

COMPETITION POLICY AND ENVIRONMENTAL SUSTAINABILITY¹

Advanced draft

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1. SUMMARY

This paper highlights the need for greater room for cooperation between businesses in the fight against climate change and the promotion of other vital environmental sustainability objectives - particularly in the light of the EU (and other) green deals. It shows how competition law (and, even more, the fear of unnecessarily restrictive or unpredictable competition law enforcement) is standing in the way of this. It identifies the key benefit for business, governments and society as a whole. It shows how the tide is turning on this and sets out proposals for further action by competition authorities, governments, international bodies, business, advisers and other stakeholders.

This paper focuses on climate change and the environment for two principal reasons. First, the world faces a climate emergency and this has to be the number one priority. Second, while other concerns (e.g. worker's rights) are very important, bringing wider concerns into the "sustainability" net is more controversial and risks diluting or delaying urgent action to help competition law accommodate the fight against climate change².

While primarily focused on competition law and sustainability agreements, Annex 1 focuses on the need for sustainable development to be at the heart of state aid law and the need for further "green reform"³.

2. THE PROBLEM

2.1 There is an increasing recognition amongst the business community that climate change presents an existential crisis (and a growing commitment to the

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² The authors may return to address these wider issues at a later date.

³ It is acknowledged that this paper refers more explicitly to EU law and European countries (to a great extent reflecting recent experience). However, the key messages are generally applicable to countries around the world.

United Nations Sustainable Development Goals (UN SDGs)).⁴ Many businesses and entrepreneurs want to be part of the solution to this crisis. The Business Roundtable in August 2019 issued a “Statement on the Purpose of a Corporation” committing (amongst other laudable aims) to “*protect the environment by embracing sustainable practices across our businesses*”. The recent focus on climate change, sustainable production, and a circular economy in fact presents an opportunity for innovative businesses. Consumers often perceive sustainability as a quality improvement, and firms can compete on the basis of being cleaner and greener, or more socially responsible, than their rivals. In such markets, competition can help foster a cleaner, circular, and fairer economy, especially if consumers are prepared to pay extra for sustainable products and services, and suppliers can for example lower their ecological footprint and minimise greenhouse gas emissions to encourage consumers to switch, with advertising and appropriate labelling. Competitors may not need to cooperate to achieve sustainability objectives where actual and potential customers’ willingness to pay for a green or more sustainable product is enough to finance investments to reduce or avoid the environmental (and social) costs to society. In such markets, and for such products, firms have both the ability and the incentive to act independently and in competition with each other to reduce, for example, greenhouse gas emissions, pollution, and exhaustion of non-renewable resources. They will compete on the basis of innovation, quality, and sustainability reputation.

2.2 Unfortunately, although most consumers favour more sustainable products, they do not always behave accordingly in the market.⁵ They are in many cases not prepared to pay at all, or not prepared to pay enough, for clean or sustainable production. In such cases, market failures occur:⁶

- On the **demand side**, market failures include an unwillingness to pay for environmental or social costs unless all other consumers pay an equivalent amount, as well as hyperbolic discounting (such as underestimating the importance of future environmental damage), behavioural biases (such as the status quo bias, which discourages consumers from trying new products or changing their behaviour), and the lack of accessible and reliable information about future costs of unsustainable products; and
- On the **supply side** also, “collective action problems” (or “coordination problems”) appear. When producing, investing or innovating, firms tend

⁴ See, for instance, “The 100 Most Sustainably Managed Companies in the World,” TWSJ, October 13, 2020. An increasing number of companies are signing on to sustainability codes like the German Sustainability Code. <https://www.deutscher-nachhaltigkeitskodex.de/en-gb/Home/Database>

⁵ See, for instance, Hellenic Competition Authority Staff Discussion Paper on Sustainability Issues and Competition Law, para. 25, available here <https://www.epant.gr/en/enimerosi/competition-law-sustainability.html>

⁶ See, for instance, the overview of market failures and government failures in the IMF Working Paper WP/19/185, Krogstrup and Oman, “Macroeconomic and Financial Policies for Climate Change Mitigation: A Review of the Literature,” September 2019.

to make independent choices designed to maximise their profits individually in the short run, based on perceived conflicting interests between them, where cooperation would have been better for everyone. This leaves everyone worse off. For example, an investment in expensive clean technology or a decision to source raw materials more responsibly may raise a producer's costs, exposing it to the risk of being undercut by rivals relying on cheap and dirty technology or raw materials, leading everyone to stay away from investing in the better alternative. That fear of first-mover disadvantage may deprive the firm from the economy of scale or scope necessary to lower average fixed costs of the sustainable alternative to a manageable level.

