Freshfields Bruckhaus Deringer

RESPONSE BY FRESHFIELDS BRUCKHAUS DERINGER TO THE EUROPEAN COMMISSION'S CALL FOR CONTRIBUTIONS ON COMPETITION POLICY SUPPORTING THE GREEN DEAL

EXECUTIVE SUMMARY

(1) With sustainability at the top of our own agenda, Freshfields Bruckhaus Deringer is grateful for the opportunity to submit its response to the European Commission's (the ***Commission***) call for contributions on Competition Policy supporting the Green Deal. We are delighted to share our views on how competition law and policy can help realise the Green Deal and other sustainability objectives while maintaining competitive markets. In particular, we believe that to achieve a climate neutral continent by 2050, everyone will have to play their part. This includes us, our clients and competition enforcers.

(2) Our submission sets out answers to all questions in the Commission's call for contributions in relation to each of State aid control (Part 1), antitrust rules (Part 2) and merger control (Part 3).

State aid control

(3) The Commission has a long-standing review and approval practice of energy and environmental aid. This has paved the way for taking account of sustainability factors in the assessment. A consistent focus on achieving sustainability goals is therefore much less novel for enforcement in State aid law than in other areas of competition law. Nonetheless, with the Green Deal, there is a clear need for a "green reform" of the State aid rulebook.

(4) From the existing State aid framework, we consider that changes are necessary to the Guidelines on State aid for environmental protection and energy 2014-2020, the Communication on "Important projects of common European interest" as well the framework for State aid for research and development and innovation.

(5) While the current set of environmental State aid rules demonstrate some impressive success stories, we consider that these could be better tailored to fit the purposes of the Green Deal through revision of: (i) the rules limiting Member States to compensate companies only for minimum additional costs of the "green element in the investment", including relevant thresholds; (ii) definitions in the renewable energy sector; and (iii) the scope of sectors covered. In addition, increased use of the "Important projects of common European interest" instrument will contribute to mobilising greater public and private funds achieving the Green Deal's objectives. Finally, a revised State aid framework should address the gap between aid for research and development of green technologies and their effective and quick use for a greener market.

Antitrust rules

(6) While most businesses will generally consider whether sustainability targets can be met through unilateral action, there will be many circumstances where this will not be sufficient to make appreciable progress towards those targets or there will be considerable pressure not to take such steps, for example, where meaningful improvements can only be achieved through industry-wide collaboration or where taking the unilateral conduct in question would result in a "first mover disadvantage" as a result of increased investment costs, on which competitors could subsequently free ride. Equally, while regulation can, and should, play a role in setting minimum standards for sustainable trade, such standards will often not be sufficient – or sufficiently timely – to meet more

ambitious sustainability targets (or indeed the Green Deal objectives), for example due to jurisdictional limitations.

(7) As such, in order for the EU's Green Deal objectives to be met, competitor collaboration will be necessary in a number of sectors – sometimes to the potential short-term economic detriment of those competitors' direct customers. In our view, however, the EU antitrust rules currently interpret "consumer welfare" too narrowly when assessing the lawfulness of sustainability agreements. The current focus of this assessment is often almost entirely on the strict economic impact of agreements (e.g. in terms of price and range) on current consumers of the products / services directly covered by the sustainability agreement, with inadequate regard given to their wider and longer-term environmental or societal effects. Competitors agreeing to standards that directly serve the objectives of the Green Deal but which would either lead to price increases (or reductions in quality, range or service) for consumers or risk foreclosing competitors or upstream suppliers are two examples commonly cited to us by our clients of desirable cooperation between firms to support Green Deal objectives that might not be implemented due to EU antitrust risks (or a lack of consistency in recognising sustainability in the enforcement of EU (and European national) antitrust rules), although many other examples exist.

(8) Assuming the Commission agrees that wider societal benefits are relevant to the exemption in Article 101(3) of the Treaty on the Functioning of the European Union (***TFEU***), we consider that it would be helpful to receive further guidance on how the Commission proposes to assess environmental benefits in the future and whether – based on its experience to date – the Commission considers that any specific safe harbours for sustainability agreements should apply. We would also welcome guidance from the Commission on how it will interpret the Article 101(3) TFEU exemption in relation to agreements that pursue sustainability objectives. For example, it is currently unclear how widely the term "consumers" should be understood when considering whether the agreement allows "consumers a fair share of the resulting benefit" and whether an agreement that results in increased costs for direct consumers could nevertheless fulfil this limb. Similarly, further guidance would be welcome on how the Commission would interpret claimed "first-mover disadvantages" when considering whether a restriction was indispensable to the attainment of an agreement's sustainable objectives. Finally, as new scenarios arise that are not covered by existing guidelines, we also consider that there is scope to make use of comfort letters as a means of providing more certainty for firms considering potential collaborations, a point demonstrated by competition authorities' responses to the COVID-19 pandemic.

Merger control

(9) The current framework of the EU Merger Regulation (***EUMR***) enables the Commission to take sustainability considerations into account in merger control. A new test for transactions with sustainability elements is not required in order to make progress in this area. Instead, sustainability considerations should play a more prominent role within the existing efficiencies framework.

(10) Our response therefore sets out steps which we recommend are taken in order to more readily enable the Commission to take sustainability-related efficiencies into account, and to give businesses more certainty as to the Commission's approach. As a starting point, the Commission may wish to provide guidance on the types of sustainability benefits it will take into consideration. In this context, we encourage the Commission to clarify whether it would consider sustainability efficiencies that benefit not only customers of the merging parties and/or end consumers, but society in a broader sense. The Commission should also continue its efforts to design an

appropriate economic framework to capture and quantify merger-specific sustainability outcomes. This includes consideration of the timeframe within which sustainability outcomes must materialise in order to be capable of supporting efficiencies arguments. Sustainability reporting initiatives could provide an initial reference point in this context.

(11) Taking such an approach would allow the Commission to consider the positive impact of a merger on sustainability, whilst retaining the existing merger control framework. However, there is significant work needed to establish an appropriate economic framework to capture merger-specific sustainability outcomes. Further consideration and consultation should take place in order to develop a suitable framework and tools for these purposes.

PART 1: STATE AID CONTROL

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

(12) The Commission has, for many years, engaged in the review and approval of energy and environmental aid. This experience should make the notion of sustainable development being at the heart of State aid law and policy much less controversial than it is in current antitrust debates. Yet, with the Green Deal and the clear need for further support of green investment targets by the private sector, the urge for a "green reform" in State aid is compelling.[1]

(13) In order to achieve the Green Deal's objectives, both the EU and its Member States will have to provide large funds for sustainable investment. This public funding is required to crowd-in private investment into projects that might otherwise not attract sufficient investors. It also has to overcome market failures that are currently hampering an increased level of environmental protection.

(14) At the same time, the underlying objective of EU competition and State aid law – to ensure a competitive level playing field – must not be undermined by the unregulated injection of public funds into the economy.

(15) A "green reform" of the State aid rulebook is therefore required if State aid is to be an enabler of EU climate objectives that at the same time maintains competitive markets.

