

The Consumer Voice in Europe

HOW COMPETITION POLICY CAN CONTRIBUTE TO THE EUROPEAN GREEN DEAL

BEUC's response to public consultation



Contact: Agustin Reyna and Vanessa Turner – competition@beuc.eu

BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS AISBL | DER EUROPÄISCHE VERBRAUCHERVERBAND
Rue d'Arlon 80, B-1040 Brussels • Tel. +32 (0)2 743 15 90 • www.twitter.com/beuc • www.beuc.eu
EC register for interest representatives: identification number 9505781573-45



Co-funded by the European Union

Ref: BEUC-X-2020-113 – 18/11/2020

Why it matters to consumers

The European Green deal is a critical policy initiative to tackle the existential threat to all of us posed by climate change and environmental degradation. As competitive pressure is a powerful incentive to use our planet's scarce resources efficiently, competition policy, by promoting and protecting effective competition in markets, has a key role to play in the realisation of the Green Deal goals. Since the promotion of consumer welfare has been a key objective of EU competition policy since its foundation, it is particularly important to protect consumers against the effects of false claims of meeting environmental objectives (so-called 'greenwashing') and unjustified price increases or restrictions of choice, quality or innovation. It is also important to ensure that the most vulnerable consumers do not bear a disproportionate share of the costs of the green transition.

Summary

Competition policy has a role to play in the EU's achievement of its Green Deal objectives, one of the world's key challenges today. BEUC welcomes the Commission's call for contributions on how this can best be realised.

Whilst it is of utmost importance that competition law does not stand in the way of achieving the Green Deal goals, and indeed actively supports these goals where possible, this does not require a fundamental change to the interpretation and application of EU competition law.

Rather, the Commission should first and foremost focus on clarification and guidance to market players on how current EU competition rules are already well equipped to ensure that genuine Green Deal initiatives can be pursued by industry in a complementary way to the important legislative initiatives that are in the pipeline as part of the European Green Deal.

Second, the Commission should lay out principles and practices to develop the current antitrust and merger control frameworks to take account of certain environmental sustainability requirements without undermining the guiding standard of consumer welfare.

Third, when public authorities provide State aid, the Commission should ensure that the interests of consumers are upheld by the conditions attached to the support granted to beneficiaries.

Specifically, EU competition policy can and should support the Green Deal based on the following principles:

- **Antitrust rules:** *Due to the broad perspective of consumer welfare in the EU, existing rules can largely accommodate agreements between market players to contribute to the achievement of the Green Deal goals. There is also room to promote sustainability, in particular fighting climate change and protecting the environment, within Article 101(3) TFEU, provided consumers are the substantial beneficiaries of these agreements.*
- **Merger control:** *the current merger control regime is well suited to supporting Green Deal objectives. As sustainability can be a dimension of quality, it is therefore a relevant parameter to analyse competition in merger control. The innovation theories of harm developed by the Commission in recent merger enforcement may serve as a useful model for analysing Green Deal mergers.*
- **State aid control:** *State aid approvals should be conditional on the support making a contribution to the goals of the Green Deal whilst considering the distributional effect of such measures on consumers, particularly in energy markets.*

1. General remarks

BEUC fully agrees with the Commission that competition policy cannot be the primary tool to fight climate change and protect the environment and that the focus should remain on specific legislation. Nevertheless, within the boundaries of the existing legal framework there is scope to clarify the application of the principles of EU competition law and its enforcement to ensure that competition law does not unnecessarily stand in the way of initiatives to meet Green Deal objectives and, where possible, can actively support projects to meet these objectives. BEUC therefore welcomes the Commission's initiative to call for contributions.

Taking Green Deal considerations into account in the application of competition law reflects not only current EU policy priorities but also fits within the normative system of EU law which foresees the integration of certain EU law goals into other policies. These include both environmental protection considerations (Article 11 Treaty on the Functioning of the European Union (TFEU¹)) and consumer protection (Article 12 TFEU²). These normative principles embedded in the Treaties should guide the interpretation and application of EU rules. Competition law enforcement must however remain founded on the tried and tested principle of consumer welfare - which will not stand in the way of agreements genuinely promoting the realisation of the Green Deal but at the same time ensures that consumers do not pay a disproportionate price for the imperative transition to a sustainable economy. BEUC fully agrees with EVP Vestager's view that:

*"Competition policy has to do its bit, of course. But it cannot replace the essential role of regulation. And in any case, as competition enforcers, we also have our own task to carry out – to protect consumers, by defending competition. It's a task that's been given to us by the Treaties – and one that's essential to keep our economy working fairly for everyone, in the green future."*³

Consumers are conscious and concerned about the climate crisis and this is a factor that should be taken into account by competition agencies. However, this does not require changing the fundamentals of competition policy but rather a search for solutions within the competition law enforcement system and its well-established concepts such as consumer welfare. A concept that in Europe is not limited to prices but encompasses also other dimensions such as quality, innovation, and choice.

The following looks specifically at how competition policy can contribute to realising the Green Deal objectives in the areas of antitrust, merger control and state aid.

2. Antitrust rules

Antitrust enforcement can play a role in achieving the Green Deal goals by ensuring that its interpretation does not stand in the way of agreements that support these goals and by vigorously enforcing antitrust rules against conduct by business that would harm them.⁴ In the following, we focus on questions 2 and 3 of the call for contributions.

¹ And Article 37, EU Charter of Fundamental Rights.

