

## EUROPEAN COMMISSION CALL FOR CONTRIBUTION ON THE GREEN DEAL AND COMPETITION POLICY

### AFEP Contribution

The European Commission launched a call for contributions in mid-October to assess the possible role of competition policy in achieving the objectives of the Green Deal.

While competition policy is not the main tool for combating climate change and protecting the environment, the Commission considers that it can nevertheless play its part and is assessing in the light of these objectives the three tools of its competition policy: **state aid control, antitrust and merger control**.

AFEP member companies welcome the approach of DG COMP, as it acknowledges other economic and political priorities, with their own constraints and logic, and the need to integrate competition policy into the Green Deal. This approach responds to a strong demand from economic actors who have long advocated for strengthened coordination between Directorates-General when drafting texts structuring the future of Europe. They also call for the inclusion of other European objectives in DG COMP's analyses. This work follows a series of discussions launched in 2020 by national competition authorities<sup>1</sup>.

Business regulation should no longer focus solely on stability or the protection of consumers and investors, but must also become a tool for competitiveness both internally and externally, and live up to current transformations, particularly in terms of climate change and the environment. In this context, competition policy must allow the development of **projects, cooperation and technologies favourable to achieving the objectives of the Green Deal**.

It must also measure and integrate the support provided by non-European states to their domestic actors, in particular in a context of crisis and regarding environmental and digital issues. This is an essential condition for maintaining a level playing field for the competitiveness of businesses.

More generally, the reflection proposed by the Commission underlines the essential complementarity between industrial and competition policies. These two policies tend to increase competitiveness, which primarily involves reducing costs and stimulating innovation. From the Green Deal's perspective, this dual objective must be part of an overall political strategy while responding to complex technical questions specific to environmental matters (e.g. can the reduction of CO2 emissions, which might increase prices, benefit from article

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<sup>1</sup> In May 2020, the French competition authority ("ADLC"), along with seven other regulatory authorities, committed to giving greater importance to environmental protection. In July 2020, the Dutch competition authority published draft guidelines on the compliance with competition law of cooperation of companies having beneficial effects for the environment. In September 2020, the Greek competition authority published a working document examining the possibilities for greater protection of the environment

101(3) TFEU<sup>2</sup> which provides for the possibility of justifying a cartel which would appear prima facie to be anti-competitive?).

Before responding more specifically to the Commission's questions (see our attached response to the call for contributions), companies wish to underline the changes and precautions required for competition policy to contribute to the objectives of the Green Deal.

## I. Regarding State Aids

The approach concerning **state aids must be part of a pragmatic, global and political vision of the economy** (environmental emergencies and global competition benefiting from more flexible rules than in the Single Market) promoting a legal framework avoiding excessive administrative burdens and conducive to the development of large-scale ecological transition projects.

Given the EU's new priorities (Green Deal, digital), companies welcome the recent announcement of DG COMP in its evaluation report of state aid rules that many texts will be adapted in the short term (GBER, RDI framework, communication on IPCEI, guidelines on state aid for environmental protection and energy...) .

This logic of updating state aids regulation in view of the climate emergency has already led three countries (Italy, Denmark and Portugal) to carry out a complete inventory of fossil fuel subsidies and several Member States to indicate their intention to gradually eliminate them.

Existing tools have demonstrated their effectiveness and adaptability in particular thanks to the rapid adoption of a temporary framework on state aid in the context of the Covid-19 crisis. Furthermore, the provisions of the Treaty and in particular the combined reading of Articles 107, paragraph 3, sub-paragraph c), 191 (environmental protection) and secondary law already provide a sufficient legal basis to apprehend state aid for projects useful for achieving the objectives of the Green Deal.

However, the EU economy's ecological transition could be stimulated by **targeted adaptations of the guidelines on state aid relating to environmental protection and energy or the framework for state aid for research and development and innovation**. It is about supporting sufficient collective creativity to compete under comparable conditions with companies supported by their national authorities in other regions of the world. To do this, it is necessary to act both on the upstream phase of R&D and on that of the most

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<sup>2</sup> However, the provisions of paragraph 1 may be declared inapplicable:

- to any agreement or category of agreements between companies,
- to any decision or category of decisions of business associations and
- to any concerted practice or category of concerted practice

which contribute to improving the production or distribution of products or to promoting technical or economic progress, while reserving for users a fair share of the resulting profit, and without:

- (a) imposing restrictions on the undertakings concerned which are not indispensable to the attainment of those objectives,
- (b) giving undertakings the possibility, for a substantial part of the products in question, of eliminating competition.

advanced stages (in particular the first industrial deployment of "first of a kind" low-carbon technologies).