- 2.3 Eminent economist Sir Nicholas Stern explained in 2007 that “Climate change is a result of the greatest market failure the world has seen”.⁷ His concern is that the price of a product does not reflect its true costs – in the sense that the market price does not include the climate and environment cost imposed on society resulting from greenhouse gas emissions and pollution. Such costs, or “negative externalities”, are not reflected in the price, and are borne by society as a whole⁸. They result in social welfare loss, because output is higher than the social optimum. Consumers and others may pay these costs later, for instance, when climate change affects them in the form of droughts and wildfires, storms and floods, diseases and health concerns caused by pollution, reduced food production, exhausted resources, or even societal unrest. A “tragedy of the commons” occurs, where overuse degrades our environment.

3. THE SOLUTIONS⁹

- 3.1 The solution to sustainability “collective action” problems is appropriate coordination.¹⁰ Coordination may be most efficient if in the form of environmental (or social) regulations, carbon emissions taxes, emission rights trading systems, rules for responsible sourcing and support for innovation including permanent extraction of carbon from the atmosphere. The problem is that regulation and taxation are often politically controversial, uncoordinated

⁷ Nicholas Stern: Climate Change, Ethics and the Economics of the Global Deal, November 29, 2007, <https://economistsview.typepad.com/economistsview/2007/11/nicholas-stern.html>.

⁸ See also on this “A Roadmap for true pricing”, June, 2019, from the 2019 True Price Foundation. Although outside the scope of this paper, the same is true for social costs

⁹ For a more detailed discussion of the problems in this area and the need for lawyers, economists and enforcers to update their approach to competition law to take account of climate change and other sustainability concerns see, for example: Simon Holmes, “Climate change, Sustainability and Competition Law”, *Journal of Antitrust Enforcement*, Vol 8, Issue 2, July 2020; or Maurits Dolmans, “Sustainable Competition Policy”-Competition Law and Policy Debate CLPD, Vol 5, Issue 4 and Vol 6, Issue 1 March 2020.

¹⁰ “Collective action, by governments, firms, investors, households and central banks, including the European Central Bank, is required to accelerate the transition towards a carbon-neutral economy and correct prevailing market failures”. Speech by Isabel Schnabel, Member of the Executive Board of the ECB, at the European Sustainable Finance Summit, Frankfurt am Main, 28 September 2020.

amongst governments, delayed, inadequate, or ineffective. For instance, environmental taxes are less than the net present social costs of pollution, and emission rights trading systems for the time being exist only in a limited number of jurisdictions, cover only a small portion of the economy, and are traded at a price well below the social cost of carbon.

- 3.2 In this light, if we want to have a chance to limit the temperature increase to 1.5 degrees Celsius above the pre-industrial level (as per the objective at the United Nations Framework Convention on Climate Change in 2015 *i.e.* the Paris Agreement) or to achieve the UN SDGs, the private sector must do its part, and cooperate where appropriate. Many firms will be reluctant to cooperate for fear of running foul of competition law or for fear of restrictive or unpredictable enforcement of competition law.
- 3.3 An example is a proposed commitment of palm oil traders not to buy product from firms engaged in deforestation. The Indonesian antitrust authority is threatening action. This discourages cooperation even where it is reasonably necessary to reduce pollution or carbon emission, or combat practices that destroy the environment.
- 3.4 Another recent example is the effort by car manufacturers to agree on higher vehicle emissions standards (in line with California standards). This is just the sort of cooperation agreement we want to see more of and, although the case was dropped, this was investigated by the US Department of Justice (DOJ) with inevitable chilling effects on similar initiatives.¹¹

Guidance

- 3.5 To enable cooperation where necessary to overcome coordination problems and achieve sustainability goals, ICC recommends that the EU and national antitrust authorities around the world (i) adopt consistent guidance concerning cooperation permitted under competition law, for instance, in the European Commission's Guidelines on Horizontal Agreements and (ii) broaden the scope for cooperation. These guidelines could cover the following issues.
- 3.6 Many forms of cooperation will not restrict competition appreciably. Examples are agreements to comply with environmental (or social) legislation outside the EU and to monitor compliance jointly, so long as information exchange remains limited; environmental labelling in accordance with objective and relevant criteria that are appropriately monitored; and open and non-binding standardisation agreements, subject to the conditions set out in the EU Guidelines on Horizontal Agreements.¹²

¹¹ See The Antitrust Car Emissions Investigation in the US, Julian Nowag, July 28, 2020, Competition Policy International.

¹² See also examples from the Unilever paper cited in footnote 29.

3.7 In *Albany*,¹³ the Court of Justice of the European Union (“CJEU”) considered whether agreements reached in the context of collective labour negotiations could be subject to competition law. The CJEU examined “*the objectives to be pursued by the Community and the Member States*” set out in Article 2 EC (now Article 3 TEU), as well as other provisions on social policy, and concluded that it “*follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.*”¹⁴ It then enquired whether exclusion of the specific agreements from the scope of competition law was “justified” in view of their “nature and purpose.”