(16) The ECJ in its recent ruling in the Hinkley Point State aid matter has recognised that the "*requirement to preserve and improve the environment, expressed inter alia in Article 37 of the Charta and in Articles 11 and 194(1) TFEU, and the rules of EU law on the environment*" must be considered "*when the Commission checks whether State aid […] meets the first condition laid down in Article 107(3)(c) TFEU*".[2] This is significant progress and strengthens the role of environmental law in the State aid review as against previous case law such as the Castelnou matter where the General Court still held that "*when assessing an aid measure which does not pursue an environmental objective, the Commission is not required to take account of environmental rules in its assessment of the aid and of aspects which are inextricably linked to it*".[3]

(17) Unprecedented transformation processes await economies in Europe and beyond as politics, society and business commit to tackle climate change and other environmental challenges. These range from supplying renewable energy, establishing a clean and circular production (in particular for CO_2-heavy industries) to accelerating the shift to sustainable mobility (e.g. hydrogen-fueled airplanes, e-trains/cars etc.). To achieve the ultimate goal of building a zero carbon and pollution-free environment, major investment and industry cooperation is required. Whether companies that combine forces on green initiatives are "*sustainably collaborating or colluding in an anticompetitive way*" is discussed below. In terms of funding, public and private stakeholders will have to cooperate to raise the necessary capital (which is estimated at an additional EUR 260 billion

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1 See Executive Vice President Vestager, speech of 22 September 2020, "The Green Deal and Competition Policy".
2 Case C-594/18 P, *Austria v Commission*, paragraph 100.
3 Case T-57/11, *Castelnou Energía, SL v Commission*, paragraph 189.

per year by the Commission).[4] Some of the public funding will come from the EU budget (e.g. the EUR 750 billion COVID-19 recovery plan and other EU funds), but EU Member States will also need to make significant contributions, which puts the focus on EU State aid rules.

(18) While the Guidelines on State aid for environmental protection and energy 2014-2020[5] (***EEAG***) have been extended until 31 December 2021 and the General Block Exemption Regulation[6] with its important Chapter 7 on environmental aid until the end of 2023,[7] it is clear that both legal frameworks require updating in substantive terms to cater for the new regulatory and political environment under the Green Deal.

(19) From the existing State aid rulebook, we consider that the Communication from the Commission on "Important projects of common European interest"[8] (***IPCEI***) and the EEAG are the key instruments supporting the Green Deal's objectives. In addition, the framework for State aid for research and development and innovation should be relied upon. While we generally consider the existing State aid rulebook to be fit for the purposes of the Green Deal, we have the following observations:

1.1. *IPCEI Communication is fit for achieving sustainability goals but could be used more frequently*

(20) A large share of Member States' subsidies will likely go into environmentally friendly industries. This obvious shift in policy objectives is evidenced by the Commission approving a number of IPCEI projects in the recent past, e.g. for a pan-European research and innovation project concerning all segments of the battery value chain[9] and for a joint research and innovation project in microelectronics[10].

(21) In July 2020, the Commission also used the IPCEI policy instrument for its "Hydrogen strategy for a climate-neutral Europe".[11] Thus, a hydrogen IPCEI is imminent.

(22) We believe that IPCEIs are the right instrument to promote the Green Deal's objectives because: (i) they allow for pan-European collaboration by Member States in specific industries and/or sectors; (ii) they are not limited to promoting certain sectors or industries but can be applied flexibly; and (iii) they generate positive spill-over effects on other markets stemming from their large-scale approach. Against this background, a more frequent use of the IPCEI tool would be welcomed and any incentive that the Commission can set to promote use of the instrument should be pursued. Increased use of the IPCEI instrument will contribute to mobilising greater public and private funds achieving the Green Deal's objectives.

1.2. *EEAG in clear need of revision to cater for the Green Deal's objectives*

(23) The current set of environmental State aid rules laid down in the EEAG (which are currently being revised) demonstrate some impressive success stories, particularly in promoting renewable

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4 https://ec.europa.eu/commission/presscorner/detail/e%20n/ip_19_6691.
5 Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28 June 2014, p 1–55.
6 Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26 June 2014, p 1–78.
7 https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1247.
8 Communication from the Commission — Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, OJ C 188, 20 June 2014, p 4–12.
9 https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6705.
10 https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6862.
11 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "A hydrogen strategy for a climate-neutral Europe", COM/2020/301.

energy. However, the rules have also often been perceived as complex, leading to protracted processes and most importantly insufficient investment volumes. Overall, we identify three aspects that could be better tailored to fit the purposes of the Green Deal: (i) revision of the concept of "eligible costs" and relevant thresholds; (ii) revision of definitions in the renewable energy sector; and (iii) broadening the scope of sectors covered in the EEAG.

- *Revision of the concept of "eligible costs" and relevant thresholds*

(24) First, the main change required for the EEAG update is to ensure that sufficient investment volumes can be raised to cater for the objectives of the Green Deal. The main principle of the rules in the EEAG is to ensure that Member States are compensating companies only for minimum additional costs of the "green element in the investment".[12] This aims to prevent any excessive, unnecessary funding.

(25) Broadening and simplifying the concept of "eligible costs" to ensure sufficient State aid can be provided to projects that support the Green Deal objectives should be considered. The scope of the EEAG should be widened to allow greater volumes to be invested in "green" projects. Such projects could also benefit from a standard maximum aid intensity of 100%.

(26) In addition, the thresholds triggering an individual notification obligation, e.g. for investment aid and aid for energy infrastructure, should be raised to allow for sufficient investment volumes.

- *Revision of definitions in the renewable energy sector*

(27) Second, the updated EEAG will have to reflect the political and market reality. New developments in renewable energy technology such as Power-to-X have to be taken into consideration. For example, the definition of "renewable energy sources" within the EEAG should be updated and broadened to include e.g. hydrogen. Similarly, the definition for "energy infrastructure" should be broadened to cover e.g. hydrogen.

- *Broadening the scope of covered sectors*

(28) Third, new specific sectors should be added to the EEAG to ensure that those carbon-intensive sectors that are particularly relevant for achieving the Green Deal's objectives are covered.

(29) The developments in the field of renewable energy technologies and the changes to the EU's climate policies that have taken place since 2014, when the EEAG entered into force, indicate that the updated EEAG should be more flexible. While it is not easy to anticipate future trends, the EEAG should enable companies to apply for State aid also for next generation technology.[13]

1.3. *Possible amendments to the framework for State aid for research and development and innovation*

(30) The framework for State aid for research and development and innovation covers industrial research and experimental development, including the development of prototypes and pilots. Its focus is on smart, sustainable and inclusive growth. Thus, it seems fit to be used in a push for new

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[12] See EEAG, paragraph 73.

[13] This might also include aid for greener user of digital technologies in line with the recent study published by the Commission "Energy-efficient Cloud Computing Technologies and Policies for an Eco-Friendly Cloud Market", 10 November 2020, https://ec.europa.eu/digital-single-market/en/news/energy-efficient-cloud-computing-technologies-and-policies-eco-friendly-cloud-market.

innovative green technologies. However, it fails to fully support transition of such technologies to the market.

(31) Especially in the renewable energy and fuel sectors, new technologies, even if fully researched, are not always profitable at the outset. A useful example in that regard are Power-to-X technologies. While considered a good alternative to fossil fuels, these technologies cannot compete with more advanced biofuels. Additional aid is needed to scale production of such fuels and make them more accessible and competitive in the future. Due to the lack of flexibility of the existing State aid framework as seen above and the concept of technological neutrality, compensation cannot always be granted under the EEAG and IPCEI. Hence a missing link remains between the aid for research and development of green technologies and their effective and quick use for a greener market. This gap should be addressed by the revised State aid framework.

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

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

(32) As noted above, State aid granted under the EEAG framework or the sustainability-related IPCEI projects by definition requires a “green element” from the financed project. Therefore, it is conceivable that State aid for activities with a negative environmental impact would be commonly granted outside of these instruments.[14]

(33) In the absence of a uniform definition of a “negative environmental impact”, the question that arises is: how such an impact should be measured? The answer could possibly be sector-specific. State aid measures could entail different types of environmental impacts, subject to a complex environmental assessment.[15]

(34) The EEAG already refer to the need to consider the possible negative impact on water systems and biodiversity when assessing aid for the production of hydropower.[16] For such cases, the EEAG recall that Member States are bound by Directive 2000/60/EC and the criteria set out in relation to allowing new modifications of bodies of water. For cases, however, where the EEAG are not applicable and clear-cut criteria on the negative environmental impact do not exist, we consider that concrete guidance by the Commission as to what constitutes such a negative impact would provide legal certainty to businesses.

