23 November 2020

Response by Linklaters LLP to the Commission's Consultation on Competition Policy supporting the Green Deal

Linklaters LLP greatly appreciates the opportunity to participate in the call for contributions launched by the European Commission (the "**Commission**") on Competition Policy supporting the Green Deal (the "**Consultation**").

This Response is structured in three parts: State aid rules, antitrust and merger control. To the extent possible, we have included examples to support our reflections on how competition rules might (or not) prove to be an effective tool in supporting Europe's goals to fight climate change and protect the environment.

Executive Summary

The Green Deal calls for mainstreaming of sustainability in all EU policies, and we are of the view that the competition law tools at the Commission's disposal all have an important role to play in fostering green business and investment strategies and ultimately delivering the Green Deal objectives. In summary:

1 State aid control

EU State aid law is, in our view, particularly well placed to foster and support a cost-effective green transition, as this will require substantial public investments (alongside private funding). The current review of EU State aid law and policy is therefore important to ensure that the Green Deal can deliver on its goals. The key points where we encourage the Commission to consider the current scope of the State aid rulebook concern (i) that sustainability and environmental protection, under certain circumstances, should be taken into account in concluding whether there is State aid within the meaning of Article 107(1) TFEU in the first place; (ii) the express provision that the net impact on the environment should be taken into account in the proportionality/balancing test of the compatibility assessment; and (iii) the update of the GBER and the EEAG, where we encourage the Commission to ensure that the guidelines are contemporary, streamlined and fit-for-purpose.

2 Competition rules

Achieving the Green Deal objectives will require close co-ordinated action between businesses to overcome a potential "first-mover disadvantage" and deliver initiatives of sufficient scale to have a profound impact. To ensure competition law no longer creates an obstacle to industry efforts pursuing sustainability, we encourage the Commission to adopt a liberal approach and a flexible framework. The current enforcement practice at the EU level could be developed to accommodate for Green Deal cooperation by setting out detailed guidance in a three-stage framework: (i) a set of cooperation agreements considered not to restrict competition and therefore not caught by Article 101(1) TFEU; (ii) agreements requiring a simplified assessment when meeting safe-harbour criteria; and (iii) agreements requiring a detailed quantitative (or qualitative) assessment under Article 101(3) TFEU. For the latter category, we believe that the benefits for society as a whole must be top of mind for the Commission when conducting its assessment.

3 Merger control

We believe that enforcement of EU merger control rules can and should play a role in helping the EU to achieve the ambitious sustainability objectives of the Green Deal. We maintain that such objectives (i) should be an integral part of the substantive competitive assessment, (ii) should be recognised as potential efficiency gains that can counterbalance price increases, (iii) and should be embedded in remedy packages aimed at fixing any negative environmental impact triggered by a transaction. Any such green shift, however, cannot ignore the need for a broader concept of "consumer welfare" and calls for a shift from the narrow assumptions that consumers only benefit from lower prices and that competition enforcement should only look at a certain category of consumers, i.e. those in the affected market. We believe that the current legal framework allows for a greener interpretation of EU merger control rules, and that such renewed interpretation could steer companies towards greener solutions.

Part 1: State aid control

4 Introduction

EU State aid law is, in our view, particularly well placed to foster and support a cost-effective green transition. Massive investments are needed to achieve the EU's bold ambitions under the Green Deal. The Commission itself estimates that meeting the 2030 targets will require annual investments of at least €260 billion.[1] An important part of the spending will involve the use of State resources and fall within the scope of EU State aid law.

Moreover, it is important to recall that the Green Deal's goals are firmly rooted in existing EU law. Article 11 of the TFEU (formerly Article 6 TEC) already puts sustainability and environmental protection at the centre stage of the Union's policies and activities. Likewise, current State aid rules and practice are already geared towards sustainability and environmental objectives and have made important contributions towards making green investments possible. The most well-known success story is the generation of electricity from renewable energy sources. Here, aid schemes designed in line with the General Block Exemption Regulation ("**GBER**") and the Guidelines on State aid for environmental protection and energy 2014-2020 ("**EEAG**") have enabled private investments and the share of energy from renewable sources has increased dramatically over the last ten years. This has helped to create a virtuous circle in which the cost reductions[2] brought about by increased demand for renewable technologies and R&D efforts mean that subsidies can be greatly reduced with a view to their phasing out, in line with the EEAG's objectives.[3]

The robust support for green policies in the Treaty and the Commission's successful track record in this area mean that there is no need for a radical reform. However, in this contribution we set out a number of areas where we believe the current rulebook would benefit from a review (the Commission's first question). The broad nature of this topic means that we will also touch upon the second and third questions.

We believe that a contemporary, streamlined and fit-for-purpose State aid framework can serve as a roadmap for Member States and help them steer their investments towards areas where public

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1 Commission, Communication on the Sustainable Europe Investment Plan, European Green Deal Investment Plan, 14 Janray.2020, COM (2020) 21 final, pages 1 and 3.

2 IRENA, Renewable power generation costs in 2019 (available at: https://www.irena.org/publications/2020/Jun/Renewable-Power-Costs-in-2019); and IEA, World Energy Outlook 2020 (available at https://www.iea.org/reports/world-energy-outlook-2020).

3 EEAG, para. 109.

funding can make a genuine difference and catalyse private sector investment. Considering that the horizon for environmental impacts by 2050 in many industries is just one investment cycle away, due to the long lifespan of relevant technologies and assets, the updated rulebook should be put into place as soon as possible for the path to the 2050 goals to be realistic.

5 Interpreting the State aid concept in light of the Green Deal's objectives

Sustainability is typically discussed as part of assessing the compatibility of State aid. However, it is important not to lose sight of the fact that sustainability and environmental protection will under certain circumstances also be taken into account in concluding whether there is State aid within the meaning of Article 107(1) TFEU in the first place.

The State aid concept is of course defined in the Treaty itself, and interpreted by the EU courts, but we nonetheless think that there is scope for reconsidering how this concept is interpreted without the need to modify Article 107(1) TFEU.

5.1 Measures that mitigate the normal charges an undertaking must bear

When the Commission assesses whether a measure that mitigates the impact of a generally applicable charge, such as a tax or a levy, is "selective" in the meaning of Article 107(1), it applies a three-step test. First, it identifies a benchmark or system of reference. Second, it determines whether the derogation from the reference system differentiates between undertakings that, in light of the system's objectives, are in a comparable situation. Third, if the measure is deemed *prima facie* selective under the second step, the Commission will assess whether the derogation can nevertheless be justified by the nature or the general scheme of the system of reference.[4]

Environmental aims can play an important role in determining the benchmark or reference system as well as for justifying a derogation. Currently, if the tax base is not linked to an environmental impact, a derogation based on environmental grounds will be seen as pursuing an "external policy objective", and the derogation will be deemed "selective" in the meaning of Article 107(1) TFEU.[5]

If sustainability is to be mainstreamed, does it make sense to continue considering environmental protection as an "external policy objective"? For example, could sustainable businesses enjoy a lower company income tax rate without this measure being classified as "selective"? We invite the Commission to consider this, as part of its current review of how to make the rulebook greener. We are aware that it is a multi-layered issue with potential repercussions on tax law and policy. However, since the Commission is looking in parallel at maximising the role of taxation in meeting the climate goals in the Green Deal, this may also be an opportune moment to reflect on the pros and cons of such ambitious reforms.

