AEDC

Contribution to the European Commission´s Consultation on Competition Policy supporting the Green Deal

27 November 2020

This contribution of the Spanish Association for the Defence of Competition has been prepared by a working group of members of the association[1]. Please note that the opinions included herein do not necessarily represent the opinions of all the individuals who are members of the AEDC.

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.

The Green Deal aims to ensure that Europe is the first climate neutral continent by 2050, but we should not forget that in addition to environmental objectives, the Green Deal also has an economic and social impact as it intends to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy. State aid plays a key role in this respect in order to foster this transition among the EU industries, but at the same time it is important to ensure that they remain competitive at global level.

The Green Deal objectives are necessarily ambitious and anticipate significant changes to the EU economy. Achieving these objectives will require significant and unprecedented levels of capital expenditure which cannot be funded by the private sector alone. The current State aid framework may not suffice to ensure that an adequate amount of resources are committed to achieving the ambitious objectives set out in the Green Deal.

The AEDC considers that the following changes in the current State aid framework may be useful to support the Green Deal:

- The time required for Member States to notify aid to the Commission and secure clearance significantly delays aid being granted and green investments being made. Careful consideration should be given to whether it would be possible to exempt sustainability investments from this process. Clear guidance on how to design those investments to avoid notification would be welcome.
- Increase of the intensity levels under the "Framework for State aid for research and development and innovation" and/or increasing aid limits under Commission Regulation (EU) No 651/2014 of 17 June declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty ("General Block Exemption Regulation" or "GBER") for aid that will provide a clear environmental benefit.
- The amendment to section 7 (aid for environmental protection) of the GBER and the corresponding guidelines to incorporate the main policy areas of the "Green Deal". The current framework already contemplates investments in some of these areas (such as aid for investments in renewable energy or promotion of energy efficiency in buildings) but others are not mentioned (such as sustainable mobility, investments in hydrogen, sustainable agriculture or the "farm to fork" strategy).

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– Given that not all countries have the same opportunities to assist their industries in this transition, solidarity with the most affected regions in Europe would be important. It might be worth analysing the differences in the amounts available in each country for this type of State aid when assessing whether the measure is compatible with the internal market. Having funds available and linking them to environmental projects does not suffice. Uncontrolled assistance in certain countries, due to the enormous amounts of public funds available, may lead to irreversible changes in the competitive landscape across the EU. State aid can only be accepted if it does not lead to significant distortions of competition between companies within the EU, all pursuing the same positive environmental goals. In other words, the fact that one country may have more funds is not an appropriate ground to allow "all" type of State aid to environmental projects if that creates an important imbalance for companies in other Member States that cannot benefit from similar (or even any) public assistance. A possible solution may be to introduce amendments to the current framework of regional aid to foster green investments in assisted areas by increasing the intensity of the aid that can be granted in these cases.

Also important is that certain industries may face more challenges to adapt to this transition. In order to ensure their competitiveness worldwide (especially in relation to industries located in countries that do not abide by such high standards as regards climate objectives) it would be necessary to provide additional aid to ensure companies and industries are able to transition swiftly to environmentally-friendly and sustainable business models. However, in the short and medium term, those industries should be allowed to have access to State support even if their activities are not aligned with environmental objectives, provided that they have clear plans and periods to implement these changes.

Similarly, it is important to be flexible when applying the rules to assess the risks of carbon leakage and allow more sectors to benefit from State aid and other ancillary measures (for instance, assignment of free CO_2 rights).

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?)***

Firstly, our view is that any improvement in State aid rules under the umbrella of the New Green Deal should introduce new incentives for environmentally positive activities, rather than merely withdrawing aid from polluting or non-environmentally oriented measures.

In this regard, we would distinguish two separate levels for the assessment:

a) *The authorisation level, at which the Member State notifies a new aid scheme or the Commission approves a new exemption under the GBER.*

The current State aid framework is complex and an important tool to promote certain objectives in the internal market. All these objectives are, in themselves, relevant, and should be individually pursued, even if environmental protection becomes a primary goal of the EU policies.

We agree that the Commission could and should take into account the positive impact of the measure on the environment as a relevant element for its assessment. In this regard, environmental efficiencies should play a role in clearing new aid.

For this reason, we believe that positive measures mitigating the eventual negative effects of an activity subject to a State aid measure on the environment should be considered as a relevant element for clearance, as they will play a major role in balancing interests. The Commission could even actively promote the adoption of these measures by the Member State, when possible.

However, we do not agree that such environmental efficiencies should become a mandatory requisite for <u>any</u> new aid, even with the most polluting activities. If adopting mitigating measures hinders or jeopardises the original goal (for example, because the cost of the mitigating measures uses up a significant part of the aid), it should not be considered a requisite for clearance. As a principle, any measure that serves an EU objective and complies with the existing requisites as defined by the Commission should be fairly considered and assessed, even if it has a negative impact on the environment. Requiring mandatory affirmative environmental action could reduce both the flexibility of the State to define important State aid measures and the Commission to pursue relevant EU objectives.

b) *The national level, at which the Member State applies the new aid scheme.*

At this level, however, the assessment is different. Once the Commission clears a new aid scheme or the Member State defines a State aid structure under the GBER, we believe that prioritising the measures that have the most positive environmental impact could be positive, as all relevant elements for granting the aid have been considered. Since the measure is already defined and any company complying with the requirements can opt for public support, all companies are on the same level and, therefore, the national authority could (and, again, should) promote those that are more positive for the environment (see answer to question 3 below).

