**Response to: Competition Policy Supporting the Green Deal**

Giorgio Monti, Tilburg University (email: G.Monti@tilburguniversity.edu)

**Introduction and summary**

Thank you for affording this opportunity to comment on how competition policy might evolve to further support the Green Deal. I have carried out research on the interaction between competition and other public policies for a number of years.[1] My take in these works has been to be cautiously supportive of cooperation agreements to support sustainability objectives. This response is not a patchwork summary of this earlier work. The challenges today are providing a clear position and an effective governance regime. My answers to your questions attempt to provide answers to these two challenges focusing only on Article 101 TFEU. I hope these observations are helpful. I remain at your disposal should you have any queries.

At a high level here are the key points that follow below.

- Clarity is best achieved by guidelines *and* decisional practice that should deliver the following
    - Guidance on how to design agreements that do not infringe competition law
    - Guidance on the kind of evidence undertakings should provide to show that the criteria of Article 101(3) are met when agreements infringe Article 101(1)
    - As a matter of strategy it is preferable to provide guidance only to Green Deal-related effects and not to a wider category of effects, recognizing however that other benefits may be pleaded
- An effective governance regime entails
    - A clear statement that Article 101(3) is read narrowly and that the evidentiary burden is on the undertakings to show that the conditions are met
    - Participation of interested parties in the design of agreements
    - Ex post review of the performance of exempted agreements
    - A suitable fining policy: immunity for good faith infringements accompanied by higher fines for greenwashing cartels

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

The example is theoretical and it is designed to explain what difficulties arise and how they could be resolved.

**Illustrative Example 1**: competitors agree to reduce the use of plastic in their packaging. This causes an increase in price as competitors use alternative packaging means which cost more but it reduces the environmental impact resulting from the manufacture and disposal of plastic.

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[1] Monti, 'Article 81 EC and Public Policy' (2002) 39(5) Common Market Law Review 1057, Monti, *EC Competition Law* (2007) ch.4, Monti and Mulder, 'Escaping the Clutches of EU Competition Law: Pathways to Assess Private Sustainability Initiatives' (2017) 42 European Law Review 635, Monti, 'Four Options for a Greener Competition Law' (2020) 11 (3-4) Journal of European Competition Law & Practice 124.

### 1.1 The measurement challenge

The first challenge relates to the positive conditions in Article 101(3): (i) What is the 'technical and economic progress' in the first condition of Article 101(3) and how do we measure this?; (ii) What is a fair share to consumers? I consider these together here, and discuss the fair share point in more detail in the answer to question 3.

Guidance would be helpful in explaining how parties may discharge their obligation to show the positive effects of the agreement. There could be lessons learned from the use of environmental impact assessments carried out in other contexts. For example, the Directive 'on the assessment of the effects of certain public and private projects on the environment' provides that for certain projects the parties are obliged to carry out an environmental impact assessment to explain the risks that the agreement poses on a set of specific variables (i.e. population and human health; biodiversity; land, soil, water, air and climate; material assets, cultural heritage and the landscape).[2] This can serve to structure the assessment of agreements. Impact assessments in advance of EU secondary law can also be a source of inspiration. These approaches will require adjustment as these assessments focus on the likely harm caused by developments that undergo this procedure, but the indicators and means of measurement would likely be usefully transposed to the scenario we have here. This is not a silver bullet as reports assessing these procedures suggest that the quality of these assessments is uneven. There are other examples of environmental regulation that may also offer ideas about how to construct a framework for evaluating the environmental impact.[3]

Furthermore, there are tools developed in economics to measure environmental gains which could be utilized, some of these are found in the impact assessments noted above. If these are used in other fields of EU Law to shape policy, there should be no objection in integrating these approaches in competition law. These methods can be used to handle both the identification of the economic benefits of the agreement as well as what the share of benefits that go to the consumer. Requiring parties to provide evidence to back up their claims is nothing novel if one looks at comparable obligations imposed upon Member States when they seek to justify restrictions on the internal market on the basis of imperative requirements.[4]

Putting together the lessons from environmental impact assessments and tools used in environmental economics, it may be productive to draw up richer categories of economic gain that may be considered under Article 101(3). A soft law document could explain what categories of gain can be considered and explaining the type of economic evidence that would be useful to demonstrate these. Here is a tentative list: (i) cost-savings for consumers from the overall use of the product (e.g. more energy efficient electrical goods reduce the cost of running the product which is greater than the price increase). Here the evidence is obvious and it is to explain the full-life cost of the machine; (ii) qualitative improvements resulting from a sustainability initiative measured by willingness to pay indicators (e.g. consumers happy to pay more for

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[2] Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1, as amended.

