

# EU COMPETITION LAW & THE GREEN DEAL: THE CONSISTENCY ROAD



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The EU roadmap for making the economy sustainable by reducing greenhouse gas emissions to net zero by 2050 and by at least 50 percent by 2030 (the “Green Deal”)<sup>2</sup> is already affecting European Union (“EU”) anti-trust policy and enforcement.

My main argument is that the European Commission (“Commission”) is already minded to tailor its competition enforcement to the Green Deal. In turn, the Green Deal legislation, and in particular the EU Green Taxonomy Regulation, offers quantitative thresholds to allow a proper balancing of sustainability benefits and anti-competitive effects to possibly exempt cooperation between competitors targeted at sustainability.<sup>3</sup>

This note is addressed to lawyers, who I argue already have the tools for advising corporations that they may cooperate to fight climate change whilst remaining in compliance of competition rules. The EU Competition Commissioner has observed that: “*it is important that companies know about the opportunities which they already have to work together for sustainability. There is a certain level of conservatism in the advisory industry.*”<sup>4</sup>

## I. WHAT HAS COMPETITION POLICY GOT TO DO WITH SUSTAINABILITY?

The two worlds of competition policy and sustainability are predicated as being distant. What are the actual cooperation initiatives that companies would like to pursue and what is the stance of the Commission?

### A. Clash Between Competition Rules and Sustainability?

Sustainability under the EU Green deal requires not only public regulation and support, but also mobilizing private investments.<sup>5</sup> In turn, private investments require coordinated action due to the misalignment of social and individual incentives (the polluter benefits from its activity but imposes the cost on the society in a classic tragedy of commons) and the first-mover disadvantage (the first green investor will increase its costs allowing those that do not follow to gain shares in the market).

<sup>2</sup> Commission’s communication, The European Green Deal, December 11, 2019.

<sup>3</sup> I use the word “sustainability” to refer to actions targeted at the six EU environmental objectives under the EU Green Taxonomy Regulation: climate change mitigation, climate change adaptation, sustainable use and protection of water and marine resources, transition to a circular economy, pollution prevention and control, protection and restoration of biodiversity and ecosystems.

<sup>4</sup> Commission’s Executive Vice-President Margrethe Vestager, Sustainability and Competition Policy conference, 23 October 2019 (phrase added at delivery, see <https://www.youtube.com/watch?reload=9&v=7mpWAOhkQbY>).

<sup>5</sup> Commission’s communication, A New Industrial Strategy for Europe, March 10, 2020: “*mobilising private investment ... is acutely important where there are market failures, especially for large-scale deployment of innovative technologies.*” An EU study, “Links between production, the environment and environmental policy,” 2019, available at [https://ec.europa.eu/environment/enveco/economics\\_policy/](https://ec.europa.eu/environment/enveco/economics_policy/), shows the inadequate private financing as a key barrier for low-carbon technologies.

On the other hand, competition policy is about individual companies remaining independent to avoid restricting competition between them, under Article 101(1) of the Treaty on the Functioning of the EU (“TFEU”). In turn, “restrictions of competition ... lead to a reduction in consumer welfare, because consumers have to pay higher prices.”<sup>6</sup> Competition violations may be exempted when they “generate objective economic benefits so as to outweigh the negative effects” under Article 101(3) TFEU.

Competition policy would focus solely on consumer welfare (and not on societal benefits), on the short-term (and not on the EU Green Deal 2030 or 2050 targets), on economics and price-related effects (and not on sustainability objectives such as climate change mitigation). Is it really the case that competition law represents an obstacle for sustainability action?

## **B. Survey of Sustainable Collaborative Initiatives**

Cooperation between companies may advance sustainability. Economists,<sup>7</sup> business leaders<sup>8</sup> and European Union legislation<sup>9</sup> have confirmed that.

We surveyed a pool of the largest Fortune 500 firms,<sup>10</sup> and made some interesting findings. First, most companies assessed have a dedicated sustainability or environment, social and governance (“ESG”) report, indicating devotion of resources (probably due to regulatory obligations).

