

CONSULTATION: COMPETITION POLICY AND THE GREEN DEAL

Iberdrola, a Spain-based energy group and the leading producer of wind power in the world, welcomes the opportunity to participate in the Commission's consultation regarding how competition policy can be instrumentalised to support the Green Deal. The company fully embraces the bold ambitions of the Green Deal and the Commission's efforts to mainstream sustainability as part of the EU's different policy areas. Iberdrola is firmly convinced that any recovery after COVID-19 can only be green, and the company itself is committed to accelerating its investments to boost economic and employment recovery. This is a path Iberdrola started 20 years ago and has led the company to allocate more than €100 billion in sustainable investments since. The company recently launched an unprecedented €75 billion investment plan for 2020-2025, focusing on renewable energy, storage, smart grids and e-mobility, with aim of promoting a green and inclusive recovery.¹

Iberdrola's response focuses on State aid control (Part 1), which is uniquely well-placed to contribute to the Green Deal. We also briefly mention antitrust rules (Part 2) and merger control (Part 3).

1 STATE AID CONTROL

Q1 MAIN CHANGES TO THE RULE BOOK

"What are the main changes you would like to see in the current State aid rulebook to make sure it fully supports the Green Deal? Where possible, please provide examples where you consider that current State aid rules do not sufficiently support the greening of the economy and/or where current State aid rules enable support that runs counter to environmental objectives."

1.1.1 Sustainability as an integral part of the compatibility assessment

The Commission currently assesses the compatibility of aid pursuant to Article 107(3)(c) TFEU based on the so-called "common assessment principles". To weigh the positive effects of an aid against its negative effects is not always easy, but the introduction of the common assessment principles has helped to make the application of this balancing test more coherent and predictable.

However, for the rulebook to fully support the Green Deal, it is critical to add that the impact on sustainability must *always* be taken into account for the purpose of assessing the compatibility of aid, even if it pursues non-environmental goals. This should apply irrespective of whether the aid is assessed under Article 107(3)(c) TFEU or under another treaty provision, e.g. Article 106(2).

At present, the impact on the EU's sustainability targets will, in principle, only be considered if the aid is environmental. By contrast, the Court of Justice's rulings in *Hinkley Point C* and *Castelnou* established that the Commission may lawfully pay no attention at all to the impact on sustainability provided that the aid in question pursues other, non-environmental goals.² In *Castelnou*, this meant that State aid to Spanish thermal plants using domestic coal could be authorised under Article 106(2) TFEU, in stark contrast to the EU's goal of closing coal mines and reducing CO₂ emissions.

It is submitted that this must change. Addressing this "gap" does not mean that any State aid with a net negative environmental impact will automatically be incompatible. It cannot be excluded that a disadvantage from an environmental point of view may sometimes be outweighed by an essential contribution to another important policy goal. For example, aid to dispatchable electricity generation

¹ See: <https://www.iberdrola.com/about-us/green-recovery>.

² *Austria v Commission*, C-594/18 P, EU:C:2020:742; and *Castelnou Energía v Commission*, T-57/11, EU:T:2014:1021.

may be required to avoid that such plants exit the market and to ensure security of supply. However, implementing the Green Deal should mean that the Member States must, as part of the compatibility assessment of such measures, be compelled to demonstrate that there is no less environmentally harmful policy option available to achieve the same goal and that measures are adopted to put into place sustainable alternatives in the mid- to long-term. In addition, it should be clarified, in the relevant guidelines and policy documents, that State aid to activities that are significantly contrary to the Green Deal's objectives cannot as a rule be found compatible with the internal market.

In this respect, it is important to think about this issue in terms of how State aid policy shapes the incentives of the Member States. Introducing impact on sustainability as an indispensable part of the compatibility assessment is critical to incentivise the Member States to anticipate problems and identify sustainable solutions in due time, i.e. before the underlying issue becomes an emergency and an unsustainable solution the only feasible, short-term option. In other words, a clear policy of testing all aid against the Green Deal's objectives would operate as a strong disincentive for Member States to be complacent and postpone the adoption of genuinely sustainable measures.

