Response to the European Commission's consultation within the "European Green Deal"

In September 2020, the European Commission launched a call for contributions on the topic *"Competition Policy supporting the Green Deal"*.

The *Autorité de la concurrence* ("the *Autorité*"), which has, more broadly speaking, made sustainable development one of its priorities for 2020, welcomes this initiative.
As part of its thinking on this topic, the Commission is examining the interactions between competition rules and the challenges of the Green Deal in that the former may hamper agreements that would be conducive to the latter.
In this respect, the *Autorité* wishes to emphasise that, although one of the antitrust concerns relates to these positive agreements, it is the responsibility of competition authorities to understand all of the practices that have an impact on the objectives of the Green Deal. In other words, both unilateral positive behaviour and negative unilateral and collective behaviour should be addressed when they have a link with the objectives of the Green Deal. It should also be noted that although the environmental challenges may indeed be huge, they cannot guide the action of a competition authority, as the latter is only competent in the field of competition policy.
The *Autorité* has noted that the Commission's consultation is intended to collect the comments of all stakeholders. Some questions asked in this consultation therefore seem to be intended in particular for practitioners or businesses. However, the *Autorité* will provide responses to these questions in order to give context to its current thinking on sustainable development issues, which include environmental questions.

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. Please explain the circumstances in which cooperation rather than competition between firms leads to greener outcomes (e.g. greener products or production processes).**

The *Autorité* does not have any examples of this type of cooperation in its decision-making practice.

However, the *Autorité* notes that, in theory, Green Deal agreements between businesses are likely to constitute restraints of competition in light of the following:

- Such initiatives have little chance of being successful if they are unilateral (due to the first mover disadvantage phenomenon), hence the need for them to be adhered to by a large portion of the market via an agreement;
- Such initiatives do serve to develop fair, green production, etc., but this is sometimes achieved to the detriment of prices, quantity and variety in the short term.

Nonetheless, such behaviour, particularly insofar as it would serve to achieve more satisfactory sustainable development results than individual initiatives within the framework of the normal functioning of market competition, could under certain circumstances meet criteria that would exempt them from anti-cartel rules (theory of ancillary restraints, efficiency gains, etc.).

The *Autorité* emphasises that, thus far, it has not been contacted by companies wishing to

conclude such agreements but which believe they would be prevented from doing so due to competition rules or their lack of clarity.

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…)?**

The *Autorité* considers that advocacy on the issue of how behaviour affecting sustainable development is addressed under competition law could be strengthened.

Against this backdrop, clarifications of the characteristics of agreements that serve the objectives of the Green Deal without restraining competition would be welcomed. The *Autorité* notes, however, that the European Commission's 2001 guidelines on horizontal cooperation agreements already contain such clarifications, which could be a relevant source of information when addressing these agreements.

The current position of the *Autorité* is to prioritise case-by-case assessment rather than to seek to develop guidelines. Lessons may then be learnt from these cases, for the attention of companies.

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?).**

Firstly, the *Autorité* recalls that some agreements are not likely to restrain competition. The aforementioned guidelines state the following: "*Some environmental agreements are not likely to fall within the scope of the prohibition of Article 81(1), irrespective of the aggregated market share of the parties"*. Several cases are then cited:

- "*this may arise if no precise individual obligation is placed upon the parties or if they are loosely committed to contributing to the attainment of a sector-wide environmental target"* ;
- "*agreements setting the environmental performance of products or processes that do not appreciably affect product and production diversity in the relevant market or whose importance is marginal for influencing purchase decisions";*
- "*agreements which give rise to genuine market creation, for instance recycling agreements, [...] provided that and for as long as, the parties would not be capable of conducting the activities in isolation, whilst other alternatives and/or competitors do not exist".*

Secondly, the *Autorité* considers that it is necessary to explore grounds within the framework of established law that, in theory, would justify restrictive agreements. In this respect, the issue of ancillary restraints and the conditions under which positive externalities can be taken into account should be examined in more depth and better explained. As regards efficiency gains in particular, a clarification of the treatment of externalities is essential given the different approaches that currently exist.

Lastly, the *Autorité* considers that a dichotomy should not be created between environmental objectives and other sustainable development objectives when applying competition law to achieve the different objectives of the treaty. In this respect, the *Autorité* proposes to make a distinction between what comes under the rule of law and what comes under the proof of facts. Although the rule of law must remain the same for all of the objectives, environmental considerations could, however, be given specific evidential treatment insofar as (i) proof that consumers derive an advantage from environmental benefits is easier to provide since these benefits can, by their very nature, benefit everyone – it would therefore be possible to establish a presumption in this case – and (ii) proof of the fair nature of the share of the benefit that is derived by these consumers can result from a determination already performed by policy makers (Green Deal, Paris Agreement, etc.).

4. As for merger control, the *Autorité* would like to share the following remarks.

On markets for which environmental issues are a key factor in consumers' choice of operators or products, sustainability is a crucial competitive parameter between market players. The *Autorité* believes that innovation is a key aspect considering the growing interest of consumers' in environmentally friendly products.

Horizontal mergers, by cancelling the competition constraints existing between the merging parties, are likely to reduce the merged entity's incentive to develop more environmentally friendly products, or to innovate by bringing new technologies to the markets. In such cases, the effect of the merger is twofold, as the offer degradation causes harm to consumer welfare and a sustainability shortfall. Killer acquisitions of an innovative new entrant or potential competitor could also significantly lessen the operators' incentive to innovate, with a global effect on the market.

Regarding **vertical effects**, a merger could be harmful when leading to the foreclosure of environment-friendly inputs, with repercussion on the downstream market(s). In this situation, the magnitude of competition harm depends on the capacity to innovate that the upstream party had , prior to the merger, and on its competitor's ability to replicate these inputs.

At this stage, the *Autorité* believes that most of the above described situations fall within the scope of existing tools for merger control.

Having said this, without changing the existing law, the *Autorité* believes that sustainability issues could be better taken into account at the **market definition** stage of the analysis. Since, depending on the markets concerned, environmental issues can be a crucial parameter in consumer choices, they might affect the assessment of the demand-side substitutability. They may also affect operator production processes (supply-side substitutability), in order to meet demand's requirements. A narrower market definition is likely to put forth important modifications of the market's structure, that otherwise would not have been easily detected.

As explained previously, the *Autorité* believes that the existing tools of **competition analysis** such as those allowing to assess price and non-price effects are sufficient to take into account environmental issues. In particular, the *Autorité*, when assessing a merger, could take into account the effects of a merger on companies' incentives to innovate.

Following a standard analysis, a merger could raise competition concerns while ultimately being beneficial to the environment by, for instance, creating synergies or strengthening innovation capacities. In such cases, the assessment of **efficiencies** is an efficient step of the *Autorité*'s analysis, to allow these beneficial effects to occur, insofar as they meet the applicable criteria.

Beyond these cases, developing environment-specific tools of analysis would require modification of the *Autorité*'s legal framework which, to this day, does not target specific sectors for

competitive assessment purposes or even for adjusting standards of proof.