The base of eligible costs (full costs including indirect costs) should be broadened to better reflect the real costs incurred by companies when the project directly contributes to the achievement of the objectives of the Green deal. Regarding the maturity level of the project, the new definition should include in the scope first industrial deployments, pre-commercial or non-marketable prototypes. The age of eligible companies should also be extended to promote the growth of companies working in these technologies.

It would also be necessary to adapt the temporary COVID framework and extend its duration, Thus applicable state aid rules could be modified even before the revision of the guidelines and frameworks for the duration of the recovery, providing additional environmental and digital incentives.

Companies therefore call upon the Commission to explore the possibility of a "**Green deal bonus**" allowing to raise the aid intensity thresholds for projects implementing it, and update the relevant guidelines and frameworks accordingly. Indeed, such bonuses would reinforce the incentive character of state aid policy for economic actors.

- **Promotion of important projects of common European interest ("IPCEI"):**

Even if the application of the Communication on IPCEI is quite recent, companies consider this communication is **an essential tool for promoting cooperation between Member States and European manufacturers**. The joint construction or production of shared technological solutions between companies requires colossal investments, in particular in environmental research and development ("R&D"). Such projects can also strengthen the European Union's leadership in the fight against climate change, in particular in certain key technological sectors (aeronautics, energy, microelectronics, automobiles, etc.), and promote European strategic autonomy in the face of competition from third countries.

In addition to batteries and hydrogen, AFEP considers that the development of low-carbon investments must continue as part of the carbon neutrality trajectory for 2050 with intermediate EU objectives for 2030 and 2040. To this end, it is important to better articulate European guidelines supporting R&D and the deployment of low-carbon technologies, particularly through IPCEIs, for which notification procedures must be simplified.

In order to increase the interest of companies in such projects, it is also essential to seek a balance between (i) the requirements relating to the search for a leverage effect ("spillover"), (ii) the obligations of dissemination of research results set up as conditions of compatibility of the IPCEI by the Commission and (iii) the preservation of the interest of the project from an industrial and economic point of view (in particular the protection of intellectual property rights). Such conditions can act as a brake on the development of disruptive technological solutions in the fight against climate change.

It is also necessary to clarify the legal framework applicable to cooperation between companies within the framework of an IPCEI with regard to the rules on anti-competitive practices (cartel and abuse of dominant position).

■ [A reference to the taxonomy which should not be exclusive](#)

Regulation (EU) 2020/852, also known as the “taxonomy” regulation, proposes a European classification to support sustainable investments. It provides a useful frame of reference for determining the sustainability of an economic activity.

Whilst the use of taxonomy appears *a priori* interesting to identify “already green” activities from the angle of the first two objectives already examined (climate change mitigation and adaptation), the work on this theme is nevertheless currently insufficient to assess the contribution of all the projects to ecological transition:

- the taxonomy applies to activities and only indirectly to projects: it is indeed based on an analysis of activities by NACE code, which does not allow to grasp the complexity of certain industrial projects;
- the notions of transitional and enabling activities, introduced only for climate criteria, seem to exclude many activities that are nevertheless in this situation. This classification should not entail a risk of not funding transition projects;
- the technical screening criteria for the climate objectives of the taxonomy have not yet been adopted. Besides, many activities are not covered yet in the draft delegated act currently under consultation, although they potentially contribute to the ecological transition and to the objectives of the Green Deal;
- finally, the technical screening criteria concerning the other environmental objectives of the taxonomy (circular economy, water resources, local pollution, biodiversity) will only be examined in 2021 and the establishment of unambiguous quantified criteria may be complicated, unlike for climate objectives, which will lead to composite indicators that are much more complex to use.

Transition activities will need to be better defined and the technical screening criteria will need to be supplemented to cover some activities that are currently excluded before the taxonomy can be referred to.

