

European Commission
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TO THE EUROPEAN COMMISSION

STATEMENT

Matter Statement regarding the Competition Policy supporting the Green Deal

Counsel and Address of the Party Giving the Statement

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European Commission's Call for Contributions

The European Commission (the "Commission") has published a call for contributions on questions regarding the compatibility of competition rules and sustainability policies.

Introduction

Castrén & Snellman Attorneys Ltd ("Castrén & Snellman") welcomes Commission's initiative and thanks the Commission for the opportunity to share ideas and proposals on how EU competition policy can best support the Green Deal. It is important that the Commission promotes green objectives and is willing to consider greener alternatives to its current practises. During the first stages of the ongoing covid-19 crisis the Commission has shown its ability to take swift and timely action. This swiftness is certainly needed also in the fight against climate change and biodiversity loss, which are likely to have catastrophic effects on our globe, if we do not change our practices as soon as possible. Following the IPCC reports it is clear that major changes are required, for example, in the way firms conduct their business operations. The climate crisis and the depletion of natural resources and increasing social inequality call for solutions on the scale of the entire economic system. This change will require and demand a great deal from firms all over the world. This also leads to increased need for cooperation between competitors.

Sustainability is a goal that Castrén & Snellman shares with its clients and that is why we have prepared our contribution in cooperation with several of our clients. Sustainability-related questions arise frequently in the assignments Castrén & Snellman handles and even more often in clients' business operations. Thus,

both Castrén & Snellman and its clients warmly welcome any clarification to the current situation from the Commission. Castrén & Snellman has also interviewed its clients and held discussions with them in order to be well-positioned to give practical examples on how the EU competition policy could support sustainability and other green goals.

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.**

Large amounts of State aid are still being granted to activities that have a negative impact on the environment and sustainability. We believe that State aid regulation should, in the future, have a link with the EU taxonomy legislation, which could provide guidance for future State aid assessment.¹ This could facilitate a shift towards supporting the objectives of the Green Deal.

- 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?**

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?)

Regarding potentially inevitable negative environmental effects arising from projects otherwise considered necessary, the thinking behind the “green bonus” discussed below could be utilised. Should mitigating the negative impacts be a matter of financial resources, we would suggest considering earmarking part of the public financing for mitigation actions.

- 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?**

We are in favour of allowing more aid or aid on easier terms for environmentally beneficial projects in comparison with comparable projects which do not bring the same environmental benefits. Although, the issue of measuring the benefits is recognised, we consider that the exact measuring (or the difficulties in it) should not

¹https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-taxonomy-sustainable-activities_en

be a barrier for making support for environmentally beneficial projects possible.

Castrén & Snellman considers that EU taxonomy legislation could provide guidance or a starting point for future State aid assessment in terms of sustainability. Taxonomy thresholds in many cases make use of sector-specific best practices and the same approach could be utilised in the “green bonus” considerations or thresholds. From the State aid perspective, it is worthwhile looking into the sector-specific screening criteria within the taxonomy. For a beneficiary to receive the “green bonus” an economic activity should contribute substantially to at least some of the environmental objectives and do no significant harm to the other environmental objectives set out in the legislation or sector-specific best practices. Already existing taxonomy could provide the most efficient and reliable method for defining eligibility for the “green bonus” in State aid.

- 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?

Kindly see section 3.a. and Castrén & Snellman’s proposition concerning utilisation of the already existing EU taxonomy legislation.

Part 2: Antitrust rules

Introduction

In order to be able to consider the relationship between antitrust rules and Green Deal objectives on a more detailed level, Castrén & Snellman deem important to summarise and clarify its positions on some of the broader issues relating to the relationship between EU competition policy and sustainable development.

The importance of the EU-scale climate action cannot be stressed enough, because of its inevitable effects on climate action taken on a Member State level. To maximise the positive effect on mitigating climate change, the Commission is encouraged to act fast and do everything that is possible within the boundaries of the existing legal framework.