² And Article 38, EU Charter of Fundamental Rights.

³ Renew Webinar, 22 September 2020, at:

https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en.

⁴ Simon Holmes, (2020), "Climate Change, sustainability, and competition law", *Journal of Antitrust Enforcement*, Vol. 8/2, pp. 354-405, <https://doi.org/10.1093/jaenfo/jnaa006>; OECD Sustainability & Competition Law and Policy – Background Note 2020, Julian Novag ("OECD Sustainability & Competition Background Note 2020"), para 45, at:

[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2020\)3&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2020)3&docLanguage=En).

2.1. Clarifications on agreements that serve the objectives of the Green Deal are required

BEUC encourages the Commission to provide further clarification on the characteristics of agreements that serve Green Deal objectives and are compatible with Article 101 TFEU. It is essential that businesses are encouraged to play their part and do not hide behind any smoke screen of purported competition law restrictions to justify inaction. This clarification should cover the types of agreements that fall outside Article 101 altogether, and the types of environmental/sustainability initiatives and benefits that could fall within Article 101(3).

As set out further below, this clarification should not, and does not need to, be stretched so far as to undermine basic principles of EU competition law such as consumer welfare. On the contrary, it is through the consumer welfare standard lens that environmental benefits could be internalised, and this is because consumers play a key role in the green transition. However, consumers should not end up bearing the cost of businesses' sustainability agreements, either directly in the form of unjustifiably increased prices or indirectly through inefficient market outcomes.

2.2. Vehicles for clarification

It is important that the Commission, in coordination with national competition authorities (NCAs), sets out guidance on sustainability agreements under Article 101 to ensure a uniform and coherent approach to sustainability and antitrust law in the EU.

It would be very important for the Commission to give guidance not only in the form of decisions in specific cases but also, and more swiftly, in the form of comfort letters and informal guidance, as it has done in relation to the COVID-19 crisis⁵, but without undermining the principle of self-assessment and compliance. Non-public guidance should be supplemented with public guidance to industry to minimise overly cautious legal advice to companies. The Commission should additionally consider making use of Article 10 of Regulation 1/2003⁶, which provides that "[w]here the Community public interest relating to the application of Articles [101 and 102] of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article [101] of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article [101(1)] of the Treaty are not fulfilled, or because the conditions of Article [101(3)] of the Treaty are satisfied". This article was included in Regulation 1/2003 for a reason and therefore to use it for the first time to support one of the EU's most important objectives would seem not only appropriate but essential.

The Horizontal Block Exemptions and Guidelines should also be updated to reflect sustainability goals. Given that their planned revision is not due to become effective until 2023 but time is of the essence in the fight against climate change and protecting the environment, it would be useful to have interim guidance on Green Deal/sustainability issues in advance of the formal adoption of new Guidelines.⁷ Ideally the final guidance in the Horizontal Guidelines would not take the form of a specific sustainability chapter, but involve explanations and examples throughout the Guidelines in relation to all different types of horizontal agreement. This would also be more in keeping with competition policy

⁵ COMMUNICATION FROM THE COMMISSION Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak ("Temporary Framework") at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0408\(04\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0408(04)&from=en).

⁶ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty

⁷ This could be modelled on the Temporary Framework on COVID-19 (see footnote 9 above). Interim guidance would also be helpful with regard to the binding effect on the Commission of its published guidance on the interpretation of Article 101 TFEU (Case C-226/11 Expedia, ECLI:EU:C:2012:795, para 28.)

not creating special sectors/categories, which can be a slippery slope. It is also more likely to be future proof for sustainability challenges.

It has been suggested by some NCAs, notably the Netherlands ACM and Hellenic Competition Commission, that companies should be able to experiment with genuine joint sustainability initiatives without fear of sanction for conduct that subsequently proves to be illegal. Whilst this may be advantageous and the Commission is not bound to fine for violations of competition law in all circumstances (for example, in relation to novel points of law), this approach must be carefully controlled to avoid gaming or other pretextual abuse or inefficiencies. It would also have to be carefully ringfenced to avoid setting a slippery slope precedent or effectively amount to the reintroduction of a notification system.

Finally, guidance in the form of the Commission's view of how antitrust law would be interpreted in relation to sustainability issues would be preferable to guidance on enforcement priorities, which inherently leaves ambiguity.

2.3. Substantive issues of enforcement practice

2.3.1. Introduction

EU antitrust law enforcement has taken different approaches (both at the European Commission and the NCAs) over the last 25 years as regards agreements in the field of sustainability and in particular environmental issues.⁸ This in part reflects the development in the use of economic concepts. Rather than seek to reconcile partially inconsistent approaches and decisions from different eras where this is not necessary, BEUC would suggest taking a holistic approach to dealing with today's and tomorrow's issues – within the constraints of the framework of the TFEU and guided by the principle that competitive markets are generally the best way to achieve green outcomes. The Commission essentially already has the tools, including economic tools, required to do this. In common with other areas which are challenging competition law enforcement today, notably the digital economy⁹, there should however be greater focus on dynamic theories of harm and efficiencies.¹⁰

It is true that the Green Deal objectives will not be realised without wide business support. Unilateral initiatives alone are also unlikely to be sufficient to move us forward at the necessary speed, given the need for scale and the first mover disadvantage problem. However, at the same time, when reviewing policy to support the Green Deal, regulators must be mindful that outsourcing the formulation and pursuit of public policy objectives to the private sector can be problematic from different perspectives¹¹:

- First, agreeing on obligatory minimum standards of production may in some circumstances reduce competition either because this may prevent the emergence of higher standards or products produced at lower standards and at a lower price

⁸ For example: Case C- 238/ 05 *ASNEF- EQUIFAX* EU:C:2006; CECEC Commission Press Release IP 01/1659, 26/11/2001; Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011], OJ C11/01, ("Horizontal Guidelines 2011"), Guidelines on the application of Article 81(3) of the Treaty [2004], OJ C 101/97, ("Article 101(3) Guidelines").