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?***

The AEDC supports the idea of favouring green objectives in line with the New Green Deal priority axes (decarbonisation, energy efficiency, sustainable mobility, circular economy, zero pollution ambition) by allowing more public economic and financing support to projects that genuinely contribute to such green objectives.

In the AEDC's view, there are two reasons in favour of the idea that an increase in public financing is required to achieve the priorities of the New Green Deal. Firstly, the main objectives set by the Commission are certainly very ambitious. Private investment alone might fall short to reach them on time. Secondly, the Covid-19 pandemic calls for incentivising investment that helps economic recovery.

This is of course without prejudice to the need to maintain State aid under control and guarantee that public aid is kept at a level that does not distort competition or disincentive private investment. The AEDC insists that private investment should take the lead in this green transformation process and that public intervention should only incentivise and complement, as necessary, private investment decisions.

In the AEDC's view, such financial support could come three ways:

- Firstly, an increase in aid intensities and/or eligible costs acceptable for environmental aids under a revised GBER and under revised Environmental Aid Guidelines;
- Secondly, promoting financing through Important Project of Common European interest ("**IPCEI**") that directly contribute to the achievement of environmental objectives; and
- Thirdly, favouring those projects that, irrespective of their main objective, contribute to environmental objectives.

In connection with the latter, a green bonus could be defined as an additional advantage granted in the context of public financing to projects that, irrespective of their main aim, genuinely contribute to the achievement of any of the environmental objectives defined in EU legislation.

From a procedural perspective, the Commission should favour the granting of an authorisation of aid pursuant to Article 108.3 TFEU to assessing the inclusion of a green bonus in the design of every aid or aid scheme.

If a Member State considers that the aid is not suitable for the inclusion of a green bonus, it should explain the reasons for such conclusion (under a sort of "include or explain principle").

If a Member State concludes that a green bonus is suitable to grant the aid, the specific mechanism could differ:

a) For individual aid, the Member State should assess on an *ad hoc* basis the most suitable specific green bonus for the aid (e.g. increase in the amount of aid or inclusion as eligible costs those specifically aimed at the green contribution);

b) For aid schemes based on competing procedures for the granting of the individual aids, Member States should design the competing process in such a way that projects that prove a genuine contribution to environmental objectives are given extra points for such contribution; and

c) For aid schemes based on non-competing proceedings, Member States should design the aid scheme requirements to ensure that projects that prove a genuine contribution to environmental objectives receive more aid than other less green projects (increasing the intensity of the aid or the eligible costs for greener projects).

   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.***

Our view is that a green bonus must be based on the following principles:

- **objectiveness**, meaning that there should be pre-set environmental objectives that merit a green bonus (see response to question 1 above);
- **measurability**, meaning that the green bonus is based on the assessment of contributions that can be measured (e.g. carbon footprint or emissions);
- **accountability**, meaning the possibility of supervising and monitoring the effectiveness of the contribution in achieving the objectives.

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?

In our opinion, it is essential that any new State aid framework applies to homogeneous categories that can be equally applicable to all EU countries. In our view, the EU Taxonomy Regulation provides a comprehensive and consistent methodology that would ensure this purpose.

On one hand, the categories defined in Article 9 and developed in Articles 10 through 16 would ensure a common approach in the different countries, so it would not be up to the Member States to define or limit the positive environmental benefits for environmental aid.

On the other hand, companies would have a common framework to consider all State aid possibilities which is not only common to the 27 Member States, but also consistent with other approaches.

Finally, as to which category criteria from the EU Taxonomy Regulation should apply, we understand that there is no point in limiting the six categories of Article 9. Since we favour a common framework, we consider that keeping the six categories would give the Member States some flexibility in designing their environmental aid schemes.

Part 2: Antitrust policy and environmental aspects

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).

There are various recent and not so recent examples of *actual* precedents where the protection of the environment and other sustainability goals were invoked before competition authorities to request the authorisation of certain agreements between competitors and/or suppliers/distributors. The position adopted by the various competition authorities involved has been diverse, but these cases show the need to provide companies with clearer guidelines to better face these possible areas of cooperation, in particular, in light of the increasing relevance in society of environmental and sustainability goals.

These cases tried to address some of the Green Deal objectives, such as the "*supply of clean, affordable and secure energy*"; "*from 'Farm to Fork' (fair, healthy and environmentally friendly food system*"; "*a zero pollution ambition for a toxic-free environment*", among others. We refer to a few examples and their different outcome:

- One of the most illustrative precedents is the well-known Dutch Competition Authority (ACM)'s *Chicken of tomorrow* case (No. 13.0195.66), which shows an attempt by various relevant players in the chicken industry to encourage sustainability in chicken breeding, production and marketing. The understanding between farmers, supermarkets and meat processors aimed at improving welfare animal conditions by adopting coordinated decisions which included larger space in farms for chickens and other environmentally friendly measures. The supermarkets also joined the initiative and agreed to only buy chicken meat that complied with such measures and criteria, and remove from their shelves chicken meat that did not meet these quality standards from 2020 onwards: that is, they would replace "regular" chicken meat with "chicken of tomorrow".

  Interestingly, the ACM did consider the improvement of animal welfare, together with possible environmental effects as relevant criteria and took into account that consumers were willing to pay more for improvements in animal welfare. However, the higher cost of the better-treated chicken exceeded the amount consumers were willing to pay (the economic value attributed by the ACM to such animal welfare) and the agreement on the removal of the "regular" type of chicken meat from the shelves reduced consumer offer. Therefore, the agreement would breach Dutch Competition Law and Article 101(1) TFEU. The ACM analysed the conditions to apply the exemption of Article 101(3) TFEU (and the corresponding Dutch provision) and concluded that the agreement did not lead to net benefits for consumers but to higher costs; in addition, the ACM considered that such sustainability goals could be reached with less stringent measures (such as improved consumer education on the available options in the market regarding different production methods, sustainable or not) but did not prove that educating consumers on such methods could be as effective as already applying a higher standard of animal protection as resulted from the agreement..

