Bellona Europa Response to the «Call for Contributions – competition Policy Supporting the Green Deal».

Part 1: State Aid Control

Question 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?

Principle of Common Interest and the EU's climate ambition

As an overarching point, it is necessary to amend the state aid rulebook and the interpretation of legislation to safeguard the climate impact credibility of the funds under state aid. Article 107 paragraph 1 of the Treaty of the Functioning of the European Union (TFEU) clearly sets out that state aid "which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market"1.

However, important exemptions are made, identifying cases where distorting effects to competition in the internal market is or could be deemed compatible, under point 2 a and b and point 3 a-e. The legal text, and its eventual interpretation, depend to a large extent on what is deemed the "common interest" – see below for reference.

TFEU, Article 107 2:
a) "aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

b) aid to make good the damage caused by natural disasters or exceptional occurrences;"

TFEU, Article 107 3:
a) "aid to promote the economic development of areas where the standard of living is abnormally low of where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance on the economy of a Member State;

c) aid to facilitate the development of certain economic activities or of certain economic area, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

e) such other categories of aid as may be specified by decision of the council on a proposal from the Commission"

With the launch of the European Green Deal, the European Commission has clearly set climate change mitigation and the green transition at the very top of their agenda, this must be reflected in the interpretation of the "common interest" principle – which must be amended to reflect properly the weight of the new climate ambition and targets. The wording in TFEU "where such aid does not

[1] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A12008E107

Bellona Europa aisbl
Rue Egmont 15
1000 Brussels, Belgium
Belgian organisation number
0458243836
www.bellona.org
Tel: +32(0)2 648 31 22
Fax: +32(0)2 646 81 22

adversely affect trading conditions to an extent contrary to the common interest", must therefore going forward place a heavier weight on positive environmental benefits to society than before – if the interpretation is to reflect the changes to the priorities and common interest of the European Union as presented through the European Green Deal. This should be established clearly in the guidelines for all state aid.

Given set climate targets, it is arguably in the common interest to ensure that state aid is part of the solution to reach set climate target of net-zero by 2050. Continuing to publicly subsidize projects and economic activity incompatible with the set climate targets is therefore not in the common interest of the European Union, and should come to a halt. As explained in the answer to question 2 below, no state aid funding should be awarded to economic activity in breach of the Do-No-Significant-Harm (DNSH) principle as outlined in the Sustainable Finance Taxonomy. This is the way to ensure that state aid does not finance or incentivise economic activity which counteracts the European climate ambition and targets – and is thus not in the common interest.

Capacity Mechanisms

It is clear from EEAG section 3.9 "Aid for generation adequacy", that the current text does not reflect important progress and market developments since its creation. This must be updated to align with the objectives of the European Green Deal. As outlined by CERRE's 2020 report on the EEAG[2]: "natural gas production, including low carbon, is not directly covered by the 2014 EEAG, but could possibly be benefit from aid for generation adequacy under section 3.9 of the 2014 EEAG". It is thus clear that the Capacity Mechanisms as it stands in the EEAG in fact has the potential to facilitate funding for activities which directly counteracts the objectives of the European Green Deal. Such funding, as mentioned under the "common principle" section, should be excluded under all state aid based on an assessment of breach with the DNSH criteria as outlined in the Sustainable Finance Taxonomy.

The EEAG clearly states in recital (20) that: "Aid for generation adequacy may contradict the objective of phasing out environmentally harmful subsidies including for fossil fuels. Member States should therefore primarily consider alternative ways of achieving generation adequacy which do not have a negative impact on the objective of phasing out environmentally or economically harmful subsidies, such as facilitating demand side management and increasing interconnection capacity".

However, there is reason to suspect that the EEAG is not functioning as intended on this point, and is in fact contributing to a continuation of, and in some cases even providing incentives to fossil fuels over renewable alternatives. This was most recently outlined in an article from Investigate Europe: "Capacity Markets: Keeping fossil fuel fires burning". Indeed a 2018 Greenpeace report found that of the funding going to renewables compared to fossil fuels through the capacity mechanisms, 98% went to "prop up coal, gas and nuclear plants".

From the Tempus Energy case in 2014, we know there are real concerns that as the capacity mechanisms state aid functions at the moment, it incentivizes funding for fossil fuels as opposed to demand side response schemes. We cannot allow special interests to take a hold of state aid funding to their own benefit, when in fact it harms not only innovation and competition of and from renewable alternatives, but also hinders our ability to ensure a sustainable future oriented security of electricity supply. It is also, quite clearly, in direct contradiction with the intention of even the current EEAG guidelines, and changes are necessary to ensure it is not reproduced in the revised EEAG.