Another issue to consider in this respect is to what extent State aid control should be employed to ensure that tax measures with purported environmental aims, or that pursue environmental and other policy goals in parallel, do not distort the internal market level playing field. Such outcomes may be the result simply of a poor design of the scope of the tax and its tax base but might in the worst cases reflect a deliberate effort to "greenwash" anti-competitive or protectionist aims. EU State aid law can under certain circumstances be used to ensure that tax measures do not favour certain activities over others with a comparable environmental impact.[6] However, case-law also indicates that the Member States have a significant margin of discretion, which is understandable in light of

[4] Commission, Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union ("**NOA**"), Section 5.1.

[5] Commission, NOA, Section 5.2.3.2.

[6] Case T-210/02, *British Aggregates Association v Commission* [2012] ECLI:EU:T:2012:110.

their fiscal sovereignty.[7] State aid policy is therefore perhaps not the most appropriate tool to address these risks; instead, this something the Commission may want to look at as part of its reassessment of EU taxation law and policies in light the Green Deal.

5.2 Market Economy Operator Principle ("MEOP")

Environmental aspects are not only relevant when appraising the "selectivity" criterion. Identifying an 'economic advantage' in the meaning of Article 107(1) TFEU requires an assessment of whether the alleged beneficiary obtained a benefit that it would not have received under normal market conditions.[8]

This reasoning has developed into the MEOP, which lies at the core of EU State aid law. Despite the many clarifications in case-law over the years, the exact contours of this principle are still subject to debate. In applying the MEOP, the Commission has emphasised that it is not relevant whether the intervention constitutes a rational means for public bodies to pursue public policy considerations (for example employment, social or regional development).[9] Instead, the Commission's view is that the decision should be taken on the basis of "*economic evaluations […] carried out to determine the profitability or economic advantages of the transaction*".[10]

While we largely support maintaining the MEOP as interpreted by the Commission and courts, we nevertheless consider that there is room to bring this principle up to date. This concept is based on the notion that the behaviour of public bodies should be compared to that of similar private economic operators under normal market conditions.[11] Today, private economic operators across Europe are embracing a green agenda. Sustainability is seen to be critical to long-term stakeholder and investor confidence (as also indicated below) and green credentials and reduced exposure to environmental risk are now integral features of business strategies. Investors value sustainability as a measure of long-term resilience to market shocks and regulatory change. The available data also suggests that sustainable funds have outperformed their traditional peers, with higher survivability rates.[12]

The Commission may want to clarify, as part of the current review, how this development shall inform its interpretation of the MEOP. Member States should be able to incorporate sustainability criteria in their decision-making process, e.g. when acting as an investor or lender to private undertakings, in the same way as the private sector is increasingly doing. These are not, in the words of the Notice on the notion of State aid, "*considerations which exclusively relate to a Member State's role as a public authority*".[13] Such an approach is also required to ensure alignment with the principle of equal treatment between private and public undertakings enshrined in Article 345 TFEU.

[7] Case C-233/16, *ANGED v Generalitat de Catalunya* [2018] ECLI:EU:C:2018:280 and Case C-105/18, *UNESA and others v Adiministracion General del Estado* [2019] ECLI:EU:C:2019:935.

[8] As explained by Advocate General Slynn: *"It is of the essence of a State aid that it is non-commercial in the sense that the State steps in where the market would not. The State may have its reasons for doing so but they are not commercial in the ordinary sense of the word"*. Joined Cases C-67, C-68 and C-70/85, *Van der Kooy v Commission* [1988] ECLI:EU:C:1988:38, Opinion of Advocate General Slynn, p. 251.

[9] Commission, NOA, para. 76.

[10] Commission, NOA, para. 78

[11] Commission, NOA, Section 4.2.2.

[12] Morning Star Manager Research, "How Does European Sustainable Funds' Performance Measure Up?" (June 2020). However, some market commentators have suggested that this "outperformance" is because the price of oil crashed and ESG funds rely less on oil investments, rather than because they are a better investment choice overall.

[13] Commission, NOA, para. 77.

6 Updating the balancing test

Over the last decade, we have witnessed the Commission introducing its ‘common assessment principles’ into various State aid guidelines, including the EEAG, the Regional Aid Guidelines, the Risk finance Guidelines, the Aviation Guidelines and the R&D&I Framework. The assessment principles are meant to ensure that the Commission follows a structured and consistent approach when balancing the positive contribution of the aid measure against its potentially negative effects as part of its compatibility and proportionality assessment.

The existing principles are generally flexible enough to accommodate the goals of the Green Deal. For example, if the sustainability targets for 2030 and 2050 are made more demanding for the Member States, this will impact on the need to intervene to overcome market failures and may make it necessary to grant additional amounts of aid. In addition, even though the assessment principles sometimes constrain the possibility to award aid, it is our view that this is nevertheless important to ensure that the Green Deal’s objectives are met in a cost-effective and proportionate manner which minimises the harmful effects of the aid for the internal market, such as the risk of crowding out private investments made on market terms or distorting competition.

However, we consider that the Commission could update its assessment principles to make clear that the negative (or positive) impacts of a measure on the environment are an important part of any proportionality assessment. An underlying principle which should then apply even if the aid pursues non-environmental goals and irrespective of the treaty provision under which the aid is assessed.

We note that the Court of Justice, in its *Hinkley Point C* ruling concluded that there is no obligation for the Commission to take into account, when assessing the compatibility of an aid measure that pursues other policy goals, whether the aid in question is detrimental to the environment.[14] However, the Commission could choose to update its assessment principles through guidelines and similar instruments to clarify how it will use its margin of appreciation, which is substantial,[15] when applying the balancing test and expressly refer to the need to take into account environmental principles. Indeed, the EEAG already contains examples of such an approach. In the chapter regarding aid for generation adequacy (or capacity mechanisms), the guidelines provide that the Member States should primarily consider ways of achieving generation adequacy that do not have a negative impact on the objective of phasing out environmentally or economically harmful subsidies.[16]

We recognise that measures that do not support the Green Deal may nonetheless deliver other important advantages to be considered as part of the balancing exercise (such as security of supply in the energy sector or connectivity in aviation). A move towards the impact on the environment featuring in such balancing exercise would simply mean that aid to implement measures which are harmful to the environment would need to offer particularly clear and substantial benefits for other objectives of general interest to outweigh the impact on the environment.

7 Updating the GBER and the EEAG

We also think that an important part of meeting the Green Deal’s objectives will be linked to updating the GBER and the EEAG (indeed, the EEAG and GBER are already under review). These documents are important as they shape and will shape how Member States design State aid schemes with environmental aims. State aid rules are complex to navigate. In order to maximise the potential of State aid to contribute to the Green Deal’s targets, clear rules are needed and, where

[14] Case C-594/18 *Austria v Commission* [2020] ECLI:EU:C:2020:742, para. 102.

[15] Case C-225/91 *Matra v Commission* [1993] ECLI:EU:C:1993:239, paras. 23 to 25 and Case C-303/88 *Italy v Commission* [1991] ECLI:EU:C:1991:136, para. 34.

[16] EEAG, para. 220.

possible, the rules should be simplified and consistent to reduce the regulatory burden and compliance costs for companies and Member States alike. In particular, it should be straight-forward for aid beneficiaries to verify that the requirements under the GBER are met, since they assume the risks (standstill and recovery) for the Member States' failures in this regard.[17]

7.1 Covering new areas and initiatives where public support can make a difference

The Green Deal Investment Plan mentions a number of areas in which State aid could help achieve the transformation to a climate-neutral economy: (i) climate-neutral production; (ii) energy-efficiency in buildings; (iii) district heating; (iv) closure of coal-fired plants; and (v) a circular economy.[18] The current call for contributions further includes (vi) sustainable mobility; and (vii) the zero pollution ambition. We share the view that huge strides are still to be made in these areas and that smart and targeted State aid can be a catalyst for private investments. To streamline decision-making, it would be helpful for the GBER to include the target areas for which clear compatibility criteria can be identified, but also for the EEAG to provide guidance and predictability for the Commission's assessment of aid schemes that warrant a closer analysis and cannot be exempted upfront in the GBER.

