Competition Policy supporting the European Green Deal

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1. Introduction

Thank you for the opportunity to participate in this call for contributions. Competition law and policy promote economic activity, and therefore are implicated by association in the negative consequences of such activity for nature and our environment. Sustainability, more precisely the UN Sustainable Development Goals, attempt to mitigate these negative effects by focusing economic activity on basic material and social needs, improving the management of natural resources, and protecting humankind against negative environmental consequences and in particular climate change.[2] Article 3(3) TEU refers to sustainable development among the Union's objectives, defining it as several objectives marrying economic performance with social or environmental concerns. One of these objectives is a high level of environmental protection, which Article 37 of the Charter of Fundamental Rights (and almost verbatim Article 11 TFEU) demands 'must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'. The European Green Deal joins a host of previous and ongoing EU initiatives pursuing sustainable development.[3] It is very welcome that the European Commission (Commission) has taken it as an opportunity to reflect on the contribution of competition law to sustainability, but arguably a general obligation for competition law to do so stems from the Treaties even before the specific goals of the Green Deal.

The call for contributions rightly mentions the Commission's competences as a border for the support that competition law can provide, but the issue is not forcing the Commission to act *ultra vires* but – as clearly stated in the Treaties – to integrate sustainable development in the exercise of those competence. There is hence another border where the regular application of competition law must stop if it leads to unsustainable development. This constraint applies both to the interpretation of competition rules in coherence with the Treaties and to the Commission' administrative action as subject to the principle of legality.[4] Within these boundaries there is space for integrated substantive concepts and enforcement choices like the Green Deal, or regular competition policy that already furthers sustainability like the efficient use of resources mentioned in the call. As will be developed, this can be portrayed as different levels of interaction:

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[2] UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

[3] See the overview at https://ec.europa.eu/environment/sustainable-development/index_en.htm#:~:text=The%20Treaty%20of%20European%20Union,the%20quality%20of%20the%20environment.

[4] For the application of this framework to data protection (as a fundamental right), see Costa-Cabral and Lysnkey, 'Family Ties: The intersection of data protection and competition law in EU law' (2017) 54 *Common Market Law Review* p. 11.

1. The application of competition rules might be excluded because it is incompatible with sustainable development, notably when State aid for an activity that contravenes EU environmental law is notified;[5]
2. Sustainable development might be given priority over competitive concerns but still be subject to proportionality, notably sustainability being used as a justification for anti-competitive behaviour or to approve State aid with negative effects on competition;
3. Sustainable development may be used to fill-in normative concepts that nevertheless preserve their competitive character, such as what is harmful to 'normal competition' in anti-competitive behaviour[6] or what is beneficial innovation in merger control;
4. Normative concepts in competition rules may already coincide with sustainable development, in particular consumer welfare with sustainability that is represented in consumers preferences.

The integration of sustainable development can use public health as a model. Under Article 9 TFEU, the protection of public health should also be taken into account in defining and implementing the Union's policy. The Commission has done so by using the consequences for national health systems and for the research of new pharmaceuticals to ground novel anti-competitive behaviour and theories of harm in merger control.[7] It did so despite the already heavy regulation of public health and scant support in its guidance. This integration of public health has been judicially confirmed, for example *Generics UK* finding that agreements limiting the production of generics constitute a restriction of competition 'adversely affecting at least the national health systems if not the final consumer'.[8] The present COVID-19 crisis further led the Commission to institute a Temporary Framework for Cooperation for arrangements that would normally be considered restrictive but may be declared not to constitute an enforcement priority.[9] With no reference to an exemption under Article 101(3) TFEU or the efficiency criteria of the Commission guidance as the reason for this priority, the framework relies on a proportionality test to assess if the cooperation protects public health.[10] Hence, the comfort letter issued for Medicines for Europe is the result of integrated action by the Commission's Health and Food Safety and Competition directorate-generals.[11] If equal consideration were given to sustainable development – integrated into the notion of harm, allowing a proportionality justification, using expertise across the Commission, and giving parties informal guidance – competition policy would already provide significant support to the Green Deal.