In summary, the ACM took into account non-purely economic advantages/benefits (animal welfare, environmental improvement) and gave them a certain economic value (based on a consumers study). However, the overall antitrust assessment was carried out only in view of economic factors; in this case, net "costs". The agreement, which led to higher standards for protecting chicken welfare at the same time led to higher "costs" for consumers.

In this regard, and while the ACM approach must be praised for introducing such non-economic values into the analysis, attaining sustainability objectives may prove difficult if the requirements of Article 101(3) are to be interpreted by the EC and NCAs from a purely economic, price-cost perspective. In this respect, certain sustainability values and goals could deserve protection by themselves and allow for cooperation between undertakings not only if their translation into economic terms (price-cost analysis) provides a positive outcome, but also if such goals may bring about or represent by themselves benefits for consumers in the long-run (though non-price/cost ones) and society, and/or promote technical or economic progress, for the purposes of Article 101(3) TFEU.

Finally, it is interesting to highlight that this case involved players in various levels of the production and commercialisation chain (poultry farmers who actually breed chickens, supermarkets and meat processors) which entails a combination of *horizontal* and *vertical* relationships which, on the one hand, reveals the complexity of certain sustainability goals that concern a multiplicity of players and, on the other, calls for the need to provide clarifications by the EC/NCAs (see answer to question 2) in relation to both sets of competition rules. Maybe the exclusion of the distributors from this agreement could have led to a different result as the "exclusionary" effect for poultry farmers not adopting the new standard would have been lower or just the result of market forces. However, it is also possible that without the intervention of the distribution level, the goal pursued would not have been totally attained or would have been attained in the long term.

If similar agreements were to be assessed nowadays with a "green" and "sustainability" approach, maybe the conclusion would be that if the combined share of the distribution operators does not exceed a certain threshold (which we recommend not be too low, or even follow the approach of standardisation agreements in the Horizontal Guidelines which do not consider market shares as a key factor – see below section 2), the agreements should had been accepted. Having a sufficiently representative portion of the distribution chain involved in the sustainability policy would create a trend and awareness between consumers and suppliers, creating incentives to adapt, but at the same time would not automatically exclude from the market those operators that have not yet adapted to the new sustainability standards.

- In the Dutch coal plant closure case, the ACM concluded that an agreement between four electricity producers to close down five coal power plants to cut CO2 and other emissions did not fulfil the conditions to be considered exempted, since it led to increased energy prices and insufficient environmental benefits. The higher energy prices were the result of reducing the energy offer (total Dutch energy production capacity was reduced by 10% as a result of the closure of plants).

  Concerning the reduction of CO2, sulphur dioxide (SO2), nitrogen oxide (NOx) and particles, the ACM assessed them and concluded that there was no actual reduction in CO2 since, based on the EU emissions trading system, the emissions allowances that Dutch energy producers would not need to purchase, will be purchased by other EU producers elsewhere (and cause an increase) and therefore there would be no real reduction in CO2 but merely a transfer of CO2 emission rights.

  As regards the reduction of SO2, NOx and particles, it recognised the positive environmental effects of the proposed agreement and attributed an economic/monetary value to such beneficial effects, taking into account the costs that adopting measures/methods would involve to reduce such substances and other calculation methods (shadow prices and prevention costs methods).

  The ACM then compared both figures (higher energy prices and savings arising from the reduction of SO2, NOx and particles) and concluded that the costs were substantially higher than the savings and, therefore, the agreement did not fulfil the conditions of Article 101(3) TFEU and the corresponding national provision.

  Again, the fact that the ACM gave real value (even if only economic/monetary value) to the environmental improvements that these agreements produced is very positive. However, there may be room for a more specific recognition of other inherent non-monetary benefits that these improvements bring about.

The following cases are also worth mentioning, even if just briefly:

- By means of comfort letters, the EC considered in 1999 that the agreements reached by two associations of Japanese automobile manufacturers to commit, on behalf of their members, to reduce CO2 emissions by cars fell outside the scope of Article 101(1) TFEU (*JAMA (Case IV/F-2/37.634)* and *KAMA (Case IV/F-2/37.611)* agreements – page 160). The commitments did not impose on car manufacturers specific obligations as to the technologies or methods to be used to achieve such reductions.

- In 1999, the EC authorised (under the individual notification system) an agreement between manufacturers of domestic appliances (Case IV.F.1/36.718. CECED) to stop producing less energy-efficient washing machines, water heaters and dishwashers on the basis that the energy savings to individual consumers outweighed the higher cost of the appliances; the EC specifically referred to the "collective environmental benefits" to society (beyond those for individual purchasers of washing machines) arising from the agreement.
- In the *DSD* case, concerning the collection of plastic waste, because the agreement gave rise to a new market (plastic waste management), the EC took the view that the agreement furthered competition, despite setting prices and establishing exclusivity.