State aid law, which requires more strategic pragmatism, cannot be complicated by an exclusive reference to taxonomy. It is necessary to establish other criteria defined by the EU and/or at the initiative of companies promoting projects in favour of ecological transition (such as the contribution of a technology or of a research project to reducing GHG emissions or to reducing the use of natural resources). From this point of view, the use of calculation methods approved at international level or, at least at the European level, could be examined to estimate the positive gains generated by the aid. A life cycle approach (LCA method) or a reference to relevant sectoral directives such as the Directive on the promotion of renewable energies (RED

II) which identifies the GHG reduction potential of certain biofuel sectors are possible examples.

Such references would allow companies to state concretely the aid's positive effects at the stage of the analysis of its compatibility, when weighing the effects. The contribution of an investment project to the development of a key technology allowing a significant gain in terms of reduction of GHG emissions would thus be positively valued with regard to the objective of climate neutrality. Similar reasoning could be applied in the analysis of the positive externalities of a research project.

#### ■ Need for a level playing field

The European regime of strict state aid controls is unique compared to other global economic areas, placing European Union companies at a disadvantage compared to some of their competitors in third countries.

Third countries will step up their funding for the environment and the fight against climate change, designed as tools to help lift their economies out of the current crisis. Among these, the rules on state interventions in support of their national companies must be taken into account in any competition analysis. In this context, the ongoing work of the Commission on **foreign subsidies is welcome**. Likewise, the establishment and correct application of **free trade agreements** between the European Union and third countries becomes even more crucial. Initiatives aimed at promoting European competition law in third countries or at developing new multilateral disciplines to regulate state aid and industrial subsidies at the international level (WTO, OECD) or at the bilateral level must be continued.

In this context, it seems appropriate to:

- **consider R&D as a strategic competitive asset** for companies in the context a globalised economy (see in particular the issue around intellectual property developed below),
- identify the role of **public procurement and European funding** to stimulate innovation and move towards supranational European public procurement; like the practices of third countries, the use of this tool would also avoid the qualification of State aid,
- reflect on (i) an **aid financing mechanism that would avoid overburdening** companies subject to competition with new tax obligations, and (ii) on the advisability of European harmonisation in this area.

Companies subject to international competition, particularly industrial companies, are key players in identifying and implementing new technological solutions with a low environmental footprint. They also play a major role in terms of direct and indirect jobs in the European Union.

In this context, these companies wish they will not be asked by the Member States and the EU to contribute financially in a disproportionate way compared to their non-EU competitors, in order to generate additional resources to finance aids fostering ecological transition as part of

the Green Deal. This is all the more important as European companies, heavily impacted by the crisis, often suffer a sharp reduction in their capacity to invest.

It is therefore important to define a European harmonisation framework to maintain the exemption or mitigation provisions - particularly in tax matters - currently applicable for these companies which are key players in ecological transformation.

## II. Regarding Antitrust Practices

The "Green Deal" is a great opportunity for Europe to strengthen its research and, ultimately, its **technological and strategic autonomy**. To do this, the development of cooperation between companies is absolutely necessary, as long as they respect the framework of Article 101 TFEU and do not develop practices/products harmful to the environment<sup>3</sup>.

Virtuous cooperation can lead to sectoral improvements, particularly in the environmental field. In its draft guidelines on competition law and environmental protection (opened to consultation until the end of September 2020), the Dutch Authority for Consumers and Markets (Autoriteit Consument & Markt) provides a concrete example: waste collection companies exchange information to optimise the route taken by trucks, reducing their mileage by 20% and leading to lower costs, emissions, vehicle wear and tear, and traffic congestion. From an environmental standpoint, cooperation between economic players is proving to be more effective than free competition and responds to the well-being of consumers and of society in general.

In addition, the Court of Justice of the European Union ("CJEU") recalled in 2000<sup>4</sup> that "the granting of an exclusive right over part of the national territory for environmental objectives, such as recycling construction waste capacity, does not in itself constitute an abuse of a dominant position. The management of certain waste can be the subject of a service of general economic interest, in particular when this service aims to deal with an environmental problem".

The reflections carried out now on the Green Deal also offer the opportunity to create legal and practical conditions for R&D sharing favourable to the greening of the economy without disseminating the intellectual property resulting from the results to competing third countries.

A recent study carried out among 200 ESG (environment, social and governance) managers of large groups revealed<sup>5</sup> that 57% of them had not engaged in pro-environmental cooperation because of too high an antitrust risk. This proportion is considerable, especially since large companies have effective levers to fight collectively in favour of environmental protection.

