November 2020

Competition policy supporting the Green Deal

Our call for a sustainable competition policy

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ClientEarth

Contents

Executive summary

ClientEarth welcomes the Commission's call for contributions on how competition policy can support the Green Deal. This alignment is necessary since, so far, competition policy primarily focussed on distortions of competition in the internal market without considering environmental negative externalities of economic activities and without having much regards to the social and environmental dimensions of sustainable development.

Competition policy should be rethought and reshaped in accordance with overarching principles of the EU treaties, such as **Article 3 TUE**, **Article 11 TFEU and Article 37 EU Charter of Fundamental Rights** that call for a consistent, coherent and integrated approach of environmental concerns across all Union policies.

Such rethinking does not need to be revolutionary in antitrust and mergers policies. In antitrust, the Commission has, yet underuses, the **legal tools at its disposal** to embrace cooperation agreements that genuinely improve sustainability and innovation, as well as to sanction those agreements that are detrimental to the environment and consumers.

Contrary to the perception, ClientEarth wishes to stress that numerous forms of cooperation between undertakings **do not or are unlikely to restrict competition**. For those sustainability agreements restricting competition, ClientEarth believes there is room to exempt truly sustainable projects benefitting consumers provided the Commission (i) adopts a broader interpretation of the term "consumer" and (ii) departs from a strict economic approach to assess improvement and progress, thereby **allowing environmental benefits to be taken fully into account**.

In addition, in order to close the current **guidance gap** and avoid national guidance disparities, we call on the Commission to provide additional comfort and guidance. We suggest different types of instruments, which can be combined, to add to the toolbox.

Finally on antitrust, ClientEarth wishes to draw the attention to the Commission's important role in addressing environmentally harmful cooperation between undertakings, by taking into account environmental considerations when setting fines as well as by putting in place safeguards against "**greenwashing**", an increasing practice that undermines competition in the internal market.

With respect to merger control, ClientEarth similarly believes that the Commission has the tools to support the objectives of the Green Deal. When assessing the compatibility of a merger, the Commission can undoubtedly consider the environmental impact and rely on a broader consumer welfare standard, which increases the scrutiny for unsustainable mergers. In addition, we suggest to **amend the legitimate interest clause to encompass sustainability goals**.

A **deeper reflection on State aid policy** is nevertheless required, if the Union has the ambition to drive the achievement of the Green Deal objectives, for itself and for the Member States, and act according to its "do no harm" oath. This is because whilst the State aid framework could be a powerful tool to support the energy transition and the Green Deal objectives, it fails to limit environmentally harmful aid so far. In the context of global warming and with the pursuit of the 2050 climate neutrality objective, fossil fuel subsidies must simply end. These also prevent other innovative and cleaner technologies to be deployed, as fossil fuel producers are monopolising funding resources to remain competitive on the market. We thus recommend that State aid guidelines or notices mention explicitly that **aid to fossil fuels cannot be found compatible with the internal market because of their incompatibility with the decarbonisation objectives.**

Similarly, the State aid rules should not allow aid to heavy polluting activities. In particular, numerous exemptions and charges reductions granted to electro-intensive users contribute to increase burden costs on citizens and undermine the funding base for the energy transition. This is contradictory with the fact that small scale market players (such as renewable energy communities) are not sufficiently supported through State aid rules, whilst the Clean Energy for all Europeans Package places citizens at the core of the energy transition – and so does the Green Deal. Aid to petrochemicals and plastics producers may also not be granted if their output is harmful substances or products. In the fishing sector, certain aid contributing to fishing overcapacity should be prohibited, as well as aid to forestry biomass and fossil-based hydrogen.

Overall, this calls for a **new compatibility assessment test**, applicable across all sectors, which must include (it is developed more in our contribution):

- A clear incompatibility of aid to fossil fuels since those investments are not in line with the Green Deal objectives;
- A systematic and effective control of compliance of beneficiaries of aid with their environmental law obligations. Relying on Member States' assumptions proved not being sufficient in a number of cases and such compliance should be a clear condition to the grant of aid – as it should be for any other field of EU law (notably energy law);
- When an activity is environmentally harmful, it should be evidenced that no cleaner and more sustainable alternatives exist – in which case no aid could be granted – and when that is not the case, aid should be subject to clear conditions must be put on the beneficiary to align its activity with environmental standards and decarbonisation targets.

More broadly the Commission should increase **transparency** of its State aid decisional practice and **enhance the rights of interested parties**. The Commission cannot both proclaim that consumers are at the centre of the transition and not being accountable for decisions it takes that harm those consumers, at the end of the chain.

Introduction

ClientEarth is a non-profit European environmental law organisation with offices in Brussels, London, Madrid, Berlin, Warsaw and Luxembourg (as well as Beijing and Los Angeles). In total, ClientEarth currently has over 200 staff working on projects in more than 50 countries. Using the power of the law, we develop legal strategies and tools to address major environmental issues, we provide legal information to most of the environmental NGOs in Brussels (and beyond) and use the courts where necessary to enforce environmental law. The organisation is composed of programmes on Climate, Energy markets, Fossil Fuels, Trade, Oceans, Harmful chemicals, Plastics, Clean air, Wildlife, Forest, Agriculture and Environmental Democracy.

For several years, ClientEarth has been advocating for State aid rules to align with environmental protection and climate protection objectives that are now contained in the Green Deal and for an effective internalisation of the cost of pollution. Besides calling for a revision of relevant State aid guidelines, in particular for environmental protection and energy and influencing relevant legislation relevant for support schemes[1], we regularly file complaints or submit observations on particular schemes that are not aligned with State aid rules on the one hand, and environmental protection objectives on the other hand.[2]

ClientEarth **welcomes** the Commission's call for contributions on how competition policy can support the Green Deal. We hope this call will awake the EU institutions, Member States and stakeholders on the necessity to adopt a competition law practice that is consistent with this new sustainable growth strategy.

As expressed by Executive Vice-President and Commissioner for Competition Margrethe Vestager[3]:

> *"[a]fter all, competition helps to make us more sustainable. In a competitive market, where there is transparency, businesses can't afford to use more scarce – and expensive – resources than they absolutely need. And competition also helps to drive innovation, and expand our society's stock of ideas and technologies that help us live more sustainably. But most importantly, perhaps, competition means that businesses have to listen to consumers, when we demand sustainable products*."

This contribution addresses the three topics of **State aid control, antitrust rules and merger control**. It is supported by **examples of rules or practices** that we believe should be supported further – including projects in which ClientEarth has been directly involved – or that evidence how competition policy has been disconnected from the pathway the Union needs to take to achieve EU's climate neutrality objective by 2050. It also contains **recommendations** for reorienting the direction of travel.[4]

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[1] For example we replied to the consultations on the revision of the State aid guidelines for environmental protection and energy (July 2019), on the ETS state aid guidelines (March 2020), on regional aid guidelines (September 2020); published a website containing our analysis of various topics of the EEAG such as support schemes for renewables, energy efficiency and district heating, industry decarbonisation, capacity mechanisms.

All our publications are available on our website.

