

"COMPETITION POLICY SUPPORTING THE GREEN DEAL"

**CONTRIBUTION FROM INTESA SANPAOLO
TO THE EUROPEAN COMMISSION'S CALL FOR CONTRIBUTIONS**

Intesa Sanpaolo would like to thank the Commission for the opportunity to provide a call for contribution in order to establish if and how competition rules can support the sustainability objectives set out in the European Green Deal (*infra*, Green Deal). As a stakeholder with a particular attention to environmental issues, Intesa Sanpaolo is pleased to participate to this initiative and would like to share some short relevant points with the Commission hereof.

The Green Deal provides an action plan to boost the efficient use of resources by moving to a clean circular economy and restore biodiversity and cut pollution. It aims at reducing gas emissions by at least 55% by 2030 and making Europe the first climate-neutral continent by 2050¹. Even if the Green Deal was introduced before the COVID-19 outbreak, it remains a priority of the 2021 Commission work program². The need to improve the health of citizens and the protection of the environment has indeed been accelerated by the disruptions brought by the coronavirus pandemic.

European Union (*infra*, EU or Union) law provides that environmental considerations, such as the reduction of pollution or climate change-related costs³, must be taken into account for the definition and the implementation of the Union policies and activities, including competition rules that are also based on economic criteria⁴.

In accordance with the Europe 2020 strategy⁵, antitrust rules help to keep prices down and encourage the adoption of more energy-efficient technologies and the use of the planet's scarce resources efficiently.

This contribution analyzes the relationship between environmental issues and **State aid control (part 1) and Antitrust rules (part 2)**. The present paper represents the position of Intesa Sanpaolo on specific issues and it does not intend to be a comprehensive study on the matter.

¹ Communication from the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "A new Circular Economy Action Plan – for a cleaner and more competitive Europe", COM (2020) 98 final.

² 2021 Commission work program – from strategy to delivery, 19 October 2020.

³ Maurits Dolmans, "Sustainable Competition Policy", CLPD Competition Law and Policy Debate Vol. 5, Issue 4 and Vol. 6 issue 1, pp. 5-6 ([link](#)).

⁴ OECD, Directorate for Financial and Enterprise Affairs Competition Committee, "Roundtable on horizontal agreement", 14 October 2010, p. 2 ([link](#)).

⁵ Communication from the Commission, "EUROPE 2020 - A strategy for smart, sustainable and inclusive growth", COM (2010) 2020 final.

Part 1: STATE AID

European companies need a State aid legal framework that supports industry's decarbonization and the implementation of renewables, energy efficient and competitive solutions. Considering that the achievement of Green Deal's objectives requires large investments, also from private companies, that should be done in the most effective and affordable way⁶. This is confirmed by the Article 11 of Treaty on the Functioning the European Union (*infra*, TFEU), which refers to the environmental integration principle, providing that a balance between competition and environmental protection is necessary, in order to support the green transition.

Question

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.*

The Commission should review the rules on State aid, in order to meet its sustainable commitments under the Paris Climate Agreement⁷ and the green targets under the climate neutrality by 2050 goal.

This process has been boosted by the COVID-19 outbreak, because European Institutions have promoted economic recovery packages⁸ to shift into a greener and more resilient economy⁹. In fact, State aid could contribute to accelerate the transition towards low carbon energy systems in a cost-effective way and address other negative consequences of the pandemic in areas of, for example, innovation and job creation.

Intesa Sanpaolo also suggests the adoption of a **State aid framework with a clearer timeline for the approval of support schemes or individual aids**, in order to provide companies with greater certainty and faster processes. Indeed, an excessive length of the procedure may lead to the blocking or cancellation of projects, which could have had a positive impact on environmental objectives. The adoption in a very short timeframe of a dedicated Temporary Framework¹⁰, to support the economy of the Member States in the context of the coronavirus outbreak, is an example of how the Commission could establish a more streamlined process for approving measures.

⁶ Speech, Executive Vice-President Vestager, "The Green Deal and Competition policy", 22 September 2020 ([link](#)).

⁷ The Paris Agreement was adopted through Decision 1/CP.21 ([link](#)).

⁸ Speech, President Von der Leyen, "Von der Leyen outlines ambitious recovery plan for Europe", 13 May 2020 ([link](#)). See also the speech of the Executive Vice-President Vestager, "Shaping the future: the role of State aid and competition rules for ensuring a sustainable green and digital recovery", 16 November 2020 ([link](#)).

⁹ Matthias Buck, Juliette Delarue, Clemens Holtmann, "The role of State Aid for a Green Recovery", webinar of 30 June 2020, Agora-Energiewende.de, p. 7 ([link](#)).

