



## CONTRIBUTION TO “COMPETITION POLICY SUPPORTING THE GREEN DEAL”

### Introduction

A2A S.p.A. (“**A2A**”) is the holding company of an Italian multi-utility group established in 2008 as the result of the merger of the former utility groups controlled by the municipalities of Milan and Brescia. A2A is mainly active in the production, sale and distribution of electricity and gas as well as in the supply of heating services, waste management and water. A2A welcomes the opportunity to contribute to the initiative of the European Commission (“**EC**”) Competition Policy supporting the EU Green Deal, and intends to point out its point of view on the interplay between competition policy and the EU Green Deal by means of the present submission.

As a preliminary remark, A2A is engaged in a wide range of activities supporting the achievement of the goal established by the EU Green Deal. In particular, A2A has already implemented - and is in the course of implementing - a wide range of business initiatives which are fully in compliance with competition law.

However, as acknowledged by the DG COMP itself, despite these goals are related primarily to regulation rather than competition, competition policy has nonetheless the potential to sustain the growth of business in the framework of the EU Green Deal. Still, in so far as the business initiatives achieving the EU Green Deal goals can be linked to the notion of consumer welfare pursuant to competition law and societal benefit, it would be advisable that competition authorities would take into account the positive climate and environmental outcomes, ultimately to the benefit of consumers, when such business practices are scrutinized under competition law.

In this respect, a key question concerns the boundaries of competition policy and the opportunity to reframe competition and antitrust rules in order to entrust them with new objectives and goals. If so, the new goals shall take into account market failures and environmental price externalities, i.e., environmental and climate change-related costs which are not reflected in market prices, but borne by the society as a whole.

Having clarified these preliminary points, we follow-up with our submission by clarifying how competition rules can contribute to achieving the outcomes of the EU Green Deal.

### Part 1: State aid control

According to Article 107(1) TFEU, the qualification of a measure as State aid requires the following conditions to be met cumulatively: a) the measure must be financed through State resources; b) it must grant an advantage liable to favour certain undertakings or the production of certain goods (the so-called selectivity); c) the measure must distort or threaten to distort competition and d) the measure must be liable to affect trade between Member States.

Against the statutory prohibition of State aid, Article 107(3) TFEU clarifies that, even if the existence of a State aid is detected, certain categories of aid may be compatible with the internal market. In particular, according to the Commission Guidelines on State aid for environmental protection and energy 2014-2020 (“**EEAG**”), which have been recently prolonged to the end of 2021, certain types of aid measures for energy and environment may be considered compatible if they comply with the following criteria: (a) contribution to a clearly defined objective of common interest; (b) need for State intervention; (c) appropriateness; (d) incentive effect; (e) proportionality; (f) avoidance of undue negative effects on competition and trade; (g) transparency of the aid.

Given this legal and regulatory framework, there are a number of ways for the EC to take environmental and energy considerations linked to the EU Green Deal into account when deciding whether to approve a State aid measure, instead of looking narrowly at whether the aid distorts competition in the market. In particular, we focus on criteria (a), (d) and (f) which can be shaped to consider environmental and climate benefits as positive elements for the assessment of an aid measure.

- i. Services of General Economic Interest and contribution to a clearly defined objective of common interest: decoupling distortion of competition when the aid measure is finalized to pursuing environmental protection and energy transition objectives*

From a general standpoint, a measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes. However, despite certain undertakings are given an advantage that is liable to distort competition, the advantage can be counterbalanced if the recipient undertaking uses the aid to pursue environmental benefits and energy transition objectives, which are hard to tackle in an alternative way.

These objectives are intrinsically of common interest for the society as a whole, and therefore they should be linked to the notion of Service of General Economic Interest (“**SGEI**”). Indeed, according to the EC’s enforcement practice and to the case-law of the European Court of Justice, SGEIs are economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there were no public intervention; in addition, the recipient undertaking must have public service obligations and the obligations must be clearly defined.

Therefore, pursuing a priority EU Green Deal objective should be equivalent to carry out a SGEI, and accordingly a measure that aims to support “green” outcomes shall be considered compatible by the EC as it does not have the potential to distort competition and brings positive outcomes for the environment. In this respect, given that the protection of the integrity of the Internal Market requires harmonization at MSs level in order to safeguard the level playing field, the EC should classify by means of Regulation the EU Green Deal objectives as SGEI, as this will ultimately bring legal certainty in relation to the compatibility of an aid with antitrust rules. Finally, we recommend adding a new layer of assessment to the EC’s State aid enforcement practice, which takes into account the principle of proportionality and addresses the consistency of measures with the EU Green Deal objectives.

