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Reply by Dentons Europe LLP to the EC Consultation on

Competition Policy Supporting the Green Deal

A. Foreword

1. We very much welcome the EC consultation on how competition policy should contribute to support the Green Deal agenda of the European Union. We are very pleased to provide below our comments on the questions raised by the EC in the consultation. Our comments focus on the antitrust aspects of the consultation. Note, though, that a number of the points raised below would apply *mutatis mutandis* to merger control.

2. Before providing our responses to the EC questions, we would like to provide the following key policy messages.

3. Our client experience indicates that, as currently applied and enforced, EU competition law can have a chilling effect on their ability to collaborate to quickly transition their industries towards a sustainable and carbon neutral economy. We have witnessed this ourselves in a number of cases. At the time of the Green Deal, all stakeholders can and should play a part in making this vital policy a success and rise up to the challenge:

   - The industry should even more proactively lead the charge in parallel or, where needed, in lieu of the action of legislators and regulators;

   - Their legal advisers also need to provide more practical and courageous advice and not hide behind the letter of the law;

   - But DG COMP and NCAs must also play a crucial role in making the Green Deal a success and are expected to be vocal, clear and more flexible in their approach to environmental collaborations. As indicated recently by a senior DG COMP official, competition policy is only a policy and DG COMP has a lot of flexibility in the implementation and enforcement of this policy without distorting key principles underpinning it. We would therefore urge DG COMP to work not only on the adaptation and clarification of the antitrust rules, but also on the messaging around its environmental collaborations policy, which will greatly contribute to fostering the creation of a risk-free environment for industries to conduct ambitious collaborations for the greater good.

4. In sum, EU competition law and policy can neither be applied nor perceived as an obstacle and an inhibitor to environmental progress.

B. The current framework fails to capture the scale and urgency of industry-wide collaborations

5. In the following sections, we consider the three questions put forward by the EC in its consultation paper. The overarching message that we seek to convey in the remainder of this paper is that the current

framework under Article 101 TFEU, including the Horizontal Block Exemptions and Guidelines (under review), should provide a clear and dedicated antitrust assessment framework and policy orientations to guide industry-wide initiatives and collaborations pursuing commonly accepted sustainable objectives.

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).

6. Generally speaking, industry cooperation in pursuit of sustainable goals takes two forms: (i) initiatives to set a new direction for the industry as a whole and (ii) joint R&D and production agreements.

(i) Industry collaboration to imprint new sustainability direction

7. Either as a result of legislative or regulatory change or as a pro-active effort to tackle an environmental challenge, a specific industry will meet in a forum (being a trade association or other forms of industry coalitions) with the purpose of setting a new direction or path in the way products are developed, designed, manufactured and supplied to customers. This exercise could take many forms, namely from industry recommendations, codes of conduct for the industry and/or its suppliers, standardization (including certification and labelling). Such cooperation will affect either the production processes or the origin of its components/input. Usually, the cooperation will be triggered by societal evolutions which may materialize in mounting pressures exerted by consumer organisations, NGOs and governments (the latter often demanding that industry deals with the issue through soft law instruments). Over the past several decades, that pressure has been on the rise and has become even more significant in the context of the Covid-19 pandemic and the Green Deal. The perception has increasingly been that individual actions are in most instances both inadequate and insufficient.

8. The inadequacy stems from the realization that individual action is unlikely to drive change at the speed and scale necessary throughout the supply-chain in order to make a real difference. Collective action undertaken by competing firms representing a significant share of purchase or supply in a given market is deemed necessary to bring about changes in production processes and product design in a faster and more impactful way. Collective action will also be more effective than individual initiatives as it will not only set the directional path forward but also create the necessary incentives to commit resources and investment to bring innovation to market more quickly. Specifically, without a collective approach, individual actors would be concerned about the risk that their competitors are not making the same commitments, causing them to sustain higher costs and lose competitiveness. In sum, environmental collaboration will often be necessary to reduce the risk of free riding, which in turn defeats the efforts done by front-running industry thought leaders. It will also be considered indispensable in order to foster credibility and accountability vis-à-vis civil society and other stakeholders, i.e. by coming out with a single and aligned industry message on how the industry is aiming at transforming the way it operates.

