Response to the DG Comp call for contributions on "Competition policy and the Green Deal"

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State Aid

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.***

In the control of State aid, compared to the application of antitrust rules, there is a closer and more systematic relationship between the protection of competition and the pursuit of other policy goals. Article 107 TFEU allows the Commission to declare State aid measures compatible with the Treaty when they are necessary and proportionate to pursue other public policy objectives (including environmental goals) falling within one of the broad categories listed in Article 107. At the same time, State aid control ensures that competition is not unduly distorted and that public resources do not merely crowd-out private investment.

If we look at the policy principles for the application of Article 107 TFEU, which have been properly spelled out by the Commission in the framework of State aid modernization, these are the very same principles which should inspire an effective industrial policy aimed at pursuing environmental goals by means of an efficient use of scarce public resources. A proper enforcement of State aid rules therefore is strategic in the perspective of both EU industrial policy and of the Green Deal. Importantly, these rules will also be applied to the use by Member States of the resources of Next Generation EU, which will have to be devoted, for a significant share (at least 37%) to pursuing the Green Deal objectives.

While the principles are already fully adequate, in the fitness check of the State aid modernization initiative the Commission has acknowledged that **implementing rules**

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and acts of soft law will have to be updated in order to reflect the new Commission priorities.

Three areas are particularly important because of their close relationship with the Green Deal: the scope of the General Block Exemption Regulation No. 651/2014, the Energy and Environmental Aid Guidelines (EEAG) and the Important Projects of Common European Interest (IPCEI) Communication. The new EEAG will have to consider the new broader set of public policy goals pursued by the Green Deal as well as the new 2030 and 2050 climate and energy targets, and be flexible enough to cover innovative solutions. Moreover, the revisions of both the EEAG and IPCEI Communication will have to take duly into account not only the environmental but also the competitiveness dimension, i.e. both the Green Deal and the new EU Industrial Strategy.

From a procedural viewpoint, **for projects financed by the Recovery and Resilience Facility**, which will have to pursue objectives which are relevant for the EU and will be adopted by means of a well-structured dialogue between Member States and European institutions, it seems likely that the Commission will be in a position to ensure a more rapid and simplified procedure for the approval of State aid.

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 hydro power plant would put fish populations at risk, how could fish be protected?)

As indicated by a well-established case law, when assessing whether State aid is compatible with the internal market, the Commission must check that the activity does not infringe rules of EU law, including rules on the environment.

On the contrary, as pointed out by the Court of Justice in the recent *Republic of Austria v. Commission* judgment (C-594/18 P) when assessing whether an aid measure aimed to facilitate the development of certain economic activities pursuant to Article 107(3) (c) but not specifically intended to pursue environmental objectives, is compatible, the Commission has to assess whether it does not adversely affect trading conditions to an

extent contrary to the common interest but does not have to weigh up the positive impact of the aid for the development of those activities with its possible negative impact on the environment.

Following the approach outlined by the Court of Justice in this judgment, an assessment of the net impact on the environment would be justified only when the aid measure at issue is specifically intended to pursue environmental objectives. If this is the case, the Commission may make the approval of the aid measure conditional on remedies aimed at avoiding a negative impact on the environment.

In other cases, it seems difficult to use State aid control to pro-actively pursue environmental objectives. Thus, it is for the public authorities of the Member States to play this role and pursue the goals of the Green Deal by a proper design of their financial incentives, of public procurement and by a careful definition of public service obligations.

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?***

As already indicated, for those projects which are developed with the support of the RRF, given the involvement of European institutions in the approval of national recovery plans, a more rapid procedure for the approval of aid measures can be easily imagined. As to the green bonus, Member States can certainly design incentive schemes aimed at encouraging green solutions. From the State aid control perspective, however, it seems important not to deviate from the principles of necessity and no overcompensation and to carefully consider whether State aid measures are designed in a way which unduly distorts competition.

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).***

Many undertakings in the EU are making significant efforts to combine sustainability and competitiveness in their corporate strategy. The most proactive ones are going beyond the need to comply with existing rules and anticipate the developments outlined in the Green Deal communication of December 2019. The main tool which they can use to this effect, avoiding a trade-off between environmental sustainability and profitability, is technological, product and organizational innovation.

For instance, by improving the energy efficiency of their plants and buildings, several companies have **reduced their operating costs**. Artificial intelligence can be used to **increase productivity** and, at the same time, significantly diminish the environmental impact of productive processes.[2]

Technological innovation can also be used for more effective **risk management**, e.g. to improve the predictability of renewable energy supply and thus improve energy security, enhance energy storage capacity and enable a more efficient use not only of energy, but also of water and other natural resources, as well as minimize the need for pesticides in agriculture.

