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Competition *policy brief*

SPECIAL ISSUE

YOUNG EXPERTS' VIEWS ON THE GREENING OF COMPETITION POLICY

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Introduction

This special issue of our Competition Policy Brief occasional series includes selected original contributions prepared for the Student Challenge that was part of the Greening Competition conference.

On 4 February, 2021 the Directorate-General for Competition hosted an on-line conference titled *Competition policy contributing to the European Green Deal* where Executive Vice-President Margrethe Vestager, Director-General Olivier Guersent and top competition experts discussed how competition rules and sustainability policies can work together. The conference was prepared by a call for contributions to which about 200 individuals and organisations replied (click here to watch the conference and read the replies to the call). Later, a Policy Brief titled *Competition Policy in Support of Europe's Green Ambition* (available here) summarised the main conclusions of this broad public conversation and explored how the feedback received since Executive Vice-President Vestager launched it in September 2020 could inspire new initiatives and policy reform.

Because this debate is about our future – the future of competition policy and, more importantly, our future on this planet – we decided that future competition experts and professionals must be part of it. When the Greening Competition conference closed, we invited university students to pick a panel discussion; picture themselves among the speakers; and tell us what they would have talked about. 37 students took up our challenge; a panel of DG Competition officials shortlisted the best 12 submissions; and over 2,500 people selected the four winners through a popular vote (all the material is accessible from here).

To give entrants in different stages of their studies a fair chance to broadcast their views, this special Competition Policy Brief has three sections: full-length scholarly papers authored by the four winners of the Student Challenge, term-paper essays from undergraduate students and long abstracts from shortlisted students.

We want to thank everyone who took part in the popular vote and all the students who took up our challenge. Every entrant gave us their original and impassioned views. Each engaged in genuine dialogue with DG Competition accepting our invitation to think of ways to make competition policy a greener public policy. For this reason alone, it was worth launching the Student Challenge in the first place. We also thank the students who invested their time in the papers that you will read in this Brief. We were impressed by the efforts all made to respond to the comments and suggestions of the expert DG Competition officials who edited their early drafts.

The views, concerns and suggestions collected in this special Brief are bold and thought-provoking. Some contributions are presented in fine technical detail; others express broad social aspirations. Some authors are young professionals, PhD students or budding researchers, others are students who have recently enrolled in their university courses. This deliberately capacious Brief has room for the academic views of all. Those views are not necessarily those of the European Commission – this was indeed the point of this exercise. We are confident that each contribution will enrich the on-going debate in its own way. From these diverse contributions two common views emerge: i) competition-policy rules and tools should grow stronger and sharper to support sustainability policies and ii) there is indeed a great deal that competition policy can do for a greener future.

The Student Challenge Team

Ubaldo Stecconi (editor in chief), Antoine Mathieu Collin and Sofia Vasileiou (editors), Alexandra Badea and José Elias Cabrera (assistant editors), Marlène Warolin (executive assistant).

All ‘antitrust’ roads can lead to sustainability

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Introduction

This article aims at exploring whether and how the goals of the EU Green Deal and especially the goal of sustainable development can be promoted by the EU antitrust rules as they currently stand. In this context, in the first part of this article it will be particularly analysed whether the objective of sustainable development can and should be included in the EU competition law objectives through a broader interpretation of the consumer welfare standard. In the second part, I will analyse the certain ways under which Article 101 TFEU may contribute to the promotion of agreements between competitors contributing to achieving the EU Green Deal goals (hereinafter “sustainability agreements”). In the third and final part it will be discussed how Article 102 TFEU may play a role in achieving the sustainable development objective.

A. Can consumer welfare standard incorporate sustainability considerations?

The consumer welfare standard is deemed as one of the common primary objectives of every competition law regime around the globe[1]. However, this consensus on promoting consumer welfare through competition is illusionary, since each one of those competition regimes perceives the consumer welfare standard in a different way due to the different political and economic circumstances prevailing in a geographical area. Thus, it would not be far-reaching to argue that consumer welfare standard is a context-specific notion that embodies the peculiarities of the markets in the different jurisdictions. This flexibility of competition law to incorporate domestic policy objectives reflects, as Professor Ezrachi mentions, the notion of sponginess of competition law[2].

However, the flexibility and the sponginess of competition law creates legal uncertainty as per the enforcement of competition law and this explains the attempt of the neoliberal economists of the Chicago School to limit the broad and flexible notion of consumer welfare, so as to make the competition law regime operable and its enforcement predictable[3].

The evolution of the definition of the consumer welfare standard in the EU law is indicative of this desire to give some purity and legal certainty to a legal area that is by definition dynamic, since it follows the dynamic nature of the market.

The EU Treaties do not include a single reference to the term consumer welfare[4]. On the contrary, Article 3 TEU refers to the well-being of the EU peoples as one of the Union aims while Article 3 TFEU refers to the functioning of the internal market as an objective of competition rules. In this framework, the General Court acknowledged in the joined Cases T-213/01 and T-214/01 Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission, the consumer well-being as the main goal of EU competition law.

However, as Professor Weitbrecht mentions a gradual modernisation of EU competition law started after the enactment of new legislation in 1990’s[5]. This new legislation gave the European Commission new powers, which required experience that no competition agency had at that time. As a result, the Commission started adopting some elements of the US competition regime and especially of the economic theory of the Chicago School. One of those elements was the consumer welfare model envisaged by the liberal Chicago School[6].The transition from consumer well-being to consumer welfare was highlighted by former Commissioner Mario Monti who used the term “consumer welfare” in his speech in July 2001[7] by stating that “the goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market. Competition should lead to lower prices, a wider choice of goods, and technological innovation, all in the interest of the consumer”. After that speech, the Commission referred in its Guidelines and Guidance Papers to this consumer welfare standard as the main objective of EU Competition law[8].

[1] Werden, 2009, “Essays on Consumer Welfare and Competition Policy”, SSRN Electronic Journal.

[2] Ezrachi, 2017, “Sponge”, Journal of Antitrust Enforcement, 5, no 1.

[3] Holmes, 2020, “Climate change, sustainability, and competition law”, Journal of Antitrust Enforcement, 8, no 2, p. 354–405.

[4] Holmes, ibid (n. 3).

[5] Merger Control Regulation 4064/89.

[6] Weitbrecht, 2008, “From Freiburg to Chicago and Beyond: the first 50 years of European competition law”, ECLR 81.

[7] Monti, ‘The Future for Competition Policy in the European Union’, London, 9 July 2001, SPEECH/01/340.

[8] Indicatively Guidelines on the application of Article 81(3) [now Article 101(3)] of the Treaty [2004] OJ C101/97, para. 13and Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C45/2 (the Guidance Paper), para. 5.

The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

According to the liberal Chicago School, this consumer welfare standard refers to the consumer surplus, which is the difference between what consumers would be prepared to pay for goods and what they do pay due to the existence of competition conditions in the market[9]. Thus, the consumer welfare as envisaged by the Chicago School focuses on low consumer prices[10]. The definition of this economic concept is rather narrow, since it focuses on the short-term price effect and on guaranteeing the consumer surplus, namely a net gain to the consumer when buying a product[11]. The adherence to this narrow economic notion of consumer welfare reflected the need for legal certainty as explained above rather than a legal requirement established in the EU Treaties.

However, the notion of welfare refers to “the health, happiness and future of a person or group” and is considered synonymous to well-being[12]. As a result, it seems that the strict adherence to the Chicago School definition is neither required by law nor reflected in the basic meaning of the notion.

In the same vein, we should not forget that the call for purity and convergence of competition law regimes and the desire for legal certainty have also been challenged by various scholars, who feel that the dynamic nature of the markets fits better with the sponginess of competition law. It has been argued that competition policy in developing countries like any other economic policy in those countries should primarily aim at achieving economic growth and development for achieving broader social objectives, such as the eradication of poverty[13]. Thus, it is argued that the desire for a convergence aim of competition law does not reflect the complex reality of market conditions.

It is worth examining whether this observation that consumer welfare can encompass broader social objectives besides the short time price effects is valid for a developed region like the EU. The EU is a sui generis Union of States with its own normative values established in the founding EU treaties and its own institutional design and bodies. According to Article 1 of TEU, one of the EU objectives is the creation of an ever-closer Union. In the same vein, Article 3 of TEU refers to the establishment of an internal market that aims at the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. According to this Article, broad social objectives like employment, social progress, protection of environment and sustainability but also economic objectives like the establishment of an internal competitive market coexist in the EU regime as envisaged in the founding Treaties. In particular, Article 7 TFEU states that the Union shall ensure consistency between its policies and activities taking all of its objectives into account. In other words, the social and economic objectives of the EU should be balanced and equally promoted. Thus, it seems that also in the developed EU area, competition policy as an economic policy should be aligned with the other objectives set out in the founding Treaties. Thus, the notion of consumer welfare should also integrate a broader meaning than the one suggested by the Chicago School. Especially, it should encompass the protection of the environment and the promotion of sustainable development.

Those two objectives were always in the spotlight as Article 3 TEU referred above shows. Besides Article 3 TEU, also Article 11 TFEU and 37 of the EU Charter of Fundamental Rights mention that environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development. This view is also confirmed by the case law of the EU Courts[14]. Especially, in Case C-487/06 British Aggregates v Commission, the Court of Justice of the European Union (hereinafter “CJEU” or the “Court”) held that Article 11 provides that environmental protection requirements are to be integrated into the Community policies including competition policy (para 73).

The need of integration of the objectives of environmental protection and promotion of sustainable development is more acute under the light of the EU Green Deal. The latter is a new growth strategy that aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy[15]. In this context, it aims at protecting, conserving and enhancing the EU's natural capital, and protecting the health and well-being of citizens from environment-related risks and impacts.

In the light of the above, it seems that the notion of consumer welfare under articles 101 and 102 TFEU can and should focus on more than price effects. Consumer welfare as an objective of EU competition law should be informed by the Union’s objective to promote sustainable development as envisaged in the founding Treaties and specified in the EU Green Deal.

B. Article 101 TFEU as a tool of promoting sustainable development

The interpretation of article 101 TFEU may contribute to achieving the objective of sustainable development in the following different ways: (i) through the interpretation of the notion of “undertaking” and (ii) through the interpretation of the notion of “restriction or distortion of competition”. It may also contribute to achieving sustainability objectives through (iii) the application of legal tools like “ancillary restraints” and the “rule of

[9] Jones & Surfin, 2019, EU Competition Law: Text, Cases, and Materials, Oxford University Press.

[10] Jones & Surfin, ibid (n. 8).

[11] Whish & Bailey, 2018, Competition Law, Oxford University Press.

[12] Holmes, ibid (n. 3).

[13] Cheng, 2020, Competition Law in Developing Countries, Oxford University Press.

[14] Nowag, 2016, Environmental Integration in Competition and Free Movement Laws, Oxford University Press.

[15] COM/2019/640 final.

reason" in sustainability agreements and (iv) through the exemption of sustainability agreements under 101 (3) TFEU.

i. The notion of undertaking

One of the ways through which Article 101 TFEU may contribute to achieving the objectives of sustainable development is through the interpretation of the notion of undertaking. As it will be explained in detail below, Articles 101 and 102 TFEU apply in entities that fall into the notion of undertaking, which has been interpreted broadly by the EU Courts. This broad interpretation, to which I will refer, means that the scrutiny of EU competition law applies even to entities that aim to promote the environmental goals and thus it could impede the achievement of their socially beneficial aim, namely the promotion of sustainable development.

As far as the broad interpretation of the notion of undertaking is concerned, article 101 (1) TFEU applies to legal entities that qualify as "undertakings". The notion of undertaking has not been defined in the Treaties and the EU Courts have adopted a functional approach toward the term by holding that "the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed" (para 21 of C-41/90 Höfner and Elser v Macratom GmbH).

As per the notion of economic activity, it has been stated that entities offering goods and services under market conditions engage in economic activity (C-41/90 Höfner and Elser v Macratom GmbH). Besides the offering of goods and services, the existence of economic/financial risk and the opportunity for profit stemming from the relevant activity also constitute elements of the notion of economic activity[16]. This functional approach focusing on economic activity rather than on the legal status shows that the concept of undertaking under the auspices of competition law is independent from the notion of undertaking under company law, meaning that an entity may be considered as an undertaking when engaging in an economic activity but not when engaging in other activities.

Those other activities may include the provision of social protection or in general activities that are usually provided by the State in the name of the public interest. Dealing with the question of whether the entities offering such services should be deemed as undertakings, the CJEU developed the solidarity criterion (indicatively C-159/91 Poucet v Assurances Generales de France) and distinguished between social protection services offered in market conditions and social protection services offered on the basis of solidarity. According to Advocate General Fenelly in Case C-70/95 Sodemare v Regionale Lombardia solidarity is defined as the "inherently uncommercial act of involuntary subsidisation of one social group by another". Crucial in assessing whether the solidarity of the activity precludes its economic nature is the freedom of the scheme to determine the level of contribution and the payable benefits (paras 14- 25 of C-159/91 Poucet v Assurances Generales de France).

In FENIN the Court held that Spanish National Health System did not act as undertaking when purchasing medical goods and equipment form FENIN. The critical point according to the General Court was that the National Health System operated based on the principle of solidarity and it was funded form social security contributions and other State funding. The General Court held that the activity of purchasing could not be separated from the public task of providing health services and so since the main activity of providing health services was not economic, the ancillary and inseparable activity of purchasing medical goods for the purpose of fulfilling the main activity was not economic either.

In this context, it has been argued[17] that Case T-347/09 Federal Republic of Germany v European Commission may be seen as a stepping stone for concluding that certain core environmental protection tasks are non-economic activities and therefore not subject to competition law (paras 31-32). However, in that case the General Court did not develop firm criteria as to which environmental activities may be deemed as non-economic. Instead, it merely noted that purely environmental protection activities which do not present the three constituting elements of the notion of economic activity (offering goods or services to the market, bearing the financial risks and possibility to make a profit) may be deemed as non-economic and therefore as not falling into the scope of competition law, since they are of an exclusive social nature. Some activities that may be deemed as purely environmental and thus non-economic are the activities of companies offering services regarding the implementation of the environmental legislation by other companies. For example, monitoring the compliance of companies with the goals and the aims of the EU Green Deal, can be seen as a purely environmental activity. Such a claim may be founded on the case C- 343/ 95 Diego Calì & Figli v Servizi Ecologici Porto di Genova, where the Court held that the policing of environmental protection rules was a non-economic task.

In light of the above, it seems that the interpretation of the notion of economic activity given in Case T-347/09 Federal Republic of Germany v European Commission may create an antitrust road leading to sustainability. Specifically, if the EU Courts further build on that interpretation of the notion of economic activity, they may find that certain economic entities engaging in purely environmental activities are not undertakings and thus are not subject to competition law. Such an interpretation of the notion of undertakings may lead to those firms not facing certain restrictions of competition law. In other words, such entities may conclude with greater legal certainty sustainability agreements with other similar legal entities, since they will not face the fear of competition enforcement.

[16] Odudu, 2006, The Boundaries of EC Competition Law: The Scope of Article 81, Oxford University Press.

[17] Nowag, ibid (n. 14).

As a result, the analysed interpretation of the notion of undertaking may be a tool contributing to promoting the sustainability through competition law.

ii. The interpretation of the notion of "restriction or distortion of competition" in Article 101 (1) TFEU

The second antitrust road that can lead to sustainability is related to the interpretation of the notion of "restriction or distortion of competition". Specifically, in this part, I argue that sustainability agreements are unlikely to restrict competition under Article 101 (1) TFEU. I will support this view by suggesting some possible interpretative approaches towards sustainability agreements based on: (a) the concept of environmental agreements of the European Commission's 2001 Guidelines to Horizontal Cooperation Agreements [18] (hereinafter "2001 Horizontal Guidelines"), (b) the concept of standardisation agreements of the European Commission's Guidelines on horizontal cooperation agreements[19] (hereinafter "2011 Horizontal Guidelines"), (c) the concept of research and development (R&D), production and commercialisation agreements of the 2011 Horizontal Guidelines and (d) the Guidelines and Discussion Paper regarding the issue of certain national competition authorities such as the Netherlands Authority for Consumers and Markets (hereinafter the "ACM").

It is worth mentioning from the outset that I am going to suggest an interpretative approach towards sustainability agreements since the 2011 Horizontal Guidelines do not include a separate section for sustainability agreements. This absence of a separate section has created legal uncertainty to the market players, who have reservations in proceeding with a sustainability agreement with competitors in the fear of competition law enforcement. Unlike the 2011 Horizontal Guidelines, the 2001 Horizontal Guidelines included, as it will be analysed, a separate section for "environmental agreements". However, after their replacement with the 2011 Guidelines, the section regarding environmental agreements was omitted. This development does not per se mean that sustainability agreements lead necessarily to restriction or distortion of competition. It means, however, that sustainability agreements may be found to restrict or distort competition under circumstances and ad hoc assessment. This possibility as well as the ad hoc assessment of the sustainability agreement create legal uncertainty to the competitors and hinders the conclusion of sustainability agreements[20].

a. Environmental Agreements in the European Commission's 2001 Guidelines to Horizontal Cooperation Agreements

I am of the opinion that the interpretative approach of the 2001 Horizontal Guidelines can inspire the interpretative approach towards sustainability agreements and influence the debate around the EU Commission's review of the Horizontal Block Exemption Regulations as well as of the 2011 Horizontal Guidelines. Those Guidelines were in force until 2011, when they were replaced by the Guidelines on horizontal cooperation agreements. They set out the principles for the assessment of horizontal cooperation agreements under Article 101 TFEU and they particularly focused on Research and Development Agreements, Production Agreements, Purchasing Agreements, Commercialisation Agreements, Agreements on Standards and Environmental Agreements.

The separate Section 7 covering environmental agreements is particularly relevant to this current analysis. Specifically, para 179 of those Guidelines defines environmental agreements as "those by which the parties undertake to achieve pollution abatement, or environmental objectives, in particular, those set out in Article 174 of the Treaty". Specifically, the provision of Article 174 (now Article 191 TFEU) states that Union Policy on the environment shall contribute to the pursuit of the following objectives: (i) preserving, protecting and improving the quality of environment; (ii) protecting human health; (iii) prudent and rational utilisation of natural resources and (iv) promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. In particular environmental agreements may set out standards on the environmental performance of products or may provide for a common attainment of environmental targets such as the recycling of certain materials, emission reductions, or the improvement of energy-efficiency (para 180 of 2001 Horizontal Guidelines).

According to those Guidelines, some environmental agreements are not likely to fall within the scope of the prohibition of Article 101(1) TFEU. Such a case may arise if no precise individual obligation is placed upon the contracting parties or if they are loosely committed to contributing to the attainment of a sector-wide environmental target. In such a case, the assessment under Article 101(1) will focus on the discretion left to the parties as to the means that are technically and economically available in order to attain the environmental objective agreed upon. In the same vein, agreements setting the environmental performance of products or processes that do not appreciably affect product and production diversity, or whose importance is marginal for influencing consumer's decisions, do not fall under Article 101(1). Similarly, agreements that give rise to genuine market creations such as recycling agreements will not generally restrict competition. This will be the case provided that, and for as long as, the parties were not capable of conducting the activities in isolation, whilst other alternatives and/or competitors do not exist (paras 185 – 187 of the 2001 Horizontal Guidelines).

As a result, the 2001 Horizontal Guidelines show that the promotion of environmental objectives such as sustainable development through Article 101 was feasible even before the EU Green Deal considerations. However, Commission also provided some safeguards in an attempt to prevent greenwashing anticompetitive agreements. Specifically, para 188 of those Guidelines provided that environmental agreements

[18] OJ C 3, 6.1.2001.

[19] OJ C 11, 14.1.2011.

[20] Holmes, ibid (n. 3)

come under Article 101(1) by their nature if the cooperation does not truly concern environmental objectives, but serves as a tool to engage in a disguised cartel.

Those same Guidelines also provided that environmental agreements might under certain circumstances fall under the scope of 101(1) TFEU. Those are environmental agreements covering a major share of an industry at national or EU level where they appreciably restrict the parties' ability to devise the characteristics of the products or the way in which they produce them, thereby granting them influence over each other's production or sales. Those may be agreements whereby parties holding significant market shares in a substantial part of the common market appoint an undertaking as exclusive provider of collection and/or recycling services for their products, may also appreciably restrict competition, provided other actual or realistic potential providers exist (paras 188, 191). The JAMA and KAMA agreements were an illustrative example of sustainable agreements that are regarded by the Commission as not falling into the scope of Article 101 (1). Those agreements concerned emission reductions amongst car producers, which nevertheless did not impose a precise obligation as to the methods of achieving this aim[21].

Thus, I am of the opinion that the interpretative approach towards environmental agreements in the 2001 Horizontal Guidelines can inspire the interpretation towards sustainability agreements in the light of the EU Green Deal considerations. In other words, this interpretative approach according to which environmental agreements may not fall under Article 101(1) TFEU can be adopted mutatis mutandis in the sustainability agreements and can thus offer another "antirust" road that leads to sustainability.

b. Standardisation agreements in the European Commission's Guidelines on horizontal co-operation agreements

The 2011 Horizontal Guidelines state in footnote 1 of para 18 that they do not contain a separate section on "environmental agreements". Standard setting in the environment sector, which was the main focus of the former chapter on environmental agreements, is more appropriately dealt with in the standardisation chapter of these guidelines. In general, competition issues arisen from sustainability agreements are to be assessed under the relevant chapter of these guidelines, which could be the chapter on R&D, production and commercialisation agreements.

Thus, it seems that the 2011 Horizontal Guidelines themselves suggest that the interpretative approach towards standardisation, R&D, production and commercialisation agreements is important since it could be applied mutatis mutandis to environmental agreements or sustainability agreements as defined from the outset.

Specifically, as to standardisation agreements, it is worth mentioning that they are agreements that aim to define the technical or quality requirements with which current or future products, production processes, services or methods may comply, including agreements setting out standards on the environmental performance of products or production processes. Such agreements may cover various issues, such as standardisation of different grades or sizes of a particular product or technical specifications in product or services markets where compatibility and interoperability with other products or systems is essential (para 257 of the 2011 Horizontal Guidelines).

According to those Guidelines standardisation agreements produce significant positive economic effects encouraging the development of new and improved products or markets and improved supply conditions.

Nevertheless, standardisation agreements also create some risks for competition law. In particular, standard setting may also give rise to restrictive effects on competition by potentially restricting price competition and limiting or controlling production, markets, innovation or technical development (para 264 of the 2011 Horizontal Guidelines). Some relevant factors when assessing the possible restrictive effects of such agreements are (i) the binding nature of the standard, (ii) the non-discriminatory access to the standard, (iii) the participation in the standard setting agreement and (iv) the use of the standard by a great part of the relevant industry.

As to the binding nature of the standard, it is worth mentioning that where members of a standard setting organisation remain free to develop alternative standards or products that do not comply with the agreed standard[22], restrictive effects on competition are unlikely to emanate. For example, if the standard setting agreement binds the members to only produce products in compliance with the standard, the risk of a likely negative effect on competition is significantly increased.

As regards access to the standard, it is to be mentioned that in cases where the result of a standard is not at all accessible or only accessible on discriminatory terms, for members or third parties this may lead to market foreclosure and thereby is likely to restrict competition.

As to the participation in the standard setting process, the 2011 Guidelines state that if participation in the standard setting process is open and thus all competitors have the chance to participate in deliberating regarding the standard, then it is unlikely that such an agreement will restrict competition.

As to the industry wide use of a standard, it has been noted that high market shares play a role in this assessment. In other words, whether the standard will in practice be adopted by a large part of the industry or whether it will only be a standard used by a marginal part of the relevant industry influences the relevant

[21] The Competition Policy of the European Community, XXVIII Report on Competition Policy 1998 SEC (99) 743 final, (Brussels, 1999)

[22] Commission Decision in Case IV/29/151, Philips/VCR, OJ L 47, 18.2.1978.

competition assessment. However, high market shares held by the parties complying with the standard will not necessarily lead to the conclusion that the standard is likely to give rise to restrictive effects on competition (paras 293, 294, 295, 296 of the 2011 Horizontal Guidelines).

In the same vein, it should be mentioned that standardisation agreements may also conceal greenwashing cartels. Specifically, certain standardisation agreements may be deemed as by object restrictions of competition where the use of standard is part of a broader restrictive agreement aimed at excluding actual or potential competitors. This was the issue in the pre-insulated pipes case[23], where the producers of the incumbent product colluded to exclude new technology from an already existing standard.

However, standardisation agreements that do not aim to exclude actual or potential competitors must be analysed in their legal and economic context with regard to their actual and likely effect on competition. If the market power of the companies involved is not significant, a standardisation agreement is not capable of producing restrictive effects on competition, meaning that it is unlikely to be caught under Article 101(1). Specifically, a standardisation agreement will normally not restrict competition (i) where participation in standard setting is unrestricted, (ii) where the procedure for adopting the standard in question is transparent, (iii) where the agreement contains no obligation to comply with the standard and (iv) where the agreement provide access to the standard on fair, reasonable and non-discriminatory terms (paras 277, 280 of the 2011 Horizontal Guidelines).

Thus, it seems that the interpretative approach towards standardisation agreements in the 2011 Horizontal Guidelines can offer inspiration for interpreting sustainability agreements under Article 101 TFEU.

c. R&D, production and commercialisation agreements in the European Commission's Guidelines on horizontal co-operation agreements

As already mentioned, according to the 2011 Horizontal Guidelines, competition issues arising from environmental agreements may be assessed under the relevant R&D, commercialisation or production agreements chapters of those Guidelines. It should be also noted that R&D agreements fall into the scope of the Horizontal Block Exemption Regulation 1217/2010. Thus, the fact that 2011 Horizontal Guidelines mention that environmental agreements may be assessed under the relevant chapter of the R&D agreements is of great importance. This is because the EU Commission showed through this mention that the 'lenient' approach towards R&D agreements, which allows cooperation between competitors for the sake of the efficiency gains could be applied also to environmental agreements. Such an interpretation and the consequent lenient approach towards environmental agreements contributes to the achievement of the sustainability goals.

R&D agreements may include cooperation between undertakings for the joint improvement of existing technologies concerning the research, development and marketing of completely new products (para 111 of the 2011 Horizontal Guidelines). From this definition, we understand that an agreement that focuses on research, development and marketing of a new environmentally friendly product may be classified both as an R&D and as a sustainability agreement. This is why it is proposed that the interpretative approach followed towards R&D agreements may inspire the interpretative approach to be followed in sustainability agreements.

The main competition reservation against R&D agreements is that they can restrict competition in various ways. Specifically, such agreements may reduce innovation by reducing the number or the quality of the products coming to the market. At the same time, such an agreement especially in technology markets, may reduce significantly competition between the parties or it may lead to anti-competitive collusion (para 127 of the 2011 Horizontal Guidelines).

For the assessment of the restrictive effects of R&D agreements on competition the competitive relationship between the parties has to be analysed in the context of affected existing markets and/or innovation. If, in the counterfactual situation, namely without the R&D agreement, the parties were not able to carry out the necessary R&D independently, then it would be unlikely for the R&D agreement to have any restrictive effects on competition (para 130 of the 2011 Horizontal Guidelines).

A second important element of the restrictive effect on competition of an R&D agreement lies with the market power of the parties (para 133 of the 2011 Horizontal Guidelines). However, it is worth mentioning that there is no absolute threshold above which it can be presumed that an R&D agreement creates or maintains market power and thus is likely to give rise to restrictive effects on competition.

In this vein, it is worth mentioning that R&D agreements may constitute a by object restriction of competition if they do not truly concern joint R&D but serve as a tool to engage in a disguised cartel. This risk resembles the greenwashing cartel risk mentioned earlier concerning standardisation agreements.

As to production agreements, it is to be noted that they may take many different forms and may provide that production be carried out jointly by the parties. In cases where a production agreement aims at the production of an environmentally friendly product, it may be qualified as both a production and sustainability agreement. An illustrative example of such an agreement that combines elements of both categories was the agreement between major producers of yoghurt, which agreed with major

[23] Case COMP IV/ 35.691, Commission Decision 1999/ 60/ EC [1999] OJ L 24/ 1.

packaging suppliers to develop and implement a voluntary initiative to make yoghurt pots from recycled plastic[24].

Production agreements raise several competitive concerns since they may lead to: (i) direct limitation of competition between the parties, (ii) collusion between the contracting parties and (iii) anticompetitive foreclosure of third parties, since parties engaging in joint production in an upstream market may be able to raise the price of a key component for a market downstream (paras 157 -159 of the 2011 Horizontal Guidelines).

The assessment of those possible anticompetitive constraints depends on the characteristics of the market in which the agreement takes place, as well as on the nature and market coverage of the co-operation and the product it concerns.

It is also worth mentioning that a production agreement may conceal a cartel and thus constitute a by object restriction of competition in cases it involves price-fixing, limiting output or sharing markets or customers.

However, it is also worth keeping in mind that production agreements can be pro-competitive, since they may lead to efficiency gains in the form of cost savings.

As to commercialisation agreements, it is worth mentioning that they involve co-operation between competitors in the selling, distribution or promotion of their substitute products (para 225 of the 2011 Horizontal Guidelines). The competitive concerns raised by commercialisation agreements are related to the fact that they may lead to: (i) price fixing, (ii) output limitation, (iii) market or customer sharing and (iv) exchange of strategic information.

The assessment of the restrictive effect on competition of those concerns depends on the counterfactual situation and on the parties' market powers. A commercialisation agreement is normally not likely to give rise to competition concerns if it is objectively necessary to allow one party to enter a market it could not have entered individually because of the costs involved. Commercialisation agreements between competitors may more likely generate restrictive effects on competition if the parties have some degree of market power.

Just like production agreements, commercialisation agreements may lead to significant efficiency gains stemming from the achievement of economies of scale or scope and of cost savings.

Overall, the 2011 Guidelines seem to accept that R&D, production and commercialisation agreements may bring about efficiency gains, thus resulting in improved and new products being developed and marketed more rapidly than would otherwise be the case. However, the competitive constraints mentioned above should also be taken into account.

Such a balanced interpretative approach can be also followed in the case of sustainability agreements.

[24] Holmes, ibid (n. 3).

d. The interpretative approach proposed by the Netherlands Authority for Consumers and Markets (ACM)

Besides the interpretative approach of the European Commission, it is also worth examining the interpretative approach towards the notion of "restriction or distortion of competition" adopted by certain national competition authorities, such as the ACM.

The ACM has already published Draft Guidelines concerning sustainability agreements. Those Draft Guidelines[25] provide for four categories of sustainability agreements that should be generally deemed as not restricting competition under Article 101(1). Specifically, those four agreements include: (i) agreements that incentivize undertakings to make a positive contribution to a sustainability objective without being binding on the individual undertakings, (ii) codes of conduct promoting environmentally-conscious or climate-conscious practices, (iii) agreements that are aimed at improving product quality, while, at the same time, certain products or products that are produced in a less sustainable manner are no longer sold and (iv) initiatives where new products or markets are created, and where a joint initiative is needed for acquiring sufficient production resources, including know-how, or for achieving sufficient scale. In general, ACM's Guidelines provide that some agreements will fall outside the scope of the cartel prohibition if their sole purpose is to make the undertakings involved, their suppliers and/or their distributors respect the laws of the countries in which they do business (paras 19 – 23).

