Chapter IV
Sustainability and competition

Sustainability and competition

1 Introduction

1. The European Commission's European Green Deal sets out a raft of measures aimed at reducing net emissions of greenhouse gases to zero by 2050.[1] Climate action was also set out as a cross-cutting issue in the German Federal Government's Coalition Agreement,[2] meaning that all policy areas need to be reviewed to see how they can contribute to protecting the climate. As a result, this issue also needs to be addressed in relation to competition policy, something which has long been a matter of debate at both the academic level[3] and among national and European competition authorities.[4]

2. In many cases, the goals of protecting competition and protecting the climate are likely to be complimentary. Efforts undertaken by companies to protect the climate can generally be regarded as competitive parameters, especially where institutional framework conditions are already in place, such as CO_2 prices. Likewise, most other sustainability targets are not likely to be achievable outside of the purview of competition law, but only within that context. This above all applies where a growing number of consumers values sustainability.

3. In some cases, by contrast, conflicts of interest may arise which necessitate a balancing of sustainability issues and the protection of competition. Companies coordinating their actions in the market in order to collectively remove low-priced and environmentally harmful products from the market and replacing them with more expensive but more environmentally friendly ones, appears desirable from the sustainability perspective. However, such coordinated action may raise concerns from an antitrust perspective. Whether the balancing of the protection of competition and sustainability is possible within the existing antitrust law framework or whether it is necessary to adapt that framework is a matter of debate in the literature and among practitioners. The Monopolies Commission presents several recommendations in that regard in this Report.

4. These questions are also not easy to assess from an economic perspective. As is the case with any other coordination of competitive parameters, there is the risk that competition – and thus innovation competition for sustainable products and technologies – will be weakened. A prominent example of this is the technical collaboration in which German automobile manufacturers engaged in the field of "AdBlue" technology which helps to eliminate harmful nitrogen oxide emissions. The European Commission came to the conclusion that it prevented innovations in the field of emissions cleaning.[5] In other cases, by contrast, free market forces could in fact stand in the way of a desirable transformation towards a sustainable economy and society if companies find it difficult to unilaterally introduce sustainable products and technologies. This may be the case, for example, where consumers are not able to accurately assess the value of sustainable products, in which case it may be beneficial for companies to coordinate their actions to overcome market inefficiencies.

5. There are, therefore, complex economic and legal issues to clarify in relation to sustainability. This Report focuses on select issues which are relevant to antitrust law: How can sustainability issues (e.g. climate action) be balanced

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1 European Commission, A European Green Deal, https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en [accessed 3 Feb. 2022].

2 Daring More Progress – Alliance for Freedom, Justice and Sustainability. 2021–2025 Coalition Agreement between the SPD, ALLIANCE 90/THE GREENS and the FDP, p. 55 (German only).

3 Inderst, R., Thomas, S., Nachhaltigkeit und Wettbewerb: Zu einer Reform des Wettbewerbsrechts für die Erreichung von Nachhaltigkeitszielen, SAFE Policy Letter 94, 2022; Holmes, S., Climate change, sustainability, and competition law, *Journal of Antitrust Enforcement* 8, 2020, 354.

4 ACM Netherlands Authority for Consumers and Markets, Guidelines: Sustainability Agreements- Opportunities within Competition Law, 2022; Federal Cartel Office, Open Markets and Sustainable Economic Activity- Public Interests as a Challenge to Antitrust Law Practice, 2020 (German only).

5 https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581 [accessed 30 March 2022].

with competitive effects (e.g. higher prices)? On what legal basis can be decided how to do that balancing exercise? Should that balancing be done within or outside the antitrust law framework?

2 Focusing on climate and environmental targets

6. The term "sustainability" refers to a broad range of societal objectives. In their 2030 Agenda for Sustainable Development, adopted in 2015, the Member States of the United Nations agreed on 17 Sustainable Development Goals (SDGs). They cover ecological, economic and social topics and comprise a total of 169 individual targets. Germany's Sustainable Development Strategy (*Nachhaltigkeitsstrategie*) is oriented to these global targets, too. One of the Strategy's main focuses is climate action. In 2019, the Federal Government adopted a Climate Change Act (*Klimaschutzgesetz*) and declared climate change mitigation to be a cross-cutting issue to which all policy areas are to be aligned.[6] At the EU level, the environment-specific cross-cutting clause of Article 11 of the Treaty on the Functioning of the European Union (TFEU) also obliges governments to integrate environmental protection requirements when defining and implementing the Union's policies and activities. Environmental objectives are put in concrete terms in Article 9 of the Taxonomy Regulation, namely a) climate change mitigation; b) climate change adaptation; c) the sustainable use and protection of water and marine resources; d) the transition to a circular economy; e) pollution prevention and control; and f) the protection and restoration of biodiversity and ecosystems.[7]

7. In order to be able to account for sustainability in an antitrust context, it must be possible to apply the term to practical cases. That means that targets must be clearly defined and their achievement empirically verifiable wherever possible so that they can be balanced with competition targets in practice. That balancing requires a systematic and uniform approach to be objective. Both the Horizontal Guidelines relating to Article 101(1) TFEU and the Horizontal Guidelines relating to Regulation 139/2004 ("EC Merger Regulation") state that a restriction of competition can be justified if the efficiencies at least compensate consumers for any actual or likely negative impacts.[8] The extent to which sustainability requirements can also be subsumed under the term "efficiencies" is currently being discussed in the literature.[9] In March 2022, the European Commission published draft revised guidelines for horizontal cooperation agreements. They contain a separate chapter on assessing sustainability efficiencies[10] which clearly sets out that sustainability issues can also be taken into account as efficiencies.

8. To gather initial experience when it comes to assessing such sustainability efficiencies, it appears to make sense to first delimit the term along the two ecological dimensions of climate protection and environmental protection. Climate and environmental targets can be more clearly defined from an economic perspective than other sustainability targets. Economics already has several tools at its disposal for evaluating efficiencies in these areas. For instance, climate and environmental economics has wide-ranging experience when it comes to quantifying damage to the environment and climate. The EU Emissions Trading System in particular can be used to attach a price to negative externalities on the climate and thus to make them economically manageable. This (monetary) assessment appears much more difficult in relation to other, social sustainability objectives and thus raises normative questions. It would be necessary to first clarify various matters, namely to what extent other targets can

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6 Federal Climate Change Act (*Bundes-Klimaschutzgesetz*) of 12 December 2019 (Federal Law Gazette I, p. 2513), as amended by Article 1 of the Act of 18 August 2021 (Federal Law Gazette I, p. 3905).

7 Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ L 198/13, 22.6.2020.

8 Official Journal of the European Union, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31/5, 5.2.2004, para. 76; Communication from the Commission, Guidelines on the application of Article 81(3) of the Treaty, OJ C 101/97, 27.4.2004, para. 85.

9 Holmes, S., Climate change, sustainability, and competition law, loc. cit.; Schley, O., Symann, M., Art. 101 Abs. 3 AEUV goes green, *Wirtschaft und Wettbewerb* 01, 2022, 2.

10 European Commission, Approval of the content of a draft for a Communication from the Commission: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 164/1, 19.4.2022.

be classified as efficiency gains as part of an assessment under antitrust law. Both national and Union lawmakers have already emphasised the importance of climate and environmental protection.

9. The Monopolies Commission will thus first be focusing in this Report on the balancing of competitive aspects and climate and environmental aspects. Unless otherwise stated, "sustainability" is here used synonymously with climate and environmental protection.[11] Once sufficient experience has been gained with assessing ecological sustainability issues under antitrust law, the investigation should be expanded to include other dimensions of sustainability targets which are on an equal footing with the ecological objectives set out in the 2030 Agenda. Narrowing the definition of the term "sustainability" to climate and environmental protection facilitates an understanding of the issue and allows the Monopolies Commission to propose recommended actions.