Second, examples of direct cooperation between two or more companies on sustainability initiatives were few, for example:

- two global energy companies agree to study hydrogen mobility in China;
- three food companies cooperating with farmers in the areas of milk production and coffee and cocoa growing;
- structural partnerships for sustainable urban mobility.

Third, in most sectors the individual initiatives were similar. For instance, in the automotive sector all players recognize electrification as a goal, the technology sector prioritizes waste reduction and recycling; and in retail the goal to reduce packaging is ubiquitous. This would seem to call for sharing of best practices, information and costs.

Fourth, most firms find state that any sustainable activities involving cooperation would preferably occur in a “pre-competitive” phase, for example a food company outlines that “*where collaboration is needed to move the needle on an industry-wide issue, we engage with relevant partners ... to identify pre-competitive solutions.*” Others are keen to clarify that they adapt their sustainable approach “*by doing business fairly and with integrity.*”

Finally, collaborations often take place within the framework of new or existing industry-wide organizations or within their direct supply chains. To provide context, one leading online retailer is a member of 23 separate sustainability-oriented organizations, while a leading energy company is partner to 17 differing environmental sustainability organizations.

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6 Commission’s 101(3) Guidelines of 2004, paragraphs 21, 13 and 33; and Horizontal Cooperation Guidelines of 2011, paragraph 269.

7 Francisco Gomez-Martinez, Sander Onderstal & Maarten Pieter Schinkel, “Can Collusion Promote Corporate Social Responsibility? Evidence from the Lab,” April 16, 2019, Amsterdam Law School Research Paper.

8 “The Urgency of Collaboration, with Paul Polman,” podcast, University of Pittsburgh Center for Sustainable Business, May 1, 2020.

9 Commission’s communication, A New Industrial Strategy for Europe, March 10, 2020: “*where identified as necessary, the approach of industrial alliances could be the appropriate tool. This has already shown its benefit in the area of batteries, plastics and microelectronics.*”

10 Fortune, Global 500 2019, <https://fortune.com/global500/2019/search/>. We focused on 35 firms; the three highest ranked firms in each industry sector within the top 100. We assessed the latest Sustainability/ESG report of each company (when available) to find examples of individual or collaborative sustainability initiatives. The data set is available with the author.

### ***C. A Review of Competition Policy is Already Happening***

While we have shown above how private initiatives have a role to play in addressing climate change, regulation remains an important tool: in the words of EVP Vestager “*we don’t need new competition rules to make this possible . . . we also have the power, as a society, to put regulations in place that can make our economy more sustainable,*”<sup>11</sup>

At the same time, the EU itself has recognized that the competition framework needs updating. “*As Europe sets out on its recovery path and speeds up the twin transitions, we should ensure that competition rules remain fit for today’s world. To make this happen, the Commission is currently reviewing the EU competition framework.*”<sup>12</sup>

The Commission is “on the job” to make its competition enforcement fit in the current climate (pun intended).

## **II. YES, WE LEGALLY CAN**

The legal basis to allow green cooperation in compliance with competition policy is to apply the consistency principle to avoid contradictions amongst the EU constitutional, Green Deal, and competition rules.

### ***A. EU Constitutional Rules***

The EU Treaties themselves recognize sustainable development and environmental protection thus conferring to them the highest protection in the EU hierarchy of norms.<sup>13</sup>

Competition policy is a tool to achieve the EU’s aims as defined in Article 3 of the Treaty of the EU (“TEU”): “*the Union shall . . . work for the sustainable development of Europe based on balanced economic growth and price stability . . . it shall contribute to peace, security, the sustainable development of the Earth.*”

Also: “*environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities*” (Article 11 TFEU; see also Article 37 of the EU Charter of Fundamental Rights, which has the same primary-law value as the Treaties).

However, other EU Treaty clauses concern other, equally important objectives, such as equality between men and women, animal welfare, employment and social protection. Why then the focus on sustainable development? Article 11 TFEU is clear: environment protection “*must be integrated.*”<sup>14</sup> Today, environmental protection is the highest EU priority through the Green Deal rules.

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11 Margrethe Vestager, “Competition and sustainability,” (October 24, 2019) available at [https://wayback.archive-it.org/12090/20191129200524/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-sustainability\\_en](https://wayback.archive-it.org/12090/20191129200524/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-sustainability_en).

