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Public consultation of the European Commission on "Competition Policy supporting the Green Deal"
Statement of Studienvereinigung Kartellrecht e.V.

A. Introduction

Studienvereinigung Kartellrecht e. V. (in the following **"Studienvereinigung"**) is an association registered under German law whose purpose is the promotion of science and research in the field of national, European and international competition law. Its members include more than 1,300 lawyers and competition economists from Germany, Austria and Switzerland. The members of the Studienvereinigung regularly advise companies and individuals on all aspects of competition law and represent them in proceedings before national competition authorities, the European Commission and in civil litigation. They therefore have particular experience in the application of competition law regulations at European and national levels. The Studienvereinigung is grateful for the opportunity to participate in the European Commission's consultation on "Competition Policy supporting the Green Deal", specifically regarding the questions in Part 2 (Antitrust Law) and Part 3 (Merger Control).

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B. Preliminary remarks

As early as 2015, an important agreement on climate protection was reached with the Paris Climate Agreement, which succeeded the Kyoto Protocol. The "Fridays for Future" movement in 2019 further raised awareness of the threat posed by climate change among large parts of the public. The request of these parts of the public for a more sustainable use of finite natural resources was subsequently incorporated into other transnational political agreements and objectives - such as the recent Green Deal, in which the European Commission **("EC"**) calls for a climate-neutral Europe by 2050. This goal can only be achieved, however, if pursued by society as a whole, to which end certain preconditions have to be established. One of these prerequisites is that the entire European legal framework – the acquis communautaire – is reviewed and adapted in a comprehensive and integrative manner with a view to this priority objective. European competition law in particular must be equipped with a suitable "toolbox" to contribute to the objectives of the Green Deal. Against this background, and in view of the need for a uniform interpretation of the competitive legal framework in all Member States, the present call for contributions is particularly welcome.

C. Part 2: Antitrust rules

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

1.1. Introduction

Since self-assessment has been introduced by Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[1] ("**Regulation 1/2003**"), the question of whether sustainability initiatives are compatible with competition law has become increasingly relevant for legal advice. The focus here is on Article 101(1) TFEU, and in particular the legal exemption under Article 101(3) TFEU. While the decision-making practice of the European Courts[2] as well as the EC[3] suggests that Article 101(3) TFEU may also acknowledge advantages for the environment or other non-genuine economic interests as grounds for justification, legal certainty for undertakings in the form of clear legal rules and communications with the authorities is still lacking. Although the Treaty provides a legal basis for including sustainability aspects in the enforcement of competition law (cf. Article 11 TFEU), the current Guidelines on the application of Article 101(3) TFEU ("**Guidelines on Article 101(3)**") considerably restrict the scope for taking non-economic objectives into account. At least in the short and medium term a more sustainable

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[1] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, pp. 1–25.

[2] European Courts 11 July 1996, T-528/93, *Métropole Télévision*, ECLI:EU:T:1996:99, para. 118 („[The] Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article 85(3) of the Treaty."); further: *Brook*, Priority-Setting As a Double-Edged Sword: How Modernisation Strengthened the Role of Public Policy, JCL&E 2020.

[3] EC 17 September 2001, 2001/837/EG, *DSD*, paras. 143-144; 24 Jannuary1999, 2000/475/EC, *CECED*, paras. 51 and 55 to 57; 21 December 1994, 94/986/EC, *Philips-Osram*, para 26; 18 May1994, 94/322/EG, *Exxon/Shell*, para 71; further: *Brook* ibid.

economy or the development of new, more sustainable technologies is often associated with cost increases and risks that may deter companies from implementing appropriate measures. Cooperation between companies may be necessary in order to react to the developments described above and reduce the associated risks. National competition authorities are therefore confronted with an increasing number of questions regarding the competition law assessment of sustainability initiatives. At the same time, the topic has moved into the focus of academic discourse. Some national competition authorities are already responding to this development by consulting on "soft law instruments" or legislative changes.

The Dutch competition authority has recently published draft guidelines setting out a framework on how the authority intends to deal with agreements that promote sustainability and may restrict competition.[4] This step was probably triggered by the recent cases *SER Energieakkoord*[5] and *Chicken of Tomorrow*[6]. In 2015, a poultry initiative by the Dutch food industry aimed at introducing an industry-wide minimum standard for the sustainable production of chicken meat was stopped as being in violation of competition law. In 2013, the authority considered the agreement to shut down five coal-fired power plants to be incompatible with the competition law ban. It decided that the expected disadvantages of the agreement for consumers were greater than the positive effects, as the shutdown of the coal-fired power plants would have no net effect on carbon dioxide emissions. However, the enforcement of both initiatives would probably have been desirable with regard to the goals of the European Union's Green Deal. The German Federal Cartel Office ("**FCO**") took a different approach. Only recently it dealt with sustainability initiatives from the consumer goods sector such as *Fairtrade Labelling Organizations International e. V.* ("**Fairtrade"**). In short, as part of its certification system, Fairtrade prohibits undercutting an agreed minimum price. Although this implies an infringement of competition law, the FCO decided, by exercising its statutory discretion, not to make the Fairtrade system the subject of an investigation.[7] The strongly divergent handling of problems such as these between Member States clearly shows that there is a need for harmonisation – this is especially true when, as in the Fairtrade case, the solution solely lies in the discretion of the authorities. Against the background of self-assessment, the risks associated with such sustainability initiatives are difficult for undertakings to predict. The current situation thus deters investment and innovation. The present call for contributions is therefore particularly welcome, also in view of the need for a uniform interpretation of the competitive framework in all Member States.

As can be seen from the following practical examples, sustainability cooperations that contribute to the objectives of the Green Deal are present in a wide range of industrial sectors

[4] See https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements [last access: 16 November 2020].

[5] See https://www.acm.nl/en/publications/publication/12082/ACM-analysis-of-closing-down-5-coal-power-plants-as-part-of-SER-Energieakkoord [last access: 16 November 2020].

[6] See "Chicken of Tomorrow"- case of the Dutch competition authority (case report available at https://www.acm.nl/en/publications/publication/13761/Industry-wide-arrangements-for-the-so-called-Chicken-of-Tomorrow-restrict-competition [last access: 16 November 2020]) as well as the discussion of the case with van der Veer, Valuing Sustainability? The ACM's analysis of "Chicken for Tomorrow" under Article 101(3), Kluwer Competition Law Blog 18 February 2015, available at http://competitionlawblog.kluwercompetitionlaw.com/2015/02/18/valuing-sustaina-bility-the-acms-analysis-of-chicken-for-tomorrow-under-art-1013/?do-ing_wp_cron=1592854613.2140469551086425781250 [last access 16 November 2020].

[7] *Engelsing / Jakobs* (2019), Nachhaltigkeit und Wettbewerb, WuW, no. 1, p. 20.

– e.g. in energy production, the textile industry, the food sector or the automotive industry. Companies are reacting to regulatory requirements as well as to pressure from private campaigns and to changing demand patterns of their (potential) customers for more sustainable, environmentally friendly and ethically produced products and services.