3 Appraisal of sustainability in an antitrust law framework

10. The first issue which needs to be clarified is whether and, if so, how sustainability targets can be balanced with the protection of competition. First, it must be examined whether there are any economic reasons for justifying certain restrictions of competition so as to achieve sustainability targets (section 3). If the answer is "yes", then the next step is to discuss how sustainability issues can be appraised in an antitrust law framework (section 3.1). This Report first and foremost conducts its examination in relation to horizontal cooperations given that national competition authorities have already issued a few decisions in this regard.[12]

11. In many cases there are likely to be complementarities between competition and sustainability targets. Efforts undertaken by companies to introduce more sustainable products or to engage in more sustainable production practices can generally be regarded as competition parameters. When consumers have a preference for sustainable products – for example sustainably produced food – then companies will align their products and services in the market to those preferences in order to remain competitive.[13] In such cases sustainability can thus often be regarded as a quality feature which is relevant to customers' choices.[14]

12. Hence, competition in particular, which is a process of discovery, will often lead to the creation of incentives to invest in sustainable technologies.[15] Restrictions of competition, for example in the form of mergers or cooperations, by contrast, could lead to a restriction of innovation competition and to the potentials of sustainable technologies not being fully tapped into. In 2021, the European Commission decided in such a case that the technical collaboration between German automobile manufacturers in the field of "AdBlue" technology to eliminate harmful nitrogen oxide emissions had hindered the development of exhaust cleaning technologies which went beyond statutory requirements and thus reduced emissions. This was deemed to be a restriction of innovation competition which contravened antitrust law. According to the European Commissioner for Competition, Margrethe Vestager, this example shows that legitimate technical collaborations in certain areas can restrict competition through

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11 The Federal Cartel Office has also looked into sustainability initiatives beyond the climate action context, see https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/18_01_2022_Nachhaltigkeit.html;jsessionid=AB783C3590E0E2159721A8FD45C81F09.1_cid387?nn=3591286 [accessed 28 Feb. 2022].

12 ACM Netherlands Authority for Consumers and Markets, press release dated 26 Sept. 2013, available at: https://www.acm.nl/en/publications/publication/12082/ACM-analysis-of-closing-down-5-coal-power-plants-as-part-of-SER-Energieakkoord; ACM Netherlands Authority for Consumers and Markets, press release dated 26 Jan. 2015, available at: https://www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainability-arrangements-concerning-the-Chicken-of-Tomorrow.

13 M. Kitzmueller, J. Shimshack, Economic Perspectives on Corporate Social Responsibility, *Journal of Economic Literature* (2)50, 2012, 51.

14 See, in more detail, para. 41ff.

15 Aghion, P., Bénabou, R., Martin, R., Roulet, A., Environmental Preferences and Technological Choices: Is Market Competition Clean or Dirty?, National Bureau of Economic Research (26921), 2020; Schinkel, M. P., Spiegel, Y., Can collusion promote sustainable consumption and production?, *International Journal of Industrial Organization* 53, 2017, 371.

innovations aimed at reducing environmental impacts.[16] This is in line with observations made in the field of economics, namely that legitimate agreements between undertakings (e.g. regarding sustainability issues) always risk being expanded to include agreements regarding aspects which restrict competition (e.g. prices).[17]

13. However, in some cases efficiencies may also arise when companies collaborate, for example when they reach agreement to jointly develop an innovation. The advantages of such collaboration can be that technologies for achieving sustainability objectives can be developed more quickly and, possibly even, better if companies pool their know-how and resources or agree on common standards. Cooperations or mergers may also be necessary for cost reasons so as to be able to bring sustainability measures to market, for instance where economies of scale can only be achieved through joint production. Since such potential sustainability efficiencies are no different from other efficiencies in other areas, they can also be exempt under the same currently applicable rules, meaning that there is also no need to adapt existing rules and regulations.

14. Besides the efficiencies which have already been set out in the guidelines on horizontal cooperations and mergers of which account can generally be taken, there is a need for debate around whether there are other specific sustainability efficiencies which can justify restrictions of competition, and whether existing rules and regulations need to be adapted so that account can be taken of these. Such specific reasons are above all debated in relation to economic factors responsible for market failures in relation to externalities and information deficits and asymmetries. Externalities arise where market participants do not fully take into account how their decisions affect third parties. Negative externalities can be particularly relevant in regard to sustainability where consumers do not take sufficient account of what influence their consumption decisions have on the climate or the environment, for instance. Another reason can be the lack of or complex information about product features (e.g. their contribution to sustainability), which cannot all be sufficiently reflected in a buying context.[18] Consumers generally have less information about a product's or a service's contribution to sustainability at their disposal than companies do (information asymmetries). Where this is the case, consumers may well choose cheaper and less sustainable alternatives since they are unable to accurately assess the value of the more expensive sustainable alternatives. Also, behavioural economics has taught us that in situations in which consumers are required to process various pieces of complex information they often base their decisions on price, since it is the easiest deciding factor to process.[19]

15. In such cases companies may have difficulty establishing sustainable products and services in the market. Where individual companies internalise the externalities and use more sustainable technologies in their production processes or offer more sustainable alternatives, this generally comes at greater cost to them than to their competitors. For the aforementioned reasons consumers might, however, often choose cheaper but less sustainable alternatives. On account of this competitive disadvantage (known as the "first-mover disadvantage"), companies often shy away from unilaterally introducing sustainable production processes and sustainable products. To ensure that the benefits associated with the use of climate-friendly technologies actually arise, it may be necessary to agree, for example, to gradually eliminate harmful technologies and to use sustainable raw materials.

16. Regulation (EC) No 1/2003[20] and the Seventh Amendment to the Act on Restraints of Competition (*7. GWB-Novelle*) replaced the system for reporting agreements which restrict competition with a system comprising a legal

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16 https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581 [accessed 30 March 2022].

17 Awaya, Y., Krishna, V., On Communication and Collusion, *American Economic Review* (2)106, 2016, 285; Fonseca, M., Normann, H.-T., Explicit vs. tacit collusion – The impact of communication in oligopoly experiments, *European Economic Review* (8)56, 2012, 1759.

18 Inderst, R., Thomas, S., Reflective willingness to pay: Preferences for sustainable consumption in a consumer welfare analysis, *Journal of Competition Law & Economics* (4)17, 2021, 848.

19 Spiegler, R., *Bounded Rationality and Industrial Organization*, New York 2011.

20 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 1/1, 4.1.2003.

exception rule and self-assessment. As a result, the involved undertakings themselves conduct a review, or have a review conducted, into whether a proposed cooperation with competitors conforms to antitrust law, and they then carry the associated legal risk of such a cooperation.[21] Owing to this risk, companies may in the past have been deterred from launching own and desirable sustainability initiatives.

17. However, agreements which are aimed at achieving sustainability objectives also need to be measured against antitrust law. If they restrict competition, then it is also impossible to achieve optimum welfare if economic resources are no longer optimally employed or competition is harmed in the long run. Restrictions of competition can also lead to sustainability innovations not being introduced to the same degree as might be expected in functioning competition.[22]

3.1 General exceptions under antitrust law for sustainability initiatives not recommended

18. Where consumers value sustainability, companies should independently decide how to turn that preference to their advantage. Where there is demand for sustainable products, restrictions on competition as defined under antitrust law are thus unlikely to be indispensable to achieving sustainability targets. In addition, the draft horizontal guidelines relating to Article 101 TFEU emphasise that wherever national or Union law obliges companies to comply with sustainability targets then restrictions of competition cannot be regarded as indispensable for complying with requirements. This is because the legislature has already decided that each company itself has to achieve this target.[23]

19. In other contexts, however, restrictions of competition could also be beneficial when it comes to achieving sustainability targets.[24] It would then be necessary to discuss whether and, if so, how to conduct a balancing between sustainability targets and potential competitive harm. The European Commission made proposals in that regard in the revised guidelines for horizontal cooperation agreements, which are currently under consultation.

20. On the one hand, certain cooperations could be directly exempt from the scope of application of Article 101(1) TFEU and section 1 of the Act against Restraints of Competition (ARC; *Gesetz gegen Wettbewerbsbeschränkungen*) if it is per se assumed that certain types of agreement are of less concern from an antitrust law perspective.[25] On the other hand, introducing an exception to the ban on cooperation under Article 101(3) TFEU and section 2 ARC could be considered in which each individual case is assessed under antitrust law to see whether sustainability interests outweigh any potential competitive harm.