By way of example, the following areas could be covered in the GBER and/or the EEAG to accelerate and incentivise the transition to a low carbon economy:

- **New renewable energy sources**: The supply of green, affordable and secure energy is critical to the Green Deal's objectives. While hydrogen is rapidly establishing itself as part of the EU's energy transition, investment costs and risks remain prohibitively high. The Commission's hydrogen strategy document recognises that support schemes are needed in order to scale-up renewable and low-carbon hydrogen before it becomes cost-competitive and market mechanisms can start functioning without government intervention.[19]

  On the flip side, where markets are well-functioning, support should be reduced or phased out to avoid a situation where private investments are crowded out. Indeed, State aid should work as a complement to market forces, stepping in only when they fail to produce the desired outcomes. As mentioned, we are witnessing how markets are shifting to more clean electricity from wind and solar-powered plants and this is happening faster than was expected just a few years ago.

  As a complement to the EEAG, the Commission can also use the Important Projects of Common European Interest ("**IPCEI**") communication to achieve the Green Deal targets. Does this communication sufficiently facilitate State aid to address market failures for large cross-border projects for hydrogen and CO^2 capture and storage? Indeed, systems for sequestering CO^2 require huge scaling up, and the Commission should ensure that the rulebook enables Member States to bolster and accelerate development and deployment.

- **Sustainable mobility**: The electrification of transport requires the development of networks of charging stations for electric vehicles and other forms of low-emission mobility infrastructure. We note that the Commission has helpful experience in this area.[20] Setting out a structured assessment framework in the GBER and/or the EEAG would however offer

[17] Case C-349/17 *Eesti Pagar* [2019] ECLI:EU:C:2019:172.

[18] Commission, Communication on the Sustainable Europe Investment Plan, European Green Deal Investment Plan, 14 Janray.2020, COM (2020) 21 final, pages 13-15.

[19] Commission, Communication on A hydrogen strategy for a climate-neutral Europe, 8 July 2020, COM (2020) 301.

[20] Case No COMP/SA.49276 *Development of a recharging infrastructure for plug-in hybrid and purely electric vehicles* [2020] OL J C93 and Case No COMP/SA.46574 *Charging infrastructure for e-mobility in Germany* [2017] OL J C83.

increased predictability and legal certainty, as well as making the approval processes smoother,

It will, however, be important that the choice between rival technologies (e.g. between hydrogen engines and electric engines for mobility, renewable energy generation and storage in electricity or different CO^2 emission reducing technologies) is not determined simply by the amount of public support available, but that market mechanisms are allowed to steer supply and demand towards the most competitive and cost-effective solutions.

7.2 Ensuring that the rulebook is fit-for-purpose

In addition to including new target areas in the GBER and the EEAG, it is important to set eligibility criteria and rules regarding eligible costs and maximum aid intensities that are suited to the Green Deal's ambitions. More ambitious objectives and tighter deadlines for achieving them should be supported by greater State aid allowance. We see several areas that need to be reviewed:

- **Aid intensities**: The rulebook sets limits on the share of a project's cost that can be financed with public funds. By way of illustration, for investment aid enabling companies to go beyond EU standards for environmental protection, the aid intensity is limited to 40% of eligible costs in the GBER and, as a general rule, to 40-60% in the EEAG.[21] We encourage the Commission to consider whether these thresholds should be raised.

  Related to this, we support the idea to offer a 'green bonus' for projects that make a genuine contribution to green goals. In particular, this would be a welcomed development where companies reduce their environmental footprint beyond the EU's norms and benchmarks, and further encourage green innovation and the deployment of new, climate-friendly technologies.

- **Operating aid**: Article 107(3)(c) TFEU generally applies to investment aid only, and hence not to operating aid. We encourage the Commission to consider extending the exceptions where operating aid is allowed. This approach is already used in the GBER which exempts two types of operating aid for the promotion of electricity from renewable sources. This is subject to limitations to avoid overcompensation (aid can only be granted until the project has been depreciated and any previous investment aid must be deducted from the operating aid). This example can also serve as a model for allowing State aid to cover operating expenses in other sectors.

- **Eligible costs**: Further, we support increased flexibility in the calculation of eligible costs that can be covered by the aid measure for sustainable investments. Currently, the maximum aid amount is generally determined based on the additional costs of the relevant investment compared to a hypothetical, less environmentally friendly investment (see e.g. Article 36 GBER). This could be revised to strengthen the focus on incentivising green investments.

7.3 Minimising the risk for greenwashing

Lastly, it is important to recall that rising to the Green Deal's challenges is not just about granting more aid and relaxing conditions. Control and monitoring of national aid schemes will continue to be important, not only to protect the internal market level playing field but also to ensure that aid is effective in contributing to the Green Deal's climate targets. To avoid a gap between rhetoric and facts —so called 'greenwashing' where supposed environmentally friendly footprints are not verified— Member States must require aid recipients to evidence any green claims. While there is still no single EU (or global) mandatory standard for reporting on such benefits, as the green agenda

[21] GBER, Article 36.

hits the mainstream, corporate reporting on these factors is becoming more common and, therefore, easier to properly assess.[22] And indeed, efforts to develop appropriate and usable metrics are already being developed as part of EU law, for example through the EU carbon emissions permit scheme and the delegated acts that the Commission will adopt under the Taxonomy Regulation.

[22] See, for example, the World Economic Forum's Consultation Draft of proposed common standards for corporate disclosure of ESG factors(available at: https://www.wlrk.com/docs/WEFIBCESGMetricsDiscussionPaper.pdf). The EU is also considering introducing its own ESG disclosure requirements

Part 2: Competition rules

8 Q1: Examples of desirable cooperation to support Green Deal objectives

As advisors, we have seen instances where companies have forgone genuinely beneficial projects because of perceived competition law risks which they considered could not be appropriately mitigated despite our advice, and where those companies could not effectively pursue those projects alone. In other words, competition law created a barrier (even if only perceived) for companies to go forward with their sustainability initiatives.

We set out below:

- categories of co-operation agreements that, in our view, can contribute to achieving Green Deal objectives in practice (section 8.1); and
- some specific examples of desirable projects to support Green Deal objectives, based on discussions with our clients (section 8.2).

8.1 Categories of agreements[23]

- Non-binding agreements that incentivise participants to contribute to a sustainability objective. For example, collective intentions, ambitions or targets of sectors regarding sustainability objectives, such as a reduction of CO2 emissions, where individual undertakings determine their own contributions and the way in which they wish to realise them.
- Codes of conduct promoting environmental or climate-conscious practices, including joint standards and certification labels (for example about the use of raw materials or production methods). Standardisation agreements will need to follow established competition rules, including that the participation criteria must be transparent and applied in a reasonable and non-discriminatory manner, and it should remain possible to have alternative standards/labels and to sell products that do not satisfy the criteria for certification.
- Agreements aimed at improving product quality and replacing products that are produced in a less sustainable manner (e.g. reducing or phasing out packaging material or technologies where greener alternatives are available).
- Agreements that concern initiatives where new products or markets are created, and where a joint initiative is needed to acquire enough production resources, including know-how, or to achieve sufficient scale. Sometimes, joint actions are necessary in the start-up phase only. In that case, lengthier collaborations could still be tested against Article 101(3) TFEU.
- Agreements that participants, their suppliers and/or their distributors will respect sustainability laws including labour laws (e.g. on child labour and minimum wages), environmental rules (e.g. banning illegal logging) and fair-trade rules. Such agreements are particularly important for undertakings that have difficulties checking for themselves whether their business partners comply with the rules. By concluding covenants, they can make the necessary agreements, allowing them to perform such checks (as long as this does not lead to the exchange of competitively sensitive information).