9. Our experience drawn from advising industry associations and coalitions shows that EU competition law can be a source of concern, delay and inhibition on industry initiatives aimed at dealing with climate change and biodiversity. Our point, however, is not to say that EU competition policy is necessarily preventing collaboration. Rather, our concern is that EU competition policy is capable of negatively affecting the speed of and the ambition underpinning industry cooperation towards achieving commonly-accepted sustainable goals. We turn to those aspects below.

    a. Compliance and competition law assessment as a source of concern

10. It is clear that compliance with EU and national competition laws of the Member States is paramount and is treated as top priority by chief compliance officers and general counsels alike. Whenever competing undertakings sit together to discuss and agree on how they should and will manage their supply chain in the future to reduce carbon emissions or protect biodiversity, the antitrust risk has to be carefully managed. This is all the more justified given that industry cooperation that set the framework (e.g. code of conduct, recommendations) or standards/certification processes against which each individual operator will be benchmarked may, in certain circumstances, affect the competitive outcome. Our experience in this area tells us that the feasibility assessment may take quite some time. This is often because the industry participants and their in-house/external counsels have had the tendency to take a very conservative approach to new forms of cooperation and, when objections are raised by one or several members, such an approach results in an effort to reach consensus, which will translate in delays and/or watering down the scope and nature of the proposed agreement.

11. This conservatism has at least two sources:

    (i) Several industries that are now engaging in Green Deal efforts may have had encounters with competition enforcers in the past (often for cartel violations) and the trend for advisors is to err on the side of caution. In this regard, the risk of getting it wrong may be significant. Further, for trade associations/industry coalitions, beyond the risk of financial sanctions and private actions, the risk is a steep loss in credibility and reputation, which if materialized, will invariably lead to disengagement and lost opportunities to cement positive industry cooperation; and

    (ii) As discussed below, there is a paucity of case-law and the current enforcement framework provides little guidance (and legal certainty). Further, over the last two decades, the prevailing self-assessment framework resulted in the industry not having sufficient and meaningful access to competition authorities to test scenarios and obtain comfort on their planned cooperation.

12. On this latter point, there is perhaps a perceived lack of adequate theories of harm to assess the likely effect of industry coalitions aimed at achieving sustainable goals. Let us take a couple of examples.

    (i) The current Horizontal Guidelines talk about standardization with a strong emphasis on standard essential patents. The main concerns articulated in the guidelines relate to IP access and the potential loss in innovation (as a result of the widespread use of the standard). In the context of an industry-wide effort to set an environmental standard (or a sustainability code of conduct with

measurable commitments), the issue could -- but may not necessarily -- entail access to essential IP and the associated risk of exclusion. Likewise, the issue could, but will not necessarily be about a loss in innovation resulting from the fact that the environmental standard may be made mandatory by the industry agreement. Rather, the concern may be on the effect of industry alignment on certain pre-competitive parameters such as input sourcing or the gradual phasing out carbon intensive production processes, which in turn will necessitate (joint) investments in R&D and production to bring innovative solutions that implement those environment standards. The question may then be more on the extent to which such commonality in production approaches may lead to justifiable exclusionary outcomes upstream (e.g. certain input suppliers may no longer find a market for their products) or a risk of collusive outcomes when developing, manufacturing and selling the finished products to customers.

(ii) In a scenario where an industry wants to promote a greener production method to the detriment of another and consequently to the detriment of certain suppliers, one may have concerns about a risk of boycott. A review of past boycott cases shows that sanctions will be warranted for where the boycott is motivated by an ulterior motive (foreclose a competitor or discipline a difficult distributor or supplier), which will be absent in the above scenario. However, since a finding of an ulterior motive is not strictly speaking part of the legal test ab initio, excluding a qualification of boycott might prove complicated and inhibit participants.

b. Delay on industry initiatives

13. As alluded to above, the antitrust assessment usually takes time and the intensity with which an industry engages in self-assessment may turn out to be costly (particularly for trade associations/coalitions that run on tight annual budgets) and result in losing momentum. As the Green Deal puts pressure on industry to play its part and calls for swift and prompt industry responses, the time required to reach the desired level of legal certainty before the industry can move forward may cause the industry to face unacceptable delays, which in turn can generate civil society's frustrations and misgivings about the seriousness of the industry commitments.

c. Inhibiting industry goals

14. Ultimately, the risk is that current EU competition policy and enforcement discourages industry from reaching new, more ambitious sustainability targets. More specifically, the industry is increasingly under pressure to be transparent and accountable vis-à-vis civil society. Efforts to develop industry codes of conduct will be coupled with expectations that such codes become mandatory and be implemented in practice by as many actors as possible. On the latter point, the code will have to translate in measureable KPIs that allow for industry monitoring as well as individual benchmarking and progress by each operator. Agreeing on the KPIs, measuring them and reporting on industry progress call for significant information exchange among competing firms (operating at the same level of trade) and firms situated upstream and downstream the value chain.