21. Cooperations which are linked to a potential restriction of competition will not always be covered by antitrust law.[26] For instance, certain cooperations relating to the creation of norms and standards are exempt from the scope of application of the cartel ban under Article 101(1) TFEU and section 1 ARC.[27] They include agreements which lay

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21 Monopolies Commission, General Competition Law in the Seventh Amendment to the Act on Restraints of Competition. Special Report by the Monopolies Commission under Section 44 (1) Sentence 4 ARC, 2004, para. 11 (German only).

22 Aghion, P., Bénabou, R., Martin, R., Roulet, A., Environmental Preferences and Technological Choices: Is Market Competition Clean or Dirty?, loc. cit.; Schinkel, M. P./Spiegel, Y., Can collusion promote sustainable consumption and production?, loc. cit.

23 European Commission, Approval of the content of a draft for a Communication from the Commission: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, loc. cit., para. 332.

24 Ibid., para. 586.

25 Article 210a of Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products ("CMO Regulation"), as amended by Regulation 2021/2117, includes such an exception to Article 101 TFEU. Accordingly, exceptions under antitrust law are in principle possible for sustainability initiatives in the field of environmental protection, animal health and animal welfare or to reduce the use of pesticides.

26 The draft guidelines of the Netherlands Authority for Consumers and Markets (ACM) contain examples of cooperations in the field of sustainability which could not be covered by Article 101(1) TFEU; ACM Netherlands Authority for Consumers and Markets, Guidelines: Sustainability Agreements- Opportunities within Competition Law, loc. cit.

27 European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11/1, 14.1.2011, para. 257ff.

down norms and standards relating to the environmental performance of products or production processes. Under the currently applicable horizontal guidelines, agreements concerning norms and standards essentially serve to determine technical or quality-related requirements applicable to existing or future products, production processes, services and methods.

22. The draft horizontal guidelines also emphasise that standards relating to the achievement of sustainability targets may also be exempt from the scope of application of Article 101(1) TFEU if the following cumulative criteria are met: (1) The procedure for developing the sustainability standard is transparent and all interested competitors can participate in the process leading to the selection of the standard. (2) The standard is not exclusive and obligatory and does not lead to any restriction of consumer choice. (3) The participating undertakings should remain free to adopt a higher sustainability standard than the one agreed upon with the other parties of the agreement. (4) The parties to the sustainability standard should not exchange commercially sensitive information which is not necessary for the development, the adoption or the modification of the standard. (5) Effective and non-discriminatory access to the outcome of the standardisation procedure should also be ensured for undertakings which did not participate in the standardisation development process. (6) The sustainability standard should not lead to a significant increase in price or to a significant reduction in the choice of products available on the market. (7) There should be a mechanism or a monitoring system in place to ensure that undertakings which adopt the sustainability standard indeed comply with the requirements of the standard.[28]

23. Where these cumulative conditions are met, the draft horizontal guidelines assume that a sustainability standard is unlikely to have a negative impact on competition. Failure to comply with one or more of these conditions does not create a presumption that the agreement restricts competition within the meaning of Article 101(1) TFEU. However, if some of these conditions are not met, it will in particular be necessary to assess whether and, if so, to what extent the agreement is likely to – or actually does – lead to an appreciable adverse effect on competition.[29]

24. According to the case law of the European Court of Human Rights (ECHR), forms of cooperation for private self-regulation purposes which restrict competition may be exempt from the scope of application of Article 101(1) TFEU on account of objectives set outside the competitive framework. In its ruling in the *Wouters* case, the ECHR came to the conclusion that regulations issued by the Bar Association of the Netherlands providing for the separation of partnerships between members of the Bar and partnerships between accountants do not violate Article 101(1) TFEU.[30] The ban on entering into partnerships did restrict competition, the ECHR ruled, but this was necessary to guarantee the proper practice of the profession of lawyer. In another ruling the ECHR held that anti-doping regulations are inextricably linked to the organisation and smooth running of a sports competition. Where these regulations serve to ensure that the competition is conducted fairly, they are not covered by the ban under Article 101(1) TFEU, that is if they are limited to what is necessary to ensure the proper functioning of the sports competition, the ECHR held.[31] There is as yet no ECHR case law which recognises a comparable exception from the cartel ban for cooperations for self-regulation purposes in the field of climate and environmental protection.

25. So-called necessary ancillary agreements are likewise not covered by the scope of Article 101(1) TFEU. They include ancillary agreements which restrict competition and in fact make the performance of a main contract (which conforms to antitrust law) possible in the first place. The condition is that the ancillary agreement is objectively necessary for implementing the main measure and that it is proportionate. There is debate in the literature as to whether restrictions of competition which contribute to sustainability might fulfil the necessary conditions to be classed as such a necessary ancillary agreement.[32]

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28 European Commission, Approval of the content of a draft for a Communication from the Commission: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, loc. cit., para. 572.

29 Ibid., para. 574.

30 ECHR, 19 February 2002, Case C-309/99, Wouters and Others.

31 ECHR, 18 July 2016, Case C-519/04P, Meca-Medina.

32 Holmes, S., Climate change, sustainability, and competition law, loc. cit.

26. Whether and, if so, to what extent cooperations in the field of climate and environmental protection meet the requirements made of agreements relating to standards which are not covered by Article 101(1) TFEU and section 1 ARC is dependent on the content, form and genesis of the respective cooperation. It remains to be seen what direction the ECHR's case law with regard to cooperations aimed at protecting the climate and environment will take going forward. Nevertheless, Article 101(3) TFEU and section 2 ARC provide a statutory exception rule with clearly defined conditions. It therefore appears to make little sense, especially with regard to ensuring the required legal certainty, to circumvent these conditions with a view to cooperations aimed at climate and environmental protection by introducing an unwritten exception rule. In the view of the Monopolies Commission it is more expedient to further develop the existing exception rule where necessary. This is also the approach adopted by the European Commission in its draft horizontal guidelines, according to which agreements which restrict competition cannot escape the prohibition of Article 101(1) TFEU for the sole reason that they are necessary for the pursuit of a sustainability objective.[33]

3.2 Sustainability should be assessed in the context of efficiencies

27. Where there is a potential restriction of competition, it is possible to conduct a balancing of competition aspects with sustainability aspects as part of an assessment of efficiencies. In the case of cooperations this is done on the basis of the criteria applicable to exemptions under Article 101(3) TFEU and section 2 ARC. Accordingly, cooperations which exhibit effects leading to restrictions of competition can fall under the exception rule if the following cumulative conditions are fulfilled:[34] The agreement must (1) contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress; consumers must (2) receive a fair share of the resulting benefits; the involved undertakings must (3) not have restrictions imposed on them which are not indispensable to the attainment of the aforementioned objectives; and the involved undertakings must (4) not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question. Where these four conditions are fulfilled, then according to the current horizontal guidelines, an agreement enhances competition within the relevant market "because it leads to the undertakings concerned to offer cheaper or better products to consumers, compensating the latter for the adverse effects of the restrictions of competition".[35]

28. At the EU level, the balancing of efficiencies in a merger procedure is enshrined in what is known as the "efficiency defence" under Recital 29 of the EC Merger Regulation. This in principle opens up the possibility of also regarding sustainability aspects as efficiency improvements and balancing them with merger-specific restrictions of competition.[36]

29. In Germany, it is possible, as part of merger control, to assess efficiencies and other benefits under the balancing clause (section 36 (1) half-sentence 2 ARC) and as part of the ministerial authorisation procedure (section 42 ARC). Under the balancing clause a merger may be cleared if it leads to improvements to the conditions of competition and the improvements outweigh the impediment toon competition. Efficiencies could, in the broadest sense, be regarded as improvements to the conditions of competition. Under section 36 (1) ARC, however, only those efficiencies can be taken into consideration which are exhibited on markets other than those on which the significant impediment to competition occurs (i.e. on improving markets). Further, improvements must be structural in nature. In past merger control procedures the Federal Cartel Office has left open the question of whether account may also be taken of efficiencies in the course of the "significant impediment to effective competition", or SIEC, test when

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33 European Commission, Approval of the content of a draft for a Communication from the Commission: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, loc. cit., para. 548.