[2] https://cerre.eu/wp-content/uploads/2020/09/CERRE_State-Aid-Guidelines-for-Environmental-Protection-and-Energy-EEAG_September-2020.pdf

Bellona Europa aisbl | Belgian organisation number | Tel: +32(0)2 648 31 22
Rue Egmont 15 | 0458243836 | Fax: +32(0)2 646 81 22
1000 Brussels, Belgium | www.bellona.org

We must ensure that state aid for capacity mechanisms under EEAG are thoroughly assessed, including to what extent the design is impartial or if indeed it results in a competitive advantage for fossil fuels as opposed to renewable alternatives. We cannot afford to be tied into long-term contracts that also extend the life-span of unnecessary and less efficient fossil fuels as opposed to renewable flexible alternatives coupled with demand side response schemes. Although the aim of the capacity mechanism, ensuring security of supply and keeping the lights on, was and is still necessary, the new EEAG must ensure a sustainable security of supply. For this to be the case, the EEAG section on capacity mechanism requires a significant overhaul.

Missed opportunity: the continued exclusion of NGO oversight and access to justice

The Aarhus Regulation grants "administrative review possibilities specifically to environmental NGOs"[3]. But, the EU Aarhus Regulation currently only allow NGOs to requests internal reviews of 'administrative acts' of individual scope, not general scope. In fact, the main reason for NGO requests to be rejected is it being deemed inadmissible due to the challenge presented not being under the individual scope.

Though the exclusion clearly shows a democratic deficit in the access to justice for NGOs and civil society, it is made worse by the fact that industry has and is able to access the courts to challenge decisions on commercial ground[4]. There is as such not a level playing field, and unequal access to justice disproportionately affecting civil society.

The Aarhus Compliance Committee recently criticised the current internal review system on these grounds. But legislative acts are still excluded, as is "acts taken when the EU institution acts as an administrative review body, such as competition decisions" – this includes state aid. There are still significant barriers[5] for NGOs seeking to challenge state aid decisions on the account of their incompatibility with environmental objectives. This is not in line with the renewed focus and attention paid to environmental concerns and objectives in the European Green Deal.

The ongoing review process must ensure that NGOs and civil society have the necessary access and rights to conduct its important societal role, holding decision-makers, private sector and society as a whole accountable to the commitments under the European Green Deal – also when it comes to competition law and state aid.

Clarity and guidelines subject to frequent updates

As a general note, the ongoing revision and evaluation process of state aid guidelines, GBER and IPCEIs should focus on clarifying and incentivising information sharing when it comes to projects and economic activities eligible for state aid. Clarity and information sharing should be a priority across the three objectives outlined for feedback in this document. As outlined also under question 2 part 2.

State aid decision have a high degree of decentralisation, which leaves room for highly politicized decision-making at the Member State level. Although there are significant benefits in Member States themselves assessing where state aid is most needed, it also leaves room for misuse through political business cycles – and short-term use of aid as opposed to much needed long-term use of aid. While structural changes are needed – as outlined through ensuring no state aid funding goes to economic

[3] https://ec.europa.eu/environment/aarhus/pdf/Commission_report_2019.pdf
[4] https://meta.eeb.org/2020/10/15/ngos-access-to-justice-made-easier-but-not-guaranteed/
[5] https://eeb.org/commission-proposal-to-strengthen-access-to-justice-tackles-main-obstacle-but-falls-short-overall/

Bellona Europa aisbl
Rue Egmont 15
1000 Brussels, Belgium

Belgian organisation number
0458243836
www.bellona.org

Tel: +32(0)2 648 31 22
Fax: +32(0)2 646 81 22

activities in breach of the DNSH criteria under the taxonomy – it is also vital that any room for misunderstanding of eligibility of state aid is counter-acted through central EU action.

We believe it is vital to set up a clear, easily accessible and dynamic information channel – in line with ongoing digitalisation efforts under the European Green Deal it should take the form of a website or database. Frequent updated of guidelines based on case-by-case clarifications should be included. We also believe it would be beneficial to include a frequently updated "frequent questions asked" on general issues not related to specific cases. When interpretations are clearly shown in specific cases, they should be included and clearly identified through this information channel.

