Competition Policy Supporting the Green Deal

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Introduction

The European Green Deal published in December 2019 prompts a reflection on the role sustainability concerns ought to play in the development of all of the EU's policies.[1] Europe is not alone in its endeavour to develop policies that protect the environment. In early 2019, the US Congress approved the Green New Deal with a view to fighting climate change, targeting fossil fuels and greenhouse gas emissions.[2] China, on its part, has been taken action in the context of its Belt-and-Road Initiative, emphasizing the importance of projects that 'support green and low-carbon development, protect biodiversity, and address climate change.'[3] The common vision is fundamental, since a specificity of climate change mitigation is that it does not matter where it occurs. Its repercussions will be global, and solutions will only be effective if adopted by as many regions as possible. There is little point in only putting out part of the fire.

The European Commission's aims that Europe be carbon emissions-neutral by 2050 and that its economy is sustainable require commitment and effort not just from governments, but also from the business community. While oftentimes competition and environmental policies will be complementary, they may also enter into conflict. Needless to say, the EU cannot compel undertakings to invest in green initiatives while simultaneously threatening to punish them for actions that, while environmentally friendly, might run counter to competition rules. At the same time, the objectives of the European Green Deal must not be misused as a way to

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[1] European Commission, A European New Green Deal <https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en> accessed 20 November 2020.
[2] US Congress, House Resolution 109 Recognizing the duty of the Federal Government to create a Green New Deal (7 February 2019) < https://www.congress.gov/116/bills/hres109/BILLS-116hres109ih.pdf> accessed 20 November 2020.
[3] Johanna Coenen *et al*, Environmental Governance of China's Belt and Road Initiative [2020] Environmental Policy and Governance 1.

circumvent the application of competition law and engage in anticompetitive conduct that does more harm than good. Commissioner Margrethe Vestager has insisted that these initiatives should never be an excuse to implement a cartel, and they should not stifle competition by making it difficult for others to compete.[4] This conundrum calls for a reflection on how to best to develop a green competition policy that does not overlook the protection of competition and consumers.

The present contribution has been drafted in response to the European Commission's call for contributions 'Competition Policy Supporting the Green Deal'.[5] It focuses mainly on Parts 2 and 3 of the call, namely antitrust rules. The authors have discussed the questions raised in the call with various academics, practitioners, enforcers, businesses and consumer organisations in Asia and Europe. They have also looked beyond the EU for potential solutions developed in other jurisdictions that could be worth considering in the European context. Importantly, the feedback obtained from EU and competition law students at the Chinese University of Hong Kong has also been incorporated to the proposals. The aim is to engage in a discussion involving not just a wide range of stakeholders but also representatives of new generations, who will have to live with the consequences of the decisions made today and will be tomorrow's decision-makers.

Background

The interaction between competition policy and environmental goals is not a new matter. Article 11 of the Treaty on the Functioning of the European Union (TFEU) contains an obligation to integrate '[e]nvironmental protection requirements … into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.'[6] This provision was introduced already in the 1980s by the Single European Act, and was subsequently reinforced by the Maastricht and Amsterdam reforms. Its incorporation into the primary law of the EU (then EEC) coincided with the 1987 Brundtland Report of the United Nations World Commission on Environment and Development about the importance of moving towards sustainable development in order to protect the environment while at the same time continuing to prosper economically.[7] The Report was one of the first publications that connected the dots, and highlighted the interrelationship between economic development and environmental protection. The competition-sustainability discussion had thus been on the cards for decades.[8]

The publication of the European Green Deal provides a perfect opportunity to foster a wider debate on how competition policy can develop in a way that is at the very least compatible with

[4] Margrethe Vestager, 'Competition and Sustainability' (October 2019) GCLC Conference on Sustainability and Competition Policy. See also Peter Alexiadis and Alejandro Guerrero, 'Sustainability Priorities and Competition Law Policies – A Meeting of Minds' (2 March 2020) Modaq Business Briefing <https://www.mondaq.com/antitrust-eu-competition-/898856/sustainability-priorities-and-competition-law-policies--a-meeting-of-minds> accessed 5 November 2020.

[5] European Commission, Competition Policy Supporting the European Green Deal <https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf> accessed 15 November 2020.