1.2. Examples of environment-friedly cooperation

The Studienvereinigung Kartellrecht has identified a significant number of desirable collaborations between undertakings that could contribute to the objectives of the Green Deal. Yet, their implementation may be hampered by competition law compliance concerns. In addition, the Studienvereinigung Kartellrecht has identified several collaborations which were not prohibited by the relevant authorities despite a lack of clarity as to whether they met the criteria of Article 101(3) TFEU.

As an example from Germany, a textile manufacturer carried out regular audits at its suppliers' factories to assess the suppliers' compliance with labour and safety standards. The textile manufacturer intended to exchange the results of these audits with competitors who carried out similar audits and to develop joint concepts for responsible procurement of textiles. This initiative aimed at improving compliance with social standards along the supply chain while minimizing audit expenses and increasing evaluation efficiency by exchanging information about compliance with the labour and safety standards in the factories. Under European antitrust law this cooperation is probably not permissible due to an inadmissible exchange of information.

Another example from the textile industry, which can be found in a similar form in other sectors and industries such as the food retail industry, concerns the plurality of manufacturers' ecological certificates. With regard to the supply industry, the variety of certificates often leads to increased costs, as each certificate sets out different requirements for the use of chemicals, pesticides and so on. Against this background, the question arises for companies in the supply industries whether and to what extent cooperation is permissible in order to establish consistent certificates and standards defined by the supply industry and to replace the numerous different ecological labels and certificates.

The same goes for cases and issues that arise in connection with efforts to bind customers or suppliers to certain quality commitments. For instance, for manufacturers of sustainable products the question arises whether and to what extent they can impose restrictions on their retailers regarding the sale of sustainable products besides the manufacturers' own goods, or whether, with regard to the sustainability aspect, further obligations can be imposed on the retailer (as part of selective distribution). On the other hand, manufacturers of sustainable products desire to agree on and pass on certain specifications across all preproduction levels. Clarification on the assessment and treatment of restrictions in the vertical relationship to achieve sustainability goals would therefore be highly desirable from the perspective of companies.

A further example can be found in the area of collective waste management systems. In Austria, an intense discussion arose around the question whether undertakings that use collected waste batteries as an input may set up a joint collection system. The collection system would have led to the creation of an authorized network of secondary raw material

retailers through which used batteries could have been collected from consumers and delivered to companies at certain prices according to certain quotas. The aim of this system would have been to keep the costs of logistics (where environmental aspects also play a role; e.g. to have as few empty runs as possible) and the purchase price for the batteries as low as possible, which is compatible with the overall goal of achieving the highest possible recycling rate. The antitrust concern of such cooperation is due to the fact that the procurement costs for old batteries constitute a high portion of the overall costs of new (recycled) batteries, so that the cooperation would have likely led to a price alignment as regards the new batteries.

Another similar example concerns the currently ongoing "sustainability agenda" of Austrian manufacturers of PET containers. Initiated by the Austrian Federal Economic Chamber (*Wirtschaftskammer Österreich* – WKO), the domestic manufacturers of packaging material for beverages, bottlers and food retail companies had already launched a "sustainability agenda" in 2004.[8] The initiative aims, inter alia, at increasing the recycling rate for PET containers. To this end, the sustainability agenda contains a voluntary commitment by bottlers to cover a certain percentage of the raw material used to produce granules from which bottles are produced with "recycled PET" (instead of "virgin PET"). In times of low oil prices, this self-commitment leads to an increase in the price of the packaging and thus ultimately the price of the beverages to be paid by consumers compared to a reference scenario without a sustainability commitment. The environmentally significant savings of CO_2 resources are therefore provided in exchange for higher consumer prices. If applied strictly, the voluntary self-commitment pursuant to the sustainability agenda is probably incompatible with the criteria in the guidelines on Article 101(3) TFEU.

Similar discussions, often driven by the Austrian Federal Ministry responsible for agriculture, regularly take place when it comes to high quality food. For instance, these discussions concern the question of whether a self-commitment of the Austrian food retail sector would be permissible according to which a certain additional amount is paid to suppliers that exclusively sell free-range eggs. Again, if applied strictly, this approach would probably not be permissible under the current framework of European antitrust law because animal welfare is not a relevant parameter for an assessment under Article 101(3) TFEU.

Another sustainability agreement discussed with the Austrian Federal Competition Authority several years ago concerned the so-called boiler exchange campaign of the Austrian mineral oil industry and mineral oil trade sector. The mineral oil companies wanted to pay subsidies to consumers if they replaced an old fuel oil boiler with a new boiler using modern condensing technology. The respective households would continue to heat with fossil fuels but would require considerably less fuel. These subsidies should have been funded by a contribution which the mineral oil companies would have had to make per litre fuel oil to a common clearing office. After long discussions, the Austrian Federal Competition Authority tolerated this approach (which has meanwhile expired as the installation of fuel oil boilers has by now been virtually forbidden in Austria). The decisive reason was that the companies involved were able to demonstrate that, from the consumers' point of view (not individually but as a whole), the financial savings achieved by using modern condensing boilers were higher than the cost of the financing contribution. If the financial savings did not outweigh

8 Cf. https://www.wko.at/service/netzwerke/ARGE-Nachhaltigkeitsagenda-fuer-Getraenkeverpackungen.html [last access: 16 November 2020].

the costs of the contribution and if "merely" a substantial degree of CO_2 savings could have been presented at the time, this initiative would probably have been prohibited.

In 2012, the Romanian Competition Authority imposed hefty fines on six mineral oil companies operating in Romania for having deliberately removed a harmful fuel from the petrol station market. The background of this initiative was an EU regulation that would have required this harmful fuel (which was much cheaper than unleaded petrol) to be taken off the market at a certain point in time. The Romanian mineral oil companies merely agreed to stop offering the fuel even before the date prescribed by the EU.[9] The local competition authority did not balance the health-promoting aspects of this approach against the price-driving effects; the authority considered the coordination to be a restriction of competition by object in which balancing issues are of no significance. The companies' attempt to persuade the EC to intervene on the basis of Article 11(6) of Regulation 1/2003 failed.

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

2.1 Introduction

The Studienvereinigung welcomes the EC's efforts to offer clarifications at various legislative levels for agreements that meet the objectives of the Green Deal without restricting competition. In general, changes in soft law and clarifications through recommendations by the EC and/or national competition authorities are easier to implement than amendments to the Treaties. However, a "*new environmental approach*" should be considered in a holistic manner.

The Studienvereinigung holds the view that a consideration of sustainability aspects is possible primarily under the individual exemption conditions of Article 101(3) TFEU. However, it would be necessary to clarify that when applying Article 101(3) TFEU, not only economic objectives in the narrow sense should be taken into account to justify a restriction of competition. The question arises here as to where the limits should be drawn: If environmental protection issues are taken into account at this point, other aspects – also falling under the broader concept of sustainability – such as full employment and social progress, which are also mentioned in Article 3 TEU, may have an equal claim to being considered as grounds for justification. This raises the question of the extent to which environmental concerns should be given priority in this context. In the following, only the environmental aspects of sustainability will be dealt with in view of the Green Deal issue at hand.

