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TO WHOM IT MAY CONCERN

Re : Contribution to European Commission regarding European Green Deal

INTRODUCTION

The Confederation of European Paper Industries (hereinafter “Cepi”) would like to thank the European Commission for opening up for contributions regarding the possibility for competition policy to support the European Green Deal.

Cepi is a European non-profit association representing the paper industry.

Cepi has four standing committees, which take long-term strategic perspectives on the issues affecting the industry. These committees work with (1) Environment and Safety, (2) Climate Change and Energy, (3) Forest and (4) Recycling. A number of ad-hoc issue groups with a main focus on improving sustainability in the industry operate under each committee.

One of the core missions of Cepi is *“to be the example of how competitiveness and sustainability can go hand in hand.”*

Examples of Cepi’s current sustainability objectives include reducing the industry’s CO₂-emissions in alignment with the EU 55% target by 2030 and creating a carbon neutral paper industry by 2050. Cepi therefore strongly believes that the European paper industry should – and is well placed to – support the European Green Deal and assist with making Europe the first climate neutral continent by 2050.

In order to do this, it is, however, necessary for the entire industry to come together and cooperate on several sustainability initiatives, because unilateral initiatives cannot achieve the necessary systemic change that is called for in the European Green Deal.

Cooperation between industry peers at a European level is therefore essential in Cepi’s view.

Cepi has on several occasions so far already experienced that such projects had to be postponed due to competition law concerns by the involved undertakings. The envisioned projects regarding sustainability efforts that Cepi are currently facilitating are still in an early phase. Cepi therefore expects the need for cooperation to increase in the future as the initiatives approach implementation. Cepi therefore expects the challenges created by competition law to increase in the future, unless more clarity is provided regarding the extent of the restrictions imposed by competition law, when undertakings cooperate on projects that would improve the sustainability in the industry.

Cepi would therefore like to contribute with the following contribution to the debate on how competition policy and environment and climate policies could work together even better.

Cepi has so far mainly faced issues with competition law, where:

- An exchange of concrete information between members of Cepi is necessary for undertakings to be able to engage in sustainability initiatives, e.g. because this is necessary to generate the required baseline facts.
- Cooperation is necessary to achieve results, because achieving the desired results require a bundling of resources and knowledge, or the desired results are dependent on coordinated action across various parts of the value chain along the life cycle of the products
- It is necessary to develop and/or impose stricter standards than those required by law in order to make the industry greener
- Cooperation on the best use of surplus, redundant or alternative resources would lead to more environmentally friendly results whilst benefiting the economy and society

Cepi has thus mainly faced concerns regarding antitrust thus far, so Cepi's contributions will only relate to the antitrust rules.

Increased clarity in the fields of state aid and merger control would, however, naturally also be very welcome.

1. QUESTION 1

Question by Commission:

- *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).*

1.1 Answer by Cepi

As already mentioned in the introduction, Cepi is still in an early phase of our sustainability initiatives. Cepi therefore expects more cases of desirable cooperation not being initiated due to competition law concerns to appear in the future.

Already at this early stage, Cepi has, however, on at least three occasions experienced that perceived competition law risks have stopped concrete projects from unfolding.

1.1.1 Information exchange

Many of Cepi's current and envisioned projects concern cooperation amongst members of Cepi in the form of working groups, where members discuss possible sustainability initiatives for the industry.

This naturally involves a degree of exchange of information between competitors. At the moment, this exchange of information is, however, limited by competition law restrictions.

In order for the members of the working groups to both fully assess the impact of different possible initiatives and thereby both finding improved, greener sustainability solutions together, and to decide whether it would be beneficial to introduce the new products or processes, it would be necessary to disclose more information to the other members of the working groups than is currently possible.

Concrete examples of action put on hold due to (perceived) limitations set by the competition rules regarding exchange of information include:

- In the context of the EU Plastic Strategy and Single Use Plastics Directive, Cepi members would be able to contribute more to the EU objectives, if the members were able to contribute more specific information to a Cepi-organised observatory for plastic free alternatives for e.g. functional coating and barrier materials. This observatory would serve to inform the value chain of already existing solutions on the market and the competent authorities implementing the Directive on one hand, and on the other hand serving as an inventory of lacking solutions, where Cepi believes the innovation efforts (by individual companies) would have the greatest impact in terms of the sustainability objectives set out in the Directives
- In the context of Zero Pollution, the industry is currently facing the situation where emissions to water, air and soil are reduced to a technically achievable minimum, and achieving further reductions would require breakthrough technologies (either in mitigation techniques or in the production process) which are beyond the capabilities of single companies in the sector or their technology suppliers. Exchange of more information than what is currently (perceived by undertakings to be) possible without facing any competition law risks, and collaborative innovation projects for breakthroughs would be necessary.