[3] Along similar lines to this suggestion see De Stefano 'EU Competition Law & the Green Deal: The Consistency Road'(2020) 1(2) CPI Antitrust Chronicle 41, who discusses Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment, [2020] OJ L198/13.

[4] A nice illustration of the depth of inquiry needed may be found in *Scotch Whiskey Association and others v. Lord Advocate and others* [2017] UKSC 76

the goods when they are advised that the packaging is more sustainable); (iii) the use of less direct indicators of economic gain, e.g. revealed preferences and stated preferences (e.g. consumers buying water filters reveal something about the value placed on clean water). These methods serve to value benefits that are once removed from the purchase of a product but which people value and whose existence enhances their well-being.[5] A list such as this would not be exhaustive (undertakings should be free to bring other types of evidence that is not foreseen) but it would indicate the kinds of analysis expected and should facilitate self-assessment of sustainability initiatives.

A related issue: what about if an environmental impact assessment is negative? Suppose that the agreement has some positive effects on the environment but also causes some negative effects (e.g. it improves water quality but increases air pollution). In my view, the overall negative effect means that the agreement does not meet the conditions of Article 101(3). This is precisely why use of a type of environmental impact assessment can help because it requires the actors to show the overall environmental impact of their arrangement and not just cherry-pick the positives.

**1.2 qualitative approaches**

An additional approach, which I think is implicit in the recently issued Dutch draft Guidelines,[6] is the following: can we use the signing of an international Treaty relating to a specific environmental goal as evidence that society as a whole places a value on undertakings who choose to cooperate in addressing that environmental goal? In other words: in a democracy the choice of elected government to pursue certain environmental goals means that citizens value this commitment and therefore a private initiative yields certain benefits that citizens/consumers value can be exempted. This gives an indicator of what society values, even if this value is not reflected in a willingness to pay analysis. The concern here is whether this method of identifying a positive gain is too subjective to be considered. However, an argument in favour of relying on qualitative indicators is found in the Hellenic Competition Commission's paper which notes that currently society under-estimates the future costs of climate change.[7] Reliance on solely objective indicators might understate the benefits of the agreement.

A related approach could be to consider the ex-ante procedure by which a sustainability initiative is crafted. Suppose undertakings consult with trading parties up and down-stream and with consumers and citizens likely to be affected by this and the result of this procedure is that the proposed agreement meets with approval by these stakeholders. Might this be evidence that helps make a case for an exemption? There is some case law that explores a 'procedural public interest test' which supports this option.[8] This is less subjective: the undertakings would have to reveal evidence of consultation and agreement by affected parties. It also allows for the agreement to be co-created by stakeholders which minimizes risks and ensures relevant evidence is utilized. Co-creation involving relevant regulators would serve to add legitimacy to this exercise.

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[5] These approaches are also espoused and explained more fully in Hellenic Competition Commission, Staff Discussion Paper on Sustainability Issues and Competition Law (2020), section 1.2.

[6] ACM Draft Guidelines, *Sustainability agreements: Opportunities within competition law*, paras 38-42. This is written in the context of the consumer pass-on test.

[7] Hellenic Competition Commission, Staff Discussion Paper on Sustainability Issues and Competition Law (2020) para.111.

[8] Monti and Mulder (above n 1) pp.651-2 look at these cases.

### 1.3 indispensability

Criticisms have been raised that the one justification often used for cooperation, the so-called 'first-mover disadvantage', is a poor one. In other words, parties should use environmental performance as a parameter to compete against their rivals and get a first-move advantage. However this should not yield a categorical answer that such agreements can never be perceived to be indispensable: this is for the parties to show on a case-by-case basis that acting alone would not be profitable and the agreement is the least restrictive alternative.

A related consideration is that merely informing consumers of superior environmental performance may not suffice to sway the consumer to pay more for the product even if the consumer is keen to act in ways that safeguard the environment. One can refer to behavioral economics to suggest that consumers may not factor in their preferences in their choices.[9] This strengthens the case for indicating that agreements may be necessary.