[5] The most direct exclusions of competition rules are the performance of public services related to sustainability preventing an 'undertaking' from being found or constituting 'services of general economic interest' that are obstructed by the application of such rules, but these will not be covered in this contribution since they rely on an express attribution of those functions.
[6] This concept being part of the definition of restrictions by object under Article 101(1) TFEU and abuse under Article 102 TFEU, see Case C-307/18 *Generics UK* EU:C:2020:52 67 and 148.
[7] See Case A.37.507/F3 *AstraZeneca* 15.06.2005 112–132 and Case M.7275 - *Novartis/GSK* 28.1.2015 101-114.
[8] *Generics UK* 156.
[9] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0408(04) 15.
[10] See Costa-Cabral 'Future-Mapping the Three Dimensions of EU Competition Law: Legislative Proposals and Covid-19 Framework' *Journal of International and Comparative Law* (forthcoming December 2020).
[11] https://ec.europa.eu/competition/antitrust/medicines_for_europe_comfort_letter.pdf p. 2-3.

1. State aid control

Question 1.1. State aid control provides an example of integrated sustainability which the prohibition of anti-competitive behaviour and merger control should take note of. Article 107 TFEU does not mention sustainable development among the grounds allowing the compatibility of aid, yet there has been no doubt that it can be read into the references in (3)(b) and (c) to 'common European interest' and the 'certain economic activities [or] economic areas'. Furthermore, even though they are not demanded by the Temporary Framework for State Aid, the Commission has referred to and accepted conditions relating to sustainable development ('conditionality').[12] The call refers to the possible impact of *Hinkley Point*[13] but, as will be seen, this judgement does not fundamentally change the importance of sustainability for State aid. Instead, State aid should give perspective to the issue of so-called 'greenwashing', as it is commonly argued in relation to private parties that sustainability should not be considered as a justification for anti-competitive behaviour due to the risk of being used as a cover for harm to competition.[14] When those parties benefit from State aid however, greenwashing has not stood in the way of considering sustainability or even been raised as a serious problem. Therefore, before greenwashing is allowed to condition the debate on anti-competitive behaviour, its empirical occurrence should at least be confirmed by analysing the much longer record of State aid.

Hinkley Point has clarified the conditions for compatibility of aid under Article 107(3)(c): the aid does not require an objective of common interest nor a market failure,[15] and the second condition of 'adversely affect[ing] trading condition' can only take into account negative effects on competition (and not to environmental principles).[16] This may indeed upset the traditional test described in the call. Nevertheless, *Hinkley Point* rejects an objective of common interest by reading of the first condition of Article 107(3)(c) TFEU literally: 'to facilitate the development of certain economic activities [or] areas'. This means that if that activity or area is selected because of sustainable development, which is to say the aid aims to promote sustainability, whether it does so adequately and proportionally is still assessed under that first condition – without the need to balance effects under the second condition. As such, *Hinkley Point* does not prevent the aid described by the Guidelines on State Aid for Environmental Protection and Energy from falling under Article 107(3)(c) TFEU.[17] The implications of rejecting an objective of common interest go in another direction, since that objective was intended to help balancing out the negative effects on competition. If Member States cannot claim it, the compatibility of the aid becomes much harder. If the Commission were to apply a strict balance of effects under Article 107(3)(c) (by also adopting a literal interpretation of 'where such aid does not'), Member States would soon prefer notifying under Article 107(3)(b) as it allows them to claim the positive effects of such an objective again.[18]

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[12] See https://ec.europa.eu/competition/state_aid/what_is_new/TF_consolidated_version_amended_3_april_8_may_29_june_and_13_oct_2020_en.pdf 45 and https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1333.

[13] Case C-594/18 P *Austria v Commission (Hinkley Point)* E U:C:2020:742.

[14] See Monti 'Four Options for a Greener Competition Law' (2020) 11 *Journal of European Competition Law & Practice* 3-4 124.

[15] *Hinkley Point* 20 and 66.

[16] Ibid. 101 and 102.

[17] Commission Guidelines on State Aid for Environmental Protection and Energy 2014-2020, OJ C 200/1, 28.6.2014 10.