3.8 The EU treaties¹⁵ set out clearly a number of objectives relating to the environment and climate change, as follows:

- Article 3(3) TEU requires that the Union shall work for “the sustainable development of Europe based on [...] a high level of protection and improvement of the quality of the environment. [...]” Art. 3(5) TEU articulates the global scope of this ambition, stating that the EU shall “contribute to [...] the sustainable development of the Earth”;
- Article 7 TFEU confirms that these objectives must be taken into account in competition law: “The Union shall ensure consistency between its policies and activities, taking all of its objectives into account...” Art. 11 TFEU reiterates that, stating “environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development” (emphasis added);
- Article 191(2) TFEU mandates that EU policy on environmental sustainability should be based on the “precautionary principle”, *i.e.* in case of doubt, environmental protections should take precedence over economic interests;¹⁶
- Article 37 of the EU Charter of Fundamental Rights stipulates that “(a) high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the

¹³ Case C-67/96, Judgment of the Court of 21 September 1999, *Albany*, ECLI:EU:C:1999:430.

¹⁴ *Albany*, para. 60.

¹⁵ The constitutions and laws of other jurisdictions contain a similar objectives and high level goals.

¹⁶ Joined Cases T-74/00, 96, Judgment of the Court of 26/11/2002 *Artegodan*, ECLI:EU:T:2002:283, para. 184.

Union and ensured in accordance with the principle of sustainable development”.¹⁷

- 3.9 Accordingly, cooperation by firms should be permissible if justified, that is, if the cooperation is reasonably necessary and proportionate to achieve the broader environmental goals required by EU law (especially once the European Climate Act has entered into force) and cannot be achieved as effectively or quickly by other means.¹⁸
- 3.10 The CJEU in *Wouters*¹⁹ permitted an agreement that had restrictions “inherent” in the pursuit of “objectives” of ensuring that “*ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience*”.²⁰ The CJEU found that “*despite the effects restrictive of competition that are inherent in it, [the ban on combination of lawyers and accountants] is necessary for the proper practice of the legal profession, as organised in the Member State concerned*”.²¹
- 3.11 Similarly, it may be argued that cooperation that is necessary and proportionate to pursue public interest objectives related to fighting climate change and environmental goals falls outside Article 101 TFEU, if the legitimate operation would not be reasonably possible (as opposed to simply more difficult) to carry out without the restriction in question.²²
- 3.12 Article 101(3) TFEU, and equivalent provisions under national competition law, permit agreements that restrict competition if they meet each of **four conditions**. They must (i) “*contribute to improving the production or distribution of goods or to promoting technical or economic progress*” (emphasis added), (ii) “[*allow consumers a fair share of the resulting benefit,*” (iii) “*not [...] impose*

¹⁷ Note also that as the Dutch Supreme Court held in the *Urgenda case*, Articles 2 and 8 ECHR mandate a “positive obligation” for governments “to take appropriate steps to safeguard the lives of those within its jurisdiction” in view of a “real and immediate risk” from climate change via “reasonable and appropriate measures.” See also Article 2(1) of the EU Charter of Fundamental Rights, which protects “the fundamental right to life”.

¹⁸ Former Commissioner Mario Monti argues that for the Albany case to apply there must be a procedural aspect to the agreement, similar to that in collective labour agreements, in the sense that the agreement must be the result of “discussion among a range of stakeholders that are affected by the policy (e.g. producers of the polluting product, its employees, consumers and non-governmental organisations representing relevant environmental interests)”. Giorgio Monti, “Four Options for a Greener Competition Law”, *Journal of European Competition Law & Practice*, Vol 11, Issue 3-4, March-April 2020. The CJEU does not require that, however, but instead relies on “the objectives to be pursued by the Community and the Member States” and an “interpretation of the provisions of the Treaty as a whole”.

¹⁹ Case C-309/99, *Wouters*, Judgment of the Court of 19 February 2002, ECLI:EU:C:2002:98. See also C-519/04 P, *Meca-Medina*, Judgment of the Court of 18 July 2006, ECLI:EU:C:2006:492 (restrictions “justified by a legitimate objective” because “inherent in the organisation and proper conduct of competitive sport” and proportionate to them).

²⁰ *Wouters*, para 97.

²¹ *Wouters*, para 107, 110.

²² On ancillary restraints, see Case C-382/12 P *MasterCard v Commission* ECLI:EU:C:2014:2201, para. 91. The CJEU also expressed it as a case where “it is not possible to dissociate [the] restriction from the main operation or activity without jeopardising its existence and aims” (para. 90).