The classification proposed by the ACM seems to crystallise and consolidate the interpretative approach of both the 2001 and the 2011 Horizontal Guidelines of the European Commission towards environmental, standardisation, R&D, commercialisation and production agreements as analysed above. This is because the ACM's Guidelines place emphasis on the same elements as the European Commission's Guidelines, namely on the binding nature of the target of the contribution agreement and on the efficiency gains stemming from those agreements. If this approach were adopted at EU level, it would contribute to achieving legal certainty, which – as mentioned since the outset – is missing from the 2011 Horizontal Guidelines. On the other side of the coin, every absolute classification that aims at creating safe havens may also create risks of greenwashing cartels.

In the same vein, the "Draft Staff Discussion Paper on Sustainability Issues and Competition law" of the HCC seems also to suggest that inspiration should be drawn from the interpretative approach of the Guidelines of 2001 and 2011 but also form the ACM Guidelines in order to reduce legal uncertainty.

[25] ACM, Draft Sustainability Agreements (July 2020), https://www.acm.nl/sites/default/files/documents/2020-07/sustainabilityagreements%5B1%5D.pdf.

iii. The application of “ancillary restraints” and the “rule of reason” doctrine in sustainability agreements

This part will examine whether legal tools such as “ancillary restraints” and the “rule of reason” can contribute to saving sustainability agreements from being prohibited under Article 101(1) TFEU.

As to ancillary restraints, it should be mentioned that they refer to restrictions of competition related to, necessary for, and proportionate to the implementation of a main non-restrictive operation (T-112/99 Metropole television v Commission). Thus, a restriction that is ancillary to an agreement does not violate article 101(1). In the Albany case[26], the CJEU decided that Article 101 TFEU does not apply to collective bargaining agreements. The conclusion followed from an interpretation of the provisions of the Treaty as a whole, since those agreements were negotiated between management and labour in pursuit of the social objectives included in the Treaties. In the same vein, in the Wouters case, concerning a decision of the Dutch Bar Association to ban multi-disciplinary practices, the Court held that Article 101(1) TFEU is not applicable to restrictive practices as long as there is a “legitimate objective” pursued which is of a public law nature and aims at protecting a public good.

As explained in Part A above, Treaty provisions such as Article 3 TEU and 11 TFEU as well as the EU Green Deal show that the promotion of sustainable development is one of the objectives of the EU. As a result, the promotion of sustainable development could qualify as a “legitimate objective” under the Wouters case law and therefore the “ancillary restraints” legal tool can be applied in cases of sustainability agreements.

Thus, it seems that the ancillary restraints route may be another “antirust” road that can lead to sustainability[27].

It should be mentioned that the doctrine of regulatory ancillary as developed in the Wouters case provides for a balancing of restrictions of competition against the reasonableness of regulatory rules adopted for non-competition purposes. This approach adopted by CJEU created a discussion of whether the US notion of “rule of reason” was introduced in EU competition law[28].

Specifically, the rule of reason in US law has been used as a balancing test between restrictions of competition and the various interests at stake. Specifically in Continental TV Inc v GTE Sylvania the Supreme Court defined the rule of reason as calling for a case-by-case evaluation, according to which the competent court “*weighs all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition*”[29].

Unlike US competition law, the EU Courts do not seem to embrace a rule of reason. In case T-328/03 O2 (Germany) GmbH and Co. OHG v Commission the Court stated that *“the taking into account of the competition situation that would exist in the absence of the agreement, does not amount to carrying out an assessment of the pro- and anti-competitive effects of the agreement and thus to applying a rule of reason, which the (Union) judicature does not deemed to have its place under Article 101 (1) TFEU*”. This statement was based on a previous similar conclusion drawn by the General Court in Case T-112/99 Metropole Television, whereas in the C-307/18 Generics case the CJEU reiterated that “*Since taking account of those pro-competitive effects is intended (…) to appreciate the objective seriousness of the practice concerned (…), that is in no way in conflict with the Court’s settled case-law that EU competition law does not recognise a ‘rule of reason’, by virtue of which there should be undertaken a weighing of the pro- and anticompetitive effects of an agreement when it is to be characterised as a ‘restriction of competition’ under Article 101(1) TFEU*”.

Thus, it seems that the settled case law of the EU Courts rejects the adoption of the US notion of “rule of reason” and recourses to the “ancillary restraints” route for similar situations. At this point, it is worth mentioning that the “rule of reason” benchmark may seem to offer greater flexibility than the “ancillary restraints” route, since the former includes a weighing exercise of the pro- and anticompetitive effects of an agreement. Ancillary restraints seem to set stricter conditions since they require that restrictions of competition should be necessary and proportionate to the achievement of a legitimate objective. However, it seems that the “ancillary restraints” route fits better with the objective of not prohibiting a sustainability agreement under Article 101 TFEU. This is because the necessity and proportionality benchmarks of the “ancillary restraints” route relate to a legitimate objective which exists in a sustainability agreement. As presented in part A above, the promotion of sustainable development is one of the EU objectives envisaged in the Treaties and in the EU Green Deal. Thus, it would be hard to argue that sustainability agreements are not related to a legitimate objective. However, it should be taken into account that the “ancillary restraints” mechanisms refer to restrictions of competition related to and necessary for the implementation of a main non-restrictive operation. The necessity of the ancillary restraint means that it must be essential to the survival of the type of main operation and as such it gives the impression that is narrowly applied. However, we can overcome this obstacle if we take into account that the use of the ancillary restraints as a legal tool does not take place in a legal vacuum. It instead takes place within a certain context and framework, which after the EU Green Deal calls for amendments. While in theory, sustainability objectives may be achieved without applying ancillary restraints to competition, in practice the

[26] Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie [1999] C-67/96 ECR 1999.

[27] Holmes, ibid (no 3).

[28] Korah, 2002, ‘Rule of Reason: Apparent Inconsistency in the Case Law under Article 81’.

[29] Whish & Bailey, ibid (no 5).

absence of legal certainty and the hesitancy of the undertakings to cooperate in the fear of the application of the competition scrutiny have proved that such mechanism would help.

On the other hand, the “rule of reason” analysis despite its flexibility focuses only on a weighing exercise of pro- and anticompetitive effects of an agreement. Such an analysis oriented only to the competition effects seems to not fit ideally with the peculiarities of the Union, which as explained in Part A need to pursue also other policies besides competition law.

Thus, the tool of “ancillary restraints” rather than that[30] of the “rule of reason” seems to fit better with the objective of allowing sustainability agreements under Article 101 (1) TFEU.

iv. Sustainability agreements and exemption under 101(3) TFEU

This part will examine whether a sustainability agreement may be exempted under Article 101(3) TFEU.

An agreement that falls within Article 101(1) is not necessarily unlawful, since it could fall under the exemptions of 101(3). Specifically, according to Article 101(3) an agreement falling into the scope of Article 101 may be exempted provided that (i) it contributes to improving the production or distribution of goods or to promoting technical or economic progress (ii) it allows consumers a fair share of the resulting benefit while at the same time (iii) it is not more restrictive than necessary and (iv) it does not eliminate competition for substantial part of the products in question. For the purposes of the current analysis, the focus will be on the two first conditions.

As for the condition regarding the improvement in the production or distribution of products, it has been further explained that the objective benefits of the agreement should generate value to the Union as a whole and not subjective benefits to the parties (C-56/64 and 58/64 Consten and Grundig v Commission).

In this context, as a matter of policy it has been discussed whether the improvements under Article 101(3) should be interpreted narrowly so as to catch the economic efficiency improvements or broadly so as to catch improvements regarding other policies such as environmental policies. In Case T-528/93 Metropole television SA v Commission, the Court seemed to adopt the broader interpretation, as it stated that the Commission is entitled to base itself on considerations connected with the pursuit of public interest in order to grant exemption under Article 101(3). The Commission has already taken into account environmental concerns in the interpretation and enforcement of Article 101(3) TFEU (Case IV/ 34.252 Philips/Osram, Case IV.F.1/ 36.718 CECED, Cases COMP/ 34493 DSD).

This broad interpretative approach of the notion of improvement under Article 101(3) TFEU seems to be consistent with the fact that as analysed in Part A above, the EU needs to promote all of its different objectives envisaged in the Treaties. Thus, just like the notion of consumer welfare, also the notion of improvement in Article 101(3) needs to be interpreted under the light of the Articles 7 and 11 TFEU, which state that environmental protection requirements must be integrated into Union's policies and that the Union shall ensure consistency between its policies and activities taking all of its objectives into account.

With regards to the second condition relating to a fair share of consumers it should be noted that the benefits accrued should be passed onto consumers. It is the overall effect on all consumers in the relevant markets that must be taken into consideration under this part of Article 101(3), not the effect on each member of that category of consumers (C-238/05 Asnef-Equifax).

Thus, the notion of consumers in Article 101(3) seems to imply that a fair share of the specific benefit should accrue to the group of users of the relevant market that were affected by the restriction of competition in the first place. This narrow approach against the notion of “fair share to consumers” has caused a debate as to whether qualitative benefits like sustainability benefits rather than quantitative benefits could and should be considered as a fair share for consumers. The narrow approach according to which the consumers of the relevant market affected need to be fully compensated seems to be inconsistent with the emphasis put on the benefits of sustainability for the economy and the long-term interest of consumers[31]. The fact that sustainability is connected with benefits for the wider society has also led to the argument that the notion of consumers as interpreted under Article 101(1) TFEU should be expanded in order to cover the society as a whole. This is because the aforementioned narrow approach does not further reflect the fact that, as mentioned earlier, EU is an institution that seeks to pursue also other objectives besides competition policy. Advocates of a broader definition of the notion of fair share claim that the assessment should not be limited to the benefit to actual (or future) consumers of the specific relevant market but should be extended to all the benefits of the conduct besides the specific relevant market. In this vein, it has been argued that consumers are also citizens and are simultaneously active in various social spheres, and thus have wider interests than their narrow financial ones in the specific relevant market[32].

In this context, according to the Netherlands’ ACM Guidelines the principle of full compensation of users in the relevant market could be abandoned if two cumulative conditions are met: (i) the arrangement is intended to prevent or limit obvious environmental damage, and (ii) the arrangement provides an efficient contribution to the compliance with an international or national standard for preventing environmental damage to which the public authority is bound[33].

[30] Case T-112/99, Métropole télévision (M6) v Commission, EU:T:2001:215

[31] Draft Staff Discussion Paper on Sustainability Issues and Competition law” of the Hellenic Competition Commission (para 69).

[32] Lianos, 2018, Polycentric Competition Law, Current Legal Problems.

[33] Chapter 5 of the ACM Draft Sustainability Agreements Guidelines.

However, the abandonment of the full compensation standard has some major drawbacks. First of all, abandoning this standard may contribute to achieving sustainability goals but may not serve the traditional goals of competition law, like the achievement of competitive prices. For example, exempting an agreement between competitors regarding the common launching of a new environmentally friendly and non-plastic bottle of water, may contribute to achieving the EU Green Deal goals and may also have beneficial results for the society as a whole and the future generations but will lead to higher prices for the current consumers, who may not have the chance to enjoy the future benefits of sustainability. Such an approach would mean that we accept that a percentage of current consumers will bear the cost of the sustainable development, which creates equality issues. In other words, since sustainable development benefits the society as a whole, the burden should be divided among the society as a whole and not among some current consumers. It seems that abandoning the full compensation standard only for the purposes of achieving the sustainability goals will mean that EU prioritises the protection of environment over any other of the many goals that it has. However, as explained in Part A, EU strives to achieve a number goals and protection of the environment is just one among them. The favourable treatment against environmental policies and their absolute prioritisation does not seem to be legally founded in the EU Treaties.

As a result, it seems that the broad interpretations of the notion of "improvement" and the notion of "fair share to consumers" under Article 101(3) TFEU seems to fit better with the objective of promoting sustainable development. It seems, however, that Article 101(3) TFEU, with its reference to consumers, seems to create a debate around the issue of whether such a broad interpretation of fair share should be adopted.

Thus, it seems that the above broad interpretations of Article 101(3) TFEU could indeed offer another antitrust road that may lead to sustainability. However, such an interpretative approach has not yet gained a consensus, due to the aforementioned drawbacks that brings with it.

C. Article 102 TFEU and Sustainable development

Besides Article 101 TFEU, also Article 102 may be deemed as an "antitrust" road that can lead to sustainability.

Article 102 TFEU may contribute to a lesser degree to the promotion of sustainable development but it would still deliver desirable outcomes through: (i) the interpretation of the notion of abusive behaviour under Article 102 TFEU and (ii) through the implementation of the legal tool of "objective justifications" in conducts promoting sustainable development.

i. The interpretation of abusive behaviour under Article 102

The notion of abuse of dominant position under Article 102 TFEU corresponds to the dominant's "*special responsibility not to allow its conduct to impair genuine undistorted competition*" as mentioned by the Court in C-52/09 Konkurrensverket v TeliaSonera Sverige AB.

Article 102 refers indicatively to four categories of conducts that are deemed as abusive. However, the settled case law[34] has clarified that those four categories of abusive conducts are not fixed, meaning that the notion of the abusive conduct may be broadly interpreted.

It is worth examining whether Article 102(a) can be interpreted in a way so as to cover conducts that are harmful to the objective of promoting sustainable development. The reference to Article 102(a) TFEU and not to the other subparagraphs can be explained by the wording of this subparagraph itself, which focusses on the imposition by the dominant undertaking of "unfair purchase or selling prices or other unfair trading conditions". The mention to the notion of unfairness seems to reflect the need that was mentioned in Part A, to incorporate some broader considerations into competition law. The reference to unfair trading conditions may enable the European Commission and the EU Courts to interpret the notion of abuse of dominant position under the lens of the sustainability objectives envisaged in the EU Green Deal and mentioned in Part A. Thus, the focus on Article 102(a) is justified by the flexible notion of fairness, which – if broadly interpreted – can incorporate the promotion of sustainable development in addition to the promotion of fair competition.

In particular, such a broad interpretation of the notion of "unfair trading conditions" may cover non-sustainable practices such as excessively low prices stemming from the use of unfriendly environmental practices and production methods. In this context, low prices especially if not passed on to final consumers may encourage an excessive use of scarce resources and may discourage sustainable practices[35].

In this vein, on 16.03.2021 the European Commission initiated investigation into PPC's (Public Power Corporation) behaviour regarding the wholesale electricity markets in Greece[36]. PPC is the largest supplier of retail and wholesale electricity in Greece and the majority of its shares is owned by the Greek State. It currently controls all lignite and hydro as well as some of the natural gas and renewable power generation plants and it is active in the supply of energy to retail and business consumers where it still has more than two-thirds market share. The Commission is concerned that in light of PPC's position both at wholesale and retail levels, it may have adopted predatory bidding strategies hindering the ability of PPC rivals to compete in the wholesale and related electricity markets. Specifically, the Commission will investigate whether PPC's behaviour might have distorted competition by slowing down investment into the generation of greener energy.

[34] C-457/10P AstraZeneca AB and AstraZeneca plc v European Commission.

[35] Holmes, ibid, (no 3).

[36] https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1205.

As a result, it seems that Article 102 TFEU can contribute to promoting sustainable development through a broad interpretation of the notion of abusive behaviour.

ii. The application of the legal tool of "objective justification" or "efficiency defence" in conducts promoting sustainability

Article 102 TFEU can contribute to the objective of promoting sustainability by justifying practices that are considered prima facie abusive but nonetheless promote sustainability.

In this context, it is worth mentioning that Article 102 TFEU does not include an exempting provision similar to Article 101(3) TFEU. Nevertheless, the case law developed some possible defences according to which abusive conduct may escape the prohibition of Article 102 in case the dominant undertaking can provide an objective justification for its behaviour or can demonstrate that its conduct produces efficiencies that outweigh the negative effect on competition.

The idea was first mentioned by the General Court in case T-228/97 Irish Sugar, in which it mentioned that the protection of commercial interests must, at very least, in order to be lawful, be based on the criteria of economic efficiency and consistent with the interests of the consumers.

According to the "DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses"[37] (hereinafter "2005 Commission's Discussion Paper") there are two types of possible objective justifications. The first type of objective justification is where the dominant company is able to show that the otherwise abusive conduct is actually necessary conduct on the basis of objective factors external to the parties involved and in particular external to the dominant company ('objective necessity defence'). The second type of objective justification is where the dominant company is able to show that the otherwise abusive conduct is actually a loss minimising reaction to competition from others ('meeting competition defence') (para 78 of the 2005 Commission's Discussion Paper).

As far as the objective necessity defence is concerned, the dominant company may be able to show that the conduct concerned is objectively necessary, for instance because of reasons of safety or health related to the dangerous nature of the product in question. Such necessity must be based on objective factors that apply in general for all undertakings in the market (para 80 of the 2005 Commission's Discussion Paper).

This tool of objective necessity defence seems to try to balance competition considerations with other broader considerations such as the protection of safety and health. The expansion of the application the objective necessity defence in cases a conduct concerned is objectively necessary because of reasons of environmental protection and sustainable development would not be inconsistent with the objectives of the Union as envisaged in the founding Treaties and the European Green Deal. However, the EU Courts has been rather sceptical in accepting such a defence. Specifically, in T-30/89 Hilti the General Court rejected arguments on objective justification related to safety considerations on the basis that public authorities undertake the task to set and enforce health and safety standards. However, the decisive point for rejecting such an argument was the fact that the company at stake did not approach the competent authority to raise such safety considerations meaning that this kind of defence was a mere tool to avoid the scrutiny of Article 102 TFEU. This ad hoc decision, however, does not mean that every argument based on safety and health considerations would fail in Court.

In the same vein, a prima facie abusive behaviour may be justified through the legal tool of the "efficiency defence". According to the latter, the dominant company must be able to show that the efficiencies brought about by the conduct concerned outweigh the likely negative effects on competition resulting from the conduct and therewith the likely harm to consumers that the conduct might otherwise have (para 79 of 2005 Commission's Discussion Paper). According to paragraph 30, for an efficiency defence to succeed the following conditions should be met: (i) there should be a likelihood of realization of the efficiencies as a result of the conduct, (ii) the conduct should be indispensable to the realisation of those efficiencies, (iii) the efficiencies should outweigh any likely negative effects on competition and consumer welfare in the affected markets and (iv) the conduct must not eliminate all effective competition.

The successful invocation of the efficiency defence in cases where the conduct promotes sustainability depends on the interpretation of efficiencies. As mentioned, in Part B(iv) above if we analyse consumer efficiencies narrowly, namely by focusing only on the price effects then sustainability considerations seem to have no place. However, if we acknowledge that consumer efficiencies incorporate considerations such as product quality and innovation, then sustainability considerations may also be covered by this defence.

Thus, it seems that the legal tools of "objective justification" and "efficiency defence" can offer another antirust road leading to sustainability.

Conclusion

In this article, I explored ways in which the antitrust rules as currently stand can deliver results in achieving the objective of sustainable development as envisaged in the Treaties and the European Green Deal.

I argued that the objective of sustainable development should not be deemed as an objective alien to and separate form competition policy, since the notion of consumer welfare can incorporate sustainability considerations through a broad interpretation.

I concluded that Article 101 TFEU could indeed offer an antirust road that can lead to sustainability (i) through the interpretation of the notion of "undertaking" and (ii) through the interpretation

[37] https://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf.

of the notion of "restriction or distortion of competition". It may also contribute to achieving sustainability objectives through (iii) the application of legal tools such as "ancillary restraints" and the "rule of reason" in sustainability agreements and (iv) through the exemption sustainability agreements under 101(3) TFEU.

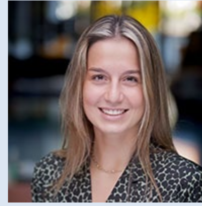
In the same vein, Article 102 can also offer an antitrust road leading to sustainability through the broad interpretation of the notion of abuse and through the application of the legal tools of "objective justifications" or "efficiency defence" to practices promoting sustainability.

As a result, through feasible legal interpretation, the current antitrust rules seem to offer ways of aligning competition policy with sustainable development as envisaged in the EU Green Deal.

When Green meets Merger Control

How to incorporate green efficiencies under EU merger review to avoid green killer acquisitions

Agustina Hermida



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Introduction

The EU set the goal to tackle climate change and become carbon neutral by 2050. These goals are stated under the EU Green Deal[1] which is focused on improving the well-being and health of present and future generations and becoming not only a European but an international priority.[2]

As has been stated by the European Commission, the EU has the collective ability to transform its economy. This means that cross-cutting actions and policies will be required from European actors and authorities to promote and contribute to the transition towards a greener economy. Initiatives taken by private actors, such as sustainability agreements and legislative measures such as tax policy responses will play a key role in this transition. And here is where competition policy comes into play. Executive Vice President Vestager has called on every individual and every authority including competition enforcers to play their part in order to succeed in this goal.[3]

In the field of competition policy, State aid initiatives and sustainability agreements have been gaining ground as measures to promote a more efficient and sustainable economy. But these are not the only options for competition authorities. The present paper proposes Merger Control as an indispensable additional tool to boost this transition.

In the context of the climate crisis, traditional concepts should be challenged. A new range of factors such as air and water pollution should be considered in the economic assessment that is an essential part of competition policy together with the evaluation of ordinary short-term and long-term effects. This should be done under the principle of sustainable development which can be defined as the development that addresses the (short-term) needs of the present generation without compromising the (long-term) possibilities of future generations.[4] In the current context, the appearance of the so-called green-killer acquisitions (that will be defined later) shows that there is need for urgent action from competition authorities.

Consequently, this paper will analyze how to evaluate and include merger-specific environmental externalities in the assessment carried out by the European Commission under EU Merger control. For that, the paper will focus on the potential consequences caused by green killer acquisitions that at present are not covered by EU merger control in order to formulate specific arguments and reinterpretations that would enable the Commission to evaluate merger-specific negative environmental externalities.

Competition policy contributing to the European Green Deal

Competition policy and sustainability are not incompatible, on the contrary, competition policy has the potential to contribute to sustainability objectives, especially by promoting innovation, which is indispensable for transitioning towards a green economy and tackling climate change. Moreover, it is worth emphasizing that the current economic crisis is the perfect opportunity to boost the transition to a greener economy through eco-innovation.[5]

Through the objectives of fostering innovation and ensuring consumer welfare, competition policy can include green factors by establishing a threshold for a regulation that promotes initiatives from private agents operating in the market. A precedent for this approach was carried out by the Commission

[1] European Commission. n.d. "A European Green Deal" accessed November 17, 2021 https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en. All internet sources used in the present paper were accessed on 17 November 2021

[2] European Commission. 2019. "Reflection Paper Towards a Sustainable Europe by 2030" https://ec.europa.eu/info/publications/reflection-paper-towards-sustainable-europe-2030_en

[3] Vestager, Margrethe. 2020. "The Green Deal and competition policy" at the European Commission https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en

[4] As defined in the 'Brundtland Report' (Common Future), published in 1987 by the World Commission on Environment and Development (WCED), The report titled 'Our common future' came to be known as the 'Brundtland Report' after the Commission's chairwoman, Gro Harlem Brundtland. https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf

[5] OECD n.d. "Green, growth and eco-innovation" accessed November 17, 2021,https://www.oecd.org/innovation/inno/greengrowthandeco-innovation.htm

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by accepting the commitments proposed by Mastercard and Visa to cut inter-regional interchange fees.[6]

By ensuring competitiveness in the market while fostering innovation, competition law ensures a positive competitive pressure that can pave the way for sustainability. However, this contribution from competition policy may raise the question of how to reinterpret traditional legal concepts to make room for environmental externalities in merger assessment.

Green killer Acquisitions

In order to define 'green killer acquisitions' we need to clarify what is meant by 'killer acquisition' in the first place. According to a common definition, a killer acquisition is an acquisition in which a company acquires innovative targets with the sole purpose to discontinue its innovation projects and pre-empt potential competition in the future.[7] The target company is usually identified as an innovating company or start-up in the early stages of product development. From an economic perspective, these sorts of acquisitions may produce a positive outcome in a scenario in which the acquiring company creates synergies to foster and exploit more efficiently the technology acquired.[8] But in the scenario described earlier, these acquisitions take place in order to stop innovative development and eliminate potential competition.[9] On the strength of this concept, we can now define 'green killer acquisitions' as acquisitions in which the innovative product developed by the acquired target company is related to green innovation. In consequence, as the acquiring company is not willing to continue with the product development, the outcome of these acquisitions is the failure to develop and use the green technology affected by the merger, to the detriment of innovation, consumer welfare and the environment.

This paper supports the argument of evaluating merger-specific environmental externalities in the assessment carried out in the process of merger control to ensure that sustainability factors that might be beneficial for consumers are considered together with traditional economic efficiencies.

Environmental externalities

Environmental externalities have been defined by the OECD in economic terms as uncompensated environmental effects from production and consumption which, even though they affect consumers, fall outside the scope of the market. In other words, when negative environmental externalities are not internalised in the market the private production costs for undertakings are lower than the social costs.[10] For this reason, if merger-specific environmental externalities are not balanced together with other traditional economic factors such as market shares or barriers to entry, it becomes challenging to correctly assess green killer acquisitions. In these transactions, the acquiring company aims to eliminate competitive pressure by acquiring a target company identified as a potential competitor that could exert significant pressure in the transition towards a greener economy. Consequently, innovation is disincentivized and competitive pressure is reduced, which undermines both the goal of creating a more sustainable system and consumer welfare.[11]

Assessment under article 22 EUMR

In April 2021, a Communication from the European Commission offered some guidance on the application of the referral mechanism set out in article 22 of the Merger Regulation to certain categories of cases.[12]

According to the Merger Regulation, the Commission has exclusive jurisdiction to review concentrations with an EU dimension that is defined by the application of combined-based thresholds.[13] These thresholds aim to delineate the transactions that are best dealt at EU level. But the EUMR also contains a corrective mechanism to the application of these thresholds allowing under specific circumstances a referral of cases between the Commission and one or more Member States, in order to allocate the case with the appropriate authority.[14] This guidance is generally applicable, but it has relevant implications also for the assessment of mergers in which the target company would remain under the thresholds because of the high level of (green) innovation and investment present in certain sectors.[15]

One can imagine the case of (green) killer acquisitions that would escape review by the Commission because the target companies were, say, start-ups with a very low turnover but promising (green) research in the pipeline. For this reason, this Communication from the Commission enables this upward referral mechanism under article 22 EUMR to tackle non-

[6] European Commission. 2019. "Antitrust: Commission accepts commitments by Mastercard and Visa to cut inter-regional interchange fees" *European Commission,* April 29, 2019 https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2311

[7] Cunningham, Colleen, Florian Ederer and Song Ma. 2020. "Killer Acquisitions" *The University of Chicago Press Journals Vol.* 129, No. 3. https://www.journals.uchicago.edu/doi/10.1086/712506

[8] Ibid, page 1

[9] Ibid, page 2

[10] OECD.2001. "Glossary of Statistical Terms, Environmental externalities" Last updated March 4, 2003 https://stats.oecd.org/glossary/detail.asp?ID=824

[11] Vives, Xavier. 2008. "Innovation and Competition Pressure" *Journal of Industrial Economics* 56(3):419-469 https://doi.org/10.1111/j.1467-6451.2008.00356.x

[12] Communication from the Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases 2021/C 113/01. OJ C 113, 31.3.2021, p. 1–6

[13] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). OJ L 24, 29.1.2004, paras 1–22 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004R0139

[14] Ibid, para. 5

[15] Ibid, para 11

notifiable (green) killer acquisitions by allocating mergers and acquisitions to the appropriate authority.

EU Merger Control and environmental externalities

EU Merger Control

The Commission has the competence to assess mergers with an EU dimension as defined under articles 1, 4(5) and 22 of the Merger Regulation[16]. The Commission analyses whether a merger would significantly impede effective competition in the common market or in a substantial part of it in particular as a result of the creation or strengthening of a dominant position.[17]

First of all, the Commission must be notified prior to the implementation. Once it has been notified, the investigation process is divided in two phases. During the first phase, the Commission evaluates potential competition concerns. So if the merger cannot be cleared, then the commission follows an in-depth analysis during the second phase of the investigation in order to provide a final decision. During this process, the Commission does an overall assessment of the merger in order to determine if it significantly impedes competition within the internal market.[18]

As the Commission has the competence to examine larger mergers with an EU-wide dimension that clear a specific turnover threshold determined by the EUMR, if a merger falls below these thresholds, then it is for the national authorities to examine it. However, as has been previously stated, these two processes are not completely disconnected since the merger assessment can be redirected between national and European authorities through the referral mechanism. This can be done at the request of the undertakings involved in the mergers or of national competition authorities.[19]

Environmental externalities in Merger Control

As we have seen earlier, these externalities are uncompensated environmental effects that are not internalised in the market.[20] However, the Merger guidelines provide that merger efficiencies can act as counteracting factors to compensate for potential harmful effects on competition identified by the Commission as a direct result from the merger.[21]

Here is where merger-specific environmental externalities could come into play. As will be explored later, there can be different approaches to the consideration of environmental externalities and sustainability goals during the investigation of a merger. It will be argued that positive or negative environmental externalities can be introduced as "efficiencies" that may counteract the effects that a merger has on competition. In the next section a few cases will be reviewed in which environmental externalities have been evaluated by the European Commission. However there is no guidance yet that clarifies how to quantify these efficiencies and assign them an economic value in the analysis of mergers and acquisitions. In addition, the EUMR does not specifically mention environmental concerns or sustainability, however, recital 23 states that the Commission should promote a sustainable development of the economy as stated in the Treaties.[22]

Precedents

In merger control, there are a few cases in which environmental externalities, sustainability or climate change have been considered in the assessment of cases. These cases are leading the way and will be the basis of future investigations. Three of these cases should be highlighted.

First, *DEMB/MONDELEZ/CHARGEROPCO*[23]. In this case the Commission considered environmental factors as part of the relevant product market analysis. After pursuing its investigation, the Commission concluded that the concept of organic, Fairtrade and a healthier or more environmentally sustainable feeling could be valued by consumers. Although in this analysis the Commission concluded that conventional and non-conventional coffee were substitutable products, it brought to light that consumers perceive environmental factors around a product as something that can differentiate it from the rest due to its positive impact.

[16] Ibid
[17] European Commission n.d. "Merger Procedures" https://ec.europa.eu/competition-policy/mergers/procedures_en
[18] Ibid
[19] European Union. 2013. "Competition: Merger control procedures" https://ec.europa.eu/competition-policy/system/files/2021-02/merger_control_procedures_en.pdf
[20] OECD. 2001. "Glossary of Statistical Terms, Environmental externalities". Last updated on March 4, 2003 https://stats.oecd.org/glossary/detail.asp?ID=824

[21] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004). OJ C 31, 5.2.2004, p. 5–18, paras 76-78
[22] Article 3(3) TFEU requires that the Union shall work for a sustainable development based on a higher level of protection and improvement of the quality of the environment, article 7 TFEU confirms that these objectives must be taken into account in competition law, article 191(2) TFEU mandates that EU policy on environmental sustainability should be based on the precautionary principles and article 37 of the ECFR [explain] states that a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union.
[23] Case M. 7292, DEMB/MONDELEZ/CHARGER OPCO (2015) para 57 https://ec.europa.eu/competition/mergers/cases/decisions/m7292_3753_2.pdf

Second, *Aleris/Novelis*[24]. In this case, the Commission considered environmental efficiencies as a crucial part of market definition. When defining the relevant market, the Commission differentiated a separate market for aluminium products that were used in the production of fuel-efficient vehicles.[25] Moreover, this factor was also considered in the remedies package that was proposed and the merger was finally approved after carrying out an in-depth investigation. As in the previous case, the Commission concluded that the acquisition of Aleris by Novelis, subject to the remedy package, would not have a negative impact on competition and would not lead to higher prices for consumers.