Example: In its 2020 decision regarding electricity generation in the Spanish non-peninsular territories, the Commission authorised aid to compensate for the additional costs to produce electricity in said territories as a service of general economic interest under Article 106(2) TFEU.³ However, the majority of the firm capacity in the non-peninsular territories consists in thermal generation, especially fuel oil- and coal-powered plants, which had to adapt to the requirements in Directive 2010/75/EU on industrial emissions should it be allowed to remain in operation beyond 2020. This was a well-known problem and had measures been adopted in time to phase-out and replace this unsustainable capacity, it would not have been necessary to grant aid to investments in the refurbishment and life extension of those existing fuel- and coal-based capacity in breach of the EU's climate and environmental goals. In fact, the aid approved was neither an early adaptation to Union standards nor an implementation of environmental requirements more demanding than Union standards.

1.1.2 Sustainability defined as meeting the 2050 climate neutrality target

(b) *Benchmarking against the 2050 targets*

Currently, the default benchmark against which to measure the environmental impact of an aid or other support measure is to which extent it is an improvement compared to the current situation. It is a relative benchmark. This is understandable and this metric will no doubt remain relevant also in the future. However, as the Green Deal is implemented in State aid policy, the main benchmark for assessing the compatibility of an aid measure should be to which extent it contributes to reaching the goal of climate neutrality by 2050 (and the intermediate milestones set up to make sure Member States are on the right track). In other words, we propose a transition to a fixed, absolute benchmark.

(c) *Internalising the notion that 2050 is just one investment cycle away*

2050 may at first sight seem like a distant target. However, it is imperative to realise that in many industries, 30 years is a single investment cycle. Accordingly, investment decisions adopted today will affect the situation in 2050 and it is important to immediately steer them in a green direction. Indeed, there is a significant risk of a long-lasting negative environmental harm as a result of the long lifespan of certain investments (so-called "carbon lock-in"). To name just an example from the energy sector: a SMR plant to produce hydrogen from natural gas has a lifetime of about 40 years.

³ SA.42270 — *Electricity production in Spanish non-peninsular territories*.

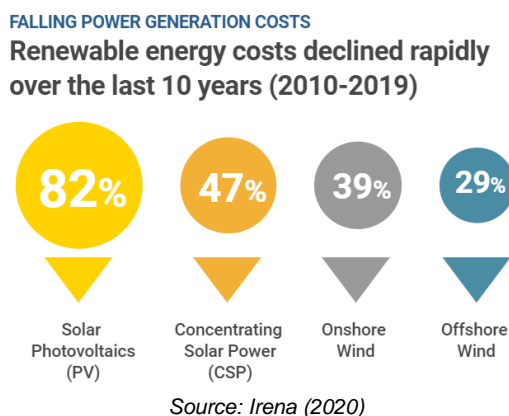
If the planning and construction phase is also taken into account, it becomes clear that an investment decided in 2021 will often outlive the 2050 target date.

For the same reason, it is important for the Commission to display a healthy scepticism towards aid measures labelled by the Member States as “transitory”. Such descriptions can be misleading. The effect on sustainability of all aid, irrespective of the label used, must be assessed under a long-term perspective that considers the risk of carbon lock-in and other enduring negative effects.

1.1.3 Avoiding crowding out of market-based investments and market distortions

The lion's share of the spending on greening the EU economy over the next decades will be private investments. This means that the Green Deal's objective of sustainable growth will be put at risk if aid measures are allowed to crowd out market-based investments. It would also risk causing long-term harm to the internal market objectives that underpin the Green Deal.

Example: Rapidly declining costs for renewables technologies⁴, a higher degree of internalisation of CO₂ emission costs for fossil fuels and the development of a merchant market based on long-term Power Purchase Agreements (“PPAs”) have made subsidy-free renewable electricity a reality.