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<sup>3</sup> See in this sense the sanction imposed by the European Commission on the truck cartel (July 2016), in particular, with regard to the timing for the introduction of emission technologies

<sup>4</sup> CJEU, 23 May 2000, C-209/98

<sup>5</sup> Linklaters [survey](#) conducted in March 2020 in Germany, France, Great Britain, the United States and the Netherlands.

In general, companies will hesitate to implement cooperation whose self-assessment under Article 101 is complex and exposes them to a certain degree of legal uncertainty. This is the case for cooperation requiring an in-depth assessment with regard to the exemption criteria, whether because of an impairment of competition between companies and/or a proven effect on the welfare of the consumer, but also cooperation for which it is simply difficult to assess the possible anti-competitive impact, due to the uncertainty surrounding many parameters to be taken into account in the risk analysis.

The Dutch authority proposed in its draft guidelines to adopt an environment-specific block exemption regulation, which would set out conditions under which green arrangements could benefit from a safe harbour. This idea could be looked at.

Existing **horizontal cooperation agreements** have demonstrated their economic usefulness. To avoid a chilling effect and consolidate R&D and the essential technological autonomy that results from it, particularly in the field of ecological transition, the approach to such cooperation must be profoundly revised on two counts:

*1. Sharing of know-how and intellectual property rights ("IPR"): creating better legal protection*

The Block Exemption Regulation applicable to R&D agreements<sup>6</sup> is too often invoked by partner research institutes/organisations claiming that the expertise of companies or IPRs (pre-existing or resulting from joint research) could be shared with third parties (competitors or not) for research and development and operation.

**As a general rule, requiring that IPRs and know-how be shared with all parties (article 3 of Regulation 1217/2010 for example) is no longer appropriate in the current context of fierce competition between the various global geographic areas.** There is indeed a risk that the result of this joint research will quickly leak to competitors from third countries. Companies must have an economic interest in sharing their intellectual property; it cannot be a precondition for obtaining the Commission's agreement. This can also discourage companies from participating in joint research and technology (R&T) and R&D activities, which will yet be the cornerstone of the competitiveness of European companies in the face of environmental and digital challenges.

*2. Nature of information exchange: to be relaxed*

The current approach in the existing guidelines leads many exchanges of information to be analysed as restrictions by object *per se* or at least as requiring a delicate and therefore potentially uncertain competitive analysis.

No cooperative research and development project can be set up without involving extensive exchanges of information, including technical, technological elements or elements relating to

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<sup>6</sup> Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements

business innovation strategies. As such, it is essential to provide a clear framework that allows the development of essential cooperation under appropriate legal security conditions.

More generally, the DG COMP's analysis of agreements between companies, whether horizontal or vertical, should:

- **innovate in the interpretation of Article 101-1 TFEU** to consolidate a more positive approach to such cooperation, in particular in the field of research, which should not be considered as restrictive and/or lead companies 1/ to have to demonstrate in a complex manner the merits of cooperation, or 2/ to renounce because of the perceived competition risks. These cooperation agreements must of course not be used to cover up prohibited cartels;
- **include the criterion of sustainability in the definition of the concept of efficiency**, at a sufficient level of priority and in a sufficiently long time frame, beyond the sole criterion of short-term price, quality or innovation. The major European priorities must indeed be integrated into the concept of efficiency;
- **broaden the criteria adopted for the “well-being of the consumer”** and society as a whole, by notably integrating into them European policy objectives other than the sole prism of the lowest price, such as utility for the consumer (search for better product or living environment quality);
- **take full account of the international situation**, in particular the support given to competitors from third countries and their activities.
- **impose no penalty** if the partners to the cooperation agree to modify their cooperation, and where:
  - o the cooperation has been made public, and the Commission guidelines have been followed in good faith as much as possible; or where
  - o the cooperation has been previously discussed with the Commission, and the Commission had not identified any major risks.

### III. Regarding Merger Control

Without modifying the existing framework, the application of merger rules could further contribute to the protection of the environment and to the objectives of the Green Deal by opposing operations with potentially harmful effects for the environment, and by authorising operations with potentially positive effects on the environment. Environmental progress should be integrated into the competitive assessment of the notified operation.

Companies consider that competitive analysis in general, and that linked to the Green Deal in particular, must evolve **to better integrate the essential notion of efficiency, and of positive effects for the climate and the environment, for the market and consumers**, which may result from merger operations.