Third, *Aurubis/Metallo*[26]. This case is the most remarkable one when it comes to the consideration of environmental externalities in the assessment of a merger. In this case, both companies were purchasers of copper scrap and the main concern of the Commission was that by increasing its buyer power the price of the material would be reduced. Therefore, its collection would be disincentivized and lead to a higher consumption of primary copper which tends to generate higher CO2 emissions.[27] By doing so, the Commission set a precedent in the consideration of environmental externalities under the theory of harm. Again, the Commission carried out an in-depth investigation and concluded that the merger would not significantly impede effective competition.

When it comes to considering environmental consequences, there are not many precedents yet to extract a tendency from the Commission. But the increasing number of companies that create innovative green products in the market and the ratification of the EU Green Deal lead suggests the need to search for the best way to introduce these factors into the legal framework.

Climate change and global warming are problems that concern all countries globally, and we have several national competition authorities that may choose to incorporate sustainability into their analyses. One controversial case is *Milba/Zollern*[28] in Germany; a joint venture that was first blocked by the Federal Cartel Office and subsequently approved by the government due to merger-specific environmental externalities. The German Federal Minister of Economics and Energy overrode the prohibition because it considered that the environmental policy objectives outweighed the competition concerns identified.[29]

Furthermore, in the *Aviagen/Hubbard*[30] case, the Portuguese Competition Authority considered the market relevance of slow-growth chickens in terms of sustainability concerns. One more time, sustainability factors were relevant in the definition of the relevant markets.[31]

Lastly, other relevant merger cases that have been paving the way to connect competition policy with global sustainable goals can be found in some US cases such as *Post/Tree House*[32] and *Danone/WhiteWave*[33].

For all these reasons, even if there are some cases arising in this field, there is yet no sufficient guidance on how to quantify the environmental externalities as an efficiency gain that could be evaluated under a balancing act. In the following chapter, we will explore several approaches to include them.

How environmental externalities could be considered under Merger Control

Climate change being a crisis that requires urgent action, the transition towards a sustainable economy should be supported by higher effort to provide legal certainty. Then, ow can competition law and more specifically merger control introduce environmental objectives to enhance the green deal?

The efficiency argument

This argument is based on the concept of efficiency that is part of the Commission's assessment of mergers. Mergers, acquisitions, or joint ventures may bring positive consequences for competition – for instance, by reducing the final price for consumers – but these can also be harmful for competition leading to undesirable outcomes. However, merger-specific

[24] Röhrig, Markus, Lukas Ritzenhoff and Malcolm Tiffin-Richards. 2021. "Green Deal and Merger Control Sustainability – A Killer Deal Rationale?" *Hengeler Mueller* https://www.hengeler.com/fileadmin/news/Newsletter/2021_03_BRX.pdf
[25] Ibid
[26] European Commission. 2019. "Mergers: Commission opens in-depth investigation into proposed acquisitions of Metallo by Aurubis" https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6305
[27] Rosenboom, Nicole. 2021. "The role of sustainability in merger control" https://www.oxera.com/insights/agenda/articles/the-role-of-sustainability-in-merger-control/
[28] Offergeld, Philipp. 2020. "Miba/Zollern: Ministerial Authorisation Revisited" *D'Kart* https://www.d-kart.de/blog/2020/08/21/miba-zollern-ministererlaubnis-revisited/
[29] Crozals, Dorothee. 2019. "German Federal Minister of Economics and Energy overrides the prohibition of a slide-bearing business join venture for environmental policy reasons" *Linklaters* https://www.linklaters.com/en/insights/publications/2019/august/german-federal-minister-overrides-the-prohibition-of-a-slide-bearing-business-joint-venture
[30] Decisão de Não Oposição da Autoridade da Concorrência. 2017. "Ccent. 45/2017 Aviagen/Hubbard" https://www.concorrencia.pt/sites/default/files/processos/ccent/AdC-CCENT_2017_45-Decisao-VNC-final-net.pdf
[31] Ibid
[32] US Federal Trade Commission "FTC Alleges Post Holdings, Inc.'s Proposed Acquisition of TreeHouse Foods, Inc.'s Private Label Ready-to-Eat Cereal Business Will Harm Competition" https://www.ftc.gov/news-events/press-releases/2019/12/ftc-alleges-post-holdings-incs-proposed-acquisition-treehouse
[33] The United States Department of Justice. 2017. "U.S. V. DANONE S.A. AND THE WHITEWAVE FOODS COMPANY" https://www.justice.gov/atr/case/us-v-danone-sa-and-whitewave-foods-company

efficiencies may in certain cases counteract these anti-competitive outcomes.[34] Therefore, efficiencies need to be evaluated in the overall assessment to determine if, according to article 2(3) EUMR, they can outweigh potential damage to market competition. When this happens, there is more ground for the approval of a merger or acquisition.[35]

The assessment is carried out by means of a balancing act that evaluates potential legitimate justifications that are able to overcome an anti-competitive outcome. This balancing act consists in a proportionality test focused on the role of consumers, and has already been applied by public authorities to the concept of consumers' "fair share" in sustainability agreements.[36] That is why the question that arises is, which are the requirements for environmental externalities to be considered as efficiencies in the balancing act?

According to the Guidelines on the assessment of horizontal mergers, there are three cumulative conditions that should be evaluated: (1) the benefit for consumers, (2) efficiencies must be merger-specific, and (3) efficiencies must be verifiable.

First, the benefit for consumers. According to the Guidelines, consumers are the relevant benchmark for these efficiencies to be evaluated. For this reason, efficiencies should be substantial and timely.[37] In competition law, mergers may bring various types of efficiency gains (i.e. innovation or quality effects) that can lead to lower prices or other benefits to consumers.[38] Even so, these are not the only efficiencies that can be presented for the benefit of the consumer. In fact, innovation has been argued as an efficiency that can overcome an anti-competitive effect in the market. A merger that promotes a certain degree of innovation or further research in a field that benefits the consumer must be carefully considered. The same applies to environmental externalities, in which their character cannot prevent us from classifying them as qualitative efficiencies.[39]

In the case of environmental efficiencies, it is necessary to review how we should define the "consumer". It has been widely argued that the concept of consumer, from a more sustainable perspective and when assessing factors such as carbon emission or levels of pollution of the sea, should be expanded in both space and time. And because of that, there is a new concept of sustainable consumer emerging.[40]

There are two aspects of the definition of consumer used in competition law that should be questioned: the concept of individuality and the short-term perspective.

Because of the amplitude of the environmental impact, the actions taken by both private and public agents may affect others and an action taken by a certain group of consumers can affect the rest of the society. For example, if someone uses a car with higher emissions of harmful gases, this agent will affect cyclists who ride nearby, people who walk around them, and the entire society. That is why when we evaluate the potential harm that an environmental efficiency can produce to consumers, we must consider whether it is only the direct consumer or the society as a whole that will suffer the consequences, such as greater air pollution. That is why, to properly assess the effects of a merger on the environment, the role of consumer welfare must be broadened. It is no longer possible to hold an individualistic approach.

Furthermore, the effect that certain actions have on the environment is not always measurable in the short-term. Many of the environmental consequences are only predictable in the medium or long term. It is therefore necessary to consider future generations among those who will suffer the consequences of our actions.

The role of the consumer is changing as a part of a more sustainable economy.[41] Therefore, it is essential for public authorities to introduce these characteristics when evaluating merger efficiencies. However, preferences for consumers are still determined by an individualistic approach and as a result of that, the role of public authorities is essential in order to prioritise newer greener technology that would bring higher long-term benefits than just short-term.[42] This was clearly demonstrated by the Dutch competition authorities in the well-known "Chicken of Tomorrow" case in which consumers' willingness to pay more for a healthier product was shown to be very low.[43]

[34] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004). OJ C 31, 5.2.2004, para 76.

[35] Ibid, para 77.

[36] The concept of "fair share" has been recently defined with a different approach by the ACM on its Guidelines ACM Guidelines on "Sustainability agreements, opportunities within competition law" https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf

[37] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004). OJ C 31, 5.2.2004, paras 79-80.

[38] Ibid, paragraph 80.

[39] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004). OJ C 31, 5.2.2004, para 81

[40] Netherlands Authority of Consumers and Markets (ACM) and Hellenic Competition Commission (HCC). 2021. "Technical Report on Sustainability and Competition" https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf

[41] In fact, in DEMB/MONDELEZ/CHARGEROPCO the Commission considered that a healthier or a more environmentally sustainable feeling were factors that should be considered in a product.

[42] Consumers tend to think about their own benefit and in the short-term perspective, that is why the benefit of a consumer when there are environmental efficiencies, should not be considered as an average consumer but rather its concept should be broadened. In general, lower prices tend to be more attractive than a future benefit.

[43] ACM. 2014. "ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow'"

Secondly, efficiencies must be merger specific.[44] This means that these should be a direct consequence of the merger and cannot be achieved by less anti-competitive alternatives. Under the assessment of these effects, the Commission compares the potential results that should be expected from the merger with a pre-merger market perspective. For that purpose, the Commission would compare the potential efficiencies with the situation prior to the merger.[45]

Lastly, efficiencies must be verifiable.[46] Verification in this sense stands for materialisation, which means that efficiencies are likely to happen in real life and can counteract the harm produced to consumers in the market. As stated before, most environmental effects are long-term and cannot be easily quantified in a short-term perspective.[47]

As argued before, concepts must be adapted and interpreted with current circumstances and the timeframe for merger efficiencies needs to be revisited. While some scholars have supported a four year timeframe for economic efficiencies, a longer period of at least 10 to 20 years should be considered for environmental effects to be included in the assessment under merger control.[48]

Therefore, the efficiency argument would not require radical changes to the current approach in merger control but a broader interpretation of some concepts such as consumer or verifiability, so environmental externalities can be assessed as qualitative efficiencies and evaluated in the assessment of the merger.[49]

As has been explored by Simon Holmes[50], there are other approaches that are worth examining under EU merger control.

One way would be to interpret the sustainability goals under article 2(1) of the EUMR. This article sets out the criteria to approve a merger and includes the "development of technical and economic progress provided that it is to the consumers' advantage and does not form an obstacle to competition." Based on the Treaties, environmental concepts could be evaluated under this test to be included as a substantive part of merger review.[51]

Another way to integrate sustainable goals into the merger control process is through remedies. Environmental remedies would be a way to accept mergers that would negatively affect the environment. By taking these countermeasures, the merger would not be blocked and the effect in the environment could be either neutral or positive.[52]

Moreover, environmental externalities could be interpreted as legitimate interest under article 21(4) of the EUMR. According to this article, these externalities when interpreted as legitimate interests could be protected over competition concerns. Although there is no express reference to environmental protection as a legitimate interest, this can still be argued by private agents and public authorities.[53]

Lastly, under national merger procedures, there is more discretion for Member States to include environmental externalities in the assessment. In this sense, Member States can include sustainability goals in their national legislation.[54]

Other arguments: Theory of harm and non-price dimension

Other approaches that could be considered when evaluating the potential environmental effects of mergers could be based on the theory of harm and the green efficiency defence. First of all, for the theory of harm to be interpreted together with environmental externalities, it is necessary to broaden the concept of innovation to ensure that sustainability falls within its scope.[55] This approach was held in the *Bayer/Monsanto* case, in which the merger was affected by environmental efficiencies in a negative way.[56]

Other arguments, such as considering sustainability as a non-price dimension, could be applied to avoid ignoring environmental externalities. As stated earlier, there are different approaches to ensure the presence of the sustainability goal based on a broad interpretation of the current legal system. Moreover, these approaches deal with the same concern: the quantification of

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https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf

[44] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004). OJ C 31, 5.2.2004, para 85

[45] Ibid, para 9

[46] Ibid, para 86

[47] Holmes, Simon. 2020. "Climate change, sustainability, and competition law" *Journal of Antitrust Enforcement* Vol. 8, Issue 2, Pages 354–405, https://doi.org/10.1093/jaenfo/jnaa006

[48] Hawk, Barry. 2002. "Substantive Standards for Mergers and the Role of Efficiencies" *Fordham Corporate Law*, International Antitrust Law & Policy, chapter 14 http://www.jurispub.com/Substantive-Standards-for-Mergers-and-the-Role-of-Efficiencies-Chapter-14-International-Antitru.html

[49] The European Consumer Organisation (BEUC) 2020 " How competition policy can contribute to the European Green Deal" BEUC-X-2020-113 – 18/11/2020 https://www.beuc.eu/publications/beuc-x-2020-113_green_deal_and_competition_consultation_20_november.pdf

[50] Holmes, Simon. 2020. "Climate change, sustainability, and competition law" *Journal of Antitrust Enforcement* Vol. 8, Issue 2, Pages 354–405, https://doi.org/10.1093/jaenfo/jnaa006

[51] Ibid, page 39

[52] Ibid, page 42

[53] Ibid, page 45

[54] Ibid, page 45

[55] Lianos, I. and D. Katalevsky. 2017. "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 https://www.ucl.ac.uk/cles/sites/cles/files/cles-policy-paper-1-2017.pdf.

[56] Nowag, Julian. 2021. "Sustainability & Competition Law and Policy" *OECD* https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2020)3&docLanguage=En

environmental effects. There are currently no guidelines on how to quantify these effects together with traditional economic effects in the market under the balancing act.

Conclusion

This paper has argued that merger control could become one of the most efficient ways that competition policy has to foster the sustainability goals stated under the Green Deal and boost the European transition towards a greener economy. By ensuring the right approach in the assessment of mergers, this instrument can complement action in other policy areas such as regulation and tax policy.

In this sense, it is important to note that although the current legislation for merger review and the most recent guidelines about article 22 EUMR that puts the focus on the issue of killer acquisitions, there is still lack of guidance on how to quantify environmental externalities in order to justify these as innovation efficiencies and evaluate them together with economic efficiencies. The quantification of these externalities is essential to carry out the balancing act.

However, the current system is easily adaptable to environmental externalities through a reinterpretation of concepts. This variability is essential as the role of consumer should be adapted to current needs. The green transition is already a reality, and these measures must be taken as soon as possible to avoid an under-enforcement situation and prevent green killer acquisitions that eliminate competition and innovation from the market.

Beyond that, environmental efficiencies need to be quantified, since they must be capable of offsetting an anticompetitive situation. It is therefore essential to determine their social value and quantification.

For all these reasons, it is now on the European Commission to take action and use this opportunity to readapt and interpret the legal concepts by giving priority to these issues and taking into consideration long-term efficiencies together with customer welfare and competition in the market in order to quantify environmental efficiencies. There is room for improvement and reinterpretation under the current legal system in order to tackle climate change and move faster towards a greener economy by fostering innovation in the market.

Green Commitments for State Aid

Competition Implications of Differentiated Rules for New Member States

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1. Introduction

The goal of making Europe the first climate-neutral continent is central to tackling the current climate crisis. This sustained effort should include the whole European community in both scope and journey. The funds from the Recovery Plan for Europe are an integral part of the future development of a sustainable Europe. Their effective allocation is dependent on rigorous and clear legislation that considers differences without making concessions.

In line with Article 107(3)(c) of the Treaty of the Functioning of the European Union, aid should be awarded for the development of target economic activities as long as it does not impede the competitiveness of the internal market.[1] Approximately 30% of the Recovery Plan for Europe funds will be directed towards the green transition.[2] The current guidelines for State aid for Environmental Protection and Energy 2014-2020 (EEAG) comprehensively include implementations of State aid for meeting future Union standards and targets.[3] Detailed analysis and evaluations procedures are presented, with clear exception paths being set out. The current assessment principles are meant to ensure that the positive impact of the aid is larger than any possible anti-competitive effects on trade within the internal market. During the latest call for revision on the EEAG[4], interested parties have noted revenue stabilization for renewable energy sources as a way of reducing risk on initial investment as an important addition in the new guidelines.[5] Extended green conditionality is another important talking point for the revision, especially in the context of the EU recovery fund.[6] Green conditionality implies conditioning funds on the environmental performance of firms in non-Emission Trading Systems (non-ETS) industries. This practice has the power of aligning the goals of the Green Deal with a smooth economic recovery following the COVID-19 pandemic.

Green conditionality might not affect all Member States in the same way. There are worries that New Member States (NMS) might be placed at a competitive disadvantage, due to structural differences in economic composition.[7] Non-ETS industries in NMS could find it harder to access funds and stick to realistic green commitments. This is because of difference in innovativeness, labour mobility, and general infrastructure. Those differences should be addressed and new State aid guidelines should consider possible divergences. One natural proposal would be that NMS should adhere to less strict green conditionality when receiving State aid. This seems like an easy fix in the short run; however, such practices can have important competitive implications for the long run. They might further the divide between NMS and other European Union (EU) Member States by promoting support for polluting firms. Such funds would allow them to decrease prices, undermining greener competition. The funds from the European Union should not further this divide but reduce it. The role of State-aid on green policy has at its core achieving the green energy transition without leaving anybody behind.

The present analysis investigates whether NMS should be allowed less strict rules for green State aid implementation, from a competition perspective. A discussion of the possible anti-competitive implications of allowing differentiated rules for NMS is addressed. While in the short run it could be that less strict rules will allow for better prices for consumers, in the long run, the outlook is less certain. Despite postponing the meeting of the target for climate neutrality, postponing the green conditionality of State aid might not imply better competitive outcomes for the NMS in the long run.

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[1] Consolidated version of the Treaty on the Functioning of the European Union art. 107, 2008, *O.J. C 115.*

[2] *Recovery plan for Europe*, European Comission, 2020, https://ec.europa.eu/info/strategy/recovery-plan-europe, [Accessed 13 November 2021].

[3] Guidelines on State aid for environmental protection and energy, 2014, *O.J. C 200.*

[4] *State aid: Commission invites interested parties to provide comments on proposed revision of State aid Framework for research, development and innovation*, European Comission, 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1605, [Accessed 13 November 2021].

[5] *The revision of the Energy Environment State Aid Guidelines Wind Europe response to the European Commission consultation*, Wind Europe, https://windeurope.org/wp-content/uploads/files/policy/position-papers/20211201-The-revision-of-the-energy-and-environment-state-aid-guidelines-WindEurope-response-to-the-European-Commission-consultation.pdf, [Accessed 13 November 2021].

[6] Natalia Fabra, *Green Deal, Recovery and State Aid Control*, Climate Strategic Initiative: Universidad Carlos III de Madrid, 2021, https://climate.uc3m.es/2021/02/16/green-deal-recovey-state-control/, [Accessed 13 November 2021].

[7] Piotr Buras, *Digging the trenches: The EU and the Green Deal*, European Council on Foreign Relations, 2020, https://ecfr.eu/article/commentary_digging_the_trenches_the_eu_and_the_green_new_deal/, [Accessed 13 November 2021].

The first part of the report will present a discussion on the role of State aid, general anti-competitive effects, and what sets NMS apart in terms of economic structure. The second section presents the problems that might arise if NMS funds lack strong green conditions. Finally, the last section outlines an overview of possible ways to account for differences while maintaining a competitive environment.

2. Background

2.1 Role of State aid

Aid for correcting market externalities has been shown to efficiently tackle the division between societal efficient outcomes and private optional production. For example, aid in the form of research and development spending (R&D) is central to the energy transition. Firms cease R&D activities in absence of provided subsidies if the value of the activity does not contribute to future expected profits.[8] Innovation can be both risky and costly, especially in absence of the right incentives. This is particularly a problem for large energy sector companies, that are not faced with direct green consumer preferences. In these cases, State aid could then greatly contribute to reducing uncertainty and promoting green initiatives.

Additionally to risk reduction, aid can also direct resources towards socially relevant initiatives, that companies would have no incentive to undertake otherwise. In industries where consumer demand depends on the environmental outlook, firms are more likely to invest in sustainable practices.[9] Companies that do not have direct to consumer retail are going to face less demand driven incentives to adopt green practices. Incentives for those companies should be externally driven, through regulation. This is because environmental practices imply expensive adoption which is unlikely to be economically profitable.[10] State aid can help provide the economic incentives that those firms lacked, thus bridging the gap between the goal of the European Green Deal and the incentives that firms face.

If accorded properly, State aid has the capacity to accelerate the green transition. It is important that such aid ensures true green goals and that it does not impede competition at the European level. In NMS, such aid can provide a cleaner slate for the development of new infrastructure and innovation. For example, new energy infrastructure, as opposed to improvements in current projects, could at times provide more efficient and more cost-effective investment alternatives. However, the appropriate investments will only be undertaken if the correct incentives are put in place. Hence, real green commitments, as opposed to aid to keep going unproductive industries, should be at the core of aid allowances.

Generally, distortions in competition from State aid play an important role in internal market trade dynamics.[11] Firms producing in Europe face competitive pressure from both domestic and other European producers. This creates an innovative and dynamic competition process, bringing both price and quality benefits from consumers. State aid can create an unbalanced competitive environment if some Member States subsidize industries that others do not. For example, cases where State aid in the form of modernization subsidies, have the potential to increase the production capacity of the incumbent, distorting competition on the internal market as it creates a stronger market position for the company on the whole common market.[12] In line with previous Court decisions regarding State aid practices, the sole threat to competition of the internal market is enough for the European Commission to block aid allowances.[13]

The first mechanism of competition distortions directly affects the profits of the rivals. For example, subsidies aimed at decreasing firms' marginal costs can directly impact exit strategies of the rival companies.[14] Especially in industries with large market concentration, such subsidies could lead to clear damages to the probability of entry in the long term. In the case where there are median degrees of substitution between firms, the effects on the rival's profits are often the largest. When there is a low degree of substitutability, and there are differentiated products, there is often very little impact on the rival's profits. This is because of clear consumer preferences and heterogeneous product characteristics. Oftentimes, industries with a high degree of substitution are also characterized by low market concentration. In those cases, the effect of one small company receiving State aid is marginally less significant on rival's profits, due to the distribution across the whole market.[15] Arguments in favour of such subsidies say that, while they impact the rivals, they do lead to lower consumer prices in the short run. Research on the pass-through of subsidies in renewable solar markets shows that this is not always the case.[16]

State aid could also lead to possible predation in cases in which the incumbents receive aid. When there is a certain assurance

[8] Xulia González, Jordi Jaumandreu, and Consuelo Pazó, "Barriers to innovation and subsidy effectiveness", *RAND Journal of Economics*, (2005): 930–950.
[9] Rademaekers Koen et al., *Study on Incentives Driving Improvement of Environmental Performance of Companies*, technical report (ECORYS for Client: European Commission - DG Environment, 2012).
[10] Ken Peattie and Moira Ratnayaka, "Responding to the green movement," *Industrial Marketing Management* 21, no. 2 (1992): 103–110.
[11] Diheng Xu, "Rationale behind state aid control over tax incentives," *World Competition* 41, no. 2 (2018).
[12] Judgment of 9 September 2009, Holland Malt v Commission, T-369/06, EU:T:2009:319, paragraphs 37, 47-48, 50.
[13] Judgment of 30 April 2009, Commission v Italy and Wam, C-494/06 P, EU:C:2009:272, paragraphs 50-53.
[14] Rainer Nitsche, Paul Heidhues, et al., *Study on methods to analyse the impact of State aid on competition*, technical report (Directorate General Economic and Financial Affairs (DG ECFIN), European Comission, 2006).
[15] Jose Garcia and Damien Neven, "Identification of sensitive sectors in which state aid may have significant distorting effects," *Report for the HM Treasury, UK*, 2004.
[16] Jacquelyn Pless and Arthur A van Benthem, "Pass-Through as a Test for Market Power: An Application to Solar Subsidies", *American economic journal. Applied economics* 11, no. 4 (2019): 367–401.

that there is going to be future coverage of fixed costs and marginal cost reductions, companies could find it more profitable to increase their production capacity. This will hinder possible entrants to the market, leaving innovative firms out of the market. Additionally, there are also situations in which state-aid could distort innovation in countries that are not sponsoring certain industries. If a foreign entrant obtains state-sponsored R&D subsidies, the returns on investment of domestic firms decrease as a result of lower probability of obtaining patents for their new products.[17]

Any State aid directed at domestic firms in one country affects the competitive process of industry in other European countries. This also applies to sustainability and clean energy. Cheaper, more greenhouse gas (GHG)-intensive energy generation can get a competitive advantage over other, less developed renewable energy industries. In the absence of green legislation, this then puts socially optimal green energy production at a competitive disadvantage. Additionally, in the context of the European Green deal and clean energy production, countries with less developed sustainable-energy industries are put at a competitive disadvantage, mostly in the form of higher entry costs, and the inability to compete in electricity generation. In 2018, the European Network of Transmission System Operations for Electricity reporter that approximately 900,000GWh of physical electricity flows were transported across borders in Europe.[18] The plans for further integration of the transmission grid until 2050, will likely largely increase these numbers. Increased interconnectivity of the grid network implies that State aid could have additional competition implications on the European market, as producers from different countries become more connected.

The imperative nature of the climate crisis calls for immediate action from Member States. This makes the use of State aid an important incentive. Its effects on competition should then not be overlooked, but rather further integrated into the updated guidelines. These guidelines should ensure that there is a smooth transition for NMS, but at the same time acknowledge the importance of green conditionality.

2.2 Green Conditionality[19]

State aid for environmental protection is an all-encompassing term, including both firm benefits awarded in the form of tax breaks, direct subsidies, loans and grants.[20] Current European Commission Guidelines for environmental protection and energy, while comprehensive, have to be adapted such that funds coming from the €1.8 trillion package are in line with the ambitious goals of the European Green Deal.[21] Adjusting the rules is of particular importance after, with the aim of readjusting European economies during the past two years, short-term economic relief measures of State aid have been relaxed.[22] While this was justified by the imperative nature of the economic crisis, medium and long-term guidelines for State aid should grant more attention to environmental effects. One way in which this can be done is ensuring that State aid is effective in both preserving the competitive integrity of the internal market, but also accounting for structural environmental changes in the companies that receive it.[23] As such, green conditionality of State aid implies that environmental effects of non-environmental aid should also be assessed.

Only aid that conditions companies on environmental performance could align the goals of the Green Deal with smooth economic recovery.[24] This implies that State aid, as part of the Recovery Package, will be conditioned on environmental performance and restructuring provided it fulfils certain requirements. However, this conditionality should not act as a substitute to ensuring a safe competitive environment on the internal market, but rather as a complement. The green commitments should be decided upon by the Commission. To ensure that the commitments are respected, previously agreed upon standards should be discussed and a surveillance mechanism implemented.

While this will align the European Green goals with firm incentives, key economic sectors, such as steel manufacturing and energy production, are likely going to be faced with expensive restructuring programs.[25] This implies that certain sectors might be faced with tough decisions to lay off employees. Depending on the sectoral composition, green conditionality can then affect the economic recovery of different Members States disproportionately. Identifying such weaknesses will ensure a common ground that will allow for the transnational support requiring in achieving environmental goals.

[17] Garcia and Neven, "Identification of sensitive sectors in which state aid may have significant distorting effects,".

[18] European Network of Transmission System Oper ators for Electricity, *STATISTICAL FACTSHEET 2018 Provisional values as of 5 June 2019*, technical report (ENTSO-E).

[19] [The views of the author are without prejudice to the judgement of the Court in case C- 594/18 P Austria v. Commission, which is extensively analysed in the next article. The editors.]

[20] Guidelines on State aid for environmental protection and energy, 2014, *O.J. C 200.*

[21] *Recovery plan for Europe*, Europan Comission, 2020, https://ec.europa.eu/info/strategy/recovery-plan-europe, [Accessed 13 November 2021].

[22] *Temporary Framework for State aid Measures to Support the Economy in the current COVID-19 Outbreak,* European Commission, 2021, https://ec.europa.eu/competition-policy/state-aid/coronavirus/temporary-framework_en, [Accessed 13 November 2021].

[23] *State aid: Commission approves up to €4 billion French measure to recapitalise Air France,* European Commission, 6 April 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1581 , [Accessed 13 November 2021].

[24] Client Earth, Agora Energiewende and Redeker Sellner Dahs, *A State aid Framework for a Green Recovery Mainstreaming climate protection in EU State aid law*, (2020), technical report (Client Earth).

[25] Valentin Vogl, Max Ahman, and Lars J Nilsson, "The making of green steel in the EU: A policy evaluation for the early commercialization phase," *Climate Policy* 21, no. 1 (2021): 78–92.

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2.3 Status-quo in New Member States

NMS joined the European Union during and after the 2004 accession rounds.[26] Those states have historically subsidized unproductive industries, as a result of transitioning from state-run economies.[27] It could be argued that NMS are starting with a disadvantage on production efficiency and economic structure, and that they cannot be expected to adhere to the same green standards for State aid as the other Member States. In NMS conditioning all funds might destabilize current production chains and industries, placing those members in weaker competitive positions. This could lead to social and political pressure, as well as increased dependency on energy imports. As such, it is justifiable that certain green conditions could be met with reluctance. For a better understanding of structural differences between Old and New Member States, certain pollution and sectoral divergences are highlighted in the following paragraphs.

Firstly, industrial and agricultural sector labour market clusters dominate the regional distribution in NMS.[28] Those regions are often characterized by high levels of emigration of the workforce, lower than average employment rates and low employment opportunities.[29] These areas are also the ones that were most affected by the transition to a market economy and are currently the most eligible for structural funds under Cohesion policy.[30] The effect of the deindustrialization and persistent education mismatch are problems that indeed make green conditionality harder to implement for firms which operate there.[31] Sustainable production is not a priority for firms that faced large economic halt in the wake of the economic recession caused by the COVID-19 pandemic and that were facing productivity problems from before. Additionally, the lower labour mobility in NMS makes workers more sensitive to changes in employment patterns in their original living areas.[32] This means that plans for green and sustainable restructuring, as part of the condition for obtaining State aid funds, will likely imply changes in already fragile working conditions in many regional areas across NMS. This causes concern for policymakers in those areas. Re-educating the labour force comes at large costs over a long period of time, which are only justified if future returns are expected to be positive.

The case for labour force re-education is also weakened by the low position NMS have in terms of digitization and innovation at the European level. At the moment, almost all NMS score below the EU-27 average global performance for innovation.[33] This ranking has not changed since 2014, showing that indeed NMS might be struggling to keep up with internal market competitive pressures. This can be a problem when implementing green conditionality, as an innovative business environment is key to promoting sustainability.[34] As such, NMS might have a harder time implementing the structural changes needed to achieve the goals of the Green Deal. They might also require more detailed surveillance and plans for retrieving State aid funds in the case of green conditionality. This will be harder to achieve if NMS are faced with more obstacles when it comes to retrieving the funds. As this is not the scope of green conditionality, these factors should indeed be taken into account. However, there is little reason to believe that the solution of more relaxed State aid conditions is the optimal one. These implications are further discussed in the following section.

Another concern is posed by the structural differences in pollution intensity levels. These could arise because of national income sectoral composition differences, between NMS and the rest of EU Member States. One key sector in which this is the case is energy production. Tackling this sector provides the opportunity of addressing emission reduction with a bottom-up approach. Such structural differences in energy generation can be observed by looking at emission data. Emission intensity is a ratio measurement of the pollution with CO_2 relative to the intensity of energy generation. That means, the larger the measurement, the more emissions are required to produce one unit of energy. Data for figures 1, 2 and 3 was retrieved from the European Environment Agency.[35] In figure 1 I plotted an overview of current GHG emissions from the electricity sector in NMS, as compared to the older EU Member States. From the figure, it can be deduced that there is a constant trend of emission reduction. NMS show no signs of convergence to the older Member States average. Past the year 2010, there is a relatively accelerated decrease in emission intensity in both groups, however, pollution index averages are still structurally lower in older European Member States.