EU State aid policy must reflect this development and start phasing out renewables aid schemes that are no longer needed.⁵ Moreover, where aid is still required, it is crucial that market premiums are used to ensure that renewable energy is integrated into the electricity market and to avoid unnecessary distortions of the price signal.⁶

Likewise, it is necessary to remove the presumption in paragraph 116 of the Guidelines on State aid for environmental protection and energy 2014-2020 (“EEAG”), which states that “*the Commission presumes the appropriateness of aid and the limited distortive effects of the aid provided all other conditions are met*”. Market realities indicate however that there are in fact less distortive regulatory and market-based instruments available and the rulebook underlines that such alternatives should be prioritised over aid.⁷ However, the current presumption in paragraph 116 creates an unhelpful disincentive for Member States to develop and implement such instruments.

A common justification for aid to renewables is that emission rights and CO₂ taxes are insufficient to internalise the cost of such emissions.⁸ However, it lies within the power of the Member State in question to change this situation. Consequently, when assessing such support, the Commission

⁴ See IRENA, “Renewable Power Generation Costs in 2019”, 2020.

⁵ EEAG, paragraph 109.

⁶ EEAG, paragraph 124; and Article 4 of the Renewables Directive.

⁷ EEAG, paragraphs 40 and 41.

⁸ EEAG, paragraph 115.

should consider to which extent the Member State has in fact adopted effective measures to address this shortcoming, such as putting in place additional CO²-based taxation. The effect of the presumption in paragraph 116 is however that no such assessment must be carried out.

To presume that aid to renewables does not distort competition is equally flawed. Indeed, in light of the ever-increasing renewables penetration and the trend towards convergence of different energy vectors (electricity, methane, hydrogen, heat, etc.), it is more important than ever for the Commission to be able to scrutinise aid schemes to ensure that they do not unduly distort the market.

Projects of Common European Interest (IPCEI) could also be mentioned. The Commission considers that, for a project to qualify as a IPCEI, it must comprise the collaboration between several Member States and make a significant contribution (a) to innovation (R&D&I; development of a new product and/or production process), (b) to the environmental, energy or transport strategies of the Union, or (c) to the internal market. However, this can clearly overlap with existing EU regulatory and aid frameworks aimed at promoting the collaboration between Member States and achieving these objectives. A clear example would be projects aimed at increasing the penetration of renewable energies, for which well-defined frameworks have been defined already. Such an overlap would be counterproductive, as it would create uncertainty for investors (e.g. potential discriminations) and reduce the potential for competition for the market. Therefore, IPCEIs should not comprise projects that can be undertaken through the existing regulatory and aid frameworks.

1.1.4 Only aid that can be scaled up and still remain compatible should be authorised

The Green Deal is likely to increase the amount of aid and non-aid market interventions seeking to accelerate the decarbonisation process. In this respect, it is important to consider that, while the market distortion brought about by an individual aid scheme may be tolerable when weighed against its positive environmental effects, the conclusion may differ in light of the broader regulatory context or if the scheme were to be repeated across Europe. It is important to equip the Commission with the necessary tools to take such issues into account as part of its compatibility assessment. The presumption in paragraph 116 of the EEAG is not the only obstacle. More generally, the rulebook is based on the notion that the Commission will consider the distortions caused by the aid as such.

Example: An illustration of this problem is the aid the Commission authorised in relation to phasing out coal-based generation of electricity in Germany and the Netherlands.⁹ The impact of each of these schemes on the common EU Emission Trading System (ETS) and, as a result, on the internal market, was analysed separately, and the Commission found in both cases that the impact was acceptable. However, the Green Deal's prioritisation of aid to the phasing out of coal-fired plants means that we are likely to see more such schemes notified in the future.¹⁰ And the combined distortive effect this will have on the ETS and the internal market may well be unacceptable.