As regards other *theoretical* areas of potential cooperation in the field of sustainability, the following is some examples:

1. Agreements between suppliers and retailers to make fishing more sustainable; overfishing is one of the most pressing matters that the European Union is facing in terms of sustainability. Agreements in this area could aim to implement measures to make fishing more sustainable; for instance, companies active in the on-trade and off-trade channels could explore possible agreements not to purchase fish from fishing companies that use destructive fishing techniques and prevent the restoration of EU fish stocks. Although this kind of agreement may involve higher costs and a reduced offer to consumers, it could be one potential way of addressing this specific sustainability challenge in an efficient and reasonable timeframe. However, this agreement would not easily be covered by current competition rules. This would be in accordance with the "Farm to fork" objective set out in the Green Deal, in order to achieve a fair, healthy, environmentally friendly food system. The proposal above, concerning a possible approval if certain (high) market-share thresholds are not exceeded, so the agreement fosters changes and creates incentives for other players to also change (even if they are not part of the agreement) could be a balanced formula: the sustainability goals would be achieved but at the same time the agreements would not have an automatic exclusionary effect. Other alternatives could be to establish transitory periods in which the percentage of purchases from non-compliant fishing companies is gradually reduced so the latter have incentives to change and, at the same time, also have some time to adapt their fishing methods and their equipment. If a large proportion of on-trade and off-trade channels join the initiative, customers would end up adapting and accepting higher costs (if necessary) if it is for a good reason, and producers would have incentives to adapt as their higher costs would also be covered.

   Competition law cannot ignore that an individual company or a consortium of companies with a low combined market share do not have economic incentives to embark into more costly production methods that meet sustainability goals if they are not somehow protected from less costly and less sustainable products. They need to have certain assurances that they will recover such higher costs in the long run and this can only be achieved if production with such higher costs and higher sustainability methods become a market "standard". This entails that analysing this type of cooperative agreements needs to be more flexible than in the past and possibly accept that the combined market share of the parties joining these "sustainability" agreements be notably higher than the current 15-20% market share accepted in horizontal cooperation agreements. Again, as indicated in section 2 below, a great deal of sustainability agreements should be assessed following the approach given to standardisation agreements, which according to the Horizontal Guidelines, are not constrained by maximum combined market share thresholds to benefit from the exemption, provided they fulfil certain specific conditions such as non-discrimination, transparency or unrestricted participation.

   In the US, Bon Appétit Management Company, a restaurant company that provides café and catering services to corporations, colleges and universities launched a "Fish to fork" program, the objective of which was to outline what local and small-scale fishing involves for both wild and farmed seafood (the guidelines included the traceability of the product, the size of the boat, the distance and the species preferences). Individual initiatives such as this are remarkable, but cooperation between competitors could have a wider impact and bring about greater and more effective environmental benefits.

2. Agreements between various economic players could address the exclusion of specific ingredients or raw materials that are usually incorporated in processed products and which either involve potential risks for human health or have been obtained by harming the environment (the final aim would be in line with the Green Deal's "Farm to fork" objective). This is the case of agreements that could limit the use of palm oil and oilseed from deforested areas (i.e. in the Amazon rainforest) in various finished products. Again, prices could rise, as for instance, palm oil is a cheaper ingredient, but consequences both in respect of human health and sustainability would also be significant (even without purely translating the environmental benefit into monetary terms).

   A relevant example of agreements intended to protect the environment and prevent climate change is the Brazilian '*Amazon soybean moratorium*', an agreement which involved a commitment by grain traders not to buy soybeans produced in deforested parts of the Amazon rainforest.

3. Supermarkets aiming to reduce their use of plastic. The possibility that supermarkets jointly develop systems to decrease the use of plastic. In Spain, since 2018, supermarkets are obliged to charge for plastic bags and from 2021 only compostable bags will be allowed to be handed out by supermarkets. While this regulatory measure (based on a 2015 EU Directive) has definitely been positive, another step in the right direction could be for supermarkets to reach an agreement to completely remove the sale of these plastic bags and replace them entirely by paper bags; or incentivising the use by consumers of reusable (cloth) bags by offering vouchers or discounts. The Green Deal's zero pollution Europe principle would be attained by this type of initiatives.

4. Also addressing the zero pollution principle, the possibility for suppliers entering into agreements to reduce their use of packaging (plastic and other materials) in their production processes. This is already a much debated matter: suppliers could coordinate and reach an understanding to go beyond the legal minimum required regarding the filling levels of food containers (e.g., a bag of chips or a bottle of juice) and squeeze even more the products into the same package or container in order to reduce the use of plastic and other packaging materials

5. Agreements to encourage more sustainable animal production in line with the goals addressed by the *Chicken of Tomorrow* arrangements.

6. Agreements between competitors to ensure waste valorisation of certain subproducts. It is very common for public authorities or private entities to request assistance to a given sector to valorise waste (for instance, wheels, unusable subproducts at the end of the aluminium manufacturing process – metallurgic slags –, sluds resulting from water depuration processes, organic waste).

   These subproducts can be used as fuels in several industries. Individual agreements to valorise waste is sometimes possible but usually difficult to achieve as the supplier needs to ensure that the acquirer will take over all the waste and a single company cannot offer such guarantee. Other times, logistics and transportation costs for the manufacturing facilities where these subproducts will be used as fuel costs makes it difficult from a price/cost perspective to use these inputs and integrate them in the production process; cooperation with competitors makes this possible.

   Competitors sharing logistics and transportation costs, allocating (i.e., "supplier sharing") sources of supply between them to ensure that each supply goes to the correct manufacturing plant, assuming 100% purchasing obligations for more than five years, etc. are competition restrictions that may not necessarily be covered by the vertical or the horizontal BER. This type of agreements are not exactly the same as joint purchasing and go beyond this type of structure. Additionally, the waste shared as a common input may sometimes represent a relevant part (above 15%) of the production costs of the entities that participate in the agreements. In order to provide legal certainty and promote this type of agreements, further guidance from the competition authorities that make the self-assessment (or the automatic exemption) under article 101.2 TFEU much easier would be welcome.