⁹ BEUC report "The Role of Competition Policy in Protecting Consumers' Well-being in the Digital Era", https://www.beuc.eu/publications/beuc-x-2019-054_competition_policy_in_digital_markets.pdf.

¹⁰ OECD Sustainability & Competition Background Note 2020, para 33.

¹¹ See also as regards the democratic legitimacy of this: Offene Märkte und nachhaltiges Wirtschaften – Gemeinwohlziele als Herausforderung für die Kartellrechtspraxis, Hintergrundpapier - Arbeitskreis Kartellrecht, 01.10.2020 ("Bundeskartellamt Hintergrundpapier"), pages 13-14, at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2020_Hintergrundpapier.html?nn=3591568.

will no longer be available in the market. The Dutch *Chicken of Tomorrow* case illustrates both of these dangers (see box below).¹²

- Second, competing individually on production standards can lead to more efficient outcomes and therefore increase the quality of products in the interest of consumers.
- Third, private initiatives in the form of agreements between undertakings are more likely to be designed to favour industry rather than focussing on public policy objectives as companies naturally act in their self-interest. This can result in consumers being misled about the real nature of the cooperation and paying higher prices in the name of dubious environmental benefits (greenwashing).

Chicken of Tomorrow

In 2015, the ACM analysed an agreement between the poultry, the broiler meat processing and the supermarket industries in relation to the introduction of welfare-friendly standards for chicken (the "Chicken of Tomorrow" agreement). This agreement involved (slightly) higher welfare standards and at the same time, the removal of regular chicken meat from sale in supermarkets (accounting for 95% of sales), leaving consumers with limited options and paying higher prices.

The ACM found that while consumers were willing to pay more for animal-welfare and environmental improvements, the planned improvements in chicken welfare under this agreement, which restricted competition, were too little compared with the expected price increase. The ACM, supported by our Dutch member Consumentenbond, concluded that the exemption criteria under the Dutch Competition Act and Article 101 TFEU were not met.¹³

In 2020, the ACM's published an analysis of the chicken meat market¹⁴ and found that in the meantime the different market participants had launched their own initiatives. Supermarkets offered differentiated levels of animal welfare, based on welfare classifications of their own, and also based on market-wide sustainability labelling. Chicken welfare standards of the chicken meat sold in Dutch supermarkets today were higher than the planned standards of the 'Chicken of Tomorrow' and more sustainable and animal-friendly chicken meat was offered in supermarkets than ever before.

This case illustrates the need for a careful analysis of sustainability claims to avoid greenwashing and unjustifiably imposing higher prices on consumers. It also clearly demonstrates that competitor cooperation is not necessarily the best way to reach sustainability goals. Other less restrictive alternatives such as labelling may be more beneficial.

When competition authorities decide on their sustainability policy and give guidance, it is therefore vital that they balance all market participants' interests. The review of antitrust treatment of joint initiatives in furtherance of the Green Deal must not sacrifice consumer interests, leading to the weakest in European society paying disproportionately for the much-needed sustainability change or not being able to afford these products any more.

For consumers this means that in promoting the Green Deal and giving companies the legal certainty they need, competition authorities must also be careful not to undermine the

¹² The German DSD case also demonstrated that competition rather than the proposed cooperation led to better outcomes for consumers, Bundeskartellamt Hintergrundpapier, pages 30-31.

¹³ <https://www.acm.nl/en/publications/publication/13761/Industry-wide-arrangements-for-the-so-called-Chicken-of-Tomorrow-restrict-competition>.

¹⁴ <https://www.acm.nl/en/publications/dutch-supermarkets-offer-chicken-meat-more-sustainable-without-any-anticompetitive-agreements>.

fundamentals of EU competition law – which is perfectly possible, as recently demonstrated by the European Commission’s approach to sensible cooperation in response to the COVID-19 crisis. We set out below further details of how this could be achieved.

2.3.2. Article 101 (1)

Many agreements promoting Green Deal goals can/will fall completely outside the scope of Article 101(1) TFEU. The large scope for agreements here is often underestimated.¹⁵ Such agreements would certainly include:

- Agreements having no appreciable effects on competition in the EU, or no appreciable impact on product diversity/consumer choice or prices
- Agreements falling within Block Exemption safe harbours, e.g. pre-market R&D or production/specialisation agreements, and the De Minimis Notice
- Agreements on targets without obligations on how best to achieve the environmental aim.¹⁶
- Agreements creating new markets.¹⁷
- Non-binding agreements such as voluntary, non-exclusionary, open standardisation agreements¹⁸

The Commission could usefully set out clear guidance on where sustainability agreements do not restrict competition and are thus wholly unproblematic. In particular, voluntary standardisation agreements may provide a useful vehicle for transparent, inclusive, and beneficial cooperation to promote the Green Deal and at the same time promote healthy competition.¹⁹