15. Further, those sustainability initiatives are unique in the sense that they often require massive supply chain adaptations (including detailed KYC requirements and/or sunset measures on certain inputs or processes) that necessitate the involvement of actors upstream and downstream the value chain. This will involve setting up industry-wide dialogue (with strong horizontal and vertical components) and associated information exchanges.

16. The current rules (in particular the Horizontal Guidelines) provide a relatively limited and uncertain framework for assessing complex and ambitious sustainability agreements. If the EC maintains the status quo, the risk is that industry will likely be more tepid when providing its own environmental response.

(ii) Joint R&D and production agreements to bring about innovative solutions

17. The sustainability challenge is unprecedented and will likely require accelerated and massive investments in R&D in order to bring about new, carbon neutral, solutions. In terms of competition policy, the enforcement paradigm should focus on the innovation process as such. That is, so long as the competitive process protects and fosters innovations that generate strong and compelling environment benefits, the restrictions that are imposed on either one or all of the parties, e.g., in the way they will exploit the R&D results, should be evaluated more flexibly. Likewise, the transitory price-effects of such cooperations should be assessed in light of the longer-term positive impact of the agreement on the sustainable goals set by the parties/regulators and on the positive perception that the cooperation creates with customers and consumers.

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…)?

18. From the various exchanges and interactions that we have had when advising clients over the past few years as well as in the course of our three web-based roundtables series in October and November 2020 bringing DG COMP and industry speakers together, it appears that antitrust guidance in the form of policy guidelines is called for. There are several reasons that justify policy intervention in the form of EC guidelines:

(i) The need for the EU enforcer message that set a positive tone on sustainability agreements. It is important to produce guidelines that create a regulatory and enforcement environment that encourages Green Deal initiatives on the part of the industry. This message could find inspiration from the draft Dutch CMA guidelines that set an inspiring risk-free framework for positive dialogue between industry and the enforcer. Further, the message should make clear that in the absence of a hard-core cartel – i.e. by object violations –, genuine industry initiatives aimed at reaching sustainable goals should be examined under an effect-based standard and ought to be treated with clemency.

(ii) It is also important to have a unified and coherent message coming from the EU since it would facilitate cooperation and coordination within the ECN and ensure consistent approaches on vetting environment cooperation agreements from the NCAs and courts across the EU bloc.

(iii) The current Horizontal Guidelines need to be updated in order to take account of several important trends (some of which are discussed above):

a) The current rules on information exchange among competitors should create a safe harbour and bring legal certainty. Today, the Guidelines only define prohibited conduct (or red light) but fail to recognize that many forms of information exchange are actually pro-competitive (or at worst competition neutral) and to create a corresponding safe harbour (green light). This would be the case where, for instance, industries collect and share (appropriately aggregated) data on current production practices (e.g. in terms of CO2 footprint or impact on biodiversity) and seek to define measurable KPIs intended to monitor and benchmark progress against commonly agreed sustainable objectives. The current Guidelines set out criteria (orange light) that fail to create a safe harbour and make industry action more difficult to validate.

b) In connection with the rules on standards and by contrast to the rules on information exchange, the current Guidelines create a safe harbour. While this is certainly welcome, the safe harbour is very narrow and strict (and in many cases and situations will not be available). The main drawback of the safe harbour is that it requires the freedom to operate outside of the standard. This has the perverse effect that industry commitments on climate change or biodiversity cannot be made binding and, hence, create a situation where anyone in the value chain can free-ride on the efforts of others and/or decide to remain outside of the initiative without making the necessary investments to modify its business practices. Further, the Guidelines require consultations and engagement with a large community of stakeholders, which is perhaps good for transparency, but often dilutes the initial initiative and/or cause the initiative to be delayed or watered down by stakeholders that are situated up/down the supply chain and are either pursuing diverging interests or are unwilling to bear part of the costs associated with the industry change. More generally, we would advocate that, in most cases, the framework set for standardization processes is not suitable for the analysis of most environmental collaborations.

19. In addition to specific sustainability guidelines, the EC should reflect on ways to generate experience, in particular through case-by-case assessments that conclude with comfort letters in specific scenarios. It is through actual situations that the EC will gain exposure and be in a position to identify and measure benefits of environmental agreements against their perceived restrictive effects on competition.

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?).