[6] Treaty on the Functioning of the European Union (TFEU) [2012] OJ C 326/47.

[7] UN World Commission on Environment and Development, Our Common Future (Brundtland Report) (1987) <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> accessed 14 November 2020. The Report defines sustainable development as development that 'meets the needs of the present without compromising the ability of future generations to meet their needs'.

[8] Julian Nowag, Article 11 TFEU and Environmental Rights, in Sanja Bogojević and Rosemary Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart 2018) 155.

its objectives, and perhaps even contributing to their achievement. If environment and growth are seen as mutually exclusive,[9] then reconciling sustainability and competition policy becomes tricky. According to Gehring, 'more sustainable competition law must take social and environmental priorities into account, rather than focusing purely on economic priorities and imperatives.'[10] One obvious solution would be to elevate environmental protection to the category of aim of competition policy. The timing of the discussion coincides with an invigoration of the debate surrounding the goals antitrust should pursue, and whether the consumer welfare standard ought to be abandoned.[11] As a consequence, there is an abundance of literature to rely on if this were to be considered a path worth exploring.

While competition law has been described as 'an obstacle for competitors to cooperate in order to scale-up their contribution to deliver on the [United Nations Sustainable Development Goals]',[12] sustainability and competition need not always collide. For instance, according to the UN, a major goal of sustainable development is to reduce inequality.[13] It has been argued that 'sustainability requires people in the industrialized countries to reduce their consumption of resources per head to a level at which everyone in the world would be able to live on indefinitely'.[14] In that context, competition law enforcement aiming to tackle the perils of market power and market concentration would help attain greater equality, thus contributing to the aims of sustainable development.

Many initiatives with sustainability objectives are easily compatible with EU competition law, and may only require minor adjustments (if any) to be lawful.[15] Yet in some cases it will be necessary to make a choice between protecting the environment and safeguarding competition. In such scenarios, it may be necessary to set aside the application of antitrust rules (possibly squandering economic freedom and consumer welfare) in favour of a more pressing objective. However, this would need to be done with caution. As Mario Monti recently pointed out,[16] various cartels have been detected stemming from what were presented as environmental initiatives.[17] If underenforcement is a general problem affecting the effectiveness of antitrust, then discussing ways to introduce exceptions to the application of the law seems undesirable. Therefore, the preferred strategy would always be 'to check what opportunities exist for making sustainability agreements within the boundaries of competition law.'[18]

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[9] Simon Dresner, *The Principles of Sustainability* (Earthscan 2008) 2.
[10] Markus W Gehring, 'Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law' (2006) 15 *Review of European, Comparative and Environmental Law* 172, 176.
[11] See E.g. Rutger Claassen and Anna Gerbrandy, 'Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach' (2016) 12 *Utrecht Law Review* 1; Sandra Marco Colino, 'The Antitrust F Word: Fairness Considerations in Competition Law' [2019] *Journal of Business Law* 329.
[12] Kevin Coates and Dirk Middelschulte, 'Getting Consumer Welfare Right: the Competition Law implications of Market-driven Sustainability Initiatives' (2019) 15 *European Competition Journal* 318.
[13] UN, Sustainable Development Goals <https://www.un.org/sustainabledevelopment/inequality/> accessed 14 November 2020.
[14] Simon Dresner, *The Principles of Sustainability* (Earthscan 2008) 3.
[15] Autoriteit Consument & Markt, Guidelines Sustainability Agreements Opportunities within Competition Law <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf> accessed 5 November 2020.
[16] Mario Monti, webinar 'Competition Law and Sustainable Development' (13 November 2020) LUISS School of Law.
[17] European Commission decision of 13 April 2011, case 39579 – Consumer detergents.
[18] Autoriteit Consument & Markt, Guidelines Sustainability Agreements Opportunities within Competition Law <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf> accessed 5 November 2020.