12 Commission’s communication, Europe’s moment: Repair and Prepare for the Next Generation, May 27, 2020.

13 For a comprehensive account, see Simon Holmes, “Climate change, sustainability and competition Law,” *Journal of Antitrust Enforcement*, April 13, 2020.

14 Only the industrial policy article in the Treaty expressly prohibits “*any measure which could lead to a distortion of competition*” (Article 173(3) TFEU). Please read Julian Nowag, *Environmental Integration in Competition and Free-Movement Laws*, OUP 2016.

## B. EU Green Deal Rules

The European Union has the target to reduce greenhouse gas emission to net zero by 2050, and to at least 50 percent compared to 1990 levels by 2030.<sup>15</sup> This is because the EU has committed itself to the 2015 Paris Agreement adopted under the United Nations Framework Convention on Climate Change and its long-term goal to keep global temperature increases to well below 2°C above pre-industrial levels, by ratifying it in 2016.

That's not only a vision, it is a set of directly applicable rules, for example an EU Regulation establishing the framework for achieving climate neutrality ("European Climate Law").<sup>16</sup> The EU is reassessing its existing policy instruments to ensure their consistency with its 2030 and 2050 emission-reduction objectives.

Private businesses and their investments have an important place in the EU Green Deal.<sup>17</sup> The EU is adopting a regulation setting out an EU-wide classification system, or "taxonomy," which will provide businesses and investors with a common language to identify those economic activities which are considered environmentally sustainable ("EU Green Taxonomy Regulation").<sup>18</sup>

## C. EU Competition Rules

Let us remind ourselves that the Commission considers different "*parameters of competition on the market, such as price, output, product quality, product variety and innovation.*"<sup>19</sup>

Article 101(1) TFEU states that "*shall be prohibited ... agreements ... which have as their object or effect the prevention, restriction or distortion of competition.*" Any assessment of cooperation that could constitute a competition restriction needs to take into account all its objectives as well as its economic or legal context.<sup>20</sup>

Article 101(3) TFEU states that "*the provisions of paragraph 1 may ... be declared inapplicable in the case of ... any agreement ... which contributes to improving the production or distribution of goods or to promoting technical or economic progress.*" Competition restrictions may become permissible even when they pursue non-competition objectives.<sup>21</sup>

For the balancing of anti- and pro- competitive effects under Article 101 TFEU, some commentators think the EU Commission is too focused on consumer welfare or on prices.<sup>22</sup> The law in reality allows businesses to argue also for qualitative efficiencies such as new and improved products<sup>23</sup> as well as long-term efficiencies.<sup>24</sup> For example, benefits within the meaning of Article 101(3) TFEU can occur also "*through increased quality or other benefits*" (paragraph 86).

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15 Commission's communication, A Clean Planet for All, November 28, 2018.

16 Commission's proposal, March 4, 2020, awaiting adoption.

17 Commission's President Von der Leyden, My agenda for Europe, October 9, 2019: "*we need to tap into private investment by putting green and sustainable financing at the heart of our investment chain and financial system.*"

18 Commission's proposal as adopted by the Council, April 1, 2020, awaiting adoption.

19 Commission's 101(3) Guidelines, paragraph 16 and footnote 84; and 102 Enforcement Priorities Guidance of 2009, paragraph 11.

20 *Budapest Bank*, April 2, 2020, paragraphs 67-69.

21 *Metro SB-Großmärkte*, October 25, 1977, paragraphs 21 and 43 (employment); *SPO*, February 21, 1995, paragraphs 242-57 (construction sector situation).

22 Consumer welfare is not a term used in the EU Treaties, nor is it significantly used in the EU case law: it was used for the first time by an Advocate General about the economics of the pharmaceutical industry in 2004, and the Court of Justice used it later sporadically, for example to argue it is for a dominant company to show that the efficiency gains from the conduct under consideration counteract any likely negative effects on competition and consumer welfare.

