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Contribution to the Call for contributions on Competition Policy supporting the Green Deal

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.

We believe that any form of State aid that would contribute to meeting the Green Deal objectives should be encouraged. Article 11 TFEU sets out the overarching principle of integrating environmental protection into EU policies and Article 37 of the Charter refers to the need to preserve but also to improve the "*quality of the environment*". As a result, we consider there is sufficient legal basis for EU State aid rules to integrate the Green Deal objectives.

We believe that the current State aid rulebook already allows certain types of aid in areas covered by the Green Deal. The GBER includes a section on aid for environmental protection enabling, for example, aid that goes beyond EU standards for environmental protection or investment aid for energy efficiency measures. However, the list of aid measures under the GBER is limited and only concerns aid measures that are deemed not to unduly distort the market. It does not cover all types of aid which could be awarded in line with the Green Deal objectives.

In parallel, the Guidelines on State aid for environmental protection and energy 2014-2020 ("**EEAG guidelines**") which have been prolonged until end 2022, are to be revised. In particular, the EU climate policies have significantly changed since the adoption of the EEAG guidelines. We believe that the revision of the EEAG guidelines will give an opportunity to the Commission to adapt the EEAG guidelines in line with the policy objectives of the Green Deal.

As we living in times of fast technological progress, there is a risk that truly innovative projects may not exactly meet the criteria of the EEAG guidelines, even revised. There should therefore be a possibility or policy allowing the approval of atypical projects directly under the Treaty, provided the environmental benefits are sufficiently demonstrated.

Alongside the EEAG guidelines, the Commission's Communication on important projects of common European interest ("**IPCEI**") is also up for review. We encourage the Commission to take this opportunity to assess how to reduce the procedural burden for qualifying for IPCEIs which may contribute to the objectives of the Green Deal. There is a perception, rightly or wrongly, that in practice IPCEI favour large national incumbents. It might therefore be worthwhile reflecting on how this concept can be opened up to projects involving smaller players with disruptive technologies.

We also see a window of opportunity in the context of the economic recovery from the COVID-19 crisis to promote "green aid". For example, the Temporary State Aid Framework adopted during the crisis included specific language on the possibility for Member States to grant State aid that would support the green transition.

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?)**

If the aid is sought under the EEAG guidelines, the simplest way to avoid a negative environmental impact is to set the standards sufficiently high. The question is more difficult where two aid policies are in conflict.

The starting principle should be that any aid measure should be in compliance with other Treaty rules and objectives. However, in any legal system, the possibility of normative conflicts arises and has frequently been solved through balancing of interest techniques. The late German constitutional judge and scholar Konrad Hesse had developed, for the purposes of German constitutional law, the "Konkordanz-Prinzip", which aimed at balancing conflicting interests in a way that both could be preserved to the greatest possible extent (e.g. transferring the fish population into other waters).

Establishing a type of "green penalty" for activities with a negative environmental impact may create an imbalance between activities or projects pursuing Green Deal objectives and activities or projects based on other relevant policy objectives (e.g. job creation).

In addition, there would be a risk of considerably delaying the approval of aid process. Indeed, incorporating this new assessment criterion would result in the Commission having to conduct a fully-fledged assessment of the environmental impact of each individual State aid measure, which would entail:

- for the aid beneficiary, to prepare and deliver some form of environmental impact report to the Commission (or other relevant documentation);

- for the Commission, to determine in each individual case whether the overall environmental impact of the project is positive or negative. Conducting such an assessment carries a certain risk, particularly in light of the evolutive nature of the Commission's green policy objectives which are likely to continue maturing throughout the existence of the aid measure. Furthermore, there may be a risk of granting too much discretionary power to the Commission to the detriment of effective judicial protection and legal certainty.

Finally, the Commission would be required to monitor compliance with the beneficiary's environmental obligations, with, ultimately, the risk of recovery of the aid (should the measure not meet its environmental targets over time). This creates legal uncertainty and may disincentivize stakeholders from entering into a “green” project.

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?**
    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.**

Establishing a “green bonus” (as for the “green penalty”) raises the question of how the Commission will quantify and rate the environmental benefits of each State aid measure. Furthermore, it is currently unclear how the Commission would determine the adequate amount of aid allowed based on the environmental benefits of the measure in question.