We believe the current gap of both understanding and information sharing is illustrated by the recent question[6] posed by MEP Tom Berendsen concerning the eligibility of green hydrogen subsidies in the Netherland under the SDE++ scheme. Although we understand, based on the reply by Commissioner Vestager[7], that "the content of discussions between the Member States and the Commission on State aid cases is confidential, especially while the case is still pending", information and clarification following a decision reached must be widely circulated and transparent. This will not only reduce the administrative burden of the European Commission – ensuring that applications for state aid from other Member States can benefit from earlier discussions and decisions, it will also provide clarity and opportunities for discussion on the climate impact credibility of future decision and discussions.

In the commission's reply, references to both RED II and the EU hydrogen strategy are made, clearly setting out which legislations and documents will be guiding the pending decision. We do note that revision of RED II delegated acts are currently ongoing, for which we have set out specific recommendations[8], and understand that decision of state aid will be based on the revised RED II when finalised. We believe it is necessary, however, to clarify what is underlying and meant by the response as it pertains to:

"State aid for hydrogen is certainly possible. As with support for other electrification technologies, this should take into account reasonable expectations about the future decarbonisation of the electricity generation mix to ensure the subsidies incentivise a reduction in pollution. For hydrogen produced from the electricity taken from the grid, the EU hydrogen strategy recommends that 'demand for electricity for hydrogen should be enabled in particular at times of abundant supply of renewable electricity in the grid'. In this context the design of the SDE++ should avoid creating incentives to increase pollution including greenhouse gas emissions."

It is not clear what constitutes "reasonable expectations about the future decarbonisation of the electricity generation mix to ensure the subsidies incentivise a reduction in pollution". Keeping in mind the growing attention paid to the production of clean hydrogen, and state aid cases for hydrogen production are expected to increase, there needs to be clear guidelines and information on what hydrogen investments and projects are eligible for state aid.

Question 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?

The ongoing evaluation process of the state aid guidelines and rules should make sure that the new state aid guidelines clearly set out that no state aid should be in breach with the Do-No-Significant-

[6] https://www.europarl.europa.eu/doceo/document/E-9-2020-005109_EN.html
[7] https://www.europarl.europa.eu/doceo/document/E-9-2020-005109-ASW_EN.html
[8] https://bellona.org/publication/position-paper-hydrogen-from-electricity

Harm (DNSH) principle as outlined by the sustainable finance taxonomy. This will ensure that state aid that does not go to sustainable economic activities, will be in line with the minimum requirements of "not doing substantial harm" to any of the six objective presented in the sustainable finance taxonomy.

Question 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?

The ongoing evaluation process of the state aid guidelines and rules must ensure that all economic activity under the sustainable finance taxonomy, in line with the overarching aims of state aid, are eligible for funding. In the context of competition policy, alignment with both Technical Screening Criteria (TSC) for one of the six objective, as well as the DNSH criteria under the remaining 5 objectives, should be incorporated into the analysis when determining potential distorting effects to competition – reflecting the arguments presented under question 1 as it pertains to the principle of "common interest".

Question 4: How should positive environmental benefits be defined?

Positive environmental benefits should be defined through alignment with the sustainable finance taxonomy, which already defines significant contribution in line with the Paris Agreement.

Part 2: Antitrust Rules

Bellona Europa has chosen to answer Question 1 and 3 together.

Question 1 &3:

- *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).*
- *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?)*

Article 101 of the TFEU sets out prohibited anti-competition agreements unless, as set out in point 3:

- *"any agreement or category of agreements between undertakings,*
- *any decision or category of decisions by associations of undertakings,*
- *any concerted practice or category of concerted parties,*

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

Bellona Europa aisbl
Rue Egmont 15
1000 Brussels, Belgium

Belgian organisation number
0458243836
www.bellona.org

Tel: +32(0)2 648 31 22
Fax: +32(0)2 646 81 22

b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".

Based on the new European Growth Strategy the European Green Deal, it is clear that anti-competition agreements with an identifiable economic, technological or consumer benefit – here also including environmental benefits – should be exempted from point 1 Article 101 of the TFEU. Below we identify how, and in which cases, based on examples.

