

SNAM inputs to the Commission call for contributions to
“Competition Policy supporting the Green Deal”

Executive Summary

While acknowledging that competition policy cannot replace environmental laws and regulation, the present consultation aims at collecting views on how best EU competition law can complement the proposed EU Climate Law and extended emissions trading scheme, thereby contributing to the delivery of EU climate targets.

The consultation encompasses the three main competition policy areas of State Aid, Antitrust rules and Merger Control.

In Snam’s view, the backdrop argument would be that market failures and environmental price externalities should be taken into account in the forthcoming revision of Competition rules¹. If this reconciliation exercise was not to take place, it is most likely that the delivery of environmental outcomes would be materially delayed due to competition policy constraints. On the contrary, competition policy can best be part of the solution, as one tool in a range including regulation, carbon taxation, emission trading systems and innovation.

At a more granular level, the main issues across the three main competition policy areas to be addressed are:

- As applied to State Aid, enhancing both State Aid guidelines and GBER in order to mirror/extend RES provisions as applied to renewable gases, in particular hydrogen, as well as allowing wiggle room for Member States to allocate aid to energy infrastructure if needs be;
- As applied to Antitrust rules, reinstating “environmental agreements” in the guidelines and, in the case of hydrogen related projects, tailoring the interpretation of the burden of proof related to art. 101(3) TFEU for hydrogen as a function of the three phases set out in the EU Hydrogen Strategy;
- Introduce flexibility as applied to merger control through the definition of a framework identifying a flexible and staged approach for activities/market segments that are key to the delivery of decarbonisation objectives, in line with the principles of proportionality. As applied to hydrogen, the approach to merger control should ideally be framed around the three stages identified within the EU Hydrogen Strategy, with the purpose of allowing the delivery of both network and non-network related functions associated with PtG.

We set out below the arguments in further detail, while acknowledging that the present debate is still fluid insofar the future shape of the EU ETS, representing the core instrument defined by the Commission to drive decarbonisation, its effectiveness as well as the associated implications of its reform from scope to cap mechanics, is yet to be

¹ For substantiated discussion on how taking environmental goals into account in competitive analysis is deemed proportionate, necessary and legal under the EU Treaties, see «Sustainable Competition Policy », M. Dolmans, CLPD Competition Law and Policy Debate Vol 5, Issue 4 and Vol 6 issue 1, March 2020, pp. 10-11.

determined. In particular, the size of the associated allowances needed and the impacts on existing regulatory frameworks are yet to be defined. The results of such a process may result into a recalibration of efforts to decarbonise different sectors and likely into a new equilibrium of EU policy mixes. The current EU policy reform agenda in relation to environment is a very complex and ambitious one, likely entailing a certain degree of flexibility at MS level in terms of climate policy as decisions will reflect the industrial and energy policy complex decisions that will greatly depend on natural resources endowment at MS level, topography, demand/supply market dynamics and sector specific investment cycles. In this context, coordination between private sector, institutions and regulatory authority will be key.

Relatedly to hydrogen, while the EU ETS is deemed to be the key instrument to reducing CO₂ emissions in the EU in light of its potential to be comprehensively applying to most sectors in the economy and inducing decarbonisation on the supply and the demand side, it is in Snam's view that it is unlikely that EU ETS will be effective to kick-start a hydrogen economy in the short run due to the relatively low CO₂ prices in the ETS compared to the cost of CO₂ abatement via renewable/low carbon hydrogen production, as well as to the current restriction of the ETS to electricity production and industry, which protects other sectors such as transport and heating from ETS-based CO₂ prices.

Overtime, it is likely that the EU ETS will gain effectiveness. In the meantime, a number of supply and demand policy provisions will be needed together with complementary amendments of competition policy rules. The expectation is that transitional provisions will be progressively withdrawn as the EU ETS, together with other market-based instruments, gain effectiveness.

Accordingly, the comments set out below are to be interpreted in the perspective of achieving the objective of enabling the energy systems transition through proportional enforcement of competition policy. In practice this would translate into the definition of more flexible and staged competition policy frameworks across the three areas of State Aid, Antitrust rules and Merger Control, enabling the delivery of decarbonisation while preserving competition outcomes.

Part 1: State aid control

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.

A revision of State Aid rules in order to better support Green Deal priority goals (decarbonisation, energy efficiency, sustainable mobility, circular economy, zero pollution ambition) could be the basis of a fully effective framework allowing MS to deliver green economy transition, while making the most efficient use of limited public funds. In Snam's view, the revision of State Aid guidelines should reflect:

- The increasingly ambitious EU environmental targets: the GHG emissions reduction targets (50-55%, "2030 Climate Target Plan") were recently increased and will possibly become even more ambitious throughout 2021, including through the forthcoming "Europe Climate Law";
- The economic downturn associated w/Covid 19;
- The residual market failure associated with the lack of recognition of environmental and flexibility/system adequacy externalities through existing policy tools (EU ETS/carbon taxes), particularly with reference to low carbon and renewable gases; and
- The latest decarbonisation discussion developments, with its narrative now hinging on the intertwine between RES and renewable/low carbon gas, in particular hydrogen, in contrast with the initial "electrification only" vision.