On the other hand, we would counsel caution in relation to the scope of Article 101(1) as regards the use of the type of approach set out in the Court’s *Wouters/Meca Medina*²⁰ judgements to exclude the application of Article 101.²¹ These cases concerned the fulfilment of well-defined and targeted public policy objectives. There is a significant difference between setting specific rules with a limited scope for particular professions or ethics rules for sports and the vast scope of competitor companies interpreting public interest notions of sustainability in potentially unlimited ways as legitimate objectives. This is too broad a subject matter to allow for a proper and demonstrably objective balancing of different interests, including those of consumers.²² The approach would thus be open to “misuse” or regulatory capture and risk becoming a slippery slope to undermine the essence of competition law. It would be very difficult to ring-fence this in any meaningful way. Finally, as public interest grounds would need to be identified at state level, this approach would also risk fragmenting the Single Market.

¹⁵ OECD Sustainability & Competition Background Note 2020, para 57.

¹⁶ For example, Case COMP/37.634 JAMA and Case COMP/37.612 KAMA (1999), Case COMP/37.231 ACEA (1998), CEMEP (2000), Commission Press Release IP/00/508, 23/05/2000.

¹⁷ DSD Decision of 17/09 /2001, https://ec.europa.eu/competition/antitrust/cases/dec_docs/34493/34493_63_6.pdf.

¹⁸ See Horizontal Guidelines 2011, para 280ff.

¹⁹ In this regard, it may be useful to consider a European environmental standards institute (similar to ETSI/CEN/CENELEC) involving all stakeholders including consumers, and not just businesses.

²⁰ C-309/99 *Wouters and Others*, ECLI:EU:C:2002:98; Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission of the European Communities*, ECLI:EU:C:2006:492. And as more recently confirmed by the ECJ in Case C-1/12 *OTOC*, ECLI:EU:C:2013:127 (for accountants) and Case C-136/12 *CNG*, ECLI:EU:C:2013:489 (for geologists).

²¹ The Bundeskartellamt also suggests that this approach can only be used in exceptional cases, see Bundeskartellamt Hintergrundpapier, pages 20, 28, 44-45.

²² Similarly, the approach suggested by the European Parliament to disapply standard Article 101(1) and Article 101(3) analysis for certain types of vertical agreements promoting sustainability (environmental, animal health or animal welfare standards higher than those mandatory under Union or national legislation) in favour of excluding the application of Article 101(1) altogether provided that the advantages for the public interest outweigh the disadvantages to consumers and that the restrictions are indispensable to the attainment of the objective, is not an appropriate way forward and should not be replicated. (Amendment 144 in EP Common agricultural policy – amendment of the CMO and other Regulations, at: https://www.europarl.europa.eu/doceo/document/TA-9-2020-0289_EN.html).

As set out above, Article 11 TFEU (and Article 37 of the EU Charter of Fundamental Rights) should be taken into account in competition policy, and indeed individual decisions, but where there is a restriction of competition, the balancing of interests, including consumers' interests, in the application of competition law can be done in a much more effective and rigorously verifiable way under the criteria for exemptions under Article 101(3) TFEU than under Article 101 (1) alone. These criteria are there for a purpose. Leaving aside burden of proof, as a "sanity check" on the substance, one would have to ask why an agreement which would fail to meet all of the Article 101(3) criteria should be permissible under Articles 11 and 101(1). Furthermore, Article 11 TFEU needs to be implemented in harmony with Article 12 TFEU on consumer protection and that requires ensuring that cooperation falling within the scope of Article 101(1) does not harm consumers. If the Commission wanted to go further, this could only legitimately be done by regulation²³ or co-regulation²⁴, in the same way that some existing legislation foresees certain general public interest exceptions from competition law.

2.3.3. Article 101(3)

Under Article 101(3) an agreement that is anticompetitive under paragraph 1 can be allowed if four cumulative conditions are met:

- 1) the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress
- 2) the agreement allows consumers a fair share of the resulting benefit
- 3) indispensability of the restriction
- 4) competition is not eliminated in respect to a substantial part of the products in question.

Article 101(3) provides considerable scope to enable Green Deal related agreements between businesses to be exempted from the ban on restrictive business practices. In many cases it should be feasible to clarify their compatibility with competition law under traditional interpretations of this Article. Nevertheless, one could also consider expanding the current approach in a limited number of circumstances.

In evaluating the room for expanded thinking, from the consumer perspective, a distinction must be drawn between on the one hand the first and second conditions of Article 101(3), where sustainability considerations can be reflected, and the third and fourth conditions which must be rigorously maintained to protect consumers. There would seem to be no good arguments to weaken the notion of indispensability since this could lead to greenwashing. Similarly, for consumers, in particular the most vulnerable consumers, if price competition were eliminated in respect of a substantial part of the products in question, we would be very sceptical that quality parameters alone could outweigh such an elimination of competition.²⁵ As long as the least well off in European society still have access to products at a range of price points (knowing that for many consumers the cheapest product is probably their only possible choice), agreements to promote more costly sustainable options which other consumers can choose would certainly be desirable.

²³ There are two ways in which regulation can do so:

- first, by pricing in externalities explicitly and thereby incentivising producers and consumers to change behaviour (e.g. carbon tax) and
- secondly by increasing minimum standards of production applicable to all market actors.