The most frequent path to exclude the application of antitrust and merger control is through the consideration of efficiencies. Rather predictably, when in trouble undertakings virtually always claim that their conduct or operation will bring about efficiencies. They bear the burden of proof as to how these efficiencies will be achieved, meaning that demonstrating non-quantifiable efficiencies verges on the impossible. Nonetheless, it should be remembered that, before getting to the point where a company is being required to produce such evidence, the relevant enforcer must have demonstrated that a violation of the relevant antitrust provisions has occurred, or that a merger is likely to significantly impede effective competition. Under the 'more economic approach' and the consumer welfare standard, the burden of proof placed on enforcers before it is allowed to shift to the defendants to show efficiencies is substantial (hence why investigations into non-cartel conduct with ambiguous effects on competition often take decades).

Enforcement of the TFEU's antitrust rules

In light of the above issues, the authors would like to share their reflection on the questions asked by the European Commission in the call for contributions. Our answers assume that the consumer welfare standard will continue to be the main goal of competition policy, and that environmental concerns (and other non-economic goals) will not become a finality in antitrust enforcement.

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).**

One specific context that the authors and collaborators considered related to sectors that cause particularly significant environmental damage. A shining example is the aviation industry. A recent study by Gössling and Humpe suggested that 1 per cent of the world's population caused half of the industry's 2018 carbon emissions,[19] leading Benoit Mayer to ascertain that 'most emissions benefit only a tiny fraction of the world's population'.[20] Some authors go as far as suggesting that, in areas like aviation, environmental protection is so important that airlines should be actively encouraged to cooperate by, *inter alia*, upgauging or using bigger aircrafts to reduce the number of flights and thus greenhouse gas emissions. However, this would likely involve less consumer choice (i.e. less flights available, and a more rigid schedule), and higher prices. Ultimately, the only way to give the blessing to such an arrangement might be a derogation of the competition law provisions for a more important goal.[21] At the same time, it should not be forgotten that the airline industry has a worrying record when it comes to antitrust violations.[22]

[19] Stefan Gössling and Andreas Humpe, 'The Global Scale, Distribution and Growth of Aviation: Implications for Climate Change' (2020) 65 *Global Environmental Change* <https://www.sciencedirect.com/science/article/pii/S0959378020307779> accessed 20 November 2020.
[20] Benoit Mayer on Twitter, @bntmayer (17 November 2020) <https://twitter.com/bntmayer/status/1328680178621448193> accessed 20 November 2020.
[21] Peter Paul Fitzgerald, *A Level Playing Field for 'Open Skies': The Need for Consistent Aviation Regulation* (Eleven International Publishing 2016). See also Jae Woon Lee's review of Fitzgerald's book (2018) 8 *Asian Journal of International Law* 300.
[22] See E.g. Commission Decision of 17 March 2017 — Relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (airfreight cartel) [2017] OJ C

Perhaps the best-known real case is the 2013 *Chicken of Tomorrow* case in the Netherlands.[23] An industry-wide attempt to develop a more sustainable way of producing chicken for consumption, with enhanced animal welfare standards, was met with opposition from the Dutch Competition Authority (ACM). According to the Dutch competition watchdog, the agreement restricted competition because other kinds of chicken would no longer be available to consumers, and prices would be higher. Efficiencies were considered under Article 101(3) TFEU, but the ACM did not find the advantages of the initiative to outweigh the competition problems it had identified.

Simon Holmes has listed other interesting examples from the case law and from situations that he is personally familiar with.[24] Still, the list is rather short, in part because of the high burden of proof imposed on enforcers to prove the existence of a contravention (making type 1 errors rather rare). Moreover, there have already been instances where the European Commission has set aside the application of competition law provisions because it gave environmental concerns greater weight, such as *CECED*[25] and *PreussenElektra.*[26]

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...)?**

Various possibilities may be explored. The most obvious would be revising both the Guidelines on the Application of Article [101(3) TFEU][27] and the Horizontal Cooperation Guidelines,[28] including clarifications. However, these are not binding. One of the disadvantages of the decentralised application of Article 101(3) TFEU and the removal of the prior notification requirement is that firms now enter into agreements without absolute certainty that they will be considered compatible with Article 101(1) TFEU. This may be one of the reasons why some green initiatives are eventually abandoned, as seen above.