23 Commission's 101(3) Guidelines refer to: "*efficiencies of a qualitative nature ... may ... be of equal or greater importance than cost efficiencies*"; "*new or improved goods or services [example of the safer tyre]*"; "*consumer pass-on can also take the form of qualitative efficiencies such as new and improved products, creating sufficient value for consumers to compensate for the anti-competitive effects of the agreement, including a price increase*" (paragraphs 59, 69, 70, 102).

24 *Ibid*: "*take into account the initial sunk investments made by any of the parties and the time needed and the restraints required to commit and recoup an efficiency enhancing investment*"; "*substantiate any projections as to the date from which the efficiencies will become operational*" "*in the application of the balancing test ... it must be taken into account that competition is an important long-term driver of efficiency and innovation*" (paragraphs 44, 58, 92).

Regarding which consumers the Commission should consider in its balancing act, some language refers to in-the-market consumers, which is not ideal for sustainability-related assessment, where the perspective is broader.<sup>25</sup> However, there is already language that can help convince enforcers to exempt sustainability efforts: “*wider efficiency enhancing effects within the relevant market, for example because it leads to a reduction in industry wide costs, these additional benefits are also taken into account*”; “*society as a whole benefit where the efficiencies lead ... to more valuable products and thus to a more efficient allocation of resources.*”<sup>26</sup>

Finally, regarding the calculation of efficiencies, the Commission recognizes that, for non-cost or qualitative efficiencies, “*it is difficult to assign precise values to dynamic efficiencies of this nature*” and encourages companies to simply “*substantiate their claims by providing estimates and other data to the extent reasonably possible, taking account of the circumstances of the individual case*” such as the availability of new and improved products (paragraphs 103 and 104).

#### **D. Principle of Consistency**

The consistency principle in EU law demands that competition policy and EU Green Deal do not contradict each other. It is set out in Article 7 TFEU: “*the Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.*”<sup>27</sup> It can be seen as an element of the rule of law, which is one of the EU common values set out in Article 2 TEU: all members of a society are equally subject to the law.<sup>28</sup>

The consistency principle is a manifestation of the good administration principle, now embodied in Article 41 of the EU Charter of Fundamental Rights. In recent years the “Better Regulation” agenda aims at EU laws which are backed up by the views of stakeholders, using the tool of impact assessments, which in turn consider the “coherence” of each option with the overarching objectives of EU policies.<sup>29</sup>

The Green Deal today is the EU’s highest priority, representing a new integration phase of the Union, like the Single Market has been for several years. Not only is the Green Deal democratically mandated by the European Parliament, it is also “hard” law, namely primary legislation (both the Treaty and the Charter) as well as secondary legislation such as the European Climate Law or the EU Taxonomy Regulation.

Indeed, the draft European Climate Law reads: “*all EU actions and policies should pull together to help the EU to achieve a successful and just transition towards climate neutrality and a sustainable future*” and that “*by 2023, and every 5 years thereafter, the Commission shall review ... the consistency of Union measures with the climate-neutrality objective*”.

For example, the European Parliament has been calling for consistency of competition rules with the EU Green Deal.<sup>30</sup> The Commission itself has already started following this consistency road.

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25 Ibidem: “*consumers must receive a fair share of the benefits with that same relevant market [or] group of consumers ... benefiting from the efficiency gains are substantially the same*”; “*the concept of consumers encompasses all direct or indirect users of the products covered by the agreement ... customers of the parties to the agreement and subsequent purchasers*” (paragraphs 43, 84, 104); see also the Horizontal Cooperation Guidelines, paragraph 329 specifically on environmental standards.

26 Ibidem, paragraphs 53, 85. See also the case law on dual-sided markets, for example *Mastercard*, May 24, 2012, paragraph 228.

27 *Front Polisario*, December 10, 2015, paragraphs 149-58.

