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Response to Call for Contributions: Competition Policy Supporting the Green Deal

Competition Policy, with a touch of Green: From 'Competition on the merits' to 'Sustainable' Competition on the Merits

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I. Introduction

This contribution seeks to add to the Commission's endeavor for greening competition policy, and thereby positively support the larger objectives of the European Green Deal to meet the 'twin [goals] of green and digital transition'[2]. More particularly, this piece contemplates on two dimension of the policy - agreements and merger control. 'Competition on the merits' refers to positive conduct on the market, even if such a conduct were to negatively impact the contestability of the market.[3] There is not one uniform definition or dimension of the notion, but there are some underlying principles that do give a tangible shape to this concept.[4] First defined by Hans Carl Nipperdey in the 1930s 'competition *on* the merits' as a concept of 'positive competition' ('*Leistungswettbewerb*'), the notion refers to the 'promotion of the sales activities of a company on its own efforts'.[5] Contrary to this, 'competition *off* the merits' ('*Nichleistungswettbewerb*') is conduct - 'either by individual companies or as an institution' - that harms competitors or consumers.[6] Distinction also needs to be drawn between 'competition on the merits' and 'fair competition', with the former being a strong indicator of the latter – meaning that if there

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[1] This paper is an abridged version of my paper with the same title '**Competition Policy, with a touch of Green: From 'Competition on the merits' to 'Sustainable' Competition on the Merits'** (*forthcoming*, copy available with the author on request).

[2] European Commission, 'Call for Contributions: Competition Policy Supporting the Green Deal' 1 (September 2020) https://ec.europa.eu/competition/information/green_deal/index_en.html

[3] The OECD note defines 'competition on the merits' principally in terms of a dominant enterprise. In this short note, I refer here principally to agreements between two or more enterprises, which may or may not be collectively dominant. OECD, 'What is Competition on the Merits' *Policy Brief* (June 2006) http://www.oecd.org/competition/mergers/37082099.pdf.

[4] OECD, 'What is Competition on the Merits' *Policy Brief* (June 2006) http://www.oecd.org/competition/mergers/37082099.pdf; OECD, 'Roundtable on Competition on the Merits: Note by the United States' 2 (18 May 2005) DAF/COMP/WD (2005) 13 https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/2005--Roundtable%20on%20Competition%20on%20the%20Merits.pdf

[5] OECD, 'Competition on the Merits: Note by Germany' 133 (30 March 2006) DAF/COMP (2005) 27 https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/OECD_2006.03.30-Competition_Merits.html

[6] OECD, 'Competition on the Merits: Note by Germany' 133 (30 March 2006) DAF/COMP (2005) 27 https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/OECD_2006.03.30-Competition_Merits.html; Ingo Mecke, 'Nichtleistungswettbewerb' *Wirtschaftslexikon Gabler* https://wirtschaftslexikon.gabler.de/definition/nichtleistungswettbewerb-37665/version-261099

exists 'competition on the merits', then there likely exists fair competition.[7] Whereas the focus of 'fair competition' may be an 'individual', 'competition on the merits' safeguards 'competition as an organizing principle of economic policy'.[8]

The approach proposed in this note, adds a dimension of 'sustainability', and proposes that the spirit of the EU Green Deal, if well-implemented, promises to metamorphose EU competition policy from 'competition on the merits' to '*sustainable* competition on the merits'. This emphasis is important considering that traditionally public interest considerations - such as 'environment' - have in competition law enforcement, been restrictively taken into account.[9] Consumer welfare lies at the heart of EU competition law, and the challenges associated with measuring environmental benefits and of apportioning them a proper attribution in the consumer welfare paradigm means that the European Commission, as well as the National Competition Authorities (NCA) have generally avoided taking these non-competition concerns into account.[10]

The note is organized as follows. Section 2 offers an inter-disciplinary insight on the relevance of greening competition policy, and in the process how this can help 'complement environmental and climate policies and regulation aimed at internalizing environmental costs'[11]. Section 3 discusses agreements in the supply chain – the focus being principally on competitors at the same level of the value chain (horizontal agreements). Section 4 discusses possible reforms to the current merger control framework. Both sections elucidate these normative policy recommendations with illustrations and reference to case law. Section 5 summarizes the discussion.