Solidly drafted guidelines could facilitate the application of Article 101(3) TFEU to green cooperation agreements. But even then, the assessing efficiencies via Article 101(3) is rather

188/14; US Department of Justice, Extradited Former Air Cargo Executive Pleads Guilty for Participating in a Worldwide Price-Fixing Conspiracy (23 January 2020) <https://www.justice.gov/opa/pr/extradited-former-air-cargo-executive-pleads-guilty-participating-worldwide-price-fixing> accessed 20 November 2020; Robert Kuttner, 'How the Airlines Became Abusive Cartels' (17 April 2020) New York Times <https://www.nytimes.com/2017/04/17/opinion/how-the-airlines-became-abusive-cartels.html> accessed 20 November 2020.

[23] ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow' (2014) ACM/DM/2014/206028 <https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf> accessed 14 November 2020. See Jacqueline M Bos *et al*, 'Animal Welfare, Consumer Welfare, and Competition Law: The Dutch Debate on the Chicken of Tomorrow' (2018) 8 *Animal Frontiers* 20; Giorgio Monti and Jotte Mulder, 'Escaping the Clutches of EU Competition Law: Pathways to Assess Sustainability Initiatives' (2017) 42 European Law Review 635, 639-641.

[24] Simon Holmes, 'Climate Change, Sustainability, and Competition Law' (2020) 8 Journal of Antitrust Enforcement 354.

[25] CECED (IV.F.1/ 36.718) Commission Decision 2000/ 475/ EC [2000] OJ L187/ 47.

[26] Case C-379/98, PreussenElektra AGv Schleswag AG[2002] ECR I-2099, para 73.

[27] [2004] OJ C 101/97.

[28] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/ 1.

complex and could require and could require 'a progressive interpretation of sustainability efficiencies connected to other goals set out in the Treaties, allowing for innovative approaches to calculate efficiencies as "accurately and reasonably as possible", using verifiable data.'[29]

Another possibility would be to consider the adoption of a block exemption for agreements with environmental protection purposes, much like the Research and Development block exemption.[30] This has been a frequent strategy in the EU context, and would require tailoring the new piece of legislation to the objectives of the European Green Deal, while including a list of hardcore restrictions aimed at preventing cartelization. The main advantage offered by a block exemption would be legal certainty: since it would be binding, companies would have remarkable assurances that, if their agreement falls within the scope of the regulation, they would be safe. However, given that the only efficient initiatives involve entire industries, the market share threshold system would not work in the context of environmental agreements.

In addition, a channel for the European Commission to issue authorizations in individual cases could be considered. In fact, Article 10 of Regulation 1/2003 would seem wide enough to allow the Commission to adopt a similar role (limited to antitrust) to the Australian and New Zealand authorities under their respective competition law regimes. Both Australia and New Zealand have a regime which allows the competition authorities to accommodate potential trade-offs between sustainability objectives and competition law, in antitrust and in merger control. The system also allows for the competition authorities to issue interim authorisations, or authorisations limited in time and is described in a very recent contribution by Australia and New Zealand to the OECD, prior to the December 2020 roundtable on sustainability and competition law.[31] Interestingly, the Chinese Anti-Monopoly Law (AML) also includes a similar provision in Art. 15(4).[32] The recent measures adopted in Australia[33] and in China to allow the adoption of measures to deal with Covid-19 under the competition regime were issued under these provisions. In New Zealand, this framework was adopted to grant authorisation to a scheme administered by the Refrigerant License Trust Board (RLTB) under which all wholesalers in New Zealand can agree to supply refrigerants only to customers that are specifically trained to safely handle refrigerants.[34] In Australia, the competition authority approved in 2018 a scheme aimed at recycling tyres[35] and a Code for ethical treatment of clothing workers.[36] As mentioned by Julian Nowag,[37] in 2020 the ACCC granted such an authorisation to the Battery Stewardship Council (BSC) for the establishment and operation of a nationwide scheme collecting and recycling batteries.

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[29] Aleksander Maziarz, 'Do Non-Economic Goals Count in Interpreting Article 101(3) TFEU?' (2014) 10 *European Competition Journal* 341.

[30] Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements [2010] OJ L 335/36.

[31] OECD, *Sustainabillity and Competition: Note by Australia and New Zealand*, <https://one.oecd.org/document/DAF/COMP/WD(2020)62/en/pdf> accessed 20 November 2020.