8.2 Specific examples

[23] These categories of agreements have also been identified by the Dutch Authority for Consumers & Markets in its Draft guidelines 'Sustainability Agreements' – Opportunities within competition law (9 July 2020), pages 7-9.

- Development of carbon capture technologies.[24] This is an area where a "first-mover disadvantage" has been overshadowing the development of innovative technologies. Cooperation would be required to ensure enough economies of scale for such technologies to be brought to market in a meaningful manner. Due to competition rules, industry participants have however refrained from engaging in cooperation that would have entailed the need to exchange information, for instance, in the development of innovative carbon capture projects. The set-up of these initiatives has therefore been slowed down and companies have instead been seeking State funding to deploy these projects by themselves.
- Oil and Gas Climate Initiative ("**OGCI**"), an industry-led initiative to set out guiding principles for member companies to contribute towards achieving a low carbon future. One of the envisaged initiatives was to fix common targets for the reduction of methane, effectively by using a common average non-binding target. While a fixed binding target would have had far more effective results in terms of lower emissions, many industry participants <u>believed</u> setting such binding targets would potentially have violated competition law. Some industry participants referred in this regard to the Commission's investigation into the German car manufacturers as an example that certain cooperation to reduce emissions can effectively be regarded as being in violation of article 101 TFEU.[25] Accordingly, the OGCI decided to use the non-binding safe approach, rendering it less likely that the final goal of methane reduction will be (quickly) achieved.

9 Q2: The need for further clarifications and comfort

9.1 Why further guidance is so important

Competition policy has an important role to play in striking the right balance between encouraging legitimate, and deterring illegitimate, collective action by industries to achieve sustainability objectives. Achieving ambitious sustainability objectives will require close co-ordinated action, often between competing firms, to overcome a potential "first-mover disadvantage" and deliver initiatives of sufficient scale to have a meaningful impact. At the same time, while the Commission has been asking businesses for bold action to meet the challenges of climate change, the absence of clear competition law guidance has been hampering legitimate industry-led sustainability initiatives throughout the EU.

A limited survey Linklaters recently conducted among business leaders found that nine out of ten businesses consider collaboration as key to achieve progress on sustainability issues.[26] 57% of business leaders that participated in the survey indicated that there are concrete examples of sustainability projects that they did not pursue because the legal risk was too high. Whilst the sample size is relatively small (and we would encourage the Commission – to the extent that it hasn't already – to consider whether a more extensive evidence gathering exercise of this type may be beneficial), we consider that there are important lessons to be learnt regarding businesses' perception of the

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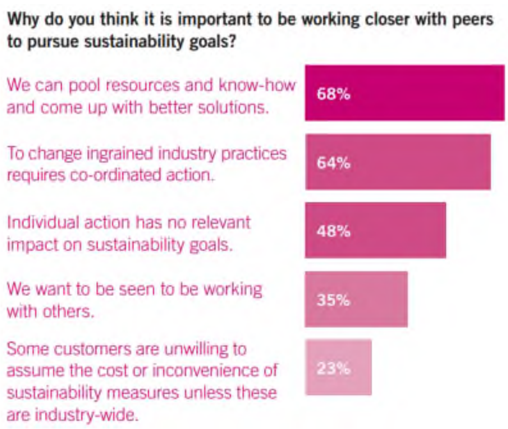
[24] Carbon capture is the process of capturing carbon dioxide at its emission source (such as cement factories or biomass power plants), transporting it to a storage location (usually deep underground) and isolating it where it will not enter the atmosphere, generally an underground geological formation.

[25] The Commission issued a Statement of Objections on 5 April 2019 to BMW, Daimler and Volkswagen in Case AT.40178 – Car Emissions; see https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2008.

[26] Linklaters-commissioned Censuswide online survey of 302 fund and portfolio managers who invest in the energy & utilities or infrastructure/transport sectors in the UK, France, Germany, Italy, Spain, Belgium, The Netherlands and Luxembourg, together with over £1 trillion of assets under management. Available at: www.linklaters.com/en/insights/blogs/linkingesg/2020/july/green-recovery-in-sight-as-1-in-4-infra-funds-expect-to-grow-green-assets-more-than-a-fifth-by-2022.

actual legal risk involved in this area, regardless of whether most proposed collaborations could in fact legitimately proceed under the existing legal framework.

In our view, and as supported by our survey results, guidance on how to pursue lawful collaborations is needed to provide businesses with enough assurances in line with their risk appetite. Whilst an exemption or even legislative change are options worthy of careful consideration, meaningful change can already be achieved through the provision of more guidance and practical examples under the existing framework.



We agree that competition law is not the solution or even the most important policy instrument at the Commission's disposal to tackle climate change and other sustainability issues. However, competition law can and should be part of the solution by giving enough comfort and clarity on the scope of the rules to allow businesses to pursue their goals in this space.

9.2 The importance of practical and flexible guidance

That leaves the question of the best form in which to give these clarifications and comfort.

A case-by-case assessment or a mere communication on enforcement priorities would, in our view, do little to encourage businesses to take forward legitimate sustainability cooperation. We believe that the industry would in the first instance benefit from clear references and examples of allowed forms of cooperation in the revised Horizontal Block Exemption Regulations (or earlier if the Commission were so minded). Second, we consider guidelines as a highly appropriate instrument to give businesses detail and clarity on which types of cooperation agreements are deemed valid, and what the framework for analysis will be (including where agreements would go too far). In this regard, we refer to the example of the Dutch Authority for Consumers & Markets (the "**ACM**") that has issued detailed guidance on its approach towards sustainability agreements ("**ACM Guidelines**").[27]

[27] ACM Draft guidelines 'Sustainability Agreements' – Opportunities within competition law (9 July 2020); https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf.

We encourage the Commission to adopt a liberal approach and provide a flexible framework for companies to ensure Green Deal cooperation. Although regulation creates a level playing field for all market participants, it will take significant time to adopt and implement, with more limited flexibility in practice.

As apparent during the Covid-19 crisis, *ad hoc* comfort letters for certain types of cooperation may lead to efficient and effective solutions. We encourage the Commission to engage with companies to ensure the necessary adaptations to their agreements before imposing any fines. If undertakings are following the potential guidelines in good faith, this issuance of comfort letters may avoid the need for enforcement. However, we observe that today companies are still hesitating to make use of such instruments fearing enforcement. To create a climate in which companies are confident about bringing forward their sustainability initiatives, we encourage the Commission to provide an effective separation between advisory units and enforcement units.

It will also be important for the Commission to publish (informal) advice to companies, as well as its decisions (including comfort letters and "non-infringement" decisions), setting out its competition assessment of sustainability agreements. Through its practice, the Commission should clearly identify those agreements where the environmental benefits outweigh any restrictions of competition. The publication of the Commission's reasoning will be vital to provide sufficient legal certainty and encourage companies to contribute meaningfully to the Green Deal. The Commission took the same approach in relation to the European Payment Initiative (the "**EPI**"), where DG Competition officials have taken the unusual step of working with participating banks to make sure the governance and fee structures comply with EU norms from the start.[28]

9.3 Importance of a harmonised EU approach

In the same vein, to ensure that legal certainty for international businesses is preserved throughout the Union, it will be important to have a dialogue and consensus about these policies at the European level. There must be a minimum level of coherence in the application of the rules, otherwise companies could still be faced with enforcement risk at the national level.[29] Indeed, there is already evidence of divergence among Member States, for example between the ACM and the Hellenic Competition Commission[30] on the one hand, and the German Federal Cartel Office[31] on the other.

