

**BY E-MAIL - NON-CONFIDENTIAL**

The European Commission  
Directorate-General for Competition

comp-green-deal@ec.europa.eu

**SUBMISSION UNDER THE CALL FOR CONTRIBUTIONS  
"COMPETITION POLICY SUPPORTING THE GREEN DEAL"**

Dear Sirs,

Reference is made to the European Commission's call for contributions "*Competition Policy supporting the Green Deal*" of 13 October 2020 (the "**Call**").

With this, we respectfully submit the following (non-exhaustive) observations:

- **The competition and State aid rules to incentivise an EU-wide effort**  
(cf. Section 1 below).  
*(This observation primarily relates to Part 1, Questions 1, 3a, 3b, and 4, as well as Part 2, Question 1 in the Call.)*
- **Clearer, more flexible, and more specific guidance is necessary**  
(cf. Section 2 below).  
*(This observation primarily relates to Part 2, Questions 1-3 in the Call.)*
- **Green benefits as a countervailing factor in the merger control assessment**  
(cf. Section 3 below).  
*(This observation primarily relates to Part 3, Question 2 in the Call.)*
- **Infrastructure should not limit green innovation** (cf. Section 4 below).  
*(This observation primarily relates to Part 2, Question 3 in the Call.)*
- **Article 102 TFEU is relevant as well** (cf. Section 5 below).  
*(This observation is of a general nature and does not relate to any specific Part or Question in the Call.)*

We confirm that we are presenting this submission in our capacity of competition law experts and practitioners, and not on behalf of any specific client of ours.

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**LAW FIRM**

WWW.KROMANNREUMERT.COM  
CENTRAL BUSINESS REGISTER  
(CVR) NO. DK 62 60 67 11

**ATTORNEY, LL.M., GRADDIP BA**

SONNY GAARSLEV

COPENHAGEN

TEL.: +45 38 77 43 62

MOB.: +45 20 19 74 48

SGS@KROMANNREUMERT.COM

**RESPONSIBLE PARTNER**

MORTEN KOFMANN

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## 1. THE COMPETITION AND STATE AID RULES TO INCENTIVISE AN EU-WIDE EFFORT

It is evident that State aid - especially as granted under the *Energy and Environmental Aid Guidelines*<sup>1</sup> and the *State aid Group Block Exemption Regulation*<sup>2</sup> - has significantly contributed to the green transformation within the EU. Even though we are of the perception that the transformation is already rather far progressed, we submit that a need for further incentivisation through State aid in different forms continues to exist in certain areas of the energy industry; this to fully enable the transition in pursuit of the European Green Deal. As an example, Power-to-X would require a certain level of public intervention and incentivisation to succeed.

Referring to the concept of a possible "Green Bonus" as introduced in the Call, we further submit that a "bonus" could be attributed in the State aid balancing test where the subsidised project not only carries with it environmental benefits, but more relevantly supports such benefits on an EU-wide basis. It is submitted that the green transition would be significantly boosted, also in terms of time, if the European Commission's guidelines on State aid were to take more into account as a positive factor that the green transition is promoted and supported within larger areas of the EU at once rather than only at a national level. Besides the imminent upside of a geographically enlarged scope, maintaining such focus would also, in our view, promote the choice of the "right solution" throughout the EU instead of several competing technologies in each and every Member State.

On the same point, it is further submitted that the competition rules ought to take into account the same goal, i.e. an EU-wide unified green transition and some level of "Green Bonus" in this assessment. As an illustrative example, we suggest that the rules on standardisation are revised to also take into account any benefits in terms of a wider geographical reach, but the same would be relevant in respect of other cooperation agreements, etc. As for specific guidance for doing so, reference is made to Section 2 below.

In summary, it is therefore submitted that the competition and State aid rules ought to incentivise a more EU-wide effort, unified as much as possible, to enable and promote the overall green transition of the EU in a neutral manner. As an overall illustrative example, we submit that the significant efforts put into competing "green car" technologies would have been better utilised, had this been aligned on an EU level.