[26] *From 6 to 27 members*, European Commission, 2020, https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/6-27-members_en, [Accessed 13 November 2021].
[27] Mancur Olson, "Why the Transition from Communism is so Difficult," *Eastern Economic Journal* 21, no. 4 (1995):437–461.
[28] Sven Smit et al., *The future of work in Europe*, technical report (McKinsey Global Institute, 2020).
[29] *Translate Labour market statistics at regional level*, Eurostat, 2019, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Labour_market_statistics_at_regional_level, [Accessed 13 November 2021].
[30] *Is my region covered?,* European Comission, 2020, https://ec.europa.eu/regional_policy/en/policy/how/is-my-region-covered/, [Accessed 13 November 2021].
[31] Anna Kiersztyn, "Stuck in a mismatch? The persistence of overeducation during twenty years of the post-communist transition in Poland," *Economics of Education Review* 32 (2013): 78–91.
[32] Klaus F Zimmermann, "Labour mobility and the integration of european labour markets," *The Integration of European Labour Markets, Edward Elgar Publishing, Cheltenham*, 2009, 9–23.
[33] *European Innovation Scoreboard*, European Commission, 2021, https://ec.europa.eu/info/research-and-innovation/statistics/performance-indicators/european-innovation-scoreboard_en, [Accessed 13 November 2021].
[34] Marcus Wagner, *Entrepreneurship, innovation and sustainability* (Routledge, 2017).
[35] *Greenhouse gas emission intensity of electricity generation*, European Environment Agency, 2020, https://www.eea.europa.eu/data-and-maps/daviz/co2-emission-intensity-9#tab-googlechartid_googlechartid_googlechartid_googlechartid_chart_11111, [Accessed 13 November 2021].

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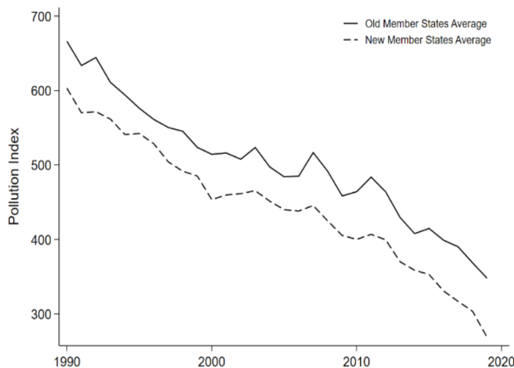
Figure 1: Pollution intensity averages from the energy sector over time

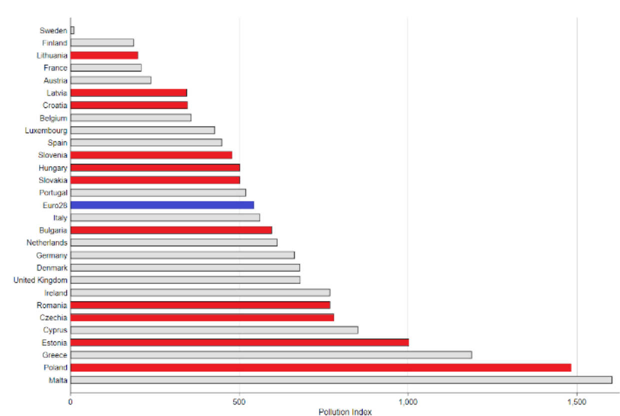


Figures 2 and 3 show a per-country representation of the evolution in pollution intensity from the energy sector. Here we can observe that in the period of approximately 30 years, there has not been a significant change in the distribution of NMS. Poland and Estonia experience the slowest decrease from all of them. This is again indicative of a coal-energy production sector, along with outdated transmission technologies.[36] Bulgaria, a country that was closer to the lower emitters in 1990 has moved up above the European average. This could be caused by the increased economic growth following the transition to a market-based economy and the ascension in the EU. Additionally, the change in position could indicate that the economic transition in this country did not account for the inclusion of renewable energy sources, but rather the development of already existing energy infrastructure. In Bulgaria, there has been little change in the energy composition over the last 30 years, with investments in renewable energy only catching some speed after 2007.[37]

Emission intensity, while an important measure for observing the development of countries energy production, does not account for productive efficiency. Productive efficiency refers to decrease in the marginal cost of production over time.[38] Due to long-term subsidization of unproductive industries, this is something NMS grapple with. This was exacerbated by persistent overeducation and skill mismatch of the country's workforce.[39] In figure 4 I show the evolution of energy production efficiency in NMS and the other EU Member States. The chosen measure decouples energy from GDP, to account for the correlation between energy production and GDP. This allows for cross country comparison across time. From the figure, we can see that in 2000 there was a significant gap in energy productivity between NMS and the other EU countries. This gap appears to close in 2008, after which all countries follow a similar upwards trend. For a better understanding of the drivers, an individual country comparison should also be considered. This was done in figures 5 and 6.[40] All NMS, while starting at a lower energy efficiency point, appear to quickly catch up. Particularly, Romania experiences an accelerated increase, similar to that of Ireland. This paves the path for further development of sustainable energy sources, exploiting the large potential those countries offer.

Overall, NMS are indeed placed in a more disadvantageous position when it comes to conditioning all State aid on environmental performance. This situation materialized because of a mixture of labour market factors, digitization and innovation progress and energy production differences. Those differences should be kept in mind when designing updated State aid rules. However, this does not mean that the new rules should absolve NMS from adhering to green conditionality. Absolving NMS from adhering to the same environmental standards creates further discrepancy across regions in a problem that transcends country borders. What seems like a disadvantaged position from NMS, can be turned around into an opportunity to level up the playing field in terms of environmental standards. The following section presents an overview of why lack of conditioning for NMS is not the preferred solution for accounting for differences. Alternative solutions are proposed in section 4.

Figure 2: Member State pollution intensity from energy sector in 1990



[36] Cambridge Institute for Sustainability Leadership (CISL), *The energy transition in Central and Eastern Europe: The business case for higher ambition*, 2019, Cambridge UK: Prince of Wales's Corporate Leaders Group

[37] *Greenhouse gas emission intensity of electricity generation*, European Environment Agency, 2020, https://www.eea.europa.eu/data-and-maps/daviz/co2-emission-intensity-9#tab-googlechartid_googlechartid_googlechartid_googlechartid_chart_11111, [Accessed 13 November 2021].

[38] Peter A Diamond and James A Mirrlees, "Optimal taxation and public production I: Production efficiency," *The American Economic Review* 61, no. 1 (1971): 8–27.

[39] Kiersztyn, Anna, "Stuck in a mismatch? The persistence of overeducation during twenty years of the post-communist transition in Poland." *Economics of Education Review* 32 (2013): 78-91.

[40] I created the charts in figures 4, 5 and 6 using data from *Energy Porductivity*,Eurostat,2019, https://ec.europa.eu/eurostat/en/web/products-datasets/-/T2020_RD310#:~:text=The%20indicator%20results%20from%20the,use%20from%20growth%20in%20GDP, [Accessed 13 November 2021].

Figure 3: Member State pollution intensity from energy sector in 2019

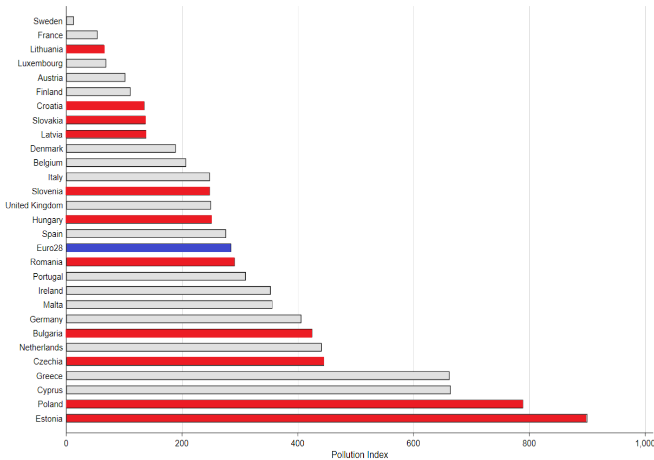


Figure 4: Evolution energy efficiency

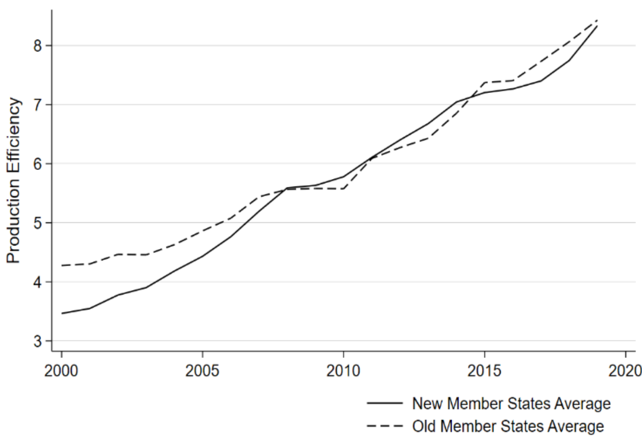


Figure 5: Energy production efficiency evolution in NMS

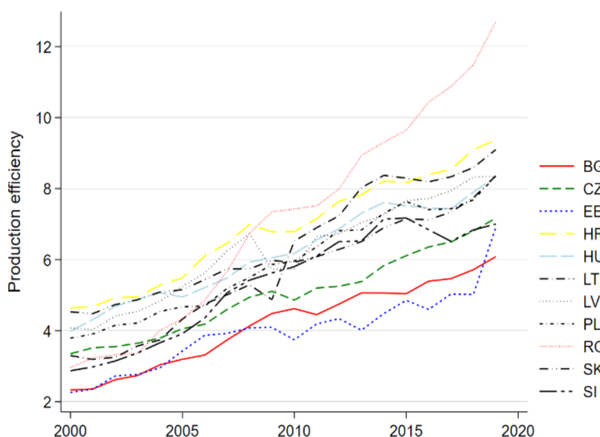
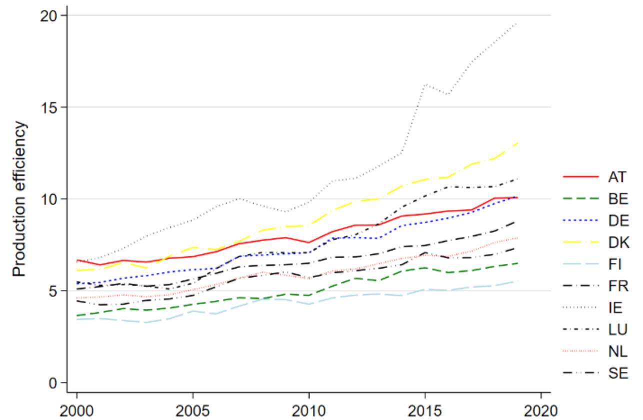


Figure 6: Energy production efficiency evolution other EU Member States



3. Implications

Awarding aid without green conditionality is likely to further set back the NMS in terms of green technology implementation. It could foster the growth of anti-competitive practices from State aid without ensuring that the green end-goal is met. Recently revised Regional Aid Guidelines[41] underline the importance of cohesion policy aligning regional development with the European Green Deal.[42] This is in line with the proposal of this analysis. The following section presents the mechanisms in which NMS will be left behind if sustainability targets do not come attached to aid allowances.

3.1 Further Divergence

State aid without green conditional requirements could imply further divergence between NMS and the rest of the Union members, even in the case of green orientation. This brings the scope of green aid further from the original goal. The goals of the European Green Deal are ambitious and can only be achieved by real commitments. These commitments are likely to imply, at some points, both profit and job losses.[43] This makes them unattractive from an economic profit perspective to firms in all Member States. Particularly, as NMS firms appear to be at a disadvantage because of the divergences explained in section 2.3. There are worries that firms in NMS that will not qualify for aid if it is conditioned on improved sustainability performance,

[41] European Comission, Communication from the Comission to the European Parliament, The European Concil, The Concil, The European Economic and Social Comittee and the Committee of the Regions, The European Green Deal, 2019, *COM/2019/64*.

[42] Guidelines on regional State aid 2014-2020, 2013, *O.J. C 209*.

[43] Tareq AlKhidir and Suhaiza Zailani, "Going green in supply chain towards environmental sustainability," *Global Journal of Environmental Research* 3, no. 3 (2009): 246–251.

would try to find alternative ways of funding. As such, they might increase prices in the short run in order to cover their losses. This could lead to higher prices, harming consumers on domestic markets.[44] In the wake of the economic recovery, this will set back consumption in key sectors for NMS, such as home-based vehicles.[45] Then, while in the short-term postponing green restructuring could allow NMS a swifter economic recovery, it does not ensure that those firms will indeed undertake the sustainability restructuring plans.[46] As environmental regulation is expected to become stricter in the European Union, those firms will just be faced with delayed compliance measures. Starting to adapt sooner allows firms the chance to possibly continue operating on the internal market. This will also ensure increased competitive pressure in the other Member States, fostering a stable and innovative environment.[47] Thus, sheltering NMS firms in the short run from relaxed green conditions would not ensure their survival in the long run.

Another important concern is that, without support, firms that are important employers in distinct regions are going to go bankrupt. If those regions are characterized by already declining labour opportunities[48], this will impact the progress of Cohesion policy.[49] This is also unpopular at the political level, causing additional pressure on representatives and decreasing supports for green policies.[50] However, the same effect can be a cause of concern in the long run as environmental regulation might become stricter. These policies will just delay re-education of the labour force, arguably weakening the competitive advantage of cheaper labour force in NMS.[51] This will lead to delayed political pressure, triggering a similar mechanism to the one described above. Such effects will then not help the case of the labour market mobility of NMS, further diverging it from the one in older European Union Member States. Additional support for labour re-education programs could help alleviate possible unemployment effects in the short run.[52] In the long run, the move towards a sustainable and green production process, fostered by a stable investing environment, could fully capture the potential of the regions, especially in terms of renewable energy investments.[53] Overall, the sooner industries in less diversified regions adapt to upcoming environmental standards, the sooner the labour market environment will stabilize. This will foster further growth and investment in the NMS. Those effects will only take place with a delay in case State aid for non-environmental practices will not take into account sustainability effects.

Additionally, there are also concerns about collusive behaviour caused by State aid. Subsidization for green product development can lead to collusive behaviour. This is because, in the presence of subsidies, collusion is always more profitable for the firms.[54] The risk of decreased demand for the product is alleviated by the aid scheme. Green product development, requiring large upfront capital investments, is sensitive to consumer demand for achieving desired profit levels. If subsidies are awarded for firms, the risk associated with falling consumer demand is decreased. This means that collusive profits become more attractive. Furthermore, this implies that green product development will not reach optimal quality improvements. In NMS, consumer preferences might be more sensitive to prices, and possibly have weaker green product preferences.[55] [56] This implies that firms will not be pushed as strongly by consumers to adopt green products and behaviour. As a consequence, low consumer preferences could foster collusive behaviour in optimal product quality improvements and prices, further harming consumers and the goals of the Green Deal.

3.2 Abuse of Dominance

In the absence of green conditionality, incumbents with large GHG emissions might find it more lucrative to delay green restructuring to reap the benefits of stabilized profit structures. Consider an incumbent firm with a large GHG footprint and significant market power that has been affected by a recent economic shock. Qualifying such a firm for State aid allowance, without ensuring set green goals can affect the competitive environment and set back greened production, through both the

[44] Gerald R Faulhaber and Stephen B Levinson, "Subsidy-free prices and anonymous equity," *The American Economic Review* 71, no. 5 (1981): 1083–1091.
[45] European Commission, *Transport in the European Union: Current Trends and Issues*, technical report (2018). https://ec.europa.eu/transport/sites/transport/files/2018-transport-in-the-eu-current-trends-and-issues.pdf, [Accessed 05 May 2021].
[46] Hagspiel, Verena, Cláudia Nunes, Carlos Oliveira, and Manuel Portela. "Green investment under time-dependent subsidy retraction risk." *Journal of Economic Dynamics and Control* 126 (2021): 103936.
[47] James M Utterback and Fernando F Suárez, "Innovation, competition, and industry structure," *Research policy* 22, no. 1 (1993): 1–21.
[48] *Translate Labour market statistics at regional level*, Eurostat, 2019, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Labour_market_statistics_at_regional_level, [Accessed 13 November 2021].
[49] Guidelines on regional State aid 2014-2020, 2013, *O.J. C 209*.
[50] Gilles Saint-Paul, "Some political aspects of unemployment," *European Economic Review* 39, nos. 3-4 (1995): 575–582.
[51] European Commission, *Transport in the European Union: Current Trends and Issues*, technical report (2018). https://ec.europa.eu/transport/sites/transport/files/2018-transport-in-the-eu-current-trends-and-issues.pdf, [Accessed 05 May 2021].
[52] Gordon Betcherman, Amit Dar, and Karina Olivas, "Impacts of active labor market programs: New evidence from evaluations with particular attention to developing and transition countries" (2004).
[53] Cambridge Institute for Sustainability Leadership (CISL), *The energy transition in Central and Eastern Europe: The business case for higher ambition*, 2019, Cambridge UK: Prince of Wales's Corporate Leaders Group.
[54] *Subrata* Saha, Izabela Nielsen, and Shib Sankar Sana, "Effect of Optimal Subsidy Rate and Strategic Behaviour of Supply Chain Members under Competition on Green Product Retailing," *Mathematical Problems in Engineering,* (2021).
[55] Aindrila Biswas and Mousumi Roy, "Green products: an exploratory study on the consumer behaviour in emerging economies of the East," *Journal of Cleaner Production* 87 (2015): 463–468.
[56] Vladimır Vietoris et al., "Analysis of consumer preferences at organic food purchase in Romania," *Polish journal of food and nutrition sciences* 66, no. 2 (2016): 139.

behaviour of the incumbent and the signals it sends to future entrants.

Firstly, the incumbent, as a receiver of aid is likely to internalize the subsidy, with little effect on direct consumer prices.[57] Thus, the aid will be used for internal revenue stabilization rather than a direct reduction in prices that downstream participants face. This internalized aid can also be used for an increase in production capacity. In the case of energy markets, there is little demand expansion, especially since developments in batteries are slow.[58] As such, investments in capacity become a viable long-term strategy for the incumbent for delaying entry. In the long term, this strategy could keep less GHG intensive firms out of the market. If the restructuring aid was not conditional on green standards and was mainly diverted to activities meant to keep the incumbent's dominant position, this can have ripple effects on the long-term green targets. Especially in NMS where incumbent energy industries require large restructuring projects, this is an important dynamic to consider.

National governments face political pressure from both workers and incumbent firms to offer aid to established industries in order to ensure their position. This is especially true for NMS governments, which, after integration on the internal market, face increased pressure to subsidise national companies, as market integration usually leads to more competition, causing inefficient national companies to exit the market.[59] In the case of incumbent subsidization for environmental restructuring plans, there are possibilities where, because on non-optimal institutional surveillance, the funds are used for payments of old debts.[60] Specifically, after being offered €50 million State aid in the form of state guarantees, the Polish steel manufacturer *Arcelor Huta Warszawa* used approximately €30 million to pay its old debts.[61] Ultimately the Commission concluded that such aid was not in accordance with the Single Market and retracted it for misuse. These dynamics intervene with the efficient allocation of State aid funds and create inefficiencies in the market allocation process, without considering any green goals. As such, these motives should be eliminated from the process of State aid allocation, ensuring that all aid is targeted with long-term climate goals in mind. NMS often argue that such drastic shifts create pressure on workers from such industries and the whole economic process. However, delaying the transition to a greener economy by incumbent protection only postpones the problem rather than providing a solution. Retraining programs, bottom-up restructuring and funds directed towards smoothing the transition are likely to encourage entry and beneficial competitive processes.

4. Possible Solutions

This section presents an overview of some general solutions that would account for differences between NMS and older EU Member States, but still ensure that the same green standard is achieved. Those are general directions that future aid guidelines can take. Implementing these solutions will not compromise on green conditionality of State aid, but could allow more powerful incentives for firms in NMS.

4.1 Tax break differentiation

Aid in the form of tax breaks for specific industrial activities, such as R&D, is effective in promoting employment and directing resources towards public interest objectives.[62] In the case of green conditionality, funds can be used for tax breaks that are directly linked to the sustainability improvement of qualifying firms. These taxes can be linked to a variety of activities, for example, income from firm activities that managed to significantly reduce carbon emissions, as compared to the averages of previous quarters. This will act as an incentive for existing firms to direct resources towards the departments that show potential towards sustainable developments.[63] One possible way to differentiate account for NMS discrepancies is facilitating the process of receiving R&D subsidies for departments that qualify for emission reduction tax breaks. As such, the tax break remains the same, but there are extra funds allocated to firms in NMS that show initiative and commitment, but that sometimes lack enough capital to undertake them. This will ensure coherent standards across Member States. One way to implement this is making use of the regional differentiation determined by Cohesion Policy guidelines.[64]

4.2 Support for labour training in firms that receive restructuring funds

As previously discussed, some regional labour markets in NMS present below EU average employment opportunities[65] and are

[57] Jacquelyn Pless and Arthur A van Benthem, "Pass-Through as a Test for Market Power: An Application to Solar Subsidies", *American economic journal. Applied economics* 11, no. 4 (2019): 367–401.
[58] Xiaosong Hu et al., "Technological developments in batteries: a survey of principal roles, types, and management needs," *IEEE Power and Energy Magazine* 15, no. 5 (2017): 20–31.
[59] Stephen Martin and Paola Valbonesi, "Equilibrium State Aid in Integrating Markets" [in eng], *The B.E. journal of economic analysis policy* 8, no. 1 (2008): 33–, issn: 1935-1682.
[60] Elisabetta Righini and Guendalina Catti De Gasperi, "Survey – The Application of EU State Aid Law in the Energy Sector, " *Journal of European competition law practice* 10, no. 1 (2019): 53–68, issn: 2041-7764.
[61] *State aid: Commission finds misuse of €2 million of restructuring aid by Arcelor Huta Warszawa*, European Comission, 2007, https://ec.europa.eu/commission/presscorner/detail/en/IP_07_1910, [Accessed 13 November 2021].
[62] Irem Guceri, "Will the real R&D employees please stand up? Effects of tax breaks on firm-level outcomes," *International Tax and Public Finance* 25, no. 1 (2018): 1–63.
[63] Lars P Feld and Bruno S Frey, "Tax compliance as the result of a psychological tax contract: The role of incentives and responsive regulation," *Law & Policy* 29, no. 1 (2007): 102–120.
[64] Guidelines on regional State aid 2014-2020, 2013, *O.J. C 209*.
[65] *Translate Labour market statistics at regional level*, Eurostat, 2019, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Labour_market_statistics_at_regional_level, [Accessed 13 November 2021].

often characterized by over-education and skill mismatch.[66] This created a less mobile workforce, that could be affected by the large-scale restructuring projects which will be required to achieve the goals of the Green Deal. Support for industrial labour training could help ease this situation, while also adapting the labour environment in NMS. Labour and social mobility were also extensively impacted by the COVID-19. This is particularly worrying as most NMS have experienced an increase in the number of young people that are not enrolled in training or employed.[67] Additionally, school closures are estimated to create lasting impacts in less developed areas. They could imply worrying outcomes for human capital development.[68] Ensuring that State aid funds align environmental focus with social security goals will create an enduring influence, levelling up the playing field for NMS. On-site programs, for firms undertaking restructuring processes should come as conditions for receiving the funds. These practices can be effective in both the development of human capital and boosting long-term earnings prospects.[69]

4.3 Support for closed-loop-supply-chain management

Closed-loop-supply-chain (CLSL) management refers to supply chains in which all consumers products are used, recycled and disposed of in a close loop.[70] This method would be particularly important in NMS, where there are still problems of adequate waste management.[71] State aid conditions which promote such methods is then likely to incentivise firms to rethink production strategy in close loops, while also promoting an innovative environment for firms that are planning on rethinking waste management. These methods and direction can also be useful in terms of novel *Waste-to-Energy* strategies.[72] In the long run, depending on technology evolution implementation, such strategies becoming integral processes in industrial activities of NMS. As such, updated State aid guidelines could nudge incumbent firms towards CLSL adoption and other novel green production strategies.

4.4 Yardstick competition and supervisory mechanism

Close supervision of the firms in NMS that were awarded State aid is needed effective allocation towards meeting the conditions that funds were awarded upon. These mechanisms, parallel to standards and investigations done by the European Commission, could also come from national regulatory authorities. They should be, preferably, undertaken with the same frequency as the commitments for emission reduction. The regulatory standards should be easily comparable and harmonized at European level, in order to align with directive 2014/95/EU, on disclosures of non-financial information.[73] Additionally, regulators can also consider yardstick competition frameworks for reporting emission reductions.[74] Promoting firms that come forward with the largest proportional decreases in emission standards, with respect to both past firm performance and rivals. In NMS, but also for in all other EU Member States, strong regulatory supervision, that takes into account industry input, but follows directives at European level, should help further incentivise firms to use economic recovery funds in line with green commitments.

5. Conclusion

Awarding State aid to NMS without green conditionality will not help them achieve the 2050 climate neutrality goals. Such a policy will likely further diverge green standards, setting NMS back in terms of sustainability adoption. This causes competitive concerns that are more imminent than industries in the NMS not being able to compete with firms in other EU Member States which received aid. NMS could end up awarding funds to firms that do not have green restructuring intentions and that will use them to strengthen their market positions. This could set back industries in NMS in terms of green innovation and producer confidence. The labour market might also be placed at a disadvantage. The workers would not have time to develop a valuable set of skills for the upcoming green economy. Operating on the assumption that further environmental regulation will be implemented in the future, NMS would not have the time to adapt and then will be placed at a more fragile competitive disadvantage. Regions that are already experiencing decline and are not diversified in terms of economic structure might suffer the most. Those regions are most common in NMS.

Adopting less relaxed green conditions for State aid in NMS is not the preferred policy for accounting for differences in structure.

[66] Kiersztyn, Anna, "Stuck in a mismatch? The persistence of overeducation during twenty years of the post-communist transition in Poland." *Economics of Education Review* 32 (2013): 78-91.

[67] Social Affairs Directorate-General for Employment and Inclusion, *Employment and Social Developments in Europe Towards a strong social Europe in the aftermath of the COVID-19 crisis: Reducing disparities and addressing distributional impacts*, technical report (European Comission, 2020).

[68] Agostinelli, Francesco, Matthias Doepke, Giuseppe Sorrenti, and Fabrizio Zilibotti. *When the great equalizer shuts down: Schools, peers, and parents in pandemic times*. No. w28264. National Bureau of Economic Research, 2020.

[69] Giorgio Brunello, Simona Lorena Comi, and Daniela Sonedda, "Training subsidies and the wage returns to continuing vocational training: Evidence from Italian regions," *Labour Economics* 19, no. 3 (2012): 361–372.

[70] N Raj Kumar and RM Satheesh Kumar, "Closed loop supply chain management and reverse logistics-A literature review," *International Journal of Engineering Research and Technology* 6, no. 4 (2013): 455–468

[71] Nicky Gregson et al., "Doing the 'dirty work'of the green economy: Resource recovery and migrant labour in the EU," *European Urban and Regional Studies* 23, no. 4 (2016): 541–555.

[72] Christos Vlachokostas, "Closing the loop between energy production and waste management: A conceptual approach towards sustainable development," *Sustainability* 12, no. 15 (2020): 5995.

[73] Council Directive, 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance [2014] *O.J. L 330.*

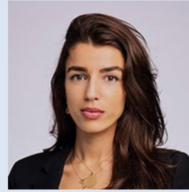
[74] Andrei Shleifer, "A theory of yardstick competition," *The RAND Journal of Economics*, (1985): 319–327.

Those differences in structure were discussed to arise from industrial composition, labour market dynamics, innovation environment and productive efficiency. Based on this analysis the following solutions are proposed: (1) incentive based tax-breaks, (2) supporting newly developed green industrial mechanisms, (3) labour market training, and (4) a strong supervisory mechanism. Those policies create green incentives, promoting firm initiatives and commitments. While these solutions do not fully solve the problem, they allow for a starting point for policy design that leaves no Member State behind. Future analysis should focus on the feasibility of implementing those solutions. This can be done by assessing design methods for the best way to implement an industry run supervisory mechanism that further stresses the importance of green production. Lastly, more attention should be directed towards empirically assessing how the same policies affect similar firms in NMS and other EU Member State. The focus of those policies could be on implementation of novel production strategies. Overall, there is much to look forward to in respect to achieving the goals of the European Green Deal. Prioritizing green solutions should be at the forefront of policy design and State aid regulation.

Green' conditionality in State aid law

The climate and COVID-19 crises reaffirmed the need, the Hinkley Point C case the possibility

Rosa Warning



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1. Introduction

State aid has recently played, and continues to play, a prominent role in at least two crises that the world is facing right now. First, the economic crisis caused by the COVID-19 pandemic, requiring massive state intervention in the economy. Second, the climate crisis, which calls for a notable (re)allocation of resources towards clean energies.

To date, the European Commission (the *Commission)* has mostly focused its State aid oversight on limiting market distortions rather than ensuring that aid measures (at large) contribute to, or at least do not harm, climate and energy policies and regulations. When aid measures aim at other purposes than climate or energy, the Commission has been less inclined (or legally restrained) to exercise its discretion in State aid matters to more generally push for an alignment of national aid measures with European climate and energy objectives.[1] Illustrative are the EUR 37 billion in bailout funds provided to airlines to tackle the economic impact of the coronavirus outbreak;[2] almost exclusively without climate conditions.

However, increasingly calls are made to look for alternative – stricter and more effective – EU climate safeguards. This paper presents one such proposal: the idea of making the award of State aid conditional on compliance with certain green conditions, in line with climate targets set at EU and Member State level.

Limited fiscal space, time constraints, and economic efficiency demand maintaining fair competition in the internal market while tackling the climate crisis.[3] Yet, this does not necessarily imply a role for the State aid framework and the Commission. The *Hinkley Point C* case (2020)[4] provided the Commission with some guidelines in this regard. Although the judgment does not seem to have led to a radical change in the Commission's assessment, the author believes that the judgment could potentially be an important step towards a real integration of EU State aid and environmental rules. Therefore, the judgment is analysed here to illustrate the potential for a conditionality-based approach in EU State aid law.

Against this backdrop, the present article aims to understand the potential for a further role of State aid law in the EU climate transition by implementing the principle of "green conditionality". To this end, the article is structured as follows: *Section 2* outlines the background of this paper by introducing the concept of conditionality, as understood in this paper, and by discussing the relevant competences involved to gain a full understanding of the (potential) role of the Commission regarding the achievement of climate objectives through State aid legislation and the concept of conditionality. The latter is done by analysing not only the Treaty provisions on State aid, but also the Commission's development towards a soft law approach, and the hardening thereof. In light of these observations, *Section 3* turns its attention to the *Hinkley Point C* judgment because, as noted above, it has potentially important implications for the possibility of a conditionality-based approach. *Section 4* discusses the complex question that the Hinkley Point C case saddles us with and proposes a solution. Based on the foregoing, *Section 5* formulates three concrete rules to be implemented in State aid law and applied in State aid decision-making practice. *Section 6* concludes.