²⁴ For example, by setting in the law clear objectives that need to be fulfilled or realised by means of industry-led initiatives. According to the 2003 Interinstitutional agreement on better law-making, co-regulation is a mechanism whereby attaining the objectives laid down in a legislative act is entrusted to parties which are recognised in the field (e.g. economic operators, social partners, non-governmental organisations). The basic legislative act therefore defines the framework and extent of the co-regulation. The parties concerned are then able to conclude voluntary agreements between themselves to achieve the objectives of the legislative act.

²⁵ Here we would not be in favour of the broader approach suggested in the draft ACM Guidelines on Sustainability Agreements, para 59, <https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements>. See also Article 101(3) Guidelines, para 110.

Assuming the third and fourth criteria of Article 101(3) continue to be interpreted strictly, we set out below some ideas on how the first two criteria could in some limited circumstances be refined to promote sustainability.

In relation to the first condition of improvements in production/distribution or technical and economic progress, this does not necessarily need to be reflected in prices but can consist in more choice and higher-quality products.²⁶ Quality considerations and innovation in the broad sense, including sustainability features, can be important factors insofar as consumers place a value on them²⁷, i.e. are willing to pay more for them.²⁸

It is often claimed that consumers value sustainability. But it is not enough to make such assertions without reliable evidence. For example, in relation to sustainable food, agriculture being responsible for 10.3% of the EU's greenhouse gas emissions²⁹ and food consumption being the main driver of negative environmental impacts generated by households in the EU³⁰, research suggests that the evidence on consumers' willingness to pay (WTP) more for sustainable food is mixed.

BEUC's June 2020 sustainable food report, including a survey carried out in 11 countries³¹, found that only one in five consumers said they were willing to spend more money on sustainable food³². A Eurostat poll from September 2020 found a significantly higher number (66%).³³ However a previous Eurostat poll found that only 19% of those questioned said they have actually changed their diets to incorporate more sustainable food.³⁴ These data do not mean that consumers do not care. Quite the contrary: a survey by our German member vzbv showed that many consumers (up to 64%) would like farm animals to be reared in better conditions and are willing to pay higher prices in return. But it is currently hard for consumers to tell, when shopping, whether a cow, pig or chicken has had a good life³⁵.

Research has shown that consumers' willingness to pay more will depend (1) on greater transparency for consumers on actual costs of foodstuffs, i.e. clear price signals to show the costs of negative externalities³⁶ and (2) on trust in the justification for sustainability price increases – in particular that these are the result of genuine sustainability improvements and are not simply greenwashing.³⁷ Consumers need to have better

²⁶ The Court has held that physically identical products can be treated differently if their environmental quality differs (Case C-2/90 Commission v. Belgium 1993, para 33, ECLI:EU:C:1992:310) This is also supported by the Horizontal Guidelines, para 308. See also OECD Sustainability & Competition Background Note 2020, para 47.

²⁷ Bundeskartellamt Hintergrundpapier, page 17.

²⁸ Whilst recognising that consumers does not always mean end consumers, these are the focus of this paper.

²⁹ European Commission, 'Farm to Fork' Strategy for a fair, healthy and environmentally friendly food system, 20 May 2020.

³⁰ European Commission Joint Research Centre, Indicators and assessment of the environmental impact of EU consumption, 2019.

³¹ Austria, Belgium, Germany, Greece, Italy, Lithuania, the Netherlands, Portugal, Slovakia, Slovenia and Spain. The results were analysed by our Belgian member Test-Achats.

³² https://www.beuc.eu/publications/beuc-x-2020-042_consumers_and_the_transition_to_sustainable_food.pdf

³³ 66% of people said that they were prepared to pay 10% more for agricultural products that are produced in a way that limits their carbon footprint: https://ec.europa.eu/info/news/sustainability-rural-areas-food-security-commission-publishes-public-opinion-survey-eu-food-and-farming-2020-oct-13_en.

³⁴ The Gilets Jaunes movement also illustrates the dangers of presuming consumers' willingness to pay more for improvements to sustainability. On the other hand, the European Commission's Consumer Conditions Scoreboard 2019 notes that more than half of EU consumers (56.8%) report that at least some of their purchasing decisions are influenced by environmental claims: https://ec.europa.eu/info/sites/info/files/consumer-conditions-scoreboard-2019-factsheet_en.pdf.

³⁵ https://www.vzbv.de/sites/default/files/downloads/2017/10/10/2017_vzbv_factsheet_animal_welfare_labelling.pdf; <https://www.vzbv.de/pressemitteilung/umfrage-verbraucher-wuerden-fuer-tierschutz-mehr-zahlen> This is also confirmed by a study of the German Federal Ministry of Food and Agriculture, 2020 https://www.bmel.de/SharedDocs/Downloads/DE/Broschueren/ernaehrungsreport-2020.pdf?__blob=publicationFile&v=20, (see page 28).

³⁶ Research shows that consumers are not seeing the true price of their consumption of different foodstuffs, internalising the negative externalities different types of food generate, see for example: <https://www.uni-augsburg.de/de/campusleben/neuigkeiten/2020/09/04/2735/> or <https://www.rewe-group.com/en/newsroom/press-releases/1710-penny-labels-its-first-products-with-true-prices>. See also on CO₂ pricing of energy: <https://www.vzbv.de/meldung/fuer-einen-verbraucherfreundlichen-co2-preis>; https://www.vzbv.de/sites/default/files/downloads/2019/01/24/19_07_01_positionspapier-vzbv_co2-bepreisung_kurzfassung.pdf.