¹⁰ European Commission, "State aid rules and coronavirus" ([link](#)).

Moreover, Intesa Sanpaolo believes that EU law should ensure the **compatibility with State aid of tax incentives for those financial companies that invest in green projects, supporting innovation and circular economy**.

As a mere example, this year in Italy¹¹ a tax credit has been established for companies that carry out environmental projects. The credit at issue amounts to the 10% of the expenses incurred for licenses, consultancy and employees. This provision is in line with secondary legislation on State aid.

In the same vein, Intesa Sanpaolo believes that also financial companies that grant loans or credit to business activities with a positive environmental impact, could be eligible to receive a **tax credit which could boost private investments in so-called green companies and projects**¹². That should be done by Member States in line with State aid rules, adapting the current secondary rules on State aids. Thus, the EU should ensure legal certainty in this regard, for example, through a **revision of Regulation 651/2014**¹³, which gives automatic approval for a range of pre-defined aid measures deemed to be less distortive of competition, under a certain threshold. Article 21, paragraph 3 of the Regulation already states that aids to finance risks for Small and Medium Enterprises (*infra*, SMEs) can be compatible with State aid rules, also in the form of tax incentives granted to private investors (but limited to natural persons) that directly or indirectly invest their money in an eligible undertaking. A similar provision should ensure the compatibility with State aid rules of **tax incentives in favor of individuals, but also undertakings (e.g., financial companies), which, through the credit disbursement**¹⁴, **invest in green initiatives of SMEs and Large Corporates** involving, for example, the reduction of emissions or the use of less pollutant alternative raw materials. That would be in line with the definition of private investors encompassed under Article 2 (72) of the Regulation.

Part 2: ANTITRUST RULES

Pro-environment legislation and regulation can lead to important advantages in terms of transparency and legal certainty. However, it could be not effective in pursuing EU sustainability goals¹⁵ due to the length of the legislative procedures. Moreover, legal actions are sometimes considered as hampering to the market actors' initiative to innovate¹⁶. Thus, public initiative must be complemented by private actions, such as horizontal cooperation among competitors. Moreover, horizontal cooperation among undertakings could overcome the huge and unprofitable investments that a company, on its own, would have to face, the so-called "first mover disadvantage".

¹¹ Law n. 160/2019, Article 1, paragraph 203 ([link](#)).

¹² For an example of investments in activities with a positive environmental impact, see Intesa Sanpaolo, "Loans and Services for the Green Economy" ([link](#)).

¹³ Commission Regulation (EU) n. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

¹⁴ Intesa Sanpaolo, "Half-yearly report as at 30 June 2020", p. 50 ([link](#)).

¹⁵ OECD, Policy Roundtables, "Horizontal Agreements in the Environmental Context", 2010, pp. 97-98 ([link](#)).

¹⁶ In this regard, see Victor Sand Holmberg, "EU Competition law and Environmental Protection – Integrate or Isolate?", Master thesis, Lund University, p. 16 ([link](#)).

Questions

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).

Multi-stakeholder cooperation can both lead to significant economic benefits and be resolute in reaching sustainability objectives, such as pollution abatement. In fact, individual actions by companies may be discouraged due to the high costs of investments. According to the Horizontal Guidelines¹⁷, companies can use horizontal agreements to share risks and costs, increase investments, improve the quality and variety of products for the benefit of innovation.

An example of a "green horizontal agreement" can be found in the "Sala Conta Multibanca" project¹⁸ promoted by the Italian Banking Association, which Intesa Sanpaolo joined. Following several cases of cash shortages occurred between 2013 and 2014 in Counting Rooms operating in Italy, banks took some initiatives to strengthen controls over the transport and custody of cash, also through actions at sector level. To this end, in 2015, a cooperation between a group of banks¹⁹ has been initiated to adopt a **new operating model which allowed participating banks to adopt (i) common rules on Counting Rooms' inspections, and (ii) an inter-bank compensation of cash**, which allowed to reduce cash movements and the role of the Italian Central Bank without any anticompetitive effect.

The project at issue has revealed to have a relevant pro-environment impact, indeed the pollutant level of a cash payment transaction, in relation to production and transport, is estimated at 4.6 g of CO₂, higher than the card transaction, estimated at 3.8 g²⁰. Thus, considering that **the project heavily reduced cash transportation**, it helped in reducing cash-related pollution. Furthermore, cash is the most expensive payment instrument, considering production, transport, custody and cash management. In Italy, such costs affect about the 2% of the average value of each transaction, and they are equal to about 10 billion Euro per year. A substantial share of the charges (about 1/4) is attributable to transportation and the "storage" of the cash²¹.