The Commission is reminded that the EU primary law does not prevent the Commission from enforcing EU antitrust rules in line with Green Deal objectives. On the contrary, the primary law can be interpreted as encouraging the Commission to make its antitrust enforcement greener. According to Article 11 of the Treaty on the Functioning of the European Union (“TFEU”) “*[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development*”.² The Commission should, therefore, integrate environmental protection requirements and sustainability goals into its antitrust enforcement. There is nothing in the wording of Articles 101 or 102 TFEU that would prohibit the Commission from bringing its enforcement practice more in line with sustainability goals.

² See also Article 3 of the Treaty on European Union and Article 37 of the Charter of Fundamental Rights of the European Union.

As the Commission notes in the call for contributions, regulation may be a good tool in the fight against climate change. Moreover, regulation would provide more legal certainty. However, given the urgency of the climate action required, it is no longer possible to wait for regulation to solve the current problems. Adoption of regulation is a slow process and there are significant risks relating to political decision-making. Action from firms is required now and this may, in some instances, require cooperation between firms.

However, firms need clarity on what is allowed in light of competition laws as well as predictability on the possible changes regarding the Commission's enforcement practice. It is, therefore, important that the Commission, which can and should move swiftly in this matter, develops its enforcement practices in a way which would provide the National Competition Authorities (the "NCAs") and firms the appropriate level of support and predictability. The development should include but not be limited to a large "green update" to the Commission's current guidelines. The renewed guidelines would allow the Commission and the NCAs to take the Green Deal objectives into account better in their enforcement practices and guarantee a level playing field across the EU. In addition, the guidelines should include concrete examples to support the NCAs' and firms' interpretation of the guidelines. Also, a possibility of granting negative clearances and individual exemptions should be considered, at least for a transition period.

The Commission is encouraged to do everything within the limits of the existing legal framework to support progressive and fast-moving firms in pursuing the Green Deal objectives for the common good, also through cooperation, if this speeds up development towards more sustainable production methods.

To provide certainty and facilitate firms' participation in promoting the objectives of the Green Deal, the Commission is encouraged to, for example and in addition to the updated guidelines, provide guidance more often in the form of guidance letters or similar instruments.

Through the call for contributions the Commission aims to identify whether there are remaining barriers to agreements supporting Green Deal objectives and if so, how such barriers can best be addressed. Castrén & Snellman has identified several barriers to such agreements as well as barriers to desirable unilateral conduct. Please find below, in the form of answers to the questions set out in the call for contributions, examples of the identified barriers as well as some proposals concerning how to address them. Although it was not specifically asked for in the call for contributions, Castrén & Snellman has also included examples and comments related to unilateral conduct.

- 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).**

For example, under the current competition rules at least the following examples of desirable cooperation raise the question whether they could be legally implemented:

Example 1: Firms in the same field of business draft together a common roadmap to a carbon free future. Could the firms make a binding commitment to make the necessary investments and gradually give up traditional production methods even if this increases costs? If not, firms not

making such investments and continuing with traditional production methods, would be able to increase their market share at the expense of their competitors investing in new technology provided that the customers are not yet willing to pay the full price of the products produced through greener technology.

Example 2: Competing firms compile a list of essential sustainability criteria that they require from suppliers in order for the industry to reach a green objective and make a commitment the purchase only from suppliers fulfilling such criteria.

Example 3: Competitors make a common roadmap concerning the increased use of recycled raw materials and make a binding commitment to adhere to the roadmap, which could increase the price of the final product.

Example 4: A local environmental authority encourages firms to cooperate to reach Green Deal objectives and competing firms agree to do so and exchange commercially sensitive information in order to attain the objectives.

Green Deal objectives and dominant firms

Example 1: A dominant firm refuses to deal with customers that do not meet the sustainability standards of the dominant firm.

Example 2: A dominant firms starts acquiring environmentally friendly raw materials and energy. This alteration in its practice requires investment in new production technology and increases costs. However, the firm sets the price of a green product below its production cost to nudge customers into switching to the environment friendly option.

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...)?