[...] restrictions which are not indispensable to the attainment of these objectives,” and (iv) “not [...] afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”

3.13 Guidance (including the new Guidelines on Horizontal Agreements) should clarify that:

- sustainable production, environmental protection and combating climate change are included in the goals of *“improving the production or distribution of goods or to promoting technical or economic progress”*. These goals are not limited to economic efficiency, but include sustainability-related improvements to production or distribution, for instance, a better allocation of resources resulting from internalisation of environmental and climate costs, and introduction of circular economy practices. They also include sustainability-related technical progress; and
- to determine whether consumers get *“a fair share”*, benefits to society as a whole should be counted. The current version of the EU Guidelines on Article 101(3) (which date back to 2004 - and were drafted before then) suggest that this requires that the same consumers who bear the costs must be fully compensated by benefits, and that this must be achieved in the same market as the one affected by the agreement.
- But a *“fair share”* need not, and should not, be interpreted in such a narrow fashion. It should take into account benefits in other markets²³, as well as benefits that accrue to future consumers, and even benefits that accrue to others. The reason is that it is not *“fair”* for consumers to obtain all the benefits of consumption while imposing the costs on the community. In effect, they are obtaining those products at prices below their true cost.²⁴
- This conclusion is mandated by the overarching treaty goals outlined above, and in particular with regard to the environment -- with Article 191(2) TFEU stating that EU policy *“shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.”*
- This is also in accordance with the principle established in the EU Commission’s forward-thinking decision in CECED that: *“The Community pursues the objective of a rational utilisation of natural*

²³ At least insofar as those benefits relate to environmental benefits (as advocated in the draft guidelines on sustainability produced by the Dutch competition authority (see footnote 45))

²⁴ See also the *“Roadmap for true pricing”* cited at footnote 8.

resources, taking into account the potential benefits and costs of action. Agreements [...] must yield economic benefits outweighing their costs and be compatible with competition rules. [...] the benefits to society brought about by the CECED agreement appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines. Such environmental results for society would adequately allow consumers a fair share of the benefits even if no [economic] benefits accrued to individual purchasers of machines."²⁵ (emphasis added).

The tide is turning

- 3.14 The need for collective action – in both business and within society at large – is now acknowledged. Cooperation amongst companies may significantly advance sustainability. For example, the OECD Guidelines for Multinational Enterprises already acknowledge the need for cooperation to achieve a number of high level goals²⁶. Moreover, the members of the European CEO Alliance have recently indicated that “*collaboration amongst members of the alliance and energy stakeholders [is] key to reaching net-zero targets*”.²⁷ Most companies dedicate significant resources to sustainability and many have a dedicated sustainability or environment, social and governance (ESG) report. This is partly due to regulatory obligations, but also as a result of their own belief in the need for it, and because of shareholder pressure.
- 3.15 However, some competition authorities have (over recent years) treated the mere sharing of competitively sensitive information as a violation of antitrust law in a broad range of circumstances and investigated “signalling” of future market intentions. In these cases, they have attacked unilateral public announcements by one company with the intent, sometimes presumed, to impact competitors or to align behaviour, particularly where the signalling appears to relate to price.
- 3.16 While it is perfectly lawful in principle for industry groups to advocate with governments and international organisations to, for example, implement effective climate mechanisms to put a cost on CO₂ emissions and achieve sustainability goals in reaching carbon neutrality, it is also evident that for any company to be part of an industry alliance which describes itself as dedicated to advocating “stable higher carbon pricing” sets off all sorts of antitrust alarm bells.

²⁵ European Commission Decision, Case IV.F.1/36.718. CECED, 24 January 1999, para. 56, at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:per%20cent3A32000D0475>.

²⁶ OECD Guidelines for Multinational Enterprises, 2011, for instance part IV, “Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.”

²⁷ European CEO Alliance, 2 October 2020, available at <https://www.volkswagenag.com/en/news/2020/10/European-CEO-Alliance-emphasizes-cross-industry-collaboration-to-fight-climate-change.html>. See also “The Urgency of Collaboration, with Paul Polman”, podcast, University of Pittsburgh Center for Sustainable Business, 1 May 2020.