20. First, it is important to note that industry collaborations aimed at meeting the Green Deal objectives differ from other important policy objectives of the EU in at least two important ways:

(i) The need for swift industry action(s): in contrast to other important EU policies, climate change and the threats to biodiversity require changes in industry practices that have to be designed and implemented at an unprecedented speed. EU competition policy has to accompany those changes in particular, foster a regulatory and enforcement environment that encourages joint innovation and R&D programmes, with the inclusion of the whole value chain, the deployment of standards and codes of conduct that engages the industry in a virtuous cycle towards achieving carbon neutrality and sharp reduction of its footprint on endangered ecosystems.

(ii) The scale and the nature of the action(s) needed: Scientists, NGOs, governments and European citizens not only demand action at an unprecedented pace but they also expect the industry change to be radical.

a) The scale of the joint R&D programmes and collaborations throughout the value chain that will be required would likely involve the main competitors (putting such collaborations well beyond the market share thresholds currently applicable under the HBER and Horizontal Guidelines or the concentration levels used in the context of the EUMR). The resulting innovations will come with a significant upfront cost, which may be financed by taxpayers (through State aids) and/or passed-on to consumers in terms of higher prices for a certain time-period. Meanwhile, the positive impact of such collaborations on the environment may not materialize immediately and may have to be measured over a much longer time-period than the current time span that the EC uses to measure efficiencies resulting from joint ventures and mergers.

b) Further, as discussed above, the industry coalitions and trade associations are under increasing pressure to be more transparent and accountable on the milestones reached by their members, which will require that the codes of conduct, recommendations and related commitments become mandatory and yield meaningful, measurable, results. Likewise, certifications and labelling will likely have to become more constraining to commit industry participants to make (joint) investments that will generate higher costs (at least during a transitory phase) in order to bring innovative products and processes that meet those stringent environmental standards.

21. Second, the EC should reflect on the current enforcement practice, specifically on the following key issues:

    (i) The definition of sustainable development and sustainability agreements have yet to be determined. One the one hand, there is the argument that sustainability ought to be considered and defined by reference to a legal instrument, being an international agreement (e.g. Treaty), an EU legislative text or national law and regulations. On the other hand, there may be many instances where industry takes action under non-legislative or regulatory pressures and such actions are intended to meet broader, yet commonly accepted, sustainable goals (which are framed or set in soft-law instruments). It would be welcome for the EC to reflect on the scope of sustainability (well beyond the "Green Deal" policy tag) and how industry collaborations can be deemed as falling within a commonly understood definition of sustainability.

    (ii) Another area worth exploring is the extent to which the pursuit of sustainable goals may be deemed to be objectively justified and if so, what would be the conditions to benefit from such justifications (that would put the whole cooperation outside of Article 101(1) of the TFEU).

    (iii) Assuming that the cooperation would be deemed restrictive of competition (which, as we posited above, should only arise through a restriction by effect test) under Article 101(1) of the TFEU, the key question will be how to assess the redeeming virtues of the sustainability cooperation under Article 101(3) TFEU. In this regard, several aspects ought to be considered:

        a) Assuming that there is a significant price effect resulting from the joint undertaking, to what extent is such price effect transitory? And what would be the relevant timeframe? For example, the joint development and launch of a new carbonless energy solution by the largest players in the market will probably come with high upfront investment costs that will translate in higher prices at least for a certain time-period.

        b) How should the antitrust analysis capture the environmental benefits of a new technology? This would, for example, apply to production processes that considerably reduce carbon emissions, whilst keeping the end-product attributes and characteristics largely unchanged. This question brings to light the extent to which out-of-market environmental benefits may be taken into account and, if so, how are they capable of offsetting the higher price paid by consumers?

        c) The next question, closely related to the previous one, is whether the antitrust harm and the redeeming efficiencies have to be determined by reference to a wider group than just consumers. Should the benefits to civil society or European citizens, e.g. enjoying cleaner air in cities, be treated as a cognizable efficiency?

        d) If so, what would be the relevant methods and timeframe for measuring such efficiencies?

22. To be noted that the above considerations would apply in the context of mergers reviewable under the EU Merger Regulation. Further, as the above discussion illustrates, the exemption regime set forth by the

HBER and the Horizontal Guidelines should recognize the need to accompany the industry in the fulfilment of sustainable goals.

23. This being said, though, the rules of EU competition law do not necessarily have to be re-written. While some fine-tuning and clarifications will be required, it is fundamentally on the way they are applied in practice that the EC should focus its evaluation.

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