university of groningen

Inclusive Competition Forum

A Competition Policy to Support the Green Deal

–

submission by Prof. dr. Hans Vedder[1], Arletta Gorecka and Fabian Richter[2]

Introductory comments

Fundamentals

It is clear that both the Treaty and simple reality require the integration of environmental considerations into EU competition policy. In the face of the current challenges humanity faces, competition law must play a role in helping the transition to a sustainable economy.[3]

The point of departure is that all economic actors, including states that seek to regulate their economies to enhance the sustainability, are essentially in a race to be second. This is inherent in the external nature of the costs involved in a lack of sustainability. As a result, any attempt to internalise these costs, whether by industry or by governments, will result in an increase of the costs and thus the price of the goods concerned. This increase in price will invariably encounter a willingness to pay that does not cover the increased prices, unless the internalisation is universal and perfect and thus covers all goods that are supplied to the market. In the absence of universal and perfect internalisation of all external costs, there will always be goods the production of which does not internalise the full external costs and which will thus be cheaper. Such cheaper goods will outcompete the more expensive goods in which all external costs have been internalised. This may be different when consumption decisions also factor in these external costs; i.e. when consumers experience extra costs as a result of a purchase of a good at a price in which not all external costs are internalised. Whether and to what extent this will occur depends on the degree to which consumers have what can be called a 'green conscience'. The end result is that in a competitive market, it makes no economic sense for a single company to go ahead and internalise environmental costs on its own. Except for a few companies that are able to carve out a niche market, this is economically irrational. Moreover, it is clear that these niche markets are insufficient to set the market on track to sustainability. There is empirical evidence to support this.

The logical step is to then turn to the state, as the state can force such internalisation across an entire industry thus negating the need for any race to be second. The problem with this is that states are active in a market for regulation. There is, again, ample empirical evidence that shows that states – at the very least – take account of international competitiveness concerns when they decide on regulation. This means that in the absence of universal and perfect internalisation of externalities by all states, governments are also racing to be second. No (member) state will impose regulations that

[1] Professor of Economic Law at the University of Groningen, the Netherlands. The research assistance of Daan Dopheide is gratefully acknowledged. All errors are mine.
[2] Inclusive Competition Forum as represented by Arletta Gorecka (Policy Analyst, ICF and PhD Candidate, Strathclyde University) and Fabian Richter (Policy Analyst, ICF).
[3] S. Holmes, 'Climate Change, Sustainability, and Competition Law', *Journal of Antitrust Enforcement*, vol. 8, no. 2, 2020, pp. 354–405.

result in perfect internalisation as that will increase production costs for companies subject to its jurisdiction and thus reduce their competitiveness.[4]

The result is clear: in the absence of universal and perfect internalisation, a competitive environment will result in all actors racing to be second in sustainability. In a race to be second, no-one finishes and only very few will even start.

Given that universal and perfect internalisation are not to be expected, the only other parameter available for a policy change to achieve sustainability concerns the competitive environment. This is where competition law and policy have a major role to play.

We believe that the Treaty both enables and in fact requires EU competition policy to play this role.

Legitimacy

The issue of the ability of EU competition policy to accommodate so-called non-competition concerns,[5] such as sustainability, is connected to the often-voiced criticism that competition authorities lack legitimacy to incorporate non-competition concerns into the application and interpretation of competition law (i.e. the definition of competition policy). We believe that legitimacy is no problem for two reasons. First, the integration of environmental considerations into EU competition law and policy is required by Article 11 TFEU.[6] This requirement to integrate environmental considerations into the definition and implementation of EU competition policy, in particular with a view to promoting sustainable development, features prominently in the TFEU and has been democratically legitimised by the fact that is has been ratified by all the member states at three different occasions. The wider, non-environmental, concerns relating to sustainability are the subject of Article 7 TFEU. That provision in connection with Article 3(1) and (3) TEU requires and thus legitimises the application of EU competition law in a way that contributes to sustainability. The second reason why it is legitimate to integrate environmental concerns into competition policy relates to the open worded nature of the competition provisions as well as the ability of competition policy to play a role in such a way as to encourage the internalisation of external costs, and thus contribute to a transformation of the competitive process itself. It is beyond doubt that the competition provisions are openly worded. The very concept of (a restriction or distortion of) competition is undefined, for example. Currently, there is a tendency to interpret competition as a reduction in consumer welfare, with the latter given a predominantly narrow understanding that focusses on short-term output effects. There is, however, no basis in the Treaty or the Court's jurisprudence to do this.[7] Moreover, competition law has always

[4] For a further analysis see H. Vedder, *Competition Law and Environmental Protection in Europe: Towards Sustainability?*, Europa Law Publishing 2003, p. 59.

[5] It may be noted that the dividing line between competition and non-competition concerns is anything but clear as competition can very well take place with regard to the sustainability of production.

