

**FRIENDS OF SUSTAINABLE GRIDS REPLY TO CALL FOR CONTRIBUTIONS: COMPETITION
POLICY SUPPORTING THE GREEN DEAL**

Preliminary Remark:

We welcome the call for contributions regarding competition policy supporting the Green Deal. We certainly recognize the close relationship between antitrust and energy law and support the consideration of their inter-relatedness in the realization of the Green Deal objectives.

There is an urgent need in certain areas to clarify and allow certain practices with potentially significant energy-related benefits that might otherwise be considered anticompetitive. At the same time, it is also important to consider existing practices that may be warranted or even prescribed within the energy law framework that lead to anticompetitive results. We are somewhat concerned that we have not found questions in the present call for contributions that allow to appropriately address the latter issues.

Examples of such issues are abundant in the process for the elaboration of the ENTSOs respective Ten Year Network Development Plans (TYNDP) and the subsequent selection of projects of common interest (PCI), which, by nature, are recognized as pivotal to realizing the objectives of the internal energy market.

The 2003 TEN-E Regulation,¹ which is the cornerstone of the TYNDP/PCI process, is currently under revision. The European Commission (EC), in its consultation on the roadmap and initial impact assessment for said revision, has asserted that one of the revision's objectives is to ensure the new TEN-E Regulation will be aligned with the objectives of the Green Deal. Accordingly, the changes that will be made to the TEN-E Regulation will be highly relevant to the achievement of the Green Deal.

One area in the current TEN-E Regulation to which particular attention should be paid in terms of antitrust impacts is the structure of the ENTSOs and their prominent role in the TYNDP/PCI process. Indeed, the ENTSOs are made up of transmission system operators (TSO) and are the ones who establish the TYNDP.

At least for electricity, those same TSOs often times sit on the ENTSO-E body that hears promoters (generally third party, non-TSOs) in the defense of their case where ENTSO-E has tentatively decided to exclude them from the TYNDP because it claims they fail to meet certain criteria. In other words, TSOs, whose projects potentially compete with third party projects are the ones who hear and decide upon the latter's case.

TSOs, through their membership in ENTSO-E, also have access to information, such as on the ENTSO-E modeling, that third party promoters do not have. This puts TSOs at an advantage when commenting on the results of the cost-benefit analysis (CBA) performed by ENTSO-E for

¹ Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009, OJEU, L 115, 25.4.2013, p. 39–75.

candidate projects. This is an important element since the CBA is decisive in the selection of PCIs. While third party promoters are given the same opportunity to comment on the CBA results, they are unable to provide meaningful comments without access to the modeling information that TSOs have.

In addition, many of the criteria for inclusion in the TYNDP require the cooperation of TSOs (e.g., TSO agreement, TSO (pre-)feasibility study, inclusion in the national development plans, which are often drawn up by the TSOs). Third party promoters do not have any means to compel the cooperation of TSOs and this puts them at a significant disadvantage in the process, resulting in projects that might otherwise be deemed critical to the realization of the internal energy market (and objectives of the Green Deal) failing to meet the TYNDP/PCI requirements if the TSOs do not cooperate with them.

Finally, certain Member States still have in their national laws provisions that reserve ownership, operation and other rights regarding transmission lines (including interconnectors) to the incumbent TSO(s) so that, in effect, a third party PCI promoter may not be able to operate its transmission line, even if it has obtained a theoretical satisfactory regulated return through a cross-border cost allocation decision.

In other words, TSOs are given significant advantages throughout the process compared to third party promoters and this may allow TSOs to stifle competition and hinder the realization of projects that could be critical for Europe's energy goals, including those of the Green Deal.

PART I: STATE AID

1. 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.

One area where there may be a form of state aid that is possibly not reported as such so it often goes undetected is in the restriction of transmission capacity for interconnectors.

For example, Norway's TSO recently announced a 200MW restriction of capacity on the countries' interconnectors (both at import and export) until 2023. The restriction may be justified on the grounds that local upgrades will be made on the Norwegian grid. However, it is unclear why these upgrades will seemingly not impact the local operator in the same way as they will impact interconnections. This will have the effect of reducing competition to some extent and the decision is left to the TSO. Allowing the TSO to pass through the restrictions to interconnectors indirectly constitutes a form of state aid to the TSO because it will impact the price of transmission capacity and hence the revenue derived by the grid operator.

2. 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?

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?)

No comment.

3. 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?

Energy communities, including renewable (RES) energy communities, take a prominent place in the recent European “Clean Energy for all Europeans” legislative package, however their implementation in practice still faces many hurdles.

One such hurdle lies in the question of who, between the owner and occupant of buildings (especially commercial buildings) participating in an energy community, should bear the costs of the installation of equipment necessary to the operation and participation in said energy community.

The regime is currently not harmonized across Member States although, in many cases, a tenant may perform works. Depending on whether it was done with or without the consent of the owner, the tenant may have to remove the works when he vacates the building at the end of the lease. On the other hand, owners are also often allowed to perform works to enhance their property, including in some places during a pending lease (possibly but not always with some financial compensation to the tenant).

