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Enel contribution to the European Commission Call for Contributions

"Competition Policy supporting the Green Deal"

Enel is a multinational Group and one of the main integrated operators in the electricity and gas sectors, with a particular focus in Europe and Latin America. We operate in the generation (being World leader in RES production) and distribution of electricity and in the trading and supply of gas and electricity.

In the European Union Enel is mainly active in Italy, Spain, Portugal, Romania, Greece, Germany, Slovak Republic, Poland and France.

Enel welcomes the opportunity offered by the European Commission to provide ideas and proposals on how the competition rules and sustainability policies may work together.

Part 1: State aid control

A consistency reference to the European Green Deal objectives and 2050 Carbon-neutrality within the evolution of the State aid rules is welcome.

Moreover, State aid control should be in line with the several initiatives that the European Union has released in order to facilitate the achievement of the transition to green economy objectives in order to support and succeed the EU decarbonisation.

The European Green Deal and the Recovery and Resilience Plan are an essential part of the total EU budget providing about more than € 1.8 of public funding to boost a sustainable recovery. For the EU, to reap the full benefits of this funding, it is crucial that competition and State aid rules continue to play their role, ensuring that European companies are incentivized to innovate; avoiding overcompensation within sectors or companies and of course ensuring that public money does not crowd out private spending.

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 current State aid rules had the objective to guide and support MSs toward the achievement of the 2020 Climate targets and they represented a very positive tool for market players and member states. Nevertheless, the evolution of the European ambition, as detailed in the announced increased decarbonisation targets aimed at carbon neutrality in 2050, requires for an adaptation of state aid rules.

We appreciate the role and the support that the State aid rules provided to MSs in the different sectors, but nowadays it is necessary a firmer and evolutionary approach to achieve 2030 Climate targets and to pave the way for 2050 Climate Neutrality.

The revision of the State aid should be in line with the several initiatives that the European Union has released in order to facilitate its objectives of common interest. Therefore, a crucial improvement of the State aid is to harmonize and streamline European policymaking.

In this context, we, as Enel Group, suggest the following areas of improvement that are not sufficiently supported by the current aid rules to achieve the greening of the European economy.

- **Electrification as an unstoppable process**. In order to face all the green transformations needed to achieve the 2050 carbon neutrality electrification deserves to be implemented in the context of the State aid rules. Indeed, electrification is essential for transport sector (electro-mobility), cold ironing, building sector, industrial sector and the green hydrogen production (electrolysers).
- **There are no doubts on the potential of GHG emission reduction attributable to the transport sector and electro mobility**. Nevertheless, the current aid rules do not support an appropriate development of the electro-mobility and related re-charging infrastructures across Europe. Several EC cases have showed that without public support there is no incentive yet to invest in e-mobility, considering the limited current number of EVs and the important capital required for charging infrastructures. Therefore, based on these assessments, introducing (i) new topics on specific aid measures concerning e-mobility within the scope of application of the EEAG, as well as (ii) ambitious thresholds to block-exempt re-charging infrastructures projects or schemes within the GBER are welcome. It is expected that under the current development trends electric transportation may become more economically advantageous than transportation based on internal combustion engines around 2026. Until then e-mobility will still need a public supporting framework – maybe even later because of entry barriers.
- **Green repurposing as key element to be leveraged**. Repurposing can be an important economic opportunity that helps to mitigate negative economic, social and environmental impacts during the transition. Moreover, efficient repurposing and restoration of land and infrastructure is often seen as a fundamental factor in attracting new businesses and permanent new jobs in the affected regions. Hence, considering that there are several dismissed plants, lands and infrastructures and there will be even more during and after the transition, Enel Group proposes to include the green repurposing in the context of the State aid measures.
- **Electricity infrastructures, digitalization and renewable grid integration.** Their role is paramount to achieve the 2030 milestones and to reach the 2050 Climate neutrality (i.e. ensuring flexibility and EVs charging and renewable generation adequate hosting

capacity). The upgrade of the electricity system to include distributed flexibility services requires huge investments to provide improvements in **digitalization of distribution assets**, i.e. smart grids devices deployment in order to enable distributed resources and aggregators value chain development.
If the State aid rules do not boost their development, there is the risk that MSs will not be able to sustain the massive investments needed to the construction, replacement or upgrade the national electricity grids, deploying effective TSOs and DSOs plans. Therefore, Enel Group strongly suggests the European Commission to deal with this issue in clarifying the circumstances under which financing of electricity infrastructures falls outside the State aid notion; in removing unnecessary geographic limitations to the financing of electricity infrastructures and increasing the thresholds within the GBER to finance electricity networks.