II. Why Green Competition Policy?

At a firm level, the incentives encountered by a firm may be different, which in the short-run may seem to be in conflict with the larger goals of the society. Whereas it is collectively of benefit for us to live in a healthy, pollution-free society with abundant availability of sustainable and green products; for a firm, and particularly its managers in charge, the goals

[7] *Supra* Note 5, p.134.
[8] *Supra* Note 5, p.135.
[9] *Supra* Note 5, p.136-137.
[10] For a discussion whether this is possible with the Treaty framework, *see* Julian Nowag, 'The Sky is the Limit: On the Drafting of Article 11 TFEU's Integration Obligation and Its Intended Reach' in Beate Sjåfjell and Anja Wiesbrock (eds), *The Greening of European Business under EU Law. Taking Article 11 TFEU Seriously* (Routledge 2014) https://www.taylorfrancis.com/books/e/9781315767864.
[11] *Supra* Note 2, p.1

of short-term corporatism often take precedence over the larger vision of sustainability. To overcome this problem of collective action, and for a policy to be able to work for the benefit of the society - in other words to overwhelm this classic tragedy of commons - the policy design must offer an enabling framework such that the regulatory costs are far outweighed by the long-term advantages, such as engaging in the uphill task of becoming sustainable. In the long term, sustainable thinking, interestingly, may not only be good for the society, but may also offer the firm a distinct position of advantage. While a regulatory framework, such as mandatory requirements for environmental compliance and tax incentives may form the outer silhouette of such a policy design, the inner fabric must be defined by an effective EU-green competition policy. This in the long run, will have positive consequences at both - the industry level as well as at the level of the EU.

For a competitive advantage to be long lasting, it must either be grounded in cost competitiveness or innovation, with the latter being more sustainable.[12]

On a finer level, how does this translate into the design of competition policy? The transformation may at first glance seem an uphill task, as it calls for fine-tuning some of the very fundamental principles of competition policy, and in the process ensure that EU competition law continues to protect competition and not competitors.

Whereas the larger goal of 'green transition' shall be facilitated through regulatory and investment laws, the suggested progress in antitrust (section III) and merger control (section IV) are aimed at strengthening this overall 'sustainable' framework.

III. Antitrust: Looking for 'sustainability' in Agreements

Scenario 1: *'Bananafoods', 'Børnfoods' and 'Delicious foods' are the three main vertically-integrated producers of ready-to-eat banana-based food products in the EU. Together they cater to over 60 per cent of the relevant market for banana and banana-based meals in the entire European Union. These three producers decide to introduce a range of organic bananas and banana-based food products. To ensure a sustainable value chain, 'Bananafoods' and 'Børnfoods' have incorporated a host of measures such as doing away with the monoculture of banana plantation, giving fair share of the produce to farmers (not*

[12] Michael E. Porter, 'The Competitive Advantage of Nations' (March-April 1990) *Harvard Business Review* https://hbr.org/1990/03/the-competitive-advantage-of-nations; *See* also Michael E. Porter *Competitive Advantage* (1985) Free Press.

only in the EU, but also outside the EU) etc. This new initiative has led to an increase of 20% costs in the production of bananas. To ensure continued profitability, the producers also agree that they will no longer produce or make available other varieties of bananas (that is any kind of banana or banana-based product that are not organically produced). This agreement evidently leads to substantial benefits for the environment; but it also leads to an increase in prices and reduction in choices for the consumer.[13]

What road, if any, to assess such agreements?

Under the old approach, the Commission individually assessed the agreement and granted exemptions on a case-by-case basis. Even following the Guidelines on the application of Article 81 EC (now 101 TFEU), this opportunity for case-by-case guidance remained. Following the modernization of the EU competition law, the possibility of individual assessment has been done away with, and for competitors that wish to co-operate, they currently need to self-assess the compatibility of their practice, and decide whether it is in breach of competition laws.

Considering the still under-developed case law on sustainability-driven and *prima facie* anti-competitive agreements, companies may sometimes refrain from cooperating and entering into horizontal cooperation agreements as referred to in scenario 1 above. Considering that there remain some grey areas in such agreements, it may be a good idea to revive the old approach for at least some period of time. Once the Commission, and the national competition authorities have gathered substantial experience based on their assessment of such incoming requests and assessments therein, it may be advisable to incorporate them in the subsequent Guidelines. In their current form, the Guidelines at recital 7 state that one of the objectives is to help businesses assess the 'compatibility of an individual co-operation agreement with Article 101'.[14] A revival of the erstwhile approach for getting Commission's

[13] This is a hypothetical illustration based on some real issues emerging at the intersection of competition and sustainability. *See* Autoriteit Consument & Markt, 'Niewsbericht: Afspraken Kip van Morgen beperken concurrentie' *ACM Publicaties* (26 Jan 2015) https://www.acm.nl/nl/publicaties/publicatie/13760/Afspraken-Kip-van-Morgen-beperken-concurrentie; Food Empowerment Project, 'Peeling Back the Truth on Bananas' https://foodispower.org/our-food-choices/bananas/ ; Josef Drexl, 'Healing with Bananas – How Should Community Competition Law Deal with Restraints on Parallel Trade in Pharmaceuticals?' *Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 11-13*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1935285;
Associated Press, 'Banana Industry on Alert After Disease Arrives in Colombia' https://www.voanews.com/americas/banana-industry-alert-after-disease-arrives-colombia.