(35) As regards concrete options on how to mitigate the negative effects of projects with a negative environmental impact in the future, we generally see the following options: (i) granting of aid under conditions for the beneficiary and the Member State to offset the negative environmental impact (through compensatory measures); and (ii) the provision of a cap on aid with negative

14 The EEAG explicitly exclude, for example, aid for the extraction of fossil fuels, see EEAG, recital 6.

15 See Miedzinski et al (2013), Assessing Environmental Impacts of Research and Innovation Policy, Study for the European Commission, Directorate-General for Research and Innovation, Brussels, p 6.

16 EEAG, paragraph 117.

environmental consequences. The latter would have the advantage of providing greater legal certainty in practice but would require clear guidance as regards the negative impact criterion.

(36) Another important consideration is how the sustainability aspects of a project are to be weighed against other aspects. Environmentally harmful State aid measures could serve other objectives such as maintaining jobs, avoiding social hardship, ensuring the viability of key industries within the EU and others. The current EEAG acknowledge that negative impacts of environmentally harmful subsidies should be considered when taking into account the need to address trade-offs between different areas and policies.[17] Against this background, accounting for the overall effects of State aid in the form of a balancing test might also be a viable solution to address the negative effects of State aid in future.

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

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

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

(37) There are several potential ways to support more State aid for environmental goals, including by: (i) adjusting the scope of existing rules to support "green projects"; and (ii) promoting crowding-in private investments into public funding strategies.

3.1. *Adjusting the existing rules to allow a "green bonus"*

(38) We consider that the easiest way to support more State aid for environmental goals is to follow a more flexible approach to support projects with a "green objective" in the future and make increased use of exemptions for aid to be granted without burdensome notification to the Commission.

(39) Likewise, extending the scope of the existing State aid framework for specific sectors, see e.g. the recently revised ETS Guidelines, or the upcoming Carbon border adjustment mechanism, may also be an option to provide more support for "green projects".

(40) One concern that has been voiced in the context of the assessment of aid to support environmental objectives, is that, for example, the revised ETS Guidelines could lead to unfair competition arising from companies from outside the EU, which are not required to comply with the same EU standards. In that regard, the objectives of the Green Deal may need be aligned with ensuring competitiveness of European companies worldwide, hence the relationship between the Green Deal and a potentially upcoming instrument on foreign subsidies control[18] should be further clarified.

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17 See EEAG, recital 6.

18 See the recently published summary of the responses to the public consultation on the White Paper on levelling the playing field as regards foreign subsidies, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12452-White-Paper-on-Foreign-Subsidies-/public-consultation.

3.2. *Crowding-in private investments into public funding strategies*

(41) Crowding-in private investments into public funding strategies is essential to raise sufficient investment volumes to achieve environmental aims. However, the strict legal framework and its interpretation by the Commission entail State aid risks for investors, intermediaries and direct beneficiaries of aid. The Commission has considered impact investors (i.e. investors that seek to generate a beneficial social or environmental impact alongside a financial return) and intermediaries to be potential recipients of "indirect State aid" when investing in green companies. This means that private investors that invested alongside the public bodies and intermediaries might have to repay (a part of) their profit. Likewise, the undertakings that received public funding might be required to repay the public investment.

(42) Such risks are often unforeseen by stakeholders. To avoid potential repayment risks (possibly years later), the Commission should consider introducing "safe harbour" rules for impact investors and related intermediaries. Such safe harbour rules could be designed de lege ferenda in different ways:

- Firstly, certain forms of (co-)investments could be clearly defined that do not qualify as aid (e.g. equity investments of up to 30% of the share capital by the public co-investor).
- Secondly, monetary thresholds for a public co-investment could be introduced where public investments below this threshold in certain sectors are generally considered as State aid free.
- Thirdly, the Commission might consider – on a temporary basis – that private and public co-investments in certain areas (either broadly defined, e.g. "hydrogen industry", or narrowly to specific products) are generally exempted. Such rules would likely encourage more investment in areas of strategic importance.

4. How should we define positive environmental benefits?

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

(43) We welcome the proposal by the Commission to adopt the taxonomy for classifying environmentally sustainable activities. The adoption of a uniform definition of "positive environmental benefits" would arguably provide greater legal certainty for Member States and companies seeking to support the Green Deal objectives.

(44) Potential inspiration on the definition can be drawn from the draft guidelines on sustainability agreements published by the Dutch competition authority for public consultation in July 2020.[19] In that regard, positive environmental benefits (i.e. "objective sustainability benefits") are defined as follows:

> "*benefits that are useful not only to the consumers, but, in general, also to society (or parts thereof) in a broader sense. Sustainability benefits are often associated with a*

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[19] ACM, Draft Guidelines "Sustainability agreements", paragraph 30, https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf.

reduction of so-called negative externalities, meaning factors that are not included in the costs for the firms but that do represent costs for society. Reducing externalities means that, in the production of consumption of products, everyone takes more into account the impact that those externalities have on the environment and on the living conditions of humans. This can produce benefits for society as a whole, including today's users and those in the future. Other sustainability benefits may involve reducing operational costs, increased innovation, quality improvements, or a greater diversity of products on offer, including the introduction of, for example, animal-friendly products or products that guarantee a fair income."

PART 2: ANTITRUST RULES

1. EU antitrust rules, as currently enforced, do not give sufficient weighting to the environmental benefits of sustainability agreements when assessing their lawfulness

(45) Agreements which restrict competition, including those agreements with sustainability objectives, risk falling within the criteria for prohibition under Article 101(1) TFEU.

(46) However, such agreements may be exempt under Article 101(3) TFEU if they satisfy each of the following cumulative limbs: (i) they contribute to improving the production or distribution of goods or to promoting technical or economic progress; (ii) they allow consumers a fair share of the resulting benefits; (iii) they are no more restrictive than is necessary; and (iv) they do not eliminate competition in the relevant market.

(47) As such, the lawfulness of sustainability agreements under EU antitrust rules is, in broad terms, assessed by considering the impact of such agreements on "consumer welfare". More specifically, the Commission is required to consider – and to balance against one another – any effect of the agreements on competition and any benefits to consumers arising from the agreements. If this balancing act is undertaken correctly, EU competition law will only prohibit those sustainability agreements whose restrictive effects outweigh its related benefits to consumers.

(48) However, we consider that EU antitrust rules currently interpret "consumer welfare" too narrowly when assessing the lawfulness of sustainability agreements. The current focus of this assessment is often almost entirely on the strict economic impact of agreements (e.g. in terms of price, quality and range) on current consumers of the products and services directly covered by the sustainability agreement, with inadequate regard given to their wider and longer-term environmental or societal effects.

2. Please provide actual or theoretical examples of desirable cooperation between firms to support Green Deal objectives that could not be implemented due to EU antitrust risks. In particular, please explain the circumstances in which cooperation rather than competition between firms leads to greener outcomes (e.g. greener products or production processes).

Sustainability agreements are not being implemented due to EU antitrust risks

(49) While, in our experience, most businesses will generally consider whether sustainability targets can be met through unilateral action, this will not always be sufficient, or will be strongly disincentivised – for example where meaningful improvements can only be achieved through industry-wide collaboration or where taking the unilateral conduct in question would result in a "first mover disadvantage" as a result of increased investment costs, on which competitors could subsequently free ride (which is discussed further below). In this regard, our clients report that seeking to differentiate a brand on the basis that it is more sustainable than its rivals' products can in practice be ineffective, even if consumers consider sustainability to be desirable in theory.