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

### 2.1 yes to Guidelines

At a minimum, further clarification should come in the form of Guidelines. Of particular assistance in Guidelines are hypothetical examples which are used to explain the analytical framework that is to be adopted. Drawing on the recent Dutch Draft Guidelines, examples should include both cases where there is no competition concern and cases where there are competition concerns and how these might be exempted. One important improvement that could be made to the Dutch draft is to explain clearly the theory of harm that might be pursued in the examples which raise no competition concerns. This account is necessary to allow undertakings to see what pitfalls they are likely to face. It would also be useful to explain how agreements may be revised to avoid falling foul of competition law in the first place.

One further observation I would like to take the liberty of making is that in providing examples it may be more prudent to devise hypotheticals rather than rely on cases that have been decided. This avoids the risk of the Guidelines giving one interpretation of a Commission decision that does not quite square with the way the original decision is drafted, not least as some past decisions have been interpreted differently by different people.

### 2.2 yes to Decisions

Guidelines could be followed by a Commission reviewing a sustainability agreement as part of its enforcement strategy and issuing a decision. Whether the result is a non-infringement decision under Article 10 of Regulation 1/2003 or an infringement decision explaining that the criteria for exemption are not met, both have the same value. A decision affords the Commission the opportunity to apply the legal framework to a concrete set of facts and allows for a better understanding of how such agreements are

[9] Volpin 'Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves) (2020) 1(2) CPI Antitrust Chronicle 9, for a nice account of the behavioral economics literature.

reviewed. It also affords the opportunity for an appeal, which may be useful given the underdeveloped state of the case-law.

**2.3 no to priorities**

In general, enforcement priorities are about making a business case that the limited resources an agency has are put to good use by selecting the cases which cause most damage to competition (or, for the Commission, those cases which have a Union interest). The focus on what cases to pick is unhelpful here where the discussion is how to exempt certain types of agreements. Nor is a statement that the Commission does not prioritize sustainability agreements give certainty when the risk of private litigation emerges. In particular, the Guidance on enforcement priorities on exclusionary conduct remains a problematic document for mixing up priorities with substantive analysis. One might make a similar comment about the COVID-19 Framework where the substantive basis for tolerating these agreements is uncertain.[10] Furthermore, since any guidance from the Commission is expected to gather consensus among national competition authorities, a statement of the Commission's own priorities has little value for national enforcers.

**2.4 informal advice: yes, with modifications**

A further option is to opt for informal advice and to publish a document to follow this up. The model I have in mind is the COVID-19 comfort letter. This has potential but could be improved by reference to the approach in the US when drafting business review letters. The latter are more clear on the theory of harm explored and the basis for authorization than the one comfort letter that has been made available so far.

**2.5 commitment decisions as an option**

On the minus side the theory of harm in a commitment decision is not fully articulated and the decision does not set the same sort of 'precedential' value as a decision. However, on the plus side commitment decisions offer a superior solution in terms of forcing parties to re-design their agreement to secure that it complies with competition law. The market test allows for participation from third parties who can contribute to shaping this agreement to minimize the risk of harm. Furthermore, commitment decisions can build an ex post review mechanism. For example the agreement could be exempted for two years and be renewed only if the promised gains materialize. (It may be argued that the flexibility with remedies can also be secured in an infringement decision as well, but this would call for a wider reflection on the use of remedies in infringement decisions.)

**2.6 fining policies: immunity coupled with punitive sanctions**

A policy not to impose fines on agreements which try but fail to secure the sustainability objectives could be considered, but this should be accompanied by a policy going the other way: raising penalties when undertakings take advantage of a sustainability initiative in order to harm competition. This might be something to keep in mind when reviewing the fining guidelines but, not least in light of some cartels that have been uncovered in the past which have used a sustainability initiative to collude.

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[10] Monti 'Business Cooperation in Times of Emergency: The Role of Competition Law' CPI 10 May 2020. https://www.competitionpolicyinternational.com/business-cooperation-in-times-of-emergency-the-role-of-competition-law/

**2.7 Governance**

As indicated above, it would be desirable if the design of a sustainability initiative is the result of a process of co-creation, involving parties who are likely to be affected as well as the national competition authority and any other relevant regulator. This increases the information available to the undertakings and facilitates the shaping of the agreement.