- **Flexibility services for the electricity system represent another key factor for the European long-term strategy**. In order to empower customers and active market participation, market-based solutions for flexibility procurement are to be sought as a default and should be linked to national specificities.
  We consider that immature flexibility technologies need the adequate support under the new aid rules to properly promote their development.
  Whereas mature technologies providing flexibility and firmness must compete in the markets at the same level playing field with the rest of technologies.
  To upgrade the electricity system to include distributed flexibility services requires huge investments to provide improvements in **energy efficiency** and **energy savings** (distributed energy resources and aggregators value chain development).

- **Energy efficiency as one of the most challenging objective to pursue at European level**. The issue at stake is that energy efficiency measures do not enjoy a widespread market attractiveness. Such consideration becomes critical if we consider the huge investments needed to reach the 2030 Target. Despite the European Commission is addressing the issue through specific directives such as the Renovation Wave, and the next Energy Performance of Building Directives (EPBD) in 2021, we wish a boosting framework to increase investments in energy efficiency measures.

- **Renewables and storage play a paramount role in the context of the decarbonisation**. Although the renewables deployment represents a real success of the European Union, there is still need of their development across the Continent. The State aid, along with the reduction of the production costs, make even cheaper the deployment of the green technologies that are essential to the achievement of the European Green Deal. However, renewables will fully play their role if supported by adequate storage technologies and/or hybrid plants. The new state aid framework should cover those aspects.

- **Green hydrogen rather than other forms**. Hydrogen can be considered as the absent topic in the State aid rules. Today, green hydrogen potential is unquestionable even if its costs are substantial; the economics and target of energy efficiency are still limitations to green hydrogen production and use. For this reason, we suggest to fasten the

development pathway of green hydrogen's production with a supporting framework of such energy carrier. Hence, it is considered necessary that the application of the green hydrogen would be concentrated, at least in the short-term, towards those industrial sectors that already use it as a raw material (feedstock) within their production cycles, in order to have an immediate return in terms of emission reduction. To do this, the cost of green hydrogen to buyers should become competitive with other types of hydrogen in order to encourage its use as a feedstock within production cycles. This intervention on the demand side could also help stimulate supply, thus contributing to the reduction of its production costs in the medium and long term.
Finally, we think useful to update the Annex III of the EEAG by adding green hydrogen to the list of eligible sectors.

- **A fast-track aid control for capacity mechanisms, which are necessary to make the vital investments in carbon-free firm capacity solutions.** It is necessary that adequate market tools with a long-term horizon be put in place. Such market tools should not be considered as State aid. Indeed, MSs should be granted with adequate instruments in order to ensure adequacy and reach 2030 Climate Targets set by the Governance Regulation (sensitive to further increases through the Climate Law). Alternatively, fast-track procedures should be considered for an agile implementation and update of such schemes.
  Finally, it should be highlighted that the **definition of a market-based Capacity Remuneration Mechanism (CRM) as State aid should be reviewed** since it is a market where firm capacity is being traded and the awarded capacity is allocated following a market process.
- **For small islands, with no possible market or weak mainland interconnection specific treatments are needed**. There are many islands and isolated electricity systems in the EU, where a competitive wholesale market is not feasible. In these cases, generation is currently organised through regulated schemes, frequently similar to those used for distribution and transmission, based on regulated remuneration for CAPEX and OPEX or on long term contracts. These schemes must allow for the introduction of new solutions such as storage or demand-side response. However, the application of State aid approaches to regulatory changes in the islands introduces delays that can endanger security of supply and slow down the energy transition.
  Therefore, we consider that these schemes should not be treated as the State aid rules, in the same way that transmission and distribution remuneration are not analysed through aid perspective, or at least a flexible fast-track mechanism should be introduced.

Finally, to guarantee a reliable achievement of the EGD and of the national NECPs objectives, it is paramount the revision of the block-exemption regulation (GBER) on environmental protection and energy session, covering sectors today not addressed (i.e. EV's charging infrastructures, hybrid RES plants, repurposing) and rising the thresholds of individual notifications.

