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HELLENIC COMPETITION COMMISSION

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To the DG COMP

European Commission

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Subject: Contributing to the European Green Deal

With regard to the call for contributions for the European Commission on "Competition contributing to the European Green Deal", the Hellenic Competition Commission has published a staff discussion paper which covers how different areas of competition policy can accommodate environmental and wider sustainability issues.

In the present discussion, the HCC would like to elaborate on the proposals it has on the following question raised under Part 2 of the "Call for contributions"

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.

In the face of a 'climate emergency' and important social challenges that will certainly result from the Green transition, it is important to equip all public policies with the tools to accommodate and enhance sustainability initiatives from both the public and the private sector.Business as usual is no morean option and the transition to an economy that is environmentally (and socially) sustainable is urgent. Systemic resilience should become a goal for public action.

Sustainability-oriented policies will benefit the well-being of citizens and consumers but may also be a means of acquiring a competitive advantage for undertakings in Europe, thus serving a broader European industrial policy agenda, as this has been put forward by some Member States.

Business requires some legal certainty, but also a complex system of nudges and incentives in order to integrate sustainability objectives in their business strategies. Of

course, governments need to develop overall strategies for the Green transition and use a mix of policies, such as innovation support for green energy, fiscal policies (tax and subsidies), carbon pricing and issuance of green bonds.

Competition authorities should also have a role in facilitating this transition to a Green economy.

First, they should make efforts to enforce competition law in a way that does not jeopardise private and public sustainability strategies. This is not about authorising what some have called 'Green cartels', but adopting a similar hospitable approach taken for R&D horizontal agreements and agreements promoting innovation. It is also important to take into account the fact that the consumers that may be affected by higher prices are those that have the lowest appreciation for the public good and therefore are the hardest to compensate. This is acceptable in the context of a transformational effort to also shift consumer preferences towards more sustainable products under the guidance of the polluter pays principle. Of course, one needs to keep an eye for distributional implications, as these consumers may also be among the poorest in society. For this reason combining environmental and social sustainability should be promoted.

In the context of the recent COVID-19 pandemic, competition authorities had to act proactively and reactively in order to address competition issues related to business cooperation as a response to the increasing coordination costs in global value chains, as well as abuses by undertakings exploiting consumers when these are the most vulnerable.[1]. In this context, the European Commission adopted a Temporary Framework Communication[2], setting out the main criteria that will be followed when assessing cooperation projects aimed at addressing a shortage of supply of essential products and services during the COVID-19 outbreak. The document foresees the possibility of providing companies with *ad hoc* comfort letters on specific cooperation projects falling within the scope of the Temporary Framework. It is noted that on this basis, the Commission issued on 8 April 2020 a comfort letter to 'Medicines for Europe', an association of pharmaceutical manufacturers, and participating companies in relation to a voluntary cooperation project to address the risk of shortages of critical hospital medicines for the treatment of coronavirus patients[3].

Such 'guidance' may perhaps be regarded useful, in order to assist firms to pre-evaluate risks related to collective agreements that address sustainability issues, also in view of the broader regulatory compass that has been put in place at the EU, but also national, levels in order to attain the SDGs. Sustainability concerns, as these are defined by the existing regulatory framework, can thus be conceived as forming part of a broader goal of systemic resilience that should frame the consideration of competition law enforcement priorities, but also efficiency gains and other forms of objective justifications for *prima facie* anticompetitive conduct.

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[1] See, https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf .
[2] Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=uriserv:OJ.CI.2020.116.01.0007.01.FRA&toc=OJ:C:2020:116I:TOC.
[3] See: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_618.

Second, competition authorities should make the necessary investments in re-defining their role and objective function in a broader context that takes into account various sorts of externalities and their inter-generation effects rather than focusing on the simple price effects of market power. To this end, the Hellenic Competition Authority plans to explore these new approaches in the next few months with the drafting and publication of a technical note which will explore different approaches of integrating environmental and competition issues, addressing efficiency concerns by internalizing negative environmental externalities under different scenario through a cost-benefit analysis but also seeking to adjust welfare analysis to a wider theorization of willingness-to-pay analysis allowing for uncertainty and more complex behavioural economics.

The assumptions on which theories of harm to competition are based must also encompass some notion of long-term sustainability effects. Competition law should break its insularity and in accordance with the principle of consistency and that of policy coherence become more synchronised with the broader constitutional values and programmatic aims regarding sustainability, at the international, EU and national levels. This could take place with the integration of complex adaptive systems thinking in competition law, that takes into account the non-linearity of the processes under examination and the interaction of different fields of human (and non-human) activity[4]. This methodological upgrade of competition law may require joint efforts between various like-minded NCAs at the European level,so as to experiment with common approaches.