More broadly, the revision should aim to:

- Enhancing the delivery of clean power (despite most RES technologies would now be in the mature phase);
- Kicking off green gases and the value chains underlying, with particular reference to hydrogen; and
- Promoting sector coupling, in order to enable timely delivery of cross-sector economic efficient decarbonisation outcomes.

In terms of the guidelines revision, it would be desirable to introduce provisions for renewable and low carbon gases mirroring those related to RES, with particular reference to the inclusion of RES within GBER. It is worth noting, however, that competitive bidding is the only permitted means of granting operating aid for generation of electricity from renewable energy sources at present. This stringent approach should not be automatically replicated in relation to renewable gases, as any support scheme underlying renewable generation should be tailored around technological maturity (hence competitive bidding may not necessarily always be the most cost efficient solution in the case of hydrogen and other low carbon at this initial phase).

More broadly, both from an end-user and production perspective, any form of State Aid should ideally be defined in stages. As acknowledged by the Commission, State Aid rules have already served the purpose of facilitating green investments in the past while protecting competition. In this spirit, the revised State Aid guidelines would need to align the Green Deal objectives and, with specific reference to hydrogen, refer to the July 2020 EU H2 Strategy in order to facilitate the delivery of the investment targets underlying.

Similarly, the reduction of charges to specific category of consumers (electricity-intensive consumers in the case of RES), is another relevant aspect which would warrant extending/tailoring to renewable and low carbon gases. In fact, while the introduction of the renewable gas category in the GBER refers to a supply side measure, demand side measures are also key to the delivery of climate outcomes. In the case of low carbon and renewable gases, the provisions should entail the identification of relevant consumer categories along the scale up phase of these markets and the inclusion of demand side provisions mirroring the aforementioned.

Finally, another aspect that would warrant revision is in relation to art. 48.2 of the GBER, which limits aid to energy infrastructure located in assisted areas. We consider these provisions to be now out of date in light of the increasingly important role that both gas and electricity networks are expected to play. In relation to gas networks, in particular, and the discussion on whether/how/when introducing regulation for H2 infrastructure, there would be a strong case to allow flexibility to Member States in terms of defining how to finance the decarbonisation of existing gas grids and the risks associated, which would expectedly be relevant mostly in the discovery and scale up phase. These costs could be best born by either gas consumers or hydrogen consumers or electricity consumers or tax payers. Most likely, in a number of cases, the most efficient outcome will be allocating transition costs onto both energy consumers and tax payers. The State Aid guidelines should be amended in our opinion to allow for this flexibility, which is deemed needed in order to remove barriers to efficient green integrated energy markets scale up.

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?)

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?

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.

4. 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?

The EU Taxonomy represents one of a set of useful references in order to support the definition of sustainability criteria as it provides a classification of economic activities in relation to their potential contribution to the European environmental objective.

However, defining environmental benefits with limited reference to the EU Taxonomy only could be too restrictive as all other activities with environmental positive externalities won't be considered. In particular, the sustainability criteria under definition in the EU Taxonomy might be too restrictive in relation to some economic activities that could help a quicker and more economically sustainable energy transition, through for instance the utilization of less polluting energy vectors first, enabling a gradual scale up of fully renewable energy vectors (as it could be the case of the progressive substitution of more polluting fuels with natural gas at a first stage and its subsequent substitution with renewable gases such as hydrogen and biomethane).

Additionally, the EU Taxonomy is as of today not yet finalized (eligibility criteria are at the moment under development only for two out of the six environmental objectives included in the EU Taxonomy so far).

Part 2: Antitrust rules

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

Companies in some specific sectors who are willing and capable to support the transition towards a fully decarbonized economy should be allowed to have a more proactive role and engage in the development of new technologies, infrastructure and uses of green energy vectors, further to what may be limited today by the existing legislative provisions.

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 clarification be given (general policy guidelines, case-by-case assessment, communication on enforcement priorities...)?