Question 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?

We consider that the evolution of the State aid rules should be in line with a phase out of aid measures having a negative impact on environmental and decarbonisation goal or, at least, to limit them as possible.

All EU policies and actions to ensure that all Green Deal initiatives achieve their objectives in the most effective and least burdensome way are crucial, as well as the European environmental protection objective achievement since more and more directly linked to the European economic activities.

Therefore, the achieving of a new set of the Energy and Environment Aid Guidelines (EEAG) that are aligned with the EU's commitment to create a clean, low-carbon and sustainable energy market based also on EU initiatives live up to a green principle to 'do no harm' is welcome.

An example where this could be applied is related to cogeneration of heat and electricity (CHP). In particular, State aid rules should be restrictive if dealing with subsidies for emitting technologies as CHP. Only small scale (< 10 MW) CHP plants with high efficiency and focused on onsite self consumption of heat and power should be entitled to aid. For large CHP plants, focused on power generation, the paradigm has changed: while in the past, CHP was an efficient way to reduce fuel consumption when producing at the same time heat and electricity, nowadays other technologies such as solar PV or wind are cheaper.

Finally, we are fully in line with the EU, promoting environmentally friendly activities and measures and, as a proactive player within the European and global energy environment we are committed to boost the EU achievement of a successful and just transition towards a sustainable future.

Question 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? How should this green bonus be defined? Which criteria should inform the assessment of a green bonus?

We welcome the EC initiative that green investments should in turn be particularly encouraged.

We agree with the criteria that only projects that substantially improve the state of the art and are expected to bring significant environmental benefits are eligible to such increase of aid intensity. Such an increase of aid intensity should incentivise aid and, more widely, investment in those projects that clearly aim at driving the change towards a more sustainable future.

Moreover, the State aid guidelines (mainly the EEAG) should as a general principle allow for supporting solutions to reduce climate and environmental impact in line with EU targets, as long as they fulfil other requirements of non-discrimination and proportionality.

A “green bonus” in the form of a higher aid intensity and of a lower share of own financing required for an initial investment seems appropriate, as well as in line with the current EC proposal. However, we cannot confirm that the increase of the aid intensity limited by 10 percentage points for sustainable projects and measures is an appropriate level to trigger those investments.

The General Block Exemption Regulation, the R&D guidelines and the Environmental Protection and Energy aid Guidelines limit the aid intensity for large companies to 50% for national industrial R&D and/or Energy aid programs. This is insufficient for example to trigger investments in innovative, sustainable and industrial-scale demonstration projects achieving full carbon neutrality.

Therefore, a green bonus to leverage the increase of the aid intensity to 100% for climate-neutral technologies in first-of-its kind innovative and large-scale projects could be considered beneficial for the EGD.

Finally, when aid cannot be granted under the General Block Exemption Regulation and it needs to be notified - and notification procedures are often too lengthy and burdensome to match the level of urgency in tackling climate change, also adding a legal uncertainty- we recommend setting up a fast-track approval procedure for projects that make a genuine contribution to the European Green Deal goals such as the Recovery and Resilience Facility projects, or the Modernisation Fund projects.

a) How should this green bonus be defined?

Given that State aid control should facilitate aid that is well-designed, targeted at identified market failures and objectives of common interest, and the least distortive, it follows that the “green bonus” should be:

- effective in achieving the desired public policy objective (more aid to greener solutions)
- designed in a way that limits distortions of competition (strict criteria to obtain it)
- addressing situations where the market cannot deliver itself (to favour the deployment of greener projects)

For that to happen, the “green bonus”, in our view, should be a European Commission’s concrete contribution aimed at incentivizing projects or measures with a positive environmental impact. It would apply for all the projects and sectors that will contribute to the achievements of the European Green Deal’s objective.

The “green bonus” should be considered as additional support tool to be given for the effort made by a Member State and/or private recipients for making decisions on environmentally sustainable activities or projects.

It could be seen as a compensation to be given to the investors in reaching the EGD and decarbonisation policy goals.

In this context, its definition and application become critical if linked to the Recovery and Resilience Plan.

