

FOTA4Climate Foundation
Topolowa 8/12
96-500 Sochaczew, Poland

Directorate General for Competition
COMP-GREEN-DEAL@ec.europa.eu

20 November 2020

Dear Sir/Madam,

We would like to thank Directorate General for Competition for the present initiative. As an environmental NGO focusing on action oriented at broadly understood decarbonisation, we look with engagement - and anxiety - at various economic, political, and regulatory developments in the EU and around the world, which are supposed to safeguard our civilisation against the catastrophic climate change and, at the same time, to increase prosperity through technological development and intensification of trade and capital flows.

Our anxiety is caused by the impression that sometimes it is more about increasing prosperity than about counteracting climate change, in particular through decarbonisation of economy. Therefore, in the first part of our response, we would like to emphasise that even though the completion of internal markets and undistorted competition thereon are among the fundamental values on which the European Union was based, constituting the primary axle of integration, they are neither autotelic nor paramount values - especially in times when, as the human kind, we are aware of civilizational threats caused by overexploitation of natural resources. From this point of view particularly we appreciate the initiative of DG COMP to look for the ways to protect those values in a way which is more cognisant of the EU climate and environmental policy goals, with a clear realisation that competition control is neither the basic nor the most effective tool.

Below, we present answers to selected questions posed by DG COMP.

Ad 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.

When considering the relationship between the particular EC policy tool that is the competence in the field of competition control and the general Union policy drive towards sustainable development, including decarbonisation, one should bear in mind certain structural issues.

The first structural issue is that competition control in the field of State aid is first and foremost to safeguard the internal market rather than e.g. protect the climate or environment. What is



important, in accordance with the Court of Justice jurisprudence¹, aid granted on the basis of Article 107(3)(c) of the Treaty on the Functioning of the European Union (TFEU) must not constitute the basis for meeting environmental goals, although these goals should be taken into account in the process of assessing its compatibility. What is more, within the assessment process, even in the case of assuming *quod non* that the aid measure can directly implement climate or environmental goals, the Commission must ensure that the aid does not violate other aims of the Treaty nor lead to expanding the Commission's competences. Consequently, it should be concluded that the basic tool for climate and environmental policy should be the law enacted by the European Parliament and the Council. This means that the Commission's practice of implementing economic policies through e.g. commitments imposed on the Member States in exchange for finding State aid measures compatible with the internal market is not admissible – those policies should first take the form of appropriate legislative proposals.

The second structural issue is that it is expressed in the global discourse around climate change that the market might not be the best tool for dealing with the civilizational challenge posed by that change. One could therefore reconsider the place of State aid within the EU economic order, including giving primacy to Union-wide environmental benefits over counteracting distortions in the internal market.

As specific solutions for State aid which could be considered for the future guidelines, FOTA4Climate identifies:

- when introducing pollution mitigation cap-and-trade mechanisms based on tradeable permits, the granting of free permits should be limited to absolute minimum;
- in the field of State aid for energy, without prejudice to the prerogatives of Member States arising from the Treaty, especially Article 194 TFEU², the policy of limiting aid to energy undertakings with respect to fossil-fuels powered installations should be continued, in particular with regard to hard coal and lignite; if it is required by security of supply considerations and the adequacy issue has been properly identified and quantified, the basic form of aid should be to keep the most polluting generating units as a form of strategic reserve along with programs to phase them out of the electricity system and market, which in practice means closure aid;
- when assessing the compatibility and compliance with environmental goals of planned capacity mechanisms, the Commission should take into account the various options to ensure adequacy held by Member States; up till now, the Commission has been focusing on the alternatives to new build generating capacity, such as demand response and increasing interconnectivity, whilst the major change with respect to 'fossil-fuel subsidies' was the introduction of the emission performance limit (so called 550/350 limit) for units committed in capacity mechanisms; from the above point of view, it seems that if it was the Commission's aim to limit the negative impact of e.g. the Polish capacity market on the EU-wide CO₂ emissions, the Commission has been successful – the Polish