It goes without saying that all the *actual* and *potential* cooperation agreements mentioned above should not in general – unless they are proven to be essential to achieve efficiencies[2] and under certain strict conditions – include hardcore restrictions in parallel with the efforts to attain the environmental goals (see in this respect *Case COMP/39.579 - Consumer detergents, 13 April 2011* which involved measures to reduce the size of packaging).

2. Should further clarifications and comfort be given on the characteristics of agreements that serve the objectives of the Green Deal without restricting competition?

Yes. Further clarifications and comfort should be given not only in relation to which agreements help fulfil the Green Deal objectives *without restricting competition*, but also – and mainly – in relation to agreements which,

[2] For example, according to the current EC Vertical Guidelines in very exceptional circumstances, resale price maintenance may be positive during a transitory period in order to introduce a new product in the market and generate demand. This is a traditional hard-core restraint that may on occasion be accepted. By the same token, if instead of launching a new product the transitory price fixing is justified by the introduction of more environmentally friendly production or distribution methods, this exception should also be available (if justified on economic/incentive grounds). Similarly, we should not rule out that a transitory horizontal price agreements consisting of transferring to the clients the costs increases related to adapting to new environmental standards could be an additional incentive for suppliers to adapt to these standards. Indeed price competition would be limited for a certain period, but this could improve the likelihood of changing costly equipment and manufacturing processes and once they are installed and a reasonable return is obtained to compensate such costs, the "price protection" would disappear. This type of proposals could go against the "very nature" of competition law principles, but could be very effective if used with caution and during short periods. Guidance from the EC on the admissibility of this type of hypothetical and exceptional restrictions with a pure sustainability/environmental final goal would be very welcome.

although restrictive under 101(1) TFEU, are necessary and proportional to achieve such objectives and comply with all the conditions of the exception of 101.3 TFEU. Guidance would be most welcome also for this type of agreements as is the case with other vertical and horizontal agreements that exceed the thresholds established to obtain the block exemptions or are not covered by them. This has also been the case more recently with cooperation between companies during the Covid-19 pandemic. Sustainability and public health matters are becoming more and more relevant and are areas where uniformity of interpretation of EU law is at stake. A clear steer from the European Commission is needed, given the evident risk of divergence when different national competition authorities need to consider whether to take into account or not - and to which extent – there is room for including non-economic criteria in the application of Article 101.1 and 3 TFEU.As mentioned in point 1, it seems that unilateral initiatives are not sufficient to attain certain sustainability goals, since the risks involved in being the first-mover discourages many businesses from investing in (usually) expensive measures to adapt their products, services and production processes to reach such goals. In addition, even if the risks were not that high, cooperation between companies appears to be key to achieving better, measurable and meaningful results in terms of sustainability and to achieve them quicker. Therefore, cooperation between companies is sometimes needed and desirable to attain those sustainability goals. Furthermore, the fact that certain sustainability goals such as the fight against climate change need urgent action, makes clear guidance on this type of cooperation more important.

If so, in which form should such clarifications be given (general policy guidelines, case-by-case assessment, communication on enforcement priorities…)?

As to how guidance and clarifications are to be provided by the EC, there are various perfectly good options. Our proposal would be to use a combination of them at both an individual (case-specific) and general level.

a) *Case-by-case*

The EC could be open to a case-by-case assessment of certain agreements, in particular, those with a more international dimension or with the potential to lay down principles that could be applied or extended to various Member States (indeed, many sustainability issues tend to be global). In this respect, the EC could use **comfort letters** in these scenarios, as it has already done in the past (see above *JAMA (Case IV/F-2/37.634) and KAMA (Case IV/F-2/37.611)* cases) or the more recent *Medicines for Europe* case in the context of the Covid-19 pandemic. The advantages of these comfort letters would be that, although not providing full legal certainty to the companies as they are not binding, still grant a fast and good level of certainty, which in practice is sufficient to foster positive cooperation and attract public interest to the goals pursued. At the same time, if they are published on the EC's website, they may offer guidance to other future cases.

This tool could be used not only by the EC but also by NCAs. In any event, information should be exchanged and discussed within the ECN to ensure consistent approaches, and it should be made publicly available so that it serves as guidance for future cases. This should be done in both directions: if the case is decided by the EC or by the NCAs, and if possible, a centralised database or website (with at least a summary in English) should be available.

A second option (or combined tool) can be **guidance letters** on new issues. If comfort letters are too burdensome for the NCAs, guidance letters to clarify new issues may be an option. This possibility is already available in the EC's toolkit. If it wants to use it in this field, the EC should state so publicly. Guidance letters do not provide the same comfort to companies and their scope is more limited. Therefore, they would not promote as much cooperation but can still be useful.

b) *General guidelines*

There are several options available: block exemption, general guidelines or guidance on priorities of enforcement. Our main proposal is the second option: general guidelines which can be provided in a double format.

- Firstly, the EC could adopt specific general policy Guidelines to address sustainability as a whole and which apply both to horizontal and potential vertical agreements.
- An alternative would be to include a specific chapter on sustainability agreements in the Horizontal Guidelines, currently under review. The 2001 Horizontal Guidelines already included a chapter on Environmental Agreements, which was removed from the current Guidelines to allow the provisions of the Guidelines on various types of agreements (standardisation, R&D, production, etc.) to apply to environmental agreements depending on their specific features (see footnote 1, paragraph 18). Perhaps the increasing concern about environmental and sustainability problems could act as a driver to, firstly, review the different existing chapters under a sustainability perspective, and secondly, add a specific chapter on sustainability agreements to the extent that further guidance on sustainability agreements is needed and cannot be dealt with under the other chapters.