As a matter of facts, the Recovery and Resilience plans could represent the perfect introductory stage for such new tool and a fast-track solution, even temporary, should be awarded to the projects that fit the European Flagships of the Recovery and Resilience Plan.

Concrete Example

We consider the development of a European RES value chain to deserve more investments to accelerate the green and digital transition, representing a key factor for the European long-term strategy, especially given the lesson learned during the pandemic.

Particularly, focusing on the PV investments, the limits of the aid intensity, provided by the existing regulation, could penalize the development of a European PV - and above all PV manufacturing - value chain by not assuring competitiveness in the international market, mostly hindering low-carbon technologies.

To this end, it would be necessary an adaptation of the rewarding mechanism for productive investments, aimed at achieving the climate energy transition goals. Given that the current limits set out by the General Block Exemption Regulation (GBER) and by the EEAG, there is no distinction between traditional and green productive investments. A reward instrument seems the only way forward to encourage investments in those projects that visibly aim at driving the revolution towards a sustainable future and a green economy.

Nowadays, considering the European skills and knowledge of technology, equipment, systems and materials, added to the high demand, a PV manufacturing would have a considerable reference market.

Europe, however, has almost lost its leadership position, leaving room to the Chinese manufacturers, which, rather than leveraging on innovative technologies, enhance economy of scale and low-cost materials.

It is essential to address that Europe can regain competitiveness by addressing through innovation the new challenges. Nonetheless, as competitive cost positioning is crucial, it is quite clear Europe’s difficulty in competing in the international market, made up of players supported by the governments in all the value chain phases.

Therefore, supporting the development of a competitive EU manufacturing industry through grants specifically addressed to PV panels’ factories could have a key role. Achieving the development of a Low-carbon European PV manufacturing Value Chain would accelerate economic recovery through the boost of a green growth. Furthermore, it will bring tangible benefits to the local context, ranging from decarbonisation and avoided emissions to the creation of new jobs for sustainable business and the generation of fiscal benefits for the local municipalities. As an example, Enel operates since 2011 the largest PV manufacturing factory in Europe. Such factory, based in Sicily, is now in its second technological phase and a further technological development, supported by adequate grants, could transform it into an innovative European hub for PV manufacturing.

Question 4.

How should we define positive environmental benefits? 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?

We welcome the EU Taxonomy, which provides an objective measurement framework for environmental sustainability for a number of economic activities, including those of the energy sector.

The ambitious objective set by the European Union to build an EU taxonomy to label green investments is strictly correlated with the task to identify and define positive environmental benefits.

On the effort to create a taxonomy or classification system to provide market clarity on what economic activities should be considered "sustainable" and to prevent "greenwashing" – the Taxonomy Regulation is welcome as a tool for climate transition and an enabler of the European Green Deal.

However, this new framework, the EU Taxonomy Regulation, applies primarily to private investments, and actually, there is no direct legal link to the State aid rules applicable to the energy and the environmental protection.

Moreover, the EU Taxonomy framework does not offer sufficient legal certainty as it is still under development, including the relevant delegated acts setting out the technical screening criteria of the various economic activities, not adopted yet.

In additions, the strong impact of public funds on innovation justifies that a more consolidated approach of the use of the EU Taxonomy should be defined before applying it.

In the context, the new instruments for sustainable finance would need to be consistent with other EU policy objectives such as security of supply, competitiveness and consumers protection and should be aligned with an affordable GHG reduction in the shorter and medium term.

Therefore, it would seem appropriate to use the measurement framework provided by the Taxonomy Regulation for assessing to what extent certain companies and activities, through State aid, may concretely contribute to climate targets in the medium and long term.

Finally, we believe that the revised EEAG could make a clear reference to Taxonomy alignment as a facilitator in State aid approval processes and assessments to fast-track the green transition related also to the Recovery and Resilience plan.

a) 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 performs two main functions that could indirectly help the definition of positive environmental benefits.
The first one is to provide a general framework for the development of an EU-wide classification system for environmentally sustainable economic activities, while the second one is to create a framework that sets out the criteria to be fulfilled to define a product or activity as environmentally sustainable.