[6] S. Holmes, 'Climate Change, Sustainability, and Competition Law', *Journal of Antitrust Enforcement*, vol. 8, no. 2, 2020, pp. 354–405, at p. 360. See further S. Kingston, *Greening EU Competition Law and Policy*, Cambridge 2011, pp. 192-194. and J. Nowag, *Environmental Integration in Competition and Free-Movement Laws*, Oxford University Press 2017, pp. 15-49. Note further that Article 37 of the Charter of fundamental rights of the European Union imposes a similar obligation to integrate environmental concerns.

[7] In fact, judgments like that in Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services and Others v Commission and Others*, para. 63, point to a broader understanding of competition. Furthermore, the judgment in Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, para. 22 point to an even broader conceptualisation where the Court refers to the ultimate aim of the competition rules

been open to other concerns.[8] As a result, competition can be interpreted in such a way as to allow the competitive process to change from the current linear fashion into a more circular method that would actively seek to internalise external costs. With this we mean that markets are currently organised around in a linear manner, whereby all production and consumption decisions are taken in relation to a unidirectional creation, distribution and consumption process in which goods are largely discarded following consumption. It is this linear thinking that enables the calculation of consumer welfare in the first place and thus enshrines the approach to markets and competition in which the necessity to *add value* is paramount. Markets, however, can also exist in a competitive effort to *maintain value*.[9] These circular markets can be just as competitive as the current linear markets are. As a result, a competition policy that supports companies in a transition from a linear to a circular, more sustainable, economy, does not legitimise the transfer of consumer surplus to producers. Nor does it legitimise a restriction of competition or lack the legitimacy needed to implement a policy on sustainability. All such a competition policy does, is to enable the switch to another more sustainable form of competition that is focussed on maintaining value.

Part 1: State Aid

1. What are the main changes you would like to see in the current State aid rulebook to make sure it fully supports the Green Deal? Where possible, please provide examples where you consider that current State aid rules do not sufficiently support the greening of the economy and/or where current State aid rules enable support that runs counter to environmental objectives.

A clear area for improvement exists where the negative environmental impact is not taken into account when state aid decisions are taken. A prominent example of this is the *Castelnou*-case. On a similar note, the environmental impact of generation adequacy support measures can be taken into account to a far greater extent. In *Castelnou*, the Commission approved a support measure for domestic coal production as a means to ensure security of supply on the Spanish electricity market.[10] This support measure had an obvious negative impact on environmental protection that resulted from the increased incineration of coal and the reduced demand for cleaner electricity production methods. The applicant in this case, supported by Greenpeace, argued that the Commission should have taken this environmental impact into account and reviewed the compatibility of the support scheme in the light of EU environmental law. The General Court rejected this firmly, holding that environmental concerns are relevant only in relation to state support schemes that have an environmental objective.[11] The review of the compatibility with the internal market, in the view of the General Court, does not entail a review of the compliance with the EU environmental acquis or the environmental effects that are inextricably linked to it.[12]

'to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union'.

[8] A. Ezrachi, Sponge'', *Journal of Antitrust Enforcement*, vol. 5, no. 1, 2017, pp. 49–75.

[9] W.R. Stahel, *The Circular Economy - A User's Guide*, Routledge, 2019, pp. 7-9.

[10] Case T-57/11, *Castelnou v Commission*.

[11] Case T-57/11, *Castelnou v Commission,* para. 188.

[12] Case T-57/11, *Castelnou v Commission,* para. 189.

This line of reasoning is mitigated in the current Guidelines on State aid for environmental protection and energy.[13] There the Commission considers that member states should primarily consider alternative means of achieving security of supply or generation adequacy which do not have a negative impact on the objective of phasing out environmentally harmful subsidies.[14] Insofar as fossil fuel based generation capacity is supported, the Commission has imposed a carbon efficiency target upon such production.[15] These examples show that the Commission's current takes account of the environmental impact to a greater extent than at the time of the *Castelnou* decision and judgment.

In this regard, the effect of the judgment in the *Hinkley Point C*-case is unclear. At the one hand, the Court essentially endorses the General Court's reasoning in *Castelnou*.[16] However, it repeats this reasoning only for the purpose of what it calls the second criterion following from the application of Article 107(3)(c) TFEU.[17] On the other hand, the Court states explicitly that, when determining whether a project is intended to facilitate the development of certain economic activities or of certain economic areas, the Commission is under a duty to check whether the EU environmental rules are complied with.[18] When a project infringes EU environmental law, aid for such a project must be declared incompatible with the internal market. We understand this to mean that the Commission is under an obligation to ensure that all activities for which it authorises state aid are in conformity with EU environmental law.[19] The practical implications of this are not clear. It is, for example, unknown whether this means that a strategic environmental impact assessment[20] for a subsidy scheme will suffice or whether an environmental impact assessment for every specific project,[21] funded on the basis of the scheme, is required. It is clear that the latter approach entails a greater effort on the part of the member states and the Commission, even when it is clearly best suited to comply with the duty of environmental integration. It is also unclear whether this entails a duty to check compliance with EU environmental law for the operational impact of activities where, for example, the state aid relates to the construction of facilities needed for those activities.[22]