Based on the answers to question 1, the Studienvereinigung will list recommendations for clarification regarding the objectives of the Green Deal:

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[9] Cf. https://adz.ro/artikel/artikel/kartellamt-verhaengt-rekordstrafe-gegen-mineraloelkonzerne-in-rumaenien [last access: 16 November 2020].

2.2 Clarifications needed in the Guidelines on horizontal cooperation and Guidelines on the application of Article 81(3) as regards exemption under Article 101(3) TFEU:

The Studienvereinigung sees a primary need for changes in the Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements[10] („**Guidelines on Horizontal Cooperation**“) and the Guidelines on Article 101(3) TFEU. Both guidelines should be revised in light of the massive increase in the importance of sustainability agreements and concrete prerequisites and framework conditions should be formulated under which companies can cooperate with regard to sustainability projects or on the basis of which cooperation projects can be legally assessed.

A basic problem here arises from the very narrow interpretation in both guidelines of the first criterion for exemption, i.e. what is to be regarded as an "improvement in the production and distribution of goods." If too much emphasis is placed on quantifying the benefits and cost savings, insufficiently quantifiable sustainability targets that have other positive effects for consumers and competition may not be considered. The Studienvereinigung takes the view that this narrow view is not mandatory under EU law and is not in line with EC's practice from the time when the EC still held the exemption monopoly. This position would have to be abandoned in the context of a "sustainability reform".

Furthermore, in the view of the Studienvereinigung, the Guidelines on Article 101(3) TFEU would have to be revised to give companies indications as to the conditions under which sustainability cooperation is eligible for individual exemption.

To this end, the EC's understanding of "improvement in the production or distribution of goods“ and "promotion of technical or economic progress" would first have to be extended explicitly to include "sustainability aspects in the production of goods or provision of services", although these may not always be genuinely economic efficiencies. In particular, consideration should be given to including measures to pursue social or ethical objectives (e.g. "fairtrade", measures to safeguard certain basic needs of farm animals) under the term "sustainability".

It should be borne in mind that sustainably produced goods or their use (e.g. the use of organic cotton in the textile industry) may not, under certain circumstances, bring about an objectively measurable increase in the quality of a good or service that directly benefits its purchaser, nor will they entail cost advantages for the purchaser. However, the use of such means does bring benefits in the form of a reduction of negative externalities. The fact that such benefits do not pass directly to the buyer, since it is in the nature of external costs that they are not borne directly by the buyer, does not however, in the view of the Studienvereinigung, in principle exclude the application of Article 101(3) TFEU.

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[10] Communication from the EC – Guidelines on the application of Article 81(3) of the Treaty (Official Journal C 101, 27/04/2004 P. 0097 – 0118).

Admittedly, the measurability of such benefits faces practical difficulties but various mathematical approaches can be found in legal literature and sometimes also in the decision practice of competition authorities.[11] They should be taken up and further developed.[12]

Ultimately, a more comprehensive consideration of sustainability aspects would also require a shift away from considering only those benefits that occur in the market on which the restriction of competition has an impact. Such an understanding does not appear to be ruled out by primary law, although the restrictive approach of the EC finds support in the decision-making practice of the ECJ.[13]

A further uncertainty exists with regard to the criterion of allowing consumers a fair share of the resulting benefit. Measures aimed at environmental protection may have a positive effect on relevant product or geographic markets other than the market on which competition is restricted as a result of the measure, or may have a positive effect on the general public as a whole rather than benefiting those consumers bearing the costs of the measure. Such benefits to individual consumer groups will only be felt indirectly and only after a certain period of time. Examples for such indirect and long-term effects would be the health benefits of eating organic food or reducing CO_2 emissions. Sustainability measures may also not be in the immediate interest of consumers in terms of cost reduction, but they are objectively useful and necessary in the long term.

If a less strict approach to the second criterion were to be confirmed here, for example in the Guidelines on Article 101(3) TFEU, both the legal practitioners and the cooperating companies would be able to make use of further scope in implementing sustainable cooperations that contribute to the objectives of the Green Deal. The example of the "boiler swap action" described on p. 5 shows that this is already being applied to some extent in antitrust law practice (in that example, however, the advantages of corporate cooperation arose within the same relevant product and geographic market as did its competitive disadvantages, which is often not the case with sustainability initiatives). It would therefore be welcomed if the EC were to establish a precise framework for the weighing of interests and the effects to be taken into account, including how the respective effects are to be quantified and qualified.

The Studienvereinigung also believes that there is a particular need for action with respect to the exchange of information. From a competition law perspective, there are certain risks in the application of Article 101(3) TFEU as block exemption regulations often do not apply.

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[11] *van der Veer*, Valuing Sustainability? The ACM's analysis of "Chicken for Tomorrow" under Article 101(3), Kluwer Competition Law Blog 18.02.2015, http://competitionlawblog.kluwercompetitionlaw.com/2015/02/18/valuing-sustainability-the-acms-analysis-of-chicken-for-tomorrow-under-art-1013/?doing_wp_cron=1592854613.2140469551086425781250 [last access: 16 November 2020]; *Wambach*, Gemeinwohlziele als Herausforderung für die Kartellrechtspraxis, Presentation given on 01.10.2020; the presentation materials are accessible at https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2020_Wambach.html?nn=3591568 [last access: 16 November 2020]

[12] A more detailed and welcome discussion of this issue is taking place by the Dutch Competition Authority in its Draft Guidelines (at para. 49 et seq).

[13] The companies listed in *Master Card Inc*. (Fn 36, para. 237), which may have softened the position also taken by the EC, according to which the advantages of a measure must in principle occur in the market in which the restriction was established, does not yet appear sufficient to open up the possibility of an exemption for measures to promote sustainability aspects in the sense described.

Various questions therefore arise with respect to cases in which information exchanges between market participants are allowed.

In particular, when it comes to infrastructure projects, an intense exchange within the industry is required. For example, pipeline projects, partly supported by state aid measures, dealing with the transport of hydrogen from the production site to the place of use, require the participation and information contribution of the entire industry. Public consultations on infrastructure projects, like projects for the transportation of hydrogen from a production site on the coast to an industrial consumer in an inland area, require the provision of information and data (including) on the individual planning of each undertaking, as infrastructure projects have to be geared to future consumptions and needs of the customer. The planning of the respective transport networks cannot be carried out individually by each undertaking; it is therefore essential to coordinate individual demand. The EC's revised framework should provide explicit guidance on the extent to which such exchanges of information are permitted.