[2] As examples of legal interventions in 2019-2020, ClientEarth filed complaints against unlawful aid to coal operators in Bulgaria and Romania; made observations on the need and design of the British, Polish, Greek, Bulgarian and Belgian capacity mechanisms; published analysis on the coal phase out compensations in Germany.

[3] GCLC Conference on Sustainability and Competition Policy, Brussels, 24 October 2019

[4] ClientEarth will contribute *inter alia* to other consultations on the revision of State aid guidelines in 2020-2021.

1 General remarks

1.1 Regulation and competition policy

In its call for contributions, the Commission takes the stance that "*Competition policy is not in the lead when it comes to fighting climate change and protecting the environment. There are better, much more effective ways, such as regulation and taxation*" but "*it complements environmental and climate policies and regulation aimed at internalising environmental costs*."

ClientEarth agrees that regulation has a crucial role to play for reaching the Green Deal objectives especially for market design, fossil fuels phase out, prohibition of toxic substances, carbon pricing/ETS, limitation of pollution levels, eco-design of products, circular economy, mitigation and remedy of environmental damages etc. Besides, while part of the necessary changes to reduce anthropogenic greenhouse gas emissions can be supported by regulation, the removal of environmentally harmful subsidies, the necessary transformation of our economies and societies will be impossible without massive contributions – and transformation - from the private sector. It is true that competition policy alone cannot help achieve the necessary change.

However, the effectiveness of regulation is subject to it being ambitious and a driver for change, strong on principles and clear in its application, timely [5] and proportionate [6], effectively implemented and systematically enforced. This is unfortunately not always the case, in particular in the fields of environment and energy: lack of overall policy coherence, too great reliance on command-and-control type of instruments, administrative management inadequacies, lack of proper governance of regulatory authorities or agencies, need for unanimity at Council level in too many areas, etc.[7] **Lack of proper enforcement also has effects on the level playing field**.[8]

Hence, complementary market-based alternatives to legislation, such as environmental agreements between undertakings, are also part of the solution. In this regard, **competition law is more than an effective way to protect the environment**. The urgency to fight climate change calls for harnessing resources in the private sector *in addition to* regulation and public investment. Furthermore, as the EU competition authority and being in charge of EU State aid control, the Commission has in many cases a significant margin of discretion. This means that, even where the set legal rules might not require a case

[5] Before any regulation takes place, there can be such an important time lag - and the establishment of effective enforcement mechanisms might entail additional delays - that instead, a cooperation between competitors to eliminate negative externalities and thus remove obstacles to invest in the development of more sustainable products can be put in place earlier. See M. Dolmans, " *Sustainable Competition Policy*", Competition Law and Policy Debate CLPD, Vol 5, Issue 4 and Vol 6 issue 1, March 2020.

[6] Where regulation is effectively enforced, it sometimes can entirely "take over" and move entire areas out of the market space that remains subject to competition (e.g. in the area of binding and enforced regulatory standards, there is no scope for competition). This can be very helpful in particular when there are market failures, e.g. where consumers tend to opt for environmentally harmful products, leading to negative externalities that will eventually have to be borne by society at large.

[7] **Energy market rules are a notorious example of implementation failures**. For example, the Clean Energy for all Europeans Package (2018-2019) comes to remedy the same core market failures as the Third Energy Package (2009). The Commission had to come up with antitrust proceedings in several cases to remedy these failures, for example in cases AT.40461 (TenneT/ DE-DK1 Interconnector), AT.39767 (BEH electricity territorial restrictions) etc.

[8] Without effective enforcement, regulation "punishes" compliant behaviours with the entailed additional costs (e.g. meeting environmental standards) **while non-compliant rivals** can continue to undercut and to free-ride on society by **causing negative externalities**. Ineffective enforcement risks to drive compliant businesses out of the market.

to be decided in favour of environmental protection, it often will be **in the hands of the Commission whether a case is ultimately decided in line with Green Deal objectives or not**. Also, the Commission has significant influence on private sector competitive behaviour and Member States' State aid practice by way of its power to issue guidance and rules, communicate on its enforcement priorities and of course, investigate anticompetitive behaviours or breach of rules.

Finally, the pressure characterising competitive markets plays an important role in the achievement of the EU sustainability objectives because it is, as recognised in the call for contribution, "*a powerful incentive to use our planet's scarce resources efficiently*". In this respect, the Commission should recall that a **sustainable competition policy** should also incentivise **a more thoughtful consumption** and even "not using" these resources in the first place"[9]

ClientEarth therefore sees **competition policy as a complementary tool to reach the Green Deal objectives** – not as a subsidiary one.

1.2 Internal market, sustainable development and consumer welfare

Competition policy needs to align with Union citizens' needs and expectations from the EU and national policy makers; business practices also must align with sustainable development requirements if we are to keep referring to "consumer welfare". Developing an internal market without considerations for the environmental and social limbs no longer makes economic sense.

As ClientEarth demonstrated with partners in October 2020 in the context of the post-pandemic recovery[10], the EU treaties themselves call for a coherent, consistent and integrated approach of internal market (and competition) policies with sustainable development objectives. **We refer to Articles 3(3) TEU, Articles 7, 9 and 11 TFEU and Article 37 EU Charter of Fundamental Rights, but also to Article 12 TFEU** that ensures consumers protection in Union policies.

The "**green oath**" in the Green Deal with the imperative "**do no harm**" says not less: "*all EU actions and policies should pull together to help the EU achieve a successful and just transition towards a sustainable future*. (...) *The objective is to ensure that all Green Deal initiatives achieve their objectives in the most effective and least burdensome way and all other EU initiatives live up to a green oath to 'do no harm'*."

Moreover, in competition practice, the Commission should adopt a "**consumer welfare test**" in which the concept of "welfare" must be consistent with Article 3(1) TFEU, which reads that the "*Union's aim is to promote (…) the well-being of its peoples*". This concept invites to the consideration of sustainability. [11]

[9] As recognised by the Commission in its Article 101(3) Guidelines, at point 85, "*society as a whole benefits where the efficiencies lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources"* Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97–118

[10] ClientEarth and Agora Energiewende report with Redeker analysis, "*A State Aid Framework for a Green Recovery: Mainstreaming Climate Protection into EU State Aid Law*", 1st October 2020

[11] Holmes, "*Climate change, sustainability, and competition law*", Journal of Antitrust Enforcement, 2020, 8, p. 362

Moreover, the concept of "consumer" should be seen as including the "society as a whole" and, in the context of the fight against climate change, future generations (future "consumers").[12]

Recommendation: Widen the assessment of the protection of "consumer welfare" and take due account of externalities of products and practices that cannot be measured in direct prices

2 State aid control

It is true that "[State aid rules] *have facilitated green investments whilst limiting distortive effects of state subsidies in the past*".[13] What the State aid rules and practice have hardly achieved though – and this is acknowledged in the Fitness Check of 30 October 2020 - is limiting aid to activities having a harmful impact on the environment. Hence, **the rules have not limited environmentally harmful effects of aid**.[14]

The fact that State aid policy is not on the right track is visible in litigation: in the energy sector for example, applicants or interveners should not bear names such as Tempus Energy,[15] Greenpeace Energy[16] or Greenpeace-España,[17] i.e. small, innovative start-up businesses, often disrupters in their fields, or environmental NGOs. Their innovative and disruptive power is absolutely needed to ensure step changes to transform a carbon-based market into net greenhouse gas emissions-neutral one. They should not have to go to court for redressing State aid decisions that have left fossil fuel incumbents benefit from schemes and stay on the market to the detriment of the competitiveness of cleaner and more flexible solutions.