Furthermore, it would in situations such as this be very beneficial for the likelihood of such large projects being undertaken, that undertakings to a greater extent are allowed to establish demand for the finalised products, thereby minimising the risks the suppliers take in developing new breakthrough technologies that are necessary to increase sustainability (signalling demand for a solution although not committing to buy a specific one).

The lack of exemptions or relaxations of restrictions regarding exchange of information in cases such as Cepi's, where the exchange of information takes place in specific working groups within a widely recognised association with a well-established compliance culture, and the exchange has a pure sustainability purpose, therefore inhibits the development and implementation of greener processes in the industry.

Because of this, Cepi believes that exemptions should be introduced for e.g. specified initiatives within recognised trade associations, where there is a strict control of the flow of information, so that it is possible to set up working groups or similar, where competition law is less restrictive.

1.1.2 Standardisation agreements

The current horizontal guidelines provide useful guidance for some types of *voluntary* joint standardisation, but further clarifications in the horizontal guidelines would be very welcome.

It is, however, Cepi's understanding that *mandatory* cross-industry standards or commitments may constitute infringements of TFEU article 101(1). For this reason, any mandatory commitments to agree on certain standards in the industry have thus far not been possible to implement, due to competition law concerns.

Even though Cepi has already set many voluntary standards in the areas of consumer safety and circular economy, Cepi is currently faced with a need to set a mandatory standard in the industry to support the objectives of the Green Deal through minimising the amount of resources required to produce our products.

This is because voluntary standards – especially in the field of circular economy – have so far lacked the necessary power to provide a system change for improving circularity and has remained a weak recommendation instead.

The current most concrete actual examples of needs for setting mandatory standards are that Cepi and its members would like to prevent “overspecification” of products made in the sector. An example of such an agreement that Cepi would like to conclude in order to prevent future overspecification is e.g. a commitment by the entire industry not to use coating designed for an extreme use with hot alcoholic beverages, when the cup is solely to be used for drinking water, or papers intended for printing medium are made whiter than the level of white that can be detected by a naked eye of a consumer.

In both cases, an agreement would need to cover the value chain up to the final customer and currently, there is a perceived limitation set by the competition rules that it is preventing not only the action but even a discussion on the topic.

It is therefore necessary that the agreement is concluded in Cepi, i.e. the association that covers and can engage all levels of the value chain.

Furthermore, it would likely be possible for the European paper industry to become more sustainable, if it was possible to make agreements to phase out certain products, e.g. non-recyclable papers for some most common uses (this is currently done by non-binding guidelines and recommendations only).

Naturally, a specified, open procedure would have to be followed when introducing mandatory standards.

Cooperation initiatives such as those in the provided examples would result in the paper industry being much greener, due to much greener products and production processes caused by less use of unnecessary resources.

As described above, Cepi believes that green outcomes such as this cannot be reached through normal competition or voluntary standards (indicated by the fact that this has not happened yet) or that the green outcomes would at least take much longer to reach without cooperation in the industry and, in particular, agreeing with the final customers. The reasons that it is necessary for competition law to allow the implementation of mandatory standards by e.g. trade associations are manifold. In this industry it is of particular importance that:

- The entire value chain, including the customers, need to start using a different standard at the same time. This is especially the case for the paper industry, because most products are produced in a mass scale, so production in smaller batches with alternative specifications are generally not possible
- It comes with high initial costs to change to a new standard, so a guarantee that the modified products are still in demand is needed

1.1.3 Cooperation on use of surplus resources

Due to the large structural changes in demand for several products produced by the paper industry that is caused by digitalisation and other societal changes, Cepi and its members are facing a need to readjust how the available resources are used.

This is for example the case for newspaper consumption, where a permanent reduction in the demand for paper for this has been declining for more than a decade and is still expected to

decline, which is accelerated by the current economic recession caused by the COVID-19 epidemic.

Many of the recently closed and existing production facilities would therefore ideally need to be put to a new use.

In order to reduce the loss for society in terms of both sustainability and economic interest, due to companies making decisions strictly from an individual company perspective, it would in Cepi's opinion be optimal to allow the industry to cooperate more closely than current competition law allows in order to make common informed decisions on the most sustainable way to utilise facilities and skilled labour, once individual companies have decided to close production facilities.

Whilst Cepi does not see it possible or necessary to be involved in the decisions by individual companies on closures or acquisitions, it is clear that every closure of a production facility potentially risks becoming a significant loss in terms of skills and jobs, logistic systems and much of the existing production facilities and equipment.