- ii. Broaden the definition of incentive effect*

EEAG clarify that “*environmental and energy aid can only be found compatible with the internal market if it has an incentive effect*”. In particular, the Commission considers that aid does not present an incentive effect for the beneficiary in all cases where work on the project had already started prior to the aid application by the beneficiary to the national authorities. In such cases, where the beneficiary starts implementing a project before applying for aid, any aid granted in respect of that project will not be considered compatible with the internal market.

However, these statements do not support pursuing the EU Green Deal objectives: incentives that are compliant with competition rules are only those given for starting new projects; nothing is specified in relation to existing projects, such as existing facilities based on coal, for which environmental and energy aid can be considered uncompliant with State aid control provisions. This would be the case because, given that these kinds of facilities had been built several years ago (and therefore are already operative), they are not in compliance with the EU Green Deal objectives, and therefore cannot benefit from public incentives.

This scenario, however, is liable to distort competition between energy sources and across Member States (“MSs”). According to the current regulatory framework, solar plants (but also other renewable sources of energy) are admitted to incentive and therefore compliant with State aid rules; they are already pursuing EU Green Deal objectives even without the incentive. Differently, existing facilities based on other sources will hardly switch their production to pursue energy transition objectives without the incentive, but if this latter would be given State aid rules will apply. In other words, MSs shall choose between complying with either the EU Green Deal or State aid provisions. The situation would be different if:

- the EC will admit existing facilities to the incentive without incurring in unlawful State aid;
- the EC will clarify which costs and support measures can be covered by the incentive;
- alternatively, streamline regulatory and administrative authorizations for new facilities, in particular if these latter are planned to pursue EU Green Deal objectives.

### **Part 2 and 3: Antitrust rules and merger control**

Some objectives linked to the EU Green Deal, in particular those related to the markets for waste management and treatment, shall benefit from cooperation among competitors without incurring in antitrust infringements. These markets are in fact characterized by intrinsic features which, in each MS, do not support the effort of market operators to reduce the impact on environment.

In Italy for instance<sup>1</sup>, national markets for waste are not fully mature from the facility as well as from the technological standpoint: in most cases, there is a significant facility deficit; in addition, these markets are enjoying transition, therefore operators may likely incur in losses without proper investments. However, given that they are not scalable, investments are not always the best choice, and so cooperation or aggregations between competitors are often mandatory.

The key question in this respect is to what extent cooperation among market operators may facilitate achieving EU Green Deal goals, allowing the exemption under Article 101(3) TFEU of certain anticompetitive agreements that bring significant environmental benefits. In this regard, Article 101(3) TFEU clarifies that only agreements 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, can be exempted from the application of antitrust rules. No explicit reference is made to positive environmental benefit, which causes the EC to assess case-by-case whether or not an agreement between competitors is lawful.

Therefore, competition policy can support the EU Green Deal objectives by exempting agreements between competitors that have a teleological nexus with environmental protection and energy transition and enable the project scale-up. Such clarification shall be given either by:

- introducing, at Article 101(3) TFEU, the contribution to the EU Green Deal among the instances that justify a lawful cooperation among competitors (and provided that no ancillary competitive restrictions are implemented); or by
- issuing/modifying secondary legislation<sup>2</sup> in order to include a range of sustainable actions among those that can justify exchanges between economic operators. This is the case for cooperation and

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<sup>1</sup> See Italian Competition Authority, fact-finding inquiry of 21 January 2016, IC49 – Mercato della Gestione dei Rifiuti Solidi Urbani.

<sup>2</sup> Most prominently: Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty; Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements.



agreements aimed at replacing non-sustainable products or implementing new waste plants facilitating “green” emissions, granting of IP rights in order to co-develop and/or co-market new sustainable products, or exchanges of sustainability-related information between competitors.

In relation to merger control, in order to assess the competitive impact of a proposed concentration, the EC should take into account that positive environmental benefits pursuant to the EU Green Deal constitute and efficiency. In particular, if a concentration is liable to facilitate the realization of EU Green Deal objectives (for instance if parties to a concentration implement a virtuous increase in waste treatment that in turn reduces emissions significantly; if the concentration increases the competitiveness of the energy industry, thereby improving the conditions of growth and raising the standard of living in the EU; or if it triggers important synergies in R&D expenditure and innovation, leading to investments in new “green” technologies), the link with consumers’ welfare will be the natural consequence, therefore it is an efficiency that has the potential to counterbalance any possible negative effect on competition. However, even in cases where the realization of EU Green Deal objectives cannot be immediately benchmarked against consumers’ welfare, the EC shall adopt a long-term perspective, which foresees the possibility to materialise “green” efficiencies also in the long run.

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A2A looks forward to cooperating with the EC in relation to developing competition policy and the EU Green Deal.