Further clarifications and comfort should be given in the form of Commission guidelines. More specifically, the Commission is encouraged to also update its guidelines on the application of Article 101(3) of the TFEU in order for the guidelines to reflect positively towards desirable *bona fide* cooperation between firms pursuing Green Deal objectives.

The Commission should also take the objectives into account in its ongoing review of the two Horizontal Block Exemption Regulations and especially when it considers revising the Guidelines on horizontal cooperation agreements. Please find details of the needed clarifications and enforcement practice developments below.

In addition to the changes to the guidelines, the Commission is encouraged to provide case-by-case guidance more often in the form of guidance letters or (if it deems necessary to follow the same process in the climate crisis as it did in the beginning of the covid-19 crisis) “comfort letters” and also, the possibility of granting individual exemptions should be considered, at least for a transition period. The Commission is encouraged to allocate its resources in a manner ensuring efficient review of cases.

Green Deal objectives and dominant firms

Further clarification is needed in relation to unilateral action taken by dominant firms, in particular clarification and examples on how dominant firms can make their business greener without violating antitrust rules. Please find details of the needed clarifications below.

- 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?).**

Currently, there are certain circumstances in which the pursuit of Green Deal objectives would justify restrictive agreements beyond the current enforcement practice. It has been perceived that the Commission has traditionally interpreted Article 101(3) TFEU rather narrowly and focused solely on economic efficiency.³ This follows from the traditional price and output centred view that the Commission and the NCAs are considered to have in their antitrust enforcement. Such standing is well justified in most of the cases. However, in relation to agreements promoting Green Deal objectives, these objectives should, in principle, be valued higher than low consumer prices.

Combating climate change and biodiversity loss are goals that require special and urgent treatment. We are in a great hurry with these objectives and failing in relation to these objectives will result in failing in many other sustainability objectives as well.

One of the key elements is to renew the way the Commission considers the benefits of sustainability agreements. When Green Deal objectives are pursued in an agreement, the traditional consumer welfare standard must be replaced with a standard of consumer well-being or with an even broader general welfare standard. This means that, although a certain group of customers would not be ready to pay a higher price for environment friendly products, their preference should not result in deeming the underlying sustainability agreement prohibited, if a broader group of consumers or the society at large benefits from the agreement in question. We believe that there are good reasons why under certain circumstances consumers should pay a relatively small additional share for firms' pursuits of Green Deal objectives. In this context, the Commission should also accept the fact that not all benefits are easily quantifiable, especially before the cooperation has been implemented in practice.

Competitive pressure is a powerful incentive to use our planet's scarce resources efficiently, as the Commission has stated in the call for contributions. However, sometimes cooperation is needed in order to avoid the first-mover disadvantage.

Many of our clients have experienced that customers' purchase behaviour is not in line with their values and customers are not (in sufficient numbers) necessarily willing to pay more for more sustainable goods or services, if cheaper and less sustainable options are available. This may lead to a situation, where the first-mover in terms of sustainability suffers. For

³ See for example Whish, R. & Bailey, D. (2018) Competition law. Ninth Edition. Oxford, United Kingdom: Oxford University Press, p. 167.

instance, the use of recycled raw materials is often more expensive than the use of new raw materials. Production methods that lead to lower GHG emissions may be more expensive than traditional production methods. For example, situations like these are where cooperation is needed.

That is why the Commission should change its current enforcement practice concerning the second, “*fair share for the consumers*” condition of Article 101(3) TFEU. The wording of Article 101(3) does not require the Commission to link the benefits to a specific market. When it comes to the agreements pursuing Green Deal objectives, it should be possible to balance negative effects on consumers in one geographic market or product market against positive effects for consumers in another unrelated geographic market or product market and it should be possible to compensate such negative effects by positive effects in another unrelated market. Also benefits to the society as a whole should be taken into consideration. For example, reduced GHG emissions benefit everyone.