Finally, we note explicitly that the judgment in *Hinkley Point C* is confined to EU environmental law. Environmental protection is obviously an important part, but not the whole, of sustainability. Social protection and fair production regulations are not mentioned explicitly in the judgment. Still, we

[13] Commission, Guidelines on State aid for environmental protection and energy 2014-2020, OJ 2014 C 200/1.
[14] Commission, Guidelines on state aid for environmental protection and energy 2014-2020, OJ 2014 C 200/1, para. 220.
[15] Decision of 7 February 2018 in Case SA.46100 (2017/N), para. 48, 139.
[16] Case C-594/18 P, *Austria v Commission* (Hinkley Point C), para. 101.
[17] Under this criterion the aid must not adversely affect trading conditions to an extent contrary to the common interest.
[18] Case C-594/18 P, *Austria v Commission* (Hinkley Point C), para. 100.
[19] For an overview and analysis of EU environmental law see J.H. Jans and H.H.B. Vedder, *European Environmental Law*, Europa Law Publishing 2014.
[20] Such strategic environmental impact assessments are required on the basis of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ 2001 L 197/30.
[21] These environmental impact assessments are regulated by means of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ 2012 L 26/1.
[22] In this regard we think of a subsidy for the construction of a plant where the construction could comply with the applicable EU environmetal law such as the EIA Directive, see fn. 20 supra, whereas the operation of that plant violates EU environmental rules.

believe that, given the fact that the Court bases its conclusion on the integration principle enshrined in Article 11 TFEU and 37 of the Charter of fundamental rights of the EU, the presence of similar integration clauses relating to other elements of sustainability would also entail a duty to ensure compliance with the EU rules applicable to those fields. Thus, the integration clauses in relation to, for example, the equality of men and women or animal welfare,[23] mean that compliance with EU law in relation to these aspects[24] must be ascertained by the Commission as well.

Compliance with the *Hinkley Point C* judgment has the potential to address one of the biggest failures in the current state aid rulebook and thus contribute to a state aid policy that supports the green deal.

2. If you consider that lower levels of State aid, or fewer State aid measures, should be approved for activities with a negative environmental impact, what are your ideas for how that should be done?

State aid notifications could be expanded to allow the member states to notify the expected environmental impact as well as the costs arising from this impact. Ideally, the normally available amount of state aid would be lowered with the expected environmental costs arising from this environmental impact. Established methods of environmental economics can be used to calculate these costs.

a. For projects that have a negative environmental impact, what ways are there for Member States or the beneficiary to mitigate the negative effects? (For instance: if a broadband/railway investment could impact biodiversity, how could it be ensured that such biodiversity is preserved during the works; or if a hydro power plant would put fish populations at risk, how could fish be protected?)

This is outside the remit of our expertise, since we are not environmental scientists or ecologists. It would seem that the project manager is most suited person to organise this knowledge. If the rules on state aid (e.g. Guidelines) clarify that the amount of allowable aid will be reduced with the environmental costs, this will create a clear incentive for the project manager to (re)organise the project in such a way that these environmental costs are minimised. Given this incentive, the project manager then also has an incentive to organise the expertise required in this regard. An open issue in this relation is how certain the environmental effects of possible compensatory or mitigating measures must be. The current interpretation of EU environmental law results in strict conditions for such measures.[25] We assume that these are equally strict for state aid compliance.

3. If you consider that more State aid to support environmental objectives should be allowed, what are your ideas on how that should be done?

[23] Respectively Articles 8 and 13 TFEU.

[24] In relation to animal welfare, Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes, OJ 1998 L 221/23 lays down some rules. As regards equal treatment, a multitude of Directives has been adopted, see the overview available at: https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/know-your-rights/equality/equality-between-women-and-men_en.

[25] See, e.g. Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij;* Case C-521/12, *T.C. Briels and Others v Minister van Infrastructuur en Milieu*; Case C-258/11, *Peter Sweetman and Others v An Bord Pleanála* and Joined Cases C-387/15 and 388/15, *Hilde Orleans and Others v Vlaams Gewest.* For a full analysis see L. Squintani, 'Balancing nature and economic interests in the European Union: On the concept of mitigation under the Habitats Directive', *RECIEL*, 2020; 29, pp. 129– 137.

Currently, the competition law enforcement has been broadening to include further, more active policies, including the rules on state aid, and sectoral competition policy; with these policies, yet, favours (i) a greater public intervention, and (ii) sectorial regulation where a rapid transition to general antitrust was envisaged. Simultaneously, the state aid is subject to modernisation, aiming to (i) to foster sustainable, smart and inclusive growth in a competitive the internal market; (ii) to focus Commission ex ante scrutiny on cases with the biggest impact on internal market whilst strengthening the Member States cooperation in State aid enforcement; (iii) to streamline the rules and provide for faster decisions."[26]

In fact, more sustainable competition law must take social and environmental priorities into account, rather than focusing purely on economic priorities and imperatives. Frequently, it has been that competition policy acts as an important prerequisite and framework to enhance the competitiveness of EU industry, referencing to state aid antitrust, and merger control.[27] While discussing the concerns of state aid, the emphasis is placed on directing the Member States toward addressing any market failures, whereas any control of prices (in respect of potential antitrust and merger) could enable restructuring and are mentioned as contributors. Yet, aspects such as a promotion of market access or reducing any barriers to entry are not mentioned.