## 2. CLEARER, MORE FLEXIBLE, AND MORE SPECIFIC GUIDANCE IS NECESSARY

In order for the European Green Deal and the Member States' national climate goals to materialise, there is a need for significant investments, R&D, and cooperation among industry peers. By way of example, it is estimated that Denmark will need to reduce its CO<sub>2</sub> emissions across industries by 26 million tonnes to reach its national goal of a 70% reduction by 2030, corresponding to a higher reduction than Denmark has achieved over the past 30 years. It is estimated that annual investments of EUR 4.3 billion in renewable energy, electrification, and infrastructure will be required each year until 2030 to reach this target. The transition towards a "green" EU cannot only be achieved through already developed and scalable solutions, but will require development of new or yet relatively immature technologies, or by more mature technologies that would, however, need to be scaled to a point which, as of today, seems difficult to do.

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<sup>1</sup> The European Commission's *Guidelines on State aid for environmental protection and energy 2014-2020* (2014/C 200/01) of 28 June 2014, as prolonged with Communication (2020/C 224/02) of 8 July 2020.

<sup>2</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 *declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty*.

This calls for increased collaboration among industry peers in order to both secure that the goals are reached and to secure EU's position as a global leader in climate action and green technologies.

The green transition's need for scale and substantial investments means that the current group block exemption regulations and the *Horizontal Guidelines*<sup>3</sup>, at least for certain actions to be taken, do not provide undertakings with the necessary "safe harbour" to give them comfort that cooperation initiatives would not fall within Article 101 TFEU. Thus, we recommend that further guidance, in particular within the following areas<sup>4</sup>, is provided when such cooperation pursues a "green" objective:

#### Information sharing

In order for undertakings to accelerate their green transition, it is deemed necessary that they can engage in relevant fora (e.g. under the auspices of trade associations) where they can share information on - and maybe even to a certain extent align - their sustainability efforts and initiatives. The green transition of many undertakings is highly dependent on the entire value chain fulfilling their part. In that regard, it would be helpful for undertakings to be able to share information about business partners' environmental compliance. Under the existing approach, such information about sustainability initiatives, "best practices"/systems, experiences with certain suppliers/vendors, etc. would generally be considered competitively sensitive as relating to undertakings' competitive parameters. It would therefore be appropriate to ensure clear guidance on the type of information and data that can be shared within the scope of Article 101 (and Article 101(3)) if such information sharing has as its objective to expand and accelerate the green transition.

#### Commercialisation / consortia agreements

The scale and investments needed, and the risks associated with the development of new renewable energy technologies, such as CCU/CCS and Power-to-X, call for increased cooperation between industry peers. The current limitations for entering into commercialisation agreements and consortia are deemed unnecessarily restrictive and thus inadequate to incentivise undertakings to make the necessary investments to ensure due scale and technologies for reaching the goals in the European Green Deal. We submit that such guidance ought to be more flexible and identify when a combined effort - despite the parties potentially being able to take on the project each for themselves - would in practice allow for (more) green benefits to be added, identified, and not least appreciated, on top of the customary "economic efficiency" analysis.<sup>5</sup>

#### Standardisation agreements

Although standards are generally not considered anti-competitive, the European Commission's current *Horizontal Guidelines*<sup>6</sup> provide for such standards to be non-binding. We submit that there would be an increased need for allowing the issuing of binding standards in order to phase out fossil fuels and accelerate the transition to green energy. Certain energy sources are still dependent on subsidies to compete with fossil fuels, cf. also Section 1 above. This puts significant pressure on national governments' spending.

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<sup>3</sup> The European Commission's *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011/C 11/01) of 14 January 2011.

<sup>4</sup> We further submit that, from an appearance point of view, the *Horizontal Guidelines* ought to include a general section on green cooperations; this to appropriately acknowledge and underline the focus on such cooperation arrangements.

<sup>5</sup> This is relevant both in respect of the assessment under Article 101(1) TFEU and Article 101(3) TFEU.

<sup>6</sup> The European Commission's *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2011/C 11/01) of 14 January 2011.

By way of example, it is expected that significant subsidies and tax cuts, estimated at EUR 670-940 million each year until 2030, are required in Denmark in order to incentivise the development of technology and the scaling thereof to reach the Danish 2030 target. In that regard, it may not only be helpful that undertakings through the issuing of standards undertake to phase out fossil fuels, but also to allow for certain limitations on the types of green energy sources in order to secure the necessary investment and widespread use of those energy sources, which would accelerate the timeline for such sources to compete with the prices for fossil fuel and other non-sustainable energy solutions.