³⁷ See also Bundeskartellamt Hintergrundpapier, page 11-12 which notes the important role of consumer behaviour (behavioural economics).

information in order to be able to make informed choices.³⁸ To counter greenwashing, measures to try to ensure that information about sustainability is accurate and verifiable will also be essential.³⁹ To evaluate whether particular initiatives really do have sustainability value, competition authorities could consult Member State environmental agencies. Furthermore, consumers must believe that any price increases are fair to ensure that the cost of sustainability is not borne by the most vulnerable consumers rather than the “polluters”.⁴⁰

As regards the second criterion of Article 101(3), that consumers receive a “fair share of the benefit”, the basic principle that users of the products that are the object of an agreement should be compensated for the harm caused to them by the restriction of competition is sound and should remain the rule.⁴¹ The question is whether one could legitimately apply a broader standard in some circumstances to take into account indirect benefits such as (1) benefits in other markets or (2) societal benefits – such as collective environmental benefits, and to factor in negative externalities.⁴²

As regards benefits in other markets, the fair share criterion can legitimately be considered fulfilled if the benefit accrues to future consumers⁴³, in the same way that agreements on innovation benefit future consumers, assuming this future benefit can be substantiated. Where the consumer benefits arise in a different market but in relation to substantially the same group of consumers e.g. saving electricity costs as a result of more efficient household appliances, the fair share criterion could also be considered fulfilled. Benefits have also been recognised on the other side of two (or multi-) sided markets from where the restriction of competition occurred as in the Mastercard case.

As regards societal benefits, the ACM has put forward one approach in suggesting that if: (i) the agreement aims to prevent or limit any obvious environmental damage, and cumulatively (ii) the agreement helps, in an efficient manner, to comply with an international or national standard to prevent environmental damage to which the Dutch Government is bound, users will, as a rule, reap the benefits in the same way as the rest of society⁴⁴ (for example, less pollution leading to better health). According to the ACM, as long as the price increase to users is lower than expected benefits for society as a whole⁴⁵ (and the other three conditions of Article 101(3) are fulfilled), this type of agreement can be exempted. It depends on an explicit legal requirement by which the state is bound which therefore embeds a redistribution between users and non-users in a democratic process.

Such agreements would not necessarily fully compensate the increased price to the users of the product affected but arguably this is not required by the term “fair”. Specifically, in relation to recognised globally tangible environmental benefits, such an approach could factor in negative externalities which might be fairer for users and non-users of the affected products. Non-users otherwise necessarily bear the cost of such negative externalities.⁴⁶

³⁸ See for example: <https://www.vzbv.de/pressemitteilung/umfrage-verbraucher-wuerden-fuer-tierschutz-mehr-zahlen>.

³⁹ For example, initiatives such as the draft guidance published by the ACM regarding sustainability claims, at: <https://www.acm.nl/en/publications/acm-publishes-consultation-its-draft-guidelines-regarding-sustainability-claims>.

⁴⁰ https://www.vzbv.de/sites/default/files/downloads/2019/01/24/19_07_01_positionspapier-vzbv_co2-bepreisung_kurzfassung.pdf and https://www.beuc.eu/publications/beuc-x-2020-100_the_consumer_checklist_for_fair_and_efficient_carbon_pricing.pdf.

⁴¹ As recognised in the Article 101(3) Guidelines, para 43.

⁴² There is no fundamental philosophical obstacle to do this according to ‘Consumer Welfare in EU Competition Policy’, Svend Albak, at: https://ec.europa.eu/dgs/competition/economist/consumer_welfare_2013_en.pdf.

⁴³ Article 101(3) Guidelines, para 87-88.

⁴⁴ Draft ACM Guidelines on Sustainability Agreements, para 38ff.

⁴⁵ In other words, where for example consumers of a restrictive agreement represent only 30% of the population, in deciding whether the price increase to these affected consumers is outweighed by the societal benefit, for this type of environmental agreement one would weigh up the price increase to consumers against 100%, not 30%, of the benefits to society.

⁴⁶ OECD Sustainability & Competition Background Note 2020, para 3.

Establishing whether the price increase to users is lower than expected benefits for society as a whole raises the question of quantification of costs and benefits.⁴⁷ It has been suggested that environmental economics and specifically shadow pricing may be one solution. To the extent that such techniques involve consumer surveys carried out by agencies when assessing an agreement under Article 101(3) TFEU, the methodology of such surveys will be critical for credibility. In particular, a revealed preference approach is likely to be more accurate than a stated preference approach.⁴⁸

However, this type of “fair share” reasoning could not be accepted in the same way for all sustainability agreements or other social issues which restrict competition and harm consumers and do not internalise negative externalities in the same way as environmental protection improvements. Whilst they are laudable aims, if the group of EU consumers affected by agreements on, for example, animal welfare or fair wages for third country workers (e.g. small farmers), would not sufficiently value the improvements they bring about, i.e. be willing to pay the resulting increased prices, this would be stretching the law too far from the consumer welfare test into an undefinable and ambiguous welfare test, susceptible to politicisation and corporate capture.