Nowadays, the society might reflect on a variety of values, which amongst others include a focus on values that cannot be reduced to monetary figures. These values, including sustainability, constitutes an element in society, not good in the market. It becomes evident that values are becoming more and more emotionally based. Understanding the emotionally based decisions reveals that behaviour of the consumers could be only partially rational.[28] Sustainability aims at achieving integrated social-economic and ecological development that benefit current and future generations. Interestingly, any potential sustainability-focused cooperation amongst competitors might result in an increase in production or purchasing costs, which initially lead to a price-increase passed on consumers.[29] Hence, any debate about the use of state aid law would depend whether we want to use the staid aid actively or passive to contribute to sustainability. That said, the state aid law should not remain too hostile to such aids, for political and social reasons.

Also, the state aid law recognises the balancing clauses. The wording of Articles 107(3)(a) and 107(3)(c) TFEU indicate that state aid could be seen as combative with internal market if it will allow promote the economic development of the areas with an abnormally low standard of living, underemployment, or to facilitate the economic activities development.

[26] Communication form the Commission on EU State aid Modernization (SAM), COM(2012) 209, para 8.
[27] Communication from the Commission, 'An Integrated Industrial Policy for the Globalisation Era Putting Competitiveness and Sustainability at Centre Stage' COM(2010) 614, above n. 5, p. 10.
[28] Daniel Solove, 'Understanding Privacy '[2008] GWU Legal Studies Research Paper 420.
[29] K Coates, D Middleschulte, 'Getting Consumer Welfare Right : the competition law implications of market-driven sustainability initiatives' [2019] European Competition Journal 318.

The content of EU industrial policy is not just determined by the balance between the market-based policies on internal market and competition of the EU versus protectionist Member States seeking to create national champions. It is codetermined by the economic crisis – and European integration always derived its effectiveness from its success at generating economic rewards for closer cooperation. At the same time, a strict monetary policy is adhered to – and the EU has always lacked the funds to conduct a pro-active industrial policy based on public spending. It will therefore let the Member States do the spending but will try to frame this spending in terms of EU law and legality under the competition rules.

Nowadays, the competition policy is very much tied to the wider objectives of the EU, which aim at promoting and protecting competitiveness, job creation and a sustainable growth. Hence, the competition law needs to be analysed in the terms of the common goals of the community, taking into account the enforcement mechanism and institutional arrangements. All of the above concludes that there is a need of a holistic appraisal of the environmental benefit and costs, where the EU, as the centralised body, should provide a framework which could allow the Member States to adopt certain priorities, and later decide to substitute their sustainability of initiatives. This would allow to acknowledge the element of public pursue dimension in the notion of sustainability. Such considerations, arguably, ought to be interpreted in the scope of wider European normative values, ensuring the consistency between the EU's policies and activities. Arguably, the EU policies would be implemented by considering social protection,[30] consumer protection,[31] public health,[32] equality considerations,[33] transportation,[34] regional development, and investment.[35] The imposition of the state aid needs to work in the current political agenda and acknowledge on green and sustainable features, as protected by the Article 3 and 11 of TEU. Nevertheless, more guidance is needed to fully apprehend the relationship between state aid and environmental objectives: how can state aid be actively proactive to ensure the green future?

a. Should this take the form of allowing more aid (or aid on easier terms) for environmentally beneficial projects than for comparable projects which do not bring the same benefits ("green bonus")? If so, how should this green bonus be defined?

The conditions, under which an exemption could be granted attempt to transform the targeted industrial policy into competitiveness measures. In this respect, two variations are distinguishable.

[30] TFEU, article 9 refers to: 'the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.'
[31] ibid, art 12; Art 38 Charter of Fundamental Rights of the European Union [2016] OJ C 202/389 (hereinafter 'the Charter').
[32] ibid, article 168(1); the Charter (n 6) article 35.
[33] ibid, article 8.
[34] The transport industry was exempted from EU competition law regime application by the Treaty of Rome. For further discussion see: Lars Gorton, 'Air Transport and EC Competition Law '[1997] Fordham Int'l LJ 602, 608.
[35] *Ford/Volkswagen* (Case IV/33.814) Commission Decision 93/49/EEC [1993] OJ L 20/14, para 36.

Firstly, the ailing firm needs to present a restricting plan to the Commission, stipulating that they have a plan to redress of its competitiveness. Secondly, the Commission should insist on adequate compensatory measures in favour of competitors adoption, which aims to mitigate the targeted nature of the of any aid proposed, and also to introduce any horizontality in a relation of the competitiveness policies.