[32] Art 15(4) AML eads: 'Agreements among undertakings with one of the following objectives shall be exempted from the application of article 13, 14 if they are: […] (iv) agreements made to achieve public interests, such as saving energy, protecting environment, relieving the victims of a disaster and so on.'.

[33] OECD, *Sustainabillity and Competition: Note by Australia and New Zealand*, <https://one.oecd.org/document/DAF/COMP/WD(2020)62/en/pdf> accessed 20 November 2020, para 41.

[34] ibid, para 34.

[35] The Tyre Stewardship Scheme, ibid, Box 1.

[36] ibid, Box 2.

[37] OECD (2020), Sustainability and Competition, OECD Competition Committee Discussion Paper, <http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf> accessed 20 November 2020, 23-24.

Coming back to the EU, Article 10 of Regulation 1/2003 states that '[w]here the [Union] public interest relating to the application of Articles [101 and 102] of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article [101(1)(1)] of the Treaty are not fulfilled, or because the conditions of Article [101(3)] of the Treaty are satisfied.' It should be read in conjunction with Recital 14 of Regulation 1/2003, which posits that '[i]n exceptional cases where the public interest of the [Union] so requires, it may also be expedient for the Commission to adopt a decision of a declaratory nature finding that the prohibition in Article [101] or Article [102] of the Treaty does not apply, with a view to clarifying the law and ensuring its consistent application throughout the [Union], in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice.'

The authors are not aware of any instances where Article 10 of Regulation 1/2003 has been applied. Consequently, little analysis has been carried out on this provision. From the 2009 Commission Staff Working Paper on the functioning of Regulation 1/2003,[38] it seems clear that the Commission considered at the time that Article 10 could be invoked 'either because the conditions of Article [101(1) TFEU] are not fulfilled or because the conditions in Article [101(3)] are satisfied.'[39] Further, in the Staff Working Paper it is posited that Article 10 could apply in two 'exceptional cases', namely '(i) to "correct" the approach of a national competition authority; or (ii) to send a signal to the ECN about how to approach a certain case.'[40]

Having said that, there is nothing in Article 10 or in Recital 14 to suggest that this provision should be limited so as to be applicable to ensure consistency in the application of competition law across the EU only (which was a major concern at the time when Regulation 1/2003 was adopted). In a 2013 opinion, Advocate General Kokott refers to Art 10 as follows:

> It is true that Regulation No 1/2003 deliberately withholds certain powers from the national competition authorities and courts, so that the Commission's leading role, firmly anchored in the system of that regulation, in framing European competition policy and the newly created exception system are not undermined. For example, the Commission is the only authority in the ECN which has the power under Article 10 of Regulation No 1/2003 exceptionally to find, by means of a declaration, the inapplicability of EU antitrust law, whereas under the second paragraph of Article 5 of that regulation the national competition authorities may at most decide that there are no grounds for action on their part in a specific case, which excludes the possibility of taking a negative decision on the merits. [41]

The adoption of an authorisation regime, either under Article 10 of Regulation 1/2003 or through new legislative measures, would allow for trade-offs to be considered on a case-by-case basis, following a rigorous analysis of the benefits expected from the authorised measures.

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[38] Commission's Staff Working Paper, *Report on the functioning of Regulation 1/2003* {COM(2009)206 final} (29 April 2009) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009SC0574&from=EN> accessed 20 November 2020, paras 112-114.
[39] ibid, para 112.
[40] ibid.
[41] *Bundeswettbewerbsbehörde and Bundeskartellanwalt v Schenker & Co AG and Others* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CC0681> accessed 20 November 2020, para 108.

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?).**

The authors urge caution when it comes to justifying 'green' agreements. As explained in our answer to the previous question, the legal framework allows for various assessment possibilities which do not excessively depart from current practice. At the same time, it should be noted that environmental protection and tacking climate change are quite possibly the most significant emergencies of our time, and therefore as important as other non-economic objectives might be, they should be prioritized. Without a planet, there can be no job creation or social objectives

Merger Control

1. **Do you see any situations when a merger between firms could be harmful to consumers by reducing their choice of environmentally friendly products and/or technologies?**

If so-called 'killer acquisitions' were an issue in the environmental sector, then action against these would be an obvious area where competition policy could directly contribute to the objectives of the European Green Deal. However, more information is needed, and the Commission could consider conducting a market study to find whether this is an issue in the sector.