The concept of efficiency gains from a merger is difficult to measure in environmental terms. Anne Perrot, then Vice-president of the French Competition Council already considered in

2006<sup>7</sup> that "*traditionally, when evaluating the effects of anticompetitive practices on consumer surplus (...) competition authorities "only" require data on price and quantities (...) evaluating environmental damage requires a wide range of information, which a competition authority may find too difficult to translate into an assessment of well-being. For example, evaluating the beneficial effects of an inter-company agreement designed to minimise local pollution requires some measurement of its effects on the health of consumers, the loss of availability that the population must pay for this reduction in pollution, etc.*"

This difficulty should not, however, prevent the competitive analysis from better taking into account the environmental impact of a merger.

Mergers can indeed lead companies to reach a sufficient scale to enable them to implement projects to green their activities. Article 2 (1) (b) of Regulation (EC) 139/2004 requires the Commission, in its analysis of the compatibility of mergers, to take account in particular of the interests of intermediate consumers and purposes, as well as developments in technical and economic progress provided that this is to the advantage of consumers and does not constitute an obstacle to competition.

An approach that is too static to competition or too focused on the European market is no longer appropriate in a world where digital technology is rapidly disrupting competition rules and where the geographical dimension of operations is called into question by the globalisation of the economy. It is necessary to take into account a **new temporality** by including **potential competition** or the captive market dimension in the analysis of the relevant market (whose definition is currently being evaluated by the Commission) affected by the merger.

In a **competition policy in favour of consumers** regarding the "Green Deal", the notion of efficiency must be reconsidered: the approach based mainly on the price impact must be supplemented by other considerations, in particular in favour of ecological transition or major priorities of the European Union. For the analysis of the placing on the market of products resulting from mergers, it becomes advisable to also integrate:

- the need to **minimise the consumption of resources over time as well as to reduce nuisances** including greenhouse gas emissions,
- the **notion of time in the full cost of the product / service ("total cost of ownership")** and of functional units.

From a procedural point of view, **merger control should be simplified for operations contributing to the Green Deal and not raising competition concerns**. Companies want procedures to be simplified and legal certainty in the assessment of their operations, especially in the field of renewable energies.

Finally, while **comfort letters** are a tool for obtaining confirmation of an analysis by the Commission, they are limited to the transaction in question. An update of the Communication

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<sup>7</sup> OCDE, « Environmental regulation and competition », 2006, <http://www.oecd.org/daf/competition/sectors/37981581.pdf> - p. 202.



concerning Regulation 139/2004 would allow a better sharing of the positions adopted by the Commission, subject to referring in a non-confidential manner to the operations concerned.

## **AFEP's Response to the Questionnaire of the Call for Contribution**

### **Part 1: State aid control**

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.

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*The approach concerning **state aids must be part of a pragmatic, global and political vision of the economy** promoting a legal framework avoiding excessive administrative burdens and conducive to the development of large-scale ecological transition projects.*

*This could be stimulated thanks to targeted adaptations of tools such as the guidelines on state aid relating to environmental protection and energy or the framework for state aid for research and development and innovation.*

*On the guidelines on state aid relating to **environmental protection and energy**, an example would be to modify the guidelines to stimulate the development of sustainable fuels, via aids targeting the financing of transitional agricultural sites, the offset of additional costs of these fuels for airline companies or the conversion of processing facilities. Another example would be to adopt a consistent approach regarding fossil fuels. The State aid rulebook should be in line with the commitments from the Paris Agreement and the Green Deal. Three countries (Italy, Denmark, and Portugal) have performed a comprehensive stock take of fossil fuel subsidies and some EU Member States intend to phase them out or have formulated specific policies in their NECPs.*

*On **R&D**, more flexibility on the maximum aid intensity thresholds should be introduced when the aided project contributes directly to achieving the objectives of the Green deal.*

*The base of eligible costs (full costs including indirect costs) should be broadened to better reflect the real costs incurred by companies when the project directly contributes to the achievement of the objectives of the Green deal. Regarding the maturity level of the project, the new definition should include in the scope first industrial deployments, pre-commercial or non-marketable prototypes. The age of eligible companies should also be extended to promote the growth of companies working in these technologies.*