34 Communication from the Commission, Guidelines on the application of Article 81(3) of the Treaty, loc. cit., para. 42.

35 Ibid., para. 34.

36 Council of the European Union, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations of between undertakings, OJ L 24/1, 29.1.2004, Recital 29.

assessing competition. It considered that the submissions made by those involved in the merger did not sufficiently meet the requirements set by the European Commission in that regard.[37] This matter has not yet been clarified by the highest courts in Germany.

30. There is ongoing debate in the literature regarding whether and, if so, how sustainability targets can be regarded as efficiency within the context of conditions (1) and (2). The two conditions needed for the exception rule to apply are interconnected since the efficiencies (condition 1) have to benefit consumers (condition 2). The actual balancing between advantages and disadvantages is done in relation to "appropriate consumer participation".[38]

Cost savings and qualitative efficiencies

31. Neither Article 101(3) TFEU, section 2 ARC, the EC Merger Regulation nor the relevant guidelines provide for criteria for balancing various aspects, they merely name more or less abstract potential efficiency benefits. These include cost savings and qualitative efficiencies which create added value in the form of new or better products or greater product diversity. It in principle appears possible to subsume sustainability improvements under these two types of efficiencies. For instance, climate protection measures can on the one hand lead to direct cost savings, especially if the sector in question is part of a national or EU emissions trading system, meaning that undertakings have to buy fewer CO_2 certificates. Assessing these and other cost-reducing measures ought not to pose any other fundamental problems in relation to antitrust law than when assessing efficiencies in other areas.[39] Where better climate protection goes hand in hand with cost savings, these ought to be quantifiable, since market prices have been calculated for CO_2 emissions in many markets. It is thus possible to compare the advantages and disadvantages of agreements based on the same monetary units.

32. Further, companies can also assert qualitative efficiencies. The production of goods can also be improved where new or better products are manufactured[40] or new products come onto the market more quickly.[41] Where undertakings agree, for instance, jointly to bring new and more climate-friendly products onto the market more quickly, this could also be regarded as an efficiency improvement. The draft horizontal guidelines now more clearly define such sustainability efficiencies and clarify that the use of cleaner production or distribution technologies or less pollution can be regarded as an efficiency gain.[42] This clarification ought to provide more legal certainty for those undertakings which invoke such efficiencies. The Monopolies Commission welcomes this.

33. Despite these clarifications, it is still necessary to clarify, for instance, which climate action goals are deemed to be relevant towards whose achievement potential efficiency improvements can contribute. Do they include the climate policy target set by the international community of limiting global warming to below 2°C or sectoral, national or EU CO_2 savings potentials? These targets should be specified as precisely as possible in order to be able to conduct a balancing of the corresponding efficiencies with an established impediment to competition. According to the draft horizontal guidelines it is always necessary to provide concrete empirical evidence of the value of efficiencies; basing their rationale on economic theory alone is not sufficient.[43] The advantages and disadvantages for consumers must,

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37 Federal Cartel Office, Decision in the merger control proceedings B5-29/18, 25 June 2018, para. 372 (German only).

38 See Pohlmann, P., *Grundfragen des Art. 81 Abs. 3 EG, Frankfurter Kommentar zum Kartellrecht*, 2008, para. 231f.

39 See also Federal Cartel Office, Open Markets and Sustainable Economic Activity – Public Interests as a Challenge to Antitrust Law Practice, loc. cit., p. 23 (German only).

40 Commission decision of 11 October 1988, OJ L 305/33, 10.11.88, Continental/Michelin, para. 23.

41 Ibid., para. 24.

42 European Commission, Approval of the content of a draft for a Communication from the Commission: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, loc. cit., para. 578.

43 Ibid., para. 579; Official Journal of the European Union, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations of undertakings, loc. cit., para. 86.

therefore, also be monetarily quantified as precisely as possible. This alone ought to prove which climate and environmental protection goals are in fact examined in detail.

34. A balancing with qualitative efficiencies will likely pose bigger challenges because no market price has been established for certain qualitative improvements, in particular in regard to environmental protection. Nevertheless, even in those cases there are a number of economic assessment methods which can be applied for calculation purposes, for instance so-called damage avoidance cost approaches.[44] These and other methods can be used to determine a monetary value which consumers are prepared to pay (e.g. for more biodiversity in city parks), making it possible to compare the costs and benefits of an agreement. These approaches now need to be both adapted so as to be applicable to an assessment under antitrust law and enlarged upon. It is debatable to what extent the competition authorities are currently in a position to conduct such an assessment given that the quality of the data used and the robustness of the approaches applied vary.

35. A restriction of competition must also be balanced with efficiencies as part of an assessment of appropriate consumer participation. Restrictions of competition in particular become problematical from the point of view of antitrust law when consumers' freedom of choice is restricted. That can above all be the case in regard to climate protection when cheaper products are to be collectively replaced with more expensive but more climate-friendly ones. First, quality-improving effects could be thwarted by cost-increasing effects.[45] Second, whether there are in fact any quality-improving effects in the first place also needs to be evaluated.[46]

Efficiencies outside the market

36. What has been key to date is that efficiencies at least outweigh the adverse competitive effects for consumers.[47] However, assessments under antitrust law are more difficult to conduct on account of the fact that efficiencies especially in the field of climate protection are not limited to the relevant competitive markets. The positive impacts of climate protection measures will also be felt in other product or geographical markets and/or will also have an impact on society as a whole. Competitive disadvantages, by contrast, will likely continue to impact consumers in the relevant market.

37. Account can currently only be taken of those efficiencies arising in the market affected by the restriction on competition.[48] The predominant view is that negative impacts on consumers in a market cannot be balanced out by positive impacts in other markets.[49] Only the advantages for consumers in the relevant market can be included in

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44 Federal Cartel Office, Open Markets and Sustainable Economic Activity – Public Interests as a Challenge to Antitrust Law Practice, loc. cit., p. 23–26 (German only); Schley, O., Symann, M., Art. 101 Abs. 3 AEUV goes green, loc. cit., p. 4; ACM Netherlands Authority for Consumers and Markets, Guidelines: Sustainability Agreements- Opportunities within Competition Law, loc. cit., para. 57ff.; Inderst, R., Sartzetakis, S., Xepapadeas, A., Technical report on sustainability and competition: A report jointly commissioned by the Netherlands Authority for Consumers and Markets (ACM) and the Hellenic Competition Commission (HCC), 2022.

45 It is, in principle, not required that consumers receive a share of each and every efficiency gain; it suffices that consumers receive a fair share of the overall benefits. Where it is likely that a restrictive agreement will lead to higher prices, consumers must be fully compensated through increased quality or other benefits; Communication from the Commission, Guidelines on the application of Article 81(3) of the Treaty, loc. cit., para. 86.

46 See para. 42ff.

47 Communication from the Commission, Guidelines on the application of Article 81(3) of the Treaty, loc. cit., para. 85; Official Journal of the European Union, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations of undertakings, loc. cit., para. 79.

48 Communication from the Commission, Guidelines on the application of Article 81(3) of the Treaty, loc. cit., para. 85; Official Journal of the European Union, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations of undertakings, loc. cit., para. 79.

49 Federal Cartel Office, Open Markets and Sustainable Economic Activity – Public Interests as a Challenge to Antitrust Law Practice, loc. cit., p. 27 (German only). In the *Master Card Inc.* case the ECHR found that the advantages of a measure must always be felt in each market in which the restriction of competition arises; ECHR, 19 Dec. 2007, Comp/34.579, Master Card Inc. However, in the

the balancing exercise, the ECHR has held.[50] In the *BBC Brown Boveri* case concerning technical progress relating to electric vehicles the European Commission also referred to the environmental benefits for the general public, although when it came to consumer participation it did not refer to these, only to the availability of a new type of vehicle. Account should only have been taken of environmental benefits, it held, that is of the extent of the benefit accruing to the drivers of electric vehicles.[51] Account can, thus, currently only be taken of efficiencies, that is increased sustainability, if consumers in the relevant market benefit from them. However, on account of the externality of efficiencies beyond the relevant market this can lead to a significant under-recording of the overall impact of the efficiencies in question.