This should include the publication of data required for production and planning of demand. Moreover, there are schedules for plant upgrades or commissioning and investment data which need to be disclosed. As financial resources are required for the entire transformation, it is important to inform investors about the dimension of the transformation, the timeline and amount of funds required in order to achieve the climate targets. At the same time, conclusions can be drawn about the individually planned production capacity of each undertaking for the upcoming decades based on such data. The data, which have to be published, may include the expected demand on hydrogen or natural gas as well as the amount of carbon dioxide that will be finally stored. Within these projects, all industrial companies involved, some of which are considered competitors, will have access to the data provided.

The exchange of this kind of information is essential for various reasons (e.g. public funding / state aid / multilateral projects).

Such information exchange may be considered as a restriction of demand-side competition. Thus, according to para 55 of the Guidelines on Horizontal Cooperation, the indirect exchange of information may also be caught by the prohibition under Article 101 TFEU.

There is uncertainty in the application of the law should an indirect exchange of information, as described above, lead to conclusions on market strategies on the procurement market and moreover to restrictive effects on competition within the meaning of recital 58 of the Guidelines on Horizontal Cooperation. In particular, markets in such infrastructure projects are highly concentrated and transparency as well as stability are apparent to all market participants.

2.3 Statements of competition authorities

The Studienvereinigung is of the opinion that legal clarifications concerning sustainability agreements could also be achieved on a less formal level. Statements and guidance papers of competition authorities are useful tools in practice when it comes to the assessment of

cooperations. In this context, like in Question 1, reference is made to the draft guidelines of the Dutch competition authority.[14]

In the context of a pan-European solution, it would be advisable to have a core statement of the EC or a joint statement of all European competition authorities within the ECN. There would otherwise be a certain risk that competition law practice in Europe might drift apart on this subject.

2.4 Summary

In principle, the Studienvereinigung believes that the existing European competition law regulations are suitable for pursuing the targets of the Green Deal, especially, with regard to the assessment of intercompany cooperation. However, clarifications would be welcome in the Guidelines on Article 101(3) TFEU as well as statements of various competition authorities – ideally coordinated at European level – and the EC. Further possible legislative changes are discussed in the answer to Question 3.

3. a.) Are there circumstances in which the pursuit of Green Deal objectives would justify restrictive agreements beyond the current enforcement practice?

An increasing number of requests received by national authorities, as well as initiatives by individual authorities aimed at giving companies greater clarity in the assessment of "sustainability cooperations",[15] provide striking evidence of the uncertainty that companies face when trying to assess their practices in this area in the light of current competition law. Responding to the consultation on the EC's guidelines on horizontal agreements, undertakings identified the demand for greener and more sustainable services, ahead of digitisation, as the main trend affecting the application of these rules.[16] Many stakeholders would therefore like to see more clarity in this area through regulatory instruments.[17]

In contrast to the 2001 Guidelines on Horizontal Cooperation Agreements[18], the current EC guidelines and (block exemption) regulations on horizontal agreements in fact provide only limited guidance as to when an agreement that primarily serves the pursuit of sustainability objectives does not fall under the prohibition of Article 101(1) TFEU.

But even the 2001 Guidelines on Horizontal Cooperation Agreements lacked clarity in some respects and the relevant chapter was limited to the assessment of environmental agreements in a rather narrow sense. Measures for the more ethical production of goods or the provision of services (e.g. actions to ensure "fair" remuneration of suppliers or their workforce or measures to guarantee certain minimum animal welfare standards) were not addressed as such.

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14 See fn. 4.

15 Cf. fn. 7.

16 Consultation report (summary), p. 16 (https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11886-Evaluation-of-EU-competition-rules-on-horizontal-agreements/public-consultation).

17 Consultation report (summary), p. 5 (https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11886-Evaluation-of-EU-competition-rules-on-horizontal-agreements/public-consultation).

18 OJ 2001, C 3, 2.

Where sustainability cooperations in principle infringe the prohibition laid down in Article 101(1) TFEU, the current guidelines on Article 101(3) TFEU considerably restrict the scope for taking non-economic objectives into account when defending an agreement under said provision. First, the guidelines only consider the possibility of exemption for "economic efficiency gains".[19] These efficiency gains would need to be quantifiable[20] or at least objectifiable[21], with even higher requirements for benefits achieved only in the long term;[22] indirect benefits would generally not be taken into account.[23] In addition, only benefits would in principle qualify as benefits that arise within the same relevant market as the one to which the agreement relates,[24] or at least a closely connected market[25].

This position was also emphasised by the EC in a statement on the proposed reform of the Dutch Competition Act, which envisaged taking greater account of sustainability considerations. The EC stated that it was not within the competence of the competition authorities to weigh often conflicting public interests against each other when assessing competitive behaviour. Furthermore, EU competition law only allowed efficiencies to be taken into account if they benefited consumers in the markets affected by the conduct, whereas the benefit to society as a whole was not a relevant criterion, the EC said.[26]

Measured against this standard, in many cases a justification of restrictive agreements on the basis of environmental benefits appears not to be possible. The positive effects of measures to protect the environment have, at least in the past, often been classified as non-economic efficiencies in terms of their direct effect, although undertakings are likely to use them for economic reasons (e.g. marketing strategies, response to changes in the demand behaviour of customers). The quantification of such efficiencies is also associated with uncertainties.[27] Different political preferences as well as a lack of scientific evidence regarding specific initiatives may prevent an objectification of possible benefits (in whatever area they occur). However meaningful the contribution of individual market participants or sectors to the achievement of sustainability goals may be, their actual (appreciable or measurable) impacts may be minimal when assessed in isolation. Furthermore, the positive effects may occur in other relevant product and geographic markets or even in areas which are not economically determinable at all.

In light of these circumstances, undertakings that initiate or enter into sustainability cooperation agreements are currently confronted with legal uncertainties that could prevent them from implementing such measures.

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19 Guidelines para 59.
20 Guidelines para 56.
21 Guidelines para 57.
22 Guidelines para 87.
23 Guidelines para 54.
24 Guidelines para 57.
25 To this extent see ECJ 11 September 2014, C-382/12P, *Master Card Inc.*, ECLI:EU:C:2014:2201, para 240.
26 The statement can be found here: https://zoek.officielebekendmakingen.nl/blg-775505.html.
27 Although various models for their "pricing" have already been proposed, and the identification of other "qualitative efficiency gains" also poses challenges, see for example the Commission's opinion on the OECD Roundtable on the Role and Measurement of Quality in Competition Analysis, DAF/COMP/WD(2013)32. *Wambach*, Gemeinwohlziele als Herausforderung für die Kartellrechtspraxis, speech held on 1 October 2020; the presentation materials can be found here https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2020_Wambach.html?nn=3591568.

b.) If so, please explain how the current enforcement practice could be developed to accommodate such agreements (i.e. which Green Deal objectives would warrant a specific treatment of restrictive agreements?

In contrast to the 2001 Guidelines on Horizontal Cooperation Agreements, the current guidelines do not provide for a specific chapter on sustainability cooperation agreements. The feedback received from the EC in the course of the consultation process has shown that a more detailed interpretation of the existing legal framework from the point of view of the EC has been requested by numerous stakeholders. The Studienvereinigung would also welcome clarifications in this respect.