Potentially, there is a need for a broader array of interaction, which would enable to consider a broader understanding of competition law, as a means to engage in effective protection of social values. With the lack of operational concepts or metrics to develop this agenda further, competition law seems to be lacking the necessary incentive to react adequately for the challenges introduced by the environmental protectionism. In addition, the traditional equation-based modelling, although it can be an important means to introduce an insightful assessment, it could not be adequate to answer the regulatory gaps in assessing competition law concerns within the green bonus agenda. Therefore, it is necessary to consider a broader aspect of complex economics, proving a more advanced conceptual and practical insight of operation to consider competition law as adequate to tackle issues arising from problems of environmentally beneficial projects.

Hence, the definition of the green bonus could encompass the avoidance of any environmental costs. In fact, achieving the green bonus should be seen as introducing balancing clauses, which could allow to balance an otherwise anticompetitive aid to benefit from an exemption. Furthermore, the green bonus could act as guiding towards the existence of positive externalities. The green bonus could seek to remedy various inequalities for equity reasons, which could justify compatibility. To put this in the context: the concept of green bonus could function as introducing more environmentally beneficial projects. Hence, it could introduce the sustainability bonus in integration of public interests (environment, or health).[36] Green bonus could, in principle, acts as a shield against imposition of environmentally harming aid and focus on improving consumer welfare. As mentioned above, the sustainability is protected and recognised within the EU Treaties, and as further recognised by Townley, non-efficiency goals must be considered within the competition legal framework, as 'jurisdiction may not have the legal capacity to achieve the ends by other means.'[37] Hence, this might originate to the EU legal foundation; certain matters are solely within the Member States' exclusive competence. This is approved by the Chicken of Tomorrow case (2014), where the competitive spectre of sustainability depends heavily on how the national competition authorises and the EU Commission value the sustainability and balance this against competition law.

b. Which criteria should inform the assessment of a green bonus? Could you give concrete examples where, in your view, a green bonus would be justified, compared to examples where it would not be justified? Please provide reasons explaining your choice.

[36] Addressing the Broken Links, p 27, citing J Nowag, 'Environmental Integration in Competition and Free-Movement Laws (OUP 2016).
[37] C Townley, *Article 81 EC and Public Policy* (OUP 2009) 39.

While considering the state aid, it is a measure of the green bonus should be informed by: (i) a cost to the public purse; (ii) negative effect on competition, (iii) advantage on the selectively chosen undertakings, and (iv) avoiding environmental costs, which could be calculated and later added to the sum of a higher subsidy.

Nevertheless, against this point, there is a possibility that the burden of the COVID-19 crisis could introduce unclear obligations or limitations upon the state aid granted during the pandemic. National competition rules might contain various rules allowing for potential relaxation of competition rules for the environmental protection. For instance, the UK does have a tool which allows competitors to collaborate in tacking the COVID-19 pandemic. In this respect, the furthering of the EU's sustainability goals could be jeopardised in the scope of publication requirement on the use of aid received in the line of the EU and national obligations linked to the sustainable development. In fact, there is recognised controversy due to a lack of a sustainability burden, particularly seeing the state aid as flooding aviation's sectors that have a negative carbon footprint.[38]

The state aid policy should remain highly centralised, and only the EU Commission should be able to declare what aid is needed for the public interests, as combative with the internal market based on Article 107(3) TFEU. In addition to above, the Block Exemption Regulation could be, in principle, introduced by the Commission for a defined category of sustainability agreements. Nevertheless, it could be difficult to accurately define sustainability agreement, and which of them are intended to fall within the block exemption, thereby resulting in a potential abuse of the bloc exemption, when the net is cast too wide or too narrow.

4. How should we define positive environmental benefits?

a. Should it be by reference to the EU taxonomy and, if yes, should it be by reference to all sustainability criteria of the EU taxonomy? Or would any kind of environmental benefit be sufficient?

Part 2: Antitrust

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).

A first example to spring to mind in this regard is VOTOB.[39] This concerns the agreement between companies operating tank storage facilities to install emissions abatement technology and to pass on the associated costs to their consumers. Notably the second part of the agreement, to pass on part of

[38] https://www.linklaters.com/en/insights/blogs/linkingcompetition/2020/esg/competition-and-sustainability/evolving-industrial-and-state-aid-policies-to-fuel-green-initiatives

[39] The *VOTOB* case did not result in a formal decision. It is mentioned in the Commisison's XXIInd Competition Report (1992), pp. 106 - 108. For a fuller analysis see H. Vedder, *Competition Law and Environmental Protection in Europe: Towards Sustainability?*, Europa Law Publishing 2003, p. 157 et seq.