[28] More specifically, the "pure advice" offered by DG Competition to the 16 participating banks included making sure that governance was open to other countries and third-party providers, and that exchanges of confidential information complied with competition rules.

[29] General policy guidelines are also not binding on the courts, which could rule that an agreement is incompatible with EU or national cartel rules. Concretely, a claimant could bring a damages claim in a civil court in response to a sustainability initiative and there would be no guarantee that the court would apply the Commission's reasoning.

[30] The Hellenic Competition Commission has issued a staff position paper stating that: "Undoubtedly, competition law can address sustainability issues". It also recognises its own role to "facilitate the transition to a Green economy and support innovation within the Green economy, taking into account possible externalities from generation to generation". Its proposals include the idea of a "green sandbox" where companies could experiment with collaborations without risk of breaching the laws.

[31] The German Federal Cartel Office ("**FCO**") remains doubtful in its recent paper on "Open markets and sustainable management – public welfare goals as a challenge for antitrust law practice" (the "**FCO Paper**") as to whether cooperation between private companies is a feasible way of attaining sustainability goals under current competition rules. The FCO identifies sustainability as an evolving competitive parameter and considers, where a conflict between the protection of competition and the common good arises, it is primarily the democratically legitimised legislature who is responsible for the balancing decision. The FCO maintains that the legislature should, however, only abandon its own legislative measures in favour of forms of cooperation of private self-regulation if these actually represent the most suitable approach.

10 Q3: Circumstances in which the pursuit of Green Deal objectives justifies restrictive agreements

When it comes to the Green Deal objectives, perhaps the most important question for competition policy is how to assess cooperation that intends to achieve such sustainability objectives. In other words, under which circumstances do Green Deal objectives justify restrictive agreements beyond the current enforcement practice. In our view, the current enforcement practice at EU level could be developed to accommodate Green Deal cooperation by applying the following three-stage framework:

10.1 Permitted agreements falling outside the scope of Article 101(1) TFEU altogether

We invite the Commission to identify a set of cooperation agreements that are in principle considered not to restrict competition and therefore not caught by Article 101(1) TFEU. In doing so, it is important to clearly define, for each type of agreement, the basis for its findings, for instance, a finding that such agreement cannot be deemed to have anti-competitive effects; an application of the ancillary restraints doctrine[32]; the Wouters doctrine as developed by the European Court of Justice under Article 101(1) TFEU[33]; or the "Albany" route where certain agreements fall outside Article 101 TFEU if the 'nature' and the 'purpose' of the agreements are primarily non-economic, even if they do include (inherent) restrictive effects.[34]

When it comes to defining categories of agreements not covered by Article 101(1) TFEU, an example can be drawn from the ACM Guidelines, where it is noted that "*sustainability agreements will usually not be anticompetitive if they do not or not appreciably affect competition on the basis of key competition parameters such as price, quality, diversity, service, and distribution method*".[35] The categories of agreements identified by the ACM in its draft guidelines would, in our view, be a good starting point to identify categories of agreements falling outside the scope of Article 101(1) TFEU. Moreover, where there is a "first-mover" disadvantage, as can be observed from our example relating to carbon capture technologies (see section 8.2 above), companies are not currently competing on the innovation parameter. Accordingly, if competition is not present, it can also not be restricted. Hence, Article 101 TFEU would not apply.

We also acknowledge the FCO's position pointing to a certain complementarity between the protection of competition and public welfare objectives.[36] In line with the ACM's approach, the FCO Paper agrees that certain forms of cooperation, including non-binding agreements, that pursue climate protection and other public welfare objectives do not lead to any restriction of competition and are therefore already outside the scope of the ban on cartels of Article 101(1) TFEU. The FCO noted that such agreements particularly include agreements in which the participating companies jointly commit themselves in a code of conduct to comply with legally binding requirements.[37]

[32] Ancillary restraints are clauses which restrict rivalry between the parties and/or third parties, which fall outside Article 101(1) if they are directly related and necessary to the implementation of a legitimate interest. See J. Faull, A. Nikpay, *The EC Law and Competition* (2nd edition), Oxford University Press (2007).

[33] In *Wouters* (Case C-309/99 *Wouters and others v Algemene Radd van de Nederlandse Orde van Advocaten* [2002] ECLI:EU:C:2002:98), the European Court of Justice held that Article 101(1) TFEU does not apply to certain restrictive practices between competitors if they serve a legitimate public interest, such as: ensuring the integrity and proper practice of the legal/pharmaceutical profession, protecting the fairness of sports against doping practices, or upholding the quality of accountancy services.

[34] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECLI:EU:C:1999:430, paras 60-64.

[35] ACM Guidelines, para 16.

[36] FCO Paper, p. 6 et seq.

[37] FCO Paper, p. 7 and 28.

10.2 Agreements that require a simplified assessment

An additional way to provide comfort and guidance to businesses would be to identify "safe-harbour" thresholds where only a simplified (qualitative) self-assessment is required to determine whether the requirements of Article 101(3) TFEU are fulfilled. For instance, the ACM proposes that this safe-harbour applies to agreements where either: (i) the parties have a combined market share of less than 30% or (ii) it is obvious that the benefits offset the harm. For these agreements, the parties need to (i) assess their market shares and/or (ii) be able to explain the benefits and disadvantages of the agreement without being required to quantify the benefits.

The challenge will be to determine the right thresholds for this mechanism. For instance, the market share safe harbours must be high enough to enable a broad cooperation within an industry. Similarly, guidance should be provided as to which agreements are seen to have sufficient benefits to outweigh the potential restrictions resulting from cooperation. Set at the right level, this approach will give parties more leeway and confidence in their self-assessment under Article 101(3) TFEU.

10.3 Agreements that require a detailed (quantitative) assessment

In assessing cooperation between companies that fall within Article 101(1) TFEU but cannot benefit from any safe-harbour approach as set out above, with a view to facilitating the Green Deal objectives, the Commission should rethink how to interpret the consumer welfare-test. A broader interpretation of consumer welfare, leading to a more flexible application of competition rules (and in particular Article 101(3) TFEU), might allow companies to more easily and more effectively achieve sustainability goals (including the Green Deal objectives). Against this background, we set out below a number of considerations for the assessment of Green Deal cooperation under Article 101(3) TFEU:

- **The scope of benefits to be taken into account**: We advocate the use of a broad range of potential contributions (i.e. benefits) in the assessment under Article 101(3) TFEU.[38] This should in particular extend to benefits to society (or parts thereof) in a broad sense (and not be limited to benefits to direct consumers of a particular product). From the perspective of society as a whole, a more sustainable product is often a better product and, therefore, product sustainability itself is a qualitative benefit.[39] Related to this, it should be accepted that the fair share of the benefits goes to society at large (including future consumers) and not merely to direct consumers. Sustainable quality improvement, for instance, may lead to higher prices for some customers in the short term, but with a longer-term perspective, these may be offset by the long-term benefits that such improvements may have (including for future consumers).
- **Quantifying the benefits**: To verify whether the identified "Green Deal" benefits of the cooperation outweigh any potential restrictions; their relevance and weight will need to be determined. In some cases, quantitative data may be available. An example is the extent to which harmful emissions are reduced through the cooperation agreement, and over what

[38] This can include for example reducing negative externalities, reducing operational costs, increased innovation, quality improvements, or a greater diversity of products on offer. This may also involve a broad range of (non-price related) qualitative efficiencies, such as technical or economic progress, green supply chains and lower CO2 emissions, within the framework of Article 101(3) TFEU.