[18] *Hinkley Point* 20.

Question 2.2. The call for contributions seems to assume that 'activities with a negative environmental impact' are in principle compatible, only asking how their effects can be mitigated, but that compatibility should be understood as exceptional. *Hinkley Point* reaffirmed that 'that State aid which contravenes provisions or general principles of EU law cannot be declared compatible with the internal market'.[19] The judgment did not consider detriment to environmental principles under the second condition of Article 107(3)(c), as just described, but this is coherent with preserving the scope of competitive competences – otherwise aid which did not harm competition could have considered to affect trading conditions. However, whether the activity being subsidised infringes environmental rules precedes this condition, and it will prevent aid from being compatible 'without any other form of examination'.[20] The Court did not formulate this test restrictively: it applies to aid in general, hence both to Article 107(2) and (3), and it mentions provisions and general principles, thus covering both regulatory infringements and teleological interpretation. The question therefore is how a negative environmental impact as described in the call does not infringe environmental rules. Even if an activity is nominally legal, it may offend environmental principles if it is unsustainable. Thus, if Member States wish to subsidise unsustainable activities, they will have to ensure regulatory compliance and point to a countervailing EU law principle favourable to the aid.

The Commission should therefore mobilise its competences to enforce the case law that aid is prohibited if it infringes environmental rules. Notably, despite accepting sustainability conditions, the Commission has demanded conditionality under the Temporary Framework for State Aid – and it is common knowledge many of the activities subsidised go against the objectives of the Green Deal. Stating which aid is considered compatible in the Temporary Framework for State Aid is an exercise of the Commission's discretion, and it could have prioritised the Green Deal by making aid that fulfils certain conditions fall under the framework while not preventing other aid from being notified as normal. Moreover, as the frameworks applies Article 107(3)(b) and this provision has been connected in *Hinkley Point* to an objective of common interest, it is doubtful that a common interest remains if the activity is unsustainable. *Hinkley Point* has nevertheless gone further by establishing the conformity with environmental rules as a condition for any activity benefiting from aid. The Commission should therefore regulate how environmental infringements are checked for in the notification process. It should also issue guidance on what legal activities it considers to still contravene environmental principles by being unsustainable (or how they can prove they are sustainable). The current regime is plainly behind: the general form for the notification of aid has no field for the conformity with environmental rules, and neither is this stated as a condition for applying the *De Minimis* Aid Regulation.[21]

Questions 3.3. and 3.4. The objectives of the Green Deal can be awarded priority, as described above, but environmental benefits are broader and their definition should therefore remain open. Moreover, sustainable development must not be reduced to an arms race where sustainable activities might receive more aid on account of a 'green bonus' while unsustainable activities continue to be subsidised, but as discussed be based on a stricter control of the latter.

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[19] Ibid. 44.
[20] Ibid. 100. The aid at issue in Hinkley Point was not tested against this because negative effects to the environment were only considered as part of the appeal of the balancing of effects within the second condition of Article 107(3)(c).
[21] Commission Regulation (EU) No 1407/2013 on the application of Articles 107 and 108 TFEU to de minimis aid OJ L 352/1 24.12.2013.

2. Prohibition of anti-competitive behaviour

Questions 2.1. and 2.3. Competition rules as set by the case law are sufficiently flexible to accommodate cooperation for sustainable development, including the Green Deal objectives, but have been hemmed in by an enforcement practice overly reliant on consumer welfare and economic calculations. This was demonstrated in the Dutch competition authority's recent draft guidelines on sustainability agreements ('Dutch draft guidelines'), which took as their starting point the Commission guidance.[22] As a result, sustainability agreements that were considered not to restrict competition under Article 101(1) TFEU were non-binding, negligeable, or limited to a start-up phase, and those that could be exempted under Article 101(3) TFEU would have (save the exception discussed below) lead to a sustainability benefit that consumers are willing to pay.[23] The Dutch draft guidelines would be a welcome clarification for many arrangements, since the Commission guidance does not refer to sustainability, but the question is whether the guarded attitude of the guidance towards precluding a restriction or accepting that it will benefit consumers should be transposed to sustainable development. This is even more so considering that the case law has established more relaxed standards for arrangements with a beneficial purpose. Not only are objectives the main consideration (interpreted in their legal and economic context) for finding a restriction by object,[24] the doctrine of 'ancillary restraints' allows a range of restrictions if they are indispensable for a beneficial activity.[25] Any of these possibilities could save the exclusionary arrangements and the sharing of sensitive information which the Draft guidelines presumed to be restrictive. Avoiding a restriction of competition is particularly important since the system set in place to detect cartels[26] can deter undertakings from even engaging in the contacts necessary to propose and negotiate sustainability agreements.