28 See also Article 13 TEU “*the Union shall have an institutional framework which shall ... ensure the consistency, effectiveness and continuity of its policies and actions*” and the remedy in Article 256(3) TFEU: “*where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the Court of Justice for a ruling.*”

29 Commission’s staff working document, Better Regulation Guidelines, July 7, 2017.

30 European Parliament’s resolution, Annual Report on Competition Policy, January 31, 2019: “*European Court of Justice interprets article 101 of the TFEU as taking into account the different aims of the Treaties; ... the narrow interpretation of Article 101 of the TFEU ... has increasingly been considered an obstacle to the collaboration of smaller market players for the adoption of higher environmental and social standards*” and “*the concept of a ‘fair price’ should not be regarded as the lowest price possible for the consumer, but instead must be reasonable and allow for the fair remuneration of all parties along the food supply chain*” (paragraphs 49 and 79); and motion on the same topic, February 25, 2020, calling for guidance on the EU merger control test so that “*in cases of mergers, the Commission does not only look at prices, output and innovation but also pays attention to the social and environmental costs*” (paragraph 45).



### III. THE CONSISTENCY ROAD

The Commission is already including sustainability in its competition rules. One may advocate for future competition enforcement that takes sustainability into account, considering the Commission's stance on environmental standards, and relying on the quantitative threshold of the EU Green Taxonomy Regulation.

#### **A. On the Road: Horizontal Cooperation Guidelines and Farm-to-fork Strategy**

The Commission has already started its “green” review of the competition law framework. For example, the current review of the Horizontal Cooperation Block Exemption Regulation and Guidelines will likely trigger the (re-)insertion of a new chapter on sustainability agreements in the revised Guidelines. According to the factual summary of the various stakeholders' contributions in the public consultation:<sup>31</sup>

- “Sustainability agreements were mentioned ... as an area where guidance was lacking ... Respondents replying with ‘yes’ [42 out of 77] considered that sustainability agreements (or ‘environmental agreements’ or ‘social equity arrangements’) deserved a specific section outside the examples given in the standardisation chapter”; and
- “the most important development according to respondents (25 responses [out of 77]) is climate change and the corresponding challenging environmental and sustainability goals ... 11 respondents believed that the antitrust policy as laid down in the HBERs and HGL is not sufficiently aligned with the Commission's climate policy.”

By the same token, the Commission's “Farm to Fork Strategy” envisages “clarifying the competition rules for collective initiatives that promote sustainability in supply chains” and that it encourages “the possibilities for cooperation within the common market organisations for agricultural products and fishery and aquaculture products.”<sup>32</sup> The actions indicated are the the “clarification of the scope of competition rules in the TFEU with regard to sustainability in collective actions” for Q3 2022 and a “legislative initiatives to enhance cooperation of primary producers to support their position in the food chain” for 2021-22.

“And yet it moves.”

#### **B. Green Deal As the New EU Imperative**

The Green Deal is the new EU imperative.

The Court of Justice has found that a competition restriction does not violate competition rules when it is objectively necessary to a public policy objective. Most commentators have referred to cases such as *Wouters* (ethics of the legal profession)<sup>33</sup> *Meca-Medina* (organisation of sports)<sup>34</sup> *Albany* (improvement of conditions of work and employment),<sup>35</sup> or *Brentjens* (sectorial social solidarity).<sup>36</sup>

I prefer to refer to the case law on the single market imperative. “*The Treaty, whose preamble and content aim at abolishing the barriers between States ... could not allow undertakings to reconstruct such barriers. [Article 101] is designed to pursue this aim.*”<sup>37</sup>

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<sup>31</sup> Available at [https://ec.europa.eu/competition/consultations/2019\\_hbers/HBERs\\_consultation\\_summary.pdf](https://ec.europa.eu/competition/consultations/2019_hbers/HBERs_consultation_summary.pdf).

<sup>32</sup> Commission's communication, A Farm to Fork Strategy, May 26, 2020.

<sup>33</sup> *Wouters*, February 19, 2002, paragraph 110.

<sup>34</sup> *Meca-Medina*, July 18, 2006, paragraph 45.

<sup>35</sup> *Albany*, September 21, 1999, paragraph 52.

<sup>36</sup> *Brentjens*, September 21, 1999, paragraph 60.

<sup>37</sup> *Consten and Grundig*, July 13, 1966, page 340.

Because market integration was and is a primary aim of the EU project, it also became an EU competition policy requirement, targeting practices that would otherwise be considered unproblematic.<sup>38</sup> The EU Green Deal is and will be an EU commitment and aim that will inform competition policy as well (possibly in a reverse manner, for example by exempting cooperation that would otherwise be problematic).