(50) Equally, while regulation can and should play a role in setting minimum standards for sustainable trade, such standards will often not be sufficient or in time to meet businesses' more ambitious sustainability targets (or indeed the Green Deal objectives), for example due to jurisdictional limitations.[20] In practice our clients report that regulatory standards are typically too

[20] Where regulatory standards diverge across jurisdictions, this can hinder the Green Deal objectives as companies are required to pursue less optimal manufacturing and logistics solutions.

slow to be adopted (if adopted at all), limited in geographical reach, inconsistent between jurisdictions and often set at the lowest possible level, and are therefore insufficient to bring about the material shifts in industry required to meet the Green Deal objectives.

(51) It follows that competitor collaboration will often be the most effective way of driving through ambitious and up-to-date sustainability targets and ensuring that they are delivered upon. However, in-house advisers report that the combination of a lack of clear guidance in this area, the generally negative attitude of enforcement authorities historically, and very significant fines for infringements of the EU antitrust rules mean that they often end up adopting an overly risk-averse approach when consulted on potential sustainability agreements, resulting in potential initiatives being dropped.

(52) We set out below specific examples of desirable cooperation between firms to support Green Deal objectives that could not be implemented due to EU antitrust risks:

2.1 Agreeing to standards that directly serve the objectives of the Green Deal but lead to price increases for consumers (or reductions in quality, range or service)

- *Food manufacturers agreeing only to use recycled packaging materials or to reduce packaging levels by agreeing on minimum fill levels*

(53) While individual businesses can of course unilaterally increase their use of recycled packaging and fill levels, industry-wide commitments would clearly result in greener outcomes overall. There may also be greater scope to educate consumers about the environmental benefits of complying with these commitments if they are introduced on an industry-wide basis. In certain cases, there may also be a competitive disadvantage for companies taking unilateral action (e.g. as a result of higher costs having to be passed on to consumers, loss of shelf presence and/or consumers selecting products with lower fill levels (i.e. with larger pack sizes) due to the perception that they contain more of the product in question). Such collaborations would likely fall under Article 101(1) TFEU.[21] Further, given that they could result in higher prices or less choice for consumers, it is uncertain whether they would satisfy the cumulative criteria under Article 101(3) TFEU (and especially the criterion that consumers are allowed a fair share of the resulting benefits).

- *Food and beverage companies agreeing to mandatory standards on packaging that facilitate recycling*

(54) Efforts to introduce mandatory common standards on packaging that would facilitate recycling (e.g. by making kerbside collection more efficient) or reduce waste (e.g. tethered caps for soft drinks) will evidently be more effective if pursued on an industry-wide basis, rather than unilaterally. In particular, without industry-wide buy-in to mandatory common standards, suppliers and manufacturers are unlikely to have the commercial certainty needed to make the capital investments required to drive through any necessary developments in infrastructure or technology. Further, while regulation would in theory be as effective as industry-led collaboration in driving standards in this area, regulation is often too slow to be adopted, limited in jurisdictional reach and not ambitious enough. Where, however, compliance with such standards leads to increases in costs being passed on to consumers and/or greater alignment of costs, it is likely that such agreements

[21] A harmonised approach to packaging standards could also be imposed or at least favoured by retail companies. Again, this could result in a first-mover disadvantage for retailers without significant purchasing power if they sought to impose certain standards unilaterally.

would fall within the scope of Article 101(1) TFEU and may be unlikely to qualify for exemption under Article 101(3) TFEU.

- *Manufacturers agreeing to stop producing less efficient machines*

(55) In *CECED*[22] an agreement of this kind was found to fall under the prohibition on restrictive agreements (then, Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement), but on the specific facts of that case qualified for individual exemption under the notification procedure then in force. The *CECED* decision suggests that the outcome of the analysis might have been different if, for example, the machines being phased out accounted for a larger share of the market (i.e. more than 10%).[23] However, by phasing out a greater share of the market on efficiency grounds, the greater one would expect the potential environmental gains to be. As explained below, there are significant uncertainties around how to quantify environmental benefits and how to balance qualitative and/or quantitative environmental benefits against restrictions in competition.[24]

2.2 Agreeing to standards that could foreclose competitors or upstream suppliers

- *Retailers agreeing to buy only from manufacturers whose production processes meet a minimum standard*

(56) Such an arrangement could be characterised as a purchasers' cartel (i.e. a collective boycott), particularly if it foreclosed upstream suppliers that were unable to, or chose not to, meet the applicable standard, thereby bringing it within the purview of Article 101(1) TFEU. While in certain circumstances such an arrangement could result in greener production processes at an industry-wide level (which in turn would contribute to the Green Deal objectives), it is not clear how the Commission would assess whether consumers had received a fair share of the resulting benefits in such a scenario, particularly if – as with the food manufacturer example above – it resulted in higher prices or less choice for consumers and the environmental benefits were not easily quantifiable.

- *Product manufacturers seeking collectively to incentivise their suppliers to employ more sustainable trading practices*

(57) Food and beverage companies might wish to incentivise their suppliers to switch to more sustainable farming practices (e.g. by switching to more sustainable crops). However, seeking to incentivise farmers to do so on a unilateral basis is highly unlikely to be effective – it will often entail significant short-term costs for farmers and even some of the largest food and beverage companies will generally only account for a very small percentage of the purchasing market for most farmed goods.

(58) Similarly, product manufacturers might also wish to incentivise their logistics providers to switch to electric vehicles but would be unable to offer sufficient incentives for logistics providers to do so if they pursued this policy on an individual basis (as the logistics providers could simply switch to other customers), and/or it could lead to a competitive disadvantage (e.g. due to higher costs).

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22 Case IV.F.1/36.718, *CECED*.

23 Paragraph 66.

24 Further uncertainty results from the difference in language used by the Commission to refer to the CECED case in its 2001 and 2011 Horizontal Guidelines. The 2001 Guidelines note that "*the conditions for an exemption under Article 81(3) are fulfilled*" in the CECED case (para. 198) (added emphasis), whereas the 2011 Guidelines instead note that "th*e criteria of Article 101(3) would [only] appear to be fulfilled"* (paragraph 329) (added emphasis).

(59) While agreements between downstream competitors to insist collectively on (or financially incentivise) more sustainable farming practices or logistics providers using electric vehicles would both bring about clear environmental benefits, it could equally result in: (i) upstream suppliers being foreclosed if they were unwilling or unable to incur the costs of switching; and/or (ii) greater alignment of the downstream competitors' cost bases. As above, it is not clear how the Commission would assess such agreements, and in particular whether consumers had received a fair share of the resulting benefits in such a scenario.

- *Trade associations refusing to admit market participants that do not comply with standards relating to sustainability*

(60) As part of their own commitment to sustainable trading practices, trade associations may wish to refuse admission to market participants that fail to comply with trading standards relating to sustainability. However, a refusal on these grounds could give rise to foreclosure concerns where membership of the trade association was deemed to be an important pre-requisite for market actors to be able to compete effectively (e.g. because consumers associated membership of the trade association with a particular level of service). In turn, this would result in less consumer choice. Similar to the example above, it is not clear how the Commission would assess whether the Article 101(3) TFEU exemption criteria are satisfied, in particular whether consumers had received a fair share of the resulting benefits.

