the Green Deal without restricting competition. Such clarifications should be given:

[5] Commission Decision in Case IV.F.1/36.718, *CECED.*

36. First, through detailed soft law instruments (e.g., guidelines) explaining the Commission's approach to assessing whether an agreement meets the objectives of the Green Deal to a sufficient degree. To allow market participants to draw sufficient comfort from self-assessment, the Commission should specify types of agreements that would not be considered as anti-competitive under Article 101 and explain whether this would be because (i) it would exempt these agreements from Article 101(1) TFEU, or (ii) consider sustainability-related efficiencies under Article 101(3) TFEU. The legal basis is particularly important when assessing antitrust risk as the burden of proof falls on a different party in each case.

37. Second, the Commission should further develop its emerging practice of giving informal guidance and comfort letters[6] for specific cooperation agreements. Increased availability of such guidance and comfort letters would (i) increase legal certainty for market participants preparing resource-intensive, innovative R&D projects with a strong sustainability element; and (ii) create a body of precedent, based on commercial reality, that would provide further guidance and comfort to the market, incentivising more sustainability-related innovation.

Q3 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?).

38. To the extent an agreement may be caught by Article 101(1) TFEU[7], given its appreciable effects on competition, and where the block exemptions for pre-market R&D agreements[8] or for production specialisation[9] do not apply, further guidance should be provided as to whether agreements which pursue Green Deal objectives could fall under the Article 101(3) TFEU exemption.

39. In many other respects, the Commission's guidelines have represented invaluable tools for businesses and their advisers in providing important guidance, transparency, and a degree of legal certainty regarding the Commission's approach. In a similar way, there is scope for the new Guidelines on Horizontal Agreements to provide better and more detailed guidance on how the Article 101(3) TFEU exemption may apply to certain

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[6] See the informal guidance on the recent network sharing agreement between Telecom Italia and Vodafone contained in Commission press release IP/20/414 of 6 March 2020 and the comfort letter issued to Medicines for Europe on 8 April 2020 (COMP/OG – D(2020/044003)).

[7] The cooperation initiatives that were subject to the Commission's decision in *Case IV.F.1/36.718, CECED* (the "***CECED Decision***") relating to the concerted outsourcing of less energy-efficient washing machines; as well as the ACM's ***Energieakkoord case*** relating to an agreement between four electricity producers to close down older coal-fired power plants to cut CO2 emissions, were deemed to fall under Art. 101(1) and its Dutch equivalent, respectively.

[8] Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the TFEU to certain categories of research and development agreements.

[9] Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the TFEU to certain categories of specialisation agreements.

specific issues and/or circumstances, taking into account important environmental and market developments during the last decade.

Article 101(3) TFEU

40. Article 101(3) TFEU provides that an agreement will be exempt from the prohibition on anti-competitive agreements under Article 101(1) TFEU if the agreement meets each of the following **four conditions** (cumulative requirement). The agreement must (i) "*contribute to improving the production or distribution of goods or to promoting technical or economic progress*", (ii) "[*allow*] *consumers a fair share of the resulting benefit,*" (iii) "*not […] impose […] restrictions which are not indispensable to the attainment of these objectives*," and (iv) "*not […] afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.*"

41. We set below some views on how additional efforts by the Commission and national authorities and greater clarity in the Commission's guidance (including the new Guidelines on Horizontal Agreements) can increase legal certainty.

Sustainability related improvements

42. The requirement for the agreement to "*improv[e] the production or distribution of goods or to promot[e] technical or economic progress*" should not be limited to economic efficiency on the basis of price and profit. Qualitative efficiencies in the production or distribution of goods and services, and the reduction of negative externalities (which may be borne as indirect costs) should be considered in relation to sustainability-related initiatives, even if these benefits are not explicitly quantifiable in all instances. When assessing whether an agreement may fall within this scope, the Commission and national authorities should hold consultations and obtain submissions from the relevant agencies or associations to consider these non-quantifiable benefits.

Fair share for consumers

43. The 2004 EU Guidelines on Article 101(3) TFEU suggest that the same consumers who bear the costs must be fully compensated by benefits, and that this must be achieved in the same market as the one affected by the agreement. However, with respect to environmental initiatives, benefits to society as a whole should be considered (including benefits to other markets). This would also be in accordance with the principle established in the CECED Decision which provided that the "*Community pursues the objective of a rational utilisation of natural resources, taking into account the potential benefits and costs of action. Agreements […] must yield economic benefits outweighing their costs and be compatible with competition rules. […] the benefits to society brought about by the CECED agreement appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines. Such environmental results for society would adequately allow consumers a fair share of the benefits even if no [economic] benefits accrued to individual purchasers of machines.*"[10]

[10] Case *IV.F.1/36.718, CECED*, see para. 56.

44. However, we recognise that the Article 101(3) Guidelines would require revision in order to allow out-of-market efficiencies to be taken into account where they benefit society as a whole, but do not completely compensate consumers within the relevant market for price increases caused by an agreement. Moreover, any such revision may be difficult to reconcile with certain EU Court judgments which imply that efficiencies must entirely compensate consumers within the relevant market.[11] We therefore submit that the only way in which the Commission can ensure that EU competition rules do not frustrate cooperative arrangements with sustainability benefits for society as a whole, while affording sufficient legal certainty to the parties to such arrangements, is by enacting appropriate legislative measures which confirm that Article 101(3) is to be interpreted in this way.

Indispensability

45. Cooperation among competitors can reduce the risk of competitors benefitting from a firm's first mover disadvantage or allow for joint investment or pooled purchasing power to refine technology or create efficient supply structures that can induce systemic changes. In order to assess indispensability, the Commission should hold consultations and obtain submissions from the relevant agencies or associations to assess whether such collective initiatives are indispensable and consider whether in the alternative industry wide changes would have been significantly delayed. Once a product or business has gained a foothold, the cooperation could and should be dissolved.