The sustainability objectives of the project, such as the reduction of emissions caused by transports of cash to and from the local subsidiaries of the Italian Central Bank, **could not have been achieved without the cooperation** of several banking institutions, provided that reduction of cash movements has been made possible only through the adoption of an inter-bank compensation activity.

¹⁷ 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" (2011/C 11/01).

¹⁸ See the presentation "Innovazione e sostenibilità nel futuro della gestione del contante" ([link](#)).

¹⁹ Intesa Sanpaolo, Poste, Unicredit, Banco BPM and Crédite Agricole. Now the cooperation is managed by the Italian Banking Association and the number of participating banks is increasing.

²⁰ For a wider analysis, see De Nederlandsche Bank, Dutch Payment Association, "From cash to cards – how debit card payment overtook cash in the Netherlands" ([link](#)).

²¹ Banca d'Italia, "Il costo sociale degli strumenti di pagamento in Italia", March 2020, p. 21 ([link](#)).

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...)?

In order to promote horizontal cooperation agreements, which pursue beneficial environmental outcomes, **legal certainty for companies needs to be increased**²². It's important that companies are able to timely individuate the border between legitimate agreements and anticompetitive collusion, for the purpose of reducing the costs associated to legal uncertainty²³.

However, this issue has not been sufficiently addressed by competition authorities. A significant exception is the Dutch Competition Authority (*infra*, ACM) which, in July 2020, has proposed **new draft guidelines**²⁴ with the aim of providing a guidance on the types of green cooperation agreements that can be adopted by companies, without breaking the competition rules²⁵. In particular: (i) the ACM will not impose fines for sustainability agreements that are later found to be anticompetitive, if the companies followed the Guidelines in good faith and the sustainability agreements were public²⁶; (ii) a quantitative assessment is provided in cases in which it is already sufficiently clear that benefits are greater than the harm of competition²⁷. This is the case, for example, of those agreements that will only lead to limited price increases or a more limited choice for buyers, while, at the same time, users will receive enormous benefits in return.

Intesa Sanpaolo believes that a better guidance to determine which green cooperation agreements do not violate the Article 101, paragraph 1 TFEU and to explain the Commission's methodology is necessary, especially for the antitrust self-assessment that is required by companies. Practical examples in a general policy guideline, such as those proposed by the ACM, are desirable. In general, Intesa Sanpaolo believes that the Horizontal Guidelines should contain a **separate chapter on "environmental agreements" like the previous horizontal guidelines**. Such chapter should also include some recommendations regarding "green syndicated loans". That would be useful for banking institutions and for the economy. Indeed, through syndicated loans, companies would benefit from the possibility of obtaining a higher value loan, cost reduction and certainty of

²² In the press release IP/20/618, 8 April 2020, accompanying the guidance on allowing limited cooperation among businesses during the pandemic, the Commission indicated that, in many cases, oral guidance given to companies was enough. However, according to Intesa Sanpaolo, comfort letters would be more effective in addressing novel and/or unique issues.

²³ Speech, Executive Vice-President Vestager, "Competition and sustainability", 24 October 2019 ([link](#)).

²⁴ ACM, "Guidelines, Sustainability Agreements – opportunities within competition law", July 2020 ([link](#)).

²⁵ See European Commission, "Statement on ACM public consultation on sustainability guidelines" ([link](#)).

²⁶ Guidelines ACM cit., p. 3.

²⁷ Guidelines ACM cit., paragraph 48.

disbursement²⁸. Obviously, for the most peculiar cases, the Commission should also provide guidance on a case-by-case basis.

Moreover, Intesa Sanpaolo supports the adoption of recommendations that clarify the conditions to benefit from the exemption under Article 101, paragraph 3 TFEU (see below). Such further explanations could be part of a standalone Block Exemption Regulation.

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?).*

According to Intesa Sanpaolo, the conclusion of green horizontal agreements needs to be encouraged by the Commission through an extensive application of the exemption provided for in Article 101, paragraph 3 TFEU. This provision exempts from the prohibition contained in Article 101, paragraph 1 TFEU, if the agreement: (i) contributes to improve the production or distribution of goods or to promote technical or economic progress; (ii) allows consumers a fair share of the resulting benefits; (iii) does not contain unnecessary restrictions; (iv) does not eliminate competition in the relevant market.