As with state aid under the GBER a mechanism to account for whether the agreement did yield the hoped for benefits can be requested. This could have teeth: penalties if the benefits do not mature. Or it could be an information gathering device. Or it could be the basis for withdrawing the exemption early. While assessing the effectiveness of competition law enforcement is a tricky task, here the review would focus specifically on what the parties have promised to deliver.

**3. Are there circumstances in which the pursuit of Green Deal objectives would justify restrictive agreements beyond the current enforcement practice? If so, please explain how the current enforcement practice could be developed to accommodate such agreements(i.e. which Green Deal objectives would warrant a specific treatment of restrictive agreements? How can the pursuit of Green Deal objectives be differentiated from other important policy objectives such as job creation or other social objectives?).**

**3.1 which objectives?**

The questions suggest that one distinguishes between non-competition objectives. This raises two different points. First: as a matter of strategy it makes sense for the Commission to zoom in on a narrow set of objectives for this policy initiative (e.g. Greed Deal objectives). By focusing on one type of positive benefit this allows the development of guidelines that are precise and focused. In particular, when it comes to explaining what economic analysis could be utilized to measure the impact of the practice under consideration, a focus on a discrete set of objectives is preferable. Those wishing to plead for other justifications can make such claims and the Green Deal-related guidelines can assist them; with sufficient experience Guidelines can be then expanded to other kinds of agreement.

The second point is about the appropriate scope of non-competition interests which may be considered. The notion of 'sustainability' has matured across time to go beyond issues pertaining to the environment. Opinions on this differ but there is sufficient case-law to support the view that the interest of protecting the competitive process is sometimes balanced with a range of other non-competition concerns. Thus as a matter of law there is no good reason to say: we authorize agreements that achieve a Green Deal objective but we never consider agreements that pursue the goal of animal welfare or the promotion of the livelihood of farmers.

An oft-repeated concern is that reading a wide number of policy objectives into Article 101(3) somehow harms the role of competition law, changes the standard to a total welfare standard, or makes the application of the law unwieldy. These concerns are unwarranted. First, as a matter of law (until the Court says otherwise) Article 101(3) includes a range of non-competition goals. Not so Article 101(1) which is focused narrowly on restrictions to the competitive process. Second, the evidentiary burden of proof remains with the undertaking: it is for the undertaking to bring credible measurements of how the agreement provides a given benefit. Third, the final condition of Article 101(3) requires that the scope for competition is retained. Therefore: the role of competition law in the constitutional order is not displaced by Article 101(3). This is not like what you have in some Member States where the Government can decide to tolerate harm to competition for other policy reasons. The welfare standard is relevant for determining the infringement in Article 101(1), not for finding the grounds for exclusion. Exemptions are just that: instances where the primary value is partially (and temporarily) displaced to favour an equally important public interest.

**3.2 out of market effects**

**Illustrative example 1:** Competing companies agree to stop sourcing a raw material from a non EU country because that country has lax environmental regulations and the raw material is extracted in a way that causes significant levels of pollution.

In this context I don't think there is any case-law that compels one to say that the global gains cannot be considered under the first condition of Article 101(3). A purposive reading of the Treaty would indicate that this agreement should be welcomed and exempted if the other conditions are met. This does raise issues about the second condition in Article 101(3), which is discussed below.

**Illustrative example 2**: Competitors making widgets agree to change the manufacturing process to eliminate the emission of noxious chemicals. Buyers pay more but the air they breathe is cleaner. The economic gain of cleaner air may be measured by the methods set out above. However the buyer pays more for the product and their personal benefit from cleaner air is lower than the higher price.

Current practice requires that the harm to consumers that results from an infringement of Article 101(1) is compensated by the benefit that the agreement achieves for those consumers. Thus in the agreement above, the consumer gets no fair share if the environmental gain for the buyer is lower than the price increase.