*State aids should also support sufficient collective creativity to compete under comparable conditions with companies supported by their national authorities in other regions of the world. To do this, it is necessary to act both on the upstream phase of R&D and on that of the most*

*advanced stages (in particular the first industrial deployment of "first of a kind" low-carbon technologies).*

*For **IPCEI projects** supporting the climate transition, guidelines should be made clearer on the extent of demonstration of a search for a leverage effect ("spillover effects"). The burden of proof should be lowered in relation to the demonstration of these effects, and alternatively, "contribution to the climate transition" should be added to the general positive indicators set out in the IPCEI Communication (paragraph 20).*

*A balance between (i) the spill-over effect, (ii) the obligations of dissemination of research results set up as conditions of compatibility of the IPCEI by the Commission and (iii) the preservation of the interest of the project from an industrial and economic point of view (in particular the protection of intellectual property rights) should be sought. It is also necessary to clarify the legal framework applicable to cooperation between companies within the framework of an IPCEI with regard to the rules on anti-competitive practices (cartel and abuse of dominant position).*

*Given the EU's new priorities (Green Deal, digital), companies welcome the recent announcement of DG COMP in its evaluation report of state aid rules that many texts will be adapted in the short term (GBER, RDI framework, communication on IPCEI, guidelines on state aid for environmental protection and energy ...).*

*It would also be necessary to adapt the temporary COVID framework and extend its duration, Thus applicable state aid rules could be modified even before the revision of the guidelines and frameworks for the duration of the recovery, providing additional environmental and digital incentives.*

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?

- a. For projects that have a negative environmental impact, what ways are there for Member States or the beneficiary to mitigate the negative effects? (For instance: if a broadband/railway investment could impact biodiversity, how could it be ensured that such biodiversity is preserved during the works; or if a hydropower plant would put fish populations at risk, how could fish be protected?)

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*AFEP supports positive measures promoting investments in support of the Green Deal's objectives, rather than focusing on a penalising approach.*

*Recent examples show the possibility of putting in place mitigation and compensation measures to offset biodiversity loss in infrastructure projects.*

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?

- a. Should this take the form of allowing more aid (or aid on easier terms) for environmentally beneficial projects than for comparable projects which do not bring the same benefits (“green bonus”)? If so, how should this green bonus be defined?

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*AFEP companies support the idea of a **bonus to support environmentally beneficial projects** by raising the aid intensity thresholds for projects implementing the Green Deal. Relevant guidelines and frameworks should be updated accordingly. Indeed, such bonuses would reinforce the incentive character of state aid policy for economic actors. This would also help orient investments in activities that enable the transition toward a sustainable and digital economy.*

*Under the General Block Exemption Regulation, Member States should be allowed to grant greater amount of financial support to projects supporting the climate transition. To do so, the concept of eligible costs should be expanded, and all projects costs should be considered as eligible costs. The aid intensity rate and the notification thresholds should be increased (see points in previous question).*

- b. Which criteria should inform the assessment of a green bonus? Could you give concrete examples where, in your view, a green bonus would be justified, compared to examples where it would not be justified? Please provide reasons explaining your choice.

4. How should we define positive environmental benefits? a. 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?

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*Regulation (EU) 2020/852, also known as the “taxonomy” regulation, proposes a European classification to support sustainable investments. It provides a useful frame of reference for determining the sustainability of an economic activity.*

*Whilst the use of taxonomy appears a priori interesting to identify “already green” activities from the angle of the first two objectives already examined (climate change mitigation and adaptation), the work on this theme is nevertheless currently insufficient to assess the contribution of all the projects to ecological transition:*

- *the taxonomy applies to activities and only indirectly to projects: it is indeed based on an analysis of activities by NACE code, which does not allow to grasp the complexity of certain industrial projects;*

- *the notions of transitional and enabling activities, introduced only for climate criteria, seem to exclude many activities that are nevertheless in this situation. This classification should not entail a risk of not funding transition projects;*
- *the technical screening criteria for the climate objectives of the taxonomy have not yet been adopted. Besides, many activities are not covered yet in the draft delegated act currently under consultation, although they potentially contribute to the ecological transition and to the objectives of the Green Deal;*
- *finally, the technical screening criteria concerning the other environmental objectives of the taxonomy (circular economy, water resources, local pollution, biodiversity) will only be examined in 2021 and the establishment of unambiguous quantified criteria may be complicated, unlike for climate objectives, which will lead to composite indicators that are much more complex to use.*