Even where the production line of production is changed (by the current or new operator), the diverse options for a new product (or combination of products) seems not to be considered by the affected undertakings, which results in large moves into production of the same new product by many new undertakings, due to a lack of information and guidance. Movements as this only have the effect of moving the structural oversupply to another product category. Better outcomes could therefore be facilitated with information exchange of the many alternative product options and consolidating data on capacity development made public by companies. Such cooperation would allow for much greener outcomes due to the optimal use of the available resources and saving economic and social losses in terms of jobs and skills continuing to be employed (by another operator and/or for another product).

Cepi therefore believes that there should be increased possibilities for undertakings to cooperate on how to best utilise surplus resources, through e.g. more common guidance by the relevant association on supply and demand in specific areas and increased possibilities of concluding specialisation agreements (e.g. by increasing the threshold for exemptions, or by emphasising the positive environmental benefits in the assessment under TFEU article 101 (3).

Similarly, Cepi has so far not been able to create digital platforms due to perceived competition law risks, where undertakings could e.g. swap loads and resources for avoiding long transport distances and to avoid available resources to be left unused, or exchange information on stock.

This would have a large positive environment impact in the following situations:

- In the developing circular economy, the global markets are experiencing severe shocks resulting in large surpluses or shortages of recyclates (in this sector: paper for recycling) which can damage the value chains seriously. Often the most extreme situations are local or regional and/or related to specific qualities of recyclates whilst, on average in Europe the situation may not be so problematic. Information exchange and possibility to swap resources between the participants would mitigate the situation and even in normal market situations avoid long transport of recyclates by several companies where they could agree to swap for a load nearer to each.
- In the climate change, European forests are under severe threat of calamities such as storms and pests that often result in significant quantities of damaged wood entering

the local market. Likewise, proactive adaptation of forest to climate change may require removing current tree species and replacing them with other species, also resulting in significant oversupply locally. Whilst wood can be used for many purposes, most purposes have a specific species they need and, again, local and regional market disturbances, potentially unnecessary transport distances – and potential losses of resource (as storage capacity for such wood is limited) – are likely to occur without information exchange and a platform for swapping loads as above.

- In industrial symbiosis, the lead idea is that one operator's waste is useful resource for another operator; this can range from production residues to water and excess heat. Such exchange of resources (with positive or negative prices, depending on the market) would require however rather detailed information on the quality, quantity and exact location of the resource and most likely would not happen with the existing rules of competition. Without such information, however, the symbiosis partners will not be able to come to an agreement as they may not know at all what materials are available and where – often resulting in procurement of “fresh materials” instead of using the circular source.
- In this regard, Cepi notes that in the Temporary Framework,¹ the Commission acknowledged that in order to address the emergency situation posed by the COVID-19 outbreak, the Commission would to a larger extent accept reallocation of stocks, and for undertakings to agree to exchange/communicate information on sales and stocks.

2. QUESTION 2

Question by Commission:

- *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...)?*

2.1 Answer by Cepi

In Cepi's experience, one of the main challenges we face in facilitating the necessary levels of cooperation in the industry is the lack of certainty that our members face as to whether specific cooperation agreements can be engaged in without risks from a competition law aspect.

As already described in the introduction, Cepi has in fact already in many cases that projects had to be postponed due to competition law concerns by the involved undertakings. In several of these cases it is Cepi's opinion that the envisioned cooperation might not constitute

¹ Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak (2020/C 116 I/02)

competition law infringements at all, but the risk and uncertainty has been enough to deter several undertakings from engaging in sustainability projects.

Examples of these are the exchange of information mentioned in section 1.1.1, where the hinderance is not just the current restrictions, but also the lack of clarity as to the extent of when an exchange of information constitutes an infringement of TFEU article 101 (1).

Cepi would therefore welcome further clarification and comfort from the European Commission on the characteristics of agreements that serve the objectives of the Green Deal without restricting competition.

2.1.1 Case-by-case assessment

Since Cepi's main challenge is to decide whether or not specific cooperation projects entail any competition law risk, it would in Cepi's opinion have the largest impact on sustainability, if the Commission offered assessments on a case-by-case basis, preferably in the form of "comfort letters" or similar.

Cepi especially sees this as the most fitting form of clarification in cases, where undertakings are able to submit a specific, well-described and non-clarified question with clear sustainability goals and effects.

In such cases a comfort letter issued by the Commission would ensure that the entire industry would be willing to cooperate on projects that could have very large effects on sustainability.

This is especially the case for I&R&D projects and standardisation agreements within the industry, because such initiatives generally mean that the undertakings incur very large expenses upon making such decisions.

A clarification on the feasibility of such initiatives from a competition law perspective would therefore make the involved undertakings much more likely to engage in sustainability projects that come with large expenses.