There are two flaws with this reading: the first is that one does not often see in Commission decisions a quantification of consumer harm under Article 101(1). It's quite heroic then to claim that under Article 101(3) the parties have to prove that the consumer is compensated when the loss this party suffers is not quantified by the Commission in the first place. The second flaw is that if you do the balancing in the second condition (fair share to consumers) you effectively ignore some of the benefits listed under the first condition or you treat the two conditions as one. For example, suppose an agreement reduces production costs by a factor of 5 and increases prices by a factor of 1, then an exemption is only available if the reduction in production costs is passed on to consumers so they get benefits (e.g. new or better quality products) of a factor equal to or greater than 1. Therefore the reduction of production costs (by a factor of 5) becomes irrelevant.

The better view from a legal perspective (which can be traced to *Consten & Grundig*) is that the balance is between the harm to competition and the gains to society identified in the first condition: we tolerate some reduction of competition provided the societal gains are perceived to be larger than the loss of competition. In other words you balance the negative effect on competition with the positive effects listed in the first limb of article 101(3), and not the second. The second condition (consumer pass-on) is subject to the first so consumers need not be fully compensated as long as they receive some benefits that are identified under the first condition: this comes from a literal reading of the text consumers must get 'a fair share of the resulting benefits' (the same phrase is used in other language versions) – these benefits are those listed in the first condition and which result from the agreement. The consumers don't have to receive all of these benefits, but enough to amount to a fair share. Similarly, the final condition of Article 101(3) flows from this because it says that competition must not be eliminated, preventing the use of a total welfare standard and retaining the importance of the competitive process.

Applied to the illustrative example above: one need not require that the consumer is fully compensated for the harm they suffer as a result of paying the higher price. One needs to show that they secure a fair share of the benefit. Fairness is a normative term and requires a value judgment, much like the notion of fairness in the context of excessive pricing. Guidelines can explain how this fairness requirement can be determined. For example, in this way: the first condition of Article 101(3) takes into account improved air quality for all, and the second condition considers whether the buyers of the product get a sufficient share of this improvement – e.g. if the agreement reduces noxious emissions to the value of € 10 million, and some of the economic gains of this improve the well-being of the consumer then the risk that the consumer pays marginally more for the good should not mean that they do not receive a fair share just because the improvement in well-being is less than the price increase. Matters may differ if the economic gains to society are much lower and/or if the price increase to consumers is very high.

An alternative is found in the Dutch Draft Guidelines. There, when evaluating an 'environmental damage agreement', the gains to all citizens are taken into account, and it is irrelevant that the direct buyers pay more than they benefit. The fact that the consumer pays more is fair because the consumer is the one who imposes the harm to society in the first place (consuming a product manufactured in a manner that pollutes the air). This option is also worth considering. However, it is not clear why this is limited to environmental damage agreements and not to other sustainability initiatives (e.g. the same logic applies to an agreement to increase the pay of farmers in Latin America which increases the price of the product but this is paid for by the person who causes the demand in the first place); second the need to link the agreement to a national or international standard seems unnecessary unless the logic is (as discussed above) that this affects the interpretation of the first condition in art 101(3). The case-law does not quite support this approach. In *Asnef-Equifax* an agreement that would deny loans to some consumers but increase the availability of loans to others should be assessed having regard to the 'overall effect on consumers.'[11] That some lose out is irrelevant if there is a gain to consumers overall. Therefore, it would take a clear statement from the Court to adopt the flexible approach to consumer benefit proposed in the Dutch draft. Not least because fairness is treated as a justifiable loss imposed on the consumer who is the cause of the pollution that the agreement now abates. However this approach too rests on a normative view of 'fair share' that rejects the position that the consumer has to be compensated fully, which is the right approach.

More generally the ECJ has considered that innovation is a benefit that counts, and here the consumer benefits are likely to be for future, not present buyers.[12] This gives us a clue that the Court is unlikely to be overly strict in its interpretation of the fair share requirement. This should give the Commission comfort in experimenting with a slightly looser interpretation than that in the current soft law documents.

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[11] *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL, Administración del Estado v Asociación de Usuarios de Servicios Bancarios (Ausbanc),* Case C-238/05,EU:C:2006:734, paragraph 70. The facts of this case were quite specific and raise the issue as to whether a consumer who is denied a loan is also getting a fair share because they are thereby protected from over-indebtedness, so it may not offer general guidance.

[12] *GlaxoSmithKline Services Unlimited v Commission*, C-501/06P, EU:C:2009: 610, 95. There was fuller consideration in the General Court.