In the context of the impending revision of the Guidelines on Horizontal Cooperation, it would thus seem desirable to dedicate a separate chapter to sustainability initiatives addressing relevant questions. In this context, it should be considered whether to give the notion of sustainability a broad understanding, including a sustainable and ethically sensitive use of human and animal resources. An example of such an understanding can be found in paragraph 6 of the draft guidelines of the Dutch Competition Authority.[28]

In particular, the question needs clarification as to the conditions under which sustainability cooperation agreements are not even caught by Article 101 (1) TFEU. For example, the drafts of the Dutch (para 14 et seq.) and Greek (para 46) competition authorities[29] give several examples of different scenarios in which it can be concluded that there is no infringement of Art 101 (1) TFEU on the basis of the decision-making practice of the European Courts. In particular, the doctrine of objectively necessary ancillary restraints, which has been established in principle by the Union Courts, could be further elaborated with regard to the types of agreement of interest here.[30] Such ancillary restraints are considered to be permissible insofar as the main agreement pursues legitimate objectives, the ancillary restraints linked to the main agreement are objectively necessary and they are proportionate to the objective pursued.[31] Indeed, sustainability, fair trade or animal welfare initiatives serve legitimate (competition-neutral) objectives. Their implementation may involve ancillary agreements which may be excluded from the application of Article 101(1) TFEU in the first place. The Studienvereinigung suggests that special rules should be established for joint ventures in the environmental sector or those which contribute to environmental protection. Such joint ventures could be granted a favourable assessment under Article 101 TFEU.[32]

In this context, particular attention should be paid to funding measures for such initiatives: Many measures to promote sustainability objectives involve significant costs (such as the costs associated with the production of "organic" products), which cannot be fully passed on to consumers directly without jeopardising the positioning and establishment of such products. This can be remedied either by subsidies in the form of state aid, as is the case in

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28 See para 1.

29 See para 4.

30 Along these lines, see also the background paper of the Arbeitskreis Kartellrecht of the German FCO, p. 20 et seq., https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2020_Hintergrundpapier.pdf?__blob=publicationFile&v=2.

31 *Cf.* ECJ 23 January 2018, C-179/16, *Hoffmann-La Roche*, ECLI:EU:C:2018:25, para 69; ECJ 11 September 2014, C-382/12 P, *Master Card Inc.*, EU:C:2014:2201, para 89 and the case-law cited.

32 See section 2, sub-section 2.12 for a more detailed discussion.

many Member States, for example in connection with electricity from renewable energy sources, or by agreements between the cooperation partners on the collection and distribution of funds, these being of course purpose-bound. For example, the German FCO had to deal with a sectoral alliance of farmers, the meat industry and food retailers intended to reward (subsidise) livestock farmers for implementing animal welfare measures. The funds required for this are mainly raised by the large food retail companies which, according to an agreement, transfer a certain amount per kilogram of meat sold to an organisation responsible for distributing the funds to the livestock farmers concerned.[33] In view of the context of the rules on the financing of the sustainability initiative, it does not seem appropriate to assume that the agreement on a uniform price premium is an agreement having as its object the restriction of competition. On the contrary, the existence of an objectively necessary ancillary agreement would have to be examined in that context.

A further regulatory instrument for creating legal certainty could be a block exemption regulation (possibly with a limited term), which should be evaluated following a "trial phase". In this context it should be considered whether, unlike in most block exemption regulations, market share thresholds above which an exemption is no longer possible should be disregarded. Particularly with regard to standardisation agreements, which are of particular relevance in the given context, it would appear quite conceivable for the market shares of the participating companies to exceed the bandwidth of typical thresholds in the (horizontal) block exemption regulations currently in force.

In order to support the EC in the possible design and implementation of future measures, a specialist sustainability/environmental unit could also be set up within the EC to better understand the links between antitrust law and the Green Deal.[34]

c.) How can the pursuit of Green Deal objectives be differentiated from other important policy objectives such as job creation or other social objectives?

In the view of the Studienvereinigung, the assumption inherent in this question (according to which competition law would currently not pursue political or social objectives) is incorrect. In addition to consumer welfare, EU competition law in particular serves the pursuit of further political objectives (e.g. the creation and maintenance of the internal market[35]).[36]

Moreover, the decision-making practice of both the European Courts[37] and the EC[38] suggests that 'non-economic' aspects may be taken into account when assessing cases under

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33 FCO, B2-72/14, *Initiative Tierwohl*.

34 See section 2, sub-section 2.12 for a more detailed discussion.

35 Fundamentally, ECJ 13.07.1966, C-56/64, *Consten and Grundig*, ECLI:EU:C:1966:41.

36 See/compare *Dunne*, Public Interest and EU Competition Law, The Antitrust Bulletin 2020, 256 on further political objectives that have been pursued in the past (also) when applying competition law.

37 European Courts 11 July1996, T-528/93, *Métropole Télévision*, ECLI:EU:T:1996:99, para. 118 (" [The] Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article 85(3) of the Treaty."); further: *Brook*, Priority-Setting As a Double-Edged Sword: How Modernisation Strengthened the Role of Public Policy, JCL&E 2020.

38 EC 17 September 2001, 2001/837/EG, DSD, paras 143-144; 24.01.1999, 2000/475/EC, CECED, paras 51 and 55 to 57; 21.12.1994, 94/986/EC, Philips-Osram, para 26; 18.05.1994, 94/322/EG, Exxon/Shell, para 71; further: Brook l.c..

the relevant competition law provisions – at least, if these interests are in line with objectives of the European Union.[39]

If nonetheless a distinction between the policy objectives mentioned is to be made, the following could be considered: Article 3(3) TEU expressly refers to a high level of protection and improvement of the quality of the environment as an objective of the European Union. Pursuant to Article 11 TFEU "*environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities [...]*".[40] On the other hand, for example, Article 147(2) TFEU, which refers to the objective of a high level of employment, only provides that the latter "*shall be taken into consideration in the formulation and implementation of Union policies and activities*" The latter provision thus places fewer requirements on European institutions,[41] which could justify a graduated implementation of such policies.

However, the Studienvereinigung is not convinced that a differentiation between various EU objectives is required in the given context.

D. Part 3: Merger control

In order to reflect the European Union's ambitious sustainability and climate protection goals in the entire field of antitrust law, it is not only necessary to develop assessment guidelines for sustainability initiatives within the scope of Article 101 TFEU. In addition, the Studienvereinigung recommends considering sustainability considerations – also in connection with merger control – insofar as these can be included in the established scope of review of the Merger Regulation[42] ("**EUMR**").

Whereas, regarding cooperation between undertakings, there are several precedents from the decision-making practice of the EC concerning the integration of sustainability considerations into the substantive assessment of the cooperation, such a practice hardly exists where merger control is concerned. However, regarding the recent decision on the merger of *Aurubis* and *Metallo*[43], in a press release EU Competition Commissioner Margrethe Vestager explicitly made reference to the European Green Deal, stating that a well-functioning circular economy in copper was important to ensure a sustainable usage of resources in the context of the European Green Deal. According to Vestager, this is why they carried out an in-depth investigation of the merger.[44] In view of the Green Deal and its extensive effects on the transformation of the economy, "green" concentrations can be expected to play a more significant role in the future.