It is furthermore suggested that, in view of the legal uncertainty and the recognised need for a rapid transition to the Green economy, more efforts should be made in order to provide undertakings with the legal certainty they need in order to make the necessary investments. This also requires more targeted competition law interventions that provide a clear set of rules to follow. Collecting information on the various business strategies and the issues they face in proceeding to this Green economy transition are also crucial so as to adapt competition law enforcement to the specific circumstances that are faced by each national economy in managing this process of major economic change.

This may require close collaboration with other regulatory authorities, in particular through discussions in the suggested national regulatory network for competition and regulatory policy, in light of the collaboration between competition authorities and sector-specific regulators in other jurisdictions[5].Eventually, a common 'Advice Unit', formed by personnel from a variety of regulatory authorities, may be formed in order to provide informal steers on proposed sustainability-related innovations, across all fields of regulatory activity, to enable more direct communication between firms, the government and other stakeholders. This may help establish, if need be, bespoke regulatory frameworks that would promote investments for Green Growth, following a process of public engagement with all stakeholders, including representative citizens' groups (civil society, NGOs).

[4]See, J. R. Ehrenfelfeld, Sustainability by Design (Yale Univ. press, 2008); W. B. Arthur, Complexity and the Economy (OUP, 2015).

[5]See, for instance in France, https://www.autoritedelaconcurrence.fr/en/pressrelease/independent-public-and-administrative-authorities-develop-their-collaboration.

This process may be facilitated with the development of a competition law sustainability 'sandbox'[6] in order, for the industry to experiment with new business formats that aim to realize more quickly and efficiently sustainability goals, and which involve cooperation between competing undertakings or even more permanent changes in market structure in order to be accomplished[7]. This could be done under the condition of some form of time-constrained authorisation, under a periodical targeted supervision of the national competition authority, after balancing the possible anticompetitive effects with the need to provide incentives for the sustainability investment and following a process of public participation, as is the best practice for environmental infrastructure projects[8]. In addition, even if such arrangements produce anticompetitive effects, businesses will not be penalised by competition authorities, if the arrangements form part of the 'sandbox', although competition authorities mayand should proceed with other remedies.

Sandbox

Given that on the one hand environmental agreements increase the risk for collaboration among competitors but on the other hand collaboration may promote innovation in critical areas towards the achievement of a climate neutral economy, there is scope for experimentation, trial and error strategies and "a learning by doing" approach. As a step before issuing general guidelines, it would be useful to allow a period of 18 months setting a sustainability "sandbox" for the live testing of new products or services in a controlled/test regulatory environment for which regulators may or may not permit certain regulatory relaxations during this limited period.

In this instance the challenge for NCAs is to strike a balance between innovation and anti-trust proceeding to a circular economy. On the one hand the spirit of innovation and enterprise must be accelerated, on the other hand consumer interests have to be safeguarded. The focus should be on new or emerging technologies, or use of existing technology in an innovative way which should also provide for a fair share of benefits to consumers. Once an NCA has specified areas where sustainable production can be promoted, it may set up a sustainability sandbox segregated into sustainable products and services on the one hand and sustainable technology on the other. However it should be cautious and set objective criteria as to the quality of the participants who will be able to test their innovative procedures and experiment in a controlled live environment.

A sustainable sandbox can:

[6]A sandbox is defined as 'a safe space where both regulated and unregulated firms can experiment with innovative products, services, business models and delivery mechanisms without immediately incurring all the normal regulatory consequences of engaging in such activity': Financial Conduct Authority, "Regulatory Sandbox", (2015) Research Paper.

[7]4 There is experience with regulatory sandboxes in the financial industry field, in particular Fintech. See, Industry Sandbox, 'A Blueprint for an Industry-Led Virtual Sandbox for Financial Innovation' (2016) Consultation Guide. The UK Financial Conduct Authority also recommended the establishment, with the support of Project Innovate, of a Fintech industry-led virtual sandbox, which would allow firms to experiment in a virtual environment without entering the real market, using their own or publicly available data and a sandbox umbrella company.

[8]M. Lee, C. Armeni, J. de Cendra, S. Chaytor, S. Lock, M. Maslin, C. Redgwell& Y. Rydin, Public Participation and Climate Change Infrastructure, (2013) 25(1) Journal of Environmental Law 33.

- Offer multi-disciplinary partnerships for sustainable solutions
- Allow specific rules to be waived
- Offer dedicated guidance to help entities deal with any anti-trust law barriers and
- Provide a sense-check to enterprise looking to develop sustainable production (and consumption) approaches and sustainable business models.