[14] European Commission, Communication from the Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements' (2011/C 11/01) https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF.

individual assessment for such sustainability driven agreements will prompt many more firms to come forward and actively engage in such initiatives.

The Dutch Competition Authority, ACM based on its experience in the *Kip van Morgan* case revitalized the competition and sustainability debate by issuing a white paper in July 2020.[15] This initiative was widely welcomed, as it offers some interesting insights and suggestions to address the challenges associated with sustainability clauses in competition assessment.[16]

To benefit from 101(3) TFEU, an exhaustive set of four conditions must be met cumulatively - meaning that once all the conditions are met, the exception is available to the parties.[17] These four conditions are: first, the agreement should lead to some efficiency gains; second, there is a fair share of the benefit flowing to the consumers; third, the restrictions are a must and indispensable to achieve the desired result and fourth, the agreement does not lead to an elimination of competition. The first and the second condition, under the current approach though problematic, also offer room for 'flexibility'. In light of the positive externalities of an environment-friendly agreement, whereas the agreement may lead to an increase in costs (in the form of higher prices) to the consumers in the relevant market, it will also lead to better air quality and a better environment for the stakeholders at large. As aptly suggested by the Greek note on Sustainability and Competition to the OECD, while the first two conditions call for 'flexibility' to consider sustainability, condition number three and four remain non-negotiable.[18] The question then is how to incorporate this 'flexibility' within the current framework?

In addition, there also exists the possibility of block exemptions, that 'produce effects *erga omnes*'. Agreements that benefit from block exemption are presumptively assumed to meet the requirements of Article 101(3).[19] If the German Bundeskartellamt's (BKA) experience in '*Gesellschaft für Glasrecycling and Abfallvermeidung*' (GGA) (the glass recycling

[15] Draft guidelines 'Sustainability Agreements' (9 July 2020) *De Autoriteit Consument & Markt* https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements
[16] European Commission, 'Statement on ACM Public Consultation on Sustainability Guidelines' https://ec.europa.eu/competition/antitrust/news.html
[17] Jonathan Faull & Ali Nikpay (eds) *The EU Law of Competition* (Oxford University Press 3rd ed. 2014), p.310
[18] OECD, 'Sustainability and Competition – Note by Greece' to be discussed at the 134th OECD Competition Committee meeting on 1-3 December 2020 (3 November 2020) 12 http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2020)64&docLanguage=En
[19] *Supra* Note 17, p.315.

purchasing cartel) is any indicator, a discussion on downright exemptions for sustainability agreements within the framework of block exemptions may not be the best place.[20]

Within the current setting, it may be highly insightful if there is a return to the practice of case-by-case assessment by the Commission, and once sufficient experience has been accumulated, an incorporation of the same in the form of best practices. It may also be useful to add here that the current Guidelines suggest an assessment of environmental agreements under the discussion on R&D, production, commercialization and standardization. This is distinct form the earlier Guidelines, wherein a full-fledged chapter was dedicated to environmental agreements.[21] Once sufficient case experience - based on case-by-case assessment - has been gathered by the Commission, it may be useful to incorporate them in the subsequent Guidelines. This can for instance, be done in the next round of review in 2030.

Possibility to seek case-by-case assessment is also highly recommended in light of the fact that while the European Commission may not look at an agreement below the market shares specified in the *de minimis notice*, there nonetheless, remains a possibility within the framework of Article 101(1) TFEU and Article 3(2) of the Regulation 1/2003 to look at such agreements in case they 'constitute an appreciable restriction of competition'.[22]

IV. Merger Control: Agri- & Seed Mergers, & lessons for reform of Merger Control[23]

Conditional clearance of three big mergers – namely *ChemChina/Syngenta, Dow/DuPont and Bayer/Monsanto* - in the seeds and *Agro-Chem Industry* effectively reduced the 'number of effective global players' from 6-to-4. To assess whether the merger have had an impact on innovation competition, a very novel test – 'significant impediment to industry innovation'

[20] *See* OECD, 'Roundtable on Horizontal Agreements in the Environmental Context – Note by the Delegation of Germany' (19 October 2010) DAF/COMP/WD (2010)88 https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/OECD_2010.10.19-Horizontal_Agreements_Environmental_Context.pdf?__blob=publicationFile&v=4

[21] Guidelines on the applicability of Article 81 to Horizontal Cooperation Agreements (2001/C 3/02). Chapter 7 of the erstwhile 2001 Guidelines (p.26 ff) dealt exclusively with Environmental Agreements.