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39 For a more detailed analysis of the decision-making practice, see for example *Monti*, Article 81 EC and Public Policy, CMLR 2002, 1057; *Petit*, The Guidelines on the Application of Article 81(3) EC: A Critical Review, IEJE Working Paper 4/2009; *Townley*, Which Goals Count in Article 101 TFEU?: Public Policy and its Discontents, ECLR 2011, 441; *Brook* ibid.

40 The provision demands an "environmentally friendly" interpretation of all EU law and should in particular be taken into account when applying competition law; see in this regard *Kahl* in *Streinz* (ed.) EUV/AEUV[3] (2018), Article 11 TFEU, para 32, para 119.

41 *Niedobitek* in *Streinz* (ed.) EUV/AEUV[3] (2018) Art 147 TFEU, para 6.

42 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("EC Merger Regulation"), OJ L 24 of 29 January 2004, pp. 1-22.

43 EC, decision of 4 May 2020, COMP/M.9409 – *Aurubis/Metallo*.

44 Cf. EC press release of 4 May 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_20_801 [last access: 16 November 2020].

A political decision will determine whether the existing limits of the regulatory regime of the EUMR should be broadened, in particular with respect to the assessment criteria stipulated in Article 2 EUMR. This should only take place, if at all, on the basis of a thorough discussion and assessment, and it must also take into account the consequences of such broadening for European merger control law as a whole. The Studienvereinigung is of the opinion that the present framework of the European merger control regime leaves enough space for sustainability considerations to be integrated. By continuing to develop the current enforcement practice, it will certainly be possible for merger control to play a role in achieving the sustainability goals of the Green Deal as well as the climate goals under the Paris Agreement.

The Studienvereinigung suggests that the manner in which sustainability aspects can be taken into account in the context of merger control should be the subject of a dialogue between the EC and the national competition authorities. Only in this way can consistency and legal certainty be ensured throughout the EU. This is necessary in particular since when carrying out their own merger control assessments, the national competition authorities draw on both decisions as well as soft law of the EC, but also occasionally deliberately distance themselves from these (especially where "public interest" questions are concerned). It would therefore be a welcome step to include grounds and limits for integrating sustainability aspects into the Horizontal Merger Guidelines and, in the interest of a level playing field within the internal market, to endeavour to have sustainability considerations taken into account in the case of merger control decisions in the Member States in the same way that they are at EU level.

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

The Studienvereinigung is of the opinion that abstract industrial and regulatory policy-related considerations should not be a criterion when assessing a concentration. The purpose of the EUMR is not to prevent concentrations that are undesirable from a political standpoint. Instead, the aim of merger control is to maintain competitive market structures and, in particular, to prevent market power from arising.[45] It is an instrument of market structure control, not market design. Consumers automatically benefit from effective competition, since this results in low prices, product diversity, higher quality and innovation.[46] This applies to sustainable and environmentally friendly products just as it does to any other product category.

In addition to further criteria, Article 2(1) (b) EUMR also explicitly includes the alternatives available to suppliers and users as a criterion relevant for the assessment. Recital 23 of the EUMR refers to Article 2 (now Article 3) of the TEU, which in turn defines sustainable development and a high level of environmental protection as goals of the European Union. A reduction of the choice of environmentally friendly products or technologies for consumers is therefore already a criterion that can – and must – be taken into account when applying Article 2(1) EUMR.

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45 Cf. Article 2(2) and (3) EUMR.
46 Horizontal Merger Guidelines, para 8.

Environmental considerations are also, albeit only occasionally, taken into account in merger control assessments by the EC, but always in the categories within the merger control assessment. In addition to the *Aurubis/Metallo* decision mentioned above, in the *DEMB/Mondelez/Charger OPCO* decision[47] the EC assessed whether there was a separate market for non-conventional coffee. On the other hand, the EC has correctly refused to take purely political objectives into account without any basis in categories within the merger control assessment. In a response to such a petition in the *Bayer/Monsanto* proceedings[48], EU Competition Commissioner Margrethe Vestager pointed out that environmental considerations are factored into the merger control assessment if they have negative effects on consumers "through decreased competition"; other considerations are subject to different statutory rules.[49]

The Studienvereinigung agrees with this assessment. Economic governance is a task of regulation, not of merger control as market structure control. The current legal framework does not allow the EC to adopt politically motivated, discretionary decisions on the compatibility of concentrations with the Common Market as they would go beyond the application criteria of the SIEC test.

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

2.1 Relevant product market

The EC's decision-making practice shows that it is possible, and may be necessary, to take sustainability aspects into account when defining the relevant product market.[50] Sustainability and environmental friendliness can be regarded as product features that are associated with higher product quality and therefore represent a distinguishing feature in the eyes of consumers. The Portuguese competition authority *Autoridade da Concorrência* opted for a similar approach when assessing a concentration in respect of which it concluded that conventional chickens and slow-growth chickens were not interchangeable and were therefore to be allocated to separate relevant product markets.[51]

Due to the constant increase in the number of sustainably manufactured products, the question of whether such sustainable products represent a separate market will likely arise from time to time in the future. From the point of view of the Studienvereinigung, there is a risk that a market definition that is too narrow could impede concentrations that are actually pro-competitive. It is often the case that the companies that manufacture products in a sustainable manner are not in a position to compete with conventional products until they are part of a merger. In this way, sustainable alternatives are created on the overarching product market. Thus, one of the regulatory aims of the Green Deal is for sustainable products to replace conventional products in the long term. Accordingly, there needs to be

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[47] EC, decision of 5 May 2015, M.7292 – *DEMB/Mondolez/Charger OPCO*.

[48] EC, decision of 21 March 2018, M.8084 – *Bayer/Monsanto*.

[49] See: https://ec.europa.eu/competition/mergers/cases/additional_data/m8084_4719_6.pdf [last access: 16 November 2020].

[50] Call for opinion, p. 5; EC, M.9076 – *Novelis/Aleris*; EC, decision of 5 May 2015, M.7292- *DEMB/Mondolez/Charger OPCO*, paragraphs 55-59.

[51] Decision of the *Autoridade da Concorrência* of 21 December 2017, Ccent/2017/45 – *Aviagen/Hubbard*.

competition between the two. For that reason, a market definition that is too narrow might prevent "green" competitors from justifiably creating economies of scale and synergies that are often important for making sustainable products more competitive, in particular with respect to pricing. In particular, entry into the mass market, which until now has always been dominated by conventional products, often requires a certain size which, in many cases, can only be achieved through concentrations.