¹ Court of Justice ruling in case C 594/18 P, Austria v Commission, of 22 September 2020

² With due regard to the obligations defined in Articles 7 and 11 of the Treaty.



government committed to allow the Ostrołęka C project as the last new build coal unit in Poland, while currently it appears that the project will not be carried out in the envisaged formula (1000 MW-class hard coal unit);

- however, FOTA4Climate would like to note that, notwithstanding the right of Member States to define their energy mix, it might be an obstacle to meet the climate goals if lower-emission generating units are replaced by higher-emission ones – e.g. according to the media, Belgium envisages replacing the phased-out nuclear units with gas-fired capacity³, thus purposely increasing the carbon intensity of the energy mix; perhaps one should consider including a Member State's obligation to prove what measures are taken so that meeting generation adequacy goals does not lead to increased CO₂ emissions;
- the State aid guidelines related to energy should also not aggravate the following problem: Regulation 2019/943 and Directive 2019/944 direct the electricity market reform towards a design strongly favouring the most flexible energy sources, e.g. through shortening of gate closure times, lowering minimum trade volumes, maximizing exchange close to real time etc.; one should bear in mind that even though this direction is meant to integrate renewable energy sources, in principle by introducing a market able to quickly absorb excess electricity generated by intermittent sources and to quickly feed additional energy from dispatchable units with short start-up time, such a change may pose an obstacle to decarbonisation for the following reasons:
 - first, the insufficient development of energy storage technologies and limited possibilities for expanding pump-storage capacity lead in practice to favouring gas-fired units, which are commonly referred to as a 'partner for renewables'⁴;
 - second, the functioning of the markets is often cited as an argument against the largest low-emission source of EU electricity, i.e. nuclear power; it is allegedly 'inflexible', 'obsolete', 'not a good partner for renewables';
 - third, one should therefore consider what is the overarching goal: introducing renewable energy sources into electricity systems or decarbonising the system? The '100% renewable' goal could hypothetically be achieved simply by relying solely on biogas and biomass plants; in the light of climate policy, the key value added by e.g. wind and solar energy is not their 'renewability' understood as independence from fuel supply, but their low-emission character (cited as a median of 11-12 g CO₂/kWh for wind and 40-50 g CO₂/kWh for solar).

Ad 2a: 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

³ See e.g. <https://www.dw.com/en/belgium-broke-law-but-can-keep-nuclear-plants-open-eu-court-rules/a-49787150>

⁴ See e.g. <https://energycouncil.com/articles/gas-naturally-compiments-renewables/>



during the works; or if a hydro power plant would put fish populations at risk, how could fish be protected?)

The aspects of environment protection should, in the first place, be addressed by decisions on environmental conditions issued on the basis of environmental impact assessment. As a part of State aid assessment it could be checked, for example, whether granting aid does not lead to the privatisation of benefits along with socialisation of cost, i.e. the burden of maintaining the environment in good condition should not be fully carried by the granting State.

Ad 3a: 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?

Apart from the solutions mentioned above, it could be a good feature to e.g. allow longer aid contract, as it was applied in the Polish electricity capacity market by allowing additional 2 years of capacity contracts for units emitting up to 450 g CO₂/kWh, which may allow for cheaper commercial financing.

Ad 3b: 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.

The criteria to apply a green bonus could be in particular the benefits from lower CO₂ emissions, as well as overall lower impact on environmental resources, e.g. the area of forests, fields, idle land to be taken by an investment – aid could promote projects least encroaching on the environment, such as electricity sources generating most energy per unit of land in their life cycle.

Ad 4. How should we define positive environmental benefits?

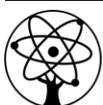
a. Should it be by reference to the EU taxonomy³ and, if yes, should it be by reference to all sustainability criteria of the EU taxonomy? Or would any kind of environmental benefit be sufficient?