#### Conclusion and procedure

We encourage guidelines on the cooperation between competitors where such cooperation has a legitimate, "green" objective. Such guidance should be clear and give undertakings a safe-harbour if a green objective is pursued. One such initiative has e.g. been initiated by the Dutch Competition Authority, which has published draft guidelines<sup>7</sup> on sustainability agreements under which the authority will not impose fines if the guidelines have been followed in good faith or agreements have been discussed with the authority without the authority identifying any major concerns, and provided the parties involved expeditiously adjust their agreements if requested. The French Competition Authority has also encouraged undertakings to seek guidance on cooperation that could benefit sustainability goals, and has set up a dedicated group to focus on such sustainability issues. Proper guidance and the possibility to engage in consultation with dedicated "sustainability" groups within the national competition authorities or the European Commission could significantly help accelerate the green transition with the legal comfort and certainty necessary for undertakings to take on this work.

### **3. GREEN BENEFITS AS A COUNTERVAILING FACTOR IN THE MERGER CONTROL ASSESSMENT**

As a general remark in respect of merger control, it is submitted that the European Commission's *Horizontal Merger Guidelines*<sup>8</sup> and *Non-Horizontal Merger Guidelines*<sup>9</sup> should be updated to reflect that green benefits are to be included in the substantive merger review as well.

It is submitted that such green benefits, to the extent being merger-specific, could constitute a relevant countervailing factor in the merger control assessment. Green benefits ought to be included in the design of remedies as well, and in general, it seems possible that an "European champion" could, as a pro-competitive feature, support the green transition on an EU level, indicating that the substantive review should take that into account instead of applying a more formalistic traditional approach only focusing on mere economic efficiency.

### **4. INFRASTRUCTURE SHOULD NOT LIMIT GREEN INNOVATION**

As a result of the necessary reductions in the fossil fuel industry, the demand for renewable energy is expected to increase exponentially in the coming years. For the energy and supply sector to accommodate this demand, significant investments in the electricity grid are needed in order to secure increased production of green power.

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<sup>7</sup> Available at: <https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements> (last visited 18 November 2020).

<sup>8</sup> The European Commission's *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (2004/C 31/03) of 5 February 2004.

<sup>9</sup> The European Commission's *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (2008/C 265/07) of 18 October 2008.

The upgrade of the electricity grid must happen at a pace supporting the desired speed in the green transition and faster than what is currently the case. Although there is - for good reason - an increased focus on FDI regulations and securing critical infrastructure within the EU, it may be necessary from a regulatory perspective to allow non-government investments in the electricity grid within the EU, subject to necessary safeguards, to ensure that the electricity grid accommodates the demand for renewable energy in the EU. We recognise that this issue may not be solved through competition law, but instead through a continued liberalisation of the energy sector, governmental investments in the grid, and corresponding changes in the regulatory regimes regulating the grid.

Following the observations reflected in Section 1 above, however, it is submitted that the competition rules should, as a high priority, generally ensure that the relevant infrastructure does not risk limiting the green innovation and transformation. It is crucial to make sure that the infrastructure does not become a bottleneck, neither for the development of green technologies, nor for its penetration within the Single Market.

Specifically, it is submitted that a uniform approach towards the (competition law) regulation of infrastructure would incentivise the owners/concessionaries of the relevant infrastructure to utilise it to the benefit of the green transition and, ultimately, would enable a far more efficient allocation of resources spent on green innovation and development.

## 5. ARTICLE 102 TFEU IS RELEVANT AS WELL

We do recognise that the European Commission has likely left out Article 102 TFEU from the Call because Article 102 TFEU is not the primary driver of making the competition rules enable the green transition. However, while acknowledging this fact, we submit that the application of Article 102 TFEU would require further guidance as to the application in the promotion of the green transition as well, just as it is the case in respect of Article 101 TFEU, cf. Section 2 above.

It is submitted that, as an example, a dominant undertaking could easily become the primary driver of a green transformation, utilising its market power to e.g. establish green market standards or the like. However, for a dominant undertaking to do so, it would require the necessary level of comfort to be provided by applicable guidelines, so that it will not fear allegations of infringing Article 102 TFEU where no anti-competitive effect is intended.

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We remain available, should our submission give rise to any questions.

Yours sincerely,  
**Kromann Reumert**



Morten Kofmann  
Partner



Sonny Gaarslev  
Attorney, LL.M., GradDip BA



Jeppe Mejer Kjelgaard  
Attorney