38. That is why a further matter to be clarified is whether account is only to be taken of efficiencies in the relevant market or also of those which have an impact outside the market, though by dint of a restriction of competition in the relevant market.[52] Account can, in principle, also be taken of efficiencies in related markets, although climate protection efficiencies are also likely to have an impact on many unrelated markets.

Time horizon of efficiencies

39. Another issue relates to the temporal dimension. The positive impacts of climate protection measures will often only be indirectly felt by future cohorts of consumers, and with a time lag, while the impediment to competition has a more direct impact on current consumers. When considering dynamic competition it should, in principle, be possible to also take account of future consumers.[53] Nevertheless, preferences can also change over time, and account would also have to be taken of this fact when balancing competitive and sustainability targets today.[54]

40. Various approaches are being discussed in the literature in an attempt to address these issues. One proposes accounting for climate action efficiencies as part of what has previously been termed "consumer welfare" and thus also taking account of any distortions of consumer behaviour. Another proposes broadening the definition of the term "consumer" beyond the relevant competitive market so as also to take account of efficiencies outside the market.[55] Both approaches are addressed in the draft horizontal guidelines; however, they raise questions.

3.2.1 Establishing consumer welfare in relation to sustainability a challenge for competition authorities

41. It appears possible to balance sustainability and competition under the current concept of consumer welfare in the relevant competitive market where sustainability improvements go hand in hand with increased benefits for consumers in the relevant market. The increase in benefits can be both direct and indirect in nature, as clarified in

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CEDED case the European Commission also recognised benefits to society as a whole; European Commission, Commission Decision of 24.1.1999, Case IV.F.1/36.718, OJ L 187/47, 26.7.2000 – CECED.

50 Pohlmann, P., *Grundfragen des Art. 81 Abs. 3 EG, Frankfurter Kommentar zum Kartellrecht*, loc. cit., para. 263.

51 Commission, Commission Decision of 11 October 1988, OJ No L 301/68, 4.11.88, BBC Brown Boveri.

52 This, among other things, was the subject of a ministerial authorisation relating to the proposed merger of Miba AG with Zollern GmbH & Co. KG; Monopolies Commission, Special Report by the Monopolies Commission under Section 42 (5) Sentence 1 ARC: Proposed merger of Miba AG with Zollern GmbH & Co. KG, 18 April 2019 (German only). The Report argued, among other things, that a restriction of competition in the market for bearings led to wind turbines being operated more efficiently and thus a possible contribution being made towards climate change mitigation. This efficiency thus had an impact outside the relevant market but was determined in the relevant market on account of a restriction of competition. The Monopolies Commission argued that the spill-over effects on potential efficiencies in other markets were too vague, and opposed granting ministerial authorisation.

53 Although account is in fact traditionally taken of dynamic effects in the same market.

54 Inderst, R., Thomas, S., Nachhaltigkeit und Wettbewerb: Zu einer Reform des Wettbewerbsrechts für die Erreichung von Nachhaltigkeitszielen, loc. cit., p. 15.

55 Schley, O., Symann, M., Art. 101 Abs. 3 AEUV goes green, loc. cit.

the draft horizontal guidelines.[56] There may, for example, be a direct increase in benefits where consumers in the relevant market feel that environmentally friendly products are of higher quality. Indirect benefits can arise on account of consumers in the market being aware that their consumption has an impact on others. In these circumstances, consumers will not experience a direct improvement to a product. However, they are prepared to pay a higher price for a sustainable product or to limit their consumption options so that society or future generations can benefit from their decision. Such indirect benefits do not represent any fundamentally new challenges for competition policy. Regardless of whether the benefits are direct or indirect in nature, they go hand in hand with a willingness to pay more, meaning that both benefits are likely to be regarded as an increase in quality.

42. Nevertheless, it is difficult to provide the relevant empirical evidence in regard to many sustainability issues, and in some cases it leads to ambivalent evaluations. The value which consumers state they attach to sustainable products when surveyed often differs considerably from their actual purchase decisions.[57] Various reasons are being discussed as to why this is the case.[58] One obvious one is that consumers' manifest willingness to pay for sustainable products is often lower than the willingness to pay for those products which they disclose in surveys. Another reason may be that consumers are in fact more willing to pay more for sustainable products but do not manifest that willingness in the market because they assume that their own individual demand does not lead to a more sustainable supply.

43. Another reason may be the lack of or complex information about product features (e.g. their contribution to climate change mitigation), which cannot all be sufficiently reflected in a purchasing context.[59] Based on a simple system in accordance with the concept of heuristics, consumers then often rely on price as the deciding factor which is easiest to process.[60] Further, various distortions of behaviour are being discussed in the behavioural economics literature which are of particular relevance in regard to sustainability, first and foremost hyperbolic discounting.[61] One relevant aspect of hyperbolic discounting is that consumers prefer a short-term benefit even if it is disproportionately lower in the long term. That means they take decisions today which they would not repeat in the future although they are aware today of what impact their actions will have (e.g. on the climate).

44. If account is now taken of such distortions of behaviour, then the fact that consumers prefer a cheaper product to a more expensive alternative although the latter is more sustainable does not necessarily indicate less willingness to pay for sustainable products. Determining consumer welfare based on manifest preferences may, thus, possibly lead to other outcomes than when various distortions of behaviour are appraised in relation to sustainability criteria.

45. However, the competition authorities are then faced with the issue of how to take account of such distortions of competition when conducting a consumer welfare analysis.[62] First, the different methods may be of varying robustness and the data used may be of varying reliability. Second, it is necessary to clarify on what normative basis a decision can actually be taken that consumers' manifest willingness does not reflect their actual preferences. This may pose the risk that a rather paternalistic perspective is adopted where others feel that they are more aware of

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56 European Commission, Approval of the content of a draft for a Communication from the Commission: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, loc. cit., para. 594.

57 According to a 2019 study by White et al., 65% of consumers have a positive attitude to environmentally friendly products and services, but only 26% are also prepared to pay for them; White, K., Hardisty, D., Habib, R., The elusive green consumer, *Harvard Business Review* (July–August), 2019, 124.

58 Inderst, R., Thomas, S., Nachhaltigkeit und Wettbewerb: Zu einer Reform des Wettbewerbsrechts für die Erreichung von Nachhaltigkeitszielen, loc. cit.

59 Inderst, R., Thomas, S., Reflective willingness to pay: Preferences for sustainable consumption in a consumer welfare analysis, loc. cit.

60 Spiegler, R., *Bounded Rationality and Industrial Organization*, loc. cit.

61 Laibson, D., Golden eggs and hyperbolic discounting, *Quarterly Journal of Economics* (2)112, 443.

62 Inderst, R., Sartzetakis, S., Xepapadeas, A., Technical report on sustainability and competition: A report jointly commissioned by the Netherlands Authority for Consumers and Markets (ACM) and the Hellenic Competition Commission (HCC), loc. cit.

consumers' order of preferences than consumers themselves.[63] Another open question appears to be which legal basis is to be used to assess consumer participation aside from manifest preferences.[64] In the draft horizontal guidelines reference is, further, made to the risk that undertakings may attempt to superimpose their own preferences on consumers.[65] To resolve these problems the draft makes it clear that "useful and appropriate context" needs to be provided when surveying consumer preferences.[66] But assessing what is "useful and appropriate" appears to pose a challenge for competition authorities.

46. To make this process less complex, the Netherlands competition authority (ACM) suggests not quantifying potential efficiencies if the joint market share of the undertakings involved in a cooperation is less than 30% and it can be assumed that the efficiencies created outweigh any potential competitive harm. Given the principle of self-assessment and the anticipated complexity of balancing efficiencies it in principle appears appropriate to introduce criteria for exempting possible cooperations in order to take some of the burden off both the undertakings and the competition authorities. However, that presupposes that consideration is as a matter of principle given to sustainability aspects in the context of assessments under antitrust law. Which criteria are to be applied to such an exemption is still a matter for debate.