In general, environmental and climate protection issues should be considered **in all areas of State aid control, not only under the EEAG**. This applies both to the required "revised Commission approach" in light of the Commission's obligations regarding environmental protection under the Treaties and to possible additional changes to the rulebook as further discussed below.

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[12] This emerges clearly also from points 87 and 88 of the 101(3) Guidelines. When it comes to the elimination of negative externalities in the form of GHG emission reductions, such accounting of future gains should, however, not occur, due to the rising social cost of GHG emissions. See on this NYU Institute for Policy Integrity, *Expert Consensus on the Economics of Climate Change*, December 2015, p. 23).

[13] Call for contributions, p. 1.

[14] Commission staff working document – Fitness Check of the 2012 State aid modernisation package, railways guidelines and short-term export credit insurance, SWD(2020) 257 final, 30.10.2020, PART 3/4, p. 85.

[15] See Case T-793/14 *Tempus Energy Ltd and Tempus Energy Technology Ltd v Commission* EU:T:2018:790. In essence, *Tempus Energy* was trying to achieve a "re-levelling" of the playing field for zero carbon operators in the Great Britain Capacity Market, which offered more favourable conditions for vertically integrated incumbent electricity generators. See on this also a study of the University of Exeter (Matthew Lockwood, *The development of the Capacity Market for electricity in Great Britain,* University of Exeter, EPG Working Paper: 1702, available, pp. 137 f.).

[16] See Case T-382/15 *Greenpeace Energy and Others v Commission* EU:T:2016:589 and, on appeal, C-640/16 P *Greenpeace Energy v Commission* EU:C:2017:752. Greenpeace Energy is active in the operation of wind- and PV-based electricity production and its application for annulment was directed against the Commission's approval of the UK Government's aid for the construction of the Hinkley Point 3 nuclear reactor.

[17]See Case T-57/11 P *Castelnou Energía SL v Commission* EU:T:2014:1021. Greenpeace España intervened in support of an application for annulment of a decision approving aid for the operator of a coal-fired power plant.

2.1 Question 1: Main changes required to the State aid rulebook

2.1.1 Consistency with EU constitutional principles and Green Deal objectives

State aid control could have been, for years, much greener than the Commission wants to admit. Considering that the EU's constitutional provisions in Articles 3 TEU, Articles 7, 9 and 11 TFEU and Article 37 EU Charter of Fundamental Rights already require the Union, including its institutions, to pursue policies ensuring a high level of environmental protection, the Commission should already have been at the forefront of practicing a State aid control that ensures a high level of environmental (and climate) protection. Like the CJEU ruled with regard to social objectives in the Treaty,[18] since the EU has not only economic, but also environmental and climate protection objectives, Treaty provisions on State aid must be balanced against the objectives pursued by environmental protection policy.

In its 2001 Environmental protection aid guidelines, the Commission had such an approach – which seems to have been abandoned since: "*Under Article 6 of the EC Treaty* [now Article 11 TFEU]*, environmental policy objectives must be integrated into the Commission's policy on aid controls in the environmental sector, in particular with a view to promoting sustainable development. Accordingly, competition policy and environmental policy are not mutually antagonistic, but the requirements of environmental protection need to be integrated into the definition and implementation of competition policy, in particular so as to promote sustainable development.*" (recital 3)

We regret the recent step backward of the ETS State aid guidelines: whilst in 2012 and in the draft released in March 2020, these guidelines mentioned that "*the primary objective of State aid control in the context of implementation of the EU ETS is to ensure that <u>State aid measures will result in a higher reduction of greenhouse gas emissions than would occur without the aid</u> and to ensure that the positive effects of the aid outweigh its negative effects in terms of distortions of competition in the internal market*", all references to the objective to reduce greenhouse gas emissions disappeared from the new ETS State aid guidelines for 2021. Even if the guidelines are indeed not really pursuing an environmental goal, we argue they should have been aligned with this objective by principle.

Recommendation: show coherence of policies and consistency of decision-making. For this, systematically refer in State aid rules and decisions to the relevant general principles of the Treaty and primarily to Articles 11 TFEU and 37 Charter of Fundamental Rights, as well as to the Green Deal objectives and "do no harm" imperative.

[18] "[The EU] *has not only an economic but also a social purpose, the rights under the provisions of the Treaty on State aid and competition must be balanced, where appropriate, against the objectives pursued by social policy* (…)" Case C-319/07 P *3F v Commission* EU:C:2009:435, paragraph 58.

2.1.2 Systematic control of compliance of activities with environmental law

The Court of Justice recalled on 22 September 2020[19] that the Commission must check, in light of Articles 11 TFEU and 37 Charter of Fundamental Rights, whether an activity complies with EU environmental laws before authorising an aid measure. An aid measure to an **activity that breaches environmental law cannot be found compatible with the internal market**. This strong ruling is not limited to aid measures that are directly pursuing an environmental objective (the aid to build Hinkley Point C power plant was not) or that are assessed under the State aid guidelines for environmental protection and energy (the aid was assessed under Article 107(3)(c) TFEU directly). We agree with the need for predictable and stable support regimes, but it must be made clear that not only “adaptations necessary to comply with Articles 107 and 108 TFEU” are permitted grounds for revisions of support schemes, but also those necessary to ensure compliance with the EU environmental acquis

To be truly functional, we recommend that this verification be:

- **conducted against all relevant environmental, nature and climate laws**. For example, the EEAG currently prescribe that waste treatment and hydropower projects shall be compliant with, respectively, the Waste Framework Directive and the Water Framework Directive. Although clearly relevant, these are not the only environmental legal frameworks applying to those projects. For hydropower specifically, compliance with Article 6.4 Habitats Directive (for projects that have a proven impact on the water status and habitats and species), *inter alia*, is directly relevant.
- **effective:** merely stating that a provision of environmental law “*must be respected*”[20] without requiring evidence from the Member State that it will be the case is not sufficient in light of case law. It should be practically easy to do for large projects, notably.[21]
- **performed in the State aid decisions themselves** or at least, the authorisation of the aid measure should be made **explicitly conditional upon proven compliance**. Situations in which the Commission merely states that an environmental law (such as the Environmental Noise Directive) is applicable but “*The present state aid decision is without prejudice to any proceedings launched by the Commission under Article 258 of the TFUE in the context of this Directive, taking in particular into account the Letter of Formal Notice (2016/2192) that was sent to Croatia since it has failed to draw up all the necessary action plans on noise*”[22] is problematic in several respects: (i) it is an admission that there is a risk that the project does not comply with the relevant directive since the Member State is generally suspected to be in breach of it; (ii) it results in the aid being authorised by the Commission, (iii) granted by the Member States and (iv) the project being built whereas (v) compliance is not ensured.