Chicken of Tomorrow

The Dutch 2015 Chicken of tomorrow case is a widely cited example of desirable cooperation between firms to support animal welfare (a part of the European Green Deal Farm to Fork and Biodiversity strategies), hindered by antitrust rules[9]. In retrospect the case sparked a much needed debate on antitrust enforcement as a potential barrier for "socially desired sustainability benefits" – as outlined by the ACM. In this particular case, recent studies have shown that the planned "anticompetitive agreement was not necessary to realize the improvement in animal welfare that was envisaged in 2013". The ACM thus conclude that: "this shows that a third party with an independent certification label can be an effective alternative to an agreement".

However, it is also shown by the ACM's recent report on the case, that their estimate of consumers' unwillingness to pay for the improvement in animal welfare was not correct. As stated by the ACM: *"Now it turns out that consumers are willing to pay more than the price increase that was projected for the Chicken of Tomorrow, for an improvement in welfare that goes further than the Chicken-of-Tomorrow requirements".*

It cannot be ruled out that the debate sparked by the case in question contributed to increased attention and consumer awareness on the topic of animal welfare, and thus long-term contributed to consumer willingness to pay a higher price. It is also possible that had the agreement not been hindered by the ACM, it might have accelerated the process even further – which might not seem like a substantial advantage at first, but for the chickens in question any acceleration would undoubtedly have been appreciated. This is important as it highlights the potential social benefit of sustainability measures such as in the case of chicken of tomorrow, as well as the opportunity costs or delays to action resulting from it being hindered. It is therefore vital that the ongoing evaluation of antitrust rules takes into account the societal opportunity cost which might occur when anti competition agreements, with a significant contribution to the European Green Deal and climate change mitigation in particular, is hindered by antitrust decisions.

Antitrust rules of tomorrow

This has high relevance when it comes to climate mitigation efforts and potential increases in price for consumers as a result of cooperative efforts to achieve emission reductions which result in significant "socially desired sustainability benefits". We must move away from short-termism to long-termism, this also when evaluating cases of anti-competition agreement with substantial societal and environmental benefits under the European Green Deal. As such, the long-term benefit to the consumer resulting from the anti-competition agreement must carry weight. If the case in question can be shown to reduce the future costs of climate change mitigation for consumers, as one example of six objectives under the sustainable finance taxonomy, it should not be hindered simply because it increases the price for consumers at present. There are of course nuances to these estimates, and one must ensure that the safeguarding of consumer interests is at heart of these decisions. However, the long-term interest of the consumer should carry the heaviest weight as compared to short-term interests. In such a cost-benefit analysis, price should not be a stand-alone metric. The environmental

[9] https://www.acm.nl/sites/default/files/documents/2020-08/welfare-of-todays-chicken-and-that-of-the-chicken-of-tomorrow.pdf

Bellona Europa aisbl
Rue Egmont 15
1000 Brussels, Belgium
Belgian organisation number
0458243836
www.bellona.org
Tel: +32(0)2 648 31 22
Fax: +32(0)2 646 81 22

benefits to society as a whole, as well as cost estimates of future spending resulting of delayed climate action must also be incorporated when estimating consumer benefits.

We must also ensure that the sustainability claims presented through an anti-competition agreement can be substantiated – we must avoid false claims of greenwashing. To this end, the sustainable finance taxonomy is a good reference point for determining the benefit of the case in question. We urge that leniency is shown in anti-competition cases where substantial contribution to sustainability criteria under the 6 objectives of the sustainable finance taxonomy can be proven alongside long-term consumer benefits, although there are antitrust risk influencing competitiveness. However, it must be shown that anti-competition agreement in question would not significantly harm other market actors also able to prove a substantial contribution in line with the sustainable finance taxonomy. This would, in effect, create a "minimum" level of contribution similarly to that discussed during the chicken of tomorrow case. Anti-competition agreements assisting market actors in achieving such a "minimum" level of contribution (with reference to the sustainable finance taxonomy – which based on the Technical Expert Group is set to be a moving target aligning with market and technological developments) should not be hindered unless significant disproportionate competitive advantage over other market actors also operating in line with the "minimum" level of contribution (aligned with taxonomy) can be shown.

Question 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…?)

In general, it is our impression that there is a degree of uncertainty amongst market actors when determining to what extent they might be in breach of antitrust rules. It is therefore our opinion that it would be beneficial to have a higher degree of transparency and openness, especially when adding on additional requirements and exemptions as they pertain to the European Green Deal. As already noted under part 1, we believe NGOs can play an important role if provided proper access.