This alternative of including general guidelines on sustainability agreements in the horizontal guidelines is the best option in general terms, although for specific type of agreements (for instance, valorisation agreements – see section 1 above), some members of the AEDC who have participated in this paper propose including specific exemptions in the new block exemption regulation on horizontal agreements that will be adapted (naturally with complementary guidelines).

The AEDC recommends including these orientations in the “horizontal” agreements package (either in the revised guidelines or the revised BER, or in both) in order to maintain coherence of the current framework and prevent its fragmentation. Guidance on the integration of the sustainability perspective in vertical restraints would have to be provided elsewhere: in particular under the current review of the Vertical agreements package and the Guidance on Vertical restraints, but would usually also have a horizontal component (for instance, distributors agreeing to abide by or support at the distribution level a certain production method agreed between competitors in a vertically related market).

When adopting such guidance, in either form, it would be very desirable if the EC could come up with some form of assessment of environmental and sustainability efficiencies, in the context of Article 101(3) TFEU, which opens a new approach to sustainability objectives. The new approach should depart from the premise of the climate change and environmental protection emergency and therefore the need to accelerate emission reductions and rapid improvements in ecologic transition.

Furthermore, this new approach would have to enhance the quality and dynamic dimensions (e.g. safety environmental standards) and give more value to sustainability improvements as an efficiency consideration. As shown in some of the precedents in the response to question 1, the benefit derived from the environmental improvement (for both the market and the consumers) goes beyond mere monetary terms. Within this new approach, it is also important to balance the negative and positive results of the cooperation not in the short term but in the medium/long term; only within this time framework, may the positive effects of sustainability improvements materialise and the negative effects of the cooperation be overcome. As shown in the precedents explained in question 1, the key of this new approach is therefore to rebalance the positive and negative effects of sustainability agreements without overestimating the negative effects and underestimating the positive effects.

Market share thresholds should, in principle (and depending on the specific type of agreement), not be a very relevant or a key factor to assess these agreements. As with the standardisation agreements in the EC Horizontal Guidelines, market shares are not a decisive criterion since the benefit of a given standard (environmental or not) usually arises when a significant part of the market adopts it. The same could be said of many potential sustainability agreements.

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?).

If the question is whether non-competition considerations should be included in the exception of Article 101(3) TFEU, our opinion is no. According to Article 101(3), only economic efficiencies should be considered. This is especially true after Regulation 1/2003 and the loss of the monopoly of the EC and should continue to be so in the future. Otherwise, the risk of there being a lack of uniformity would be high. Furthermore, the NCAs are not best placed (or legitimised) to balance competition against other public good considerations.

However, the concept of efficiencies should be that mentioned in our response to point 2, that is: qualitative and not only quantitative or monetary (cost reductions, pricing level), medium-long term instead of just short term, dynamic and not just static effects, and taking into due consideration the emergency situation and the need to accelerate emissions reductions to fight against climate change and move forward in protecting the environment. We believe that, if non-competition considerations are not included in Article 101.3, there is ample room to take into account the positive effects of improvements in environmental protection and progress in ecological transition deriving from cooperation of undertakings.

In this regard, The AEDC welcomes the DG Comp Chief Economist Team´s current efforts on developing techniques to allow to take into account the environmental benefits in efficiencies assessments for the application of Competition law, among other non-competition criteria. Particularly, we agree with Chief Economist, Mr. Pierre Régibeau, that there is no reason to exclude out-of-market efficiencies and that it should be possible to develop new methods of assessment or adapt methods from fields like environmental economics. Notwithstanding this, we also agree with the Chief Economist that this should not result into using competition policy tools to achieve policy goals that could be better addressed by other policy tools[3].

[3] News published by PARR on 24 November 2020 regarding a conference given by Mr. Régibeau at Informa's annual Advanced EU Competition Law conference.

The AEDC considers that the Green Deal objectives should not be differentiated from a theoretical perspective from other important policy objectives such as job creation, social objectives or public health concerns. These latter goals do not deserve less consideration and protection than the Green Deal goals. But we do believe that additional consideration should be given to whether, in each specific case, there is a need to accelerate the attainment of a certain level of protection of these policy goals (e.g. emergency), as well as its dynamic importance in the medium-long run. This approach can have an impact on the requirements to be met to apply the exception in Article 101(3), in particular the level and type of efficiencies recognised, the indispensability test and whether a fair share of the benefits reached the consumers. Caution should always be taken to prevent that the restriction goes beyond (either in scope or in time) what is needed to attain the goal pursued. This is shown by recent cases in analogous fields such as the *Medicines for Europe* case, in which the EC issued a comfort letter to confirm that, under certain conditions, certain cooperation practices aimed at responding expeditiously and effectively to shortages of Covid-19 medicine did not raise concerns under the EU competition rules where they were strictly necessary for achieving the primary goals of the arrangements.

Additionally Green Deal objectives tend to protect limited and unrecoverable resources in the long run (i.e. our planet), whilst other equally worthy public interests (such as, job creation) are recoverable in the long run. For instance, in the short run, the strict application of competition law (for instance, denying State aid to inefficient companies or prohibiting a merger that does not meet the "failing firm defense standard") could lead to job reductions. However, in the long run, competition law promotes the creation of new industries and new more efficient and competitive businesses that will absorb the re-oriented man power loss in the first round of strict application of competition law. However, with regard to the Green Deal, the objective is to preserve resources that cannot be reconverted or changed or adapted in the future. If the current fast trend of environmental degradation continues, the loss is irrecoverable and cannot be "reoriented" or compensated by new businesses or new industries in the future.