Regardless of who performs the works, the property could increase in value partly due to the “greening” of the building leading to higher scores in terms of energy performance certificates (benefiting the owner at least in the long run) and, simultaneously, the efficiency of the building’s energy consumption would increase (benefiting the tenant through lower electricity consumption and thus lower bills). Despite these advantages, there are currently few incentives to encourage the performance of efficiency enhancing works and the participation in (RES) energy communities.

State aid could be designed and allowed to incentivize (e.g. in the form of a “green bonus”) the performance of necessary enhancements to buildings both in terms of efficiency and enabling the participation in (RES) energy communities.

It should also be noted with regard to energy communities, that the latter should be developed in close cooperation with the distribution system operators (DSO) and, where applicable the relevant TSOs, acting as facilitators. Although more related to antitrust than state aid concerns, it is critical that the DSOs indeed act as facilitators and do not, to preserve their legal monopoly, create unwarranted barriers to the deployment of energy communities.

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.

No comment.

4. How should we define positive environmental benefits?

a. Should it be by reference to the EU taxonomy³ 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?

Asides from the EU taxonomy, it may be worthwhile to consider also the criteria taken into consideration by the ENTSOs in the elaboration of their respective TYNDPs. Indeed, when assessing the costs and benefits of infrastructure projects that apply for inclusion into the TYNDP, the ENTSOs consider environmental impacts. These include i.a. emissions of CO₂ as well as non-CO₂ emission, the impact on protected sites (e.g., under the Habitat Directive or Natura2000), etc. The ENTSOs have thus designed environmental impact indicators and it may be useful to seek inspiration for the definition of positive environmental benefits from the underlying elements considered by the ENTSOs in determining such impacts.

PART II: ANTITRUST RULES

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

One area where we would like to see an evolution is in long-term transmission capacity allocations to facilitate the uptake of renewable corporate power purchase agreements (PPA).

Many private companies are procuring energy from renewable energy generation sources (RES) as part of their plans to reduce carbon emissions in their sustainability strategies. Corporate PPAs (i.e., long-term supply contracts guaranteeing the delivery of renewable power from generator to business) help address the off-take risk for developers and financing parties and therefore can significantly help to increase and accelerate the deployment of renewables.

Encouraging cross-border PPAs is thus an important element in expanding their contribution to Europe's energy transition. In 2019, the global market for RES corporate PPAs had grown to represent 14 GW. Corporate PPAs have risen rapidly in Europe also, with however still only 1.6 GW worth of deals in 2019. While this represents progress, the full potential of corporate PPAs remains largely untapped in Europe due to existing regulatory barriers.

One such barrier, and a critical one, is the fact that transmission system operators (TSO), supported by regulators, predominately refuse to enter into long-term transmission capacity allocation contracts, even in the context of capacity allocation auctions. This means that a key element in the price of PPAs (which require underlying capacity for the delivery of the contracted RES) remains

highly uncertain and acts, at least to some extent, as a deterrent to the conclusion of long-term RES corporate PPAs.

The reason behind the lack of long-term transmission contracts lies in part in the reliance on an erroneous interpretation of a 2005 preliminary ruling of the Court of Justice of the EU (CJEU).² In this case, the CJEU was asked by a Dutch court to provide a preliminary ruling on preferential access to an electricity interconnector by an undertaking (i.e., SEP) that previously held a monopoly, because of long-term agreements concluded prior to the liberalization of the EC energy markets. The CJEU ultimately held that the preferential treatment violated EU law. However, and contrary to what some have claimed, it did not in the ruling prohibit long-term capacity contracts per se. Rather, the Court ruled that Member States were prohibited from granting priority access to capacity rights covering a large portion of the market on the sole justification of honoring existing contracts, without asking the European Commission for a derogation that was available to them.

In addition, the European Commission has looked into long-term contracts in the gas sector in the *Distrigas* case and considered that contracts of too long a duration and that tied up too great a share of the market could amount to an abuse of dominance prohibited by European antitrust rules.

Allowing for long-term transmission capacity contracts would not only facilitate the uptake of RES corporate PPAs (and thus the integration of RES into the EU energy mix) by contributing to reducing price uncertainties, it would also allow developers of transmission lines to reduce their own cost of financing since at least some level of their remuneration could be guaranteed for the foreseeable long-term. This in turn would allow for increased capacity available for the integration of RES.

It would be helpful to explicitly authorize the conclusion of long-term transmission capacity contracts under certain conditions, such as specifying a maximum duration, or even better, specifying a maximum market share that could be the subject of such contracts so as to ensure that a sufficient portion of the market remains open. In other words, we would welcome guidance as to “safe harbors” below which long-term transmission capacity contracts would explicitly be authorized. This would enable the conclusion of long-term RES corporate PPAs with more certainty and hence enhance their likelihood and encourage their uptake, thereby in turn contributing to the further integration of RES into the European energy mix.

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

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² Judgment of the Court of Justice of the European Union of June 07, 2005 in case C-17/03, *VEMW, APX and Eneco N.v. v. DTE*.

to “safe harbors” below which long-term transmission capacity contracts would explicitly be authorized. Please see for further details our reply to point 1 above in this section.