Therefore, the aid framework could reflect the EU Taxonomy, which provides harmonised criteria determining which economic activities can be considered environmentally sustainable, based on these four requirements:

1) Contribute substantially to at least one of the six environmental objectives (Climate change mitigation; Climate change adaptation; Sustainable use and protection of water and marine resources; Transition to a circular economy; Pollution prevention and control; Protection and restoration of biodiversity and ecosystems)
2) Do not significantly harm any of the six environmental objectives
3) Complies with technical screening criteria
4) Social Rights and principles must be observed

In conclusion, we welcome an overall design of these sustainable provisions, which should be robust and shortly finalized before applying for public sectors in order to guarantee a coherent achievement of the EGD objectives, the 2030 Climate targets and to pave the way for 2050 Climate Neutrality.

Final remarks on State aid control

On State aid control, we highlight that in the current situation of economic crisis, the EU is trying to boost the Green Deal and the economy providing additional support (Recovery funds, Next Generation EU). The requirement of individual notification of each project for its subsequent approval within the framework of State aid can be a serious obstacle to effectiveness. Only certain frameworks (e.g. the GBER) and under very limited conditions allow certain margin to avoid the notification of projects.

The above-mentioned General Block Exemption Regulation (GBER) should broaden and modify the field of application, so that the projects envisaged by the Member States in their respective Recovery and Resilience Plans or Modernisation Fund can benefit from the exemptions of the Regulation in key aspects such as geographical scope, thresholds and beneficiaries of aid.

Currently, these key aspects are so tight that do not allow accommodating projects of a certain volume, in certain regions and by certain enterprises. If the GBER conditions are not met and notification is required, the average state aid authorization period can be approximately two years. Certainly, the Commission can approve the aid at a preliminary stage if, after a first examination, it is shown that it is compatible with the internal market. Specifically, Article 4 of Regulation 2015/1589 provides that the European Commission may authorize, within a period of two months from the day following the entry of the complete notification, all those aids that, after a first examination, result compatible with the internal market.

The adoption of a specific temporal framework for the Recovery and Resilience Plan or Modernisation Fund is needed. It should be common for the 27 Member States in order to make the state aid rules more flexible, as the EC has already done throughout the Covid-19 pandemic. This specific framework should include an agile authorization procedure and should define the specific field of application for RRP or MF projects. This RRP or MF will address economic and social consequences of the economic slowdown while contributing to the achievement of the European Green Deal objectives.

Part 2: Antitrust

As input to the debate on how antitrust policy and environmental and climate policies work together – and how they could do that even better, please consider the following questions:

Question 1.

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).**

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…)?**

European antitrust law has undergone a number of adjustments over the years to adapt to changes due to the enlargement of the European Union and the transformations of the markets.

Regulation 1/2003, the cornerstone of the EU antitrust enforcement rules and procedures, had the prime objective of bringing about a more effective enforcement system by enabling the Commission to concentrate its resources on the prosecution and punishment of anticompetitive practices rather than the *ex ante* screening of notified agreements. Most notably, the notification system was abandoned and businesses were compelled to assess the compatibility of their conduct with the EU competition rules and on targeted ex post enforcement action by competition authorities. Despite the Commission's guidance to assist undertakings - through a set of notices and the adoption of revised block exemption regulations and accompanying guidelines concerning the application of Article 101 of the TFEU - this system of self-assessment still lacks a practical guidance with concrete examples which could significantly lower the burden on market players.

A greater and more frequent use by the Commission of the possibility to issue informal guidance to undertakings provided for in whereas 38 of Regulation 1/2003 would improve the legal certainty contributing to the promotion of innovation and investment. Another proposal to meet these latter objectives is to authorise certain cooperative joint ventures, not subject to merger control, through comfort letters. In addition, regarding green deal cooperation between competitors it would also be useful to introduce the extension of comfort letters beyond COVID-19 to issues of green or sustainability linked cooperation.

This would certainly increase legal certainty, provided that an expedited authorization procedure is also introduced.

Moreover, to reach those goals the EC could issue guidelines and communication on enforcement priorities. A concrete example might be a collection of lawful cooperation between competing undertakings to achieve sustainability goals and agreements in key sectors engaged in the transition to carbon neutrality that could be proposed to guide undertakings in the self-assessment of agreements and market practices in line with the New Green Deal policy objectives.