Looking at the marketing side, many companies are trying to **increase sales** through product differentiation, meeting or pro-actively promoting private demand for green products and demand for green public procurement. A common strategy entails a re-orientation of the product mix towards more sustainable products. Moreover, sustainable companies may also obtain **better access to financial resources**, as several financial intermediaries are promoting green finance.

[2] An interesting example is provided by the full digitalization of the port of Livorno in Italy. See Ericsson-Cnit-FEEM-Port Network Authority of the North Tyrrenian Sea, *Port of the future. Addressing efficiency and sustainability at the Port of Livorno with 5G*, June 2020.

Differently from improvements on the supply side, whether an undertaking succeeds, because of its green policies, in increasing sales and obtaining financial resources on more favorable terms does not depend only on the conduct of the company, but also on the attitudes and incentives of private and public purchasers and of providers of financial resources, which in turn may be influenced by public policy. We will discuss in paragraph 4 what kind of policy initiatives, on the supply side and on the demand side, can support individual green competitive strategies.

In some cases, companies may find it efficient to cooperate with other undertakings in order to pursue their green competitive strategy, for instance by means of R&D agreements or joint production initiatives. They may also need to exchange information with other companies along the value chain to control the environmental footprint of their products according to a life cycle perspective. Thus, the conditions under which cooperative agreements and exchanges of information aimed at pursuing the Green Deal goals are compatible with Article 101 should be sufficiently predictable to allow virtuous undertakings to develop their green competitive strategies following an approach entailing antitrust compliance by design.

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...)?***

Agreements not falling within the prohibition of Article 101(1)

From a substantive viewpoint, in the revision of the Horizontal Guidelines it will be useful to provide a broad overview of the situations in which agreements between undertakings contributing to the Green Deal goals do not infringe Article 101(1). In this paper we will focus on agreements which do not appreciably restrict competition and on the public policy exception.

a. *Agreements which do not appreciably restrict competition*

Many cooperative initiatives in the environmental area which are extremely important for the green transition do not have an appreciable impact on competition, i.e. on competitive variables (price, quality, choice, innovation), and hence do not fall within the scope of Article 101(1).

In particular, in the forthcoming Guidelines it would be useful to emphasize that this is also the case for agreements which may have an actual or potential impact on price or choice **when, overall, this negative impact on competitive variables is negligible.** Many agreements leading to the substitution of an existing product/process with a more environmentally friendly alternative may fall into this category, for instance agreements aimed at changing or reducing the use of packaging materials.

Secondly, the Guidelines may indicate that the agreements whereby undertakings jointly establish **sectoral or cross-sectoral environmental targets, with no specific individual obligation on the parties as to the way in which such targets should be pursued**, typically do not raise competition concerns within the meaning of Article 101(1). This clarification would cover several initiatives undertaken in recent years to meet environmental challenges, such as the Circular Plastics Alliance, and would indicate to undertakings an antitrust compliant way to cooperate to pursue the Green Deal objectives.

Moreover, the Guidelines should provide examples concerning cooperation in the environmental area of agreements which are **not restrictive of competition compared to the counterfactual situation**. For instance, agreements contributing to the creation of new technologies/products/markets that would not have existed in the absence of the agreement do not restrict competition within the meaning of Article 101(1). A joint initiative, instead of independent actions, may be necessary to exploit complementary assets/skills or also to reach a sufficient scale. This scenario may be especially relevant for R&D and production agreements, although it cannot be excluded that it can be applied also to other categories of agreements (e.g. commercialization or purchasing agreements). Obviously, all these agreements should not entail further unnecessary restrictions.

For **standardization agreements**, the 2011 Horizontal Guidelines already indicate a number of conditions which, if met, entail that the agreement is not restrictive of competition within the meaning of Article 101(1). The same approach can be followed in the new Guidelines with a focus on standardization initiatives concerning environmental issues. What matters, in these cases, is that participation to the standard-setting process is open, procedures are transparent, the adoption of the standard is voluntary and access is provided on fair and non-discriminatory terms.

The **exchange of information** on environment-related data may not have an adverse impact on competition if it does not include commercially sensitive information. Moreover, undertakings may have to exchange some information in order to comply

with some legislative requirements. In the revised Horizontal Guidelines the Commission should usefully include examples of legitimate information exchange in the environmental area, both when the exchange takes place along the value chain and when it occurs between actual or potential competitors.

b. The public policy exception

In specific cases an agreement aimed at achieving the Green Deal goals may not fall within the scope of Article 101(1) because of its link with the pursuit of a public policy objective. The relevant case-law (e.g. *Wouters, Meca-Medina, Albany*), however, is narrowly circumscribed and it is still much debated how widely the public policy exception can be applied. It would be useful to indicate in the Guidelines which are the substantive and procedural requirements that may be relevant for the application of the public policy exception in the Green Deal area.