2.3 Agreeing common investment objectives

- *Investors agreeing common objectives for green investment plans*

(61) By agreeing on common objectives for green investment plans, fund managers could potentially help improve standards in the industry, as companies seeking investment will be more incentivised to ensure that they meet the investment criteria. While fund managers can implement green investment plans unilaterally, a concerted effort could be expected to be more effective in driving change. However, such agreements could be considered to reduce uncertainty in relation to competing fund managers' strategic decision making. Further, if as a result of the common plan, fund managers were effectively required to invest in companies with higher cost bases, this could result in lower returns for their own customers, which – again – could preclude them from satisfying the Article 101(3) TFEU exemption criteria (at least as historically interpreted and applied).

2.4 Information exchanges

- *Energy companies exchanging competitively sensitive information when collaborating on initiatives designed to enable the transition to low-carbon generation*

(62) EU Member States may offer State aid to energy companies for projects designed to contribute to net zero targets (e.g. through reductions in carbon emissions and/or an increase in renewable energy capacity). However, in order for these projects to be effective in meeting the Member State's (and the EU's) targets, energy companies will typically need to collaborate with competitors and this may indeed be a condition of the funding. However, the exchange of competitively sensitive information between competitors has consistently been found to amount to an object restriction of competition by both the Commission and the EU Courts. Further, in practice, object restrictions only very rarely qualify for exemption under Article 101(3) TFEU.

While steps can be taken to mitigate EU antitrust risk, the decisional practice and jurisprudence in the EU often results in energy companies taking an overly conservative approach to information exchange, thereby making it harder to meet sustainability targets. Further guidance in this area would be welcome, in particular practical guidance on how the Commission would assess information exchange which is necessary for businesses to engage in collaborations which are established in order to deliver Green Deal objectives and the safeguards businesses should put in place in order to avoid infringing Article 101(1) TFEU.

3. Are there circumstances in which the pursuit of Green Deal objectives would justify restrictive agreements beyond the current enforcement practice? If so, please explain how the current enforcement practice could be developed to accommodate such agreements (i.e. which Green Deal objectives would warrant a specific treatment of restrictive agreements? How can the pursuit of Green Deal objectives be differentiated from other important policy objectives such as job creation or other social objectives?).

(63) In light of the above, we consider that there are circumstances in which the pursuit of Green Deal objectives would justify restrictive agreements beyond the current enforcement practice.

(64) Assuming wider societal benefits are relevant to Article 101(3) TFEU, two areas of uncertainty that emerge from the above examples and where it would be helpful to receive further guidance are:

(a) how the Commission proposes to assess environmental benefits; and

(b) whether a trade-off exists between wider societal benefits and the impact on direct consumers (for example, where a sustainability agreement results in higher prices or worse service for individual consumers).[25]

(65) In our view, the following steps would enable the proper assessment of sustainability agreements and the benefits relating to them.

a. Establishing agreed parameters on the quantification of the environmental benefits of sustainability agreements

(66) Economic methodologies used to measure the economic effects of restrictive agreements (e.g. higher prices) reflect a consensus as to the values that underpin the assessment of consumer welfare. However, the same cannot be said about the assessment of the environmental effects of sustainability agreements (e.g. cleaner air). There is considerably less agreement regarding certain important values that form the basis for assessing the benefits or downsides of sustainability agreements. For example, there currently is no consensus as to the value of a tonne of carbon or the value of a 10% improvement in an air quality index. While consensus may evolve as precedents emerge from case law and elsewhere, the Commission could accelerate this process by, after consulting further with the relevant stakeholders, seeking to establish a set of agreed parameters on the values that form the basis of the assessment of environmental effects of sustainability agreements.

[25] The Commission’s 2001 Horizontal Guidelines contained a valuable self-standing chapter on environmental agreements, which – in our view unfortunately - was subsequently demoted to a mere sub-chapter of the section dealing with standardisation agreements in the 2011 Horizontal Guidelines.

b. *Reinterpreting the Article 101(3) TFEU exemption*

(67) As currently formulated, EU antitrust rules ask whether any restriction to competition caused by sustainability agreements is outweighed by any sustainability benefits to consumers arising from the agreement.

(68) However, reversing that test for sustainability agreements – by asking whether the sustainability benefits to consumers are outweighed by a reduction in competition (rather than vice versa) – would constitute a meaningful shift on the part of competition authorities in recognising and ascribing value to sustainability benefits when assessing such initiatives.[26]

c. *Providing more guidance on the Article 101(3) TFEU exemption*

(69) The second limb of the Article 101(3) TFEU exemption (see above) requires those agreements seeking to fall under that exemption to allow "*consumers a fair share of the resulting benefit*". The Commission could provide further guidance on the scope and extent of this limb, including on whether:

(a) The term "consumers" includes broader society, rather than just the purchasers of the product/service covered by the agreement. Previous guidance from the Commission[27] and some EU case law[28] indicates that this can be the case, but express guidance to confirm the position as it relates to sustainability agreements would be welcome.

(b) The term "consumers" includes future consumers (and, if so, whether it is relevant how far into the future). In this regard, we note that:

- the draft guidelines recently published by the Dutch national competition authority, the Consumer and Competition Authority (***ACM***), state that the benefits on future customers should be taken into account when assessing the lawfulness of sustainability agreements.[29] The ACM's position may, at least in part, be born out of the criticism that was levelled at it after it only considered the environmental impact of an agreement between competitors to accelerate the closure of five coal-fired power stations in the Netherlands over the remainder of the power stations' life cycles, rather than assessing the longer-term impact, and therefore ultimately found the agreement to be anti-competitive; and

- certain regulators are expressly required to take into account the interests of future consumers. For example, the principal objective of Ofgem (the UK's energy regulator) is to "*protect the interests of existing and future consumers*

[26] This is effectively the approach taken by the Commission in relation to certain types of vertical agreements. Recital 8 of Regulation 330/2010 (the Vertical Agreements Block Exemption Regulation) provides that: "*It can be presumed that, where the market share held by each of the undertakings party to the agreement on the relevant market does not exceed 30%, vertical agreements which do not contain certain types of severe restrictions of competition generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits*" (added emphasis).

[27] Paragraph 49 of the 2011 Horizontal Guidelines states that the 'concept of "consumers"' encompasses the customers, potential and/or actual, of the parties to the agreement'. Similarly, paragraph 84 of the 2004 Exemption Guidelines states that the 'concept of "consumers" encompasses all direct or indirect users of the products covered by the agreement'.

[28] Case IV.F.1/36.718, *CECED*.

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

in relation to gas conveyed through pipes and electricity conveyed by distribution or transmission systems".[30]

(c) The term "consumers" includes consumers based in jurisdictions beyond the EU. The impact of unsustainable practices and, by extension, sustainability agreements will often be felt across multiple countries and even multiple continents.

(d) The term "a fair share" has a different meaning in the context of sustainability agreements. Previous Commission guidance[31] acknowledges that not all benefits will necessarily be quantitative, but specific guidance relating the circumstances in which qualitative evidence is sufficient would be helpful for companies seeking to achieve sustainability objectives.

(70) The third limb of the Article 101(3) TFEU exemption (see above) requires the restrictions on competition imposed on the undertakings concerned to be "indispensable" to the attainment of the agreement's pro-competitive objectives. There are a number of scenarios in which this assessment could hinge on whether a "first-mover disadvantage" really would exist if the conduct had instead been undertaken on a unilateral basis. With this in mind, it would be helpful to receive guidance on how this point would be assessed by the Commission (e.g. whether facts that only became apparent after the event would be relevant to the Commission's ex-post assessment) and the leeway available to industry players.

