

Competition Policy supporting the Green Deal Response to Call for Contributions

Introduction

1. The Oil and Gas Climate Initiative (OGCI) has pleasure in presenting its response to the European Commission's call for contributions to the debate on competition policy support for the European Green Deal. This paper provides OGCI's input into the second part of the Commission's call, namely, the debate on how antitrust policy and environmental and climate policies work together and how they could do that even better.
2. OGCI is a CEO-led consortium that aims to accelerate the industry response to climate change. OGCI member companies explicitly support the Paris Agreement and its goals. As leaders in the industry, we aim to assist society in the transition to a low-carbon future and the achievement of net zero emissions as early as possible. Our members collectively invest around \$7B each year in low carbon solutions. OGCI Climate Investments, our \$1B+ fund, invests in solutions to decarbonize sectors like oil and gas, industrials and commercial transport. OGCI members include bp, Chevron, CNPC, Eni, Equinor, ExxonMobil, Occidental, Petrobras, Repsol, Saudi Aramco, Shell and Total.
3. OGCI considers that, along with other public tools and initiatives, competition law regulators can play an important role to support businesses in achieving the Green Deal goal of a climate-neutral Europe by 2050. This role is particularly sensitive, given the challenging scale and pace of Green Deal objectives.
4. OGCI believes that industry-wide co-operation is essential for developing comprehensive and co-ordinated contributions to tackling environmental challenges. Achieving the Green Deal outcomes will require policies that enable the adoption of new technology and infrastructure at pace. Co-operation among businesses seeking solutions to help address climate change is key and may be especially beneficial where significant investment is required or where there is a high level of commercial risk. Co-operation is sometimes necessary in order to enable companies to achieve the viable scale necessary to develop innovative products and services, and to engage with customers to select and test innovations for further use.

Clarifications and comfort on the characteristics of agreements serving Green Deal objectives without restricting competition

5. Major investments are necessary for certain projects aimed at delivering a low-carbon future. Clarifications and practical advice from the Commission would be welcomed on the way in which companies may work together to achieve this objective without breaching EU competition law. Such guidance is likely to increase and accelerate the number of joint company initiatives contributing to Green Deal objectives and as such may help deliver faster and more cost-efficient outcomes.
6. Currently, in the absence of such guidance, businesses may decide not to embark on a project at all, or adopt an over-cautious approach, for example, by establishing potentially unnecessary and costly information ringfencing arrangements that could slow down the project or limit the scope of beneficial cooperation.
7. Commission clarifications and comfort could take three forms. The first is a **climate-specific block exemption regulation**, setting out the conditions under which arrangements seeking solutions to help address climate change could benefit from a safe harbour. As an EU regulation, it would provide the greatest certainty for businesses. Early proposals to adopt a block exemption would also provide a benchmark for EU Member States that may be contemplating their own national regulations, to avoid creating a risk of inconsistency. Given that solutions to help address climate

change often require cooperation of multiple businesses to deliver best results, any market share limit specified in such a block exemption should be higher than the limit normally provided in other block exemptions.