[19] Judgement of 22 September 2020, *Austria v. Commission*, C-594/18P, paras. 44-45 and 100

[20]Commission decision on SA.48472 (2018/N) – Croatia – Amended concession agreement relating to the Istrian Y Motorway, fn. 74 and decision on SA.5683 (2020/N) – Croatia Sixth amendment to the concession agreement relating to the Istrian Y Motorway, fn. 95: “The Commission considers that Directive 2002/49/EC ("the Environmental Noise Directive") must be respected in this regard.” There is no assessment on whether that project was indeed compliant.

[21] There should be mechanisms in place. For example, the EC in 2015 opened a case against Romania for failure to apply the environmental acquis to small hydropower plants, but there is no mechanism in place to ensure that the affected plants do not receive incentives. The recent EC letter of formal notice to Croatia on inadequate application of the Habitats Directive in the case of wind farms shows that this also applies to other renewables.

[22] Commission decision on SA.48472 – Croatia – Amended concession agreement relating to the Istrian Y Motorway, fn. 74

- **monitored throughout the duration of the aid**: the Dabrova Dolina hydropower plant in the Mrežnica Natura 2000 site in Croatia was not built in line with the project specifications for which it was permitted and did not apply the mitigation measures stipulated in its environmental permit. In summer 2017 this contributed to the drying out of the Šušnjar tufa waterfall, yet the authorities dragged their feet in admitting the problem and only acted more than a year later after prompting from the Commission. However, for the period of non-compliance the project was still receiving feed-in tariffs.[23]

We also call on the Commission to be as vigilant about environmental impacts and violation of environmental law in State aid assessments **as it is for reviewing EU funding applications**. The recent case of Bulgaria's planned motorway through Kresna gorge is a relevant example of the Commission assessing compliance of an infrastructure project with environmental laws[24]; it led Bulgaria to withdrawing its application to EU funding and allegedly work towards making the project compliant with environmental laws. There is fundamentally no reason why eligibility to State aid should be assessed less strictly than eligibility to EU funds and the Commission should conduct the same level of control.

Recommendation: Systematically require that Member States justify that the activity that will benefit from State aid complies with environmental laws throughout the duration of the aid grant. When Member States notify an aid scheme, there should be procedures in place for that verification prior to granting the aid. Non-compliance with environmental law of an activity should trigger either a negative decision or recovery of aid.

2.1.3 A greener State aid agenda for the Western Balkans

On 10 November Western Balkans leaders signed the Sofia Declaration on the Green Agenda for the Western Balkans, thus bringing to life one of the Green Deal's action points. With this, they **pledged to phase out subsidies for coal and adhere to EU State aid rules**, as well as to adopt the EU Climate Law. While this is very welcome, the countries have for years already had obligations to apply EU State aid rules under their Stabilisation and Association Agreements, and also - in the energy sector – under the Energy Community Treaty. Implementation and enforcement are sorely lacking and in practice the national State aid authorities are not functionally independent. Some lack structural independence, while others lack capacity, political will, or enforcement tools. The case of the Federal guarantee for a loan from China Exim Bank for the Tuzla 7 coal plant in Bosnia and Herzegovina shows how brazen the authorities in the countries can be in their breach of the State aid rules.

The Green Deal includes the move to introduce a carbon border tax which could, if applied to the electricity sector, send a very strong message in favour of decarbonisation to the Western Balkans, but **this needs**

[23]See also ClientEarth's contribution to the targeted consultation on the EEAG, July 2019, para. 45-46
[24]ClientEarth and other organisations submitted evidence that Bulgaria is in breach of its obligations under Article 6(2) and Article 12 Habitats Directive and that the authorities must take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated as required by 92/43/EEC on the conservation of natural habitats and of wild fauna and flora. Environmental impact assessments (EIA) and appropriate assessments (AA) were also not conducted properly. See https://www.foeeurope.org/bulgaria-pulls-eu-funding-request-motorway-kresna-170120

to be accompanied by stronger measures for the enforcement of EU State aid rules in the accession countries. One way to do this would be to introduce ex ante notification and investigation by the Energy Community Secretariat under the Energy Community Treaty, in order to address breaches before they occur, at least in the energy sector where the countries clearly count on participating in the EU market.

2.1.4 Enhanced procedural rules for a smoother decision-making

"*The involvement and commitment of the public and of all stakeholders is crucial to the success of the European Green Deal. Recent political events show that game-changing policies only work if citizens are fully involved in designing them. People are concerned about jobs, heating their homes and making ends meet, and EU institutions should engage with them if the Green Deal is to succeed and deliver lasting change. Citizens are and should remain a driving force of the transition." "Since it will bring substantial change, active public participation and confidence in the transition is paramount if policies are to work and be accepted*." (The Green Deal)

Since citizens must be at the forefront of the Green Deal that "*put[s] people first*" and since it is recognised that the involvement of the public triggers both game-changing policies and general acceptance of the transition, these principles must be fully integrated into State aid policy. The Commission should act on **three fronts**: (i) increasing transparency of State aid procedures; (ii) enlarging the notion of "interested parties" in the Procedural Regulation 2015/1589; and (iii) enabling internal review of State aid decisions in accordance with the Aarhus Convention.

Transparency

Enabling the public to know and search when an aid measure is planned by a Member State and investigated by the Commission and how it is designed, would help the public control the use of public funds and State aid to the private sector. It would also enable the public to better monitor if planned aid measures are aligned with State aid law, the Green Deal objectives and environmental law.

At present, the Commission's State aid register is completed **only** when the Commission adopts a decision in a particular case. There is no mention in the State aid register of: (i) the date when pre-notification discussions regarding a planned measure by a Member State started; (ii) the date of the filing of a pre-notification (i.e. a draft State aid notification in the context of pre-notification discussions); (iii) the date of a formal notification and information thereon; (iv) the date at which the Commission finds the notification file to be complete; (v) a provisional timeline of the adoption of a decision at the end of the preliminary investigation[25]; (vi) "comfort letters" sent by the Commission to Member States informing them of the approval or refusal of their scheme before a final decision is formally issued.

The procedures are more transparent in other relevant fields that could serve as models:

[25] Since notifications and exchanges between the Commission and member states are in electronic form, it should not be an additional administrative burden to simply extract and report procedural steps in the register.