2.2. Relevant geographic market

Sustainability aspects can also play a role when defining the geographic market. In recent years, consumers have become increasingly aware of environmental problems and have changed their habits with respect to demand. For this reason, the consumers could make more deliberate decisions and, for example, limit their procurement radius in order to prevent environmentally harmful transport, or increase this radius in order to obtain access to environmentally friendly products. As a result, geographic markets might have to be defined differently in the future. However, there is a risk here that markets that are too narrowly defined will be touted as an indication of market power of "organic producers", even though these producers are still fighting to make consumers more aware of their sustainable products as compared to conventional goods.

2.3 Consideration of harmful effects on environmental protection/sustainability goals

As already explained above, purely political sustainability considerations that cannot be assessed through categories of competition law should not be taken into account in merger control assessments. Such an assessment would entail a great risk of turning out to be discretionary. On the other hand, negative effects of a concentration on sustainability goals can and should always be relevant if found in competition-related categories such as choice for consumers, innovation, etc. In this connection, the Studienvereinigung refers to the EC's focus on competition in innovation, in particular in the *Dow/DuPont* and *Bayer/Monsanto* concentrations, which could play an important role when assessing the effects of a concentration on the sustainability goals of the Green Deal.

2.4 Concentrations between established competitors

In both recent decisions *Dow/DuPont* and *Bayer/Monsanto,* the EC made use of a theory of harm that focussed on the effects of the concentration on competition and innovation. It concluded that a concentration of competing innovation drivers can reduce competition in the industry and would likely lead to a reduction of innovation incentives of the merging parties.[52] The EC considers innovation as an "input activity" so that a concentration might have a negative impact on markets and products of the entire industry.[53] Whilst the theory of harm in the decision *Dow/DuPont* was based on market characteristics of the pesticides industry,[54] this approach could be generalized such that the concentration leads to a reduction of innovation in the overlapping innovation space of the merging parties and ultimately reduces the innovation incentive overall.[55] By measuring the innovation output of

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[52] EC, decision of 27 March 2017, COMP/M.7932, *Dow/DuPont*, rec. 2002; EC, decision of 21 March 2018, COMP/M.8084 – *Bayer/Monsanto*, para. 75.

[53] EC, decision of 27 March 2017, COMP/M.7932, *Dow/DuPont*, para. 348.

[54] Ibid. para. 2000.

[55] Ibid. para. 3056.

the parties and by reverting to factors such as patents and innovation activity in the past, the EC can identify the most relevant innovation drivers among the market participants[56]

These principles can be transferred to sustainability considerations. A transformation to more sustainability is an inherently dynamic process, which could be explained by assessing the dynamic effects of a concentration rather than static effects alone. If a concentration reduces the incentives of the merging parties and their remaining competitors to develop innovative, sustainable products, consumers will be deprived of such products and technologies. Moreover, the development of the entire industry towards more sustainability will be impeded. The theory of harm developed in *Dow/DuPont* and confirmed in *Bayer/Monsanto* therefore appears to be a suitable approach for integrating sustainability considerations into the substantive assessment in merger control and its further evolution is desirable. However, such evolution should also take into account that the bundling of activities in the innovation space could also generate pro-competitive effects, for instance if a concentration leads to the acceleration of and focussing on the development of green technologies, in particular of those connected with high development costs.

2.5 Concentrations of particularly dynamic undertakings

Further, there is a risk of an impediment to competition in innovation if an established undertaking intends to acquire a target which is emerging or particularly innovative in the field of sustainable products and services and might exert competitive pressure on the established undertaking in the future.[57] Such concentrations could also have a negative impact on the innovation activity of companies. Considering the central role innovation plays in this respect, a loss of potential competition from "green competitors" might adversely affect the achievement of sustainability goals and, consequently, deprive consumers of sustainable and better products.

Article 2(1) (a) EUMR allows for these situations and stipulates an obligation for the Commission to take into account, inter alia, "the need to maintain and develop effective competition within the common market" with regard to "actual or potential competition".[58] Accordingly, negative effects on competition in innovation, also in the field of sustainable products and services, can (and must) be taken into consideration under the current legal framework. Nevertheless, a continued development of the assessment criteria appears to make sense since an increased number of concentrations in the sustainability area can be expected as well. In particular, the systematics for assessing competition in innovation developed by the EC in its decisions *Dow/DuPont* and *Bayer/Monsanto* can serve as a meaningful reference point.

2.6 Design of conditions and obligations

Sustainability aspects could also play a role for the selection and design of remedies offered by the merging parties, where a concentration is being cleared subject to conditions. In principle, the EC can request either structural or behavioural remedies; in practice, it generally prefers structural ones. Sustainability aspects, however, could provide an oppor-

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[56] Ibid. para. 379.

[57] See also Guidelines on the assessment of horizontal mergers, para. 37 et seq.

[58] See also Guidelines on the assessment of horizontal mergers, para. 60.

tunity for offering “creative” behavioural remedies, referring to the future market behaviour of the merged entity. For instance, such remedy could provide for an obligation to invest a certain amount in R&D efforts relating to sustainable and environmentally friendly technologies.

However, the Studienvereinigung would point out that sustainability aspects are not necessarily suitable for removing competitive concerns; further, the EC should not instrumentalize such behavioural remedies to implement aspects of industrial policy. Nonetheless, such behavioural remedies can potentially be the appropriate tool for removing competitive concerns with regard to competition in innovation. The EC should therefore openly assess such remedies proposed by the merging parties.

2.7 Sustainability as eligible efficiency

Concentrations frequently generate efficiencies that will mitigate the negative effects such that the concentration would not significantly impede effective competition.[59] Such efficiencies cumulatively need to generate benefits for customers, be merger-specific and verifiable.[60] Article 21(4) EUMR leaves little room for claiming “public interests” in a merger control proceeding. However, the Studienvereinigung takes the view that the current framework of analysis frequently allows sustainability aspects to be considered as relevant economic efficiency gains and thus do not constitute “public interests” within the meaning of Article 21(4) EUMR.

2.8 Consumer welfare

The Studienvereinigung believes that the benefits of sustainability are fundamental advantages for consumers.[61] Indeed, the EUMR does not define the relevant "efficiency benefits". Article 2(1) (b) EUMR calls on the EC to take into account, among other things, the *"development of technical and economic progress”* when assessing the substantive issues of a merger. According to recital 23 of the EUMR, environmental and sustainability considerations must therefore also be considered as fundamental objectives of the European Union (see above).

A merger can contribute to the sustainable development envisaged in the Green Deal. For example, mergers can accelerate the development of sustainable technologies or enable such technologies in the first place. A merger can also lead to significant synergies that enable the merged entity to reduce negative externalities in the production process. Achievable benefits can take many forms, including reduction in CO_2 emissions, water and soil pollution, a decrease in the utilization of pharmaceuticals in livestock farming, etc.

Often external effects, and hence their reduction through more sustainable management, occur in markets other than those directly affected by the merger. This raises the question

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59 See also recital 29 of the EUMR.