The EU competition law framework already allows restrictions which are objectively necessary for reasons of health or safety, which is very much relevant for the Green Deal: “*hardcore restrictions may exceptionally be objectively necessary ... and fall outside Article 101(1) for reasons of safety or health.*”<sup>39</sup> This is also known as the ancillary-restraint doctrine: “*directly related and necessary to the implementation of a main non-restrictive transaction and proportionate to it.*”<sup>40</sup>

### **C. Past Cases on Sustainability**

Authorities have already been including non-economic factors in their assessment, though to a limited extent.<sup>41</sup> For example, the Commission has referred to the avoidance of environmental risks in the assessment of joint ventures between competitors under the former EU notification regime in place before 2004.<sup>42</sup>

In the post-2004 decentralized era of EU competition enforcement, where businesses can no longer notify their arrangements to the Commission, the decisional practice of national authorities have also dealt with sustainability:

- In 2010 certain Nordic competition authorities published a joint report encouraging the analysis of the potential costs of reduced competition versus the environmental economic benefits.<sup>43</sup>
- Other authorities have declared climate action amongst their objectives.<sup>44</sup>
- The Dutch Competition Authority (“ACM”) has committed not to taking action against sustainability arrangements if the stakeholders engage with it.<sup>45</sup>

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38 EU Treaty's Protocol No 27 on the internal market and competition (which forms an integral part of the Treaties under Article 51 TEU).

39 Commission's 101(3) Guidelines, paragraph 2; Vertical Guidelines, paragraph 60; and 102 Enforcement Priorities Guidance, paragraph 28.

40 101(3) Guidelines, paragraph 29.

41 Or Brook, Struggling with Article 101(3) TFEU: Diverging approaches of the Commission, EU Courts, and five competition authorities, 1 November 2018, Common Market Law Review.

42 Commission decisions of December 23, 1992, IV/33.814 - Ford Volkswagen (joint venture for the development and production of a multi-purpose vehicle in Portugal); December 21, 1994, IV/34.252 - Philips-Osram (joint venture for the manufacture and sale of lead glass tubing for lamps); May 18, 1994, IV/33.640 - Exxon/Shell (chemical production joint venture); January 16, 1998, IV/C-3/36.494 - EACEM (commitment by a large part of the members of the European Association of Consumer Electronics Manufacturers to reduce energy consumption by televisions and video recorders); September 17, 2001, COMP/34493 - DSD and others (German system for the collection and recovery of sales packaging), October 16, 2003, D3/35470 - ARA and D3/35473 - ARGEV, ARO (Austrian collection and recycling system for packaging).

43 Competition Policy and Green Growth, October 2010.

44 UK Competition and Markets Authority (“CMA”) annual plan, January 23, 2020: “*we can act in a way that supports the transition to a low carbon economy.*”

45 ACM's press release of December 2, 2016, Basic principles for oversight of sustainability arrangements. A Dutch legislative proposal to foster competitors' collaboration towards sustainability goals is under way, see <https://zoek.officielebekendmakingen.nl/dossier/35247>.



It is true that national enforcers have not taken sustainability-related factors into account in their assessment,<sup>46</sup> or in any case they clarified that the consumers must benefit from the arrangements under review.<sup>47</sup> Most commentators refer to a Dutch decision blocking an initiative among supermarkets, slaughterhouses and farmers to replace regularly-produced broiler chicken with more sustainable alternatives in order to raise animal welfare.<sup>48</sup>

However, sustainability is by definition “trans-boundary” (which is a term used by most EU Green Deal legislation), and it may be sensible in these early stages that larger *fora* offer guidance on the relationship between competition policy and sustainability, such as the EU, the European Competition Network, the International Competition Network or the OECD (this last organization is organizing a sustainability and competition round table in December 2020).