46. The response of competition authorities to the COVID-19 pandemic has illustrated how these can respond effectively to crises by publishing guidance and adapting their procedures in order to facilitate collaborations deemed necessary and appropriate to achieve public policy goals. Lessons can be drawn from this experience to remain flexible and be ready to address and consider environmental or sustainable-related initiatives on an ongoing basis.

No elimination of competition

47. Any cooperation to achieve sustainability objectives should be strictly limited to that which is necessary for those objectives. The Commission should ensure that agreements include safeguards to ensure that cooperation does not spill into other areas. Competitors must be able to show that they will continue to compete in relation to other (significant) parameters, i.e. price, quality, innovation, branding, etc.

The importance of Green Deal objectives

48. As regards the differentiation of Green Deal objectives from other important policy objectives such as job creation or other social objectives, we consider an important distinction to be the universal impact of climate change and environmental damage. Such impact will, in the long run, adversely affect all other policy issues such as job creation, if preventative steps are not taken, whereas the reverse is not necessarily true (higher unemployment does not directly impact climate change). An increasing number of droughts, wildfires, storms and floods, exhausted resources, reduced food production,

[11] For instance, Case T-131/99 *Shaw* ECLI:EU:T:2002:83, para. 156.

and diseases and health concerns caused by pollution (among many others), will result in social unrest, considerable employment issues and reduced welfare on a general basis.

PART 3: MERGER CONTROL

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?

49. While merger control enforcement could indeed contribute to achieving the environmental and sustainability goals ("**ESG**") set in the Green Deal, the Commission's holistic assessment of a transaction should not, in the interests of legal certainty, take such objectives into account to the detriment of the merging parties. In other words, the consideration of such objectives in merger assessments should not lead to penalising the merging parties if, e.g., their product offerings fail to meet certain ESG. Measuring consumer harm by considering the parties' level of adherence or commitment to ESG or the environmentally friendly nature of their product offerings would risk undermining the holistic nature of the Commission's competitive assessment of a transaction.

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?

50. While the promotion of sustainability objectives cannot constitute a primary goal of the EU merger control regime, it is clear that merger enforcement could contribute to achieving the ESG espoused in the Green Deal. In particular, two dimensions of the EU's merger assessment regime lend themselves to a holistic assessment, which could take environmental and sustainability factors into account.

51. By way of preliminary remark, the wording of Article 2(1) of the EU Merger Regulation requires the Commission to consider, inter alia, the development of technical and economic progress, when assessing whether the transaction in question is compatible with the internal market. This language arguably allows for environmental or sustainability factors to form part of the holistic assessment of any transaction. However, given that the Commission's decisional practice may have potentially complex and un-envisaged repercussions on incentives of market players, an approach which considers the positive impact of mergers on sustainability and environmental goals would be preferable to one which penalises mergers which would not fall into this category.

Efficiencies

52. The Commission's ability to take into account efficiencies offers an effective means of promoting environmental and sustainability goals. In particular, the Commission's guidelines recognise that transactions may give rise to different types of efficiency gains, including lower prices but also "other benefits to consumers."

53. Transactions which are likely to promote ESG may give rise to such "other" benefits to consumers. In this regard, the Commission may wish to take an expansive view on how such benefits would be treated in the context of a merger assessment. In particular,

while the potential positive impact of a transaction on the environment may be quantifiable, the benefit to the consumer may be less so. Potential environmental benefits may also take a length of time to materialise and therefore could require the Commission to consider a longer time span in its assessment of efficiencies.

Market definition

54. A careful assessment of the relevant market is likely to be one of the key mechanisms through which merger control rules can support the achievement of ESG. In many cases, consumers are likely to consider products and services to be substitutable even where they are not environmentally friendly or sustainable. An overly narrow market definition, which overemphasises a product or service's pursuit of ESG is likely to, not only artificially skew the correct market definition for competition law purposes, but also potentially adversely impact firms which are active in the supply of environmentally friendly goods or services.

55. Indeed, from a demand-side perspective, where consumers might switch between environmentally friendly and non-environmentally friendly products with great ease, the price of the product is likely to be a more important factor in the choice of a product than its environmentally friendly characteristics. The traditional factors used to define the market cannot be rejected in favour of taking into account the environmental characteristics of a product. It is therefore important to consider the environmentally friendly nature of products within the present assessment framework rather than as an entirely distinct factor.

56. Price and end-use of products will continue to be the greatest indicators for defining markets rather than production characteristics which are environmentally friendly or sustainable. It is possible to take these new factors into account further in merger assessments. However, it must be done in an appropriate manner by balancing these factors within the current approach of determining market definition.

57. Overall, while merger control rules could contribute to the promotion of ESG, they should not, in our view, be deployed as a tool to that end. Environment and sustainability objectives are primarily pursued through specific measures aimed at specific issues, either through "hard" prohibitions of a certain behaviour (e.g. statutory thresholds) or "soft" nudging towards a behaviour advantageous from an environmental or sustainability point of view (e.g. the ability to trade excess emission certificates). Merger enforcement can only accompany such primary measures and in doing so should not lead to enforcement exceeding what is statutorily required. That is, merger control rules should not form the basis for penalising undertakings which are compliant with statutory requirements in relation to ESG. As explained above, there is scope for merger control rules to encourage or promote ESG through, for example, taking a broader stance on efficiencies for relevant transactions. Greater guidance and clarity on how such considerations may feature in the Commission's assessment would be welcome in the interests of legal certainty.

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November 2020