However, we see an analogy to the sustainability discussion in antitrust (see below), which contemplates to extend the concept of “consumer welfare”, as a matter of policy if not law, to include non-price external benefits for both the users of the product/service at stake and the wider public.

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?**

We believe that the EU Taxonomy Regulation is currently the most appropriate framework of reference on sustainability and should serve as a starting point. The purpose of the Taxonomy Regulation is to create a uniform definition of what constitutes sustainable investment in the EU. As such, it would be appropriate if State aid rules referred to that Taxonomy when defining environmental benefits.

In addition, an advantage will be that market practice and market players will likely develop around the assessment of what constitutes a sustainable investment under the EU Taxonomy Regulation, which could also benefit the assessment of environmental benefits under State aid rules. The high level of detail of the Taxonomy, in particular once all regulatory technical standards will have been adopted, in addition guarantees that no undue discretion will be used in the assessment of environmental benefits.

Nevertheless, the Taxonomy Regulation should not be seen as a straightjacket. It is very likely that environmental innovation progresses at rapid speed and other types of environmental benefits will be identified over the next years; those should be assessed on a case-by-case basis based on a set of thorough, but not unreachable criteria.

Furthermore, we would encourage the Commission to consider environmental impact assessments carried out across the EU (in line with the Environmental Impact Assessment Directive) as basis to identify and quantify environmental benefits.

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).**

For reasons of professional secrecy we are not in a position to provide actual examples. The range of theoretical examples is wide, and the valuable work carried out by the Dutch and Greek competition authorities provides some tangible examples.

Cooperation between firms to achieve the policy objectives of the Green Deal may be crucial in certain contexts and EU competition law rules should reflect new market developments linked with sustainability objectives. It just happens that the green transition coincides with an era in which many companies have developed innovative and disruptive business models. In particular, more and more innovative business models based on cooperation are emerging (e.g. leasing of equipment or cooperation on sourcing raw materials) which makes the need for practical guidance on how to self-assess cooperation agreements all the more pressing.

Cooperation can be a means to develop and deliver “greener” products/processes in a shorter time frame (in order to meet the short-term Green Deal objectives) and to share costs (particularly in the context of expensive R&D). Similarly, cooperation may be needed where purchasing prices are higher as a result of sustainability commitments (e.g. purchasing alliance to buy carbon-neutral steel).

Moreover, open cooperation creates a level-playing field by ensuring that smaller firms with little economies of scale are also be able to participate and eventually can offer the same more sustainable product/process to customers.

We believe that guidance on sustainability agreements should be based on a set of objective criteria and practical examples. For example, it should take into account the fact that certain sustainability agreements require a strong collective effort to be impactful which may entail extensive information sharing (e.g. exchanges of information on raw materials or process technicalities).

Collaboration may be considered because it is objectively necessary (consortia), but also because it reduces financial and operation risk. An environmental innovator ready to invest in better technology may be concerned of being undercut on price by less environmental competitors. A fast food producer may worry about damaging the brand if the products are sold without the colorful carton boxes. In such cases, industry-wide concertation – based on the model of standard setting – may be a way to facilitate the adoption of environmentally friendly commercial decisions (that do not necessarily increase the price for the buyer).

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…)?**

Today, many companies are reluctant to enter into a sustainability agreement because of concerns that cooperation might be deemed restrictive under Article 101(1) TFEU or might not meet the criteria of Article 101(3) TFEU. As to the latter, it is very difficult to rely on efficiencies given the exposure to the risk that the regulator does not accept their demonstration as being to the requisite standard.

We therefore believe further clarification on the application of competition law rules to sustainability agreements would be needed to encourage parties to enter into such agreements. The below paragraphs focus on the different forms in which clarification could be given.

<u>First</u>, we believe rules on sustainability agreements should be included in the revised Commission's guidelines on horizontal cooperation agreements ("**HGL**"). The public consultation on the HGL clearly highlighted a lack of guidance in the area of sustainability agreements. However, sustainability initiatives may also concern parties in a vertical relationship meaning the review of the Vertical Block Exemption Regulation ("**VBER**") should also focus on providing more guidance on the validity of sustainability agreements to ensure the overall legal framework on cooperation agreements is consistent. In order to guarantee legal certainty, the review of the HGL and VBER should also cover the situation where parties are potential competitors or where cooperating parties share both vertical and horizontal links.