#### **D. Sustainability Standards**

EVP Vestager recently stated that “*businesses can ... get together to agree standards for sustainable products ... without breaking the competition rules.*”<sup>49</sup>

The current Horizontal Cooperation Guidelines recognize that “*standards on ... environmental aspects of a product may also facilitate consumer choice and can lead to increased product quality [or] innovation*” and offer examples: washing machine makers agreeing to no longer manufacture energy-inefficient products; or standardised packaging (paragraphs 329 and 331).

In some circumstances standard-setting falls outside the scope of Article 101(1) altogether.

These standards, however, may need to be binding and not just voluntary. While the Horizontal Cooperation Guidelines indicate that “*restrictions in a standardisation agreement making a standard binding and obligatory for the industry are in principle not indispensable*” (paragraph 318), we interpret the applicable legal test for an exemption to be that the standard should not cover more than is necessary to ensure its aim, leaving the participating companies competing on all other competition parameters.

For instance, the Commission cleared a commitment on reducing emissions from new passenger cars sold in the EU by the Association of Japanese Automobile Manufacturers (JAMA) and the Association of Korean Automobile Manufacturers (KAMA) because the companies remained “*free to develop and introduce new CO2-efficient technologies independently and in competition with each other.*”<sup>50</sup>

The current Horizontal Cooperation Guidelines contain some helpful guidance: “*standards only covering minor aspects or parts of the end-product are less likely to lead to competition concerns*” (paragraphs 293); “*if the use of standard terms is binding, there is a need to assess their impact on product quality, product variety and innovation*” (paragraph 306) and “*possibility cannot, however, be ruled out that making standard terms binding may, in a specific case, be indispensable to the attainment of the efficiency gains generated by them*” (paragraph 320).

We trust the upcoming revised Horizontal Guidance will clarify how companies can use standardisation (and R&D)<sup>51</sup> to reach (even binding) sustainability objectives, without any spill-over effects.

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46 Judgment of the Dusseldorf Higher Regional Court of March 15, 2017, paragraph 335, upholding the competition authority (Bundeskartellamt)'s decision finding that the Baden-Württemberg state had infringed competition law by engaging with private and public forest owners, holding that sustainability concerns such as forests management, climate, water balance or clean air could not be taken into account under Article 101(3).

47 The Bundeskartellamt has been assessing sustainability initiatives (for example, Tierwohl which is an industry association bringing together companies from the agriculture, eat-processing and food retail industries to promote animal welfare), clarifying that the consumer has to benefit too (see recent Annual Reports of the Bundeskartellamt in the section on the 2nd Decision Division).

48 ACM's analysis of January 26, 2015, “Chicken of Tomorrow,” where the 101(3) exemption was not offered because the benefit to consumers was valued at €0.64/kg less than the additional cost to consumers. See also the ACM's analysis of September 26, 2013 on the closure of five coal power plants.

49 Margrethe Vestager, “Competition and sustainability,” (October 24, 2019) available at [https://wayback.archive-it.org/12090/20191129200524/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-sustainability\\_en](https://wayback.archive-it.org/12090/20191129200524/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-sustainability_en).

50 Commission's press release of December 1, 1999, Commitments by Japanese and Korean Car Manufacturers to reduce CO2 emissions, IV/F-2/37.634 - JAMA and IV/F-2/37.611 - KAMA.

51 Horizontal Cooperation Guidelines, paragraph 149.

## ***E. Without Green-Washing***

At the same time, sustainability should not be the excuse for businesses to cartelize or otherwise engage in conduct that goes beyond a specific and measurable climate-change-related activity (that is, green-washing, which is defined as “*the practice of gaining an unfair competitive advantage by marketing a financial product as environmentally friendly, when in fact basic environmental standards have not been met*”).

The Commission heavily fined laundry detergent powder competitors which would have agreed to keep the price unchanged and excluding specific types of promotions during the implementation of an environmental initiative targeting dosage and weight reduction of laundry products and corresponding packaging material;<sup>52</sup> or truck makers which would have coordinated on timing and on passing on costs of emission technologies for trucks compliant with newly introduced environmental standards.<sup>53</sup>

In a pending case the Commission has adopted the preliminary view that automotive OEMs would have colluded to restrict competition on the development of technology to clean the emissions of cars. The Commission clarified that “*the [investigated] behaviour is to be distinguished from forms of cooperation between companies aimed at improving product quality and innovation which do not raise concerns under EU competition law.*”<sup>54</sup>

## ***F. Relying on the EU Green Taxonomy Regulation for Quantification***

There is a solution to avoid green-washing: the EU Green Taxonomy Regulation.