In antitrust:

- In the case of on-site inspections (dawn raids), the Commission usually publishes a press release.[26]
- Along with its final decision, the Commission also publishes the final report of the Hearing Officer[27] and, Advisory Committee opinion(s), if any.[28]
- In case the parties to a proceeding submit a commitments proposal, the Commission also publishes the following documents[29]:
  - the "market test notice",
  - the full text of the commitment proposal in its non-confidential version,
  - (usually) a press release announcing the market test and setting out the key issues of the case and the proposed commitments.
- Both where the Commission intends to adopt a commitment decision and a decision finding the inapplicability of the prohibitions laid down in Articles 101 or 102, it publishes a summary of the case and the main content of the commitments or of the proposed course of action.[30]
- Commitment decisions and decisions finding inapplicability of Articles 101 and 102 have to be published. [31]

In mergers: the Commission publishes the fact of a concentration notification along with details identifying the parties and economic sectors involved[32], as well as deadlines, suspensions and end dates that enable the public to follow the investigations' schedule.[33] In addition, subject to publication are also the decisions with which the Commission appoints a hearing officer and those regarding the interruption, termination or transfer of the hearing officer, as well as his final report.[34]

On applications for exemptions under the Directive concerning common rules for the internal market in natural gas: pending notifications or applications for prolongation of national exemptions are published and opened for comments (although within a very short timeframe and with extremely limited information that does not allow for meaningful contributions).[35]

[26] E.g. press release of 20 October 2017, "*Antitrust: Commission confirms inspection in the car sector in Germany"*
[27] Antitrust ManProc, Section 13, Right to be heard, p. 10/11, para 5
[28] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25, Article 14(6).
[29] Antitrust ManProc, Section 16, Commitment Decisions, para 3.5
[30] Article 27 (4) of Regulation 1/2003
[31] Article 30 (1) of Regulation 1/2003
[32] EU Merger Regulation, Art. 4(3)
[33] See e.g. summary of case M.8870 E.ON / INNOGY in the register, referring to several deadline suspensions
[34] Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, 2011/695/EU, Articles 2(1) and 17.
[35] See for example recently: Commission notice of pending notification of national exemption for Alexandroupolis LNG terminal, last updated 19 October 2020; Commission receipt of the notification from the Greek Regulatory Authority (RAE) on the prolongation of exemption for Trans Adriatic Pipeline (TAP), 12 August 2020

Recommendation: adapt Commission's procedures to higher transparency standards by:

- entering the dates of the various **procedural steps** (including of pre-notification and notification of aid measures) in the State aid register;
- publishing the **pre-notification and notification files** in order to inform the public about the type, amount and objective of aid measures, the beneficiaries and relevant features, since market operators are as concerned by possible distortions of competition due to grant of aid as they are by an antitrust or merger case. We highlight that aid measures that are notified are generally decided in a transparent manner at national level so secrecy at EU level is not justified;
- publishing Commission's **letters to Member States** finding that Articles 107 and 108 TFEU are inapplicable to a measure that would not qualify as State aid[36];
- publishing non-confidential versions of State aid decisions **in a timely manner**. To this effect, amend the Procedural Regulation and Best Practice Code to include a period – that could be of two weeks – for the Member State to redact any confidential information; beyond which period the Commission decision would be presumed not to contain any confidential information and should be published in the State aid register.

All these publications and information should be communicated as soon as they are validated, received or released by the Commission.

Revising the notion of interested parties

Considering that State aid policy is also about controlling the use of public funds, there is no good reason why civil society organisations should not be expressly given the status of an "interested party" under Article 1(h) of the Procedural Regulation.[37]

Members of the public and civil society organisations contribute, through substantiated complaints, to the Commission's scrutiny of unlawful aid or misuse of aid. Any person or organisation whose interest may be affected by the grant of aid should be vested with the procedural rights entailed by the status of "interested parties".[38]

As systematically demonstrated by ClientEarth in its complaints to the Commission, the wording of Article 1(h) Procedural Regulation does not exclude individuals or civil society organisations.[39]

Furthermore, the reason for why **State aid may be considered compatible with the internal market is often not purely economic**. In particular, the EEAG provide that "*[t]he general objective of environmental aid is to increase the level of environmental protection* (…)" (para. 30). It follows from such recognised

[36] As an example, the Commission wrote to Germany on 4 July 2018 (ref. COMP.B3.JK/JG/kd*D*2018/082136) that the statutory compensation scheme for nuclear power pursuant to the nuclear exit law (16th AtG-ÄndG of 28 June 2018) was in line with *Asteris* case law and did not have to be notified by Germany. This letter was not published.

[37] Council Regulation 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ 2015 L 248, p. 9.

[38] See recitals 32 f. and Article 24 of the Procedural Regulation as well as Section 9 of the Best Practices Code

[39] Case C-83/09 P *Commission v Kronoply and Kronotex* the Court stated that the definition of interested parties in Article 1(h) "*covers an indeterminate group of persons*" (see paragraph 63). It has been opined in literature that the list is too narrow and should potentially include NGOs (see Rusche in: Immenga/Mestmäcker, Wettbewerbsrecht, Vol. 3: Beihilfenrecht / Sonderbereiche, 5th ed. (2016), Beihilfenverfahrens-VO Art. 1, at 11).

non-economic objective of common interest – as well as common sense – that non-economic interests can be concerned by the grant of State aid. An organisation that possesses such an interest, based on its statutory documents and/or its demonstrated activities, is an interested party where that interest is affected by the granting of State aid.

Moreover, the Court of Justice recently confirmed that aid to an activity that breaches EU environmental law cannot be found compatible with the internal market.[40] Compliance with environmental laws is a matter of particular public interest given the impacts such violations can have on habitats, biodiversity, food, health and well-being amongst others. NGOs are admissible to act against such violations when they arise in other contexts that competition law. The same goes with activities that breach EU secondary law in other fields.

Since the Commission has exclusive powers to control the compatibility of an aid measure with the internal market, and since access to national courts faces obstacles in a number of jurisdictions, direct procedural rights under the State aid procedural regulation are necessary.

Recommendation: the definition of "interested parties" in Article 1(h) Procedural Regulation should be revised as underlined and removed: *"'interested party' means any Member State and any person, non governmental organisation, undertaking or association of undertakings whose interests might be affected by the granting of* aid,~~ *in particular the beneficiary of the aid, competing undertakings and trade associations."*~~

Application of the Aarhus Convention to State aid decisions

The Commission is consulting until December 2020 on its proposal to amend the Aarhus Regulation.[41] The Commission has adopted this legislative proposal with the objective of bringing the EU into compliance with the Aarhus Convention and to ensure delivery of the Green Deal.[42] However, in its current form, it would do neither of these things because it includes restrictions that would continue to exclude a significant proportion of EU non-legislative acts from internal review.

In particular, the proposal still excludes internal review of Commission State aid decisions. State aid decisions are administrative acts adopted by the Commission (and are not quasi-judicial acts in any way) that may breach EU environmental laws. The CJEU has explicitly confirmed[43] that the Commission needs to ensure that its State aid decisions only authorise projects that comply with EU environmental law. NGOs must therefore be able to request an internal review if there is evidence that the Commission may have failed to verify that the project benefitting from State aid complies with EU environmental law.[44]

Moreover, State aid decisions are powerful instruments that affect the environment. The Sustainable Investment Plan does recognise the role of State aid to achieve the Green Deal objectives. For example, State aid decisions shape the EU's energy market (support to fossil fuels, to renewable energy sources, security of supply measures, etc.), which has a direct impact on the balance between polluting and non-

[40] Judgement of 22 September 2020, *Austria v. Commission*, C-594/18 P, ECLI:EU:C:2020:742, paras 44-45, 100.

[41] COM(2020) 642 final 2020/0289 (COD), 14 October 2020

[42] In the Green Deal, the Commission committed to 'consider revising the Aarhus Regulation to improve access to administrative and judicial review at EU level for citizens **and NGOs** who have concerns about **the legality of decisions with effects on the environment'** and to 'take action to improve their access to justice before national courts in all Member States'.