- 3.17 Perhaps as a result of this, a recent survey of multinational firms shows that companies do not cooperate on sustainability and carbon neutrality as much as they declare they would like to do.²⁸ Publicly known examples of direct cooperation between competing firms on sustainability initiatives are rare.²⁹ In most sectors the individual initiatives are similar,³⁰ so, in many instances (not all), it may be more efficient, quicker, and less costly (and better for consumers and society overall) if there was less duplication of effort and costs, and some sharing of at least information- and sometimes costs.
- 3.18 Most firms accept the real benefits (to both themselves and to wider society) from sustainability. They understand the need to collaborate, given that unilateral efforts often either fail or do not make the headway needed to achieve sustainability goals. However, they are fearful of doing so because of competition law constraints, perceived or otherwise. In the light of this, instead of cooperating, many companies merely refer to their “leadership” on sustainability or to superiority over competitors³¹ based on “performance indexes” showing improvement over time. This is a missed opportunity and the losers are us-society in general.
- 3.19 While reticence in embarking on cooperation between firms to advance sustainability may be understandable, even competition authorities are now starting to see the need for cooperation in this area. For example, the European Commission has recognized that *“the approach of industrial alliances could be the appropriate tool. This has already shown its benefit in the area of batteries, plastics and microelectronics”*.³²

²⁸ Gianni De Stefano, “EU Competition Law & the Green Deal: The Consistency Road”, Competition Policy International, 28 July 2020, refers to a survey of a pool of the largest multinational firms within the Fortune 500 list. Another survey concluded that antitrust fears also deterred collaborations to secure living wages and incomes across supply chains.[Fairtrade Foundation ‘Competition policy and sustainability: a study of industry attitudes towards multi-stakeholder collaboration in the uk grocery sector’ (April 2019), p. 14, available here <https://www.fairtrade.org.uk/wp-content/uploads/legacy/competition-law-and-sustainability---Fairtrade-Report.pdf>]

²⁹ One public example is the OGCI – the Oil and Gas Climate Change Initiative – a CEO-led consortium that aims to accelerate the industry response to climate change and support the Paris climate change agreement and its goals - see <https://oilandgasclimateinitiative.com>. See also the Fair Wear Foundation initiative to implement a living wage standard – see <https://api.fairwear.org/wp-content/uploads/2016/06/OpiniontoFWF-TheApplicationofEUCompetitionLawtoFWFLivingWageStandardfinal1.pdf>. See also the examples mentioned in the Unilever submission to DG COMP, Sustainability Cooperations between competitors and Art.101TFEU, available: https://www.unilever.com/Images/unilever_submission_sustainability_competition_law_tcm244-551751_en.pdf.

³⁰ For instance, the automotive sector recognises electrification as a goal, the technology sector prioritizes waste reduction and recycling; and in retail the goal to reduce packaging is ubiquitous.

³¹ For example, a textile company states “we’ve differentiated ourselves from competitors in our original raw materials business”, for a telecommunications company “the pressure to prioritize sustainability comes from many sources ... competition”, and for a food company “staying ahead of competitors means ... sustainability and fair trade certification”.

³² European Commission’s communication, A New Industrial Strategy for Europe, 10 March 2020.

- 3.20 Fear of competition law certainly seems to be a factor which deters or chills collaboration in this area. For example, the Fairtrade Foundation published a set of interviews showing that business executives see competition law (and potential enforcement) as a barrier to sustainable collaborative efforts.³³ As another example, several firms find it helpful to state that any sustainable activities involving cooperation occur only in a “pre-competitive” phase.³⁴
- 3.21 Finally, collaboration often takes place within the framework of new or existing industry-wide organisations or within their direct supply chains.³⁵

The need for more robust advice

- 3.22 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*”.³⁶ However, for businesses and their (in-house and external) lawyers advising them to be less “conservative,” and give more robust advice, guidance is needed.
- 3.23 This is an area where competition authorities can and should build bridges to encourage sustainability agreements by giving clear and concrete guidance on the acceptable parameters of collaboration in the sustainability field.³⁷ Admittedly some tools are already available for advisers to rely on. For example, the European Commission has already authorised agreements to pursue sustainable goals.³⁸ The European Commission has also declared its willingness to issue and publish comfort letters in the future.³⁹
- 3.24 The revised Horizontal Cooperation Guidelines will hopefully reintroduce a chapter that will take into consideration that the victims of the anti-competitive

³³ “Competition Law and Sustainability: A study of industry attitudes towards multi-stakeholder collaboration in the UK grocery sector”, 29 January 2019.

³⁴ 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”.

³⁵ For example, one leading online retailer is a member of 23 separate sustainability-oriented organizations, while a leading energy company partners with 17 different environmental sustainability organizations.

³⁶ 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?v=7mpWAOhkQbY>).

³⁷ For example, some agencies have referred to companies hiding behind “green fairy tales” (6 October 2020, International Competition Network’s Cartel Working Group: Horizontal Agreements on Sustainability in a World on Fire) – this language will do nothing to assuage genuine concerns of companies that even perfectly legitimate cooperation on sustainability will be subject to attack from antitrust agencies.

³⁸ These examples are from the late 1990s and early 2000s because since 2004 there has been no notification system for agreements in the EU. The best, and most forward looking, of these is the CECED case referred to above and cited in footnote 20.