Sustainable investment is defined as investment in activities that contribute to one of six environmental objectives: climate change mitigation, climate change adaptation, sustainable use and protection of water and marine resources, transition to a circular economy, pollution prevention and control, protection and restoration of biodiversity and ecosystems.

For each environmental objective, the EU Taxonomy Regulation lays down technical screening criteria for determining whether economic activities contribute substantially to that objective. These criteria (Article 19):

- ❑ consider both the short- and long-term impact of a given economic activity;
- ❑ are quantitative and contain thresholds;
- ❑ build upon Union labelling, certification and standards;
- ❑ are based on conclusive scientific evidence and the precautionary principle ex Article 191 TFEU;
- ❑ take into account the potential market impact of the transition to a sustainable economy;
- ❑ cover all relevant economic activities within a specific sector to avoid distorting competition in the market; and
- ❑ are easy to use and be set in a manner that facilitates the verification of their compliance.

Businesses and their counsel will be able to appreciate whether they can proceed with their conduct, measuring against these technical screening criteria. By the same token, the Commission’s Directorate for Competition will be able to measure the sustainability scope of arrangements that it is asked to advise on or that investigates.

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<sup>52</sup> Commission decision of April 14, 2011, case 39579 - *Consumer Detergents*.

<sup>53</sup> Commission decisions of July 19, 2016 and 27 September 2017 in case AT.39824 - *Trucks*.

<sup>54</sup> Commission’s press release of April 5, 2019, case AT.40178 - *Car Emissions*.

## IV. CONCLUSION

Both the Commission and private companies have tools today to assess how sustainability-related conduct and investment can be initiated in compliance with competition rules.

Lawyers can already advise in this direction. The Fairtrade Foundation recently published a set of interviews showing that business executives may see competition law as a barrier to sustainable collaborative efforts.<sup>55</sup> Advisors can offer constructive advice for companies to reach their green goals, for example by suggesting a standard that leaves the companies competing on other parameters, or by participating for the entire works of a trade association to explore the nuances of information exchanges between competitors.

In addition, while this note does not focus on State aids, one cannot not mention how the EU Commission it is also aligning its State aid and Green Deal policies.<sup>56</sup>

Finally, the Commission is open to discuss: “*if companies come to us and they say ‘this we want to do’, we’d be happy to look at it, and ... tell you about the results.*”<sup>57</sup> The Commission has several tools in its toolbox: inapplicability decisions (under Article 10 of the EU Procedural Regulation 1/2003); guidance letters (under the 2004 EU Notice on the matter) or comfort letters (under the 2020 Temporary Framework). Coronavirus-dedicated mailboxes of competition authorities could be maintained in future months also for sustainability initiatives.

While authorities need to have proof that business initiatives are not covering illegal actions (green-washing), the Green Deal legislation is offering the needed benchmarking and measurement, and EU competition policy is moving to the right direction. Sound advice can already be offered now.

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55 “Competition Law and Sustainability: A study of industry attitudes towards multi-stakeholder collaboration in the UK grocery sector,” January 29, 2019

56 Not only is the Commission amending its State aid framework in light of EU Green Deal, reviewing in the next months its Environmental and Energy guidelines, its Emission Trading System guidelines and its Communication on Important Projects of Common European Interest. The Commission is also embedding green objectives in its State aid compatibility assessment (see the Second Amendment to the Temporary Framework on recapitalization, May 8, 2020: “*large undertakings shall report on how the aid received supports their activities in line with EU objectives and national obligations linked to the green and digital transformation*”; see also the green commitments required by France for its the State aids to Renault and Air France) as well as EU recovery plan (see the EU Communication of May 27, 2020 linking EU funds to a large scale renovation wave and renewable energies).

57 Gianni De Stefano, Covid-19 and EU Competition Law: Bring the Informal Guidance On, May 5, 2020, *Journal of European Competition Law & Practice*.



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