[43] Judgement of 22 September 2020, *Austria v. Commission,* C-594/18P, ECLI:EU:C:2020:742, paras 44-45, 100.

[44] See also Ökobüro and ClientEarth's joint letter of 6 November 2020 on Aarhus Communication ACCC/C/2015/128

polluting industries on the market. They determine when an industry can benefit from free emissions (ETS) allowances or be compensated for indirect emissions costs. Although this can preserve their competitiveness, it relieves them from internalising pollution costs and can disincentivise shifting to cleaner energy sources or increasing energy efficiency. State aid guidelines (the EEAG) have a crucial role in the integration on the market of renewable energy sources and determine when aid can be granted to improve environmental protection. State aid decisions also authorise public funding of infrastructure projects (roads, pipelines, airports etc.) that must comply with environmental laws.

Recommendation: Article 2(2)(a) of the Aarhus Regulation should be deleted in order to bring the regulation in compliance with Article 9(3) Aarhus Convention.

2.2 Question 2: Less aid to harmful activities

There are a number of rules, and interpretation thereof in State aid guidelines that leave room to supporting, with taxpayers money, activities that are now known to be harmful for our health and environment. Whereas specific guidelines would need to be revised individually and we make targeted propositions in Annex, we propose **principles and assessment grid that can be mainstreamed** across all State aid rules and practice. There should also be a strict incompatibility with the internal market of aid to activities that are incompatible with the Green Deal objectives, such as to fossil fuels.

Activities and practices that are prohibited under environmental laws or discouraged by environmental policies can be presumed to be harmful and fall within the scope of the consultation's question. Activities that are not in line with the Green Deal and which are sufficiently evidenced, by science, to be harmful for the environment (including for nature, climate and health) should equally be excluded from State support.

Before detailing what assessment criteria should apply to these activities, question 2.a. of the call for contribution raises several comments.

2.2.1 Question 2.a: comments on Commission's stances

The Commission asks: "*For projects that have a negative environmental impact, what ways are there for Member States or the beneficiary to mitigate the negative effects?*" If the Commission is asking about the range of mitigation measures that a project owner can put in place to minimise its environmental impact, these measures stem from relevant environmental law and implementation measures the Commission can refer to. We struggle to see how they can be a matter of competition law.

The Commission then mentions some infrastructure that could have an impact on biodiversity. It is evident that not only broadband, railways and hydropower investments have an impact and that not only biodiversity can be affected. As pledged by the Commission itself, competition policy should also be aligned with the Zero Pollution Action Plan that includes air, water and soil pollution that also affect human health.[45] The Farm to Fork Strategy aims at adopting practices that are safer and healthier for food consumption. The release of greenhouse gas emissions and increased energy consumption are also relevant negative impacts that the Clean Energy Package (with the Efficiency First principle) and the Energy System Integration Strategy, *inter* alia, aim at tackling. Hydropower has impacts on habitats and

[45] See ClientEarth's reply to the Commission's "Roadmap on an EU Action Plan Towards a Zero Pollution Ambition for air, water and soil", October 2020

species indeed[46] but can also have a significant impact on population and health through human displacement and resettlement; restrictions of the right to access to water and/or land; effects on water quality and ultimately on health; employment patterns; impairment of property rights and so on.[47] Small hydropower projects (<10MW) are particularly harmful in this respect whilst contributing very little to energy production and security of supply.[48] **Hence, the question should cover *any type* of infrastructure and *any type* of negative environmental impact.**

The question also assumes that the works will proceed – and implicitly, that State aid would have been authorised regardless of identified negative environmental impacts of the project. **This is an assumption that must be reversed** as explained hereafter. In this respect, the Commission's stances that State aid decisions merely *authorise* a Member State to grant aid and do *not oblige* it to proceed (and the project to be built) are legally correct but practically false and tinged with bad faith.[49] The "flip side" of the criteria of incentive effect is that when an activity receives State aid, it goes forward. This is particularly the case for the types of large infrastructure projects targeted by question 2.a.

2.2.2 Call for a revised assessment of aid to harmful activities

We believe the **Commission has the powers** to refine its compatibility assessment of aid measures in light of and in line with general principles of the Treaty mentioned above and the Green Deal objectives. **A new assessment grid** should include[50]:

- As mentioned above under section 1.1.2 (and with the examples referred therein), a baseline should be verifying that activities that will benefit from aid **comply** with all relevant environmental laws throughout the period they receive state aid.

- provisions that **exclude support for activities that are environmentally harmful**, ideally also going beyond the requirement of ensuring compliance with EU environmental legislation. In this respect, going beyond environmental legislation will in many cases be required to ensure alignment with Green Deal objectives, because the current EU environmental legislation does not yet ban (or provide stricter emission limits for) many practices that entail negative environmental externalities;

[46] Due to river fragmentation, severe modification of river flow and temperature regimes, and dramatic reductions in sediment transport.
[47]For instance, small plants are usually derivation-type plants, involving rivers and streams being dammed and put into pipes to increase the water velocity and therefore the efficiency of the plant. However, this can severely impact access to and quality of water for local people in remote areas, whilst deforestation for the construction of access roads and pipelines can lead to erosions and impact access to land and disrupt kilometres after kilometres of river banks. These are only examples of negative effects.
[48] ClientEarth will develop its proposal to amend the EEAG in respect of hydropower in its response to the consultation on the revision of the EEAG.
[49] Further Reply by the European Commission on behalf of the European Union, following the remarks of the complainants ClientEarth and Ökobüro in Case ACCC/C/2015/128, 21 July 2018, para. 11: *"(…) no compulsory intervention of the Member States can take place after a Commission decision on State aid, the national authority being perfectly free to not implement the Commission decision in the sense of not granting the aid measure*."
[50] In details, see ClientEarth and Agora Energiewende report with Redeker analysis, "*A State Aid Framework for a Green Recovery: Mainstreaming Climate Protection into EU State Aid Law*", 1st October 2020, pp. 13-14

- An assessment according to which:
  - the more an aid measure increases - or does not mitigate - negative environmental or climate effects (e.g. in terms of biodiversity or greenhouse gas emissions)[51],
  - the more long-term the negative environmental or climate effects of an aid measure (e.g. because of the life-time or persisting pollution of the supported investment or activity),
  - the more alternative measures exist that would be less harmful to the environment or avoid negative environmental effects altogether[52], and
  - the less 'safeguards' for mitigating negative environmental effects are proposed by the beneficiary of the aid[53], then
  - **the less an aid measure can be considered to be in line with sustainable development in the internal market and the more restrictive the compatibility conditions should be.**

2.2.3 Call for a proper assessment of environmental impacts

It is very rare, outside the scope of aid measures for environmental protection, that the Commission takes environmental considerations - including the findings of the environmental impact assessment - into account when performing the "balancing of interests" test to assess the compatibility of aid.[54] Alternative and environmentally less harmful solutions are rarely if at all considered or even on the radar during the assessment.

This is particularly striking in **decisions on aid for energy infrastructure**.