3.2.2 Accounting for public benefits leads to distribution issues

47. One approach goes further by proposing expanding the concept of consumer participation beyond the relevant market.[67] Even if consumers in the market do not benefit from an agreement, they do benefit if there are externalities outside the market. This, first, raises the question of whether account should be taken of such efficiencies outside the relevant market in the context of a competitive analysis. If the answer is "yes", then this, second, raises the question of how far that concept should be expanded geographically.[68] That is likely to be dependent on whether the European Commission or national competition authorities are responsible for examining a particular matter. If the European Commission conducts the examination, the efficiencies can be assessed within the EU. If the Federal Cartel Office conducts the examination, then in the opinion of the Monopolies Commission account should only be taken of those efficiencies which have an impact in Germany, since the scope of the Act on Restraints of Competition only encompasses Germany. The fact that the Federal Government, a constitutional organ, is obliged only to the general public in Germany also speaks against considering efficiencies outside of Germany in that case.[69]

48. The draft horizontal guidelines propose a somewhat narrower approach. In order that account can be taken of efficiencies outside the market, the "parties should be able to … demonstrate that the consumers in the relevant

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63 For a more in-depth discussion of the practical implications of behavioural economics and "libertarian paternalism", see Bruttel, L., Stolley, F., Güth, W., Kliemt, H., Bosworth, S., Bartke, S., Schnellenbach, J., Weimann, J., Haupt, M., Funk, L., Nudging als politisches Instrument- gute Absicht oder staatlicher Übergriff, *Wirtschaftsdienst* (11)94, 767. Haucap also raises the issue that the competition authorities may be subject to distortions of competition too, see Haucap, J., Implikationen der Verhaltensökonomik für die Wettbewerbspolitik, *DICE Ordnungspolitische Perspektiven* 65, 2014.

64 Inderst and Thomas, for example, argue that the legal postulate of taking account of distortions of behaviour in relation to sustainability could be derived from the obligation to pursue sustainability objectives under Union law; Inderst, R., Thomas, S., Reflective willingness to pay: Preferences for sustainable consumption in a consumer welfare analysis, loc. cit., p. 21.

65 European Commission, Approval of the content of a draft for a Communication from the Commission: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, loc. cit., para. 599.

66 Ibid., para. 598.

67 Schley, O., Symann, M., Art. 101 Abs. 3 AEUV goes green, loc. cit.

68 Pohlmann argues that if the relevant market is larger than the EU, a consumer participation analysis should be conducted of the entire relevant market; Pohlmann, P., *Grundfragen des Art. 81 Abs. 3 EG, Frankfurter Kommentar zum Kartellrecht*, loc. cit., para. 264.

69 See, for example, Monopolies Commission, Special Report by the Monopolies Commission under Section 42 (5) Sentence 1 ARC: Proposed concentration of Miba AG with Zollern GmbH & Co. KG, 18 April 2019, loc. cit., para. 72f. (German only).

market substantially overlap with the beneficiaries or are part of them". In addition, they must demonstrate what part of the "collective benefits" occurring or likely to occur outside the relevant market accrue to the consumers of the product in the relevant market.[70] The logic behind such "collective benefits" appears to be that consumers in the market have no individual preference for a more environmentally friendly product but nevertheless could, as citizens, benefit from better environmental protection as a collective benefit, for instance in the form of cleaner air. In such cases there may be an overlap between the beneficiaries outside the market and consumers in the market.[71] On the other hand, the European Commission also makes it clear that there is no overlap where a cooperation only leads to local environmental benefits outside the market which do not have a positive impact on consumers in the market.[72]

49. That is why, when compared to a broader approach, this somewhat narrower approach still requires that consumers participate in the relevant market. Nevertheless, it also leaves some questions open. First, the argument that where consumers manifest no sufficient preference for sustainability they nevertheless, as citizens, benefit from an increase in sustainability is probably not convincing in all cases.

50. But even if such overlaps did exist, it is still unclear how to balance competitive harm and sustainability. As already mentioned in the above, besides the problems which arise when it comes to quantifying qualitative sustainability benefits in particular it is an open question as to what extent consumers have to be compensated by sustainability benefits. According to the currently applicable guidelines, the pass-on of benefits from the efficiencies must at least compensate consumers for any actual or likely negative impacts.[73] There is ongoing debate in the literature as to whether full compensation is still advisable in regard to sustainability since consumers contribute in part to the social damage caused on account of their consumption.[74]

51. Broadening the definition of the term "consumer" to include public benefit aspects thus inevitably raises distribution questions.[75] Where undertakings agree to replace less expensive but more harmful products with more expensive and more climate and environmentally friendly products, for example, consumers of the more harmful products could be worse off in a market while consumers outside the market could be better off owing to better climate and environmental protection. Applying the Kaldor–Hicks criterion, where undertakings reach agreement on coordinating their actions this can lead to an efficient outcome if those consumers can be compensated by others for the loss of benefit.[76] The criterion states that an allocation is efficient if the value attached to climate protection measures is greater across all consumers of whom account is to be taken than the loss of benefits accruing to those consumers. However, how to implement such compensation at the institutional level is not a question which competition policy is required to answer. The trade-off between different consumer groups thus again ultimately raises normative questions, for instance which group is to benefit from the efficiency gains and how. That, in turn, raises questions around the legitimacy of implementing measures if current legislation has not expressly enshrined sustainability as a target in antitrust law.

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70 European Commission, Approval of the content of a draft for a Communication from the Commission: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, loc. cit., para. 606.

71 Ibid., para. 604.

72 Ibid., para. 604.

73 Communication from the Commission, Guidelines on the application of Article 81(3) of the Treaty, loc. cit., para. 85. That equally applies to mergers; Official Journal of the European Union, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, loc. cit., para. 79.

74 Holmes, S., Climate change, sustainability, and competition law, loc. cit.; Schley, O., Symann, M., Art. 101 Abs. 3 AEUV goes green, loc. cit.

75 By contrast, the criterion of Pareto efficiency previously applied in a consumer participation analysis avoids such distribution issues; see also Wambach, A., Gemeinwohlziele als Herausforderung für die Kartellrechtspraxis, presentation given on 1 October 2020 at a meeting of the Antitrust Law Working Group.

76 Pursuant to the Kaldor–Hicks criterion it is sufficient for such compensation to be only theoretically possible.

3.3 Interim conclusion

52. The focus of the debate around how account can be taken of sustainability aspects in antitrust law is on the concept of appropriate consumer participation. One matter under debate is whether account can be taken of sustainability externalities based on the current concept of consumer participation or whether the definition of the term "consumer participation" needs to be broadened beyond the relevant market. Both approaches have merits in economic terms. Taking account of these externalities based on the concept of consumer participation does justice to the fact that consumers may well be subject to distortions of behaviour when it comes to sustainability which it may, possibly, be better to account for using methods applied in behavioural economics. Broadening the definition of "consumer" beyond the relevant market takes account of the fact that external effects – above all of climate change mitigation – also have an impact outside the relevant market.

53. On the other hand, the two approaches raise a number of normative and legal issues as regards implementation. The draft horizontal guidelines represent a good first compromise between the various approaches and are a sensible starting point for driving forward the debate on how to take account of sustainability targets in the context of antitrust law. Here, too, some details have yet to be clarified, including how to account for and balance collective benefits. It will, however, only be possible to resolve these issues based on more case practice.

4 Once more cases have been dealt with, introducing the efficiency defence in regard to sustainability as part of merger control procedures under the Act on Restraints of Competition should be considered

54. The debate around the possible tension between competition and sustainability is first and foremost conducted in relation to the assessment of cooperations under antitrust law. Although hardly any sustainability-related merger control procedures are being conducted at present, it is possible that sustainability aspects will in future be submitted more frequently in the context of assessments of proposed mergers.

55. In Germany the question of the admissibility of an efficiency defence based on the EU merger control procedure has not been conclusively clarified (see para. 28). Should more sustainability aspects be put forward in the context of proposed mergers going forward, then the efficiency defene could offer a suitable legal framework for systematically and uniformly examining sustainability efficiencies as part of merger control. For that reason the question of whether an efficiency defence in relation to climate and environmental protection aspects could explicitly be included in merger control procedures in Germany will be discussed in the following. The Monopolies Commission currently sees no reason to do so on account of the lack of actual cases. However, should, in the context of merger control procedures, the Federal Cartel Office receive more efficiency-related submissions which have a bearing on sustainability going forward, then enshrining the efficiency defence in German competition law could be a solution which is in conformity with the legal system and compatible with Union law.