We therefore recommend that further clarifications are given on the "characteristics of agreements that serve the objectives of the Green Deal without restricting competition". But we also believe it is necessary to further elaborate and clarify antitrust rules and cases in general. Although the Commission already contributes positively to such a development through their annual competition reports, we recommend that an online dynamic database is established, with continuous updated guidelines and case-by-case assessment. We believe it would also be beneficial to have a determined space where frequently asked questions are updated in a dynamic fashion – and that this site is widely marketed.

Part 3: Merger Control

Question 1: Do you see any situation when a merger between firms could be harmful to consumers by reducing their choice of environmentally friendly products and/or technologies?

We see one category of merger being particularly relevant it this case. Where a proposed merger would not threaten effective competition, but would result in environmental efficiency losses

Bellona Europa aisbl
Rue Egmont 15
1000 Brussels, Belgium

Belgian organisation number
0458243836
www.bellona.org

Tel: +32(0)2 648 31 22
Fax: +32(0)2 646 81 22

Let us assume a merger between two high-emission market actors. The merger results in overall cost reduction, and thus reduces the immediate incentive to reduce emissions as a way to cut costs. The consumer is faced with an opportunity cost in the shape of a more sustainable product from the merging companies which failed to materialize due to the merger.

The merger could also result in more sustainable products being outcompeted (as the pollution is not properly addressed through pricing mechanism), or prevent their development or market entry, due to reductions in costs in the short-term. Consumers might need time and more information concerning the reliability and differences in the sustainability of the two products to change consumption patterns from low-cost to sustainability-high quality. In the long-term however, this would reduce consumers access to sustainable products, and could in fact lead to loss of investments done into sustainability and lead to lock-in in high emitters in the long-term. It would also create high barriers for market entry, as well as hamper the development of sustainable products, if the negative environmental effects are not reflected in the price of production.

Question 2: Do you consider that merger enforcement could better contribute to protecting the environment and the sustainability objectives of the Green Deal?

Additionally, to the points mentioned in response to question 1 – setting out the important part played by environmental factors and sustainability factors as well as "effective competition" - it is our opinion that there is currently room for additional action in the current EU Merger Regulation 139/2004 (EUMR)[10]. We do believe amendments should be made to enable a greater focus on the environmental efficiencies, but there is still room for merger enforcement to play a role as it stands. The regulation does already set out under Article 2 point 2 and 3 which mergers are compatible and incompatible with the common market:

Article 2.

(2) "A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.

(3) A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market"

Recital 23, provides additional context and reference to Article 2 in the TEC, when determining what constitutes "effective competition".

(23) "It is necessary to establish whether or not concentrations with a Community dimension are compatible with the common market in terms of the need to maintain and develop effective competition in the common market. In so doing, the ***Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty establishing the European Community*** *and Article 2 of the Treaty on European Union".*

The referenced article 2 in TEC[11] outlines: *" The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious,*

[10] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32004R0139
[11] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A12002E002

balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."

Here the reference to "sustainable development of economic activities", "sustainable and non-inflationary growth" as well as "a high level of protection and improvement of the quality of the environment" clearly links merger control to the overall sustainability objectives of the European Union.

This link must be clarified however, and it should be considered to revise the EUMR to ensure that link is clear and is reflected in case law, at the very least a new set of guidelines identifying the link and its growing importance in relation to the European Green Deal should be widely distributed. As such, it should be assessed if positive environmental factors counteract potential impediments to effective competition resulting from the proposed merger. Although this is an area where substantial efforts and work still remain, for merger control to be in line with the European Green Deal, the OECD's "Sustainability & Competition Law & and Policy – Background Note"[12] outlines cases where in fact environmental concerns have already played an important part in merger control decisions, as listed below.

- ***Bayer/Monsanto 2018:*** "it has been argued that the Bayer/Monsanto merger is also negatively effecting sustainability (Lianos and Katalevsky, 2017). The merger would not only increase industry concentration, entrench market power leading to higher prices for farmers and locking them in, but it would similarly affect the availability of seed diversity and overall could lead to increased use of fossil fuel based herbicides and pesticides thereby negatively affecting sustainability (Lianos and Katalevsky, 2017)"
- ***Miba/Zollern 2019:*** "In this case involving a German medium sized company, the minister justified his decision by references to innovation potential regarding technology relevant to renewable energy technology which in turn would be crucial for the reduction in CO2 emissions, environmental protection and sustainability"

12 http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2020)3&docLanguage=En