The justification of cooperation that may result in higher prices for sustainable products (or less choice of unsustainable ones) is usually assumed to be the main competitive issue regarding sustainability.[27] In order for an exemption under Article 101(3) TFEU to be granted, consumers must be allowed 'a fair share of the resulting benefit', which the Article 101(3) TFEU Guidelines interpret as consumers being 'at least compensate[d]' for the restriction of competition.[28] The Dutch draft guidelines translated this into a cost/benefit calculation of the price increase/willingness-to-pay for sustainability, which had already been applied by the Dutch competition authority in a decision prohibiting cooperation on animal welfare because consumers were unwilling to shoulder the expected price increase.[29] This is all in line with the consumer welfare goal adopted by the 'modernisation' of the Commission's enforcement, which has led to a shrinking of the application of Article 101(3) TFEU.[30] Cooperation is set to fail a cost/benefit

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[22] https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements.

[23] For a more extended comment covering this and other aspects of the Dutch draft guidelines discussed below, see: https://europeanlawblog.eu/2020/10/09/competition-law-and-sustainability-dutch-authority-makes-headway-with-draft-guidelines/.

[24] Case C-179/16 *Hoffman-La Roche II* EU:C:2018:25 78-79.

[25] Case C-381/12 P *MasterCard* EU:C:2014:2201 89-91.

[26] https://ec.europa.eu/competition/cartels/legislation/leniency_legislation.html.

[27] A question not part of the call for contributions, but equally deserving of attention, is how colluding or abusing a dominant position might harm sustainability, see Nowag 'Sustainability & Competition Law and Policy – Background Note', OECD DAF/COMP(2020)3 53-61. Harm to innovation is discussed below regarding mergers, but it (and other instances of harm) could also be tailored to Articles 101 and 102 TFEU.

[28] Commission Guidelines on the application of [Article 101(3) TFEU] OJ C 101/97 27.4.2004 85.

[29] https://www.acm.nl/en/publications/publication/13761/Industry-wide-arrangements-for-the-so-called-Chicken-of-Tomorrow-restrict-competition.

[30] See Brook 'Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts,

calculation because if consumers are willing to pay for sustainability, competition will usually deliver it. The main reason why consumer preferences are ignored – market power – is not remediated by cooperation. Even infrastructure or market creation may be undertaken by individual competitors based on expected gains. As the call for contribution recognises for mergers, sustainability is an increasingly determinant factor for consumer preferences.

If there is no willingness-to-pay for sustainable development, however, the current enforcement practice hits a stumbling block. There is little room for evolving consumer preferences when willingness-to-pay is assessed alongside (short-term) market definition, as confirmed by the Dutch competition authority's failure to anticipate what consumers actually ended up paying for animal welfare.[31] In any event, as also described in the Dutch draft guidelines, current prices might reflect the consumers' unwillingness to internalise the costs of unsustainable products. One option would be to return to pre-modernisation broader concerns under Article 101(3) TFEU,[32] and thereby substitute or expand consumer welfare with sustainable development. Competition law has not however stood still, and the Court and the Commission would have to disavow the definitions of consumer welfare they gave in the meantime. The Dutch draft guidelines proposed another option as an exception to willingness-to-pay: when 'environmental prices' could show that a price increase for consumers is offset by a reduction in costs to society. The logic is that it would be 'fair' that consumers internalise those costs, and this seems tailor-made for the greenhouse emission reductions of the Green Deal.[33] There are however multiple problems with this approach. First, imposing a fair cost is not the same as a allowing a fair share of the benefits, Article 101(3) TFEU to all appearances intending to safeguard the interests of consumers. Second, quantifying benefits to society leaves out the qualitative and undetermined benefits that are common in sustainability. Third, the economic expertise of competition authorities is in the orthodoxy of consumer welfare which has most resisted sustainability. In sum, even if it would not be legally barred, dismissing unquantified benefits and relying on consumer welfare expertise carries an evident risk of false positives of harm which is certain to chill sustainability initiatives.