8. The second form of clarifications and comfort comprises **specific guidelines relating to projects aimed at addressing climate change, with practical examples** to enable intending participants to conduct self-assessments with confidence.
9. Such specific guidelines could address a broader range of issues and examples than a block exemption. It would be particularly helpful to have practical guidance on exchanges of information between competitors in the context of agreements or initiatives seeking solutions to help address climate change (e.g. highlighting information that may be freely disclosed as it is outside the scope of Article 101.1 TFEU, information that may be disclosed but only via ringfencing, or third-party arrangements and information that may not be disclosed). Indeed, certain joint projects between competitors require exchanges of various types of non-public data. By way of hypothetical example, this could include information such as individual emissions data, production quantities and capacity for emissions reduction projects, or information on individual firms' technologies, best practices and R&D for projects aimed at developing more effective solutions to particular climate change issues. This guidance would be helpful in promoting the generation of solutions that can have a real impact on climate change. The antitrust environment for competitors requires great care to be taken in identifying which information may be shared and in structuring antitrust-compliant ways of sharing it, even where they believe their projects are unlikely to have any negative effect on competition. Whilst case law and the Commission's 2010 Horizontal Guidelines provide general guidance on the exchange of these types of data, they leave a significant degree of uncertainty. OGCI believes that the guidelines should be drafted to foster collaboration leading to climate change and environmental benefits.
10. In addition, it would be helpful to have guidance on the types of project or joint activity between competitors that would be caught by Article 101.1 TFEU and those which would fall outside its scope. Knowing which arrangements are considered by the Commission to be pro-competitive would promote greater certainty. OGCI suggests that a non-limitative list of examples should be provided in the guidance, and that these might include benchmarking, standardisation of GHG measurement methodology, target-setting for reduction of GHG emissions and standard setting. OGCI would be happy to provide the Commission with further information and assistance in this respect.
11. The guidelines should also address the application of the general exemption criteria in Article 101.3 TFEU to agreements in support of solutions to help address climate change. OGCI supports the approach to general exemption taken by the Dutch competition authority in its draft guidance "*Sustainability agreements – Opportunities within competition law*". In particular, the assessment under Article 101.3 TFEU should balance the harm caused to competition against the positive benefits brought to society as a whole, rather than focusing merely on short-term, monetary benefits to users. The potential environmental benefits of projects seeking solutions to help address climate change should be taken into account for the purpose of this balancing test, assessed over the longer term. As with the Dutch guidelines, those benefits should be assessed only qualitatively where they obviously outweigh the harm caused to competition or the combined market share of the parties is below a certain threshold, leaving the more complex quantitative assessment for arrangements where benefits are not obvious and the parties have a higher market share.
12. Defining the relevant market in the context of projects seeking to help address climate change may be complex. Specific guidance on market definitions at various stages of a project, particularly in the pre-operational stages of a project, when no real market has developed (e.g., CCS projects pre-revenue), or in markets that are not well established, would therefore assist in providing greater business certainty.

13. While standalone antitrust guidance would be particularly helpful, a climate-change section in the revised 2010 Horizontal Guidelines, would also be useful.
14. Where the characteristics of a project do not fit within the block exemption or any guidance, it will be important to have a way of confirming with the Commission the legality of an individual project raising specific questions. This should be available within a relatively swift timescale to prevent projects being abandoned or delayed. We propose that it could be based on a **voluntary, fast-track comfort letter procedure**. Publication of non-confidential versions of these comfort letters would contribute to wider understanding of the application of EU competition law to cooperation in support of solutions to help address climate change.
15. Turning to enforcement, OGCI would welcome an approach similar to that taken in the Dutch competition authority's proposals. In particular, OGCI believes that no penalty should be imposed where an agreement pursuing GHG reduction, or other solutions to help address climate change, has been discussed with the Commission and the Commission has not identified any major concerns, or where the parties have made public the existence of their agreement and have drafted it in good faith, following Commission guidelines, and in each case where they have amended their agreement if requested by the Commission.
16. OGCI does not intend to discuss the content of the Dutch proposals in any further detail in this response, but it believes that, in their detailed consideration of sustainability issues, their analysis of the application of exemption criteria in different cases, their incorporation of multiple examples and their clearly set out enforcement policy, the proposals set a very helpful precedent.
17. Achieving a consistent approach between the EU and foreign competition authorities in relation to competition law policy, guidance and procedures in the context of the Green Deal would provide even further certainty for businesses and important leadership on these critical issues.

Accommodating restrictive agreements in pursuit of Green Deal objectives going beyond current enforcement practice

18. OGCI also believes that, in specific circumstances, restrictive agreements that are currently avoided because they are considered by firms to risk falling foul of competition law should be justified beyond current enforcement practice where needed for solutions to pressing climate change challenges. Circumstances that would justify going beyond current enforcement practice are most likely to include where, for example, dealing with a pressing challenge requires competing firms to share their strategic information or R&D outcomes with each other, or enter into exclusivity arrangements that foreclose some of their competitors, or agree amongst themselves the withdrawal of products from markets or limitations in production. Current enforcement practice could be developed to accommodate these circumstances, in the form of clear guidelines on derogations where there is an immediate and pressing need for restrictions on competition beyond those normally treated as compatible with EU competition law. Precedent for this approach exists in the derogations granted for competitor cooperation to stabilise markets through collective planning of production and sale of certain agricultural products due to COVID-19.

Conclusion

19. In conclusion, OGCI believes that the climate-change specific competition law measures referred to in this response would play a key role in the promotion and achievement of Green Deal objectives, by providing businesses with increased legal certainty, thereby fostering their involvement in developing operative solutions in support of carbon neutrality objectives.
20. Since the timeframe for meeting the Green Deal objectives is ambitious, there is a need for these measures to be put in place as soon as possible. OGCI is available to assist the Commission with further information on any of the issues raised in this response.