Furthermore, we note that while the current HGL does not provide any language on sustainability, the previous HGL ("**2001 HGL**") included a section on "environmental agreements". In particular, the 2001 HGL considered environmental agreements that covered *"a major share of an industry at national or EC level"* and *"appreciably restrict the parties' ability to devise the characteristics of their products or the way in which they produce them*" as agreements that may restrict competition. However, the 2001 HGL did not define a market share threshold below which the agreement would be exempted or deemed unlikely to restrict competition. By comparison, the ACM draft guidelines on Sustainability Agreements published in July 2020 ("**ACM guidelines**") create a presumption of validity under Article 101(3) TFEU, for agreements between parties with a combined market share of less than 30% (i.e., no quantification of effects required below this threshold). This safe harbour creates a level playing field and ensures a more swift and efficient process, likely to encourage companies to enter into sustainability agreements. In order to avoid forum shopping and to make sure an EU-wide approach to sustainability initiatives is adopted (of particular importance to global companies), a similar safe harbour should be adopted at EU level.

<u>Second</u>, on the creation of general policy guidelines, we consider that such guidelines may not be required if sufficiently detailed guidance on sustainability agreements is provided in the revised HGL and VBER. On the other hand, should the Commission decide not to include substantial guidance on sustainability agreements in the revised HGL and VBER, sustainability guidelines may be required to provide further legal clarity. Either way, guidance should cover the following points:

- <u>The possibility for parties, before entering into a sustainability agreement, to seek the Commission's guidance on an informal basis on the validity of the agreement</u>. The Commission increasingly encourages informal discussions. Such consultations can be particularly useful for parties facing specific practical difficulties in applying the conditions of Article 101(3) TFEU. As a further incentive, the ACM guidelines also foresee that parties who seek the ACM's opinion before implementing the sustainability agreement in question, will be exempt of any fines if the agreement is later found to be incompatible with the Dutch Competition Act (subject to the condition that parties promptly implement the changes suggested by the ACM in case of incompatibility). This guarantee is likely to encourage parties to come forward with their sustainability agreements and to open a dialogue between the regulator and relevant stakeholders. A similar incentive at EU level would encourage more parties to enter into a sustainability agreement.

- Guidance (and possibly, practical examples) on allowed exchanges of information in the context of sustainability agreements. As explained above, a sustainability agreement may require extensive sharing of information. In line with the new business models developed to meet sustainability objectives, a new approach to information sharing may be required to ensure legal certainty. We believe it would be beneficial for parties involved to be able to refer to specific guidance (with examples) on which types of information can/cannot be exchanged based on their cooperation context.

- Guidance on how to apply the criteria of Article 101(3) TFEU in the context of sustainability agreements. The ACM guidelines propose to relax the “fair share” criterion for certain agreements called “environmental-damage agreements” (i.e., agreements that aim to improve production processes that cause harm to humans, the environment, and nature). The fair share criterion will be deemed met by environmental-damage agreements if they contribute to a policy objective to which the Dutch government is bound and if society “as a whole” is better off (no full compensation to users required). However, agreements going further than the national/international standards to which the Dutch government is bound will not be considered an environmental-damage agreement and will not covered by this “relaxed” rule. Although the set of policy objectives to which the Dutch government is bound may be sufficiently wide to catch a majority of sustainability agreements, this rule may disincentivise certain companies from going a step further than the Dutch government’s policy objectives. Furthermore, policy objectives will vary from one Member state to another which would considerably complexify the task of multinational companies in establishing an EU-wide sustainability agreement. We would encourage the Commission to give further guidance on how to apply the objective criteria of Article 101(3) TFEU in the context of sustainability agreements.

Third, in relation to case-by-case assessments, the Commission may consider developing an open database with short descriptions of cooperation projects (in compliance with business confidentiality requirements) that have been approved by the Commission and/or national competition authorities in order to incentivize stakeholders to enter into similar cooperation projects. This would also help build a broader EU framework in the field of sustainability agreements.