[39] As we explain in more detail below, it is not (yet) a given that this is also the case from a consumer's perspective.

period.[40] We encourage the Commission to give guidance on the various methods of quantitative assessment it is likely to accept. The limited available precedents containing such analysis are old and the methodologies used are rather limited.[41] In particular, methodologies need to be set out that enable consideration of wider contributions and non-price benefits, rather than focusing merely on the more easily quantified but relatively narrow direct short-term price effects. This will require translating fundamentally non-economic effects (e.g., environmental effects) into economic values to enable a balancing exercise and it will also require looking beyond short-term cost-benefit analyses (as these will not account for longer-term effects of sustainability initiatives). For instance, emission-reducing technology and processes may be very expensive and lead to significantly higher pricing. How the benefits outweigh the competitive harm is therefore of crucial importance. To ensure that the benefits can be clearly quantified, it is important to evaluate the elements of environmental benefits based on objective methodologies and criteria (i.e., objective economic models) instead of complex *ad hoc* estimates of savings and costs. The Commission could for example opt for the use of proxies to conduct a net benefits assessment of emission-reducing agreements by using the concepts of "environmental prices" and "shadow prices" (which tell us about the cost of emissions and their long-term effects). In any event, the Commission should issue detailed guidance on how to make use of these benchmarks, to maximise legal certainty for businesses. This is not outside the realm of courts and competition authorities. We have seen this move, for instance, through consideration of the effects on innovation competition in mergers.

- **The merits of a qualitative assessment of the benefits**: Qualitative assessments should, in our view, be considered alongside quantitative assessments.[42] Indeed, in light of the difficulties associated with demonstrating long-term objective benefits and as certain benefits cannot (easily) be quantified[43], there must also be scope for a qualitative analysis. Too strong a focus on quantifying benefits risks blocking sustainability initiatives which, when assessed qualitatively, would be beneficial. This is in particular the case when non-price effects need

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[40] For example, in the Commission's DSD case of 2001, the Commission used a qualitative assessment of exclusivity in agreements for packaging waste collection services resulting in cost savings and lower prices for consumers. Another illustration can be found in the Commission's CEDED case, where it compared the increased consumer price for more energy efficient washing machines against the benefits of lower electricity consumption, which was translated into a monetary equivalent of reduced emission levels.

[41] Competition authorities have tended to focus on the more easily quantified direct cost savings or survey-based 'willingness to pay' amounts. See for example the views of competition authorities in their submission to the OECD roundtable on Horizontal Agreements in the Environmental Context (2010). In its contribution, the CMA suggested that benefits of a co-operation agreement among public transport providers that resulted in reduced road congestion were considered as a direct economic benefit. See also the Commission's DSD and CEDED cases in footnote 40 and the Dutch coal plan closure and Chicken of tomorrow cases in footnote 42.

[42] In the past, quantification has been the preferred method. For example in the Dutch coal plan closure case, the ACM compared higher electricity prices associated with the closure of coal plants against the benefits of lower emissions, which were calculated based on a combination of shadow prices (which track emission costs) and prevention cost method (which tracks the savings in not needing to take emission reducing measures). On the other hand, in the Dutch Chicken of Tomorrow case, the ACM relied on the "willingness to pay" test, thereby comparing higher prices of sustainably produced chickens against consumers' willingness to pay for animal welfare and environmental improvements. Besides the "willingness to pay", one could also consider the "willingness to accept" which accounts for the (minimum) amount that one would have to pay a person to voluntarily accept a negative change in benefit (for example) traffic noise and air pollution.

[43] The FCO Paper for example notes in this regard that quantification creates practical and normative problems. To this extent, the FCO paper provided an overview of various economic valuation methods for determining the "willingness to pay" or the "willingness to accept", including (i) indirect valuation methods that derive the value of an unpriced good from the value of another good for which a market price exists, (ii) direct valuation methods that include techniques that directly ask consumers what value they attach to a particular good; and (iii) the avoidance of cost approach, determining the value of an unpriced good on the basis of the costs of its avoidance. In essence, a range of different evaluation methods would often lead to different results. The FCO also maintains that it would not be possible to evaluate all aspects of sustainability within an economic system based on monetary value.

to be measured (e.g. quality, choice and innovation). A potential method for conducting a qualitative assessment is the use of “true costs and true prices”, where businesses compare the actual costs with the social costs of their products. Actual costs can sometimes be lower if certain externalities are not considered.[44] Investing in more sustainable production processes and products may increase a company’s development and production costs. As a result, sustainable products are in general more expensive than non-sustainable ones. At the same time, consumers in Europe tend to be price sensitive so there may not be a willingness to pay for more sustainable products. And we know that consumers may not perceive future costs to be as large as they actually are (hyperbolic discounting) or may believe that choices made at an individual level cannot make a difference.[45] Guidance on the pass-through of any increased sustainability costs to consumers (or lack thereof) and how this could impact co-operation between companies would therefore also be welcomed.

- **Other 101(3) TFEU conditions**: To fulfil the conditions of Article 101(3) TFEU, any sustainability measures that give rise to competition restrictions, must be proportionate. We consider that this condition could be met by demonstrating that cooperation is (i) necessary to avoid the “first-mover disadvantage”; and (ii) an efficient manner to achieve the objective (i.e. absent the cooperation, the same objective could not be achieved in the same way). Similarly, to unlock the potential of sustainability cooperation, the Commission would need to adopt a flexible approach to ensure that the requirement of Article 101(3) TFEU, that sufficient competition remains in the market, does not act as a blocking condition (especially in instances where a significant part of the industry takes part in a specific initiative/cooperation). Guidance on these points would be most welcomed to provide comfort to businesses.

10.4 How to differentiate Green Deal objectives from other policy objectives

A final question that the Commission rightly poses is how the pursuit of Green Deal objectives can be differentiated from other important policy objectives (such as job creation or other social objectives). Put differently: what warrants a specific treatment of Green Deal objectives?

Notably, Green Deal objectives have been demarcated as key objectives by primary EU legislation. As such, Article 11 of the TFEU states that “*Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development”*. Similarly, Article 37 of the Charter of Fundamental Rights of the EU, requires that “*A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development*”. In addition, Article 114(3) TFEU obliges the Commission to take, as a base, a high level of protection in its legislative proposals concerning environmental protection.

There is also a broad understanding that there is a sense of urgency around climate change, certainly compared to other policy objectives. Indeed, in order to achieve the timing, set by the European Commission in its Green Deal (to be the first climate neutral continent by 2050), swift and impactful action is required from actors throughout Europe. Tackling climate change requires a different approach than other policy objectives because it is irreversible.

[44] See ACM Guidelines, para 35.

[45] NYU Institute of Policy Integrity, ‘Experts on the economics of climate change expressed higher levels of concern about climate change impacts than the general public, when asked identical survey questions’ (Expert Consensus Report” 2015, available at www.edf.org/sites/default/files/expertconsensusreport.pdf).

More specifically, the assessment of the exemption under Article 101(3) TFEU may differ between agreements to support Green Deal objectives and agreements that support other policy objectives. For example, for social objectives the Commission will need to use other qualitative or quantitative substantiation methods (for example, how a higher degree of employment may contribute to social security policies and/or Gross Domestic Product of a certain country). Here again, the benefits for society as a whole must be on top-of-mind of the Commission when assessing the agreements, rather than the fair share for the specific users of the product. Consequently, while there is some potential overlap with the assessment of sustainability agreements, we consider that agreements with social objectives will in any event require a distinct but detailed assessment of the anticipated benefits and substantiation methods under article 101(3) TFEU.