However, a sustainability sandbox will not give a blanket relaxation for anti-trust law. NCAs may consider relaxing, if warranted, anti-trust rules for sandbox applicants for the duration of the sustainability sandbox on a case-to-case basis.

A careful design of the procedures for the collaboration between NCAs and the different entities participating in the sandbox exercise will also be needed.

Systematic post-implementation reviews that would integrate both competition and sustainability assessments of past mergers and/or antitrust infringement cases should also be helpful. It would be crucial to integrate in these reviews a broader market testing of the remedies imposed, from the perspective not just of the usual market players but also from that of various stakeholders (including citizen groups and environmental NGOs).

Another avenue could be for NCAs to issue general guidelines to clarify under which conditions the private sector may take cooperative action to promote the attainment of sustainability objectives and what form of public accountability mechanisms should be put in place, including the enforcement of competition law.

These initiatives at the national level may provide interesting spaces of experimentation in EU competition law and policy. To the extent that the case(s) involve(s) an effect on EU trade, ultimately, it/they could be moved up from the national level to the Court of Justice of the EU that may set useful legal precedents for the future that could also influence private enforcement of competition law.

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?).

In the context of fulfilling SDGs objectives, certain inter-company agreements related to environmental schemes, involving companies and other stakeholders, can produce substantial benefits from an environmental perspective, while at the same time they may have the potential to limit competition (such examples include agreements to increase the collection of plastic waste, agreements to improve the efficiency of washing machines[9],

[9] See CECED (Case COMP IV.F.1/36.718) Commission Decision 2000/475/EC (2000) OJ L 187/47. In this case the Commission took into account the 'collective environmental benefits' arising by an agreement

attempts to promote sustainable production methods and 'animal welfare' [10], supermarkets developing systems to increase recycling, agreements that aim to reduce greenhouse gas emissions, in particular in the transport sector, or to develop a common data collection system for sustainability purposes, various agreements setting sustainability standards, for instance on the environmental quality from wastewater discharges, or agreements setting a sustainability certification scheme). In such cases the question is whether it is possible to adjust the issues causing competition concerns without harming the environmental sustainability objectives, thereby attaining the goals of the different policy areas involved. Joint commitments or other collective initiatives by industry players may be necessary in order to achieve meaningful change in key sustainability areas, and can be examined under both Art. 101(1) and Art.101(3) TFEU.

One may in this case combine two approaches: First, a crucial question is to what extent agreements between companies – and possibly other stakeholders–to enhance the social and environmental sustainability of their supply chains are, can or should be **excluded** from the scope of the prohibition principle for anticompetitive agreements. It is not always clear from the outset what is allowed and what is not when it comes to collective agreements to enhance sustainability. Second, it is important to explore if the benefits of a specific agreement to sustainability **trade off** its costs, in terms of less competition and higher prices. This assessment very much depends on how the European Commission and National Competition Authorities value the sustainability improvements and weigh these against the possible reduction in competition. The first obstacle to override, in order to encompass sustainability goals in competition law enforcement, is the wording and the relevant interpretations of the competition law provisions, both at the EU and national levels. The second difficulty is the methodology for the evaluation and the weighing of these different concerns.

The interplay of paragraphs 1 and 3 of Article 101 TFEU is also particularly interesting in order to design optimal legal tests for the occasion. While the burden of proof for Article 101 TFEU is on the plaintiff, the specific NCA or the Commission, the evidential and legal burden shifts to the defendant under Article 101(3) TFEU. The design of legal tests, some restrictions being by their nature anticompetitive, while others requiring a more detailed effects-based analysis, also often depends on a careful consideration of error costs, for over-enforcement or under-enforcement. The weight of each type of error, which should also form part of the calculus, may however vary significantly, if one takes a static framework focusing only on some price-related aspects of consumer welfare, from a more dynamic framework that integrates broader categories of social costs through time. Assuming that some effects are linear may also have different implications as to the design of legal tests than if this assumption is changed to non-linearity, with cascade effects and tipping points.

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between washing machine manufacturers to cease production and importation of less energy efficient machines.

[10] The case known as the 'Chicken of Tomorrow' refers to a joint initiative by organizations from the poultry sector and supermarkets to introduce a sector wide sustainability policy. This initiative was disrupted by the Dutch Competition Authority (ACM). See 'ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow' dated 26 January 2015.