the environmental costs in the form of a separate charge that was uniform for all companies involved in the agreement, is what met with competition concerns.[40] In a nutshell, it resulted in the qualification of this agreement as a green price fixing cartel that restricted competition by object. According to the Commission, the consumers should be able to shop around for the tank storage operator that passes on the smallest part of the cost increase associated with the investment in abatement technology.[41] It is obvious what the result of this would be on the parties. The ability of consumers to shop around for the operator offering the lowest pass on results in an incentive to reduce the investment in abatement technology. Whilst this can trigger competition for cheaper abatement technology,[42] it can equally well result in lower investments or no investments at all in emissions abatement technology. The result could thus be a race to be second in the market for cleaner tank storage. In the case of VOTOB, the minimal level of environmental protection (or emissions abatement) was laid down in a voluntary agreement between the industry involved and the Netherlands government. However, the uncertainty, as a result of having to compete, as to the ability to pass on the environmental costs, negates any incentive to go beyond these minimum standards. VOTOB is also interesting as regards the Commission's understanding of the polluter pays principle in relation to competition law. In this regard the Commission agrees with the idea that the polluter should pay as this entails an internalisation of external costs. The problem in relation to competition law is that the Commission considers that consumers – who are at least partially the polluters – should be able to shop around for suppliers that pass on a smaller percentage of the environmental costs.[43] It is, again, clear that this is bound to result in a race to be second as the Commission holds that consumers who are 'reluctant to accept a higher price would, while becoming environmentally aware, remain in a position to negotiate conditions.' This environmental awareness is obviously a good thing, but nowhere nearly enough to bring about the actual change in consumption and production that is needed for a sustainable economy.

The second case we would like to mention in this regard concerns the Netherlands national energy accord. Part of this agreement that involves a broad representation of industry, civil society and (environmental) NGOs was the coordinated closure of coal-fired power plants. This agreement was brought to the attention of the Netherlands NCA.[44] The ACM considered that the benefits of the agreement, the avoided emissions of pollutants associated with coal combustion, did not compensate the projected increase in electricity prices. As there were no net benefits for consumers, the agreement was deemed to restrict competition and thus abandoned. This type of analysis and reasoning echoes that in *VOTOB* and rests on an unduly narrow understanding of competition law and the analytical framework it prescribes whereby benefits have to accrue to the exact group of

[40] Informally, however, initial indications were that this agreement would be acceptable.
[41] Commisison, XXIInd Competition Report (1992), p. 108, pt. 185.
[42] See also Commisison, XXIInd Competition Report (1992), p. 107, pt. 181. Note that this is by no means necessary to have this – as the Commission calls it – knock on effect. Also with a mandatory and coordinated pass on of (part of) the costs, there is still an incentive for the operators to obtain the lowest prices from the technology suppliers, if only as this would reduce their costs or increase their profits.
[43] Commisison, XXIInd Competition Report (1992), p. 108, pt. 185.
[44] https://www.acm.nl/nl/publicaties/publicatie/12032/Afspraak-sluiting-kolencentrales-is-nadelig-voor-consument

consumers who face the potential price increases.[45] This can be explained better by analysing the possible new approach by the ACM in this regard.

This possible new approach is laid down in the draft Guidelines adopted by the ACM. These enable, for the purpose of applying the third paragraph to take into account the positive effects on a wider group of users, so not just the users affected by the price increase.[46] The ACM considers this legitimate only for environmental agreements that contribute to the attainment of (inter)nationally binding environmental targets. Because of the fact that the agreement contributes to the attainment of a target that is binding on the Netherlands, the possible transfer of welfare from the consumers affected by the agreement to the users at large is considered legitimised. This, however, does narrow down this possibility to those agreements that concern environmental benefits and those agreement that contribute to the attainment of binding targets. This restriction, sensible as it is, is not required. As has been pointed out, there is no requirement in EU competition law to (fully) compensate the consumers affected by an agreement. There is only a requirement to ensure a 'fair share' for 'consumers'. In this regard it is clear that the very concept of a fair share by no means implies (full) compensation. It is similarly clear that the consumers mentioned in Article 101(3) are not specified to mean just those consumers who also face a price increase. The purpose of the fair share-condition in the application is to ensure that advantages that solely accrue to the parties are insufficient to warrant an exemption. It is thus fulfilled when an agreement contributes to a greater good than just the interests of the parties to the agreement.

Obviously, such contributions to the general interest, like increased sustainability, would be easier to accept when they can be defined and quantified more clearly.

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…)?

We still regularly encounter initiatives that are not pursued because of a fear of the competition law implications, even when these are possibly remote, minor and/or improbable.[47] As a result, clarification should also be provided to agreements that do not restrict competition. Ideally, this would take a layered structure that relies on case by case assessments (landmark cases) and substantive guidelines (i.e. not enforcement priorities). These landmark cases could be used to set and define the basic rules that apply in relation to the non-applicability of Article 101(1) or 102 TFEU to an environmental practice. Adopting case-based assessments will also add to the legitimacy of competition policy adopted by means of acts that are subject to judicial review. These case-based assessments can then be supplemented with guidelines that explain and extrapolate the fundamental rules that underlie the decision-making practice. A communication on enforcement priorities will offer insufficient legal guidance and certainty and it therefore a sub-optimal solution.

[45] For an excellent analysis of the untenability of this approach see Ch. Townley, *Article 81 EC and Public Policy*, Hart, 2009, p. 188 et seq.
[46] The draft guidelines can be accessed at https://www.acm.nl/nl/publicaties/concept-leidraad-duurzaamheidsafspraken.
[47] This is based on the authors' own experiences. In view of the confidentiality of the parties involved, no further details can be disclosed.