Moreover, to deny other Member States the right to replicate an authorised scheme is not a good policy option. First, it would arguably amount to discrimination and undermine the level-playing field of the internal market. Second, it would incentivise Member States to rapidly notify such aid to benefit from a "first mover advantage" over other Member States that might not be able to offer similar aid.

1.1.5 Harmonised limits for aid measured in terms of CO² savings

The proposals above would lead to lower aid intensity thresholds for measures with a negative environmental impact. In addition, it would be helpful to harmonise, whenever feasible, the maximum amount of aid calculated in terms of euros per ton of CO² saved. This would have several benefits:

⁹ SA.42536, *Closure of German lignite plants*; and SA.54537, *Prohibition of coal for the production of electricity in the Netherlands*.

¹⁰ COM(2020) 21 final, "European Green Deal Investment Plan", page 14.

(i) harmonisation reduces the detrimental effects to the internal market level-playing field, and (ii) aid to activities with a significant negative environmental impact (e.g. those with lower emissions savings) would be systematically disadvantaged, which incentivises more sustainable alternatives.

Q2 LESS AID TO ACTIVITIES WITH NEGATIVE ENVIRONMENTAL IMPACT

“If you consider that lower levels of State aid, or fewer State aid measures, should be approved for activities with a negative environmental impact, what are your ideas for how that should be done?”

First, it is necessary to define what is meant by “negative environmental impact”. In this respect, we refer to the discussion in Section B.1.2 above about (i) the need to benchmark State aid against the 2050 targets, and (ii) internalising the notion that 2050 is a single investment cycle away.

Second, and as mentioned in the reply to Question 1, aid with a significant negative environmental impact should, as a general rule, not be eligible for aid. A “significant” negative impact could be understood as measures that are incompatible with the Green Deal’s objectives and whose negative impact cannot be remedied by a commitment to adopt mitigating measures. This criterion is key as it would operate as a strong disincentive for Member States to be complacent and postpone the adoption of genuinely sustainable measures. On the contrary, Member States should be incentivised to anticipate the issues to be tackled and find sustainable solutions before unsustainable solutions are the single feasible option. In any case, Member States should be allowed to opt for measures with a significant negative environmental impact in case of supervening events only, although prioritising those that do not lock in negative impacts and can later be easily removed and substituted.

Third, to the extent that measures with a significant negative impact would nonetheless remain eligible for aid, the rulebook should at least ensure that (i) this is strictly limited to exceptional circumstances, which must not be foreseeable and avoidable (see Section B.1.1 above), and (ii) the activity benefitting from the aid does not become more competitive in the market than sustainable measures (e.g. significantly lower maximum aid intensity should be allowed).

“a. For projects that have a negative environmental impact, what ways are there for Member States or the beneficiary to mitigate the negative effects? (For instance: if a broadband/railway investment could impact biodiversity, how could it be ensured that such biodiversity is preserved during the works; or if a hydro power plant would put fish populations at risk, how could fish be protected?)”

There will often be more than one way to mitigate such negative effects on the environment. It would be helpful for the Commission to prepare guidance in order to help the Member States and the aid beneficiaries to put the most effective and appropriate mitigation actions in place as well as to make the Commission’s compatibility assessment more predictable.

More generally, the choice between different mitigating actions should be based on the “do no harm” principle, i.e. once these actions have been implemented, a sustainable measure should not cause a significant permanent negative impact on any of the relevant environmental criteria.

In addition, it is important to note that while a project could have a direct positive environmental impact, it also could have an indirect negative environmental impact. Mitigation measures should be considered not only for both direct negative environmental impacts, but also for and indirect negative environmental impacts.

Example: In our reply to Question 1 we mention the German and Dutch support regimes related to the phasing out of coal-based generation. These phase-outs have a clear direct positive environmental impact, but also an indirect negative environmental impact if the price of the carbon emission rights in the ETS is depressed as a result (i.e. a disincentive to carbon emission reductions; contrary to the goals of the Green Deal). In these cases, we consider that an appropriate mitigating action would be to cancel the carbon emission rights that will not be needed by the phased-out coal plants anymore, thus avoiding the impact on ETS price.