The past year has shown (again) that EU State aid rules play a crucial role. Both in maintaining a level playing field and in helping to pave the way for economic restructuring and recovery. Yet, the rules can do more to ensure that the recovery is sustainable. The challenge for State aid rules is to take a longer-term and more dynamic view of the process of competition, the starting point of which is currently not a situation of equilibrium.

2. Background

(a) Understanding the concept

In simple terms, conditionality as a policy instrument must be understood as the attachment of conditions to a promised EU benefit. It is a policy tool as conditionality can be used by the EU to incentivise actors towards attaining specific governance goals, namely by making the entitlement to financial support

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1 See similarly, Clientearth, Agora-Energiewende, and Redeker Sellner Dahs. 2020. "A State Aid Framework for a Green Recovery. Mainstreaming climate protection in EU State aid law," Report, p. 3.

2 With a further EUR 4 billion currently under discussion. See Commission. 2020. "Coronavirus Outbreak – List of Member State Measures approved under Articles 107(2)(b), 107(3)(b) and 107(3)(c) TFEU and under the State Aid Temporary Framework." Accessed June 27, 2021. ec.europa.eu/covid-19/State_aid_decisions_ Greenpeace. 2020. "Airline Bailout Tracker" Accessed June 27, 2021. greenpeace-airline-bailout-tracker.

3 Similarly, these factors demand tackling the COVID-19 crisis and the climate crisis in parallel.

4 Case C-594/18 P *Austria v Commission* (*Hinkley Point C*) EU:C:2020:742, para. 100.

The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

conditional on Member States' compliance with certain obligations or objectives.[5] The failure to comply with the clearly identified obligation or goal entails the loss of entitlement to financial assistance. The (proposed) use of conditionality as a policy instrument is not new and has recently been the topic of debate.[6] For example, in the context of the MFF post-2020.[7]

State aid law is also not unfamiliar with the concept of conditionality.[8] A recent example is the State aid Temporary Framework to support the economy in the context of the COVID-19 outbreak.[9] The conditions include rules concerning dividend payments and tax heavens, but environmental conditions are formulated in rather passive terms.[10] The only sustainability condition is the obligation on large enterprises to report on the use of aid in alignment with the Union's climate-neutrality objective. One might well ask, however, why taxpayer money should be spent in support of structures that are not sustainable and that the State would want to discourage or is committed to combat and eliminate.[11] Such questions become even more pressing if it turns out that support to the fossil fuel industry would not be in line with the ambitious goals of Member States for reducing carbon emissions and with the EU Green Deal.

In light of these legitimate questions, the concept of green conditionality in State aid law is interpreted here as making the grant of State aid for *non*-environmental reasons subject to compliance with certain climate conditions. While it is true that "[State aid rules] *have facilitated green investments whilst limiting distortive effects of state subsidies in the past*,"[12] they do not limit aid to activities that harm the environment.[13] This can be understood when analysing the logic under Article 107 TFEU. State aid is in principle prohibited, but the "exemptions" to the general rule are premised on a recognition that markets may not always work properly when left alone – due, for example, to the presence of externalities – and may need some intervention from the state to work more effectively.[14] Thus, the Treaty expressly provides that certain non-economic reasons, which have been interpreted to include environmental ones,[15] can constitute legitimate justifications for the grant of State aid. However, integration generally works one way. In other words, while the State aid rules encourage positive environmental effects, they have not limited environmentally harmful effects of aid.[16]

(b) Understanding the limits: The respective roles of Member States governments and the European Commission

Before examining the potential for a conditionality-approach in State aid law, it is worthwhile recalling the competences involved. One of the distinguishing features of State aid control is that the Commission has to deal primarily with Member States and not with firms. The EU's regulation of State aid restrains the ability of democratically elected governments to invest and subsidise as they wish,[17] and thus involves the close scrutiny by the Commission of transactions that have historically been the exclusive preserve of sovereign states.[18] Articles 107-109 TFEU, which have remained almost unchanged since their incorporation into the original Treaty of Rome, therefore, rest on a particularly sensitive compromise. They balance between the liberal vision of an integrated market and the Member States' prerogative to intervene in their own economies.[19]

[5] Kölling, Mario. 2017. "Policy conditionality – a new instrument in the EU budget post-2020?" *Swedish Institute for European Policy Studies,* no. 10: 1-7, p. 2.

[6] For instance in the context of the negotiation of the Multiannual Financial Framework (MFF) post-2020. The basic idea underlying this new conditionality under the MFF post-2020 is to suspend EU funding for Member States that do not respect the Rule of Law, see e.g. Heinemann, Friedrich. 2018. "Going for the Wallet? Rule-of-Law Conditionality in the Next EU Multiannual Financial Framework" *Intereconomics* 53, no. 6: 297-301. Review of European Economic Policy.

[7] An obvious difference between conditionality in the State aid framework and other types of conditionality, for example, in the context of the MFF post-2020, is that the latter concerns the use of the *EU budget* as a policy instrument (the suspension of EU funds in cases of systematic rule of law infringements), whereas the introduction of conditionality in State aid legislation concerns restrictions imposed upon the *national* budgets.

[8] E.g. Commission Communication C 83/1 of 7 April 2009 "Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis" OJ 2009 C 83/1, at 4.5.

[9] On 18 March 2020, the Commission issued a Temporary Framework of State aid rules that relaxes rules on direct grants, loans, guarantees, and capital injection and equity measures that the Member States can take. The Temporary Framework has been amended and complemented three times, on 3 April, 8 May and 29 June 2020.

[10] Commission Communication C(2020) 3156 final of 8 May 2020 "Second Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak" [2020] OJ C 164, paras. 44 and 45; Commission Communication 2020/C 218/03 of 2 July 2020 "Third amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak" OJ C 218, section 1, para. 2.

[11] Similar question raised in Nowag, Julian, and Marios Jacovides. 2020. "Covid-19 and the transformative power of State Aid: a framework for a democratically legitimate recovery" Accessed 29 June 2021. lexxion.eu//covid-19-and-state-aid.

[12] ClientEarth. 2020. " Competition policy supporting the Green Deal Our call for a sustainable competition policy." Accessed 5 July 2021. clientearth-reply-to-call, p. 8.

[13] See e.g. Commission Communication 2014/C 200/01 of 28 June 2014 "Guidelines on State aid for environmental protection and energy 2014-2020 (EEAG)" [2014] OJ C 200.

[14] Kingston, Suzanne. 2011. *Greening EU Competition Law and Policy*. Cambridge: Cambridge University Press, p. 379.

[15] Ibid.

[16] Recognised in Commission. 2020. "Commission staff working document – Fitness Check of the 2012 State aid modernisation package, railways guidelines and short-term export credit insurance" SWD(2020) 257 final, part 3/4, p. 85. This approach has also been confirmed by the General Court. See, for example, Case T-158/99 *Thermenhotel Stoiser v. Commission* [2004] ECR II-1.

[17] Kassim, Hussein and Bruce Lyons. 2013. "The New Political Economy of EU State Aid Policy"J. Int Comp Trade, p. 1.

[18] Ibid., 3.

[19] Ibid., 4.

The call for the Commission to introduce a green conditionality mechanism into State aid law implies that the Commission has the competence to do so. It is certainly true that the Commission is exclusively competent in the area of State aid control, but initially State aid policy remained a Member State competence.[20] In principle, State aid is a policy area of negative integration and centralised control. As the notion of aid transformed and became "more complex," there was a shift from negative to positive integration and from soft to hard law. With the gradual development of its soft law approach, the Commission has gained increasing influence on the substance of State aid *policy*.

Member States governments progressively appeared to accept this development.[21] This must be understood in light of two instruments of the Commission. First, the most powerful instrument at the Commission's disposal: (the threat of) a negative decision.[22] Indeed, ''*the harder it gets for the Member States to circumvent European State aid control and the costlier it gets to simply ignore it, the more politically salient becomes the question of which types of State aid are still considered to be admissible in the common market.*"[23] Second, the Commission managed to shift and increase the burden of proof regarding compatible aid towards Member States.[24] In order to pass the balancing test and enhance the chances for approval of aid measures, national governments will want to design and justify their State aid measures along the lines of the Commission's Guidelines, communications and Frameworks, in which the Commission lays out how it intends to exercise its wide discretion in assessing whether planned aid measures are compatible with the Treaties.

The soft rules[25] laid down by the Commission have become *de facto* and even *de jure* binding upon Member States. Whereas, in principle, Member States keep the autonomy to design their own State aid *policies*, as long as these do not violate EU competition law, the latter qualification indicates that deciding about the compatibility of State aid necessarily involves considerations about policy aspects as well.[26]

The GBER[27] offers an example of how possible exceptions to the State aid prohibition have been harmonised at the European level by gradually transforming previously soft rules into directly applicable regulations. The GBER allows the Commission to declare additional categories of aid compatible with the internal market and exempt them from the ex-ante notification requirement. The eligible beneficiaries and the maximum proportion of the eligible costs that can benefit from the GBER embody specific European objectives to be pursued by Member States. As regards environmental aid, the GBER refers explicitly to the Europe 2020 strategy.[28] The specific objectives contained therein reflect the social objectives broadly identified in Article 3(3) TEU, which also refers to a high level of environmental protection.[29] In the context of energy, the EEAG 2014-2020 provides another example of a set of guidelines that are "*surely more than a transparent description of the Commission's State aid policy: they are pointing the way ahead for the EU's renewable energy regulation by the means of State aid control, thereby shaping the relevant markets of renewables.*"[30] By explicitly allowing Member States to grant aid to these sectors under the conditions set out in the guidelines, the Commission is providing legal certainty to Member States and market operators, and is thus facilitating these investments. More recently, by encouraging Member States to attach green strings to their aid measures (even if not binding) and by considering a "green bonus" for Member States that voluntarily decide to do so, the Commission has again – in the language of the State Aid Modernisation programme (SAM) – invited Member States to provide "good aid" (or, indeed, "green" aid), that is, aid that reflects the objectives of the Green Deal. Namely, by providing a strong financial incentive for Member States to award such aid.

Consequently, from the scope of the derogations under Articles 107(2) and 107(3) TFEU and from the secondary legislation adopted for their implementation, the Commission's vision of "good" aid, reflecting the EU's environmental and climate policy, can be inferred to varying degrees. However, the "hardening" of the Commission's soft law approach since the early 1990s must be understood as reflecting the Commission's desire to find an appropriate mix of policy instruments in a regime in which it

[20] Moreover, as State aid and environmental policies of the EU are areas governed by different categories of competences (Article 3(1)(b) respectively 4(2)(e) TFEU), this division of competences must be taken into due account in the definition, implementation and judicial review of those policy areas and relevant legal provisions.

[21] Blauberger, Michael. 2011. "State aid control from a political science perspective" *Research Handbook on European State aid Law*, p. 35.

[22] Ibid, p. 39; Micthell P. Smith, Mitchell P. 1996. "Integration in small steps: the European Commission and Member- State aid to industry." *West European Politics*, no. 19, p. 568

[23] Blauberger, Michael. 2008."From Negative to Positive Integration? European State Aid Control Through Soft and Hard Law" *MPIfG* Vol 8, no. 4, p. 5.

[24] Blauberger 2011, supra *n.* 21, p. 39.

[25] Cini was the first to speak of the "Commission's soft law approach," Cini, Michelle. 2000. " From Soft Law to Hard Law? Discretion and Rule-making in the Commission's State aid Regime."*Journal of European Public Policy*, Vol. 8, no. 2.

[26] Blauberger 2011, supra *n.* 21, p. 33.

[27] The GBER was adopted pursuant to the Commission's discretionary derogation of Article 107(3) TFEU, within the framework of the State Aid Modernisation (SAM) package, Commission Communication COM(2012) 0209 final of 8 May 2012 "EU State Aid Modernisation" (SAM).

[28] Ferri, Delia and Juan J. Piernas López (2019). "The Social Dimension of EU State Aid Law and Policy" *Cambridge Yearbook of European Legal Studies*, Vol. 21, p. 170 and 98.

[29] However, a clear difference from the imposition of a green conditionality mechanism at EU level is that in the case of the GBER, Member States are ultimately free to decide whether or not they wish to follow the easier route of the GBER.

[30] Koenig, Christian. 2014. " Where is state aid law heading to." *EStAl* Vol. 4, p. 611. This can also more generally be linked to another EU document, the 2017 Report on Competition Policy, which states that State aid rules "*play a key role in meeting the EU's ambitious energy and climate targets*," Commission Report COM(2018) 482 final of 18 June 2018 "Report on Competition Policy 2017," p. 13.

remains ultimately dependent on Member State action. Indeed, the Commission cannot issue and enforce State aid policy against strong Member State opposition.[31] In this regard, an obvious but important power rests with the Member States: the ultimate decision to grant State aid.[32]

The resulting competence structure is an interesting one. On the one hand, the Commission has exclusive and extraordinary competence in the area of State aid control. Increasingly, the Commission has used this discretionary power in the area of State aid control to influence State aid policy as well. It is therefore clear that State aid law is already being used as an incentive instrument for the greening of the European economy – albeit in a "soft" manner. The listing of beneficiaries and applicable aid intensities in the GBER is just one example. At the same time, however, the Commission can only order Member States to *not* pay aid. In other words, it is up to the Member States to decide whether and for what purpose they grant aid, and they are free to design their aid measures and structures in line with their political choices and constitutional setup. Ultimately, the question of whether the Commission can actively push for the acceleration of the green transition by making the grant of State aid conditional on compliance with predefined green conditions depends on whether it can do so without impinging on the Member States' prerogative to decide whether or not to grant aid and for what purpose. The last point seems to have been reaffirmed by the Court of Justice in the *Hinkley Point C* case, discussed in the next section.

3. Lessons from the Hinkley Point C Judgment

In September 2020, the Grand Chamber of the Court of Justice (CJEU) ruled in a case concerning the approval of aid granted to the Hinkley Point C nuclear power station. This was the first case in 30 years in which a Member State challenged a Commission Decision approving State aid granted by another Member State. Following the COVID-19 crisis, heightened sustainability awareness could result in more cases being brought by Member States challenging approval of environmentally damaging aid.

The *Hinkley Point C* case has not led to a radical change. Nevertheless, certain portions of the Judgment could potentially have important implications, both for the broader relationship between State aid and environmental protection and for the extent to which the State aid rules can be used to address environmentally damaging aid measures. The case thus relates to the core of what the European Green Deal is about: a requirement of big cuts to greenhouse gas emissions within Europe, partly by reform of the EU State aid rules.[33] Therefore, it is relevant to discuss the case here. The judgment has been received differently with some commenters interpreting the judgment as supporting a strengthening of the rules on environmental State aid, and by others as achieving the opposite. At a minimum, the judgment should facilitate discussions.

"Common interest" requirement? Not under Article 107(3)(c) TFEU

The first point relates to the criteria that the Commission uses to determine the compatibility of State aid. As part of the State aid modernisation programme in 2012,[34] the Commission developed "common assessment principles" for determining whether aid can be authorised under Article 107(3) TFEU. These have since been laid down in State aid guidelines and mean, *inter alia*, that for an aid measure to be compatible, Member States must demonstrate that it contributes to a "well-defined objective of common interest". When examining the notification, the Commission decides whether or not the Member State had properly defined an "objective of common interest". This puts a great deal of power in the Commission's hands to determine what was, and what was not, in the (European) "*common interest*".[35]

In *Hinkley Point C*, the Court found that Article 107(3)(c) lays down only two conditions for the compatibility of aid: that aid facilitates the development of certain economic activities [or areas] and that it does not affect trade to an extent that is contrary to the common interest. The Court thus explicitly rejected Austria's argument that aid must support an objective of common interest to be compatible according to Article 107(3)(c) TFEU.[36] Consequently, the Court confirmed that the Commission cannot judge proposed aid measures by Member States based on the aim pursued by the measure in question.[37] It hands back to Member States the power to determine which "economic activities" are subject to Article 107(3)(c) TFEU, as long as the aid does not adversely affect trading conditions to an extent contrary to the common interest.[38] Therefore, the Commission may not

[31] Blauberger 2008, supra *n.* 23, p. 22.

[32] *''To decide whether to act and, if so, with how much vigor, is an endemic feature of State aid policy,''* Thomas J. Doleys, Thomas J. 2013."Managing the Dilemma of Discretion: The European Commission and the Development of EU State Aid Policy"J. Ind Comp Trade, Vol. 13, no. 27, p. 24.

[33] The Hinkley Point C judgment thus touches upon the potential for successful implementation of the EU Green Deal.

[34] Commission Communication COM(2012) 209 final of 8 May 2012 "EU State Aid Modernisation" (SAM), para. 18.

[35] Especially, since it is settled case law that the Commission enjoys a wide discretion in the application of Article 107(3) TFEU.

[36] Unlike under Article 107(3)(b) TFEU, which concerns aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State (*Hinkley Point C,* supra *n.* 4, para. 20).

[37] *Hinkley Point C,* supra *n.* 4, para. 19.

[38] The judgment leaves open the question of whether or not it is a precedent for refuting entirely a common interest condition for State aid to be compatible in the internal market. For an analysis of this question refer to Eidissen, Stig. 2020. "Common Interest as a Condition for State Aid Compatibility," *EStAL*, vol. 19(4): 452-463.

use its discretion to impose specific criteria on the activities to be developed.[39]

The effect of this finding must, however, be nuanced. First, Member States will want to highlight the Union interest in approving the aid upon notification. Second, the finding must be seen in the light of the Court's interpretation of the Commission's duty to verify that the activity complies with EU law when assessing whether the first condition is satisfied. The Judgment thus exemplifies the distinction between State aid control and policy.

New relationship State aid EU environmental law

Going beyond the General Court[40] and AG Hogan,[41] the CJEU ruled that the requirement to preserve and improve the environment and rules of EU law on the environment apply in the nuclear energy sector.[42] State aid for an economic activity falling within the nuclear energy sector that is shown upon examination to contravene environmental rules cannot be declared compatible with the internal market.[43] The Court held that […] "*If [the Commission] finds an infringement of those rules, it is obliged to declare the aid incompatible with the internal market without any other form of examination.*"[44]

However, in balancing the positive and negative effects of the aid on the internal market, the second stage of the State aid assessment, the Commission is not required to take into account any negative effects other than the negative effects of the aid on competition and trade between Member States.[45] Environmental considerations may still be relevant to the question of whether the aid will distort competition and/or trade between Member States but there rests no obligation on the Commission to assess whether the aid causes environmental damage separately to that assessment.

Prior to the *Hinkley Point C* case, the General Court held that compatibility with EU environmental rules is irrelevant in State aid law unless the aid has an environmental objective, and that any breach should be dealt with by way of Article 258 TFEU proceedings.[46] In this sense, the CJEU's finding that the Commission is obliged to check that an activity "*does not infringe*"[47] EU environmental law before approving aid under Article 107(3)(c) TFEU is an important step forward in achieving true integration of the EU's State aid and environmental rules.[48] This approach is to be applauded from the point of view of the EU Green Deal, as it is in line with its ambitions.

Implications

What does this mean in practice for the future of EU State aid control, and the integration of climate considerations into the compatibility assessment of non-environmental aid?

The judgment means, first of all, that the Commission must carry out environmental compliance checks required by law and thus, must have the knowledge enabling it to do so. Such environmental compliance assessments should be laid down in State aid law and practice, similar to the approach followed in the Commission's proposal for the revised EEAG 2022 (CEEAG).[49] Regarding the general compatibility assessment under Article 107 TFEU, the CEEAG now explicitly contains the check that there is "no breach of any relevant provision of Union law". Paragraph 32 reads: "*If the supported activity or aid measure or the conditions attached to it, including its financing method when it forms an integral part of the measure, **entail a violation of relevant Union law, the aid cannot be declared compatible with the internal market***" (emphasis added).

Importantly, the judgment also suggests that the European Climate Law[50] will be a gamechanger. The first European Climate Law is an important factor in achieving the EU's Green Deal goals. In particular, because it would formalise into law the binding target of net-zero GHG emissions by 2050.[51] Following the Green Deal's reasoning, the Climate Law would ensure that all EU policies contribute to this goal and that all sectors play their part. It is also envisaged that "*the EU Institutions and the*

[39] According to Fernando Pastor-Merchante, the main take-away from the case is the confirmation that the rules on State aid follow the logic of *negative integration:* they do not limit the objectives that Member States may pursue through their measures of financial assistance to firms, but only the externalities that they have upon competition and trade within the internal market, Pastor-Merchante, Fernandes. 2020. "Analysis: Advocate General Hogan argues that the Commission may approve State aid for the development of nuclear energy" EU law live. eulawlive-hinkleypoint. Accessed 20 May, 2021.

[40] In *Castelnou Energía*, the General Court admitted that environmental protection has to be taken into account, but rejected this requirement where the Commission assesses aid that did "not pursue an environmental objective", Case T-57/11 *Castelnou Energía, SL v Commission* [2014], EU:T:2014:1021, par. 189.

[41] Opinion A-G Hogan, Case C-594/18 P *Hinkley Point C* [2020] ECLI:EU:C:2020:352, para. 90.

[42] *Hinkley Point C*, supra *n.* 4, para. 45.

[43] Ibid.

[44] Hinkley Point C, supra *n.* 4., para. 100; and similarly, para. 45.

[45] Hinkley Point C, supra *n.* 4., para. 102.

[46] See Case T-57/11 *Castelnou* EU:T:2014:1021, paras. 187-191.

[47] Hinkley Point C, supra *n.* 4., para. 100;

[48] Thus, building on earlier case law which held that account may be taken of environmental objectives (constituting one of the essential objectives of the Union) when assessing compatibility of State aid with the internal market, see e.g. Case C-487/06 P *British Aggregates* EU:C:2008:757, para. 92.

[49] Proposal for Communication from the Commission. 2021. "Guidelines on State aid for climate, environmental protection and energy 2022 (CEEAG)" can be retrieved from: CEEAG Draft communication. Accessed 21 May, 2021.

[50] Commission Proposal for a Regulation of the European Parliament and the Council COM(2020)80 final of 4 Marc 2020 establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (*European Climate Law*) [2020].

[51] Commission Communication of 4 March 2020 "Proposal for Regulation of the European Parliament and of the Council establishing the framework achieving climate neutrality and amending Regulation (EU) 2018/1999," COM(2020) 80 final, Article 1.

*Member States are collectively bound to take the **necessary measures** at EU and national level to meet the target*".[52] Thus, the Commission will have a legal obligation to take the "*necessary measures*" to ensure that the legally binding objective of climate neutrality in the Union by 2050 is achieved and to eliminate inconsistent Union measures. On this basis, allowing aid measures that are inconsistent with the binding objective of climate neutrality may well violate the Climate Law.[53] The achievement of this binding objective cannot be promoted if at the same time Member States subsidise industries that will make the achievement of the binding climate-neutrality objective impossible. Especially when the financing of a project/activity conflict with the beneficiary's legal EU environmental obligations stemming from national law implementing EU environmental law.[54]

However, what should be the approach to projects/activities that do not infringe the beneficiary's (EU) environmental law obligations directly, but which involve by nature substantial GHG emissions (e.g., fossil fuel activities, aviation)? This complex but urgent question is answered in the next section.

4. The elephant in the room: aid that harms the environment, but not the law

As mentioned above, according to the Court's case law, the Commission is not obliged to take into account environmental effects which are not unlawful. This leaves an important and, in light of the successful implementation of the EU Green Deal, urgent question unresolved. Especially, since the Climate Law has not yet entered into force. Namely, *how should the compatibility of State aid measures be assessed when an aid measure indirectly harms the environment without being explicitly prohibited by primary or secondary legislation ("EU law")?* Indeed, it is possible that an aid measure is not legally in breach of other EU law but supports an activity that indirectly harms the environment and undermines possible future action to protect the environment. A pressing question, since the highly damaging effects of an aid measure on the environment may completely neutralise its positive contribution to another well-defined common interest. This is all the more worrying since investments made today may have a life span far beyond 2050.

A solution to this question is proposed along three lines. First, it is shown how environmental considerations may still influence the balancing exercise that the Commission must undertake (even though the Court has held that the only negative effects to be taken into account are the adverse effects on competition and interstate trade). Second, it is shown how environmental considerations can also affect the balancing test based on the Court's clarifying emphasis on the Commission's task to minimise distortions. While the first solution fits the literal wording of the judgment (what is and what is not considered to be negative effects that the Commission must take into account when examining the aid), this second solution results rather from an interpretation of the Court's consideration that more account should be taken of the negative effects of the aid on competition and trade. Finally, a structural conditionality approach is proposed for the first stage of the State aid assessment, so that there are fewer cases where aid harmful to the environment would pass this test. The last two points are outlined in the next section.

Environmentally damaging aid that distorts the internal market

In the balancing exercise, the Commission is not currently required to consider any negative effects other than the negative effects of aid on competition and trade between Member States. However, as noted above, environmental considerations may still be relevant to whether the aid will distort competition and/or trade between Member States.

Kingston correctly observed that now that the EU internal market for energy becomes a reality, it can be seen how distortions to inter-State trade may arise from State aid to activities that affect cross-border trade in energy.[55] She provides the example of the free movement of goods context where it is settled case-law that national measures that are "*capable of hindering, directly or indirectly, actually or potentially*" intra-State trade in green energy may constitute a barrier to trade within the meaning of Article 34 TFEU.[56] According to Kingston, following this logic, one can, for example, "*readily imagine that a national subsidy for the fossil fuel industry may lead to the reduction of green energy imports, by making dirtier energy cheaper.*"[57]

As the Court has held, the test for distortion of competition is whether the aid in question strengthens the position of an undertaking in relation to its competitors.[58] The crucial test is whether aid improves the beneficiary sector's financial position.[59] In general, aid that is granted for purposes other than environmental ones, but indirectly harms the environment, may strengthen the position of polluters relative to their competitors who, in pursuing those other objectives, do implement climate safeguards, with or without aid. By granting aid (i.e. an advantage

[52] Commission. 2020. Proposal for a Regulation "establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law)" COM(2020) 80 final, p. 7. The statement is supported by the TFEU [2012] OJ C 326/47, Articles 7 ("coherence principle") and 4(3) ("duty of cooperation").

[53] Kingston, Suzanne. 2020. "State aid and the European Green Deal: The Implications of Case C-594/18 P *Austria v Commission* (Hinkley Point C)" UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper, no. 6, p. 18.

[54] Client Earth 2020, supra *n*. 1, p. 46, par. 79.

[55] Kingston 2020, supra *n.* 52, p. 14.

[56] See, for instance, Case C-573/12 *Ålands Vindkraft* EU:C:2014:2037, para. 66; Case C-379/98 PreussenElektra EU:C:2001:160, para. 69.

[57] Kingston 2020, supra *n.* 52, p. 15.

[58] See, e.g., Case C-148/04 *Unicredito Italiano* EU:C:2005:774, para. 56.

[59] Cases 62 and 72/87 *Exécutif Régional Wallon v Commission* EU:C:1988:132; Case T-14/96 *Bretagne Angleterre Irlande v Commission* EU:T:1999:12, para. 78.

conferred from State resources) to polluters, the beneficiary of the aid does not feel the full impact of the price mechanism at issue.[60] "*In this way, such aid runs contrary to the polluter pays principle provided in Article 191(2) TFEU, as implemented by the pricing mechanism at issue*."[61]

Furthermore, a breach of the internal market that is currently entirely legitimate but clearly undesirable, is the breach that occurs when different Member States decide to pursue the same objectives with their aid measures, with some national governments deciding to attach green conditions to their aid measures while others do not. Indeed, the Temporary State Aid Framework released during the coronavirus pandemic leaves it up to the Member States to determine whether to attach green strings to their aid measures.[62] It should be noted that from an internal market perspective – a key feature of EU State aid rules – a more coherent approach is clearly preferable. Following the crisis and the more flexible application of the State aid rules, widespread concerns have been expressed about the resulting internal market imbalance due to the differing financial capabilities of Member States. Leaving it up to the Member States to decide whether or not to attach green conditions to their aid measures carries the risk of leading to a further imbalance of the internal market. Encouraging the application of green conditions could lead to differences at Member State level with potentially distortive effects on competition. To a certain extent, concerns that an uneven State aid response could be detrimental to the internal market[63] and that countries with the deepest pockets could gain an unfair advantage in the single market[64] would become less eminent if all Member States were required to attach (minimum) green conditions to aid for distressed companies. Similar issues related to an uneven State aid response to the COVID-19 crisis also arise with respect to the green transition, but since the impact of the negative externality in question – climate change – is of course not confined to any individual State's border, the greater financial capacity of some Member States will, at least to a certain extent, also benefit other (poorer) countries.

Moreover, leaving it to the Member States is unlikely to bring about the change needed to reverse climate change. In the end, national governments do not want to put their national undertakings at a competitive disadvantage against foreign undertakings that do not have to meet strict climate targets to receive support. Potentially, undertakings could even sue their national governments for attaching green conditions to an aid measure of which they are the beneficiary. Albeit it would be rather unpopular to bring such a claim, it would not necessarily be unsuccessful. Green conditions can indeed contribute to a competitive disadvantage for undertakings who have to comply with them. As long as such conditions are not centrally agreed and imposed at EU level, it could be argued that governments that nevertheless opt for them contribute to an infringement of the internal market vis-à-vis the aid recipient, i.e. the national beneficiaries.

5. Recommendation for a new compatibility assessment

Based on the foregoing, three concrete rules are proposed to be implemented in State aid legislation and to be applied in State aid decision-making practice. This presents the third answer to the question of how to conduct the compatibility assessment of aid that does not explicitly infringe EU law on the environment, but indirectly harms the environment.

The proposed rules do not require a revision of the Treaties. As will be seen, a great deal can be done by updating the EU State aid Frameworks and Guidelines without a change to the law.

Rule 1: ''Do no harm'' compatibility assessment

Member States verify that a supported project or activity complies with EU environmental law obligations or with the beneficiary's national law implementing EU environmental law. The Commission controls that the verification is carried out in a satisfactory manner.

The rule is in line with the green oath to ''do no harm'' included in the Green Deal.[65] The EEAG and the Regional aid Guidelines already provide such a rule, reminding Member States and undertakings of their legal obligations. However, this obligation is currently not fully integrated in State aid practice. Instead, the rule should be applied horizontally as a minimum legal requirement in all State aid guidelines. Moreover, the rule should be reflected in the Commission's decision-making practice under the general rules of Article 107(2) and (3) TFEU.[66]

To give full effect to this clause, the authorisation to grant aid shall be made conditional on adequate proof of compliance – with an obligation on Member States and aid beneficiaries to provide the Commission, respectively the Member State, with the relevant documentation. Since compliance with EU environmental law is an ongoing question, this rule also implies obligations to monitor and report on compliance. This would

[60] Such could be a tax or emissions trading scheme, see Kingston 2020, supra *n.* 70, fn. 69 and 70.

[61] Kingston 2020, supra *n.* 52, p. 14.

[62] ClienthEarth 2020, supra *n.* 1, p. 9.

[63] Since the Commission did not require the Member States to impose (green) conditions upon the receival of State aid, the conditions attached to aid packages have varied significantly. E.g. compare SA.57153 (Lufthansa's aid package is conditional upon a divestment of up to 24 slots/day at each Frankfurt and Munich airports) with SA.57082 (Air Franse's package is contingent on green initiatives, such as a 50%-reduction in carbon emissions on domestic flights).

[64] See for instance Maczkovics, Carole. 2020. "How Flexible Should State Aid Control Be in Times of Crisis?" *EStAL*, vol. 3, p. 281.