History shows that incumbents may consider engaging in cartels and other illegal practices to delay the adoption of disruptive technology and to limit the costs and the impact of environmental regulation. In 2014, truck producers were fined for, *inter alia*, agreeing to the timing of the introduction of new emission technologies.[42] Last year, the European Commission issued a Statement of Objections against BMW, Daimler and Volkswagen, with preliminary findings that these companies have colluded to restrict competition in the development of clean emission technology for new diesel and petrol passenger cars.[43] If proven, this would be an instance of companies aiming at restricting competition on innovation in products directly relevant to the aims of the Green Deal.

In light of this history, it would appear possible to speculate that established companies may consider buying up promising start-ups and nascent/small companies, with a view to either limiting their competition to existing products, or to discontinue research and development or commercialisation of potentially disruptive products. This would be an instance of so-called 'killer acquisition', or 'nascent firm acquisition' phenomena. The existence of such practices has been studied in the pharmaceutical sector, and is very much debated currently in the context of mergers by big tech. The debate ranges from considering whether the thresholds for merger

[42] European Commission, Press Release IP/16/2582 (19 July 2016)
<https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2582> accessed 14 November 2020.
[43] European Commission, Press Release IP/19/2008 (5 April 2019)
<https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2008> accessed 14 November 2020.

control scrutiny are adequate or should be changed (or, like in Germany and Austria, should be lowered), to the appropriate theory of harm to be adopted in such cases and the standards for intervention. A recent OECD paper provides an admirable summary of the issues that arise and the concerns raised by the risk of over-enforcement and under-enforcement.[44]

The possibility that killer applications may take place in the environmental sector would be an obvious concern for the availability of environmentally friendly products or technologies to consumers. It would also be a serious drawback for the Green Deal's focus on innovative tech (innovation in energy and on climate change adaptation technologies, amongst others), and make Europe more competitive. This is therefore one area where competition policy could make a significant difference in helping to achieve the goals of the European Green Deal. At the same time, the difficulties of intervening to scrutinise mergers involving small companies and start-ups are very real.

2. **Do you consider that merger enforcement could better contribute to protecting the environment and the sustainability objectives of the Green Deal? If so, please explain how?**

Given the uncertainties, one possible way forward would be to commission a market study to identify whether killer acquisitions may be an issue in the environmental sector too, by following the same methodologies used to study the impact of such acquisitions in the pharmaceutical sector. In big tech, the FTC has recently announced that they are investigating small acquisitions.[45] A similar approach would provide clarity in the environmental sector too.

Another route to explore could be increased ex post analysis of mergers, with the possibility of ultimately forcing the merger to be undone. According to Thomas Philippon, '[a]ntitrust regulation is likely to require more ex post control than in previous decades. Past acquisitions that have led to monopoly power are natural candidates for a break-up.'[46] It could be a condition for clearance that a merger is assessed again after a specific amount of time, and if it is found to have significantly impeded effective competition, then appropriate remedies could be imposed. It is worth noting that some European jurisdictions already allow the Ministers to overrule the competition decision: the UK allows for some public interest considerations to be taken into account by Ministers in mergers,[47] and Germany too.[48] An ex post review could be applied in these cases, and form the basis for guidelines.

[44] For a very recent overview of the issues and the concerns posed, see OECD, Start-ups, Killer Acquisitions and Merger Control (2020) <www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf> accessed 20 November 2020.
[45] See <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies> accessed 20 November 2020.
[46] Thomas Philippon, *The Great Reversal* (2019) Harvard University Press, page 276.
[47] The Secretary of State can intervene on public interest grounds: see Lloyds TSB/HBOS <https://www.lexology.com/library/detail.aspx?g=22cf097e-5e36-4a7f-87c9-8a1abff79667> accessed 20 November 2020.
[48] In the *Mibal/Zoller*, the Minister overruled the decision of the Bundeskartellamt to block the joint venture on environmental grounds.