Q3 MORE AID TO ACTIVITIES WITH POSITIVE ENVIRONMENTAL IMPACT

“If you consider that more State aid to support environmental objectives should be allowed, what are your ideas on how that should be done?”

a. Should this take the form of allowing more aid (or aid on easier terms) for environmentally beneficial projects than for comparable projects which do not bring the same benefits (“green bonus”)? If so, how should this green bonus be defined?

b. Which criteria should inform the assessment of a green bonus? Could you give concrete examples where, in your view, a green bonus would be justified, compared to examples where it would not be justified? Please provide reasons explaining your choice.”

Reaching the Green Deal’s ambitious targets will, in many cases, require State aid to be granted as a complement to and as an enabler of private investments. However, as the Commission’s consultation document acknowledges, aid should take second stage to regulatory and tax measures. Intelligent regulation and fiscal regimes can be used to shape companies’ incentives to invest in sustainability in a way that is less distortive of competition and trade than State aid.

Consequently, the focus should be first of all lie on improving the market design, including:

- ***Swift and consistent implementation of the Clean Energy Package.*** The Commission should closely monitor the Member States’ implementation of the regulations and directives included in this package to ensure that they are effectively applied and that market mechanisms are not distorted. This is an area in which significant improvements should be achieved.
- ***Embedding the Energy System Integration Strategy.*** We have already witnessed a major convergence of energy sources, largely driven by the electrification of heating and mobility. However, many regulatory and tax differences remain in place and undermine the aims of the Green Deal. For example, the Commission has identified the higher tax burden on electricity compared to fossil fuels such as coal, gas or heating oil as an important problem.¹¹
- ***Reinforce key environmental legislation:*** the ETS Directive and the Industrial Emissions Directive in particular have played a central role for the EU ‘s decarbonisation efforts, but it is difficult to see how the Green Deal’s goals could be achieved unless these instruments are updated and the requirements imposed on Member States and polluters tightened.
- ***Adapt the Renewables Directive to the Green Deal targets:*** this is necessary e.g. to update the thresholds for minimum savings relative to fossil fuels.

In general, the current rulebook, e.g. the common assessment principles, is flexible enough to allow additional aid to be awarded where this is required to achieve the Green Deal’s goals. No major overhaul is needed. It would be helpful however to provide updated guidance in the revised General

¹¹ COM(2020) 299 final, “Powering a climate-neutral economy: An EU Strategy for Energy System Integration”, page 14.

Block Exemption Regulation and EEAG as regards new aid categories. The framework for State aid for research and development and innovation should also be kept in mind —R&D&I will play a key role for the Green Deal —, but these rules are generally fit for purpose also in this new policy context.

This should not be understood as a call for complacency. As mentioned in Section B.1 above, the rulebook does need an update e.g. to ensure that less or no aid is granted to unsustainable activities.

Q4 DEFINITION OF POSITIVE ENVIRONMENTAL BENEFITS

“How should we define positive environmental benefits?”

a. Should it be by reference to the EU taxonomy and, if yes, should it be by reference to all sustainability criteria of the EU taxonomy? Or would any kind of environmental benefit be sufficient?”

“Positive environmental benefits” should be defined in a robust manner by referencing the basic Green Deal objective: for the EU to become climate neutral by 2050. Once more, we refer to the discussion in Section B.1.2 above about (i) the need to benchmark State aid against the targets for 2050, and (ii) internalising the idea that 2050 is only one investment cycle away.

It is not clear to which extent the EU taxonomy, which is currently under elaboration, will adequately reflect these requirements. The taxonomy regulation itself is broadly worded and offer little concrete guidance in terms of determining under which circumstances aid is compatible. If the EU taxonomy proves insufficient, it will be necessary for the State aid rulebook to include the criteria to assess the sustainability of measures or to at least complement the EU taxonomy. It also important, more generally, to bear in mind that the taxonomy is linked to information asymmetries in the relationship between issuers and investors and that such asymmetries play less of a role in State aid policy.