³⁹ That would be under the Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, 8 April 2020. Coronavirus-dedicated mailboxes of competition authorities could be maintained in the future for sustainability initiatives.

effects and the beneficiaries of the positive effects of sustainability may be the same or, at least, overlapping constituencies. Even beyond environment - related sustainability, the European Commission's Directorate for Competition is leading the Farm to Fork Strategy supporting collective initiatives to promote sustainability in supply chains.

- 3.25 Advisors can offer constructive advice for companies to reach their sustainability goals, for example by giving safe harbours, by suggesting a standard that leaves the companies competing on other parameters, or by participating in the work of trade associations to explore what can be lawfully exchanged between competitors in pursuit of legitimate climate change and other sustainability goals.

Businesses need a global level playing field

- 3.26 The EU has stepped up its 2030 climate ambition: reduction of greenhouse gas emissions of at least 55 per cent compared to 1990. There are proposals for key energy and climate legislation, including to adapt the EU Emissions Trading System and to tighten energy efficiency rules and CO₂ standards. This needs to be accompanied and augmented by very clear guidance on the Commission's approach to collaboration in the area of sustainability and climate change.
- 3.27 Businesses, especially in Europe, are worried by the absence of comparable increases in ambition by other governments or firms. It is important to maintain an international level playing field around new sustainable technologies and to encourage significant investment in sustainability challenges such as carbon capture and storage, and new technologies to detect and manage methane and other carbon emissions.
- 3.28 It is recognised that the EU may propose a carbon border adjustment mechanism for selected sectors to reduce the risk of carbon leakage (compliant with World Trade Organization rules). The European Commission is also encouraged to engage with other international authorities and to keep green objectives in mind in all policy initiatives, for example in the State aid arena⁴⁰ as well as for foreign subsidies.⁴¹
- 3.29 Considering the close link between human actions and the environment, environmental goals cannot be achieved without parallel actions to provide actors at all levels with the financial means to use more environmentally friendly means of production.

⁴⁰ Businesses would welcome that certain isolated initiatives (see the Second Amendment to the Temporary Framework on recapitalization, 8 May 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) become more generalized for legal certainty as well as the public good.

⁴¹ The European Commission's White Paper on levelling the playing field as regards foreign subsidies, 17 June 2020, contains scarce references to the EU Green Deal.

4. THE BENEFITS OF BUSINESS COOPERATION

- 4.1 Given the scale and the urgency of the fight against climate change we need to harness all available resources. Where appropriate, businesses collaborating in this fight has a number of advantages:
- 4.2 Regulation cannot do everything. Nor can public investment (much as we favour increased public investment for a “green recovery”). We must harness the resources of the private sector as well.
- 4.3 For business, collaboration in this area has vast potential for new and profitable business (see, for example, some of the examples set out in Unilever’s paper referred to in footnote 30).
- 4.4 All of us, as citizens and consumers, will benefit from more sustainable products and healthier lifestyles – whether it is products made using fewer, or more sustainable, materials; having warmer and better insulated houses; or having clean air to breathe.

5. SUMMARY OF PROPOSALS

- 5.1 In summary, ICC recommends the following proposals for action from each of the major stakeholders able to influence the debate and move towards a position of improved legal certainty for businesses engaged in sustainability arrangements:

Competition authorities

- 5.2 ICC believes that competition authorities should as a matter of priority:
 - adopt clear, practical and consistent guidance on:
 - the types of cooperation arrangement which do not typically give rise to concerns under competition laws⁴²;
 - the criteria businesses should use to assess whether sustainability arrangements which could give rise to

⁴² For example, agreements which do not impact key parameters of competition; agreements solely aimed at promoting quality, diversity or innovation; joint initiatives necessary to create new products or markets; non-binding targets/codes of conduct (with transparent and non-discriminatory access criteria); or agreements solely aimed at ensuring all parties comply with all legal requirements in all relevant countries.

competition law concerns would benefit from exemption under EU/national laws or equivalents⁴³; and

- the factors which are likely to result in arrangements infringing competition laws, without the possibility of exemption;
- set out their **enforcement priorities** with respect to arrangements designed to meet sustainability objectives where any restrictions are limited to those which are necessary to achieve those objectives⁴⁴; and
- adapt their procedures to be ready to provide **timely advice** (for example, in the form of 'comfort letters') or individual **decisions** in relation to arrangements where businesses require a greater degree of legal certainty in order to proceed.