Part 3: Merger control policy and environmental and climate policies

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?***

As a final remark, and for consistency reasons with Part 1 on State aid, the AEDC does not consider that the merger control regime should be used as a tool to prohibit environmental/sustainability dangerous transactions. If these transactions do not give rise to competition concerns, competition authorities should not prohibit them just because the new entity is not environmental friendly or will worsen environmental conditions. Other regulations should address these concerns, but not competition law.

Similarly, we fully agree with Commissioner Vestager's remarks in relation to the analysis of the Bayer/Monsanto merger in 2017. At that time, there was widespread opposition to the transaction by environmental NGOs and the wider public based of environmental and climate change concerns. In that respect Commissioner Vestager responded that "*while these concerns are of great importance, they do not form the basis of a merger assessment',* arguing that such concerns *'are handled by my colleagues and national authorities and are subject to European and national rules to protect food safety, consumers and the environment and climate*". Additionally, she remarked that "*the basis of a merger assessment is formed around what many of you also raise: concerns about potential negative effects of the merger on consumers and farmers through decreased competition, increased prices, less choice and less innovation as well as increased dependence on few global suppliers*"[4].

Another thing altogether would be that the transaction leads to competition concerns in nascent markets of environmental/sustainable services or products. We may refer, for instance, to transactions that negatively affect incentives to invest in R&D or that "kill" innovative initiatives of one company to develop more sustainable products or services that compete with the ones of the acquirer. Sustainability is a qualitative (non-price) criterion that affects the competitiveness of a company, as clients start giving importance to this factor when choosing suppliers. Companies compete not only in price, but in quality and innovative products, even in privacy policies and also in sustainability principles. Hence, if a transaction has the effect of "killing" a competitive project in sustainability terms, in that case and only in that case, merger control could be used to prohibit or condition the transaction. The rationale would be similar to the one applied in transactions that refer to economic sectors in which innovation is a significant competitive factor (for instance, pharma, energy, telecoms, digital). Analysing the merits should not focus on whether the transaction is good or bad for the environment, but whether it reduces competition in markets where innovation in environmental/sustainability aspects is a competitive factor.

The EC decision in Aurubis/Metallo is an example of this latter approach. In this case, environmental and sustainability considerations formed part of the EC's decision to open a Phase II. In particular, the EC's concerns were that the deal might reduce incentives for re-cyclers to collect and sort copper scrap (an important component in electric vehicles). In this context, Commissioner Vestager, said: "*Demand for copper*

[4] See https://ec.europa.eu/competition/mergers/cases/additional_data/m8084_4719_6.pdf and https://ec.europa.eu/commission/presscorner/detail/en/IP_17_2762

is likely to increase, notably also due to the growing importance of electric cars. A well-functioning, competitive copper recycling industry is key to meet the future needs of European industry and to limit the impact on the environment. The Commission will carefully assess the merger between Aurubis and Metallo, the two leading copper scrap refiners in Europe, to ensure the transaction would not negatively affect competition in this important sector".

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?

Yes. We envisage at least three ways in which merger control can better contribute to protect environmental and sustainability goals, which relate to market definitions, the analysis of efficiencies and the design and acceptance of remedies.

a) Market definition

Market definition is a key aspect of the merger control assessment that allows the parties and the authorities to analyse the prospective impact of the transaction within the category of substitutable products. Usually the narrower markets are defined, the higher the merging parties' shares are and the stricter scrutiny becomes.

Environmental and sustainability factors may sometimes serve to identify different – and narrower – relevant markets. This permits a more thorough analysis of the impact of the transaction in these markets specifically, without diluting the effects of the transaction on other less environmentally friendly products.

In fact, there are several examples of EU and other precedents where competition authorities have defined relevant markets taking into consideration environmental factors. We refer, for instance, to the following cases:

- In DEMB/Mondelez/Charger OPCO, environmental considerations formed part of the EC's relevant product markets analysis (organic, fair trade and other certified coffees vs. conventional coffee).
- In Aleris/Novelis, environmental issues also formed part of the EC's market definition (lightweight aluminium – for the production of reduced emissions fuel-efficient vehicles – as a separate market), which played an important role in the substantive assessment, as well as in the parties' remedies package.
- The Portuguese authority has considered sustainability factors when defining relevant markets (Aviagen/Hubbard).
- The US agencies have also considered sustainability factors when defining relevant markets (organic vs. conventional products). For instance:
    - In Post/TreeHouse (ultimately abandoned by the parties), the Federal Trade Commission considered a private label ready-to-eat (RTE) cereal product market which excluded "natural and organic" cereals. This was in part because these "tend to have healthier and more expensive inputs" – resulting in more expensive downstream products.
    - In Danone/WhiteWave, while the Department of Justice was less explicit about non-price factors, a differentiation could be inferred from the description of the inputs for raw organic milk, which "is collected from organic cows on organic farms that must meet rigorous USDA regulations", impacting the downstream price.

b) Analysis of efficiencies

Merger control cannot follow principles that are inconsistent in nature and concept with Article 101.3 TFEU. If, as explained in Part 2 above, the AEDC advocates for a flexible approach in analysing efficiencies under Article 101.3 TFEU so as to embrace sustainability objectives, a similar flexible approach and concept of efficiencies should be followed under the merger control regime. Hence, the AEDC considers that at least to assess efficiencies in the merger control process the EC Commission and the NCAs should also take into consideration whether the transaction positively contributes to improving the environmental and other goals of the Green Deal.

