

# Green Deal and EU competition law

Submission by assoc prof Julian Nowag (Lund and Oxford)

13 November 2020

Given time and space constraints, I will limit my submission to two points. One with regard to use of the **State aid rules and CO2 emissions** (I) and one with regard **antitrust rules** (II) and in particular Question 2 of the call for submission and fines.

## I. State aid rules and CO2 emissions

With regard to State aid, the submission relates to a policy proposal.

The EU and the Member States have not only committed to reducing CO2 emissions but indeed agreed to reduce fossil fuel subsidies, as an easy way to reduce CO2 emissions.

A ODI/CAN report estimated that fossil fuel subsidies in the EU are around 112 billion Euro per year between 2014-2016.<sup>1</sup> However, even this estimation of subsidies is prone to underestimate the real level of subsidies in the EU. This is so as it is only based on the 11 largest EU economies.

In a recent working paper<sup>2</sup> forthcoming in Climate Policy we explored the potential of the EU State aid regime regarding fossil fuel subsidies. We estimate that 58.22-69.59 billion (or 51-62%) of those subsidies mentioned in the ODI/CAN report are already subject to the EU State aid regime (recognising the difference between on the one hand fossil fuel subsidies and on the other fossil fuel subsidies that can be qualified as State aid under EU law).

Thus, EU State aid policy can provide a substantial contribution in phasing out fossil fuel subsidies. EU State aid control is a highly effective policy tool with its requirements for notification, examination, transparency and reporting, and the potential for recovery. Moreover, as compare to other means of reducing fossil fuel subsidies, the State aid control mechanism is already agreed upon and has an established enforcement system which does not depend on the political will and agreement amongst member states.

In the paper we suggest a more active use of the EU State aid rules to monitor and control fossil fuel subsidies. In particular, we suggest:

- a separate category of State aid for fossil fuels. This would be a sensible development as it would increase transparency and would also ensure that such subsidies are not ‘hidden’ under the common label ‘environmental (and energy) aid’. Separating aid for the fossil fuel industry from other energy aids is also justified as they are also substantially different from aid for renewables. The creation of a separate category of aid would create additional transparency (eg via the State aid score board) and would potentially increase not only the legal pressure but also the political pressure to reduce such harmful subsidies.
- Additionally, the Commission could use its power to start a State aid sector inquiry to look specifically at aid for fossil fuels. This would further increase transparency and might lead to the ‘discovery’ of aid that has not been notified.
- Finally, the Commission’s discretion in the exemption of aid could be used to increase the pressure to phase out such harmful State aid over time.

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<sup>1</sup> Ipek Gençsü, Maeve McLynn, Matthias Runkel, Markus, Trilling, Laurie van der Burg, Leah Worrall, Shelagh Whitley, and Florian Zerkawy ‘Europe Overseas Development Institute and CAN Europe Report - Phase-out 2020: Monitoring Europe’s fossil fuel subsidies’ (28 September 2017) <https://www.odi.org/sites/odi.org.uk/files/resource-documents/11762.pdf> page 2

<sup>2</sup> See Nowag, Julian and Mundaca, Luis and Åhman, Max, Fossil Fuel Subsidies in the EU: EU State Aid Rules as Control and Phase Out Tools – Opportunities and Estimates (October 20, 2020). LundLawCompWP series, Available at SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3725464](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3725464)

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## II. Antitrust

There will most likely be many submissions that offer contributions on how Article 101(3) TFEU or the *Wouters* route could and should be used. However, as your *question 2* under Antitrust suggests, more guidance on **a)** what is not covered by Article 101 (1) TFEU would help substantially with reducing the perception of antitrust vs sustainability. And **b)** guidance on fines might also prove important.

### a) Question 2 Guidance on what is not within the Scope of Art 101 (1) TFEU

In a recent paper in *Concurrence*<sup>3</sup> we explored this field. The paper argued that there are a number of options that do not lead to a balancing of competition and sustainability benefits. These are in particular the definition of an undertaking, state action, *de minimis*, agreements unlikely to restrict competition, standardisation agreements and platforms.

Guidance in form of Guidelines could in particular

- bring back (as in the previous horizontal guidelines) guidance on agreements unlikely to restrict competition with relevant examples from the case law/decisional practice.
- provide more/better guidance on standardisation agreements as the current guidance seems to be mainly overlooked by actors (industry, lawyers, and even academia and some NCAs). This might be so as the wording seems to be aimed at standards in the IT sector. The wording seems therefore often not well understood with regard to other standards such as sustainability standards. Clarification in this area could be part of the horizontal guidelines or it might be worth thinking about whether a separate guideline for standards would be advisable. Such a guideline could cover all standards and also address matters of standard essential patents etc.
- Finally, guidance on whether the following agreements are within the scope of Article 101 (1) TFEU would be helpful: agreements to comply with the legal requirements in other countries (where problems with compliance and enforcement of laws exist). The Dutch draft guidelines suggest that such agreements are unlikely to be subject to the prohibition on agreements restricting competition.

### a) Fines

A final point relates to fines and expectation of fines.<sup>4</sup> It might be helpful (as in the Dutch draft guidelines) to provide assurances not to be fined if

- companies faithfully followed the guidance by the authority to achieve sustainability objectives (whether that guidance was informal guidance, or guidelines)
- and the anti-competitive effects were not intended/ directly foreseeable
- and the companies involved abandon the anti-competitive behaviour once asked by the authority.

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<sup>3</sup> Julian Nowag and Alexandra Teorell, 'Beyond Balancing: Sustainability and Competition Law' *Concurrences* N° 4-2020 34-39.

<sup>4</sup> See also Julian Nowag, Background note, OECD (2020), Sustainability and Competition, OECD Competition Committee Discussion Paper, page 28-29, available at <http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf>.