4. Should further clarifications and comfort be given on the characteristics of agreements that serve the objectives of the Green Deal without restricting competition? If so, in which form should such clarifications be given (general policy guidelines, case-by-case assessment, communication on enforcement priorities…)?

a. Guidance by the Commission would provide firms with greater legal certainty and enable them to support Green Deal objectives more effectively

(71) As noted above, we consider that cooperation between firms to support Green Deal objectives has been inhibited by EU antitrust rules and EU antitrust rules should therefore be interpreted, applied and enforced in a way that enables greater cooperation and greener outcomes.

(72) In order to help deliver on ambitious sustainability goals being set at national and international levels, it is important that firms are offered sufficient flexibility and legal certainty in the context of EU antitrust rules to enter into sustainability driven cooperation. Especially in the area of climate change, time is of the essence and the Commission should provide to the business community a clear legal framework within which environmentally sustainable cooperative initiatives can be conceived and implemented, in parallel with and supplementing EU-wide regulation and governmental action.

(73) In the absence of guidance from the Commission, firms must (and will continue to need to) self-assess against historic case law and enforcement practice, which often was adopted at a time when there was less focus on sustainability objectives.

(74) The Commission has frequently published guidelines on the application of EU antitrust rules, such as its "*Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the*

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[30] https://www.ofgem.gov.uk/about-us/our-priorities-and-objectives.

[31] 2004 Exemption Guidelines.

European Union to horizontal co-operation agreements"[32] and its "*Guidelines on Vertical Restraints*".[33] These guidelines often contain policy guidance, detailed information on the framework of assessment and case-by-case examples to provide greater legal certainty to businesses.

(75) The adoption of specific guidelines on agreements with sustainability objectives and / or the communication of enforcement priorities in this area would enable firms to assess better whether collaborations with sustainability objectives are compliant with EU antitrust rules and provide greater legal certainty for firms seeking to support Green Deal objectives. As noted above, there are specific areas where further guidance is required for sustainability agreements, such as the application of the Article 101(3) TFEU exemption.

(76) We note that the ACM published draft guidelines on sustainability agreements for consultation in July 2020.[34] These guidelines seek to explain, with examples, the types of sustainability agreements that do not typically restrict competition and the circumstances where sustainability agreements that do restrict competition are permissible (for example, due to benefits that offset the restrictions of competition). We welcome the greater clarity provided by the ACM throughout these draft guidelines on the opportunities available for undertakings to enter into sustainability agreements, including elements which are innovative in terms of the approach firms should take when assessing the benefits of sustainability agreements for consumers and wider society against any restrictions of competition.

(77) However, the lack of a coherent approach and international cross-agency alignment is a fundamental issue for many firms. Without such alignment, the practical value of guidelines issued by individual Member States will be limited. For larger joint sustainability initiatives, coherence at least at EU level is necessary in order to facilitate significant sustainability gains.

(78) Therefore, we consider that it is important for the Commission to publish guidelines on the application of EU antitrust rules to collaborations with sustainability objectives, particularly around the circumstances where sustainability agreements that do restrict competition are permissible. The inclusion of examples and case-by-case assessments in these guidelines would provide greater clarity to firms. This would also ensure a more consistent and coherent application of EU antitrust rules, as national competition authorities would also benefit from pan-European guidance.

b. There is scope to provide greater comfort to firms that are seeking to pursue sustainability objectives

(79) In light of the ambitious sustainability goals being set by the Commission and the need to take rapid action (especially in the area of climate change), there is greater scope for the Commission to provide comfort to firms that are collaborating on sustainability initiatives.

(80) For example, the ACM's draft guidelines state that it will not impose fines where:

(a) firms have discussed their sustainability arrangements informally with the ACM (preferably at an early stage) and the ACM has not identified any major concerns, but the arrangements are subsequently found to be incompatible with competition law; or

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32 2011/C 11/01.
33 2010/C 130/01.
34 https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements.

(b) firms have followed the ACM's guidelines in good faith, but the arrangements are subsequently found to be incompatible with competition law.

(81) We consider that the Commission should consider providing similar comfort to firms in order to mitigate the risk of EU antitrust rules inhibiting sustainability initiatives.

(82) Prior to the introduction of Regulation 1/2003, firms were able to notify their agreements to the Commission to benefit from the exemption under Article 101(3) TFEU and the Commission could issue a comfort letter confirming that the relevant agreement fell within the Article 101(3) TFEU criteria. The Commission has recently re-introduced "comfort letters" in the context of the COVID-19 pandemic. Given that rapid and urgent action is needed to meet the Green Deal objectives, there may be greater scope to introduce comfort letters for firms seeking to utilise the Article 101(3) TFEU exemption in the context of sustainability arrangements. In order to provide greater comfort to firms and mitigate the risk of placing unrealistic administrative burdens on the Commission, we consider that comfort letters should be available: (i) until new guidance is published by the Commission (as explained above); and (ii) once new guidance has been published, where particular sustainability arrangements are not covered by the guidance.

PART 3: MERGER CONTROL

(83) Sustainability and environmental factors are an increasingly important driver of M&A strategy and rationale. However, so far merger control has featured less prominently in the debate on sustainability and competition law. Both the Commission and national competition authorities now recognise that competition laws can be used to promote and achieve the substantial investments required to implement the Green Deal. This is no less true for the EU's merger control regime than for its antitrust and state aid rules.

(84) Merger control can, and should, serve as one of the Commission's tools in its sustainability efforts, including at an international level. The International Competition Network (the ***ICN***) has marked sustainability as a key theme for next year and for its conference in Hungary in 2021. We encourage the Commission to use fora like the ICN to take the lead on these discussions with regulators worldwide and to promote an internationally coordinated approach. Close cooperation with authorities outside the EU is desirable both for regulatory consistency and to encourage and enable "green" transformations on a global scale.

(85) In our view, the current framework of the EUMR should enable the Commission to take sustainability considerations into account in its merger reviews. A new test for transactions with sustainability elements is not warranted. Instead, sustainability considerations can be taken into account under the existing efficiencies framework.

1. Do you see any situations when a merger between firms could be harmful to consumers by reducing their choice of environmentally friendly products and/or technologies?

(86) We recognise that the ability to decrease consumers' choice of products post-merger can be harmful to consumers to the extent this results in a significant impediment to effective competition (***SIEC***). As explained in more detail below: (i) the existing merger control framework, and specifically the SIEC test under the EUMR,[35] already allow the Commission to take into account the competitive effects associated with a merger which reduces consumers' choice of products; (ii) merger control can, and should, only assess consumer "harm" in terms of its objective of ensuring effective competition pursuant to the SIEC test; it cannot assess the impact on other policy objectives; and (iii) there is no legal basis for taking a distinct approach to assessing environmentally friendly products or technologies.

1.1. Merger control can only assess the impact of a merger on effective competition

(87) As identified by the Commission's call for contributions itself, the sole aim of merger control regulation is to promote and protect effective competition in markets.[36] We agree with this approach which is reflected in the existing framework for merger control. As noted in our response to Question 2 below, any amendments to the existing framework risk introducing legal uncertainty and could act as a potential deterrent to business looking to undertake transactions, including "green" transactions.

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[35] The Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the ***EUMR***) and associated regulation and guidance.

[36] Commission's call for contributions on competition policy supporting the Green Deal, https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf, p 1.

1.2. The existing merger control framework already considers the impact of a merger on consumer choice

(88) The impact of a merger on consumer choice is already considered as part of the Commission's assessment of whether a merger will result in an SIEC. The Commission aims to prevent those mergers that deprive consumers of the benefits of effective competition by significantly increasing market power.[37] As such, the current merger control framework already recognises that, to the extent a merger of two firms reduces output, choice or quality of products or services (i.e. consumer choice), this could result in an SIEC and should be prohibited by the Commission.