5.3 We welcome the steps taken by a number of authorities in recent months in this area, notably:

- progressive draft guidelines and discussion papers published by the Netherlands Authority for Consumers and Markets (ACM)⁴⁵ and the Hellenic Competition Commission⁴⁶;
- statements by the European Commission's Executive Vice-President, Margrethe Vestager, and other senior officials, recognising the role that EU competition policy should play in supporting sustainability initiatives; and the Commission's call for contributions on the role of competition policy in supporting the European Green Deal (13 October, 2020) ; and
- contributions by other authorities, including the UK's Competition and Markets Authority (CMA) and the French Autorité de la concurrence, towards developing a better understanding of the interaction between competition law and sustainability and elevating these issues to be strategic priorities in each of the agency's annual plans.

5.4 ICC also welcomes the steps taken by many authorities in response to the COVID-19 pandemic, which illustrated how authorities can respond effectively

⁴³ For example, how businesses should substantiate the environmental benefits arising from a collaboration and the degree to which consumers and/or wider society are deriving benefits which outweigh any anti-competitive effects (such as high prices or reduced choice).

⁴⁴ We welcome, for example, the statement from the ACM that they will not impose fines in relation to sustainability agreements which have been discussed with the authority in advance or published and where the authority's guidelines have been followed in good faith.

⁴⁵ <https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements>

⁴⁶ https://www.epant.gr/files/2020/Staff_Discussion_paper.pdf

to crises by publishing guidance and adapting their procedures in order to facilitate collaborations deemed necessary and appropriate to achieve public policy goals. ICC believes that the authorities should build on these welcome developments in their responses to the climate change crisis.

Governments

- 5.5 ICC believes that governments have an important role to play in providing competition authorities with the appropriate degree of direction or guidance needed by authorities when exercising their discretion in relation to enforcement of national competition laws to achieve sustainability objectives.

International bodies

- 5.6 Because many sustainability initiatives operate internationally and therefore often need to comply with multiple legal requirements, international convergence and consensus on these issues is essential. ICC believes that international bodies such as the International Competition Network (ICN), European Competition Network (ECN) and OECD have a crucial role to play in facilitating convergence and the development of international best practices which businesses and their advisers can follow.
- 5.7 ICC welcomes initiatives taken by those bodies so far, as well as on-going discussions and future events. ICC encourages governments, competition authorities, businesses and advisers to contribute to those discussions, with a view to reaching a consensus and adopting clear guidelines in the near future.

Business

- 5.8 In order to assist authorities in developing clear guidance, ICC encourages companies to share practical examples of the types of sustainability initiatives which may be hindered because of a lack of legal clarity or a perceived risk of competition law enforcement, and the challenges companies are facing in practice.
- 5.9 ICC recognises the potential difficulties companies may face when disclosing details of such collaborations to regulatory authorities, but ICC would encourage companies, advisers and authorities to explore ways in which practical examples may be shared without giving rise to confidentiality concerns or other risks arising from such disclosure.

Advisers

- 5.10 ICC believes that clear guidance and more flexible procedures would also assist advisers (whether in-house or external, and whether lawyers or economists) in giving more robust and more pragmatic advice in this area. In addition, improved transparency of advice provided in relation to individual arrangements would

also help the business and legal communities. ICC would therefore encourage such advice or opinions to be published, where confidentiality concerns permit.

- 5.11 Most global law firms organise seminars and publish alerts on sustainability. One idea could be to also dedicate time to advise pro bono SME or industry segments which would benefit from legal comfort that they can cooperate to reach sustainability goals⁴⁷.

Other stakeholders

- 5.12 Other stakeholders, including consumer groups, NGOs and environmental experts, also have an important role to play in providing practical examples of current areas of uncertainty and the need for clearer guidance and consistency across jurisdictions. ICC encourages such groups to continue their helpful engagement and to work together with other stakeholders to achieve the desired outcomes.

⁴⁷ See also the efforts being made by the Consumer Goods Forum (CGF) to promote sustainability on a voluntary basis.

ANNEX 1

GREENING STATE AID

With many years of case practice in the review and approval of environmental aid, the claim that sustainable development should be at the heart of State aid law and policy may seem less controversial than is apparent from the current debate in antitrust. Yet, with the EU Green Deal and the clear need for further support for green investment targets by the private sector, the urge for a “green reform” in State aid could also not be more compelling:

- This has been clearly recognised by Executive Vice President Vestager in her speech of 22 September 2020 (The Green Deal and Competition Policy).
- The hydrogen strategy for a climate-neutral Europe, published by the European Commission on 8 July 2020 recognises the need to adapt the current State aid rules to these new challenges.
- While the Guidelines on State aid for Environmental Protection and Energy (2014-2020) have been prolonged by one year, and the General Block Exemption Regulation with its important Chapter 7 on environmental aid until the end of 2023, it is clear that both legal frameworks from 2014 need an update in substantive terms to cater for the new regulatory and political environment under the EU Green Deal.
- The CJEU in its recent ruling in the Hinkley Point State aid matter (Case C-594/18 P, Austria/Commission) has recognised that the “requirement to preserve and improve the environment, expressed inter alia in Article 37 of the Charter and in Articles 11 and 194(1) TFEU, and the rules of EU law on the environment” must be considered “when the Commission checks whether State aid [...] meets the first condition laid down in Article 107(3)(c) TFEU.” This is a significant improvement and strengthens the role of environmental law in the State aid review as against previous case law such as the Castelnou matter.⁴⁸