3. Are there circumstances in which the pursuit of Green Deal objectives would justify restrictive agreements beyond the current enforcement practice? If so, please explain how the current enforcement practice could be developed to accommodate such agreements (i.e. which Green Deal objectives would warrant a specific treatment of restrictive agreements? How can the pursuit of Green Deal objectives be differentiated from other important policy objectives such as job creation or other social objectives?).

Long-term transmission capacity allocation contracts can be considered restrictive agreements since they tie up a portion of available capacity for long periods of time. However, as explained above in point 1 of this section, they are also critical in facilitating the uptake of long-term corporate RES PPAs, which in turn will allow for a faster and increased deployment of RES.

It would thus be useful to allow long-term transmission capacity contracts, while possibly limiting their duration and/or the market share they can represent.

Energy communities are another area where certain antitrust-related rules have an impact on the Green Deal objectives.

Indeed, consumers must now be afforded an unrestricted choice in their electricity supplier, which encourages competition amongst suppliers. This liberty of choice has an impact on the creation of energy communities (including RES energy communities). Indeed, if, for example, the owner of a multi-dwelling building wanted to create an energy community, said owner would only be able to do so in respect of the energy provided to common areas, otherwise the owner would be restricting the right of consumers that occupy the premises to choose their supplier, which would be contrary to established legislation.

This results in a significant hurdle to the creation of energy communities. The issue applies both to private dwellings and to commercial ones, such as without limitation shopping centers or port environments.

This similarly impacts RES energy communities, which become more difficult and less worthwhile to establish if only a portion of the energy supplied to the community may be concerned. Such restrictions in turn limit the uptake of RES.

It would therefore be advisable to explicitly allow for a derogation to consumers’ free choice of supplier to allow the owners of multi-premise properties to enter into appropriate RES energy community agreements that would cover the entire premises and not only the common areas thereof.

PART III: MERGER CONTROL

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

Actually, we see cases that are currently not possible where mergers between firms could help contribute to the energy transition and Green Deal objectives.

Indeed, the current unbundling requirements that came about with the Third Energy Package as part of the liberalization of the energy market make it difficult, if not impossible, for a TSO that is unbundled under the Independent Transmission Operator (ITO) model to merge with one that is unbundled under the Full Ownership Unbundling (FOU) model.

The ultimate goal under the Third Energy Package is full ownership unbundling, yet in the ITO model, it is considered that sufficient safeguards exist to allow for a TSO that was already part of a vertically integrated undertaking (VIU) to remain part of said VIU provided certain conditions are met to guarantee the independent actions of the TSO. This is to prevent the TSO and the VIU of which it is part from closing the market by favoring transactions within the group.

Because the ITO model is only available to TSOs that were already part of a VIU at the time the Third Energy Package entered into force, a TSO unbundled under the FOU model is not legally authorized to subsequently become part of an ITO (and thus a VIU), including through a merger process.

The foregoing limits the opportunities for mergers amongst TSOs. This in turn may limit the possibility of enhanced cross-border exchanges, which are critical to the realization of the internal energy market. Not allowing these mergers to happen may also hinder increased RES integration since one TSO may have a much larger and easier (existing and potential) access to RES from which the other TSO might benefit, thereby increasing the overall potential for RES integration.

For an example of a situation where a merger might be harmful to consumers by reducing their choice of technology, please see our reply to the next question.

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

We do see at least one area in which merger control could be enhanced in the energy field to ensure competition endures.

Indeed, new market players are entering the energy sector with new products. Incumbent grid operators (i.e., TSOs and DSOs), seeing an opportunity, sometimes partake in these new markets as part of their non-regulated activities. However, by nature, grid operators have access to information that new players may not have. While we support encouraging TSOs (and DSOs) to facilitate these activities, some restrictions should also be put in place so as to ensure the former continue to act in the general interest and do not use their position to later absorb start-ups or companies in emerging energy markets, thereby stifling growth in those markets.

For example, TSOs have a monopoly in the transmission of electricity. This also gives them access to information to which others (non-TSOs) may not be privy. Some companies are entering the market of data management and are providing services that allow better price forecasts. Some TSOs have created or are creating platforms to facilitate the exchange of data management services with possible customers of such services.

The facilitation of contacts between the aforementioned service providers and potential customers is certainly positive. However, it cannot be excluded that at some point, TSOs will have gathered sufficient information on these exchanges for them to acquire certain service providers and bring those competences in-house. This would then allow the TSOs to favor their own in-house services, thereby possibly creating significant barriers to new entry and possibly even eliminating existing market players. It is therefore important not only to be aware of these possibilities, but also to have adequate safeguards, including through merger control, in place to prevent them from happening.

Another area where we see the potential for merger control to contribute to the objectives of the Green Deal is regarding storage ownership. As of now, there is uncertainty regarding the possibility for grid operators to invest in, or own, electricity storage assets.

Due to the intermittent nature of RES, storage is set to play a pivotal role in the further integration of RES into the European energy mix. Explicitly allowing grid operators to actively own electricity storage assets would facilitate investments in these critical assets. This would in turn accelerate the deployment of storage, which is necessary for the energy transition and a greener energy mix.

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