Competition law must at some point drop economic measures of consumer welfare in order to enable the cooperation necessary for the Green Deal. This quantification is typically propped up by fears of greenwashing but, as already remarked for State aid, there is no reason to award it such an importance. There is only sporadic evidence of cartels disguised as sustainability initiatives and no indication that they cannot be handled by regular cartel enforcement. The Court has not been afraid to justify anti-competitive behaviour beyond consumer welfare, namely the well-known *Wouters* case law based on legitimate objectives.[34] *Wouters* is only subject to a test of proportionality, namely the adequacy of the measure to the objective and not going beyond what is necessary.[35] In other words, competition should give way to the extent necessary, not that anti-competitive effects have to balanced under any economic calculation. This departure from consumer welfare may be the reason why *Wouters* has been ignored by the Commission guidance and the Dutch draft guidelines. Nevertheless, there is a broad doctrinal consensus that *Wouters* would apply to sustainability.[36] This would solve the problem of qualitative benefits and avoid

and Five Competition Authorities' (2019) 56 *Common Market Law Review* 135.

31 https://www.acm.nl/sites/default/files/documents/2020-08/welfare-of-todays-chicken-and-that-of-the-chicken-of-tomorrow.pdf.

32 See Brook (cit. fn 30).

33 https://ec.europa.eu/competition/antitrust/news.html.

34 Case C-309/99 *Wouters* EU:C:2002:98 97.

35 Case C-1/12 *Ordem dos Técnicos Oficiais de Contas* EU:C:2013:127 96.

36 See Nowag (cit. fn. 27) 78.

chilling sustainable development, as when the same test is applied under free movement rules to public interest justifications – including environmental protection.[37]

Question 2.2. Since there are multiple grounds allowing cooperation for sustainability purposes, enforcement practice should offer several avenues. It was already mentioned that many sustainability initiatives are not restrictive of competition or would qualify for an exemption under the consumer welfare logic of the guidance. This should be reflected in an update of the Article 101(3) TFEU Guidelines, but considering that a review of the Horizontal Cooperation Guidelines has already been announced[38] this latest guidance could already cover Article 101(3) TFEU together with detailing when certain kinds of sustainability agreements are unlikely to be restrictive. A review of Horizontal Block Exemption Regulations was also announced,[39] and they should also include sustainability within their respective scope. A block exemption specifically dedicated to sustainability could also be considered in order to provide legal certainty and encourage sustainable development, since these sustainability agreements are not in principle restrictive by object but are currently subject to the *de minimis* threshold for effects.

The most pressing issue however is the application of *Wouters*, since it is the sole avenue for initiatives that are potentially unsupported by consumers or market-wide arrangements beyond the scope of block exemptions. Guidance on proportionality is possible and useful, as the Guidelines on State Aid for Environmental Protection and Energy demonstrate. The Commission might be unwilling to formalise a test departing from consumer welfare, but the *Wouters* case law cannot continue to be ignored. A possible solution would be to adopt a procedure to provide informal guidance such as the one set up by the Temporary Framework for Cooperation, which as noted at the outset is based on a proportionality test and therefore also based on *Wouters*.[40] Informal guidance may also help with the issue referred in the call for contributions of differentiating the Green Deal from other sustainable development: while all sustainability may qualify for justification under Article 101(3) TFEU and *Wouters*, the Commission is entitled to elect the Green Deal objectives as enforcement priorities – as it did for the cooperation to address the effects of COVID-19 – by setting a dedicated informal guidance procedure.