60 Guidelines on the assessment of horizontal mergers, rec. 76-88; Guidelines on the assessment of non-horizontal mergers, rec. 53; EC, decision of 27. June 2007, COMP/M.4439 – *Ryanair/Aer Lingus*, para. 1127; General Court, judgment of 6 July 2010, T-342/07 – *Ryanair/Commission*, para. 387.

61 Cf. *Kingston*, The Role of Environmental Protection in EC Competition Law and Policy, p. 222 regarding environmental factors.

of whether such efficiencies can be considered. The Guidelines on the assessment of horizontal mergers[62] **("Horizontal Merger Guidelines")** state that efficiencies "should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur."[63]

A restriction of the respective efficiencies capable of being taken into account to those that occur in the market where there is a risk of anti-competitive effects is neither mandatory nor appropriate under the legal framework of Article 2(1) EUMR or under the existing case practice from the EC. Especially if efficiencies contribute to the achievement of sustainability objectives, it should be possible to take them into account even if they occur outside the relevant market.[64] A broader understanding is also justified under Article 2(1) EUMR, which refers to "the structure of all the markets concerned" as well as to "technical and economic progress" without limitation to the relevant market. Finally, efficiency gains are accepted as a balancing factor precisely because they "raise the standard of living in the Community."[65]

If a merger enables the merged entity to pursue innovation in the field of sustainability, consumers can also benefit from "new or improved products or services".[66] In addition, mergers can also create economies of scale and scope that enable the merged entity to offer sustainable products at more competitive conditions, e.g. at lower prices. This appears to be particularly important as sustainable products (currently) tend to be more expensive than conventional products. Mergers can therefore improve the competitiveness of sustainable products and thus contribute to replacing "conventional" products by regular market mechanisms in the long run, not least by creating incentives for suppliers of conventional products to invest in sustainable technologies on their part.

The Studienvereinigung assumes that the merged entity will often also have the incentive to pass the efficiency gains on to consumers.[67] This is particularly true if the merger helps to reduce the production costs of a sustainable product, as the company will have every incentive to also reduce the price of the product in order to compete with conventional products, which are regularly cheaper.

2.9 Merger specificity

Efficiencies are only considered in the competitive assessment if they are a direct consequence of the notified concentration.[68] This essentially requires a necessity test, which must be applied uniformly to all types of concentration. It represents an important limitation on the consideration of sustainability aspects and prevents "greenwashing" of mergers where less anti-competitive alternatives are available.

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62 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), pp. 5–18.

63 Horizontal Merger Guidelines, para. 79.

64 Even *Pierre Régibeau* (DG Competition Chief Economist) emphasized at a conference, that taking external effects outside of the relevant market into account "would make a lot of sense", conference "Sustainable development and competition law: Towards a Green Growth regulatory osmosis", organised by the Hellenic Competition Commission, on 28th of September 2020.

65 Horizontal Merger Guidelines, para. 76, recital 4 of the EUMR.

66 Ibid. para. 81.

67 On this aspect: Horizontal Merger Guidelines, para. 84.

68 Ibid. para. 85.

2.10 Verifiability

Efficiencies have to be verifiable so that the EC can be reasonably certain that the efficiencies are "likely to materialise" and "substantial enough to counteract a merger's potential harm to consumers."[69] Where "reasonably possible", efficiencies should therefore be "quantified".[70] The Studienvereinigung sees the quantification of the efficiency gains as a major challenge when considering sustainability aspects.

The competitive assessment is based on economic findings and, if possible, uses econometric tools to assess the effects of a merger. This applies to negative effects and must also apply to positive effects in the interest of legal certainty and the objective application of antitrust law. At the same time, quantification ensures that economic and not political considerations form the basis for the assessment of mergers.

The Studienvereinigung therefore considers the requirement of verifiability and, where possible, quantifiability to be necessary. Regarding a more comprehensive consideration of environmental issues, however, the EC should be open to new economic theories, instruments, and methods to thoroughly assess the effects of a merger. This is particularly important if the merger leads to a reduction in external costs. If such sustainability gains can be quantified with a broader range of econometric tools, there is no need to adapt the current analytical framework. Since it is the nature of sustainability gains that they occur in the medium and long term, the Studienvereinigung suggests that the time frame within which the efficiency gains must materialize should be set in a more flexible way.[71]

The Horizontal Merger Guidelines leave some flexibility when the necessary data are not available to allow for a precise quantitative analysis. The Studienvereinigung suggests that environmental issues, which by their nature are difficult to quantify, could also be considered by analysing the environmental impact of a deal as projected in the merging parties' business plan, management statements, historical examples, etc.[72] This would take some pressure off the parties, who may not have the expertise to provide the economic analyses and models required for complex quantification. This is important because the burden of proof to demonstrate efficiencies rests with the merging parties.[73]

2.11 Assessment of joint ventures

An important issue in regard to projects that can contribute to the protection of the environment is whether undertakings would prefer only to cooperate on a short-term basis or opt for joining forces on a lasting basis. In developing fields like the one motivated by the EU Green Deal, joint ventures play a major role. They allow companies to join forces in certain areas and at the same time maintain their economic freedom in others. This is usually an essential aspect for innovation. It might therefore be a good idea to create a special regime for joint ventures in the environmental sector or such that contribute to the environmental cause. Such joint ventures could be given preferential treatment under the

[69] Ibid. para. 86.
[70] Ibid. para. 86.
[71] Ibid. para. 87.
[72] Ibid. para. 88.
[73] Ibid. para 87.

EUMR/Article 101 TFEU – this could be provided for in the Guidelines on Horizontal Cooperation/Block Exemptions, if certain requirements are met in each case. For that reason too, a possibility should be found to measure the environmental benefits that can be derived from such a JV.[74]

If a certain level were reached, a JV could benefit from the fast-track/exemption regime. The motivation for participating undertakings would therefore be that in furthering the environmental cause of the EU they might also obtain permission for the other aspects of the JV that would otherwise have not been possible (or only with strict remedies) or would have taken much more time. Nevertheless, the Studienvereinigung does not recommend any changes in the definition of a joint venture in Article 3(5) EUMR.

2.12 Proposals for concrete measures to implement greater consideration of sustainability considerations

Adding sustainability aspects to the EUMR itself is a political decision. This should, if at all, only be made based on a thorough discussion and assessment and must also consider the consequences of such an extension for European merger control law as a whole. The Studienvereinigung believes that, as outlined in this Statement, the current framework of the European merger control regime leaves sufficient room for integrating sustainability considerations.

However, the Studienvereinigung suggests that the Horizontal Merger Guidelines should be supplemented by environmental and other sustainability considerations. In particular, the consideration of efficiencies in this area should be presented separately.

On the authority side, we would suggest creating a specific unit/task force that could build up a practice in assessing such JVs/environmental projects and advise the EC on the implementation of future measures. This unit could also be responsible for infringements of Article 101 and 102 TFEU and help the EC to better understand the links between competition law and the Green Deal. Furthermore, it could cooperate with other national competition authorities in Europe and around the world in this regard.[75]

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[74] See question 2, point 3. b.).
[75] Ibid.

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