This does not mean that decision-makers and society do not have a responsibility towards broader sustainability issues beyond the environmental component, including better animal welfare standards or working conditions of workers outside the EU. However, competition law is not the best vehicle to achieve such important goals. This can be legitimately done through the adoption of specific regulation by democratically elected institutions to set minimum standards. This may well involve the sacrifice of efficiencies, but this sacrifice may be justified in specific circumstances and there are precedents for this approach. The GDPR sacrifices economic efficiencies in favour of the protection of personal data for example.

On the basis of the above considerations, one approach under Article 101(3) to different types of sustainability agreements is summarised in the table below.

Interpretation of criteria required for an Article 101(3) exemption of sustainability agreements

Conditions under Article 101(3)	Environmental benefits	Benefits for workers in third countries	Animal welfare benefits
Improvement in the production or distribution of goods or the promotion of technical or economic progress	Yes ⁴⁹	Yes	Yes
Fair share of the resulting benefit.	Consumers of the affected product are imposing negative externalities on non-users so taking account of benefits to all EU consumers, including non-users, in “fair share” is justified.	No negative externalities directly affecting non-users in the EU, therefore WTP ⁵⁰ must be evidenced for consumers affected by increased prices.	No negative externalities directly affecting non-users in the EU, therefore WTP must be evidenced for consumers affected by increased prices.
Indispensability	Yes	Yes	Yes
Non elimination of competition	No elimination of price competition.	No elimination of price competition.	No elimination of price competition.

⁴⁷ The ACM suggests that quantification is not necessary in every case, draft ACM Guidelines on Sustainability Agreements, para 45ff. Nor would it be necessary to seek exact quantification in every case which may result in misleading precision. A “sanity check” order of magnitude may suffice to determine that there are genuine benefits to consumers.

⁴⁸ See also Bundeskartellamt Hintergrundpapier pages 24-26 on the difficulties of accurate quantification, which also raises normative concerns.

⁴⁹ This is a factual question that needs to be proven in the specific case.

⁵⁰ WTP: Willingness to pay.

2.3.4. Anticompetitive conduct harming Green Deal Objectives

Existing antitrust law is well equipped to deal with anticompetitive agreements/conduct by business that can harm the Green Deal objectives. Cartels preventing consumers from buying sustainable products or restricting sustainability in other ways can and should be pursued in the same way as cartels that raise prices, restrict other quality parameters, output or innovation. A good example of this is the ongoing investigation into an alleged collusive scheme restricting competition in the development of technology to clean the emissions of petrol and diesel passenger cars⁵¹.

It would seem difficult for the Commission to change its stated policy of pursuing all cartels to suggest that it will prioritise Green Deal cartels without thereby signalling that other would-be cartelists may be safe from prosecution. This could have a seriously harmful effect on consumers of a potentially very wide range of products. The Commission should however reflect on whether fines for collusion to harm sustainability or to indulge in greenwashing have a sufficient deterrent effect on potential cartelists.

2.4. Merger control

Recognising sustainability as a quality dimension, and therefore as a relevant parameter of competition, would not seem to require any radical change to the current approach in merger control. A merger reducing consumer choice of sustainable options would harm consumers and should not be cleared, any more than a merger reducing innovation - unless the restriction of competition can be solved by remedies.⁵² Similarly, clearing an anticompetitive merger merely because it promotes sustainability should not be considered compatible with the EU Merger Regulation⁵³ unless it can genuinely fulfil criteria for efficiencies. The policy developed by the Commission in relation to innovation in recent merger cases could serve as a useful model for the dynamic analysis of mergers with a Green Deal element.

By contrast, opening the door to purely non-competition factors in merger control decisions would seem difficult to reconcile with the current legal framework. Such an approach would be a risky slippery slope to special pleading of other types and could ultimately undermine the fundamental rationale on which merger control is built, that competitive markets are in the best interests of consumers, economic efficiency and thus society in general.⁵⁴ It has not been considered necessary to weaken merger control by softening the application of the failing firm defence in response to the COVID-19 pandemic. If effective competition is considered the driver of efficient outcomes, the same should hold true in relation to the Green Deal.

It is noted that some Member States foresee the ability to overrule merger decisions by national competition authorities on the grounds of public policy, including environmental protection.⁵⁵ The Commission may need to consider whether environmental protection could constitute a valid public interest ground within the meaning of Article 21 (4) second paragraph of the Merger Regulation.

⁵¹ https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2008.

⁵² Case M.8084 – Bayer/Monsanto, Decision of 21.3.2018.

⁵³ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004R0139>

⁵⁴ See also Bundeskartellamt Hintergrundpapier page 43.

⁵⁵ For example, the *Miba/Zollern Gesch.-Z.: I B 2 – 20302/14–02*, Decision of the Minister of the Economy and Energy of 19/08/2019 in Germany in relation to a renewable energy related merger, at: https://www.bmwi.de/Redaktion/DE/Downloads/V/verfuegung-verwaltungsverfahren-miba-zollern.pdf?__blob=publicationFile&v=4.

The call for contributions notes that consumer preferences are a key aspect in the assessment of the effects of a merger, both in terms of identifying the relevant product markets and analysing the extent to which the merging companies compete against each other and against other firms. It also notes that today, environmental and sustainability considerations play an ever-increasing role in this respect. As set out above, when analysing individual cases, it will be important for the Commission to take steps to determine what preferences consumers really hold and their actual market behaviour on the basis of objective and well-designed studies, and not simply to rely on assumptions or assertions by merging parties on the basis of surveys carried out with the merger in mind.