Although from a policy perspective the degree of priority given to each of the Green Deal objectives may be different, from a legal perspective this is a matter for interpretation and ultimately depends on the legal nature of the legal rights and obligations mirroring these Green Deal objectives. Broader sustainable development objectives are firmly enshrined in the EU Treaties. The economic, social and environmental aspects of sustainable development are highlighted in Article 3 (3)of the Treaty on European Union[11]. Article 11 of the Treaty on the Functioning of the European Union (TFEU), refers to an effective incorporation of the requirements of environmental protection in policies and measures with the aim to promote sustainable development[12]. Similarly, EU law comprises a "Horizontal Social Clause" in Art 9 TFEU.Article 7 TFEU[13] sets a framework for 'consistency' between EU policies and activities and all its objectives, which is profoundly linked to the principle of policy coherence that is essential for the attainment of SDGs[14]. Article 13(1) TEU also provides that the EU institutional framework 'shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions', which provides a broader interpretative guidance for the implementation of all areas of EU law, including competition law.

Article 37 of the EU Charter of Fundamental Rights stipulates that "(a) high level of environmental protection and the improvement of the quality of the environment *must* be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development" (emphasis added). Furthermore, the social integration clause

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[11] Art. 3 (3) TEU: *"The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance…".*

[12] Art. 11 TFEU: "*Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development"*. This article produces some binding effects. See, for instance, concerning Article 6 TEC (now Article 11 TFEU), the Opinion of AG Jacobs in Case C- 379/ 98, *Preussen Elektra* [2001] ECR I– 2099, para 231: 'Article 6 is not merely programmatic; it imposes legal obligations' and the Opinion of AG Gelhoed in Case C- 161/ 04, *Austria v Parliament and Council* [2006] ECR I– 7183, paras 59– 60, noting that Article 6 TEC 'cannot be regarded as laying down a standard according to which in defining Community policies environmental protection must always be taken to be the prevalent interest', but '[a] t most (this provision) is to be regarded as an obligation on the part of the Community institutions to take due account of ecological interests in policy areas outside that of environmental protection strictosensu'. Compare with the position of AG Cosmas in Case C- 321/ 95 *Greenpeace* [1998] ECR I– 1651, suggesting that the integration principle should have some form of direct effect. For a discussion, see T Schumacher, 'The Environmental Integration Clause in Article 6 of the EU Treaty: Prioritising Environmental Protection' (2001) 3 Environmental Law Review29.

[13] Art. 7 TFEU: "*The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers"*.

[14] As emphasized in para 7 of the Annual Report on Competition Policy (2018/2102(INI) by the Committee on Economic and Monetary Affairs of the European Parliament: *"the fact that competition rules are treaty based and, as enshrined in Article 7 of the TFEU, should be seen in the light of the wider European values underpinning Union legislation regarding social affairs, the social market economy, environmental standards, climate policy and consumer protection; takes the view that the application of EU competition law should address all market distortions, including those created by negative social and environmental externalities*".

may itself be considered as helping to implement the objectives enshrined in Art 14, 29, 31, 34, 35, and 36 of the EU Charter of Fundamental Human Rights(education, access to labour market, fair working conditions, social security, health and security, access to services of general interest), which could be considered as referring to the objective of the Green Deal for a just and inclusive transition. Finally, Article 2 of the European Convention on Human Rights (ECHR) on the right to life may also provide an additional opportunity to take into account climate change goals, as there is a serious risk that the threat of climate change will affect the current generation who may suffer loss of life.

Should these constitutional values be more relied upon in competition law enforcement, it would be difficult to differentiate between environmental and social sustainability. This may become more clear if the specific fundamental right is used as a sword, rather than as a shield, in conjunction with competition law enforcement in order to find a competition law infringement. The eventual horizontal (third-party) effect of such rights may be different to the extent that such rights would give rise to correlative duties on the private actors that have been found to simultaneously infringe competition law and jeopardize the fulfillment of the specific right. While the horizontal effect of social rights (as well as more generally fundamental rights and freedoms) has been accepted in some legal orders,[15] it is still a relatively marginal view in others.[16] The issue may be raised in view of the relatively vague nature of such obligations which, depending on the perspective one takes on theories of rights, may be understood as imposing correlative duties and obligations on specific duty-bearers, in this case the public authorities implementing them, or may give rise to more general claims over the attention given to the interests of the right-holders without these necessarily being prescribed to specific duty-holders and giving rise to determinate duties. The analysis of the impact of such social rights will be done on a case-by-case basis, taking into account different parameters, such as if the specific right is binding, if it is sufficiently determined through the use of qualification criteria, or what is the nature of the competence of the EU in this specific policy domain.

Although the political timing of the reforms regarding environmental sustainability and social sustainability may be different, from a legal perspective their interaction with competition law should be tackled in a similar fashion.

[15]See, E. Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union – A Constitutional Analysis*(Oxford University Press, 2019).

[16]See the discussion in J. King, "Social Rights in Comparative Constitutional Theory" in *Comparative Constitutional Theory* (edited by G. Jacobsohn and M. Schor, Cambridge University Press, 2018), 162-164.