As a final note, we do not see a reason to distinguish between various Green Deal objectives. All agreements with certain (direct or indirect) sustainability objectives must benefit from the proposed flexibility. Any distinction made would suggest that there are more and less important objectives. Such a distinction would require a political choice and general policy guidelines would not be the right method to establish that distinction. There is also a risk that such distinction overcomplicated the analytical framework, thereby missing the mark.

Part 3: Merger control

We believe that the enforcement of EU merger control rules could and should play an important role in helping the EU to achieve the ambitious sustainability objectives of the Green Deal. We see clear evidence of a rise in transactions where deal rationale is grounded in sustainability factors. Given the nature of the EU merger control regime, the onus is on dealmakers to bring forward mergers motivated by sustainability objectives or which will generate sustainability benefits. We would welcome and encourage careful consideration of these factors by the Commission as a legitimate part of its merger assessment. This will in turn provide much-needed certainty and guidance on its assessment framework for other merging parties considering their own sustainable investment strategies.

11 Q1: Situations when a merger between firms could be harmful to consumers by reducing their choice of environmentally friendly products and/or technologies

Conceivably, there are situations where a merger between firms could be harmful to consumers by reducing their choice of environmentally friendly products and/or technologies, for instance where:

- following a merger, the merging parties promising to lower prices might lead to pressure on producers, who could, at least in theory, be forced to cut corners on environmental safeguards and shelve green initiatives; or
- where an established market player with a polluting business model acquires a smaller business selling a more sustainable product and may then integrate the smaller brand's production process into their own, reducing the environmental quality of the final product.

The risk of such situations occurring can be addressed within the parameters of the Commission's usual review of the competitive effects of a merger under Article 2 EUMR, as harm to consumers in the form of a reduction in service and/or innovation is already a consideration in relation to analysing the various theories of harm that can result from a merger.

12 Q2: How merger enforcement could better contribute to protecting the environment and the sustainability objectives of the Green Deal

Merger enforcement has an important role to play in protecting the environment and delivering the sustainability objectives of the Green Deal. There are four stages where the Commission can better support these objectives:

- in the substantive review of mergers under Article 2;
- in shaping market definition;
- when considering efficiencies; and
- when considering remedies.

12.1 The substantive review of mergers under Article 2

Article 2 EUMR requires the Commission to determine whether a transaction would result in a significant impediment to effective competition ("**SIEC**") in the internal market or a substantial part of it. Article 2(1)(b) EUMR sets out the criteria which the Commission must consider when assessing a transaction. These criteria include 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) EUMR).

We consider that environmental and sustainability factors ("**Sustainability Factors**") should fall within the meaning of "economic progress" as suggested by the Hellenic Competition Commission in its Draft Staff Discussion Paper[46]. Although the Commission typically focuses on short-term price effects when assessing a merger, Article 2 EUMR does not limit the Commission to an analysis of price effects. Moreover, both the EU Treaties[47] and more recent EU policy developments like the Green Deal and related legislation[48] provide legislative legitimacy for the inclusion of Sustainability Factors in merger assessments. Given the emphasis placed on fighting climate change by Commission Officials[49], the Commission should and could integrate Sustainability Factors into its merger assessments.

In practice this should mean that *positive* Sustainability Factors can play a part in clearing deals (i.e. concluding that a merger "would not significantly impede effective competition" and therefore there is no "SIEC"). Equally, as discussed above, *negative* Sustainability Factors could play a part in reaching a conclusion that a deal should be blocked – or only cleared subject to remedies (i.e. concluding that a merger "would significantly impede effective competition" and therefore there is a "SIEC").

Although Article 2 EUMR is neutral on this point, consideration of environmental factors in merger cases tends to be asymmetric based on a different standard of proof: it is more likely that a reduction of competition in terms of sustainability parameters or restricting "sustainability innovation" would be considered by the Commission as an additional reason for *blocking* an anti-competitive merger, than positive Sustainability Factors being a reason for clearing it.

12.2 Shaping market definition

The Commission should consider Sustainability Factors when defining the product and geographic market(s) in which the merging parties operate. We consider this is important as market definitions frame the Commission's SIEC assessment, provide the reference point for market shares and calculation of concentration levels and can play into the merging parties' remedies package.

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[46] Draft Staff Discussion Paper on Sustainability Issues and Competition Law by the Hellenic Competition Commission, 17 September 2020, Paragraph 100.

[47] Recital 23, EUMR requires the Commission to "place its appraisal within the general framework of the achievement of the fundamental objectives" of the EU when assessing a merger. This includes, notably, "the sustainable development of economic activities and a high level of protection and improvement of the quality of the environment" (Article 2 Treaty establishing the European Community (Consolidated version 2002), Article 3(3) Treaty on European Union and Article 37 EU Charter of Fundamental Rights).

[48] Moreover, while not yet law, the draft EU Climate Law arguably gives greater and more immediate scope to the Commission to take active steps to support the Green Transition, stating that: "The relevant Union institutions and the Member States shall take the necessary measures at Union and national level respectively, to enable the collective achievement of the climate-neutrality objective."

[49] See the call to arms by Commissioner Margrethe Vestager, 'Competition and Sustainability', Speech, GCLC Conference on Sustainability and Competition Policy, Brussels, 24 October 2019 (available at: https://wayback.archive-it.org/12090/20191129200524/https://ec.europa.eu/).

Existing case law already demonstrates Sustainability Factors at play when it comes to market definition[50]. Empirical research also indicates that Sustainability Factors can constitute a differentiating factor in the eyes of consumers[51] as explicitly acknowledged by the Commission in its call for submissions.

12.3 When considering efficiencies under the EUMR

Under the Horizontal Merger Guidelines, efficiencies brought about by a merger may "*counteract the effects on competition and in particular the potential harm to consumers that it might otherwise have*". Thus, the Commission can take into account the factors mentioned in Article 2(1)(b) EUMR, including the "*development of technical and economic progress*". The Commission should analyse Sustainability Factors as potential "efficiencies".

Although efficiency claims in merger cases have generally been met with scepticism by the Commission, it has assessed efficiency claims in relation to innovation in a number of merger cases and explicitly considered benefits not directly related to price[52]. Indeed, the Horizontal Merger Guidelines ("**HMG**") state that consumers may benefit from new or improved products or services, resulting for instance from efficiency gains in the sphere of R&D and innovation[53]. If the Commission is willing to consider changes in quality-adjusted prices (to account for changes in quality), we consider that the Commission should also consider changes in social cost adjusted prices (the improvement in environmental quality being an improvement in social cost).

Given the historical treatment of efficiencies, we would welcome a fresh look by the Commission at how efficiencies in the merger context are quantified, encompassing not only Sustainability Factors, but other quantifiable efficiencies too.

For efficiencies to be taken into account under the EUMR, they (i) must benefit consumers; (ii) be merger-specific; and (iii) be verifiable[54]:

(i) **Efficiencies must benefit consumers**: The Commission and national competition authorities have employed narrow methodologies to quantify environmental benefits,

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[50] For example, although it did not need to conclude on market definition, in Case No COMP/M.7292 *DEMB/Mondelez/Charger OPCO* [2015] OJ C387, Paragraph 7.3, the Commission considered a market segment for non-conventional coffee (organic, fair trade and other certified coffees) versus conventional coffee as responses from retailers indicated that some consumers might perceive non-conventional coffee as fulfilling different needs from conventional coffee such as the need to contribute to sustainable development.

Similarly, in Case No COMP/M.9076 *Aleris/Novelis* [2019] OL J C70 (a merger of two US producers of aluminium products), environmental issues formed a crucial part of market definition. The Commission found that aluminium flat rolled products, such as aluminium automotive body sheets, used in the automotive industry, are in a separate market than other aluminium products. Of particular relevance to its conclusion on a separate product market was that these aluminium automotive body sheets are used in the production of lighter, more fuel-efficient cars. This approach to market definition, in turn, framed the Commission's substantive assessment and also played into the parties' remedies package.