2.5. State aid control

According to Article 12 TFEU “consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities” and Article 11 TFEU indicates that “Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities”. The horizontal nature of these provisions supports the view that not only Articles 101 and 102, but the whole body of EU competition law and policy must take account of consumer and environmental protection requirements.

In the context of the implementation of the European Green Deal, while State aid is likely to play an important role to stimulate the switch to a more sustainable economy, careful consideration must be given to the impact on consumers, and in particular the most vulnerable ones. This issue is particularly important in the energy sector. Electricity is vital for the economy, as well as for the everyday life of all consumers, and its generation and use have great implications for the planet. EU state aid rules have a very direct and tangible impact on the structure of the energy market since the energy sector is amongst the most subsidised.

For the EU to become climate neutral by 2050, which is at the heart of the European Green Deal, it is important that State aid plays its role. However, current State aid measures in the energy sector in the form of reduced energy prices given to a large number of industries have led to increased costs for domestic energy consumers⁵⁶. These state subsidies have a direct impact on energy costs for consumer households, putting consumers at risk of debt or harm to their health due to reduced use of energy.

Exempting industries from network costs and levies and providing state subsidies inflating household bills falls under the scope of EU State Aid law⁵⁷. The subsidies allowed under the 2014-2020 Guidelines on State aid for Environmental protection and Energy can thus have a disturbing impact on consumers. We welcome therefore that the Commission has started the process to review its Guidelines. State aid in the energy sector must be oriented to attaining clear sustainability goals but at the same time it must consider the distributional

⁵⁶ For example, in Germany, the financial relief granted to companies by the industrial renewable electricity surcharge exemptions amounts to more than 4 billion EUR per year, according to the German Federal Office for Economic Affairs and in 2016 alone, German energy intensive industry received around 6.5 billion EUR in subsidies. Climate Action Network, European Fat Cats, EU Energy Intensive Industries: paid to pollute, not to decarbonise <http://www.caneurope.org/docman/fossil-fuel-subsidies-1/3310-european-fat-cats-report-april-2018/file>, page 18

⁵⁷ For example, in 2019, average household electricity prices increased by 3.7% to 21.6 euro cents/kWh in comparison to 2018. For industrial consumers electricity prices increased in 2019 following five consecutive years of decreasing electricity prices. Average, industrial electricity prices increased in 2019 by 7.8% to 11.0 euro cents/kWh in 2019 compared to 2018. Looking back over a longer period of time, compared to 2009, average electricity prices for household consumers across the EU increased significantly, by 33% in nominal terms, while industrial prices increased by 9.3 % over the same period. The price increase for electricity consumers mainly reflects increases in non-contestable charges of the electricity consumers' bill. In 2019, on average, 37% of the final price consisted of the energy component (contestable charges), while the remaining 63% of the electricity bill consisted of non-contestable charges, i.e. the sum of network costs, taxes, levies and other charges. Source: ACER Market Monitoring Report 2019 – Energy Retail and Consumer Protection Volume: https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ACER%20Market%20Monitoring%20Report%202019%20-%20Energy%20Retail%20and%20Consumer%20Protection%20Volume.pdf

effects of such measures on consumers, particularly due to the essential character of energy services.

State aid must be oriented at supporting initiatives that lead to a greater reduction of greenhouse gas emissions than would occur without the aid, as stated in the Commission's consultation on the revised EU Emission Trading System (ETS) State aid Guidelines. Even if this specific objective was dropped in the final text of the ETS Guidelines, we believe that it should be a guiding principle together with ensuring that the positive effects of the aid outweigh its negative effects in terms of distortions of competition in the Single Market.

Further to this, beneficiaries of State aid need to demonstrate a genuine commitment to reducing their greenhouse gas emissions and increasing their energy efficiency performance. Therefore, we support the requirement that beneficiaries, irrespective of their size, have to conduct an energy audit or have an energy or environmental management system in place⁵⁸.

Finally, the COVID-19 crisis has shown the importance to attaching specific conditionalities to State aid, particularly in polluting sectors such as aviation. BEUC has suggested that in the context of State aid provided for the recovery of the aviation sector, ambitious sustainability objectives and climate targets should be included as binding conditions for receiving the aid. This could be done for example by committing to reduce x % of CO2 emissions by a certain date, shifting to alternative fuels (e.g. this could take the form of "blending mandates" requiring airlines to progressively increase their share of alternative fuels to power their planes) or cutting domestic flights where there is a more sustainable alternative like trains⁵⁹.

In the coming years State aid will be an important policy tool to ensure that transport and mobility systems become more sustainable. It is therefore essential that State aid is oriented towards the development of means of transport that are less polluting such as rail. Investment in infrastructure will be crucial to connect consumers across the European Union and provide a real and convenient alternative to air transport.

⁵⁸ https://www.beuc.eu/publications/beuc-x-2020-010_beuc_response_public_consultation_on_draft_ets_state_aid_guidelines.pdf

⁵⁹ https://www.beuc.eu/publications/beuc-x-2020-076_beucs_contribution_-_aviation_roundtable.pdf



This publication is part of an activity which has received funding under an operating grant from the European Union's Consumer Programme (2014-2020).

The content of this publication represents the views of the author only and it is his/her sole responsibility; it cannot be considered to reflect the views of the European Commission and/or the Consumers, Health, Agriculture and Food Executive Agency or any other body of the European Union. The European Commission and the Agency do not accept any responsibility for use that may be made of the information it contains.