2 ANTITRUST RULES

Iberdrola also welcomes the Commission’s ambition to identify barriers in the antitrust rulebook that may put a stop to private agreements that support the Green Deal objectives. In this regard, we take note of the helpful comments and suggestions from stakeholders as part of the Commission’s consultation regarding the review of the horizontal block exemption regulations and the Horizontal guidelines.¹² Indeed, industry action to reach the sustainability targets will often involve agreements between competitors and the antitrust rules must not be applied to make such agreements inviable.

To incorporate environmental goals as part of the assessment pursuant to the antitrust rules is sometimes seen however as a threat to a coherent application of the rules. We do not share this view.

It is true that the modernisation of EU antitrust rules over the last 20 years is grounded in a broad consensus among stakeholders that the main goal of this area of law is to avoid harm to consumer welfare caused by situations of market power. This consensus has had many advantageous effects. The antitrust rules are today interpreted and applied in a more principled, coherent and predictable manner. However, the greening of EU competition policy should not undermine these achievements.

First, it is important to dispel the idea that environmental goals are “non-economic”. The cost savings from avoiding environmental harm is an “efficiency” and can be quantified, and such benefits can be weighed against other effects of a conduct. This is nothing new. The first example of how this can be done as part of a conventional competition law assessment dates back more than 20 years.¹³

¹² See: https://ec.europa.eu/competition/consultations/2019_hbers/index_en.html.

¹³ Case IV.F.1/36.718, *CECED*.

Second, it is important to distinguish between the scope of the antitrust rules and the possibility, within this scope, to take other policy goals into account. To incorporate sustainability as part of the antitrust analysis does not broaden the outer boundaries of this set of rules. In other words, the fact that a practice harms the environment is not sufficient to classify it as distortive of competition.

However, when assessing the legality of a conduct that does fall within the scope of these rules, it is possible and often important to take other legitimate policy goals into account. For example, in *Wouters*, the Court of Justice held that the policy goal pursued by the practice at hand meant that it, despite its restrictive effects, was not prohibited under EU antitrust rules.¹⁴ The ruling in *Budapest Bank* shows that a conduct which is a plausible source of efficiencies is not a “by object” restriction.¹⁵

The other side of the coin is that it would be challenging to defend the legality of a practice that does affect competition, in the established sense, and at the same time is detrimental to the environment. Again, this is nothing new. As mentioned, harm to the environment is an inefficiency and a practice which is both anticompetitive and a cause of inefficiencies will normally be struck down as unlawful.

3 MERGER CONTROL

Lastly, environmental considerations should in our view play a role also in EU merger control enforcement. Consumers increasingly demand sustainable products and services, and undertakings compete with each other to meet this demand in much the same way as they compete on price or quality. If a merger or acquisition leads to a significant impediment to effective competition for such sustainability parameters, the Commission will be able to intervene under the EU Merger Regulation (“EUMR”). Other transactions will trigger environmental efficiencies, which should also be given due weight in the EUMR analysis EUMR, as a counterbalance to the potentially restrictive impact.

In addition, the goals of the Energy System Integration Strategy are relevant from a merger control perspective. The convergence between different energy sources means that electricity companies and fossil fuel-based companies increasingly compete, also for corporate takeovers. Fossil fuel-based companies will however enjoy an unfair competitive advantage as a result of their low tax burden. It would arguably be inconsistent with the Energy System Integration Strategy objectives to refrain from taking such distortions into account as part of the analysis under the EUMR.¹⁶

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¹⁴ *Wouters and Others*, C-309/99, EU:C:2002:98.

¹⁵ *Budapest Bank and Others*, C-228/18, EU:C:2020:265.

¹⁶ See *RJB Mining v. Commission*, T-156/98, EU:T:2001:29, paragraphs 112-114.