*Transition activities will need to be better defined and the technical screening criteria will need to be supplemented to cover some activities that are currently excluded before the taxonomy can be referred to.*

*State aid law, which requires more strategic pragmatism, cannot be complicated by an exclusive reference to taxonomy. It is necessary to establish other criteria defined by the EU and/or at the initiative of companies promoting projects in favour of ecological transition (such as the contribution of a technology or of a research project to reducing GHG emissions or to reducing the use of natural resources). From this point of view, the use of calculation methods approved at international level or, at least at the European level, could be examined to estimate the positive gains generated by the aid. A life cycle approach (LCA method) or a reference to relevant sectoral directives such as the Directive on the promotion of renewable energies (RED II) which identifies the GHG reduction potential of certain biofuel sectors are possible examples.*

*Such references would allow companies to state concretely the aid's positive effects at the stage of the analysis of its compatibility, when weighing the effects. The contribution of an investment project to the development of a key technology allowing a significant gain in terms of reduction of GHG emissions would thus be positively valued with regard to the objective of climate neutrality. Similar reasoning could be applied in the analysis of the positive externalities of a research project.*

## **Part 2: Antitrust rules**

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).

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*The "Green Deal" is a great opportunity for Europe to strengthen its research and, ultimately, its technological and strategic autonomy. To do this, the development of cooperation between companies is absolutely necessary, as long as they respect the framework of Article 101 TFEU and do not lead to the development of practices/products harmful to the environment.*

*From a horizontal point of view, in some cases, cooperation between companies would make it possible to develop greener products or manufacturing processes that one company would not be able to develop on its own or would enable this development in a faster and more efficient way.*

*From a vertical point of view, in some cases, cooperation between undertakings would make it possible to improve industrial know-how with customer/supplier experience and in the long term improve the efficiency of the product or process.*

*We provided in our position paper the example underlined by the Dutch Authority for Consumers and Markets (Autoriteit Consument & Markt) in its draft guidelines on competition law and environmental protection. In this situation of exchange of information between waste collection companies, **cooperation led to more efficiency and positive impacts on the environment and society well-being (lower costs, lower emissions, lower traffic congestion...)***

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...)?

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*Additional guidance such as guidelines on green cooperation would be welcome, as comfort letters as those published by the Commission in the context of COVID-19 are not made public. Guidelines should contain numerous practical examples. Specific guidance in relation to exchanges or information or joint procurement in the context of environmental cooperation would be very helpful.*

*Other possible clarifications could entail:*

- The adoption of an environment-specific block exemption regulation, which would set out conditions under which green arrangements could benefit from a safe harbour (see the approach taken by the draft guidelines of the Dutch competition authority) ;*
- The Commission should take a stance on being opened to increasingly providing comfort letters in relation to environmental cooperation – in particular where the characteristics of a given project do not fit with block exemption/guidelines. It should be a voluntary/fast-track procedure.*
- On enforcement, the Commission should consider not imposing any penalty if the partners to the cooperation agree to modify their cooperation, and where:*

- *the cooperation has been made public, and the Commission guidelines have been followed in good faith as much as possible; or where*
- *the cooperation has been previously discussed with the Commission, and the Commission had not identified any major risks.*
- *The EU Commission could take the lead and encourage other national competition authorities to harmonise their positions on climate cooperation to foster legal certainty for international cooperation.*

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?).

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*On the need for current enforcement practice to be developed to accommodate agreements favourable to the greening of the economy, it should be underlined that legal and practical conditions for R&D sharing should be created without disseminating the intellectual property resulting from the results to competing third countries. We referred in our position paper to a [study](#) published in March 2020 that showed that among 200 ESG managers of large groups, 57% of them had not engaged in pro-environmental cooperation because of too high an antitrust risk and uncertainty surrounding many parameters to be taken into account in the risk analysis.*

*However, horizontal cooperation agreements have demonstrated their economic usefulness. To avoid a chilling effect and consolidate R&D, the approach to such cooperation must be revised: Better legal protection must be created regarding the sharing of know-how and intellectual property*