In addition to considering effects on unrelated geographic and product markets, the guidelines should also expand the temporal scope of Commission's considerations; the effects for future consumers should also be taken into account. Focusing merely on the impact on current consumers and price benefits may lead to a situation, where for example, current consumers would benefit from cheap products, but in the long term this could lead to depletion of natural resources or destruction of environment to the detriment of future consumers.

These changes would require a notable shift to the Commission's practice. To provide support and predictability to NCAs and firms, the Commission is encouraged to provide examples on how the benefits may be taken into account in various situations and which benefits are considered to have a sufficiently close relation to Green Deal objectives. Also, a possibility of granting negative clearances and individual exemptions should be considered, at least for a transition period.

The Commission's enforcement practice relating to the condition, “*an improvement in the production or distribution of goods or in technical or economic progress*” as stated in Article 101(3) TFEU should also be clarified. It should be clarified that also progress in terms of sustainability meets this requirement even if this does not have an impact on the actual quality of the product in question. The new interpretation would encourage more sustainable production. Such development would especially facilitate the realisation of circular economy, since currently it is often substantially cheaper to use new raw materials instead of recycled materials.

Lastly, in addition to Commission's reassuring remarks in the call for contributions, firms need more detailed guidance as well as encouragement from the Commission regarding voluntary, industry-wide green standardisation as well as R&D cooperation. Both are of key importance in the pursuit of Green Deal objectives. It should be made clearer in the Block Exemption Regulations and in the relevant guidelines, which types of sustainability agreements are considered acceptable. Especially R&D cooperation, also between firms with larger market shares, should be promoted, in order to speed up technological development and creation of more sustainable production methods.

Green Deal objectives and dominant firms

Regarding dominant firms, guidance would be needed on the conditions under which dominant firms can make their businesses greener.

There should be clarifications and examples helping firms identify sustainability-related situations in which a dominant firm could e.g. price below cost or refuse to deal because of Green Deal objectives without such practice being considered an abuse. Especially the realisation of circular economy will require a significant amount of new technologies. The firms should be incentivised to conduct R&D and rewarded for their investments and risk-taking by preventing free riding. This could be done, for instance, by considering the relevant temporal market for innovations pursuing Green Deal objectives in a way that the innovators are not immediately obliged to deal with competitors in accordance with Article 102 TFEU. Thus, the instrument should also clarify the Commission's perspective on market definition regarding sustainable products. This would benefit the other parts of competition law as well.⁴ Firms may also be rewarded for their risk-taking by allowing them to price the new products competitively even below costs, since otherwise it could be insurmountably hard to nudge consumers to choose greener products.

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?

The importance of environmental factors should also be considered in merger control and more weight should be given to such factors in future merger assessments. Castrén & Snellman has identified at least the following examples:

Example 1: “Killer acquisitions” in the cleantech space. A situation where a well-established firm acquires its potential competitor in the early stage of development in its innovative environmentally friendly project and terminates the project after the acquisition. The well-established firm blocks potential future competition merely to avoid a potential future threat to its market position.

Example 2: Acquisitions having an adverse effect on the incentives to invest or carry out R&D related to cleantech and consequently reducing competition.

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?

Merger enforcement could better contribute to protecting the environment and the sustainability objectives by considering environmental factors in the merger control assessment and assessment of remedies.

Environmental and sustainability aspects should be considered in the merger control assessment. For example, in cases where the merger is likely to lessen competition but also enhance sustainability, both of these effects should be taken into consideration and weighed against each other.

Castrén & Snellman considers, that at least following the considerations related to merger remedies and sustainability objectives could be taken into account:

⁴ See part 3: Merger control

- In a situation where several types of merger commitments could address the competitive concern, the most environmentally friendly solution should be imposed.
- To address “killer acquisitions” described in section 3.1., merger commitments should prevent acquiring firms in order to terminate environmentally friendly projects initiated by the acquired company.
- Non-economic rationales should be considered in situations where proposed merger commitments are insufficient to address the competitive concerns resulting from the merger but where the merger would undoubtedly result in significant environmental benefit.

Drafted by

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CASTRÉN & SNELLMAN