This is why unprecedented transformation processes await economies in Europe and beyond as politics, society, and business commit to tackle climate change and other environmental challenges. These range from supplying renewable energy, to establishing clean and circular production (in particular for CO₂-heavy industries), to accelerating the shift to sustainable mobility (e.g. hydrogen-fuelled airplanes, e-trains/cars etc.). To achieve the ultimate goal of building a zero carbon and pollution-free environment, major investment and industry cooperation is required. Whether

⁴⁸ See Case T-57/11, para 189, where the General Court held that “when assessing an aid measure which does not pursue an environmental objective, the Commission is not required to take account of environmental rules in its assessment of the aid and of aspects which are inextricably linked to it”.

companies that combine forces on green initiatives are sustainably collaborating or colluding in an anti-competitive way is discussed above. In terms of funding, public and private stakeholders will have to cooperate to raise the necessary capital, which the European Commission estimates at an additional EUR 260 billion per year to achieve the 2030 climate and energy targets.⁴⁹ Some of the public funding will come from the EU budget (e.g. the EUR 750 billion COVID-19 recovery plan and other EU funds), but EU Member States will also need to make significant contributions, which puts the focus on EU State aid rules.

The issue of crowding-in private investment is of particular concern to industry players

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

Stakeholders often fail to foresee such risks. To avoid potential repayment risks (possibly years later), the Commission should consider introducing “safe harbour” rules for impact investors and related intermediaries. Such safe harbour rules could be designed in different ways. Firstly, certain forms of (co-)investments could be clearly defined that do not qualify as aid (e.g. equity investments of up to 30% of the share capital by the public co-investor). Secondly, monetary thresholds for a public co-investment could be introduced where public investments below this threshold in certain sectors are generally considered as State aid free. Thirdly, the Commission might consider – on a temporary basis – that private and public co-investments in certain areas (defined either broadly, such as “hydrogen industry”, or narrowly to specific products) are generally exempted. Such rules would be likely to encourage more investment in areas of strategic importance.

A prudent revision of the Commission’s energy and environmental aid rules

The current set of environmental State aid rules laid down in the Environmental and Energy Guidelines (currently under revision) demonstrate some impressive success stories, particularly in promoting renewable energy. However, they have also often been perceived as overly complex, leading to protracted processes and, most importantly, insufficient investment volumes. The main principle of these rules is limiting Member States to compensate companies only for the additional costs of the “green element in the investment”. This is intended to prevent any excessive, unnecessary

⁴⁹ European Green Deal, 11 December, 2019 [COM (2019) 640 final].

funding. Where a “non-green” investment would otherwise have taken place, this makes sense. However, in many important instances, there is no “non-green” investment that would otherwise be made (and therefore no practical comparator) so the limitation to “additional” costs has no useful meaning. These rules need to be made more flexible to deal with such situations.

A shift to greener state aid

A much larger share of the Member States’ subsidies must (and is likely to) go into environmentally friendly industries. This obvious shift in policy objectives is evidenced by the Commission recently approving an “important project of common European interest” (IPCEI). Seven Member States provided EUR 3.2 billion public support in a pan-European research and innovation project in all segments of the battery value chain. In July 2020, the Commission also brought this policy instrument into play for the hydrogen value chain as part of its “Hydrogen strategy for a climate-neutral Europe”. It will not be the last.

Finally, while we need more support for initiatives to support the green deal, fight climate change, and promote sustainability, we must also ensure consistency in state aid policy and reconsider aid to industries and projects that damage the environment and contribute to climate change. For example, any support for coal must facilitate a rapid phase out and promote a “just transition”. Similarly, any support for the airline industry in the context of the COVID-19 pandemic should have “green obligations” (as France imposed on Air France).

About The International Chamber of Commerce (ICC)

The International Chamber of Commerce (ICC) is the world's largest business organization representing more than 45 million companies in over 100 countries. ICC's core mission is to make business work for everyone, every day, everywhere. Through a unique mix of advocacy, solutions and standard setting, we promote international trade, responsible business conduct and a global approach to regulation, in addition to providing market-leading dispute resolution services. Our members include many of the world's leading companies, SMEs, business associations and local chambers of commerce.

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