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?).

Please see the response above to question 1. There are very good reasons to include sustainability benefits under the heading of technical and economic progress within the meaning of Article 101(3). This provision has been used multiple times by the Commission to allow for cooperation to produce higher quality goods.[48] It is beyond doubt that a more sustainably produced good is a higher quality good. Moreover, the fact that this good has been produced more sustainably invariably results in a fair share for consumers. As we have argued above in our answer to question 1, there is no need to interpret Article 101(3) to mean that only advantages that compensate the loss in welfare for the affected consumers can justify an exemption. The main criterion is the third criterion: the necessity test. Here it should be possible to balance any restrictions of competition with the qualified and quantified sustainability benefits. These benefits can be differentiated from other benefits because of the intergenerational impact that is a unique and defining feature of sustainability-related policy objectives.[49] In this regard, the fact that a sustainability initiative contributes to a change-over to more sustainable (e.g. circular) organisations of markets, should also be taken into account as a sustainability improvement. The clearer and better quantified these benefits are, the easier it will be to establish that a certain restriction of competition is indispensable to attain these benefits. As regards the fourth criterion, sufficient residual competition will easily remain as the price and/or sustainability quality is just one of many factors with regard to which competition is possible.

Part 3: 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?

Be it the agricultural sector, the digital sector, automotive or other industries, market concentration is advanced and so are the imbalances of markets. Such imbalances of power affect small farmers, workers, and producers the most and are at the risk to lead to ever more exploitation of people and the planet. However, such unsustainable business practices do as well affect consumers. Stepping back from the prevailing rather price centric approach to consumer welfare, it becomes apparent that consumers may be harmed in the long term through a loss of quality, the use of pesticides or the degradation of the environment.

The proposed merger of Bayer and Monsanto in 2017-2018 was a milestone in raising public awareness of EU's competition law and policies. An unprecedented flood of opinions reached the EU Directorate-

[48] E.g. Decision 93/49, Ford/Volkwagen, OJ 1993 L 20/14 and Decision 91/38, KSB/Goulds/Lowara/ITT, OJ 1991 L 19/25. For a fuller analysis and other decisions see H. Vedder, *Competition Law and Environmental Protection in Europe: Towards Sustainability?*, Europa Law Publishing 2003, p. 161 et seq.

[49] Job creation, for example, does not have inherent intergenerational benefits as the jobs created today may well be obsolete tomorrow. Improving the qualify of the environment or improving people's capability to obtain adequate income, on the other, do necessarilly have such intergenerational effects.

General for Competition. NGO's mobilised citizens to participate to open consultation processes as the proposed merger would create the world's largest integrated pesticides and seeds company and lead to "*risks for human health, food safety, consumer protection, the environment and the climate*".[50]

An increasing concentration in the seeds and fertiliser sector (already particularly concentrated) may not only be detrimental to farmers (as intermediate consumers of the products sold by Bayer and Monsanto) but also to final consumers in terms of availability, innovation and research and development. For example, studies looked at the seed industry in different European countries showing that private plant breeding has narrowed its focus to fewer species and that the diversity within species may also have declined. Similarly, research conducted at the University of Illinois in 2016 concluded that not a single new species has been introduced into the European food system since the era of large-scale mergers began.[51]

A recent example shows Cavendish bananas, which are dominating modern supermarket shelves, suffering from a so called TR4-fungus due to high monoculture. The practice of growing crops with limited genetic diversity—technically called monoculture—aids in cheap and efficient commercial agriculture and marketing, but it leaves food systems dangerously vulnerable to disease epidemics. In case of the TR4 fungus that devastates the Cavandish banana plants, consumers in importer nations will most likely see higher prices and scarcer stock of bananas.[52]

In this regard, merger control is not only an important political tool to prevent the concentration of market power – but also to conquer highly unsustainable business practices which do affect consumers in a long term. The ICF shares the opinion of EU competition commissioner and vice-president Margrethe Vestager that there are other regulations outside competition law that are better placed and much more effective to "drive the fundamental changes that we need".[53] However, competition policy, and so merger control, must plat its role in the European Green Deal. Competition law cannot replace the essential role of regulation, but it should not be part of the problem but part of the solution.

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?

Ensuring consistency between the EU's sustainability objectives and competition law enforcement would have to go beyond a consumer-centric reduction of choice, costs and/or innovation analysis which is the mainstream approach at the EU level today. A strengthen cooperation with other Directorates-General, such as DG AGRI, DG EMPL and DG ENV during a merger review could help

[50] URL: https://ec.europa.eu/competition/mergers/cases/additional_data/m8084_4719_6.pdf, last seen 19.11.2020

[51] For more information, see "EU Cometition Law and Sustainability in Food Systems: Addressing the Broken Links", pp 27-31. See also J Nowag, "Sustainability & Competition Law and Policy – Background Note" for the OECD, para 58, highlighting in particular the study on the Bayer/Monsanto merger by Lianos and Katalevsky, "Merger Activity in the Factors of Production Segments of the Food Value Chain: A Critical Assessment of the Bayer/Monsanto merger", Centre for Law, Economics and Society Policy Paper Series 2017/1, https://www.ucl.ac.uk/cles/sites/cles/files/cles-policy-paper-1-2017.pdf

[52] URL: https://www.nationalgeographic.com/environment/2019/08/banana-fungus-latin-america-threatening-future/

[53] Margrethe Vestager: URL: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en,

ensure that merger control is in line with the EU's sustainability principles. The merging parties must be systematically analysed – not stricter rules, but smarter rules on merger control, in consistency with broader sustainability objectives, must become more mainstream.