[22] Case C-226/11 *Expedia Inc.* v. Autorité de la Concurrence and Others (13 December 2012), para 38

[23] The discussion in this section is based on my findings in Kalpana Tyagi, '6-to-4 Mergers in the Seed & Agro-Chem Industry: Unsustainable Challenges with the Current EU Merger Control Framework' (*forthcoming*, copy available with the author on request) and 'Mega Mergers in the Seeds & Agro-Chem Industry: Nipping the Seeds of Innovation (& Sustainability) in the Bud?' (June 2019) *Conference on Competition and Sutainability Sciences Po Paris* https://www.researchgate.net/publication/337281563_Mega_Mergers_in_the_Seeds_Agro-Chem_Industry_Nipping_the_Seeds_of_Innovation_Sustainability_in_the_Bud

(SIII) was introduced to assess the merger between Dow and DuPont.[24] In Bayer/Monsanto, the merger led to the creation of the world's biggest vertically integrated leader in seeds, pesticides and digital agriculture. Like Dow/DuPont, the concern again was not only with price and output, but also the impact of the transaction on the level of innovation. The very novel SIII test was central to the assessment of how the transaction may adversely impact the localized innovation spaces. In ChemChina/Syngenta, though innovation was not so-central as in the other two transactions, investment in an essential sector as food and agri-business by a (state-subsidized) state owned enterprise (SOE) remained an (unaddressed) issue of concern.

Even though these merger assessments bring out forward-looking practices, such as innovative use of remedies (as in the Bayer/Monsanto transaction) or fine-tuning the substantial impediment to effective competition (SIEC) test to assess the impact of the transaction on innovation; they nonetheless, continue to present a much bigger question – with these transactions, are we allowing 'too big to fail (and feed)' Seed/Agri business? This in turn puts in peril the sustainable development goal two that endeavours to ensure food for all.

While EU Merger Control need not be inspired from UN Sustainable Development Goals, but the question is whether this complex interplay of non-competition concerns such as access to food and sustainability be taken into account within the framework of Regulation 139/2004? From a teleological perspective there is an evident need to ensure that treaties of the EU must 'form a "coherent system", wherein Article 11 TFEU and Article 3(3) Treaty on European Union', respectively calling for 'environmental integration' and 'sustainable development of Europe' serve as a reference point.[25]

Merger Control Regulation 139/2004 in article 21(4) permits Member States to take suitable measures to protect 'legitimate interests'. [26] Following the 2008 sub-prime financial meltdown, the UK government introduced 'financial stability' to the list of 'public interest' in its merger control assessment.[27] Currently in the EU, 'legitimate interests' within the meaning

[24] Nicolas Petit, 'Significant Impediment to Industry Innovation: A Novel Theory of Harm in EU Merger Control?' (2017) *ICLE Antitrust & Consumer Protection Research Program White Paper 2017-I* https://pdfs.semanticscholar.org/678b/182e0246fd67b256e144fd1862ec86986b98.pdf
[25] *See Supra* Note 23, p.9. *See* also references therein.
[26] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentration between undertakings [2004] OJ L24/01, Article 24.
[27] Kalpana Tyagi, 'Merger Control in Times of Financial Crisis: An Expedient Instrument to Heal the Fledgling Economy or an Object of Abuse' *Rotterdam Institute of Law and Economics and Behavioural Approaches to*

of Regulation 139/2004 include 'public security, plurality of the media and prudential rules'.[28] Evidently there exists a possibility within the meaning of Article 21(4) to incorporate such sustainability issues into consideration.

Another possibility could be to address sustainability-related concerns in the design of merger remedies. These could for instance, be ensured through non-structural remedies, whereby the parties commit to form a 'patent pool' and/or offer small and medium enterprises (SMEs) the possibility to cross-license genetic traits on Fair, Reasonable and Non-discriminatory (FRANDly) terms.[29]

V. Summary

The suggestions in this short note intend to outline how the competition policy may strengthen the policy effects of the Green Deal by effectively complementing the 'regulatory [objectives of] environmental laws and green investment [such as green bonds and other fiscal policies]'.[30]

The European Green Deal is a fertile ground to convince that competition and regulation can indeed work in harmony, and this in the big picture, would also be the EU's natural and moral contribution to the ongoing global debate on sustainability.

Contract and Tort Erasmus School of Law Working Paper Series 2015/5 pp. 5, 10 ff https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2614861.

[28] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentration between undertakings [2004] OJ L24/01, Article 24.

[29] *See Supra* Note 23, pp. 7-8. *See* also references therein.

[30] Speech MV, 'The Green Deal and Competition Policy' 22 September 2020 webinar; OECD, *See Supra* Note 18, p.15.