First, Intesa Sanpaolo believes that it is necessary to **include in the first condition also the achievement of long-term economic benefits**²⁹, such as the improvement of environmental or social conditions³⁰. Secondly, the term “consumers” in the second condition should also include future generations of consumers³¹, that would benefit not only from low prices, but also from less pollution and greater health³². Competition authorities should apply the exemption provided for in Article 101, paragraph 3 TFEU when the reduction in competition are outweighed³³ by the expected sustainability objectives and consumers receive a fair share of those benefits³⁴. In fact, by assigning monetary values to the reduction of emissions,

²⁸ Intesa Sanpaolo appreciated the study commissioned by the European Commission on loan syndication, “EU loan syndication and its impact on competition in credit markets” ([link](#)).

²⁹ Zsotia Tari, “Competition or environmental protection: is it necessary to choose?”, *Iustum Aequum Salutare* VI. 2010/4, p. 281 ([link](#)).

³⁰ Green agreements will meet the first condition of Article 101, paragraph 3 TFEU if the parties can substantiate the claimed benefits either qualitatively or quantitatively. In this regard, see Guidelines ACM cit.

³¹ The notion of “consumers” should include (i) current and future purchasers or users, (ii) direct or indirect purchasers or users, and even (iii) the “society”. In this regard see European Commission, decision of 24 January 1999, case IV.F.1/36.718 – CECED, paragraph 56. In this regard, see also Simon Holmes, “Climate change, sustainability and competition law”, *Concurrences.com*, p. 24 ([link](#)).

³² See European Parliament “Resolution of 31 January 2019 on the Annual Report on Competition Policy” (2018/2102(INI)), paragraph 79.

³³ European Commission, “XXVth Report on Competition Policy 1995”, paragraph 85 ([link](#)). See also Julian Nowag, “Competition law's sustainability gap? Tools for an examination and a brief overview”, *Lund University Legal Research Paper Series*, October 2019, p. 5 ([link](#)).

³⁴ The Communication from the Commission, Notice, Guidelines on the application of Article 81, paragraph 3 TEC [now Article 101, paragraph 3 TFEU] (2004/C 101/08) provides that the assessment of the “benefits flowing from restrictive agreements is in principle made within the confines of each

it is possible to move away from short-term price effects and start to quantify the wider benefits³⁵.

For example, in the past, the Commission found an agreement which set standards for energy consumption between importers and producers of washing machines exempted from the prohibition of anti-competitive agreements³⁶. More recently, the Luxembourg Antitrust Authority³⁷ exempted, under national law, the price-fixing agreement concluded between Webtaxi S.à.r.l. and its members in the market of taxi booking system. In particular, the fixing of uniform fares, determined by a common algorithm, was considered legitimate also because it was necessary to pursue the reduction of pollution, which allowed consumers to obtain a net benefit. To sum up, **past and recent practices shows that environmental concerns may be considered in antitrust assessment**, as long as they enhance consumer welfare and an efficient allocation of resources³⁸.

Conclusions

As briefly explained above, Intesa Sanpaolo believes that competition law has a role to play in combating climate change and protecting the environment. However, in order to allow the antitrust rules to effectively pursue the sustainability goals of the Green Deal, **a revision of State aid framework and horizontal cooperation agreements is desirable**.

Intesa Sanpaolo would like to thank the Commission again for the opportunity and is available to further discuss the proposed issues.

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relevant market to which the agreement relates" (paragraph 43) and that *"the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement"* (paragraph 85 which contains reference to see Court of Justice, 13 July 1966, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH vs Commission of the EEC*, Joined Cases 56 and 58-64, ECLI:EU:C:1966:41). However, in the ACM's draft guidelines on sustainability agreements, paragraph 41, *"it can be fair not to compensate users fully for the harm that the agreement causes because their demand for the products in question essentially creates the problem for which society needs to find solutions."* In this regard, it must be recognized that the current state of EU case law regarding Art. 101, paragraph 3 TFEU seems to limit the possibility to consider a partial compensation for consumers (see Court of Justice, 23 November 2006, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, Case C-238/05, ECLI:EU:C:2006:734, paragraph 72, where the Court stated that for Article 101, paragraph 3 to apply *"the overall effect on consumers in the relevant markets must be favourable"*).

³⁵ Regarding the consumers' willingness to pay, see the ACM's analysis of the sustainability arrangements concerning the "Chicken of Tomorrow" ([link](#)).

³⁶ European Commission, case IV.F.1/36.718 – CECED cit.

³⁷ Conseil de la Concurrence, Decision n. 2018-FO-01, 7 June 2018, Webtaxi S.à.r.l.

³⁸ Victor Sand Holmberg, "EU Competition law and Environmental Protection – Integrate or Isolate?" cit., p. 42.