3. Merger control

Questions 3.1. and 3.2. Merger control can play an important – and still largely unacknowledged – role in sustainable development. Theories of harm to innovation have been developed for abandoning competing pipeline products in the pharmaceutical sector (with implications for public health, as already noted),[41] and were put to the service of sustainability when *Dow/DuPont* protected the research and development of active ingredients replacing other ingredients substances earmarked by environmental legislation.[42] This is different from competition in sustainable products, namely the consumer preferences referred in the call, for which standard merger control is sufficient. It is also different from market power harming innovation similarly

[37] Case C-28/09 *Commission v Austria* EU:C:2011:854 119.
[38] https://ec.europa.eu/competition/consultations/2019_hbers/index_en.html.
[39] Ibid.
[40] See Costa-Cabral (cit. fn. 10).
[41] See Commission Competition Policy brief on EU Merger Control and Innovation 2016)/1.
[42] Case M.7932 *Dow/DuPont* 27.3.2017 1981 and Nowag (cit. fn. 27) 58.

to a price increase,[43] since *Dow/DuPont* relied on 'innovation spaces' independently from markets on which market power could be found.[44] *Dow/Dupont* thus provides an excellent example of integrating environmental principles and how those principles differ from regulatory compliance: the active ingredients to be replaced, despite harmful, remained legal. It is therefore regrettable that *Bayer/Monsanto* applied the same theory of harm but kept sustainability gains implicit, making it seem that innovation was protected regardless of its value for sustainability, and effectively arguing against its integration.[45] One thing would be to prohibit a merger solely based on sustainability and regardless of its competitive implications, which would indeed go beyond the Commission's competences, another to integrate sustainability in the test of a significant impediment to effective competition as *Dow/Dupont* did through harm to innovation.

Merger control can therefore contribute to sustainability (in addition to safeguarding competition on sustainable products) by extending harm to innovation beyond the highly regulated sectors on which it has been found and adapting it to other theories of harm. Regulatory approval in advance to commercialisation is not a condition for finding innovation spaces, which in *Dow/DuPont* and *Bayer/Monsanto* often relied on internal documentation of research targets. Capabilities within each innovation space were assessed based on intellectual property output, but this can also be adapted to other sectors or replaced by other factors (dedicated resources, final products, etc.).[46] The main issue is identifying which innovation is beneficial for sustainability and not fall into *Bayer/Monsanto*'s agnosticism. Environmental principles remain available for activities that, despite legal, are acknowledged as harmful. Preventing innovation that would address these negative effects should be open to theories of harm beyond competing pipeline products. It should be remembered that *Dow/Dupont* identified a trend of fewer novel products as industry concentration increased,[47] and concentration ratios could apply to worsening sustainability indicators as a starting point of an inquiry on harm to innovation – which should be examined as thoroughly as market definition. Inquiries or intervention of third parties could also provide those starting points. A logical application of sustainability is the acquisition of resources, and acquisition markets are usually not covered in the same detail as products sold. Whether structural changes to acquisition are likely to stem innovation and reinforce unsustainable production chains should be part of merger control. One could even go further and ask if the prohibition of approving State aid when activities contravene environmental rules could be extended to the approval of mergers of such activities, as the Commission is in the same administrative position in both: acting under competition competences but bound to enforce the principle of sustainable development.

[43] Commission Guidelines on the assessment of horizontal mergers (Horizontal Merger Guidelines) OJ C 31/3 5.2.2004 8.
[44] *Dow/DuPont* 350-351, see Graef and Costa-Cabral 'To regulate or not to regulate Big Tech' (2020) Concurrences 1-2020 26.
[45] Case M.8084 *Bayer/Monsanto* 21.3.2018 3010-3029.
[46] A regulatory environment only seems necessary because the theory of harm to innovation is being grounded on references in the Horizontal Merger Guidelines to 'pipeline products', but this is a placeholder for a practice which has raced ahead of the guidance, see Horizontal Merger Guidelines 38 and Graef and Costa-Cabral (cit. fn. 44).
[47] *Dow/DuPont* V.8.6. Concentration in the industry was not a theory of harm but a supporting element of the findings of harm to innovation.