Moreover, sustainability efficiencies may likely lead to cost increases, as innovative production methods should be developed or more costly raw materials should be used. Under the "traditional" approach, a merger that leads to higher costs and higher prices would not be considered to create efficiencies capable of compensating the loss of price-competitive pressure resulting from the merger.

The AEDC proposal is to encourage the EC Commission and NCAs to start considering also this type of efficiencies and not only base the concept of efficiencies on short-run cost/price considerations.

In some EU jurisdictions, such as Germany or Spain, the merger control procedure may exceptionally comprise a two-step analysis. The first one analyses the transaction from a purely technical competition law perspective. The review is carried out by the competition authority. The second-step analysis is carried out by a political body (in Spain, the Council of Ministers, with the prior recommendation and filtering of the Minister of economy[5] and in the case of Germany, the Minister of Economics and Energy). These "political" bodies may decide to authorise or condition a merger that the competition authority previously recommends to prohibit or subject to different remedies applying a "public interest" test, which includes, for instance, protecting the environment.

In Spain, there are no precedents of transactions prohibited by the competition authority that were subsequently approved or subject to remedies by the Council of Ministers on grounds of an environmental or sustainability public interest. However, Germany does have one precedent that may inspire the future role of merger control procedures for improving the Green Deal goals. In particular, case *Miba AG and Zollern GmbH & Co. KG*[6] prohibited by the Bundeskartellamt on competition grounds and subsequently approved with conditions by the Minister of Economy. In particular, the Minister considered that the joint venture resulting from the transaction *(i)* played an important role for the energy turnaround, which is an essential element of the German government's sustainable environment policy; and *(ii)* the positive effects of the transaction for the environment and climate protection outweighed the competitive disadvantages of the merger.

These examples evidence that in some EU Member States the merger control regime forms part of the Government's "economic policy" and as such, public interest other than competition may be involved in the authorisation process. Nonetheless, this public interest only plays a role as a "last resort" measure (i.e. only if the transaction is initially prohibited or conditioned by the competition authority).

The AEDC believes that if the EC truly wants to foster the achievement of environmental and sustainability goals, these goals should be embedded within the concept of efficiencies in the competitive assessment of the transaction carried out by the competition authorities. This would ensure that due consideration of these efficiencies *(i)* is given in a systematic and consistent way; *(ii)* does not depend on governmental decisions, which may also be influenced from time to time by other public interests, and *(iii)* does not depend on how the merger control regime is structured in one country as compared to other (many EU countries do not have this type of two-step merger control regime and cannot consider environmental aspects to approve a merger that hinders competition but significantly improves environmental conditions)[7].

[5] See article 10.3 of Law 15/2007 for the Defence of Competition.

[6] See the Bunderskartellamt press release at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_01_2019_Miba_Zollern.html. See also the annual report of the Bundeskartellamt of 2019 (page 32) at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Jahresbericht/Jahresbericht_2019.pdf?__blob=publicationFile&v=3: "*In January 2019 the Bundeskartellamt prohibited the formation of a joint venture between Miba AG and Zollern GmbH & Co. KG. The companies had planned to pool their hydrodynamic plain bearing production activities in a joint venture. The authority's investigations showed that the two companies are the major competitors in a market which is already highly concentrated. The merger would have exacerbated the situation because Miba and Zollern, two very close competitors from the customers' perspective, would join forces. After the merger was prohibited the parties applied to the Federal Ministry for Economic Affairs and Energy (BMWi) for ministerial authorisation. In a special opinion commissioned by the Ministry for Economic Affairs and Energy, the Monopolies Commission recommended against granting ministerial authorisation. However, the Ministry granted the authorisation subject to conditions, holding that the merger was significant for achieving the energy transition and environmental objectives associated with it, which would mean that there was an overriding public interest to authorise the merger. Miba and Zollern then filed an appeal against the Bundeskartellamt's prohibition decision with the Düsseldorf Higher Regional Court. The Court will probably decide on the appeal in the second half of 2020*".

[7] As an example – but not proposing we go this far – it is interesting to note that in some countries, such as **South Africa**, general and diversified public interest tests are conducted alongside a traditional competition test to complete a merger assessment. When justifying a merger on public interest grounds, the Competition Commission must consider the effect that the merger will have on a particular industrial sector or region, employment, the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive, and the ability of national industries to compete in international markets. A PIT was used in the ABI/SAB merger, for example,

c) Remedies

We envisage two possible scenarios where due consideration of environmental and sustainability aspects should be considered when designing remedies.

Firstly, cases in which remedies are primarily aimed at increasing competition, for instance, improving interconnection capacity between Member States in the energy or telecoms sector, but at the same time are positive from an environmental or sustainability perspective. When assessing the suitability and sufficiency of these remedies – which should at least solve the competition concerns – the company and the authority should try to choose that which better protects the Green Deal goals.

Secondly, if we are suggesting that a transaction that gives rise to competition concerns may nonetheless be approved in view of the specific "sustainability" efficiencies that it generates, it could be legitimate for the competition authorities, if they have doubts on whether such efficiencies are enough to overweight the loss of a relevant competitive force in the market, to ask for additional remedies seeking to improve such environmental/sustainability efficiencies. This approach is different to the previous one because the remedies would not be mainly designed to solve the competition concerns, but merely to improve the environmental/sustainability efficiency gains that supposedly justify the clearance of the transaction under the "efficiencies" defence.

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prompting the companies to make significant commitments in order to address both public interest and competition concerns arising from the merger.