*As a general rule, requiring that IPRs and know-how be shared with all parties (article 3 of Regulation 1217/2010 for example) is no longer appropriate in the current context of fierce competition between the various global geographic areas. There is indeed a risk that the result of this joint research will quickly leak to competitors from third countries. Companies must have an economic interest in sharing their intellectual property; it cannot be a precondition for obtaining the Commission's agreement. This can also discourage companies from participating in joint research and technology (R&T) and R&D activities, which will yet be the cornerstone of the competitiveness of European companies in the face of environmental and digital challenges.*

*Innovation in the nature of information to be exchanged*

*The current approach leads to many exchanges of information being analysed as restrictions by object per se or at least as requiring a delicate and therefore potentially uncertain competitive analysis.*

*No cooperative research and development project can be set up without involving extensive exchanges of information, including technical, technological elements or elements relating to business innovation strategies. As such, it is essential to provide a clear framework that allows the development of essential cooperation under appropriate legal security conditions.*

*More generally, the DG COMP's analysis of agreements between companies, whether horizontal or vertical, should:*

- innovate in the interpretation of Article 101-1 TFEU to consolidate a more positive approach to such cooperation, in particular in the field of research, which should not be considered as restrictive and/or lead companies 1/ to have to demonstrate in a complex manner the merits of cooperation, or 2/ to renounce because of the perceived competition risks. These cooperation agreements must of course not be used to cover up prohibited cartels;*
- include the criterion of sustainability in the definition of the concept of efficiency, at a sufficient level of priority and in a sufficiently long time frame, beyond the sole criterion of short-term price, quality or innovation. The major European priorities must indeed be integrated into the concept of efficiency;*
- broaden the criteria adopted for the “well-being of the consumer” and society as a whole, by notably integrating into them European policy objectives other than the sole prism of the lowest price, such as utility for the consumer (search for better product or living environment quality);*
- take full account of the international situation, in particular the support given to competitors from third countries and their activities.*

### **Part 3: Merger control**

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?

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*From a procedural point of view, merger control should be simplified for operations contributing to the Green Deal and not raising competition concerns. Companies want procedures to be simplified and legal certainty in the assessment of their operations, especially in the field of renewable energies.*

*On contributing to the Green Deal, merger enforcement could better take into consideration the potential positive environmental impacts of a merger in as a key element in the efficiency analysis, for example with the gain of cleaner technologies, which would help it achieve its environmental transition. Mergers can indeed lead companies to reach a sufficient scale to enable them to implement projects to green their activities. The Commission should consider*

*efficiencies in its analyses, such as the reduction of GHG emissions, the need to minimise the consumption of resources over time as well as to reduce nuisances including greenhouse gas emissions, or the notion of time in the full cost of the product / service ("total cost of ownership") and of functional units.*

*Better guidance could hence be given by the Commission on how merging parties can use positive environmental benefits not only as part of efficiency arguments but in their overall deal rationale. Sustainability under Article 2(1)(b) of the EU merger regulation should also be better considered, through for example "the interests of the intermediate and ultimate consumers". The interpretation of the consumer welfare standard should be broadened, and technical and economic progress factors could be developed, provided that it is to consumers' advantage and does not form an obstacle to competition. Possible sustainability benefits should be of course weighed against possible anticompetitive effects of the merger.*

*Such an approach would lead to necessary increase of specialisation (and number of specialists) on climate and energy issues within DG COMP, and of more intense and earlier collaboration between DG COMP and other DG, such as DG Environment, so to better assess mergers that might contribute to the objectives of the Green Deal.*

*Increased harmonisation would also be needed within the International Competition Network to increase legal certainty for international environmental projects.*

*Finally, an approach that is too static to competition or too focused on the European market is no longer appropriate in a world where digital technology is rapidly disrupting competition rules and where the geographical dimension of operations is called into question by the globalisation of the economy. It is necessary to take into account a new temporality by including potential competition or the captive market dimension in the analysis of the relevant market (whose definition is currently being evaluated by the Commission) affected by the merger.*



## **ABOUT AFEP**

Since 1982, AFEP gathers the largest companies present in France. The association, based in Paris and Brussels, aims to foster a favourable environment for businesses and to present the vision of its members to French public authorities, European institutions and international organisations. Restoring business competitiveness to achieve sustainable growth and employment in Europe and meet the challenges of globalisation is AFEP's priority. AFEP has around 113 members. More than 8 million people are employed by AFEP member companies and their cumulative annual turnover amounts to 2,600 billion euros.

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