[65] Commission Communication COM(2019) 640 of 11 December 2019 ''the Europan Green Deal,'' p. 19.

[66] Again, this is also clearly confirmed in the recent *Hinkley Point C* judgment (paras. 44 and 100).

imply a change of approach, as State aid authorisations is on-off at a moment in time. In this regard, the Commission should consider including safeguards such as a five-year review of the compatibility of the aid with the climate and environmental compatibility assessment, as part of the Member States' obligations to report regularly to the Commission on the implementation of the aid. The rule thus supports a conditionality-based approach. Conditionality involves (continuous) compliance with EU law and should be the first step in the compatibility State aid assessment.

When the first European Climate Law comes into force and the goal of climate neutrality by 2050 is enshrined in legislation, the Commission should also publish a Guideline on how it will assess compliance with this new law. The assessment criterion would come down to the impact of the aid measure towards the achievement of the climate neutrality target, that is, the binding target of net-zero GHG emissions by 2050. Such guidance is important for national governments and State aid beneficiaries so that they can design and justify their State aid measures accordingly.

As explained, the Commission's soft law approach has enabled it to enter the field of State aid policy, illustrated by the fact that State aid law is already widely used as an incentive instrument for the greening of the European economy. However, the question of whether the Commission can go further, and actively push for the acceleration of the green transition by imposing a green conditionality mechanism, depends on whether or not it can do so without impinging on the prerogative of Member States to decide whether to grant aid and for what purpose. The rule to structurally integrate compliance with the Climate Law in the first step of the State aid assessment respects this balance of powers. Assessing aid on the basis of their commitment to reach the net-zero target by 2050 does not necessarily inflict on the competence of Member States to decide what objective they wish to pursue with their aid. What it does mean is that whatever aim the measure pursues, it is (also) subject to the condition that the aid is consistent with the climate target.

"*If [the Commission] finds an infringement of those rules, it is obliged to declare the aid incompatible with the internal market without any other form of examination.*"[67] This makes the need for guidance even stronger. Since no balancing is allowed at this first stage, it must be clear when a breach has occurred. The following example illustrates this. It can be argued that aid must not aggravate competitive advantages unduly acquired by the beneficiary.[68] Non-compliance with the Climate Law will generally give the undertaking a cost advantage over undertakings that do comply with the legal requirements. This is because compliance with environmental law obligations regularly leads to additional costs for companies. However, since there would be no room for further examination, the Commission cannot consider that authorisation of the aid will be withheld only if such unlawfully obtained cost advantages distort the level playing field in the internal market.[69] At this stage of the assessment, non-compliance would immediately lead to the conclusion that the aid could not be declared compatible with the internal market, and therefore ineligible for approval.

While there is no room for balancing at this stage of the State aid compatibility assessment, to be able to decide whether or not infringement with EU law exists, the Commission must conduct a so-called "climate and environment compatibility" assessment of the aid measure with the climate neutrality target and other climate and environmental obligations stemming from EU and national law. For example, by imposing a mandatory requirement for State aid notifications to demonstrate compliance with EU environmental law and address environmental impacts, both positive and negative, of the proposed aid.[70] The assessment should take into account whether an aid measure increases (or fails to mitigate) negative climate effects (e.g. in terms of greenhouse gas emissions) and thus has a detrimental impact on reaching the net-zero target by 2050. Furthermore, the expected lifetime of the effects of the aid measure should be taken into account. In this context, the question of whether the effects of the aid measure on the climate are short or long-term is relevant. Finally, consideration may be given to whether the beneficiary has proposed environmental "safeguards" to mitigate adverse effects on the environment.

As a result of that test:

- if an aid measure increases – or does not mitigate – negative environmental or climate effects (e.g. in terms of greenhouse gas emissions);
- if the negative environmental or climate effects of an aid measure are long-term (e.g. because of the lifetime or persisting pollution of the supported investment or activity); and
- if the Member State in question did not propose any or insufficient "safeguards" for mitigating negative environmental effects,

the aid measure cannot be considered to be in line with the Climate Law (and the EU Green Deal) and hence, cannot be declared compatible with the internal market.

National climate protection and energy transition objectives set out in Member States' national energy and climate plans (NECPs)

[67] *Hinkley Point C*, supra *n.* 4., para. 100.
[68] ClientEarth 2020, supra *n.* 1, p. 47.
[69] If the Court would not have made a decision to the contrary, such reasoning would typically prevail in the second stage of the balancing test.
[70] See Kingston 2020, supra *n.* 52, p. 15.

should function as a minimum benchmark.[71] Aid measures that are inconsistent with these objectives would not meet the test. Therefore, Member States should make the granting of the aid conditional on the observation and monitoring of national environmental law obligations.

Rule 2: Compliance with EU Treaty provisions on energy and the environment

The Commission can declare that aid in support of fossil fuels is unambiguously not in line with EU law on the environment unless environmental safeguards are integrated into the measure.

Although State aid that contravenes provisions or general principles of EU law cannot be declared compatible with the internal market, the Court added in the *Hinkley Point C* judgment that the provisions and the principles must be sufficiently clear so that their contravention by State aid is unambiguous. This was not the case for aid to nuclear energy, which is already evident from the fact that supporters of nuclear energy argue that it is safe, clean, and sustainable, while others dispute that vehemently. Therefore, it is not obvious that State aid to nuclear energy would necessarily infringe Treaty provisions and general EU principles. For State aid to fossil fuels, however, the case is different.

The Court held that "*the principle of protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability cannot be regarded as precluding, in all circumstances, the grant of State aid for the construction or operation of a nuclear power plant.*"[72] According to Nicolaides, *"the Treaty provisions on the environment and energy are rather general so that it is not possible to say unambiguously that State aid to nuclear energy is contrary to them*."[73] The question is: are the Treaty provisions really too general so that their contravention by State aid is *never* unambiguous? Or are the opinions about nuclear energy too diverse, and therefore, it cannot be said that aid to nuclear energy is necessarily contrary to EU rules on the environment? The latter interpretation seems to be more in line with the rest of the Judgment and with EU climate policy objectives.

The polluter pays principle is indeed often thought of as an aspirational or guiding principle rather than one that is justiciable by courts.[74] Furthermore, Article 11 TFEU is vaguely worded: it does not specify what the environmental requirements are, what integration entails, and how this integration is to be done in practice. However, support for fossil fuels seems to be the textbook example of a violation of the polluter pays principle. And it is rather obvious that aid granted in support of fossil fuels without integrating environmental safeguards is not in line with Article 11 TFEU, according to which environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.

Therefore, it would be within the Commission's power to declare that aid in support of fossil fuels is unequivocally not in line with EU law on the environment, unless environmental safeguards are integrated into the measure. In some situations, it will not (yet) be possible to directly replace an activity with high greenhouse gas emissions with lower or zero-emission technologies. In such cases, safeguards could include a requirement for the national government to demonstrate that the support is limited in time and linked to a clear commitment to switch to a zero-emission technology as soon as possible.

This would thus present another opportunity for the Commission to consider the environmental effects of non-environmental aid, at least, when it concerns State aid in support of projects or activities that are unambiguously not in line with EU environmental law, such as support to fossil fuels. This opportunity is to be welcomed as the phasing out of fossil fuels subsidies has been present as an objective in State aid rules for a decade now without any concrete implementation.[75]

Rule 3: Exploring less environmentally damaging alternatives

In keeping distortions of competition and trade to a minimum, the Commission must verify the absence of less environmentally damaging alternatives that would achieve the objective pursued with the aid measure to the same extent. If such alternatives exist, the Member State concerned should motivate why the alternative is not opted for.

State aid to intensive polluters can have clear distorting effects on the market, even (or especially) if the aid in question does not directly breach EU environmental law. As mentioned in the previous section, this entails one of the most pressing questions that State aid law is currently facing in the context of the climate crisis. Especially, since the CJEU has also stated that the Commission, when balancing the positive and negative effects of

[71] See similarly, ClientEarth 2020, supra *n.* 1, p. 13.
[72] Hinkley Point C, supra *n.* 4., para. 40.
[73] Nicolaides, Phedon. 2020. "The Common European Interest and the Environmental Impact of State Aid: The Case of Nuclear Power" Lexxion, no. 27. Accessed 28 June 2021. [lexxion/stateaidpost]
[74] Kingston, Suzanne. 2020. "The Polluter Pays Principle in EU Climate Law: An Effective Tool Before the Courts?" UCD Working Papers.
[75] Council decision on aid for the closure of uncompetitive coal mines, rec. 2; IPCEI Communication, rec.19, which refer to the fact that "the European Council Conclusions of 23 May 2013 confirmed the need to phase out environmentally or economically harmful subsidies, including for fossil fuels, to facilitate investments in new and intelligent energy infrastructure"; exclusion of (hard) coal form the scope of the Rescue and Restructuring aid Guidelines, rec. 16 and 18, EEAG, para. 43 mentions the "environmental objective of phasing out environmentally … harmful subsidies, including for fossil fuels". This objective is repeated in the Green Deal.

the aid on the internal market, does not have to consider negative effects other than the negative effects of the aid on competition and trade between Member States.[76]

The fact that environmental considerations are only relevant to the question of whether the aid will distort competition and/or trade between Member States seriously decreases the role of climate considerations in the second stage of the State aid assessment (the balancing test). It means that the negative effects on the climate are only taken into account to a limited extent.[77]

Yet, at the final stage of the State aid compatibility assessment, the Commission must ensure that the negative effects of the aid measure are limited and that they are smaller or outweighed by the positive effects.[78] It is not always clear how the Commission determines this.[79] However, the bigger reliance on the impact of aid on trade and competition suggested by the *Hinkley Point C* case means that the Commission needs to rely more on assessing the potential negative effects of State aid and show how it weighs the positives and negatives and carries out their balancing to prevent unnecessary and disproportional aid. Consequently, it should be more explicit that its task is to keep distortions to the minimum, "*for any given objectives of the aid which are for the Member States to determine*".[80] In practice, it seems that the Commission ensures that "*aid does not adversely affect trading conditions to an extent contrary to the common interest*" by stripping aid measures from restrictions or provisions which are not necessary for the achievement of their positive objectives. It seems difficult to maintain that distortions are kept to a minimum in situations where there are less environmentally damaging alternatives that achieve the objective of the aid measure to the same extent. Especially, since the Court has acknowledged that State aid measures need to take account of environmental concerns, which could well mean that the environmental impact of aid measures must be minimised.

Therefore, for example, Member States should explore alternative ways to achieve the objective pursued by their aid measure that would have a less negative impact on the objective of becoming climate neutral by 2050 – or none at all. If such alternatives exist, Member States should explain why they are not used despite the EU objective of phasing out environmentally harmful subsidies.[81] This requirement would particularly hold in the case of aid that relates to activities that involve by nature the emission of GHGs while promoting a recognised common interest (e.g., employment).

The support for Air France offers an example of the direction that we should be heading. Air France was under an immediate need to keep operating and maintain employment. The French government was able to give out support to Air France but made it a condition that the airline reduce the number of domestic flights and shift traffic to less polluting alternatives such as rail.[82] By including the condition to explore alternatives to inland flights and develop a strategy for greening the fuel it is using, the French government urged Air France to reduce future emissions. The requirement to examine the existence of less environmentally damaging alternatives (because they do not exist or are not *yet* possible) should be integrated into the second stage of the State aid assessment. More systematic consideration of alternative, less distorting aid measures would lead to greater clarity on how the Commission determines that the negative effects of the aid are limited or offset by positive effects. For example, considering the possibility of less distortive aid measures and either opting for them or making valid arguments as to why such an alternative is not possible in a specific case would almost automatically imply that the negative effects are limited.

6. Concluding remarks on conditionality

This research sought to answer the question to what extent EU State aid law could play a stronger role in the current EU climate transition by applying the principle of "green" conditionality. More specifically, it sought to answer the question of how to assess compatibility in situations where aid is not explicitly in breach of EU law, but still causes environmental damage.

Currently, environmental objectives are mostly considered in State aid law when looking at the "positive effects" of the aid.[83] Conditionality, as understood by this study, would mean that (negative) environmental effects are considered when assessing aid that is not directly aimed at environmental protection.

To analyse the possibility of such conditionality, it was first necessary to understand the competences involved. This paper adopts the view that reasonable expectations of State aid law in the climate crisis and, potentially, in accelerating the green transition, are informed not only by the Treaty provisions and secondary legislation, but also by the fact that it remains

[76] Hinkley Point C, supra *n.* 4., para. 102.

[77] As stated before, those negative effects on the climate can, however, entirely neutralise the positive effects of an aid measure.

[78] See Commission Decision 2015/698 *Hinkley Point C*, L 109/44, para. 495.

[79] See similarly Buendía Sierra, José Luis. 2021. "Making the (Hinkley) Point about Compatibility Control." EStAL, vol. 20(1), editorial; Nicolaides, Phedon. 2021. "Shedding Light into the 'Black Box' of State Aid: The Impact of *Hinkley Point C* on the Assessment of the Compatibility of State Aid." EStAL, vol. 20(1): 4-14.

[80] Nicolaides, Phedon. 2021. "Shedding Light into the 'Black Box' of State Aid: The Impact of *Hinkley Point C* on the Assessment of the Compatibility of State Aid." EStAL, vol. 20(1): 4-14, p. 13.

[81] The Commission could potentially reject aid measures on this ground by showing that they cause greater harm to competitors and disturb trade to a greater extent because it is possible to achieve the same policy objectives with less distortion of competition, Nicolaides 2021, supra *n.* 98, p. 10 and fn. 12.

[82] Commission decision of 4 May 2020, State aid SA.57082 COVID-19 – France: Air France.

[83] Thus, the environmental benefits are considered.

ultimately the Member States' exclusive competence to design and execute their individual State aid *policies.* The discussion of the competence structure in State aid law was intended to show three things. First, the fact that there is a difference between State aid control and State aid policy. The Commission's exclusive competence is confined to the former. Second, the Commission has increasingly developed its soft law approach, establishing its vision of "good" aid. In this way, the Commission has entered the area of State aid *policy.* Third, within its vision of good aid, there is a clear connection with the EU's climate and environmental policies. Being aware of its dependence on Member State action, the Commission may be inclined to use its extraordinary powers in the area of State aid control to further develop its vision of "good" State aid policy in line with EU climate objectives. In fact, with its consideration of awarding "green bonuses" to Member States that voluntarily decide to attach green conditions to their aid measures, the Commission would continue its approach of incentivising Member States in a direction favoured by it – that is, *de facto* aligning national State aid policies with the EU's climate policy goals. From an internal market perspective, a conditionality-based approach would be the preferred route. Moreover, the recent *Hinkley Point C* judgment seems to speak against harmonisation of national State aid policies by the Commission and in favour of an effective integration of environmental considerations in State aid law.

Based on this Judgment, and in line with EU climate policy goals and concrete targets set at EU and Member State level, the present paper has formulated three rules to be applied when assessing the compatibility of State aid. By formulating these rules as conditions, this paper has shown that there is room for a "green" conditionality-based approach in the State aid assessment.

Rule 1: ''Do no harm'' compatibility assessment

Condition: Authorisation to grant aid will be conditional on conclusive evidence of compliance with EU environmental law obligations or the beneficiary's national law implementing EU environmental law. When the first European Climate Law enters into force, the climate and environment compatibility assessment will include an assessment of the impact of the aid measure on achieving the climate neutrality target (e.g., with intermediate targets set at five-year intervals).

State aid notifications should address environmental impacts, both positive and negative, of the proposed aid. A number of factors (e.g., expected lifespan of the effects) may be relevant in this regard. These should be laid down in a State aid Guideline, to be published at the same time as the first European Climate Law.

Rule 2: Compliance with Treaty provisions on energy and the environment

The formulation of this second rule in terms of a condition seems trickier but is perfectly in line with the Court's ruling in the *Hinkley Point C* case. The condition means that the authorisation of aid shall be conditional to satisfactory evidence of compliance with EU Treaty provisions on energy and the environment. Only if the aid is unambiguously not in line with the EU law provisions, should the approval of the aid be refused. The integration of environmental safeguards can play a role in this regard, as it can prevent infringements. The condition is formulated as follows:

Condition: If environmentally harmful aid is unambiguously not in line with EU law on energy and the environment, the aid cannot be granted. The integration of environmental safeguards may prevent this conclusion.

From a clarity perspective, it is preferable that this second condition be distinguished from the first, albeit both concern the first stage of the State aid compatibility assessment. The first condition should relate to EU secondary law, such as the Green Deal and the future Climate Law. The second condition should require a compatibility assessment with Treaty provisions on energy and the environment. Given the Court's considerations on these Treaty provisions, this second condition will only cover subsidies that are harmful to the environment, such as fossil fuels. The reason being that State aid to other activities or projects will not lead to the conclusion that the aid is unambiguously in breach of these Treaty provisions.

Rule 3: Verifying absence of adequate, less environmentally damaging aid measures

The last condition concerns the second stage of the compatibility test: the balancing of the negative and positive effects of the aid. Throughout this paper, it has been emphasised that the CJEU has ruled that the Commission is only obliged to take into account the negative effects of the aid on competition and trade between Member States. However, the Court's judgment in the *Hinkley Point C* case also stipulated what the Commission's core task in the area of State aid control is about: keeping distortions of competition to a minimum. Since the CJEU has further stressed that State aid needs to take account of environmental concerns, this paper has raised the question of whether this does not at least imply the examination of whether aid can be granted in a less environmentally damaging way. Therefore, this third condition is formulated as follows:

Condition: In order to minimise distortions of competition and trade, the Commission must verify the absence of less environmentally damaging alternatives that would achieve the objective pursued by the aid measure to the same extent.

The latter condition is relevant where the aid measure does not pursue an environmental objective and does not directly infringe EU environmental law. Where such viable alternatives are available, the Commission could require the Member State

concerned to justify why it has not chosen this less damaging alternative, despite clear EU and Member State policy objectives to the contrary. The Commission could also consider the need to require structural environmental protection safeguards for projects/activities that do not directly infringe the beneficiary's (EU) environmental law obligations, but which by their nature involve substantial GHG emissions. Even if the aid measure is not directly in breach of the future Climate Law or the EU Green Deal, it can be argued that the nature of those documents requires the search for less harmful alternatives and the integration of environmental safeguards.

It is further noted that environmental considerations, without the need to formulate a new condition, can also have an impact on whether aid distorts competition and trade in the internal market (the second stage of the State aid assessment).

In conclusion, State aid law should be more broadly embedded in and related to climate and environmental policy. Conditionality, as discussed in this paper, has provided an analytical lens through which to understand the possibility for such increased embeddedness of State aid to its wider context. A conditionality-approach in State aid law allows a level playing field to be maintained, while securing a longer-term view of the competition process, making it a sustainable one.

Open data trusts: A radical proposal

Alexander Bowen

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"In November 2019, you said that climate change is an existential threat. Now you must prove that you mean it".[1] This statement that Greta Thunberg directed at the European Parliament's Environment Committee could have been directed at any number of our civic, social and corporate institutions. The subtext that alongside the looming climate crisis there is a looming crisis of hypocrisy is broadly applicable and perhaps more so in the corporate sphere.

Online, companies boast that they are carbon neutral – "carbon neutral since 2007" one company prominently claims[2] – yet the reality is very different. The same companies that emblazon their climate credentials have systematically used data (including data supplied by governments) to pursue their business plans in our modern fossil-fuel economy. Technologies developed by the same companies that boasted of their own carbon neutrality have been deployed to enable further fossil-fuel extraction and further pollution. Our planet's data, our data, is being used against our planet.

Yet for every action there is an equal and opposite reaction. The action – a Jurassic interpretation of the profit motive – should remind us that we must be that opposite reaction. But we must not be merely equal in scale to it, we must be far larger; indeed, we must be as large in our reaction as the climate-crisis itself. That is where the role of the European Commission and the European governments lies. So far public data has been used for private gains and polluting activities. In future, Europe must learn to systematically use public data for our social and climate purposes. We must build an anti-carbon data environment.

Europe rightly prides itself on being an open society, where from Lisbon to Lapland democracies built around our common values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights are meant to prevail. Since the two world wars that threatened Europe's very existence, each generation has tried to renew these values and added new ones that reflect the challenges they face. In the same way Europe renewed itself to face the challenges of the late 20th century – deindustrialisation and the collapse of the Warsaw Pact in the east, to name two – we need to renew Europe based around our current challenges, which I believe are the excessive concentration of carbon and of capital. For Europe to renew its open society in the 21st century, Europe must embrace open data.

In her 2020 State of the Union address, President of the European Commission Ursula Von der Leyen stated that Europe must lead the way on digital by creating common data spaces.[3] In my opinion, these common data spaces or open data trusts should hold our common data and make it accessible to all. In other words, we need a public option for Europe's data to compete with the corporate hoarding of public data.

In addition, we should get hold of non-sensitive data from companies that do business in Europe and use it to fill our data trusts. Corporations should provide the information that individual customers need to exert a genuine control over their own data and that our society needs to continue to innovate.

To make an example, every family in Europe should be able to check on a smart meter how much energy they use, for what price, and whether it is produced using renewable sources. We should be able to see the average cost and consumption of comparable families and rapidly switch to alternative suppliers.

These data trusts would allow Europe's research and innovation champions to find new ways to maximise energy efficiency. They would also empower consumers and move them away from information asymmetry so that they can both reduce their bills and their carbon emissions. These ambitious goals should be at the forefront of European policy – including competition policy.

We have seen in this pandemic the kind of social innovation that has been possible using freely available public and crowdsourced data. At the beginning of the pandemic, compliance in major European cities with lockdown measures was publicly published using data from traffic services – so called community mobility reports[4] – helping officials better coordinate their response to the pandemic. In Asia in particular we've seen the power of data usage for public health – with Taiwan crowdsourcing information on mask supplies[5] so as to avoid busy rushes and cities in other countries using data on public transport usage to work out their levels of service[6].

The lessons from the health crisis and how data can be used to help can be put to use in dealing with the climate crisis. I propose to add a Data for Climate and Public Purpose Act to the Digital

[1] https://www.europarl.europa.eu/news/en/press-room/20200304IPR73905/greta-thunberg-to-meps-we-will-not-allow-you-to-surrender-our-future. This and all internet sources used in this paper where accessed on 4 November 2021.
[2] https://sustainability.google/.
[3] https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655.
[4] https://www.google.com/covid19/mobility/
[5] https://www.bbc.com/news/technology-52883838
[6] https://www.arup.com/projects/covid-19-local-authority-travel-and-transport-data

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Services Act and Digital Markets Act. The European Commission, the Council of the European Union and the European Parliament should ensure passage of this act by the first year of the next European Parliament. This would arguably coincide with the COP30, which the EU should bid to jointly host. This Act would put forward the kind of corporate regulation previously mentioned, starting in the key climate sector of electricity production and supply. Once proven successful, the mandate could be expanded to reach sectors such as agriculture, construction and transport.

European data trusts should achieve three purposes: democratisation, socialisation and greening.

Democratisation. European data trusts should return to us control over our data, creating a European e-citizenship alongside our existing European and national ones. In the kind of data citizenship I propose, European citizens would be able to shift their data between sites; opt to share their data (for instance their search history) with up-and-coming competitors; and see to what use their data are put to. Fundamentally, a public data trust could restore public trust.

Socialisation. Europe has begun to establish a precedent, through the General Data Protection Regulation and Data Protection Directive, that data belongs to those who provide the information. However, with the right to fully personal data comes a responsibility to the wider society to provide that data anonymously and securely to governments to help society.

Greening. The 21st century's existential challenge is the development of sustainable technologies and of new ways of organising our societies. A new social and political dialogue on the role of public institutions in the promotion of this kind of innovations is needed. The technologies that we need to tackle the climate crisis include ways to produce and distribute energy from renewable sources. In principle, these technological needs are well understood and the physical infrastructure is already being rolled out. But if we are serious about the next step, we would need much larger amounts of data and data of a different nature; that is, primarily social – as opposed to physical – data.

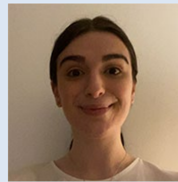
According to a current narrative, the rugged technology entrepreneurs achieved success by themselves. But this is a myth. They could not succeed without society.[7] The contributions that governments gave them in terms of financing and the contributions that we the public gave them in terms of our data have to be repaid. In Europe's – and the world's – greatest challenge, overcoming climate-change, is exactly when that debt comes due. European governments should impose a new standard of full data disclosure. In her 2020 speech at the European Parliament referred to above, Greta Thunberg said that "Nature does not bargain, and you cannot make deals with physics."[8] It may not be possible to make deals with physics but you can make deals with the companies that operate in Europe. The European Commission should pursue a climate social contract in the form of a Data for Climate and Public Purpose Act, which embraces real transparency and creates public data sets so that Europeans can do what they do best – innovate in crisis. This way, Europe's digital decade can also be the start of Europe's green century.

[7] Cf. Andrew, Scott. 2021. *The Rugged Entrepreneur: What Every Disruptive Business Leader Should Know*. Simon & Schuster. Cf. also Mazzucato, Mariana. 2011. *The Entreprenuerial State: Debunking Public vs. Private Sector Myths*. Anthem Press.

[8] Cit.

The role of Competition Policy in the Green Growth Movement

Jessica Harte



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Climate change has finally become something that we have stopped only talking about. There is now a considerable movement driving change in our society[1]. European Commission President Ursula Von der Leyen put sustainability at the top of her agenda. Sustainability has eventually gathered some political traction. However, political intervention is not sufficient; mass participation is required. It is here that competition policy plays its part. It facilitates cross participation from three key players; policy makers, the businesses that are subject to the policies and the consumers who benefit from them.[2]

Competition policy has a unique ability to drive the necessary change to work towards green growth. Competition policy encourages enterprise and innovation – both of which are essential to the green growth movement. However, at present, competition policy is not fully compatible with environmental regulation. The relationship between the two needs balancing.[3] Upon examination of case law, it seems that within the European Court of Justice, the scale is tipped in favour of Competition Law and the promotion of the four freedoms.[4] The same is reflected in the actions of the European Commission. [5] This is understandable given these are the foundational freedoms of the European Union. However, if the European Union has proven anything, it is its ability to move with the times. The green promises are there, sustainability has been named a top priority, now we need action.

For green growth to establish itself, a few factors must come together. There must be a clear goal – the European Climate Law has set this in motion – and fair competition and environmental regulation must complement each other to achieve said goal.[6] However, the scale is tipped in favour of competition policy, creating an inherent clash between the two.[7] For a long time, environmental aid had been considered to be State aid. Change is happening, State aid that is earmarked for sustainable missions can be facilitated. Specific guidelines have been set by the Commission which governments must comply with to be in adherence with Competition Policy.[8] This is a very positive change. The other prongs of competition policy must become more adaptable too.

The pandemic has created the perfect momentum for a policy re-start. As we work towards re-building the European economy, it must be remembered that a green re-build is the only viable option.

The disastrous impact COVID-19 has had on our economies is well known. The pandemic's potential to damage the economy has been discussed from day one. Fears of high levels of unemployment, the looming threat of inflation and massive national debts continue to be imminent fears for all. What is less well documented is the damaging effect climate change and extreme weather events have on our economies.[9] In 2020 alone, economic losses exceeded €150 billion, according to Munich Re calculations.[10] An economic re-build is essential. In the midst of both crises, we must think laterally. Competition policy is one avenue that must be considered in this re-build.

In order to rebuild our economies, a serious push on innovation is required. However, without the necessary changes in competition policy, it seems that public funding for said innovation will be constrained. Innovation and competition policy have a circular relationship. When they are allowed to work symbiotically, there is potential for huge economic growth, but more than that, there is potential for green growth. To encourage sustainable innovation, state intervention is necessary. Now more than ever, many companies are struggling as we continue to stumble

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1 Buch-Hansen, Hubert, Carstensen and Martin B. 2021. "Paradigms and the political economy of ecopolitical projects: Green growth and degrowth compared." *Competition & Change*

2 Vestager, Margrethe. 2019. "Competition and sustainability". Speech at the GCLC Conference on Sustainability and Competition Policy. Brussels, 24 October 2019

3 Maisin, Jean-Benoît and Michelle Meagher. 2020. "Sustainable development and competition law: Towards a Green Growth regulatory osmosis." *Concluding discussion. Sustainable development and competition law: Towards a Green Growth regulatory osmosis*, Athens, 28 September 2020.

4 Fotis, Panagiotis N. 2021. "Sustainable Development and Competition Policy." *Energy Research Letters* 1(4)

5 Joannin, P. 2020. "Competition Policy and Industrial Policy: For a Reform of European Law" https://www.robert-schuman.eu/en/european-issues/0543-competition-policy-and-industrial-policy-for-a-reform-of-european-law. Accessed 14 October

6 See the European Climate Law portal at: https://ec.europa.eu/clima/eu-action/european-green-deal/european-climate-law_en. Accessed 13 October 2021.

7 Joannin 2020, supra n. 5

8 Guidelines on State aid for environmental protection and energy 2014-2020 *OJ C 200, 28.6.2014*

9 Maisin and Meagher 2020, supra n. 3

10 Munich Re. Climate Wise Report 2020 – Disclosure against the ClimateWise Principles. 2020. https://www.munichre.com/content/dam/munichre/contentlounge/website-pieces/documents/Climate-Wise-Report-2020_publication-version.pdf/_jcr_content/renditions/original./Climate-Wise-Report-2020_publication-version.pdf. Accessed 26 March 2021.

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through this pandemic, the notion of providing funding for such ventures is far out of reach for these companies. We are no longer in a position to wait. Intervention is necessary now. Both states and the European Union, as they begin to recover, will be able to provide this funding.[11] It seems that the obstacle is more political than financial.

We have seen the positive effects that State aid can have in this sector. In Germany there are privately owned companies producing wind energy. This was unimaginable in Germany only a few years ago and is still so in other countries today. State aid facilitated this project and allowed a certain degree of privatisation in the production of renewable energies.[12] Other similar projects should also be facilitated by State aid. The environmental benefits outweigh potential risks to competition policy, this seems to be recognised by the policy makers. To further development in this area, it could be argued that green growth falls under the economic development justification. Not only is climate change a burden on the economy, but there would be plenty of room for economic growth if State aid was facilitated in this sector.

Competition policy also extends to antitrust. Under antitrust law, certain forms of co-operation between businesses are prohibited. This, of course, makes complete sense, as anti-competitive behaviour has serious potential to harm consumers. However, during the COVID-19 pandemic a comfort letter was issued by the European Commission to Medicines for Europe, an association of generic pharmaceutical manufacturers, which authorised co-operation between certain companies to increase the production of critically needed medicines.[13] Many safeguards were attached to the comfort letter to ensure that the co-operation would not go beyond what was objectively necessary to fulfil its purpose.[14] The comfort letter proved to be a success; during a time of great difficulty, it facilitated the provision of urgently needed medicine. The comfort letter was also restricted to a narrow timeline.[15] This also helped to ensure that it would not be taken advantage of. This comfort letter played a vital role in the COVID-19 crisis. A similar intervention could have the same effect in the fight against climate change. With careful supervision to ensure any co-operation is strictly necessary, time restricted, transparent and open, once again it seems that the positives outweigh any potential fear.[16] There is precedence for this approach in the event of a crisis, ensuring that there is a supervision protocol in place.

The final branch of competition policy is merger control. Under this instrument, the test that is applied is the potential of the agreement to substantially lessen competition in the marketplace. All other things being equal, agreements that are vertical in nature often raise anti-competitive concerns. However, consideration can be given to potentially beneficial agreements[17], such as research and development joint ventures or product standardisation agreements.