A successful example on the topic is represented by the Draft Guidelines on Sustainability Agreements published in the Netherlands by ACM. According to the Dutch Authority certain types of collaboration do not restrict competition per se e.g. joint agreements to comply with laws in other countries, such as bans on child labor or illegal logging. In cases where agreements could restrict competition, they could anyway be permitted if certain conditions are fulfilled such as benefits for the lowering of carbon emissions. An interesting feature in these draft Guidelines is the way in which these benefits are weighed against the disadvantages without making reference to numerical analysis, being rather sufficient to give a full account of the benefits and disadvantages e.g. in the cases where the combined market share of the businesses entering into the agreement is less than 30%. We truly welcome the attitude of the Dutch Authority that will not impose any fines for joint agreements where businesses have clearly followed the Guidelines in good faith but ultimately did not meet all the conditions, rather asking for the agreements to be amended.

In the guidance for the market players the EC could acknowledge how agreements or practices boosting the New Green Deal policy objectives – e.g. related to energy efficiency, RES development, low carbon technologies, clean and smart mobility, circular economy etc. - should be considered as covered by Article 101(3) exception and so exempted from the prohibition of Article 101(1) since they contribute to improving the production or distribution of goods or to promoting technical or economic progress. For example, the EC could consider whether agreements generating environmental benefits could *ex se* meet the "positive" conditions set under article 101(3) i.e. contributing to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. Such presumption may for example apply to agreements satisfying certain specific environmental criteria to be determined according to the "Green Deal objectives" both at research and development level as well as in relation to the production and distribution of good and services. An example of such form of cooperation is the co-marketing agreements for the commercialization (also in bundle) of products/services with a beneficial environmental impact.

In conclusion, switching from the benefits for certain consumers criterion to the "green" or "environmental" benefits for the whole society may represent a big opportunity for the companies to diversify the cooperation premises in order to reach Green Deal objectives.

Nevertheless, this process will also require a more precise guidance and an increased legal certainty at the EU level on:

(i) how to substantiate such benefits (in terms of level of detail, of minimum requirements or thresholds – when quantification is possible, as well as regarding likelihood) for making sure that the “fair share of benefits” principle does not become obsolete;

(ii) the extent to which limiting imminent environmental damages or the need to reach certain European goals (a) may be enough by themselves for justifying cooperation instead of genuine competition, or at least (b) may have priority or higher chances for qualifying for a “green light”, and

(iii) the milestones of “sufficient competition” acceptable in the context of pursuing such important goals, also factoring the extreme urgency of climate change.

All these developments may increase legal certainty for market players.

The same rationale should also apply for the assessment of efficiencies generated by conducts engaged by undertakings with a significant market power under article 102 TFEU. In gas and electricity retail markets, there is a gradual spread of bundle/aggregated offers of energy commodity with products/services aimed at achieving greater environmental sustainability goals. Such integrated/bundle offers are aimed at meeting specific needs of the end-customers that go well beyond the energy consumption but rather are intended to reduce it. The environmental benefits generated by similar bundle/aggregated offers shall thus be taken into account in the assessment of whether such conducts may be justified from an antitrust standpoint irrespective of the market power held by the undertakings concerned in relation to the commodity only.

On the contrary, agreements or conducts having a negative environmental impact should be assessed by more strict criteria. For examples, in order to be justified from an antitrust perspective, undertakings engaging in conducts/agreements pursuant to articles 101 and 102 TFEU should demonstrate, with strong evidences, that there were not alternative measure that would equally meet the original objectives but with less environmentally harmful effect.

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?).

EU antitrust rules, by regulating agreements for the supply of electricity, may evolve in so far as to further protect the development of energy from renewable sources by, for instance, intervening with targeted changes on the conditions to which the Power Purchase Agreements are subject.

More specifically, some adjustments could be proposed within the current Vertical Block Exemption Regulation which is applicable to energy supply agreements between a supplier and large industrial purchasers, as they operate at different levels of the production and/or distribution chain (i.e. non-competitors). Due to the less significant anti-competitive scope of this type of agreements, the VBER establishes a “safe harbor zone”, that is an area of exemption from the prohibition of agreements for those that do not contain certain clauses and provided that the market shares held by the supplier and the purchaser do not exceed 30% of the market, calculated with reference, respectively, to the sales markets and the purchasing markets. The VBER regulates also the duration of these contracts. According to Art 5.1 (a) “the exemption shall not apply to any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years.” The notion of non-compete obligation as defined in Art 1 (d) includes: (i) “any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, (ii) or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value or, where such is standard industry practice, the volume of its purchases in the preceding calendar year.”