An enhanced role for individual guidance

The case-law has already provided plenty of indications both on the interpretation of Article 101(1) and on the conditions which must be met for the application of Article 101(3). The Commission's block exemption regulations and Horizontal Cooperation Guidelines, which are currently under review, also contributed to increasing predictability.

Still, especially when cooperation agreements entail huge investments, as is the case for many R&D projects, alliances and cooperative joint ventures, it would be useful for undertakings to discuss ex ante with the Commission (or national competition authorities - NCAs) whether their project is compatible with EU law, so as to enhance legal certainty and allow a rapid adjustment of the agreement if the Commission (or NCA) raises competition concerns.

After the adoption of Regulation 1/2003, there has been no much room for individual guidance by competition authorities on the compatibility of agreements with Article 101. The idea behind the modernization initiative was that, after the first decades of application of Article 101, the case law had already provided undertakings with sufficient guidance and therefore the system could rely on self-assessment. Although Regulation 1/2003 does not completely rule out the possibility to provide guidance and indeed contemplates specific tools for the Commission to this effect (informal guidance pursuant to recital 38, positive decisions within the meaning of Article 10), the existing instruments have been used sparingly. The same holds for national competition law.

Recent developments call for a different attitude by the Commission and national competition authorities with respect to individual guidance. Undertakings are facing a challenging economic environment as a result of both globalization and the economic crisis. These challenges already led the Commission to adopt a new strategy for EU industrial policy aimed at promoting competitiveness in the context of the green and digital transition; they may also justify a targeted initiative aimed to support companies in the assessment of the compatibility of their agreements with Article 101.

The Commission and several NCAs have already taken a step in this direction for cooperation projects aimed at addressing a shortage of supply of essential products and services during the coronavirus outbreak. A similar approach may be extended, in the light of the Green Deal and the New Industrial Policy Strategy, at least to those agreements which pursue the key objectives of the EU strategy, namely innovation, competitiveness and sustainability. The tool may be either opinions, comfort letters or, for the Commission, positive decisions pursuant to Article 10 of Regulation 1/2003.

Uniform application of Article 101

National competition authorities within the European Competition Network have undertaken important initiatives in the area of competition law and sustainability which raise important issues and deserve careful discussion (e.g.. the ACM draft guidelines and the Hellenic Competition Commission discussion paper). However, ensuring uniform guidance at the EU level on the application of Article 101 to sustainability agreements remains of utmost importance for the establishment of the single market.

Commission Guidelines on the application of Article 101, and in particular on horizontal cooperation agreements, thus play a crucial role. Although most cooperation agreements pursuing the Green Deal goals already fall into one of the six categories covered by the 2011 Horizontal cooperation guidelines, the key role of environmental goals in the EU political agenda suggest to provide specific guidance on sustainability agreements in the forthcoming revision of the Guidelines.

In the same perspective, in specific cases the Commission may also consider the possibility to adopt positive decisions pursuant to Article 10 of Regulation 1/2003. Notably, such decisions should be adopted by the Commission on its own initiative when they are useful in the public interest to ensure a proper interpretation of Article 101. This may certainly be the case for sustainability agreements in those instances in which the assessment raises new or controversial issues and a uniform approach to the

application of Article 101, subject to the control of the Court of Justice, would increase legal certainty for private initiatives pursuing the Green Deal goals.

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?).***

Application of Article 101(3)

The most controversial issue, for the application of Article 101(3) to restrictive agreements pursuing the Green Deal goals, is how to interpret the second condition, i.e. that the restrictive agreement should allow consumers a fair share of the resulting benefits.

According to one view, this condition implies that those consumers who suffer harm as a result of the anticompetitive agreement should be compensated. The current Guidelines on the application of Article 101(3), based on the case-law of the Court of Justice, provide that "the concept of 'fair share' implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition (…). In line with the overall objective of Article 81 to prevent anti-competitive agreements, the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement. If such consumers are worse off following the agreement, the second condition of Article 81(3) is not fulfilled" (para. 85). This requirement is specific and different from the overall benefits which can result from the agreement on society as a whole ("Moreover, society as a whole benefits where the efficiencies lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources").

According to a different view, the second condition aims at preventing undertakings which take part in the agreement from being the only beneficiaries of the efficiency gains: a fair share of the benefits should be enjoyed by other subjects (consumers or, more generally, society as a whole) and it is not necessary to fully compensate the consumers which are directly affected by the agreement.

Sticking to the traditional view, to the extent that the restrictive agreement entails a beneficial effect on the affected consumers (e.g. the purchasing price is higher but the life-long cost of the product is lower because of increased energy efficiency), the second condition may be met. The circumstance that the agreement may also have a broader positive effect on society is just an additional, important but legally not indispensable, factor. This is also a possible interpretation of the Commission decision in *CECED*.