Within this very narrow window, sustainable growth can be encouraged. The risk to competition is minimal here, given the rigidity of the control to which all agreements are subject. This is a very low risk option that should be considered.

Research and development departments could be encouraged to cooperate to advance green growth in areas of common interest. It is in every company's best interest to work together towards a more sustainable future. It is time to set a new standard. Instead of companies using their sustainable ideas as a competitive edge, they should combine resources to find better solutions, faster. Product standardisation is another avenue to consider. Packaging could be subject to a standard set by companies together. Again, this would see sustainability goals achieved in a more timely fashion. Let it be a comfort that said co-operation would be subject to merger control and therefore would not substantially lessen competition.

The slight relaxation of competition policy rules would run definite risks, particularly with respect to the first two prongs of the policy. These risks, however, can be mitigated with careful oversight. It is also important to note that the risks posed by these slight relaxations are nothing in comparison to those that climate change brings. Price fixing, market carving and the threat of cartelistic behaviour are all very real threats that are damning to consumers. One does not intend to minimise the seriousness of such actions. It is merely contended that climate change is a more immediate and irreversible threat. The time for passivity on the climate change front is over. It is not suggested that all caution is thrown to the wind either, but that highly regulated allowances are made in the name of green growth. Competition policy has the ability to have resounding positive impacts in the pursuit of green growth, it is now up to policy makers to allow it.

Businesses have long escaped any real responsibility for sustainability. It is high time that they are held accountable for their negative environmental impacts, but more than that; that they are held responsible for making a positive contribution to this cause. Competition policy can evolve to facilitate this contribution. Business co-operation, coupled with State aid, remove the financial and resource barriers that businesses face, leaving no excuse.

[11] Fotis 2021, supra n. 4
[12] Vestager 2019, supra n. 2
[13] Latham and Watkins. 2020. "The European Green Deal & Competition Policy." https://www.lw.com/thoughtLeadership/The-European-Green-Deal-And-Competition-Policy. Accessed 25 June 2021.
[14] Norton Rose Fullbright. 2021. "Sustainability, antitrust and the EU Green Deal." Last modified January 2021. https://www.nortonrosefulbright.com/en-gb/knowledge/publications/4d7ef55a/sustainability-antitrust-and-the-eu-green-deal
[15] Christoforou J, Renner C, Sinan M. and Murphy F.M. 2020. "The EU Commission publishes its first comfort letter to foster co-operation among businesses in the pharmaceutical sector during COVID-19 pandemic." *Concurrences: Anti-Trust Publications and Events*, 8 April 2020
[16] Christoforou et al 2020, supra n. 15
[17] Maisin and Meagher 2020, supra n. 3

Without business involvement, there is only so much that can be done in the fight against climate change. Business uptake has always been hugely important to the cause. Businesses call the shots on the kinds of products and services consumers enjoy and how they are produced, packaged, marketed, distributed and disposed of. Without business buy-in, there is a limit to what an individual consumer can achieve.

It can be argued that competition policy is, at its core, a consumer protection policy. It seeks to regulate the market to ensure that consumers are not subject to unfair trade practices. It has enjoyed large success in this area. Prior to its implementation, cartelistic behaviour and market carving were more common-place.[18] Without demonstrating a greater ability to adapt in the face of climate change, Competition Policy could expose consumers to a much greater risk.

Another point of note is that competition policy strives to encourage choice in the marketplace. But excessive rigidity can also limit consumer choice. Many consumers want sustainable products and are willing to pay a little more for them. The grim reality is that in a lot of circumstances they are not available. Should we see a reform of competition policy towards sustainability, this situation would improve, allowing consumers to play their part in the fight.

Should these small changes in competition policy be facilitated, a perfect breeding ground for innovation would be created. Not only would more public funding be available, but businesses would have the opportunity to cooperate in non-anti-competitive ways.

Each element in the product cycle must be altered, from sourcing all the way to disposal. If we are going to create a circular economy, these changes are essential.[19] Easily said, not so easily done. But with the assistance of a more sustainably minded competition policy, the challenge becomes manageable. It is here, in the creation of a circular economy, that the annular relationship between competition policy and innovation will truly thrive.

Working towards sustainability is not just a must for survival, it is also a worthwhile move from an economic standpoint. A greener economy means new job opportunities. Emerging areas such as eco-innovation, eco-design and sustainability all need to be staffed. Should further incentive be required, it is estimated by the European Green Growth Index that said sectors can bring net savings of up to €600 billion for European businesses.[20]

COVID-19 has proved our ability to deal with challenges and alter rules and policies to match both societal and economic needs. In the past, policy change has always been a rather lengthy process. This is often understandable, however, we are in crisis mode. The immediacy of the devastating effects of the pandemic forced policy makers to jump into action. The foot must be left on the pedal, the adaptability that has been seen in the past two years must not slip away. It is time now to sustain green growth. It must be a priority for all policies, competition included.

The goal is to turn the European Union into a resource-efficient, green and competitive-low carbon economy.[21] Small but well-designed changes in competition policy can help bring this goal closer. Europe cannot squander this opportunity.

[18] Warlouzet L. 2016. "The Centralization of EU Competition Policy: Historical Institutionalist Dynamics from Cartel Monitoring to Merger Control (1956-91)". *JCMS: Journal of Common Market Studies* 54 (3)
[19] European Commission. 2021. Green Growth and Circular Economy. https://ec.europa.eu/environment/green-growth/index_en.htm. Accessed 24 May 2021.
[20] European Commission 2021, supra n. 19
[21] European Commission. 2021, supra n. 19

European Commission

Testing the limits of competition policy: An exemplary interdisciplinary approach to contribute to the Green Deal objectives

Leon Knoke

Leon is an Economics undergraduate from Heinrich-Heine University, Dusseldorf. Currently, he is researching at the Düsseldorf Institute for Competition Economics. Leon is passionate about seeking interdisciplinary approaches capable of creating novel solutions for complex issues such as climate change. Therefore, he is exploring the role competition policy can play.

Introduction

On 4 February 2021, the Directorate-General for Competition organised a conference hosted by Executive Vice President Margrethe Vestager to discuss how competition policy can contribute to the Green Deal. As the event's information letter states:

"Competition Policy is not in the lead when it comes to fighting climate change and protecting the environment – there are better, much more effective ways, such as regulation and taxation. However, competition policy can complement regulation and the question is, how could it do that most effectively?"[1]

Had I been one of the speakers on Panel 1, I would have suggested that competition policy should test its limits by cooperating with other disciplines to contribute to the Green Deal objectives. Therefore, the aim of this paper is to demonstrate a thought-provoking framework as an example for several other possible interdisciplinary frameworks.

This paper is structured as follows. First, it will discuss the role that competition policy could play by cooperating with other disciplines to contribute to the Green Deal objectives. Thereafter, a specific framework will be proposed explaining how such an interdisciplinary workforce could harness large digital platforms to deploy green nudges on citizens. Subsequently, it will be illustrated how green nudges could increase environmental awareness and pro-environmental behaviour which in turn would contribute to the Green Deal objectives. Finally, this paper will conclude with a summary of the various findings and provide an outlook for future opportunities.

The role of competition policy contributing to interdisciplinary workforces

As seen with the Digital Markets Act (DMA), DG Competition and DG Connect already made a far-reaching proposal as an interdisciplinary workforce to ensure that large online platforms which act as "gatekeepers" behave in a fair way online.[2] It would be very valuable to consider further interdisciplinary workforces in which competition policy could be included. When it comes to defining the qualification criteria for large online platforms, competition policy is particularly useful. Competition policy could define similar criteria to those proposed in the DMA for other interdisciplinary workforces. Billions of citizens use online platforms on a daily basis. The European Commission could take advantage of this by harnessing the platforms for achieving social or environmental goals. Furthermore, it is important to highlight the role of competition economists. For instance, competition economists have the expertise when it comes to market power regarding Article 102 TFEU. The greater the power of the undertaking, the greater its responsibility should be. Therefore, competition economists are valuable in analysing pro- and anti-competitive effects of any interventions that the interdisciplinary workforce may conduct.

It does not seem that the European Commission has an independent workforce that combines several different disciplines. Coupling competition economists together with social scientists such as environmental and social psychologists, and other economic experts, such as behavioural or environmental economists, could lead to innovative ideas and novel solutions. Eventually, it is crucial for competition policy to test its limits and try to cooperate with many different experts. The European Commission needs to embrace complexity when it comes to important issues such as climate change.

Budging large online platforms to deploy green nudges

To illustrate how competition policy could cooperate with other disciplines to contribute to CO2 neutrality, I propose an interdisciplinary workforce that aims to incentivize large online platforms to deploy green nudges on citizens. The result of such a cooperation could be increased environmental awareness and pro-environmental behaviour of citizens. Since DG Competition

[1] European Commission. 2021. "Competition policy contributing to the EU Green Deal". Accessed October 20, 2021. https://eugreendealcompetition.eu

[2] European Commission. 2020. "The Digital Markets Act: ensuring fair and open digital markets". Accessed July 11, 2021. https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en

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needs to remain largely independent, the role of competition policy shall mainly focus on helping define the criteria of large online platforms.

First of all, the term 'nudging' describes "any aspect of the choice architecture that alters people's behaviour in a predictable way without forbidding any options or significantly changing their economic incentives".[3] Nudges that aim to reduce a negative environmental externality rather than individual welfare are called green nudges.[4] Thereby, a green nudge does not aim to correct a mistake in decision-making. It rather uses people's biases and moral utility to induce them not to cause negative externalities.

According to Michalek et al.,[5] nudges prove to be a critical instrument within the environmental policy toolkit since they are a key mechanism when it comes to addressing intuitive and habitual environmental behaviour through policy instruments. It is noteworthy to mention that demand- and supply-side regulations, as well as public education on behaviour change strategies need to be as transparent as possible.[6] Citizens could push back against these regulations if they feel manipulated. However, such objections might not be highly present since green nudges aim to correct for a negative externality rather than interfere with the individuals' biases.[7]

The cost of implementing and providing a nudge should not be forgotten. The cost of nudges can be diverse. On the one hand, some nudges only require a small modification in the choice architecture. For example, default nudges, where either a default option is implemented, or the existing default option is redesigned. On the other hand, several other nudges require non-negligible fixed costs and/or variable costs. Moreover, most nudges can be tested for viability in a pilot study before general implementation. Therefore, it is valuable to highlight the potential of green nudges as an example of how an interdisciplinary workforce could contribute to the Green Deal objectives.

Currently, nudging primarily focuses on a state-citizen relationship in which the state deploys the respective (green) nudge (Oliver, 2013).[8] However, some nudges are difficult to deploy through a state-citizen relationship. Hence, nudging can be seen as a starting point from a regulatory point of view. Subsequently, an alternative for the European Commission could be to initiate changes in individual behaviour by budging the private sector to deploy (green) nudges.

Budge policy is defined as follows:

"Budge policy limits its focus to countering the profit maximising behavioural economic informed harmful manipulation of consumers by private organisations by openly regulating against these activities, or by requiring organisations to use behavioural economic-informed interventions that are expected to be beneficial to their clientele".[9]

Budging shifts away from an individualistic perspective on nudging tools and includes legal and political institutions that interact with nudging measures.[10] Broadly speaking, starting from a supply-side perspective, budging can be considered as an instrument which tackles manipulations by the private sector. To enforce compliance, disobeying particular regulations should lead to consequences such as monetary or non-monetary sanctions. Budging the private sector away from socially harmful acts is a great opportunity to contribute to the achievement of the Green Deal objectives. Therefore, one particular example of how budging could be used to increase environmental awareness and pro-environmental behaviour through large online platforms is demonstrated in the following.

What is meant by environmental awareness? Although environmental awareness as a term seems intuitively clear to most people, it is often used in different contexts and does not have a general definition.[11] According to the authors, environmental awareness can be defined as the attitude regarding environmental consequences of human behaviour. Thus, environmental awareness may precede pro-environmental behaviour. Increasing individuals' environmental awareness could lead to a higher willingness to pay for green products. Green competition between companies would therefore be strengthened.

However, several studies show that environmental awareness does not necessarily imply that one automatically engages in

[3] Thaler, Richard H., and Cass R. Sunstein. 2008. *Nudge: Improving decisions about health, wealth, and happiness*. Yale University Press, New Haven, p. 6

[4] Carlsson, Frederik, Christina Gravert, Olof Johansson-Stenman, and Verena Kurz. 2019. *Nudging as an environmental policy instrument*. Department of Economics, Göteborg University

[5] Michalek, Gabriela, Meran, Georg, Schwarze, Reimund, and Yildiz, Özgür. 2015. "Nudging as a new 'soft' tool in environmental policy. An analysis based on insights from cognitive and social psychology." *Discussion Paper Series recap15*, no. 21, European University Viadrina, Frankfurt (Oder)

[6] Leggett, Will. 2014. "The politics of behaviour change: Nudge, neoliberalism and the state." *Policy & Politics 42*, no. 1, pp. 3-19

[7] Carlsson, Fredrik, Christina Gravert, Olof Johansson-Stenman, and Verena Kurz. 2019. "Nudging as an Environmental Policy Instrument." *Working Papers in Economics 756*, University of Gothenburg, Department of Economics

[8] Oliver, Adam. 2015. "Nudging, shoving, and budging: Behavioural economic-informed policy." *Public Administration* 93, no. 3, pp. 700-714

[9] Oliver, Adam. 2013."From nudging to budging: using behavioural economics to inform public sector policy." *Journal of Social Policy* 42, no. 4, pp. 685-700

[10] Lepenies, Robert, and Magdalena Małecka. 2015. "The institutional consequences of nudging–nudges, politics, and the law." *Review of Philosophy and Psychology* 6, no. 3, pp. 427-437

[11] Ham, Marija, Dajana Mrčela, and Martina Horvat. 2016. "Insights for measuring environmental awareness." *Ekonomski vjesnik: Review of Contemporary Entrepreneurship, Business, and Economic Issues* 29, no. 1, pp. 159-176

pro-environmental behaviour (e.g., Blake, 1999[12]; Kollmuss and Agyeman, 2002[13]). Therefore, environmental awareness is rather the first step in becoming a green consumer. Ultimately, it comes down to increasing the citizens' pro-environmental behaviour in the long run since certain human behaviours have a negative impact on the environment. Kollmuss and Agyeman (2002) define pro-environmental behaviour as behaviour that consciously seeks to minimize the negative impact of one's actions on the natural and built world. This includes for example the minimization of resource and energy consumption, using non-toxic substances and reducing waste generation.

Certainly, competition policy alone cannot achieve these objectives. Increasing environmental awareness and pro-environmental behaviour needs to be achieved through a cooperation between experts from several different areas. As mentioned above, there is a high potential to budge large online platforms in terms of increasing environmental awareness and pro-environmental behaviour through deploying green nudges on individuals (Figure 1).

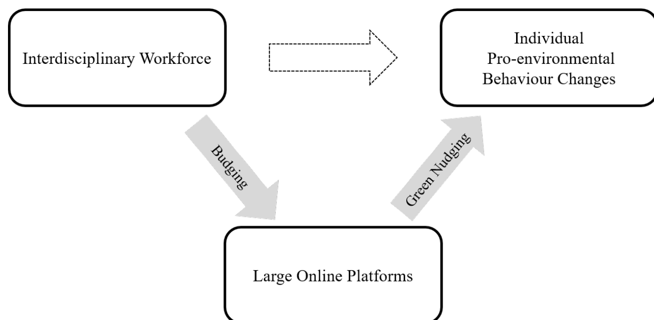

Figure 1. Relationship between the interdisciplinary workforce, large online platforms, and individuals' pro-environmental behaviour changes. Adapted illustration from Giest (2020).[14]

In order to highlight the potential of budging large online platforms for deploying green nudges to contribute to the Green Deal, a few green nudging possibilities are exemplified in the following. There are several domains where human behaviour has large negative impacts on the environment that could be mitigated by nudging. Figure 2 demonstrates six respective domains and eight nudging interventions that may result in mitigations of negative environmental impacts of individual behaviour.[15] Although several types of green nudges exist to contribute to the Green Deal, only nudging green defaults and green norms are explained more thoroughly in the following.

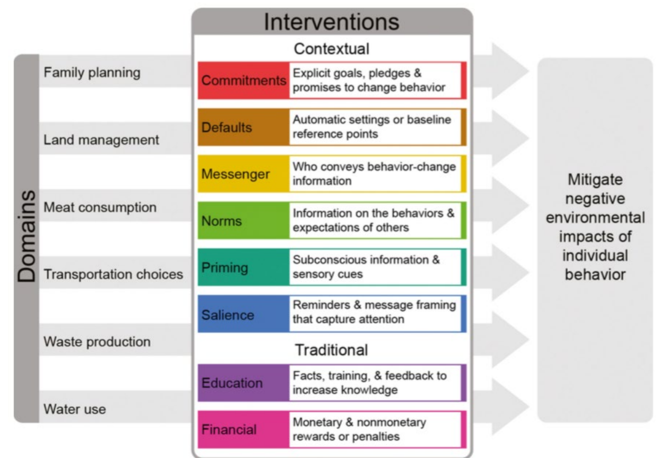

Figure 2. Behaviour-change interventions that target decision making in six domains where human behaviour has large impacts on the environment.[16]

First, setting defaults in terms of choice architecture can result in very different outcomes. The default effect refers to the tendency of individuals to stick with an alternative already chosen by someone else, even when the cost of making an active choice is very small.[17] This is for example the case regarding organ donations. Studies have shown that countries where citizens are organ donors by an opt-out default results in significantly more organ donation rates than countries with opt-in defaults.[18] That is why budging large online platforms in order to set green defaults is a highly valuable tool. For instance, in terms of flight booking, nudging citizens can significantly increase the amount of carbon-offset donations to compensate the negative ecological impact of aviation.[19] Currently, the number of fliers who choose to pay carbon-offsets is low. Setting green defaults could change this behaviour. Székely et al. (2016) show that proposing higher levels of default payments presented in a slide bar on an online flight-booking platform significantly increases the amount of carbon-offset donations (Figure 3).

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[12] Blake, James. 1999. "Overcoming the 'value-action gap'in environmental policy: Tensions between national policy and local experience." *Local environment* 4, no. 3, pp. 257-278

[13] Kollmuss, Anja, and Julian Agyeman. 2002."Mind the gap: why do people act environmentally and what are the barriers to pro-environmental behavior?" *Environmental education research*8, no. 3, pp.239-260

[14] Giest, Sarah. 2020. "Do nudgers need budging? A comparative analysis of European smart meter implementation." *Government Information Quarterly* 37

[15] Byerly, Hilary, Andrew Balmford, Paul J. Ferraro, Courtney Hammond Wagner, Elizabeth Palchak, Stephen Polasky, Taylor H. Ricketts, Aaron J. Schwartz, and Brendan Fisher. 2018. "Nudging pro-environmental behavior: evidence and opportunities." *Frontiers in Ecology and the Environment* 16, no. 3, pp. 159-168

[16] Byerly et al. 2018, supra n. 15

[17] Carlsson et al. 2019, supra n. 7

[18] Johnson, Eric J., and Daniel G. Goldstein. 2003. "Do Defaults Save Lives?" *Science* 302, pp. 1338-1339

[19] Székely, Nadine, Markus Weinmann, and Jan vom Brocke. 2016. "Nudging people to pay CO2 offsets – The effect of anchors in flight booking processes." Paper presented at the *Twenty-Fourth European Conference on Information Systems (ECIS), İstanbul,Turkey, 2016*

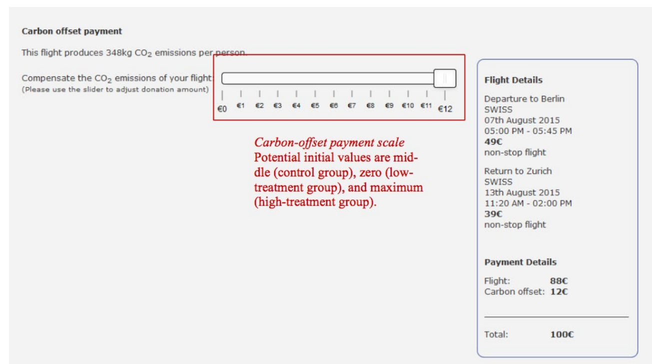

Figure 3. Design of carbon-offset payment decision in terms of flight booking (Székely et al., 2016).

The donation-rate mean of the group with the maximum anchoring condition is significantly higher than the mean of the group where the default of the carbon-offset donation is zero. That implies that setting green defaults can positively influence the individuals' decision-making regarding pro-environmental behaviour.

The second possible intervention is nudging green norms. Social norms are "rules or standards that are understood by members of a group, and that guide and/or constrain social behaviour without the force of laws."[20] A study by Severo et al. (2019)[21] points out that individuals who are exposed to information related to social responsibility and environmental sustainability are positively influenced in the formation of social and environmental awareness. Manipulating social norms would imply an even greater intervention into the citizens' life. Although manipulation is usually negatively connotated, it does not necessarily need to be. In this case, increasing environmental awareness which may lead to pro-environmental behaviour change would eventually benefit the individual in the long run. As mentioned before, people might not be negatively affected by such an intervention.

Lastly, a mix of green nudging interventions might be another alternative to contribute to the Green Deal. As seen in figure 2, there are many different possibilities to nudge pro-environmental behaviour. Combining different types of interventions such as commitments and social norms is therefore highly valuable. For instance, Jaeger and Schultz (2017)[22] conducted a large-scale field experiment in collaboration with a Southern California water utility during California's fourth consecutive year of drought. The experimental manipulation was delivered to 8,876 households via one of five door hangers. All door hangers included the same information regarding three mandatory water efficiency behaviours. The five conditions were: Information only (control group); Strong warning; Strong warning and commitment; Social norm; Social norm and commitment. The social norms conditions included the information that 80% of households in their community were following water efficiency guidelines. In the commitment condition, residents were asked to indicate their commitment by checking a box and providing a signature, and then returning the door hanger to the front door for collection the following day. The results show that immediate reductions were evident for committers that received either a strong warning or normative information. Interestingly, only households that made a commitment after receiving a social norm message reduced their water consumption in the long run. More specifically, the aforementioned group reduced the water use by 8% four months after the intervention, compared to the control group. Thus, the results suggest that normative information can influence the individual's intrinsic motivation.

The European Commission should see great potential in nudging green norms by budging large online platforms, as intrinsically motivated commitments tend to generate relatively long-term behavioural changes. For instance, green norms in terms of environmental awareness could be nudged through social media. This might be more effective than deploying nudges through a state-citizen relationship since the European Commission cannot reach as many ordinary people on a daily basis. The choice of these examples is thoughtful, as they are meant to highlight the untapped potential of what an interdisciplinary workforce could contribute to achieve the Green Deal objectives. Surely, the workforce needs to analyse and discuss such nudges and its short-and long-term effects in much more detail. While decent studies already exist, future research is needed to further explore the potential of budging the private sector to deploy green nudges especially in the digital world.

Conclusion

To sum up, this paper's main point is that competition policy should test its limits by cooperating with other disciplines. As seen with the DMA, an interdisciplinary workforce with DG Competition and DG Connect already provided novel solutions. This should not be the last cooperation. A framework in which the European Commission would form an interdisciplinary workforce to budge large online platforms to deploy green nudges on individuals would therefore be particularly relevant. There is a high potential to change individuals' behaviour since these platforms are used by billions of citizens on a daily basis. As mentioned above, recent studies have shown that it is fruitful to combine information systems and green nudges to increase environmental awareness and pro-environmental behaviour.

The European Commission may consider further digital and non-digital sectors where specific green nudges could result in

[20] Cialdini, Robert B., and Melanie R. Trost. 1998. "Social influence: Social norms, conformity and compliance." *Handbook of Social Psychology, 98 edition*, p. 151-192. Quotation, p. 152

[21] Severo, Eliana Andréa, Julio Cesar Ferro de Guimarães, Mateus Luan Dellarmelin, and Rossana Parizotto Ribeiro. 2019. "The influence of social networks on environmental awareness and the social responsibility of generations." *BBR. Brazilian Business Review* 16, pp. 500-518

[22] Jaeger, Christine M., and P. Wesley Schultz. 2017. "Coupling social norms and commitments: Testing the underdetected nature of social influence." *Journal of Environmental Psychology* 51, pp.199-208

significant pro-environmental effects. Subsequently, small interventions can imply large impacts on the environment. It is noteworthy for the European Commission to consider budging large online platforms on a case-by-case basis since general conclusions cannot be drawn. That is why it is even more important to have an interdisciplinary workforce with various experts discussing potential green nudges. However, if the suggested budging framework is not achievable for now, other approaches should be considered that may be easier to push through. Enforcement does not necessarily have to be the solution. For instance, an interdisciplinary workforce could solely recommend best practices or even cooperate with large online platforms. This could be achievable, as combating climate change is in all of our interests.

Competition policy together with other disciplines could also tackle other issues beyond climate change. The separate disciplines may not have enough influence to enforce potential solutions on their own. Hence, the European Commission should utilize these potential resources by building interdisciplinary workforces. Any successful interdisciplinary workforce that creates new ideas and solutions regarding the aforementioned issues would increase the likelihood that other public institutions follow the European Commission's approach. Finally, this paper should be considered as a thought-provoking approach which may lead to several other innovative ideas and novel solutions. Certainly, there are no simple answers to such difficult issues. Thus, it is necessary to embrace complexity and cooperation in the 21st century.

‘Competition in innovation’: How to rescue the EU Green Deal

Valentina Garilli

Valentina holds a master’s degree in Law from the University of Trento, Italy, and she is currently working as a trainee lawyer in commercial and tax law at a law firm in Rome. While training to become a lawyer, Valentina still pursues a strong interest in European law, especially competition and environmental law.

A deeper inclusion of the dimension of innovation in the competitive analysis can contribute to the EU Green Deal. This result can be achieved through the general application of the ‘competition in innovation’ and ‘innovation space’ concepts to all fields of competition law. In order to guarantee this result, they should also be considered in the revision of the Notice on the definition of the relevant market.

While the ‘effect-based approach’ adopted by the European Commission by the end of the 20th century focuses the scope of the competitive analysis on what occurs in existing markets, nowadays the increasingly dynamic economy requires a broader look, precisely at what *is going to happen* (Drexl 2012, p. 5)[1]. Cases where undertakings, which are not yet competitors, dispose of innovation capacity on future markets are progressively increasing (Drexl 2012, Abstract)[2]. Therefore, it is necessary not to overlook the possible negative effects that a conduct taking place on existing markets could have on the incentive to innovate in new products or processes.

The concept of ‘competition in innovation’ has been firstly conceived in the field of Art. 101 TFEU, precisely in relation to horizontal co-operation agreements, with the objective to outweigh the limited scope the current competitive analysis can reach and to protect the innovation process (Robertson 2020, Part II.5.III)[3]. Indeed, this concept concerns a different dimension, other than the one covered by the traditional definition of the relevant market: while the latter refers to the final stages of the distribution process, the former takes into consideration the R&D stage of production.

In the context of horizontal co-operation agreements, the Commission has identified three dimensions to be defined: two of them were linked to existing markets, while the last one referred to competition in innovation and new product markets. In the third dimension, it is important to understand whether the parties to an agreement share competing R&D poles, in order to evaluate whether “after the agreement there will be a sufficient number of remaining R&D poles”[4], meaning a sufficient innovation drive.

The concept has already been applied in other contexts, precisely in the Commission decisions *Dow/DuPont*[5] and *Bayer/Monsanto*[6], where the Commission included the dimension of innovation in the competitive analysis, *following* the definition of the relevant market.

In the Dow/DuPont merger, the Commission stated that, in order to assess competition in innovation, it is important to consider the spaces in which this kind of competition occurs (‘innovation spaces’. See also Robertson 2020, Part II.5.III)[7]. Identifying the undertakings capable of developing new products or processes can help assess whether, “*through increased concentration and in light of high barriers to entry, the Transaction would be likely to reduce innovation output* […]”[8].

In light of the mentioned approach adopted by the Commission, the ‘competition in innovation’ and ‘innovation spaces’ concepts can be more than useful to integrate the Green Deal objectives in the competitive analysis.

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[1] Drexl J. 2012. *Anticompetitive Stumbling Stones on the Way to a Cleaner World: Protecting Competition in Innovation without a Market*, Journal of Competition Law and Economics, 8(3)

[2] Drexl J. 2012. *Anticompetitive Stumbling Stones on the Way to a Cleaner World: Protecting Competition in Innovation without a Market*, Journal of Competition Law and Economics, 8(3)

[3] 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], para. 119 ff.; see also, Robertson V.H.S.E. 2020. *Competition Law’s Innovation Factor, The Relevant Market in Dynamic Contexts in the EU and the US*, Oxford: Bloomsbury Publishing Plc. Kindle

[4] 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], para. 120

[5] Case M.7932 – Dow/DuPont, 27 March 2017 [2017] OJ C353/9

[6] Case M.8084 – Bayer/Monsanto, 21 March 2018 [2018] OJ C456/10

[7] Case M.7932 - Dow/DuPont, 27 March 2017 [2017] OJ C353/9, para. 2162; see also, Robertson V.H.S.E. 2020. *Competition Law’s Innovation Factor, The Relevant Market in Dynamic Contexts in the EU and the US*, Oxford: Bloomsbury Publishing Plc. Kindle

[8] Case M.7932 - Dow/DuPont, 27 March 2017 [2017] OJ C353/9, para. 2163

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Among all the other objectives, a zero-emission European Union by 2050 can only be achieved through the shift to a clean circular economy and sustainable mobility. The only way to guarantee the latter is to mobilise research and foster innovation[9].

As already explained, the limits of the current competitive analysis are linked to the 'market-based approach', meaning the excessive reliance on existing markets.

However, as an example, a merger between undertakings producing fuel-driven cars may not cause any particular concerns in the existing market. However, if we assume that the undertakings involved are already investing in rechargeable batteries for electric cars, the merger may have the effect of reducing their post-merger incentive to search for a better product or process in the electric cars' sector, resulting in a less developed and less 'green' technology (Drexl 2012, pp. 3-4)[10].

Likewise, the R&D BER states that an R&D agreement may be exempted because the joint market shares do not exceed 25% in the existing market[11]. Despite this, it may still entail risks for innovation regarding related future markets; risks that the consideration of 'competition in innovation' may prevent from materialising (Drexl 2012, pp. 22-23)[12].

Overlooking these effects can cause a delay in the introduction of better technology and the favouring of a long-lasting monopolization in place of constant competition (Drexl 2012, p. 39)[13].

Even if 'competition in innovation' and 'innovation spaces' concern a different dimension, where there is no transaction and, therefore, no market, including the concepts in the Notice can help broaden the scope of the analysis, detecting situations where the overlap of innovation poles can cause a future decrease in the innovation drive. The analysis will technically follow the definition of the relevant market, but, in order to guarantee their general application, their inclusion in the Notice is advisable (Graef 2020, pp. 5-6)[14].