Aid to fossil fuel infrastructure contradicts the call for a phasing out of environmentally harmful subsidies and undermines the green transition. Nevertheless, for the vast majority of gas infrastructure projects (gas pipelines, gas interconnectors, LNG terminals, gas storage, etc.)[55], the Commission has issued decisions not to raise objections and declared the aid compatible with Article 107(3)(c)TFEU and the EEAG, **without making any environmental considerations**. In these decisions, the Commission steadily follows the Member States reoccurring argument that the objective of common interest[56] for granting State aid to gas infrastructure is security of supply. This nearly looks like a **"ticking the box" exercise**. Yet, given the EU gas infrastructure overcapacity, new gas infrastructure projects are not required for security of supply,

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[51] To this end, Member States should require the aid beneficiary to produce a "climate and environmental impact report" demonstrating how the aid will be used for the beneficiary to align its activities with climate protection and energy transition objectives. It is essential that such reports are published alongside the State aid measure or decision thereon, duly monitored and effectively enforced by the Member States and the Commission and that the practice always evolves towards more stringent pathways and commitments.

[52] If cleaner alternatives exist, Member States should duly motivate why these are not supported instead of the planned project.

[53] **Safeguard measures** could be a review of the climate and environment compatibility assessment of the aid every five years and in any case when the relevant climate, energy, biodiversity targets are revised upwards and granting authorities' responsibility to demonstrate that the beneficiaries of the aid continue to meet all the criteria every five years (as part of the Member States' reporting obligations).

[54] In decisions 629/2009 and SA38037, relating to investment in the electricity and natural gas transmission systems in Romania, predating the entry into force of the EEAG, the Commission briefly took into account environmental protection considerations in its balance of interests.

[55] See e.g. the following Commission decisions: SA43879 (Aid for the construction of the new Trans Adriatic pipeline in Greece); SA39050 (Aid for 9 new projects for new gas transmission systems in Poland); SA51023 and SA52049 (Aid for the construction of a cross border gas interconnector between Greece and Bulgaria); SA39515 (Aid to new LNG terminal in Pori, Finland); SA42889 (Aid to new LNG terminal in Hamina, Finland); SA51983 (Aid to new LNG terminal in Krk, Croatia); SA50953 (Aid for the extension of the new LNG terminal in Swinoujscie, Poland).

[56] Though this criterion has now been questioned by the CJEU in case C-594/18P, in any event

meaning that it should not be deemed a valid objective for the Member State to pursue. A 2020 report by consultants Artelys found that "*the existing EU gas infrastructure is sufficiently capable of meeting a variety of future gas demand scenarios in the EU28, even in the event of extreme supply disruption cases*".[57] For instance, although the EU has a huge overcapacity for LNG terminals (as indicated by the Commission itself in its decision regarding the terminal in Krk (Croatia), the capacity utilisation is in the order of 25% to 30% on average in the EU[58]), aid is provided and authorised for the construction of new LNG terminals.

In addition, for gas infrastructure projects that are listed as Projects of Common Interest (PCI), the Commission presumes that the project fulfils an objective of common interest. ClientEarth has raised valid objections against the inclusion of gas infrastructure projects on the PCI-list[59], which has been underpinned by a recent report from Global Witness.[60] The European Ombudsman found on 17 November 2020 that PCIs are not screened against their sustainability or lack thereof.[61]

Recommendation: In its 2001 Environmental protection guidelines, the Commission was proposing a practical solution that could be applied today: "*When the Commission adopts or revises other Community guidelines or frameworks on State aid, it will consider how those requirements can best be taken into account. It will also examine whether it would not be expedient to ask the Member States to provide an environmental impact study whenever they notify it of an important aid project, irrespective of the sector involved*."(recital 83).

But it is not sufficient to conduct *any* environmental impact assessment of a project. It needs to lead the Commission to require form Member States to demonstrate that there are **no more sustainable alternatives** to achieve the same outcome and are more worth spending taxpayers money on.

A screening of Commission's State aid decisions reveals that when a project is seen as an environmental improvement compared to an alternative or what it replaces (e.g. conversions from coal to gas or to unsustainable biomass, new gas connections[62], or waste incineration[63]), the Commission seems satisfied with a *better* solution without investigating what would be *the best* or the "*even better*" one. The Commission stops its reasoning there and does not ask the Member State to justify – on the ground of the objective of common interest and appropriateness criteria, for example – that there is not an even "greener" alternative. Just because such projects *may be less* environmentally harmful than alternatives (such as burning coal), it certainly does not mean that they are desirable. As technological and market developments evolve, greener and more efficient solutions, including in energy infrastructure and supply and flexibility, are increasingly feasible and competitive, so that stopping at "what is slightly better" is no

[57] Artelys, "*An updated analysis on gas supply security in the EU energy transition*", 2020,

[58] Commission decision on SA 51983, Aid for the construction of LNG terminal in Krk, Croatia, para. 44.

[59] ClientEarth's legal analysis on the 4th PCI-list, 29 January 2020

[60]Global Witness Report, *Pipe down – How gas companies influence EU Policy and have pocketed 4 billion euro of taxpayers' money*, June 2020

[61]Decision in case 1991/2019/KR on the European Commission's action concerning sustainability assessment for gas projects on the current List of Projects of Common Interest, 17 November 2020

[62] See e.g. Commission decisions on SA. 45779 (2017): Modification oil plant into gas plant and LNG terminal in Malta; SA. 36290 (2014): extension of gas network in Northern-Ireland

[63] Just for one example, the Commission approved a Polish scheme for the construction of a combined heat and power plant in Gdansk that would burn municipal waste (decision SA. 55100). The reasoning for the intervention was that "without public support, a heating plant fired with conventional fuels such as natural gas or hard coal" would have been constructed. However, waste incineration is still highly polluting.

longer acceptable; that is not even guaranteed to be cheaper in the long run (also taking into account the risk of stranded assets and progressive divestment of private investors from unsustainable projects).

2.2.4 Phase out of aid to fossil fuels

Despite the new assessment test proposed above, aid to some activities that are clearly not in line with the Green Deal should outright be found incompatible with the internal market. This is actually what the Commission itself proposed in the draft regional aid guidelines, stating that support to coal and lignite should be found incompatible with the internal market *because* these investments are not in line with Green Deal objectives. The Commission's proposals for Recovery and Resilience Fund and the Just Transition Fund did not include support to gas. The Commission has thus taken **bolder statements** recently than it does in this call for contributions.

General remarks

"***As outlined in the European Green Deal, fossil fuel subsidies should end.***"[64]

Phasing out fossil fuels from Europe's energy mix by 2030 is crucial for meeting the Paris agreement commitments as well as EU's 2030 climate and energy targets and the objective of making Europe carbon-neutral by 2050. In addition to market-driven closures, which are inevitable for coal and lignite in most European markets, phasing out fossil fuels means a correlative **end to the subsidies that support them** – many of which constitute State aid – **from now on**. The EU and Member States have pledged *for a decade* to phase out subsidies for fossil fuels and for coal in particular.[65] However, *"Fossil fuel subsidies in the energy sector remained stable between 2015 and 2018, with coal subsidies amounting to 30%."*[66] Finding State aid to fossil fuels incompatible with the internal market is not only a matter of respecting the "green oath". It is also a matter of **levelling the playing field** up for technologies that have an actual potential for deployment and that would be much more competitive if they did not have to compete with depreciated incumbents under public funding perfusion. Since the deployment and market integration of cleaner and more flexible technologies is also a legal requirement under the Clean Energy Package and part of the EU's System Integration Strategy, competition law including State aid rules should serve that goal in the best manner.