56. Pursuant to Recital 29 of the EC Merger Regulation, the European Commission may in principle examine sustainability aspects as efficiency improvements and balance these and merger-specific restrictions of competition. The condition that the efficiency must benefit consumers corresponds to the first two conditions for the exception rule under Article 101(3) TFEU (see para. 27f.) to apply.

57. In its guidelines on the assessment of horizontal mergers the European Commission makes it clear that efficiencies have to (1) benefit consumers, (2) be merger-specific and (3) be verifiable, and that the conditions are cumulative in order to counter any potential competitive harm.[77]

58. Similar to the horizontal guidelines, the guidelines on the EC Merger Regulation cite cost savings as an example of efficiency gains which arise in the context of production or distribution and provide an incentive, following a

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[77] Official Journal of the European Union, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, loc. cit., para. 78.

merger, to charge lower prices.[78] That means that if a merger leads to both more environmentally friendly and lower-cost production, those efficiencies which have a positive impact on sustainability can already be taken into account as part of an efficiency defence and no separate investigation method is required. It is, for instance, possible for undertakings needing to purchase emissions certificates in relation to their production to assert possible cost savings as an efficiency owing to a reduction in emissions following a merger. The suppliers of undertakings at the end of the value chain have already internalised these costs and the emissions savings are reflected in the reduced purchase costs.

59. In the *FedEx/TNT Express* case, for instance, the European Commission found that the merged entity could achieve cost savings on account of the merger through economies of scale in the air network which were recognised as efficiencies following the merger.[79] According to the Commission, the merged entity was able to reduce the number of planes travelling or to replace existing planes with fewer and larger aircraft, thereby increasing the capacity utilisation of each flight.[80] The merger therefore not only led to cost savings on account of the reduced use of aircraft but also to a reduction in aircraft emissions. Account was not explicitly taken of the aircraft emissions savings when assessing efficiency gains, only implicitly through the cost savings owing to the economies of scale in the air network.

60. It is, however, also possible that more climate and environmentally friendly production processes or the production of sustainable products lead to higher costs. The European Commission has not yet conducted such a balancing of cost-increasing effects, structural competitive harm (on account of a merger) and the positive effects on sustainability; this would be possible, though.

61. On account of the lack of actual case experience gained to date, the Monopolies Commission currently sees no cause to adapt the guidelines on the EC Merger Regulation. Should, in future, more sustainability aspects be put forward in the context of proposed mergers, it would – as in the draft horizontal guidelines on Article 101 TFEU – also be necessary to clarify in the guidelines on the EC Merger Regulation of which sustainability improvements account can be taken as efficiency gains. Moreover, reference should be made to the fact that it still remains to be clarified, in relation to merger control, which sustainability objectives are regarded as relevant in order that efficiency gains can be recognised (see para. 33f.). How to balance the protection of competition and sustainability as part of consumer participation, which normative issues an assessment of efficiency raises in the context of consumer welfare as previously defined, and how those efficiency gains are to be dealt with which accrue outside the relevant market was already discussed in section 3.

62. Pursuant to the guidelines on the EC Merger Regulation, efficiencies are relevant for an assessment of competitiveness if they are a direct consequence of the registered merger and cannot be achieved to a similar degree by means of less anticompetitive alternatives. This is because a proposed merger always represents a permanent change in the market which extends beyond all competitive parameters. A proposed merger thus represents a much more serious interference with competition in a market than, for example, a cooperation which is limited as to time and does not necessarily affect all parameters of competition. It must also be examined, in the case of mergers in relation to which parties put forward climate-friendly efficiency gains, whether these gains can be realised solely on account of the merger.

63. The EU's efficiency defence can, in principle, be a suitable tool for taking account, as part of a merger control procedure, of those sustainability improvements which arise on account of a merger. So far, the EU's efficiency defence was not very successful in relation to proposed mergers because of the high requirements and the burden of proof on the undertakings. In no proposed merger did an efficiency defence lead to the complete elimination of the European Commission's competition concerns. Furthermore, the European Commission is as yet aware of hardly

78 Ibid., para. 80.

79 European Commission, FedEX/TNT Express, Case M.7630, 8 January 2016, para. 535.

80 Ibid., para. 511.

any merger procedures in which sustainability efficiencies have been put forward and quantified. The lack of actual cases is no doubt the reason why merger control has so far been little discussed in relation to sustainability.

64. The Monopolies Commission is of the opinion that the efficiency defence in relation to climate and environmental protection aspects offers a suitable legal framework on the conceptual level for assessing the efficiency gains of a proposed merger of undertakings. It would guarantee a systematic and uniform assessment on the part of the Federal Cartel Office. Since the high requirements of an efficiency defence would also form the basis in relation to sustainability efficiencies, the sustainability efficiencies put forward need to carry all the more weight the stronger the restrictions of competition of a proposed merger are.

65. Even though the efficiency defence has not yet been enshrined in the Act on Restraints of Competition, the Federal Cartel Office already regularly assesses efficiency defence arguments put forward by the parties to a proposed merger of undertakings. Efficiencies put forward have, however, as yet not been relevant to the decision-making in any procedure, since the parties' submissions were always deemed insufficient.[81] Including the efficiency defence in regard to climate and environmental improvements in the Act on Restraints of Competition could lead to the merging parties already making detailed submissions regarding such efficiencies as part of the merger control procedure.

66. In Germany, undertakings also have the option of filing an application for ministerial authorisation after a proposed merger is blocked by the Federal Cartel Office. Under section 42 ARC, the Federal Economics Minister may, on application, clear a merger of undertakings blocked by the Federal Cartel Office if the restrictions of competition are, in the individual case, outweighed by the advantages to the economy as a whole resulting from the merger or if the merger is justified by the overriding public interest. The public benefits put forward may overlap with the efficiency gains which would be examined in the context of the efficiency defence based on the example of the EC Merger Regulation. However, these are often not cost savings which can be quantified but benefits which are more qualitative in nature. Further, public benefits generally also have an impact beyond the relevant market.

67. An example of efficiencies put forward by undertakings can be found in relation to the merger between Miba and Zollern in 2019, which was initially blocked by the Federal Cartel Office and for which clearance was subsequently granted by the Federal Economics Minister.[82] The undertakings submitted that the proposed merger would enable the involved entities to tap into synergies and take advantage of potential specialisations, which would lead to the increased utilisation of their production capacities and to cost benefits. The Federal Cartel Office assessed the efficiencies put forward on the basis of Recital 29 of the EC Merger Regulation. It concluded that the parties' submissions did not meet the requirements of the horizontal guidelines on the EC Merger Regulation, which had to apply in domestic proceedings accordingly. In particular, the Federal Cartel Office found fault with the fact that the synergies cited appeared plausible in part, but that detailed documentation was lacking, as a result of which it was not possible to examine the parties' statements. Moreover, the Federal Cartel Office stated, insufficient evidence had been provided as to why the efficiencies were merger-specific. It also did not find it plausible that consumers would benefit from these efficiencies in a timely manner.[83] Since the efficiency defence in this case was not relevant to its decision-making, the Federal Cartel Office was, ultimately, able to leave open the question of

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81 The Federal Cartel Office examined efficiency objections in the merger control procedures Telekom/EWE (B7-21/18), Miba/Zollern (B5-29/18), Edeka/Tengelmann (B2-96/14) and ProSieben/RTL (B6-94/10), for example:

Federal Cartel Office, Decision in the administrative proceedings B7-21/18, 30 December 2019, para. 97ff. (German only)

Federal Cartel Office, Decision in the administrative proceedings B5-29/18, loc. cit., para. 372ff. (German only)

Federal Cartel Office, Decision in the administrative proceedings B2-96/14, 31 March 2015, para. 378ff. (German only)

Federal Cartel Office, Decision in the administrative proceedings B6-94/10, 17 March 2011, para. 227ff. (German only)

82 Federal Minister of Economic Affairs and Energy, Order in the administrative proceedings Miba AG and Zollern GmbH & Co. KG, I B 2 – 20302/14–02, 19 August 2019 (German only).