[9] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - *The European Green Deal*, COM(2019) 640 final, p. 3, figure 1

[10] Drexl J. 2012. *Anticompetitive Stumbling Stones on the Way to a Cleaner World: Protecting Competition in Innovation without a Market*, Journal of Competition Law and Economics, 8(3)

[11] Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, Art. 4(2)

[12] Drexl J. 2012. *Anticompetitive Stumbling Stones on the Way to a Cleaner World: Protecting Competition in Innovation without a Market*, Journal of Competition Law and Economics, 8(3)

[13] Drexl J. 2012. *Anticompetitive Stumbling Stones on the Way to a Cleaner World: Protecting Competition in Innovation without a Market*, Journal of Competition Law and Economics, 8(3)

[14] As the Commission itself stated, '*while there could be no market in innovation as such, this should not keep competition authorities from investigating a transaction's 'impact … at the level of innovation efforts*', case M.7932 - Dow/DuPont, 27 March 2017 [2017] OJ C353/9, para. 348; see also, "[…], *merger decisions like* Dow/DuPont *and* Bayer/Monsanto *have explored the impact of the respective acquisitions on innovation competition based on the concept of innovation spaces. Anticompetitive effects within innovation spaces may result in harm in more than one relevant product market, as innovation spaces are discovery targets of innovation efforts over which firms compete as an input for later products. This need to look beyond relevant markets for existing products, for instance through the notion of innovation spaces, should be recognized in a revised Market Definition Notice*." Graef I. 2020. *Feedback on the evaluation of the Market Definition Notice*, Tilburg University

Phasing out Fossil Fuel Subsidies: Green Conditionality Attached to the Compatibility Assessment under Article 107(3) TFEU

Sofia Ghezzi

Sofia holds a LLB in European Law (Cum Laude) from Maastricht University, and an LLM in European Competition Law and Regulation (Cum Laude) from the University of Amsterdam. She is currently pursuing an LLM in International Business Law: Climate Change and Corporations at Vrije Universiteit and she is involved as a researcher for the Institute for Internet & the Just Society. Sofia is passionate about the intersection of law and culture, and the underlying influences of society in law.

It should be undisputed that human activities cause global warming and climate change.[1] The presence of greenhouse gas emissions (GHG) in the atmosphere has drastically increased from the industrial revolution causing the rise of global surface temperature.[2] GHG emissions are predominantly attributed to the current energy production, primarily via the burning of fossil fuels.[3] To tackle the problem of climate change, the EU Green Deal advocates for the energy transition towards renewable sources, the increase of energy efficiency, and the development of smart infrastructures, to reach carbon neutrality by 2050. In particular, the phasing out of fossil fuels is critical in achieving the objective of zero-net emissions. It is estimated that 75% of the EU GHG emissions are derived from the production and consumption of energy, and most of the EU energy system is based on fossil fuels.[4] Despite the political momentum, in May 2021, the first comprehensive study of the journey towards zero emissions by the International Energy Agency showed that government promises are still falling short in the view of achieving climate neutrality.[5] The Banking on Climate Change Report has revealed that 35 global banks have not only been sustaining but expanding the fossil fuel sector.[6]

State aid policy can facilitate the green transition. The green transition requires significant investments: the Commission has estimated that €260 billion needs to be pooled just to achieve the targets set for 2030.[7] Several funds have been made available by the EU through various mechanisms, such as the European Green Deal Investment Plan and the Just Transition Mechanism. Additionally, private investments and investments from States' budgets remain important. For this reason, State aid plays a major role, as green subsidies are a *conditio sine qua non* to the green transition.

The controversy over EU State aid rules and the EU Green Deal's objectives arises from the current legality of fossil fuel subsidies. Under the current State aid framework, nothing prohibits States from granting aids to fossil fuel processes. The framework currently does not recognize fossil fuel subsidies as a specific category; thus, those subsidies are likely to be categorized as environmental and energy aids.[8] Often, fossil fuels aids are funded in the form of so-called *capacity mechanisms* so as to enable security of energy supply. However, aid for generation adequacy may contradict the objective of phasing-out environmentally harmful subsidies, as provided in the EEA Guidelines Recital 220. In *Castelnou Energía v Commission*, the Commission allowed the State aid to a coal power plant as justified under Article 106(2) TFEU – i.e. necessary for ensuring the security of the energy supply. The measure had an obvious negative impact on the environment, but the General Court approved the aid, holding that environmental concerns are only relevant with State support schemes that have an environmental objective.[9]

Diverging from the *Castelnou Energía v Commission* judgment, Article 11 TFEU, together with the *Hinckley Point C* judgment,

[1] IPCC. 2021. "Climate Change 2021: The Physical Science Basis – A Summary for Policy Makers" IPCC AR& WGI Last accessed October 27, 2021,https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf, 5.

[2] Ibid.

[3] NASA. 2021. "Global Climate Change: The Causes" Last accessed October 27, 2021. https://climate.nasa.gov/causes/.

[4] Communication from the Commission: A Clean Planet for All COM(2018) 773 final, 6-8.

[5] International Energy Agency. 2021. "Zero Net by 2050: A Roadmap for the Global Energy Sector" *IEA* https://www.iea.org/reports/net-zero-by-2050. Abnett, Kate. 2020. "EU budget plan falls far short on climate goals, researchers say" *EURACTIV Network*, July 14, 2020. https://www.euractiv.com/section/climate-environment/news/eu-budget-plan-falls-far-short-on-climate-goals-researchers-say/.

[6] Rainforest Action Network. 2020. "Banking on Climate Change Fossil Fuels Report 2020" RAN https://www.ran.org/wp-content/uploads/2020/03/Banking_on_Climate_Change__2020_vF.pdf.

[7] Communication from the Commission: The European Green Deal COM(2019) 640 final, 15.

[8] Nowag Julian, Åhman Max, and Mundaca Luis. 2020. "Fossil Fuel Subsidies in the EU: EU State Aid Rules as Control and Phase Out Tools – Opportunities and Estimates" *Research Gate Lund Law Competition Series* 1 (October): 3- 25, 23.

[9] T-57/11, *Castelnou Energía v Commission* [2014] ECLI:EU:T:2014:1021 §§186-189.

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provides a legal basis for implementing the following new rule in the compatibility assessment: *all types* of State aid granted by the Commission under Article 107(3) TFEU must follow environmental law.[10] In the *Hinckley Point C* judgment, the ECJ firstly referred to its previous case law, *Nuova Agricast,*[11] so as to renew the rule that State aid contravening provisions or general principles of EU law cannot be considered compatible with the internal market.[12] Secondly, the court notably stipulated that State aid for economic activity in the nuclear energy sector covered by the Euratom Treaty still needs to be compatible with environmental laws and Treaty provisions.[13] Therefore, the application of Article 11 TFEU, Article 194 TFEU, and Article 37 Charter of Fundamental Rights, as well as secondary law on environmental protection, is not precluded. Even though the Hinkley Point C aid was not designed to protect the environment, but aimed at ensuring the security of energy supply, it must nevertheless comply with EU climate and environmental law.

Regardless, State aid law may not be enough to reach a complete phase-out of fossil fuel subsidies, as the wording of Article 107(3) TFEU does not permit to the Commission to include environmental considerations among the negative effects on the internal market when carrying out the balancing test, as the protection of the environment does not *per se* compose a part of the internal market.[14] Article 194(2) TFEU also poses an issue, as it does not permit a complete ban of fossil fuel subsidies due to the Member States' right to choose their own energy mix.

The judgment demonstrates the possibility to include green conditionality under Article 107(3) TFEU, although limited by the wording of Article 107(3) TFEU, and of Article 194(2) TFEU. Without reservation State aid should be fostered as a positive tool of EU integration and assist the green transition when possible.

[10] This is already provided for in Recital 7 of the EEA Guidelines: "to avoid that State aid measures lead to environmental harm, in particular, Member States must also ensure compliance with Union environmental legislation […[". However, this obligation was never considered in practice under Article 107(3) TFEU for all types of aids, but only when State aid falls within the EEA Guidelines' scope. Communication from the Commission: Guidelines on State aid for environmental protection and energy 2014-2020 ("EEAG"), OJ C200.

[11] C-390/16 *Nuova Agricast* [2008] ECLI:EU:C:2008:224.

[12] C-594/18P, *Austria v Commission* [2020] EU:C:2020:742 §44 and §100.

[13] Ibid. §45 and §100.

[14] Ibid. §98-102.

Why Albany should cover sustainability agreements

Mari Koskela

Mari is a recent graduate from the University of Oxford (BCL, Distinction) and Queen Mary University of London (LLB, First Class Honours). She enjoys finding solutions to legal and societal problems by exploring relationships between different legal fields, which inspired her to contribute to the discussion concerning competition law and the Green Deal.

Competition law can present an obstacle to the much-needed cooperation between companies in climate change mitigation as sustainability agreements can be deemed incompatible with Article 101 of the Treaty on the Functioning of the European Union ('TFEU').[1] I argue that this obstacle can be overcome by following the Albany route.[2] More specifically, I contend that in assessing the rigour of sustainability agreements in reference to the Albany line of case law, the Paris Agreement of 2015 ('the Paris Agreement') provides assistance. In doing so, I address the concerns raised in DG Competition's Conference on Competition Policy and the Green Deal[3] that extending Albany to sustainability agreements (i) is an improper application of policy objectives; and (ii) facilitates greenwashing.

Proper Application of Policy Objectives

It has been argued that sustainability agreements are not comparable with *Albany*-type collective labour agreements and treating them as such would undermine the well-balanced system of Article 101 and 101(3) of the TFEU.[4] However, taking a purposive interpretation of the law,[5] sustainability agreements and collective labour agreements feature similar goals and social policy objectives, including the protection of fundamental rights.

In rendering judgements, a core task of the Court of Justice of the EU ('CJEU') is to balance conflicting rights, freedoms and fundamental rights,[6] as well as the Union's constitutional provisions.[7] Article 7 of the TFEU is particularly relevant in this regard. It states '[t]he Union shall ensure consistency between its policies and activities taking all of its objectives into account.'[8] These objectives include social affairs, environmental standards, climate policy and consumer protection.[9] The CJEU remarked in *Albany* that 'the social policy objectives pursued by [collective agreements] would be seriously undermined' if they were subject to competition law.[10] In interpreting the Treaty 'as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of [social policy] objectives', the CJEU was of the opinion that collective agreements must be regarded as falling outside the scope of competition law.[11] Holmes contends that when proposed sustainability agreements are read together with the constitutional provisions of the TFEU,[12] 'exactly the same reasoning could be applied to sustainability agreements as for collective agreements in the workplace.'[13] Both collective agreements and environmental sustainability agreements pursue social policy objectives recognised in the Union's constitution.

Furthermore, *Albany* touched on human rights issues. Freedom of association is an internationally recognised human right under Article 11 of the European Convention on Human Rights,[14] which extends to the right to collective bargaining.[15] The right of collective bargaining and action is also provided in Article 28 of the EU Charter of Fundamental Rights. In essence, voiding a collective agreement as anti-competitive raises human rights concerns.[16] Similarly, the preamble of the Paris Agreement[17]

[1] Dirk Middelschulte, 'Competition policy contributing to the European GreenDeal' (*YouTube*, 7 February 2021) <https://www.youtube.com/watch?v=DY1J5F5v0Ok> accessed 8 June 2021; see also Simon Holmes, 'Climate change, sustainability, and competition law' [2020] JAE 8, 354-405.

[2] Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie [1999] C-67/96 ECR 1999.

[3] DG Competition organised a conference entitled 'Competition policy and the Green Deal' on 4 February 2021, see <https://ec.europa.eu/competition/information/green_deal/index_en.html > accessed 8 June 2021.

[4] Vanessa Turner, 'Competition policy contributing to the European Green Deal' (*YouTube*, 7 February 2021) <https://www.youtube.com/watch?v=DY1J5F5v0Ok> accessed 8 June 2021

[5] Purposive interpretation refers to the idea that in interpreting the law, courts can have regard to contextual factors to ascertain the law's purpose. This can be contrasted with literal interpretation of the law which results in a strict application of legal rules. Arguably, collective agreements and climate agreements have several overlapping purposes, including the fulfilment of human rights objectives.

[6] Shaun Bradshaw, 'Collective agreements and EU competition law: do we need an exemption?' (Doctoral Thesis, University of East Anglia 2019) <https://ueaeprints.uea.ac.uk/id/eprint/71232/1/Collective_Agreements_and_EU_Competition_Law_-_Do_we_need_an_exemption.pdf> accessed 8 June 2021.

[7] The Treaty on the Functioning of the European Union, arts. 7, 9 and 11.

[8] ibid, art. 7.

[9] The Committee on Economic and Monetary Affairs of the European Parliament, Annual Report on Competition Policy 2018 (31 January 2018).

[10] *Albany* (n 2) para, 59.

[11] Ibid. para 60.

[12] Such as Article 3 of the TFEU which describes the Union's aim to be the promotion of peace, values and well-being of its peoples.

[13] Holmes (n 1) 370.

[14] European Convention on Human Rights, art. 11.

[15] *Wilson and others v the United Kingdom* [2002] ECHR 552, [2002] IRLR 568, (2002) 35 EHRR 20 (applications nos. 30668/96, 30671/96 and 30678/96).

[16] Bradshaw (n 6).

[17] Decision 1/CP.21 'Adoption of the Paris Agreement' (12 December 2015) UN Doc FCCC/CP/2015/L.9

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justifies climate action with reference to human rights obligations. It holds that 'parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights.'[18] While states are in any case required to interpret Treaties with reference to the relevant rules of international law,[19] the explicit inclusion of human rights objectives in the preamble reinforces the relevance of human rights in climate change. In addition, various provisions in the Paris Agreement recognise the relationship between the enjoyment of human rights and climate change.[20] As such, human rights considerations have acquired a place of importance in the climate change context through the Paris Agreement.[21]

From Greenwashing to Collaborative Climate Action

Relaxing competition rules raises concerns about greenwashing.[22] However, the proposed sustainability exception under *Albany* need not be wide, capturing all agreements that have a sustainability objective. Rather, in parallel with *Albany,* which stipulated two cumulative conditions for the finding that social policy objectives outweigh competition objectives,[23] a similar conditional test could apply to sustainability agreements. Taking inspiration from the Paris Agreement, parties could be required to demonstrate how the sustainability agreement in question enables them to achieve their home country's Nationally Determined Contribution targets (NDCs) under Article 3 and 4 of the Paris Agreement. Indeed, there are various ways in which companies can contribute to the NDCs.[24]

The importance of private sector involvement has gained consensus in the climate change discourse.[25] Admittedly, to put the above proposal into effect, the states that are Parties to the Paris Agreement would need to foster effective communication between industry players to ensure that businesses know where they stand in the climate change agenda. This could serve as a pathway to developing the dialogue between states and the private sector in emission reduction and climate change adaptation.[26]

[18] Ibid. recital 12.
[19] Vienna Convention on the Law of Treaties, art. 31(1)(c).
[20] e.g. recital 9 recognises the relationship between climate change and equitable access to sustainable development and eradication of poverty and recital 10 suggests a link between food security and climate change.
[21] Manuj Bhardwaj, 'The role and relationship of climate justice and common but differentiated responsibilities & respective capabilities (CBDR-RC) principle in the international climate change legal framework' (2017) <https://www.connect4climate.org/sites/default/files/files/publications/Climate%20Justice_Manuj% 20Bhardwaj%20India_0.pdf> accessed 8 June 2021; Benoit Mayer, 'Human rights in the Paris Agreement' (2016) 6CL109-117 <https://www.benoitmayer.com/files/Human%20rights%20in%20the%20Paris%20Agreement.pdf> accessed 8 June 2021.
[22] The term 'greenwash' emerged from the Earth Summit held in Rio de Janeiro in 1992. The Concise Oxford Dictionary defined the term in 1999 as 'Disinformation disseminated by an organisation so as to present an environmentally responsible public image.'
[23] *Albany* (n 2) the conditions are set out in paragraphs 59-60 of the judgment: (i) collective agreement must be concluded in the context of collective negotiations between management and labour; and (ii) it must seek to improve conditions of work and employment.
[24] For a detailed discussion, see IFC, 'Creating markets for climate business' (An IFC Climate Investment Opportunities Report, 2017) <https://www.ifc.org/wps/wcm/connect/efab8303-2918-4fc2-b4ee-00260c4d9777/IFC-Climate_Investment_Opportunity_Creating_Markets.pdf?MOD=AJPERES&CVID=l-sCYLz> accessed 8 June 2021.
[25] UNCC, 'Private investments are crucial to achieve Paris goals' (News, 2017)<https://unfccc.int/news/private-investments-are-crucial-to-achieve-paris-goals> accessed 8 June 2021.
[26] GRI and CDP, 'Nations must engage with private sector to achieve Paris Agreement' (Report, 2019) <https://www.arx.cfa//media/regional/arx/post-pdf/2020/04/14/policy-engaging-business-in-the-ndcs-paris-agreement.ashx?sc_lang=en&hash=B45AB2E4FC7CA59F1743B6338F3D0011> accessed 8 June 2021.

How to greenify the Vertical Block Exemption Regulation: The incorporation of sustainability concerns in the assessment of vertical agreements

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The sustainability discourse (at the legislative level[1] and in private initiatives[2]) is increasingly moving away from simply assessing the environmental impact of a single step of the production process to a more sophisticated life-cycle analysis, which also includes distribution. Concretely, retailers require their suppliers to meet environmental standards, suppliers include sustainability requirements in selective distribution contracts, and cooperate with their distributors to ensure sustainable distribution.[3]

The question arises how competition law affects these trends. The Commission is resolute: 'No specific issue in relation to sustainability agreements in the vertical supply chain was identified during the evaluation [of the Vertical Block Exemption Regulation ('VBER')]', but also leaves some room for reflection: 'However, in line with the objectives of the European Green Deal, any related issues may be taken into account when considering next steps'.[4] Does competition law on vertical agreements hinder the aforementioned trends? Or, contrarily, does it stimulate green cooperation within the supply chain?

First, the VBER accommodates sustainability cooperation within the supply chain, making vertical sustainability cooperation a lot easier than horizontal cooperation. This is because all sustainability agreements between undertakings with a market share under 30 percent are exempted from Article 101 TFEU, as long as they do not contain hardcore restrictions.[5] Since barely any hardcore restrictions limit sustainability choices, almost all green initiatives along the supply chain are 'protected' under the VBER. Interestingly, the VBER also facilitates an essential aspect of the road to sustainable products. Under the VBER, a supplier cannot be restricted from selling spare parts to end-users, independent repairers and service providers.[6] Although the Commission pursued other objectives in setting this restriction (e.g. efficient access to and pressure on the price level of spare parts[7]), this provision facilitates the repair market, something other fields of law (e.g. IP law) struggle with.[8]

Conversely, there are still several unclarities and hurdles for undertakings willing to greenify their supply chain that are associated with vertical competition law. The three most important ones are: the resale price maintenance ('RPM') provision, selective distribution, and information sharing. First, Article 191(2) TFEU states that the polluter should pay. As a consequence, the true price of a product is the market price plus the unpaid external cost of carbon.[9] If suppliers want to ensure that these external costs are carried along the supply chain, they could agree with their distributors to include the external cost in the price. However, the question then arises whether this is a minimum price, which would amount to a forbidden hardcore restriction under the VBER.[10] Second, an increasing number of suppliers selects their distributors based on criteria related to sustainability (e.g. sustainable packaging, proximity to public transport, use of green energy). If the supplier wants to install a

[1] For example, the EU Taxonomy regulation (https://eur-lex.europa.eu/legal content/EN/TXT/PDF/?uri=CELEX:32020R0852&from=EN); Circular Economy plan (https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1583933814386&uri=COM:2020:98:FIN).

[2] E.g. Philips (Life Cycle Analysis (LCA), Ecodesign And EP&L". 2021. *Philips EngineeringSolutions*,https://www.engineeringsolutions.philips.com/looking-expertise/environment-health-safety/life-cycle-analysis-lca-services/) and Deloitte ("Enhancing The Value Of Life Cycle Assessment".2021.*Deloitte*,https://www2.deloitte.com/content/dam/Deloitte/us/Documents/process-and-operations/us-consulting-enhancingthevalueoflifecycleassessment-112514.pdf).

[3] de Brousse, Angélique. 2021. "Competition Law And Sustainability: An Industry Perspective". In *Competition Law, Climate Change & Environmental Sustainability*, 279. New York: Concurrences; Graham, Ben. 2021. "What Role Does Antitrust Play In How FMCG Companies Choose To Pursue Sustainability Goals?". In *Competition Law, Climate Change & Environmental Sustainability*, 299-300. New York: Concurrences.

[4] European Commission. 2020. "Evaluation of the Vertical Block Exemption Regulation" *Commission Staff Working Document SWD(2020) 173 final*: 31.

[5] Article 2 and 3 VBER.

[6] Article 4(e) VBER.

[7] Wijckmans, Frank, and Filip Tuytschaever. 2018. *Vertical agreements in EU competition law*. Oxford: OUP, 240.

[8] Terryn, Evelyne. 2019. "A Right To Repair? Towards Sustainable Remedies In Consumer Law". *European Review Of Private Law* 27 (4): 851 - 874; Van Gool, Elias. 2021. "A European 'Right To Repair': Yes! But How (Far)?". Blog. *CCM Blog*. https://law.kuleuven.be/ccm/blog/?p=68.

[9] "A Roadmap For True Pricing - True Price". 2021. *True Price Foundation*. https://trueprice.org/a-roadmap-for-true-pricing/; Dolmans, Maurits. 2021. "Sustainable Competition Policy And The "Polluter Pays" Principle". In *Competition Law, Climate Change & Environmental Sustainability*, 19. New York: Concurrences.

[10] Article 4(a) VBER.

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selective distribution system, 'such a system must constitute a legitimate requirement, having regard to the nature of the product concerned, to preserve its quality and ensure its proper use.'[11] However, this criterion is unclear when the product itself has nothing to do with sustainability, but the undertaking still wants a sustainable supply chain. Third, while the VBER appears to indicate that the supplier can share an unlimited amount of information with its distributor as long as they are in a strictly vertical relationship, some unclarity exists regarding the extent to which the supplier can share this information with their end-users and other distributors. Being able to share information can drive the adoption and impact of sustainability initiatives.[12]

As stated above, the majority of vertical sustainability agreements would be exempted under the VBER. However, even sustainability agreements that contain hardcore restrictions or agreements between undertakings with a market share above 30 percent can (under certain conditions) be exempted under Article 101(3) TFEU. The interpretation of these conditions is under full scrutiny with regard to horizontal sustainability agreements. Suggestions include, among other things, a more flexible reading of the 'fair share for consumers' condition.[13] Clarifying Article 101(3) TFEU will also encourage sustainable vertical cooperation.

The previous paragraphs have set out the current problems and unclarities concerning vertical agreements and sustainability. Not only is it desirable to address these ambiguities, but more progressive steps are also possible.[14] For instance, the Commission could remove the market threshold for vertical agreements with a focus on sustainability and thus include these agreements (even when the undertakings' market share exceeds 30 percent) in the 'safe haven' of the VBER. In light of the VBER review, there is no better time to reflect on possible clarifications and adaptations and to take the above-mentioned issues into account when considering the next steps.

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[11] European Commission. 2010. "Guidelines On Vertical Restraints", para 175

[12] Graham, Ben. 2021. "What Role Does Antitrust Play In How FMCG Companies Choose To Pursue Sustainability Goals?". In Competition Law, Climate Change & Environmental Sustainability, 299-300. New York: Concurrences.

[13] Holmes, Simon. 2020. "Climate Change, Sustainability, And Competition Law". Journal Of Antitrust Enforcement 8 (2): 354-405. doi:10.1093/jaenfo/jnaa006; Gassler, Martin. 2021. "Sustainability, The Green Deal And Art 101 TFEU: Where We Are And Where We Could Go". Journal Of European Competition Law & Practice. doi:10.1093/jeclap/lpab001.

[14] For example, with regards to the food supply chain, the European Parliament has stated that 'The EU competition rules should not apply to vertical agreements and concerted practices aimed at applying higher environmental, animal health or animal welfare standards than the ones prescribed by EU or national laws if the advantages to the public outweigh the disadvantages.' ("How To Help Farmers Deal With Risks And Crises | Actualité | Parlement Européen". 2021. *European Parliament.*,https://www.europarl.europa.eu/news/fr/press-room/20201019BKG89682/eu-farm-policy-reform-as-approved-by-meps/5/how-to-help-farmers-deal-with-risks-and-crises).

The EU Green Deal and competition policy: challenging the status quo today, to protect ourselves tomorrow

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"Of course, no one has a bigger stake in the green transition than the young generation"
— Margrethe Vestager, opening words at the 'Competition Policy contributing to the EU Green Deal' Conference

The interrelationship between the EU Green Deal and competition is rooted in a wider debate about the values that Europeans consider crucial to their future, including non-economic concerns.[1] This includes sustainability interests. For instance, a merger between two companies that together can establish a greener production process will benefit the wider population, even if there might not be 'hard' economic benefits. Hitherto, competition enforcers have struggled to reconcile these 'public policy interests' with economic interests.[2] Behind this struggle lies, on the one hand, the difficulty in measuring the value of non-economic benefits and, on the other hand, the economic standard used to quantify the impact of market behaviour on consumer welfare.[3]

The purpose of competition law is to protect the process of competition, ensuring efficient allocation of economic resources.[4] This, in turn, will promote the welfare of consumers through innovation, improvements in price, choice and quality.[5] As such, consumers are at the centre of competition law and guarding and fostering their benefits should shape competition policy.[6] However, '**consumers**' remains narrowly interpreted, with little leeway to take into account benefits for a wider group of consumers.

[1] "Consumer demand is extremely powerful in driving change, and consumers are valuing sustainability now more than ever" see Margarida Matos Rosa, 'What the current antitrust and merger rules deliver, and what they don't ...' (4 February 2021) https://webcast.ec.europa.eu/competition-green-deal-conference (at 11:59:24) [accessed September 2021].

[2] Or Brook, 'Priority Setting as A Double-Edged Sword: How Modernization Strengthened the Role of Public Policy' (2020) 16(4) JCL&E 435, 444.

[3] Michael Ristaniemi and Maria Wasastjerna, 'Sustainability and competition: Unlocking the potential' in Guy Canivet, Ekaterina Rousseva and others (eds), *On-Topic: Sustainability and competition law* (Concurrences 2021) 58.

[4] European Commission, 'Guidelines on the Application of Article 81(3) of the Treaty' [2004] OJ C101/ 97 para 13 and 33 ('Article 101(3) Guidelines').

[5] Commission, 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' [2004] OJ C31/5 para 8.

[6] Article 101(3) Guidelines (n 4) para 13; see also Rutger Claassen and Anna Gerbrandy, 'Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach' (2016) 12(1) Utrecht L Rev 1, 3.

In its Guidelines, the Commission gives an example of two companies producing vehicle components that will combine their R&D investments through a joint venture to upgrade the production of a component.[7] This component could positively impact the environment, since vehicles would consume less fuel and emit less CO_2. In its analysis, the Commission refers to the restriction of competition within the meaning of Article 101(1) TFEU and it explains that it is likely to fulfil the Article 101(3) TFEU criteria. To assess the latter, the Commission says "it would be necessary to take into account that consumers will benefit from a lower consumption of fuel."[8] This illustrates that consumers are indeed at the heart of the analysis. Further, it could be argued that there are two ways to integrate the non-economic, environmental benefits into this analysis.

In the first scenario, there is both an economic and a non-economic benefit resulting from 'a lower consumption of fuel'. Indeed, consumers who consume less fuel, pay less — an economic benefit. The non-economic benefit resulting from less fuel is clear too: vehicles emit less CO_2, a specific target of the EU Green Deal. Therefore, there is not a direct issue when it is possible to embed the value of the non-economic benefit into the value of the economic one. However, if the non-economic benefit does not overlap with the economic one (the product is not both ecologically and economically efficient), how to take into account the former? In this example, it is possible that the component will be more expensive due to the joint venture, since it, for instance, will require a new design or energy sources that are costlier to consumers (such that it outweighs the lower fuel expenses), but greatly beneficial to the environment. It is possible that the Commission would say that the purpose of competition enforcement is to prevent markets from becoming less competitive and that it cannot balance the economic harm with the environmental benefits that result from the innovative component.

[7] European Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' [2011] OJ C 11/1.

[8] *Ibid* para 149.

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The EU Green Deal, however, aspires to create a **sustainable** European economy. Development can be declared sustainable if it "meets the needs of the present without compromising the ability of future generations to meet their own"[9]. To adequately pursue the EU Green Deal objectives, 'consumers' should be interpreted more broadly in the Article 101(3) Guidelines, encompassing also 'future generations' and 'society as a whole'.[10] Certainly, as part of the EU-wide policy against climate change, the Commission could then allow cooperation in situations like the abovementioned example. If the economical harm for direct consumers, caused by this joint venture, can be balanced with the environmental benefits for society as a whole, the assessment under Article 101 TFEU would be truly in line with the EU Green Deal. The legal bases enclosed in the Treaties provide ample support to embrace sustainability and include future generations in competition enforcement under Article 101 TFEU, such as Article 3(3) TEU, Article 3(1), 7, 9 and 11 TFEU, Article 37 of the EU Charter of Fundamental Rights, and the EU Green Deal itself.[11] The newly proposed EU Climate law might give another push towards an interpretation in that direction. The proposal puts forward that "[t]he Commission should [...] engage with all parts of society to enable and empower them to take action towards a climate-neutral and climate-resilient society, [...]"[12]. Ultimately, the EU Green Deal is a blueprint for the transformational change of *future* Europe. Since the EU Climate law aims to write into law the EU Green Deal's goals, the interpretation of the competition rules should reflect that as well.

Rather than solely considering short-term losses for consumers of a particular product or service, the Commission could acknowledge benefits for wider, including *future*, society. This would increase legal certainty[13], but it would also send a message to young stakeholders. If we — and particularly the younger generation — are willing "to pay for green"[14] to drive innovation, we hope the EU is willing to be innovative with us.

[9] Brundtland Commission, Our Common Future (Report of the World Commission on Environment and Development), (OUP, 1987) 8; see also UNGA Res 66/288 (27 July 2012) UN Doc A/RES/66/288.

[10] Article 101(3) Guidelines (n 4) para 87-88.

[11] "The EU Courts have repeatedly said that other Treaty objectives, like environmental protection, have to be considered in competition enforcement and even the Commission recognised this in the CECED case", see Dirk Middelschulte, 'What the current antitrust and merger rules deliver, and what they don't ...' (4 February 2021) https://webcast.ec.europa.eu/competition-green-deal-conference (at 12:21:11) [accessed September 2021].

[12] Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law)' COM (2020) 80 final, para 20.

[13] In a similar sense, the Commission recently found that 5 car manufacturers breached Article 101 because they exchanged information about the development of "AdBlue"-tanks which contain a chemical content that helps reduce NO_x emissions. This decision (i) was an opportunity to apply the analytical toolbox to a concrete situation, (ii) provided useful guidance to companies wishing to cooperate for R&D, and (iii) is relevant because the technical development that was impeded concerned technology that protects the environment and provides *benefits to consumers*. See *Audi v Bayerische Motoren Werke v Daimler AG v Porsche v Volkswagen* (Car Emmissions) (Case COMP/AT.40178) Commission Decision 2004/33/EC [2021] *not yet published*, https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40178 [accessed 20 September 2021].

[14] "What is true is that consumers' willingness to pay for green is an extremely powerful incentive for green innovation by firms, so keeping competition conditions strong is therefore a strong contribution of competition policy for the Green Deal.", see Margarida Matos Rosa, 'What the current antitrust and merger rules deliver, and what they don't ...' (4 February 2021) https://webcast.ec.europa.eu/competition-green-deal-conference (at 11:59:52) [accessed September 2021].