(89) More specifically, we note that the impact of a merger on consumer choice is taken into account in the following stages of merger analysis:

a. Defining the relevant product markets for assessment

(90) According to the Commission's Notice on Market Definition, the relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the product characteristics, their prices and their intended use.[38]

(91) As the Commission suggests in its call for contributions, environmentally friendly characteristics or sustainability product features can be associated with higher product quality and may constitute a differentiating factor in the eyes of consumers.[39]

(92) Consequently, if consumers only view other environmentally friendly products as substitutes, this may result in a narrower market definition and, as a result, in higher market shares and increased market power for the merging firms, which is more likely to indicate an SIEC.

(93) However, the current framework for product market definition in the context of the EUMR does not allow the Commission to place undue weight on any single product characteristic where this is not reflected in equivalent consumer behaviour. In other words, the mere fact that a product is particularly environmentally friendly does not mean it invariably forms its own market. Instead, market definition requires a full market analysis. The eventual consideration of sustainability issues in the context of market definition, while welcome, should not mean that markets should necessarily be defined narrowly. Similar principles and the customary tools used to define product markets should apply equally in cases involving transactions with sustainability components.

b. Considering closeness of competition

(94) A similar substitutability analysis takes place when assessing the closeness of competition between firms. As set out in the Commission's Horizontal Merger Guidelines (***HMG***), where firms are close competitors, there is a higher degree of substitutability between the merging firms' products and therefore it is more likely that post-merger the combined entity will raise prices significantly.[40]

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37 Guidelines for the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5 February 2004, p 5–18, paragraph 8.

38 Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372/5, 9 December 1997 (***Notice on Market Definition***), paragraph 7.

39 Ibid footnote 36, p 5; the approach to market definition will to a large extent depend on prices. For example, if prices today and historically have not included the cost of carbon emissions but in the future (as carbon pricing is introduced) they will include such cost, historic precedents for market definition may no longer be applicable.

40 HMG, paragraph 28.

(95) Consequently, if the merging firms are close competitors in the manufacturing of environmentally friendly products, there could be a higher degree of substitutability between their products. However, the extent to which these firms are close competitors requires analysis of the specific market as would be the case if the firms produced other products. The mere fact that firms both produce environmentally friendly products does not in itself mean they are close competitors.

1.3. No distinct approach necessary when assessing environmentally friendly products or technologies

(96) The current merger assessment therefore already takes into account the impact of a merger on consumer choice. Applying a different level of scrutiny of environmentally friendly products or technologies is unwarranted. First, and as indicated above, this would be inconsistent with the aim of, and SIEC test under, the merger control regime. A different test, if introduced, would complicate merger review.

(97) Second, as a practical matter, it can be very difficult to identify which products are "environmentally friendly" as the term is ambiguous and highly subjective. Whether a product is environmentally friendly is partly driven by consumer perception and behaviour, which is already addressed by the existing framework for product market definition and the assessment of closeness of competition.

(98) Third, increasing scrutiny of environmentally friendly products or technologies could ultimately discourage firms that have developed such products or technologies from participating in potentially efficiency-enhancing M&A activity (for fear of increased regulatory scrutiny that this would bring). This would run entirely counter to the objectives of the Green Deal.

2. Do you consider that merger enforcement could better contribute to protecting the environment and the sustainability objectives of the Green Deal? If so, please explain how?

(99) For the purposes of this question we have considered: (i) the role of merger control in protecting the environment and sustainability objectives; (ii) the scope to consider protection of the environment and sustainability objectives under the current merger control framework, in particular considering the use of efficiencies arguments; and finally (iii) the importance of encouraging rather than penalising "green" business.

2.1. The role of merger control in achieving the Green Deal objectives

(100) We agree that in order to meet the Green Deal sustainability objectives of boosting the efficient use of resources by moving to a clean, circular economy, restoring biodiversity and cutting pollution, considerable effort in the form of investment, innovation and transformation on the part of businesses across a range of industries is required. Public sector initiatives alone will not be sufficient to meet the EU's ambitions. This is reflected in the Green Deal itself which recognises the need to "support industry to innovate" and "invest in environmentally friendly technologies".[41] Merger control can therefore play a role by facilitating sustainability-led mergers in three key ways:

- **No increased scrutiny of "green" businesses -** above all, the Commission will need to make sure that it does not discourage firms from developing sustainable products or technologies. As indicated in our response to Question 1, conducting an overly rigid assessment of two

[41] See https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.

environmentally conscious competitors could result in unwarranted increased scrutiny of businesses that are contributing to the goals of the Green Deal. As such, sustainability should not be seen as a distinguishing factor in itself but as a standard to which all businesses should aspire.

- **Encouraging transactions which promote the objectives of the Green Deal -** in some cases, businesses will need the scale and scope which only a merger or an acquisition can bring about to make necessary transformations commercially feasible, and to realise their "green" transformational goals. To the extent possible, and within the bounds of promoting effective competition, merger control should not restrict firms from pursuing transactions which lead to enhanced sustainability outcomes post-merger.

- **Increased recognition of sustainability and green benefits as efficiencies -** there will also be circumstances where the potential anticompetitive effects of a transaction could be offset by sustainability-related efficiencies. The Commission should ensure that it is able to accurately assess efficiencies and take them into account. Our response below focuses on the types of allowances which may need to be introduced to the current framework under the HMG when assessing sustainability-related efficiencies.

2.2. Consideration of sustainability objectives under the current merger control framework: the Efficiency Defence

(101) As set out above in response to Question 1, under the current merger control regime, the Commission can take into account sustainability both: (i) in the assessment of product markets; and (ii) in the assessment of closeness of competition as part of its consideration of whether the merger will result in an SIEC.

(102) The current merger control framework also recognises that merger-specific efficiencies can counteract concerns that a transaction will significantly impede effective competition.[42] Consequently, if notifying parties can demonstrate verifiable merger-specific efficiencies, this can provide a defence to a transaction that would otherwise raise competition concerns (the ***Efficiency Defence***).[43]

(103) Under the current guidelines, in order to demonstrate merger-related efficiencies, parties must show that: (i) efficiencies benefit consumers; (ii) are merger-specific; and (iii) can be verified and quantified with reasonable certainty.[44]

(104) We consider the different aspects of this test below, including the extent to which sustainability-related efficiencies arguments can already be considered within the existing framework and guidelines. We also set out our views on the steps which we would recommend are taken in order to more readily enable the Commission to take sustainability-related efficiencies into account, and to give business more certainty as to the Commission's approach in this regard. Creating a useable and effective model for sustainability-related efficiencies would encourage transactions which promote the Green Deal's sustainability objectives. Taking such an approach

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42 HMG, paragraphs 76 and 87; see also the UK Competition and Markets Authority's (***CMA***) recently published draft revised Merger Assessment Guidelines (***MAG***), which recognise relevant customer benefits as one category of merger efficiencies and expressly refer to reduced carbon emissions, paragraph 2.5, (see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/935593/Revised_MAGs_Nov_2020.pdf).

43 HMG, paragraph 76.

44 HMG, paragraph 78.

would allow the Commission to consider the (positive) impact of a merger on sustainability and environmental protection, whilst ensuring that this takes place within the existing merger control framework.

a. Objective consumer benefits

(105) In order to benefit from the Efficiency Defence, merging parties would need to be able to identify objective sustainability benefits that will result from the transaction. As a starting point, the Commission may wish to provide guidance on the types of sustainability benefits it will take into consideration.

(106) In doing so, the Commission should recognise that consumer benefits are not limited to lower prices alone.[45] The range of possible non-price aspects of competition that firms may use to win customers is wide and includes the sustainability of a product or service.[46] Efficiencies can also manifest themselves, for example, in the form of new or improved products or services.[47] When a merger promotes a more sustainable production process or the introduction of an environmentally friendly product, this can contribute to both environmental protection (impacting very directly on consumer welfare, in the widest sense) and the development of economic progress.