Alternatively, the guidance from the Commission could come in the form of more informal guidance on a case-by-case basis, so undertakings can discuss with the Commission what behaviour can be considered as "safe harbour" and obtain guidance on necessary safeguards for any initiative.

2.1.2 TFEU article 101 (3)

The horizontal guidelines should also provide more specific guidance on where the promotion of sustainability objectives has the potential to outweigh potential negative effects of cooperation in the sense of TFEU article 101 (3).

Of special importance, it is at the moment not clear from the case law or guidelines from the Commission to what extent sustainability (i.e. a qualitative benefit):

- Can be qualified as technical or economic progress (for example in the form of reduction of negative externalities).
- How much certainty of initiatives achieving specific outcomes in terms of sustainability that is required before the benefits can constitute "technical or economic progress" in terms of TFEU article 101 (3)
- How the sustainability effects should be quantified or qualified (in particular at the outset of the initiatives before the results can be measured)

- Will result in a fair share of the benefits being received by the consumers, e.g. in cases, where cooperation results in a reduction in CO₂ emissions.
 - This includes an assessment of how far into the future potential sustainability benefits can be considered as efficiencies that fall under TFEU article 101 (3), since sustainability efforts often have a much longer timeframe than purely economic benefits.
 - Furthermore, clarifications on who the sustainability initiatives should affect positively for the initiatives to constitute efficiencies that fall under TFEU article 101 (3), since sustainability initiatives will often have a much wider group of people that reap positive effects than just the direct customers

2.1.3 Clarification on safeguards

Cepi believes that undertakings and associations of undertakings would benefit greatly from more clarification on which safeguards can be used to make sure that competition law is not infringed, when for example exchanging information.

Examples of such clarification could be that it was clarified to what extent Chinese walls, the use of “clean teams” or information only being passed on to third parties would mean that competition law was not infringed, when exchanging information.

3. QUESTION 3

Question by Commission:

- *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?).*

3.1 Answer by Cepi

As already mentioned, the Commission has previously responded to exceptional challenges faced by undertakings by allowing for greater cooperation between undertakings, by issuing the Temporary Framework during the COVID-19 outbreak.

The climate crisis is a severe situation affecting all citizens and has created an unprecedented challenge for undertakings, which in turn has created a need for undertakings and associations of undertakings to quickly cooperate on introducing measures that must be implemented swiftly and have a great effect on the sustainability in their industries.

Cepi therefore strongly believes that the current climate crisis is a crisis of the same magnitude as the COVID-19 outbreak, which in spite of the longer duration also requires great cooperation immediately.

The severity of this challenge that undertakings are faced is made clear from the very ambitious goals and timeline provided in the European Green Deal, which in Cepi’s opinion stresses the need for cooperation between undertakings to increase the speed of the adoption of new sustainability measures.

In Cepi’s opinion, undertakings are therefore currently faced with exceptional circumstances in which cooperation should be allowed to pursue Green Deal objectives, even if such

cooperation would fall under TFEU article 101 (1) under the current enforcement practice by the Commission. Cepi strongly believes that an exemption should be introduced for cooperation that is necessary for the relevant industry to achieve the goals in the European Green Deal where less stringent measures could not achieve the goals as effectively.

Examples of such justifiable initiatives would in Cepi's opinion e.g. be:

- Agreements to not use specific "non-green" technologies even where such technologies might make it slightly cheaper to produce the goods, so that such an agreement would not directly benefit consumers economically
- Industry commitments to only use materials that can be recycled or meets sustainability certifications, thus phasing out other kinds of materials, even where the phased-out materials would be slightly cheaper, so that such an agreement would not directly benefit consumers economically
- Increased exchange of information between undertakings
- Possibilities for associations of undertakings to introduce mandatory standardisation
- Increased cooperation on increasing the utilisation of surplus resources

In Cepi's opinion, competition law should especially allow increased cooperation, when the cooperation concerns sustainability objectives, which are set out in EU policies such as the Zero Pollution policy or European Green Deal, since these areas are in Cepi's opinion also where the actions of Cepi's members can have the greatest impact on sustainability.

As already mentioned, Cepi also strongly believes that less restrictive measures should be applied, when cooperation takes place within and is managed by a widely recognised association with a well-established compliance culture, and that it can be ensured that the cooperation solely has sustainability purposes.

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Cepi remains at your disposal for any questions or comments.

We understand that there will be a conference on this interesting and important topic in early 2021 and Cepi would be grateful, if we could attend this and provide you with more concrete examples of the competition law challenges that we have been faced with during our sustainability projects and provide more specific quantifications on how large an impact increased cooperation between Cepi members compared to what is currently allowed, would have in terms of sustainability.

Yours sincerely,



Jori Ringman