This is of particular importance in mergers that take place in the agri-food sectors[54] and textile, garments, leather and footwear value chains, where imbalances of power as well as buyer power is a huge issue.

In this sense, it must be considered that even if increased buyer power may be put forward as an "efficiency" in the form of cost reductions and therefore lower prices to the consumers in Europe, regard must be had to whether such "cost reductions" might be passed on to more vulnerable actors in the supply chain and result in general in social and environmental risks. EU competition policy has developed an economic approach predominantly concerning economical considerations while considering non-monetary aspects, such as human and environmental rights, as restrictive to their competitive market structure. Hence, "competition maximises society's total wealth but does not necessarily result in optimal income distribution".[55] As a structural consequence, reduced margins trickle down to workers, who spend long hours in unsafe conditions for wages which do not assure a decent standard of living for their families.[56] Many supply chains are characterised by the continuous struggle to produce cheap goods, which is leading to a massive imbalance of power, unfair sharing of values, and unsustainable practices. While it is the downward pressure on costs that fuels the exploitation of people and the planet, the balances of power are crucial. Increasing buyer power by less sustainable buyers negates any possibility for supplying industries to become more sustainable.

It is acknowledged that the Horizontal Merger Guidelines[57] do provide the grounds for the analysis of the merging parties' buyer power to a certain extent, however there is no obligation to do so. Consequently, it is rather uncertain to what extent competition authorities will take buyer power, or even other sustainability aspects arising from imbalances of power, into consideration. Here, socio-environmental aspects must be embedded more explicit into the assessment of mergers. For that the Commission must provide guidance in order to clearly set out the direction of enforcement in the future. The ICF does urge such guidance on how to take into consideration the protection of the environment and human rights aspects in merger reviews and calls for a greater use of remedies and the existing legal framework of the EU when it comes to merger control.

Article 21(4) of the EU Merger Regulation ("EUMR"), for example, can be used as a possible tool to integrate sustainability into merger control enforcement. "*Although public interest considerations do not explicitly form part of the substantive test of EU merger control, Article 21(4) EUMR includes a legitimate interest clause, which provides that Member States may take appropriate measures to protect three specified legitimate interests: public security, plurality of the media and prudential rules,*

[54] The Unfair Trading Practices Directive addresses buyer power in the agricultural and food supply chain, but it does not concern the creation or further consolidation of buyer power through concentrations (Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain [2019] OJ L 111/ 59). At any rate, its scope is limited to the agricultural and food supply chain.
[55] Gellhorn, Kovacic, Calkins (2004): p.57.
[56] Toma I. (2019) 'Competition Law and Sustainability in the Netherlands – Sustainability exemption to competition law in the Netherlands as role model for Europe?', Fair Trade Advocacy Office, Brussels.
[57] Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/03

and other unspecified public interests that are recognised by the Commission after notification by the Member State."[58] The increasing interest in sustainability by the NCAs could lead to the trigger of Article 21(4) by a MS to apply to the Commission in order "to claim an additional legitimate interest, such as the protection of small-scale farming as a structural element of the national economy, employment, biodiversity, the right to food or socio-environmental sustainability of the food chain"[59], or sustainability in general based on the EU Treaties.

There is no immediate need for any amendments to the existing merger toolbox to ensure that the Commission's merger policy is consistent with the EU's sustainability objectives. The legal basis is already provided in the Treaties.[60] The existing legal framework of the EU does provide a bridge from EU antitrust regulations to broader public interests and welfare considerations, and several examples from Article 101 TFEU case law could serve as a basis for taking into account sustainability in merger control directly based on the TFEU.[61]

[58] Ioannis Lianos, "The Bayer/Monsanto merger: a critical appraisal", Report created for the German Bundestag, 26 June 2018, p 43.
[59] Addressing the Broken Links, p 32.
[60] Article 3 of Treaty on the EU (especially Articles 3(3) and 3(5)), Articles 7 and 11 TFEU, and Article 37 of the Charter. See also preamble 36 of EU Merger Regulation: "The Community respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles."
[61] General Court decision in T-451/08 – *Stim* [2013], para 73; Commission decision in Case COMP/AT.39847 – Ebooks (12 December 2012), para 152; Commission Decision in Case AT.40023 – Cross-border access to pay-TV (26 July 2016), paras 73-74. Even though these examples concern Article 167(4) TFEU, Articles 7 and 11 TFEU and Article 37 of the Charter provide similar obligations for the Union.