83 Federal Cartel Office, Decision in the administrative proceedings B5-29/18, loc. cit., para. 375 (German only).

whether it may take account of efficiencies as part of the assessment of competition in the context of a merger control procedure under German law.[84]

68. In their application for ministerial authorisation filed following the Federal Cartel Office's blockage, the undertakings among other things asserted that the achievement of environmental protection and sustainability objectives was a public interest consideration. The merger, they stated, contributed to safeguarding innovation potential for future-oriented developments in relation to bearings, which were an important factor for supporting the energy transition. The Federal Economics Minister based his decision to grant ministerial authorisation on the fact that the public interest consideration "know-how and innovation potential for the energy transition and sustainability" applied. This, the Minister stated, could be recognised as an overriding public interest.[85] He argued that the innovation potential of the merged entity was considerably larger than if the parties engaged in parallel research and development (R&D).

69. In the opinion of the Monopolies Commission, which recommended not granting ministerial authorisation, environmental policy benefits are externalities which may be regarded as public benefits if third parties also benefit from these impacts without the merging parties being paid for these benefits.[86] Unlike the Minister, the Monopolies Commission concluded that this did not apply to the *Miba/Zollern* case, since many of the environmental impacts addressed in research on these bearings which were put forward in the application were own benefits, that is developments which were indeed relevant to the energy transition but which were already being remunerated in the market in line with their value. There was a lack of evidence of the public impacts cited, namely wind turbine noise reduction and the possibility of developing lower-emissions, (partially) gas-powered shipping vessel engines. In the view of the Monopolies Commission, it was also doubtful whether these benefits existed to a sufficiently relevant degree to establish the public benefit on which a ministerial authorisation could be based.

70. Generally speaking, the first examination to be conducted as part of a ministerial authorisation procedure is whether the sustainability benefits put forward by the undertakings are expected to actually arise and whether they are to be recognised as public benefits. Were the Federal Cartel Office, in the future, to examine such efficiencies as part of a statutory efficiency defence – as is being considered by the Monopolies Commission – then it would already determine whether any efficiencies would arise on account of a proposed merger. A distinction would thereby in particular have to be drawn between efficiencies which only benefit the merging undertakings and those which are of benefit to consumers. Were the Federal Cartel Office to determine, as part of its assessment of competition, that a proposed merger would lead to no merger-specific efficiencies, then it would only be possible to once more make these submissions in an application for ministerial authorisation to a limited degree, since the minister is bound by the factual and legal findings of the cartel authority.[87]

71. So far, account has only been taken of those efficiencies which arise in the relevant market as part of an efficiency defence pursuant to Recital 29 of the EC Merger Regulation, but not in regard to what are known as "out-of-market efficiencies", that is efficiencies that arise outside the relevant market. An additional assessment by the Federal Economics Ministry as part of a ministerial authorisation procedure thus appears expedient where the Federal Cartel Office determines that there are efficiencies which do not lead to sufficient benefits for consumers in the relevant market which balance out any possible competitive harm. In such cases, it may also be examined, as part of the ministerial authorisation procedure, whether the efficiencies outside those markets affected by the proposed merger lead to significant sustainability improvements, that is whether they generate benefits to the whole of society or represent an overriding public interest, and thus balance out the competitive harm to a sufficient degree. The efficiency defence would thus serve as an additional assessment tool which already gives the involved

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84 Ibid., para. 372f.

85 Federal Minister of Economic Affairs and Energy, Order in the administrative proceedings Miba AG and Zollern GmbH & Co. KG, I B 2 – 20302/14–02, 19 August 2019, para. 167 (German only).

86 Monopolies Commission, Statement by the Monopolies Commission regarding planned ancillary provisions in the Miba/Zollern ministerial authorisation proceedings, 5 August 2019, p. 2 (German only).

87 Thomas, in: Immenga/Mestmäcker, *Wettbewerbsrecht*, *Bd. 2: GWB*, 5th edition, 2014, section 42 margin no. 74.

undertakings confirmation when the Federal Cartel Office gives its decision as to whether the proposed merger leads to any sustainability efficiencies.

72. However, these efficiencies must meet the high requirements which are to be made of public benefits if ministerial authorisation is granted. The parties must submit concrete evidence to show how the public benefits contribute to achieving the Federal Government's sustainability objectives. Moreover, as is the case for each application for ministerial authorisation, evidence must be provided that these are of benefit to consumers and that the public benefit can only be achieved through the proposed merger, i.e. that it is merger-specific. Further, the more relevance is attached to the restrictions of competition, the higher the requirements to be made of the public benefits. The protection of competition must be the rule, and the granting of ministerial authorisation must remain the exception.[88] Otherwise there is a risk that mergers will significantly impede competition without contributing anything at all to climate change mitigation. Greenwashing on account of mergers which make no contribution to protecting competition and to protecting the environment and climate must be precluded.[89]

5 More scientific expertise to assess sustainability in antitrust law possible

73. Since – as set out in the above – many sustainability aspects can be regarded as economic efficiencies, they should, in the opinion of the Monopolies Commission, continue to be assessed within the antitrust law framework. When balancing the protection of competition under antitrust law and sustainability targets outside of antitrust law there is, in the opinion of the Monopolies Commission, the risk that the protection of competition will cede to sustainability targets.

74. There is, currently, relatively little actual case experience. However, should more cases arise going forward in which sustainability improvements play a role, then provision should be made for a scientifically driven balancing under antitrust law. In such cases the competition authorities should be given additional expertise which focuses on assessing sustainability aspects. Experts should in particular be versed in environmental and climate economic issues and thus be in a position to assess any sustainability efficiency benefits put forward. Procedures have already become established in climate and environmental economics which can also be made workable for an assessment under antitrust law. As there have only been few practical cases to date, this expertise could initially be provided by external academics. Should it then become apparent that sustainability aspects are gaining relevance in cartel proceedings, the setting up of an internal "sustainability team" in the competition authorities could also be considered.

75. The final assessment of competitive harm, the assessment of efficiencies and the balancing of competitive harm and sustainability should be publicly available and readily understandable. The relevant analyses should be published so as to guarantee as objective a review as possible. This guarantees that companies intending to merge will in future be able to gear projects more clearly to transparent case practice. To gain initial experience of assessing sustainability efficiencies under antitrust law, an ex-post evaluation of any decisions given should also be conducted. This should, in particular, include whether the efficiency gains put forward actually arose.

6 Summary of assessments and recommendations

76. The relationship between sustainability and competition can raise complex economic and legal issues. Some economic justifications for restrictions of competition can indeed be derived so as to ensure achievement of those sustainability targets which are socially desirable. In the view of the Monopolies Commission, this balancing exercise can and should still be conducted under antitrust law. The European Commission's draft horizontal guidelines make constructive recommendations in that regard which should be further enlarged upon.

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88 German Bundestag, Explanatory Memorandum to the Federal Government Bill for a Second Act to Amend the Act against Restraints of Competition, Bundestag Printed Paper VI/2520, 18 August 1971, p. 31 (German only).

89 The term "greenwashing" refers to the practice of giving a misleading impression about the environmental impacts of a particular product; UK Competition and Markets Authority, Making environmental claims: a literature review, 2021, para. 2.

77. Many aspects of sustainability can already be assessed within the existing framework relating to efficiency benefits. If more sustainability efficiencies are in future put forward in the context of proposed mergers, it would be worth considering whether an efficiency defence for sustainability improvements could also be introduced in domestic law for merger proceedings pursuant to Recital 29 of the EC Merger Regulation. To ensure that the competition authorities are in a position to conduct this balancing exercise, they could be supported by additional academic experts with experience in assessing climate and environmental economic issues.

78. The competition authorities should not take account of other non-competitive impacts which cannot be regarded as economic efficiencies so as not to water down the protection of competition through other policy targets. Account can be taken of them outside of the antitrust law framework, and they should be as transparent and objectively verifiable as possible.

79. In many cases competitive and open markets can be an instrument for producing innovative technologies which at the same time serve climate change mitigation. However, instruments used outside the competition policy framework will no doubt make a bigger contribution to internalising externalities, for example through regulation and minimum standards set by the legislature.