As an auxiliary measure, it seems right to refer to the environmental benefits defined in Article 9 of Regulation 2020/852; however, these benefits are so all-encompassing and defined in such a general way that it is difficult to indicate any benefit beyond them. Nevertheless, it seems enough that any kind of environmental benefit is included as criterion in State aid control – we need all tools that contribute to improving the condition of environment and to decarbonisation.

It is key, however, not to extend the criteria for ‘sustainable investments’ on the basis of the Taxonomy Regulation to State aid rules, in particular as criteria for the compatibility with the internal market – for the following reasons:

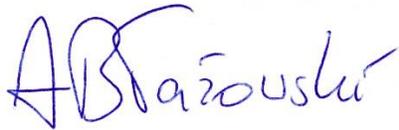


- first, the Taxonomy was designed with another purpose in mind – to define what can be marketed in the EU as a sustainable investment, and not what is beneficial for the environment; the scope of application is precisely defined in Article 1 of the Regulation – it relates to selling financial instruments, while State aid may be granted in various context and in response to various economic needs of Member States; the Taxonomy thus applies to single investments, and not the scale of the whole economy; e.g. the fact of a significant rise in demand for rare earth metals will not be a problem for an investor seeking ‘green bonds’, but may be a problem in the system scale – thus the Taxonomy does not seem as a proper point of reference to assess policies in that scale;
- second, FOTA4Climate proposes to abandon the technological neutrality rule as a nominal requirement for the compatibility of capacity mechanism and renewable support schemes with the internal market; Member States should be allowed to choose the tools for meeting climate goals which are appropriate to their conditions, e.g. the wind and sun potential, but also social acceptance for investments – we will not decarbonise the system by relying on some hypothetical scenarios of renewables developing in response to contracts-for-difference auctions if the local conditions do not allow the development to take place;
- third, while the European Commission approaches nuclear power in a neutral way in its statements; the way in which this technology was treated in the technical report to the Taxonomy Regulation unequivocally shows a lack of neutral approach on behalf of the report authors; nuclear power was, in an arbitrary way, treated as undeserving of defining the ‘do no significant harm’ (DNSH) criteria. In the light of contemporary knowledge, there is no reason to assume that in the context of nuclear power the effect of long-term storage of radioactive waste (and, in particular, the scale of its production) is unknown and it is therefore not possible to define the DNSH criteria, while at the same time assuming that natural gas-based technologies meeting a certain emission threshold do fulfil that criterion. In other words, the authors of the technical report arbitrarily decided which knowledge gaps justify a conclusion that a certain technology does no significant harm in its life cycle and which do not;
- fourth, the taxonomy report shows a very peculiar approach to technological neutrality: it is first declared that a technology-neutral threshold of 100 g CO₂/kW is imposed, then certain technologies are exempted (even though wind, solar, and existing hydro meet that threshold according to IPCC life-cycle emissions calculations, so there is no need to exempt), then biomass is allowed as ‘being roughly equivalent to 100 g’ (although according to the same calculations it is rather around 230 g CO₂/kWh), and finally nuclear power is excluded altogether without defining DNSH criteria; FOTA4Climate is of the opinion that the rule of technology neutrality should be abandoned inter alia because of the ease in which the application of that rule can be manipulated;
- fifth, the CJEU judgment on Hinkley Point C project State aid yet again confirms the settled view according to which the development of nuclear power is a treaty aim. It means that the EU (Euratom Community) should develop mechanisms facilitating investment in nuclear power. The choice between various sources of energy is a matter for each Member State, but those which decide to develop nuclear power should have the appropriate conditions in the EU law, in accordance with the Euratom Treaty and CJEU



jurisprudence. FOTA4Climate supports that view – each Member States should be allowed to choose the desired tools for climate and environmental policy, while the EU law obligations should incentives such a choice of tools which allows for actual meeting of environmental and climate goals.

Yours sincerely,
FOTA4Climate



Adam Błażowski, Board Member