The Commission calls for views on whether specific provisions should apply to horizontal and vertical agreements between undertakings pursuing the Green Deal objectives. In this relation, it is Snam's view that "environmental agreements" should be reinstated in the guidelines as part of the review of the horizontal – in fact, these were removed in 2010. In particular, the 2001 horizontal guidelines indicated that "environmental agreement" are unlikely to fall under Article 101 if *"no precise individual obligation is placed upon the parties or if they are loosely committed to contributing to the attainment of a sector-wide environmental target"* leaving discretion to the parties as to the means; and in case of *"agreements setting the environmental performance of products or processes that do not appreciably affect product and production diversity"*; and *"agreements which give rise to genuine market creation, for instance recycling agreements"*. Exemption under Article 101(3) is available if *"net benefits in terms of reduced environmental pressure resulting from the agreement, as compared to a baseline where no action is taken. In other words, the expected economic benefits must outweigh the costs"*. Article 101(3) TFEU permits agreements that restrict competition if they meet four conditions. They must (1) "contribute to improving the production or distribution of goods or to promoting technical or economic progress"; (2) "allow consumers a fair share of the resulting benefit"; (3) "not impose restrictions which are not indispensable to the attainment of these objectives"; and (4) "not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".

It is Snam's opinion that environmental agreements should automatically meet the first condition of Article 101(3) TFEU and, in particular with relation to low carbon gases and hydrogen, that a proportional and staggered approach to the burden of proof associated

with condition (2-4) should be framed within the guidelines to ensure that competition policy is aligned with EU environmental and energy policy².

In addition, the new guidelines should be amended in order to support not only environmental standard-setting/agreements, yet agreements contributing to the delivery of green energy production through addressing the so called “first mover disadvantage” and cutting through other coordination problems.

In the context of the energy systems, these should be allowed and promoted to any agreement that could contribute to the development of demand and supply side of hydrogen, in light of the paramount role that it is expected to play in the decarbonisation of the natural gas sector, as well as other high decarbonisation potential low carbon gases (e.g. biomethane) and energy efficiency. Particularly in relation to hydrogen, the softening of antitrust rules in relation to accelerating the definition of end-use appliances standards is of priority relevance in allowing the development of the value chains underlying that are needed to promote the timely kick off of the industry. It is likely to be the case, in fact, that for low margin hydrogen end-use related products, and/or for end use market segments where consumers are unwilling to pay for sustainability, sector-wide agreements may be needed.

In terms of the best form to provide the envisaged level of comfort, we deem an update of the guidelines, as opposed to case by case assessment or other notification forms, to be the most effective way forward.

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 can be differentiated from other important policy objectives such as job creation or other social objectives?).

² https://ec.europa.eu/energy/sites/ener/files/hydrogen_strategy.pdf

Part 3: 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?

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?

As it has been clearly explained by the Commission, reorganisations and mergers are generally welcome insofar that they do not produce harmful effects and contribute to increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the EU.

In this context, merger control could be best enhanced through the definition of a framework that allows a flexible and staged approach for activities and market segments that are key to the delivery of decarbonisation objectives, in line with the principles of proportionality.

As applied to hydrogen, for example, the approach to merger control should ideally be framed around the three stages identified by the Commission with the EU hydrogen Strategy. In our view, there is a strong case for softening merger control provisions as applied to specific investment areas, including power to gas facilities, that are particularly relevant to the delivery of decarbonisation during the discovery and technology upscale phase. In the case of power to gas facilities, for instance, merger control should not prevent the potential of specific assets in terms of both network and non-network related functions to unfold, e.g. the approach to PTG ownership should be reflecting the need to allow efficient investment volumes and operation.

Going into some further level of granularity in relation to PtG ownership, different consideration could apply depending on the specific type of activity. Indeed, we believe there is a strong case to allow ownership of or engagement in PtG facilities by network operators for R&D and pilot projects, in particular where the evaluation of technical impacts on the network plays a central role, potentially subject to certain conditions to be defined by regulatory authorities. Similarly, for large-scale PtG facilities, TSO engagement should be allowed insofar the market is unlikely to deliver these projects and if the projects are desirable from a wider system perspective, which could in turn potentially be evaluated in an ex-ante assessment.

The ex-ante assessment could be based on a logical framework such as the one developed by CEER in 2019 (The Bridge Beyond 2025), but skipping the proposed multiple-step market test to avoid significant delays to relevant investments. Finally, we remark that the CEER foreseen multiple-step market test approach is complex and lengthy, since it includes several stages which have the potential to take months and years to generate a result and allow the decision process to enter the next step. This carries the risk that relevant investments will be delayed or even called off in favour of other (more carbon-intensive) technologies. This, in turn, poses a risk to the timely deployment of significant

PtG production capacities envisaged in several European countries, given that there is currently no stable market-driven business case for most hydrogen production technologies.

Rather than actually following the multiple-step market test process in practice, regulators could use the logical framework as the basis for a conceptual ex-ante assessment to decide on the level of TSO/DSO involvement for certain hydrogen activities, under consideration of the maturity of the underlying technology, an assessment of the economics of this activity in the merchant market, and the benefits related with the activity. For this purpose, clear European guidance should be provided, potentially including through Merger Control regulation, to ensure a thorough, yet timely review, tendering and approval process.