Much depends on the size of the negative impact on consumers, since as we have already seen if this impact is small it may be possible to exclude the application of Article 101(1). The potential trade-off and the related hard choices emerge when consumers are significantly adversely affected by the restrictive agreement (e.g. a significant price increase) and, at the same time, the agreement entails a significant benefit for society (e.g. reduction of emissions/pollution).

The debate has already pointed out that, from a theoretical perspective, it is possible to attribute a price to the negative environmental impact of the process/product on society and adjust the market price accordingly. The idea is that consumers should pay a price which takes into account the negative environmental impact of their purchasing activities (according to a "polluter pays" principle).

However, it is clear that it would be hard for competition authorities to decide on the trade-off between lower prices and better environmental conditions, substituting their vision to consumers' preferences in the application of competition rules. As anticipated in the introduction, EU competition rules do not follow a public interest approach and therefore do not allow to authorize restrictive agreements just on the grounds of public interest. The attribution of a price to the "polluting impact" of the purchasing act is theoretically appealing and may be useful in environmental policy, but cannot easily been imported in the application of Article 101(3), since the legitimacy of competition authorities to substitute a welfare enhancing choice to consumer preferences would remain controversial. It is worth recalling that, whereas for environmental protection EU law provides several alternative instruments, for the protection of less wealthy consumers from restrictions of competition the application of competition rules is the only available tool.

The Dutch ACM draft Guidelines refer to the specific situation of an international or national environmental target to which the government is bound. In this case, according to the draft Dutch Guidelines, if an agreement (i) aims to prevent or limit any obvious environmental damage and (ii) helps, in an efficient manner, comply with the

international or national public target, it should be possible, in the application of the second condition of Article 101(3), to consider also benefits for others than merely the users.

The reference to the national or international target to which the government is bound is clearly meant to introduce an element of political legitimacy for the choice entailing, in the application of Article 101(3), the prevalence of environmental protection in the trade-off with the express preferences of users.

If this approach is followed, the third condition of Article 101(3) will come to play a crucial role, i.e. the assessment of whether the restrictive agreement is necessary to reach to objective and no less restrictive alternatives are available. Taking into account also the legitimacy dimension, whenever it is feasible to adopt a different policy tool to reach the objective (e.g. taxation, regulatory measure, mandatory requirement) it may be difficult to argue that the restrictive agreement is necessary, although it may be more rapid than the adoption of the policy measure.

Creating a link between the assessment of agreements and the use of other policy tools

The possibility for companies to discuss with the Commission whether cooperative solutions are compatible with Article 101 may turn out to be useful also in those cases in which the market failure cannot be properly dealt by means of Article 101(3) for the reasons outlined above. It is typically the case when an agreement on broad environmental targets, with no binding individual obligations, is not sufficient because undertakings would not individually contribute to achieving the target if other companies do not do the same and, however, a more binding agreement would lead to a significant worsening of competitive variables (in particular, a significant increase in price).

In such situations, the Commission may proactively suggest/promote other ways to correct the market failure. In particular, it may take the initiative and propose mandatory requirements, either following the so called “New Approach” to technical harmonization or by means of traditional regulatory measures.

When it is possible to follow the New Approach, the Commission may also promote a European standardization effort, based on the existing framework for standard setting (Regulation 1025/2012) which ensures participation of all interested stakeholders, transparency and access to the standard on FRAND terms. Hence, undertakings will be able to comply with the mandatory requirements either by implementing the standard

(with presumption of conformity) or by other equally effective means. In this last case, it will be for the undertaking to prove compliance with the mandatory requirements.

Compared to an agreement, such binding solutions may be less rapid but have other advantages. First of all, regulatory measures and mandatory requirements are adopted following a legislative process, ensuring democratic legitimacy for choices which may entail, for some consumers, a worsening of conditions (e.g. higher price) because of the pursuit of a prevailing general interest (environmental protection). Moreover, regulatory measures and mandatory requirements, differently from agreements, would be binding on all companies, not only on the parties of the cooperative initiative, and therefore they may be more effective in addressing the market failure. On the other hand, whenever it is possible to follow the New Approach (i.e. mandatory requirements + standardization), there will not be a unique technical solution and there will remain room for alternatives equally capable of meeting the requirement, thus not unduly restricting competition and innovation processes.

After all, this is a well-established approach to addressing market failures, which does not raise issues of lack of institutional legitimacy and is already being followed by the Commission in the Green Deal. An important example is provided by the Commission's initiative, within the EU Strategy for Plastics in the Circular Economy, to propose mandatory requirements for recycled content and waste reduction measures for key products such as packaging, construction materials and vehicles, taking into account the activities of the Circular Plastics Alliance.