[51] For example, recent research by IBM found that 77% of consumers seek products that are sustainable and environmentally responsible; 72% of consumers that consider sustainability / environmentally responsible products to be very important are willing to pay a premium of 35% (see Karl Haller, Jim Lee, and Jane Cheung, Meet the 2020 consumers driving change, IBM Report 2020, Figures 3 and 4, available at: https://www.ibm.com/downloads/cas/EXK4XKX8).

[52] Efficiency claims made by merging parties were partially accepted by the Commission and balanced against the competition harm. This was notably the case in Cases No COMP/M.4267 *Deutsche Börse/Euronext* [2006] OL J C256, COMP/M.6570 *UPS/TNT Express* [2013] OL J C186 , COMP/M.6905 *Ineos/Solvay* [2013] OL J C273, COMP/M.7421 *Orange/Jazztel* [2015] OL J C376 and COMP/M.7278 *GE/Alstom* [2015] OL J C25. Moreover, also in Case No COMP/M.7630 *FedEx/TNT Express* [2016] OL J C220, even though the transaction was ultimately not considered to lead to a significant impediment to effective competition, the Commission found that the transaction would give rise to verifiable, merger-specific efficiencies due to network cost savings which would benefit customers.

[53] Paragraph 81, HMG

[54] Paragraphs 78 to 88, HMG

focusing on attributing monetary values to short-term environmental effects[55] and the willingness to pay direct consumers within the relevant affected markets[56]. This fails to take into account benefits to be realised over time and those flowing to society more widely. An important question relating to Article 2 EUMR – and a big focus of the wider debate – is whether to interpret "competition in the internal market" strictly or more widely to capture out-of-market green efficiencies; i.e. those flowing to a wider group of consumers than the direct consumers of the relevant product. There have been conflicting opinions from Commission Officials on this[57]. We consider that the notion of consumer benefit should be interpreted broadly to encompass the interest of all consumers in preserving environment and reversing the damaging effects of climate change. This wider approach aligns with evolving European attitudes, for example – and as discussed above – that of the ACM (as endorsed by the Commission), to capture some out-of-market benefits in the context of sustainability agreements.[58]

(ii) **Efficiencies must be "merger-specific"**: This requires consideration of the extent to which Sustainability Factors can "justify" a merger as there may be less restrictive means of achieving the same environmental objectives[59].

(iii) **Efficiencies must be "verifiable"**: This requires that the Commission must be "reasonably certain that the efficiencies are likely to materialise". However, Sustainability Factors may take some time to materialise and may be difficult to quantify, so the criterion of verifiability should not be applied too strictly; it should be sufficient for companies to provide an estimate of the positive effects on the environment based on current scientific data[60].

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55 See, for example the Commission's approach in CECED (Case 36718) Commission Decision [1999] OL J 187, where it compared the increased price of energy efficient washing machines against the benefits of lower electricity consumption; or the Dutch Competition Authority's analysis of higher electricity prices from closing coal plants against the benefits of lower emissions (available at: https://www.acm.nl/sites/default/files/old_publication/publicaties/12082_acm-analysis-of-closing-down-5-coal-power-plants-as-part-of-ser-energieakkoord.pdf).

56 For example, in the Chicken of Tomorrow case, chicken producers came to an agreement to improve the welfare of chickens (and to replace 'regular' chickens with the 'chicken of tomorrow'). The Dutch Competition Authority (the ACM) attempted to quantify the benefits of these improvements (based on a consumer survey) and found that the improvements came at a higher cost (1.45 eurocents per kilo) than a combination of what consumers were willing to pay (68 eurocents per kilo) and the positive environmental effects (14 eurocents per kilo) (i.e. a total of 82 eurocents). They therefore concluded that the potential advantages to animal welfare did not outweigh the reduction of consumer choice and potential price increases and the initiative was abandoned.

58 ACM, Draft Sustainability Agreements Guidelines (July 2020). The guidelines take the position that for agreements which aim to prevent or limit any obvious environmental damage and efficiently promote compliance with a binding international or national standard (termed "environmental damage agreements"), it should be possible to take into account benefits for others than merely the customers in the relevant market. This is because those customers (as a group) already sufficiently benefit from the agreement as members of society. Thus, an environmental damage agreement having the effect of reducing CO2 emissions, in line with the related EU goals, can be lawful if society benefits more widely – even if users of products/services in question are not entirely compensated for the loss of competition (e.g. incur a price increase). For other sustainability agreements, any benefits must "fully compensate" relevant customers for the anti-competitive harm they suffer as a result of the sustainability agreement. This means that such customers will have to attach sufficient value to the benefits to offset the harm (paras 40-44).

59 For example, the Commission might conduct a proportionality assessment assessing whether licensing emissions reducing technology would result in a less restrictive outcome than an acquisition of a company developing such technology.

60 Although corporate reporting on sustainability factors is becoming more common and quantification of environmental costs and benefits has developed over recent years (e.g. in Europe, through the EU carbon emissions permit scheme and the taxonomy Regulation), there is still no single EU or global mandatory standard for reporting on environmental and other sustainability data.

12.4 When considering remedies

We consider that commitments aimed at eliminating an environmental harm should be possible where that environmental harm forms part of the competition concern. Indeed, sustainability concerns played into the remedies package offered in *Novelis/Aleris*[61].

There are understandably concerns that the Commission would exceed its competence by actively including commitments on environmental protection and sustainability measures. A pre-requisite for reflecting a sustainability agenda into a remedies strategy is, therefore, that the Commission can articulate sustainability harms within the competition framework. As explained above, this is possible. For example, if the Commission were to take into account the carbon "price" when assessing the competitive effect, then a remedy that would reduce emissions or counter any negative effects (e.g. carbon off-setting) could be appropriate. Equally, where the Commission is concerned about competition problems relating to a particular category of customers (perhaps those involved in development of more environmentally friendly products) a remedy to supply those customers on no less favourable terms than other customers or on fair, reasonable and non-discriminatory terms could be an appropriate remedy.

It may be helpful for the Commission to draw up guidelines to deal with such remedies. We propose that sustainability remedies should: "benefit consumers"; be "merger specific" (i.e. remedies must be "no more extreme than necessary" to remedy the harm likely to be caused by the merger); and the harms being remedied must be "verifiable".

We acknowledge that effective sustainability remedies are more likely to fall into the category of behavioural remedies. Although the Commission has stated that structural remedies are preferable, the Commission has often accepted behavioural remedies where they can address the SIEC (particularly as part of a package of remedies)[62].

[61] Case No COMP/M.9076 *Aleris/Novelis* [2019] OL J C70 : As noted above, the Commission was concerned that the merger would result in reduced choice of suppliers and higher prices for aluminium automotive body sheets, a particular concern because of the use of that product to develop more fuel-efficient cars. This traditional competitive analysis was resolved through a traditional remedy: divestment of Aleris' entire aluminium automotive body sheet business in Europe. The full text decision is unavailable, so it is not possible to assess whether the fact that this case was relevant to sustainability resulted in special treatment, although it is notable that the use of the body sheets for fuel-efficient cars was specifically highlighted in the press release.

[62] The CJEU has repeatedly stated that 'behavioural commitments are not by their nature insufficient to prevent the creation or strengthening of a dominant position, and they must be assessed on a case-by-case basis in the same way as structural commitments', e.g. in Case T-87/05 *EDP v Commission* [2005] ECLI:EU:T:2005:333, para. 100 and cases cited there.