For many multinational companies, the difficulty lies in implementing a global sustainability project covering different jurisdictions in and outside the EU. In this context, we consider it essential to launch a dialogue within the ECN and the ICN to make sure there is a sufficient level of communication and coordination (at least within the EU) on these issues.

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?).

The answer is "yes" – but it depends on the circumstances of the particular case. In times of national emergencies (e.g., war, natural disaster), a higher degree of collaboration is required that may not be appropriate in ordinary times. Where there is a great urgency of situation or a particular measure of great environmental benefit that can only be achieved by anti-competitive collaboration, that may be the price to pay.

There should be no *a priori* limitation on the list of policy objectives a particular sustainability agreement may serve and job creation/social objectives may be one of them. In relation to the Green Deal objectives specifically, these are often overarching long-term objectives which cannot be directly translated into a corporate policy (e.g. reduction of greenhouse gas emissions by at least 55% by 2030, reduction of sale of antimicrobials for farmed animals and in aquaculture by 50%). While this means that many sustainability agreements are likely to fall into one of the "boxes" of the Green Deal, the main difficulty will be to prove that there are sufficient benefits to offset the restrictions of competition in line with Article 101(3) TFEU. In this context, we believe the determinant factor will be sufficient guidance on the application of the criteria of Article 101(3) TFEU to ensure the validity of a priori restrictive sustainability agreements.

In addition to the practical difficulties in applying the fair share criterion (already discussed above), further leeway would be needed in relation to the consumer benefit criterion. In particular a consumer benefit is defined under Article 101(3) TFEU as "*improving the production or distribution of goods*" or "*promoting technical or economic progress*". However, social improvements or improvements in terms of quality should also be taken into account. The Commission should consider expanding its interpretation of this criterion, namely by taking into account different objective grounds. This should be reflected in the Commission's guidance.

The third criterion of Article 101(3) TFEU (indispensability of the cooperation) may also be difficult to meet, for example where strong companies cooperate in relation to R&D (e.g. development of new recycling techniques) or enter into a purchasing alliance ("greener" food also means higher purchasing prices). Stakeholders would greatly benefit from further guidance on how to apply the indispensability criterion in the context of sustainability agreements.

Finally, meeting the fourth criterion of Article 101(3) TFEU (no elimination of competition) may be difficult when companies with strong market power are involved. However, where there is sufficient room for competition on price, quality, innovation, etc., the criterion should be considered to be met.

The question how to distinguish environmental policy goals from others is complex. At a recent competition policy conference, a key member of a competition authority described Article 101 TFEU as a well-enshrined principle of law that allows (under its umbrella) a potentially infinite number of policies. That raises interesting questions about the relationship between law and policy: is the policy a factor that may *de facto* facilitate the acceptance of a particular agreement, the regulator having discretion as to how much it wants to relax the standard of demonstration; or does the policy determine the reach of the law? Meaning: if two undertakings conclude an anticompetitive agreement that clearly advances other treaty or policy objectives (energy security, public safety, public security, gender diversity etc.), would they not be entitled, as a matter of law, to the same more flexible standard of assessment than sustainability agreements, even though there is no similar policy effort underway? However, the risk of "today the hand, tomorrow the arm" should not deter DG COMP from making sustainability a top priority.

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?**

Sustainability in antitrust means recognizing non-price externalities beyond "economic consumer welfare" to allow what would otherwise be prohibited. The reverse would be problematic. No competition authority would find an agreement anti-competitive because it harms the environment. Similarly, it would seem problematic to prohibit a merger based on the ground that it may be environmentally harmful. To prohibit a merger that reduces the choice of environmentally friendly products/technologies resembles the discussion about "innovation" and should be answered based on the same methodologies – is there a legal basis in the current EUMR?

Hypothetically assuming that the EUMR standards for assessment are not limited to purely monetary aspects, potentially negative effects on the environment of a merger could simply be dealt with by means of imposing remedies to counter the negative effects identified in the course of the assessment of a merger by an authority, for example by divesting one of the two 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?**

Mergers are not normally driven by environmental considerations. However, where a merger produces sustainability effects, this could be an additional reason to clear it, unless it is blatantly anti-competitive. If one considers sustainability benefits as non-price externalities, the status of efficiencies in merger control has always been more ambiguous.