(107) We also encourage the Commission to clarify whether it would consider sustainability efficiencies that benefit not only immediate consumers, i.e. end customers of the merging parties, but society (or parts thereof) in a broader sense. This approach is taken by a number of competition authorities, including the Dutch ACM[48] and the UK CMA.[49] Sustainability benefits often stem from a reduction of negative externalities (factors that are not included in businesses' costs but that do represent costs for society). Reducing these negative externalities can therefore produce benefits for society, including today's and future consumers.

(108) A list of those benefits that, in the Commission's view, support the Green Deal's and other sustainability objectives and which would therefore be taken into account by the Commission when assessing the parties' Efficiency Defence (assuming these can be substantiated), would be instructive and enable parties to target and substantiate their efficiencies claims.

b. Verifiability

(109) Historically, it has been very difficult in practice for parties to succeed in an Efficiency Defence. The challenge lies in substantiating and verifying efficiencies, and demonstrating that they are of sufficient size to outweigh any otherwise negative effects of the transaction on competition. The Commission must be able to conclude with reasonable certainty that a merger will bring about the efficiencies claimed. Therefore, parties must be able to quantify any claimed efficiencies and demonstrate that they are merger-specific.[50] In relation to sustainability, this could prove challenging without established economic tools and frameworks to quantify and assess the claimed efficiencies. We therefore urge the Commission to review its current approach to analysing

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45 HMG, paragraph 80. The European Parliament has also previously emphasised that "consumers have interests other than low prices alone, including animal welfare, environmental sustainability, rural development and initiatives to reduce antibiotic use and stave off antimicrobial resistance, etc." European Parliament resolution of 31 January 2019 on the Annual Report on Competition Policy (2018/2102 (INI)), paragraph 79.

46 See UK CMA MAG, paragraph 2.5.

47 HMG, paragraph 81.

48 ACM, Draft Guidelines "Sustainability agreements", paragraph 30 (see https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf).

49 UK CMA MAG, paragraph 8.19.

50 HMG, paragraph 86.

efficiencies and consider taking a more permissive approach with respect to sustainability-related transactions.

(110) In respect of sustainability-related efficiencies specifically, we note that there are early-stage initiatives such as that recently announced by the Commission's Chief Competition Economist,[51] which look to quantify and assess merger sustainability outcomes such as cleaner air or improved biodiversity. However, there is significant work needed to establish an appropriate economic framework to capture merger-specific sustainability outcomes. Further consideration and consultation should take place in order to develop a suitable framework and tools for these purposes.

(111) In considering an appropriate economic framework, we note that some sustainability objectives lend themselves more easily to quantification than others, and some have already been subject to quantification by other regulators and schemes. For example, under the EU's emissions trading system, it is now common for businesses operating in the internal market to buy (and trade) emission certificates for every ton of carbon dioxide they emit. This has, in effect, put a price tag on emissions within the EU. Accordingly, where parties can prove that the merged entity can reduce greenhouse gas emissions by a specific amount, this can already be presented in monetary terms and thus as a quantifiable efficiency resulting directly from the merger.

(112) For other sustainability-related efficiencies, sustainability reporting initiatives could provide an initial reference point in the effort to design a framework for the quantification and auditing of sustainability outputs. As both a management and accountability tool, sustainability reporting is the practice of measuring, disclosing and being accountable to internal and external stakeholders for organisational performance towards the goal of sustainable development. It involves reporting on how an organisation considers sustainability issues in its operations and on its environmental impact.[52] There already are several sets of guidelines (or voluntary standards) for sustainability reporting in the private sector. For example, Global Reporting Initiative, an independent international organisation of sustainability reporting (***GRI***), International Integrated Reporting Council and Sustainability Accounting Standards Board. The use of objectives, targets and indicators similar to those already employed in performance reporting could help to make merger-specific efficiencies more easily quantifiable. This could include factors such as the merged entity's intensity of energy consumption and its contribution to the international commitment on climate-related expending.

(113) Some EU institutions and agencies, including the European Investment Bank (the ***EIB***) and the European Intellectual Property Office (the ***EIPO***), already publish sustainability reports drawing on these reporting initiatives.[53] The EIB, for example, measures the carbon footprint of its lending operations and compares this against applicable benchmarks. In doing so, the EIB has partnered with the GRI and has applied its reporting framework since 2005. The adoption of a comprehensive reporting framework, with indicators monitoring actual spending on climate action and related results, will facilitate the consideration of sustainability efficiencies in the context of merger control.

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[51] See MLex Market Insight article from 28 September 2020 titled "EU working on tools to analyse green efficiencies in mergers, Régibeau says", https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1227055&siteid=190&rdir=1.

[52] A stocktake of sustainability reporting in EU institutions and agencies published by the European Court of Auditors is available under https://www.eca.europa.eu/Lists/ECADocuments/RCR_Reporting_on_sustainability/RCR_Reporting_on_sustainability_EN.pdf.

[53] EIB Group 2019 Sustainability report, https://www.eib.org/attachments/general/reports/sustainability_report_2019_en.pdf.

(114) The Commission should recognise that in the absence of any quantitative data, substantiations will have to remain qualitative in nature in some cases. For sustainability efficiencies that are more difficult to quantify, merging parties may inevitably need to focus on identifying the nature of the benefits as much as possible. In such cases, although perhaps more challenging to substantiate and verify, the Commission should be susceptible to the parties' descriptive assessment, for example, regarding the likelihood of, and reasons for, claimed efficiencies actually materialising. The Commission may also wish to advise more generally on the extent to which sustainability efficiencies must be substantiated (in terms of the level of detail, degree of quantification, likelihood and timeframe).

c. Merger-specificity, timeliness and no reasonably practicable alternative

(115) Where a merger leads to recognised sustainability outcomes which benefit consumers, the Commission will consider to what extent these outcomes are merger-specific efficiencies. Only those efficiencies that directly or indirectly result from the transaction can be taken into account and balanced against any potential harmful effects on competition.

(116) The Commission also only considers effects that will occur within a reasonable time.[54] In this context, the Commission may wish to consider further the timeframe within which sustainability outcomes must materialise in order to be capable of supporting an Efficiency Defence. It is inherent to the design of most sustainability initiatives to be beneficial (often with increasing marginal returns) in the medium and long term. Our view is that – given the scale of the environmental crisis we face – this should not be reason to disregard these efficiencies.

(117) The main remaining obstacle to an Efficiency Defence based on sustainability factors is for parties to show that the claimed efficiencies cannot be achieved with "less anticompetitive, realistic and attainable alternatives of a non-concentrative nature."[55] In that respect, we draw the Commission's attention to the wide scope of discretion it has when determining "reasonably practical" alternatives, especially in light of the urgency of some sustainability initiatives, for example those required to tackle the global climate crisis.

2.3. *Encouraging rather than penalising "green" business*

(118) Finally, we note that for merger enforcement to better contribute to protecting the environment and the Green Deal's sustainability objectives, the Commission should avoid discouraging or penalising merging parties involved in driving sustainable solutions through mergers and acquisitions. In our view, increased scrutiny and legal uncertainty, longer review periods and higher transaction costs are a potential deterrent to businesses considering "green" transactions. Consequently, businesses may be discouraged to make the very substantial investments required to implement the Green Deal. Instead, due consideration of efficiencies arguments could act as an incentive to engage in sustainable transactional activity and thereby promote the Green Deal's and other sustainability objectives.

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[54] See HMG, paragraph 9, according to which the Commission "*may take into account future changes to the market that can reasonably be predicted*."

[55] HMG, paragraph 85.