Those provisions could apply also to RES Power Purchase Agreements (RES PPA). With specific reference to Long Term RES PPAs and with the ultimate aim of guaranteeing a full achievement of the objectives of the New Green Deal, i.e. supplying clean, affordable and secure energy, these thresholds involving (a) the duration of RES PPAs, (b) market share and (c) share of purchases, should be removed insofar as these contracts are exclusively related to the support of RES development.

Moreover in many cases PPAs also require a relationship-specific investment made by the supplier, in relation to which the Guidelines on Vertical Restraints state in paragraph 146 that “a non-compete or quantity forcing agreement for the period of depreciation of the investment will in general fulfil the conditions of Article 101(3). In the case of high relationship-specific investments, a non-compete obligation exceeding five years may be justified”.

To further support the above-mentioned proposal, it is worth underlining that - other than preventing the lack of investments necessary to achieve the EU Green Deal commitments – RES PPAs lead to efficiencies for both energy producers in terms of greater financial certainty, and for industrial consumers since they reduce exposure to the volatility of energy prices. In addition, the RES market, addressed by these contracts, is also thoroughly fragmented as demonstrated by the high number of active operators, and purchasers in this segment do frequently resort to the common practice of requesting a number of competing offers before choosing the supplier.

Long-term contracts, regardless of market/purchase shares, may therefore guarantee not only greater certainty of the return on green investments, but can also allow businesses already involved in the support of energy from renewable sources to further commit to EU Green Deal objectives.

Part 3: Merger

Research and advances in technology are fundamental for economic progress. The goal of promoting sustainable development requires protecting and encouraging innovation, so that firms come up with new and better technologies, products or know-how that can help, for instance, to reduce the levels of emissions or bring other sustainability or environmental improvements. Merger control makes sure that there is no loss of innovation caused by mergers between rivals, that would otherwise continue bringing benefits.

As input to the debate on how merger policy and environmental and climate policies work together – and how they could do that even better, please consider the following questions:

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?

The environmental goals that the European Institutions set, and those envisaged in the Climate Law requires huge investments.

As said many investments shall be financed through European or Member State resources and a big role shall be played by the Recovery and Resiliency Facilities.

The European companies shall play a major role in investing in greening the economy and developing new technologies. In capital-intensive sectors such as energy, the creation of joint ventures between market players (in both horizontal relationship and vertical ones) may represent an opportunity to speed up investment plans anticipating them even of some years.

The European big companies are called to play a major role in this peculiar situation possibly creating ad hoc joint ventures to share the investments and the risks.

It would be paramount that the European Commission in assessing proposed JVs would have the wiliness and possibility to take in due consideration the environmental and sustainability objectives of the New Green Deal.

Some examples could be useful to understand the proposal:

- JV between carmakers for innovative models of electric vehicles,
- JV between energy companies or between energy companies and other players to deploy charging stations
- JV between market players to deploy batteries

- JV between energy companies or energy companies and energy intensive customers in deploying large scale electrolysers

Depending on the market shares of the involved players, merger in those sectors that prima facie could be seen as restriction of competition in the market or for the market could in reality represent the way to put in place massive investments that the companies alone would not do, thus postponing in time e.g. the development of new car models or the deployment of a critical number of electric charging stations.

The deny of a clearance to those mergers could harm the progress and the quick deployment of business strategic for the full and quick implementation of the NGD's goals.

In such cases, the EC should give the right weight to the NGD goals and approve the deal.

To do so it would be desirable to update the Merger Regulation or, at least, to give the proper evaluation of the benefit of the proposed JV in terms of efficiencies.

As stated in whereas 29 of the Council Regulation (EC) No 139/2004 "in order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned.

It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position."

Among the efficiencies, the EC should include the environmental and sustainability goals.

As happened in 2004 with the guidance on Horizontal merger where there is a chapter on the efficiencies evaluation, the Commission should publish guidance on the conditions under which it may take environmental or sustainability efficiencies into account in the assessment of a concentration considering the gain not only in the relevant market but the overall benefit for the European society and ultimately for the eco-system.