[64] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2020 report on the State of the Energy Union pursuant to Regulation (EU) 2018/1999 on Governance of the Energy Union and Climate Action, Brussels, 14.10.2020, COM(2020) 950 final, p. 22

[65] See e.g. Council decision 2010/787 of 10 December 2010 on state aid to facilitate the closure of uncompetitive coal mines, recitals (2) and (3); IEA, OECD and World Bank Joint Report on "*The scope of fossil-fuel subsidies in 2009 and a roadmap for phasing out fossil-fuel subsidies*
", November 2010; The European Council Conclusions from 23 May 2013 confirmed the need to phase out environmentally or economically harmful subsidies, including for fossil fuels, to facilitate investments in new and intelligent energy infrastructure; European Commission, Communication from the Commission. Guidelines on State aid for environmental protection and energy 2014-2020, recital (2)

[66] Annex 2 - 2020 report on the State of the Energy Union pursuant to Regulation (EU) 2018/1999 on Governance of the Energy Union and Climate Action.

State aid rules currently allow aid to fossil fuels:

- **Article 10(c) of the ETS Directive** still allows free allowances in the power sector under certain circumstances until 2030, and is being used by Bulgaria, Hungary and Romania. Yet Romania and Bulgaria continue to finance the purchase of remainder emissions allowances to their coal plants, as rescue aid.[67] Free allowances should be phased out much earlier than 2030.
- **The list of Projects of Common Interest** contains a significant number of fossil fuel infrastructure projects, of gas specifically. Those projects are eligible to EU funding, to fast-tracked environmental impact assessment and to a presumption that they meet an objective of common interest in State aid assessments. The remainder of compatibility assessments are largely a formal exercise. The EU Ombudsman found on 17 November 2020 that the PCI list elaboration does not properly take sustainability of projects into account.[68] Speculation about the potential use of such infrastructure for so-called "green gas" in the future cannot be an excuse to continue the lock-in to gas infrastructure, as it is highly unlikely that so much green gas will be available or economically viable. State aid decisions must be taken based on the current state of knowledge without overoptimistic speculation about potential future development.
- **Highly-efficient cogeneration** as defined in Annex II Energy Efficiency Directive has proven to be a loophole allowing State aid for fossil fuels as well as incineration of waste that is not only biodegradable and would therefore not qualify for renewable energy State aid (eg. Sofia incinerator).

[67] See ClientEarth complaints of 11 March 2020 registered under references SA.54045 (2020/MI) BEH recapitalization Bulgaria and SA.56710 (2020/MI) – Romania - Alleged aid to CE Oltenia – financing of ETS Allowances. That an operator of fossil-fuel based electricity production is granted rescue aid to be in a position to meet its obligations under the ETS is contradicting the objectives of the Commission's own ETS Guidelines (they provide that "*the primary objective of State aid control in the context of implementation of the EU ETS is to ensure that State aid measures will result in a higher reduction of greenhouse gas emissions than would occur without the aid and to ensure that the positive effects of the aid outweigh its negative effects in terms of distortions of competition in the internal market. State aid must be necessary to achieve the environmental objective of the EU ETS (necessity of the aid) and must be limited to the minimum needed to achieve the environmental protection sought (proportionality of the aid) without creating undue distortions of competition and trade in the internal market.*" It outright defeats the purpose of the need for fossil fuel-based electricity generators to purchase ETS allowances in order to ultimately rendering fossil fuel-based electricity generation economically unviable.

[68] European Ombudsman decision in case 1991/2019/KR on the European Commission's action concerning sustainability assessment for gas projects on the current List of Projects of Common Interest. The Ombudsman called for future project assessments to take into account CO2 and methane emissions, efficiency impacts, "as well as the impact on the overall greenhouse gas intensity of energy production in EU Member States and the emissions related to the functioning of the infrastructure itself." See also ClientEarth' legal analysis, *Non-compliance of the 4th PCI List with EU law and the Paris Agreement*, 29 January 2020

- **Capacity mechanisms** are often, by design, supporting fossil fuels "to a great extent" as the Commission itself stated about coal in its decision to *authorise* the Polish capacity mechanism. This is acknowledged in the Fitness Check of state aid rules of 30 October 2020. The British, Italian and planned Belgian capacity mechanisms leave a large share of capacity contracts to gas, including new gas capacity with contracts as long as 15 years in some instances. Whilst the Commission seemed to want to balance security of supply objective with the need to remove harmful environmental subsidies in paragraph 220 EEAG, this provision was never enforced effectively to disfavour environmentally harmful subsidies, under the auspices of technology-neutrality.

Recommendation: Include in each State aid guidelines or notice a statement that aid to fossil fuels cannot be found compatible with the internal market *because* they are not compatible with the decarbonisation objectives. We propose the following: "[*Type of] aid to the production or combustion of fossil fuels, be it for electricity or heat generation or for any other purpose, will not be considered to be compatible with the internal market under these guidelines as investments in that sector are not in line with the European Green Deal objectives, nor with the target to reduce greenhouse gas emissions by [55%] by 2030 provided in the European Climate Law*."

Coal

In the Sustainable Europe Investment Plan,[69] the Commission recognised that **the closure of coal-fired power plants is crucial** to achieve the transformation to a carbon neutral economy and that State aid may be used to achieve such a phase-out.

State aid rules and practice currently do not limit aid to the coal or lignite sector whereas operating aid can only be palliative; and whether such continuous support is compatible with the Green Deal objectives is currently not assessed. As a recent example, we refer to the Commission's decision authorising rescue aid to Complexul Energetic Oltenia in Romania in February 2020 - after the Green Deal was released - on the basis of the Rescue and Restructuring Aid Guidelines.[70]

Notwithstanding the impact of sectorial regulation, mandatory pollution standards, pricing mechanisms such as the Union Emissions Trading System ("ETS") and carbon taxes on the profitability of coal-fired power plants in the EU, an intervention by the Member States may in certain cases be needed to accelerate the closure of coal-fired power plants that are still profitable or have prospects of profitability well beyond 2030.

ClientEarth is opposing to the contractual and auctioned compensations planned for lignite and hard coal plants, as well as the new strategic reserve for some lignite units in the German Coal Exit Law (*Kohleausstieg* - SA.53625(2019/EO)) because they are not necessary for the closure of coal units based on their market-driven closure scenarios, actually prolong the lifetime of some units and are grossly disproportionate in amounts.[71] Since the previous lignite reserve of 2016 did not fully achieve the

[69] Communication from the Commission, Sustainable Europe Investment Plan, COM(2020) 21 final. Section 4.3.4. Aid for closure of coal fired power plants, page 14

[70] Commission decision on SA.56250

[71] ClientEarth published and filed several analysis of the incompatibility of these compensations to the Commission in October 2019, May 2020

promised reduction of CO_2 emissions[72] and was unnecessary for security of supply, we welcome that the Commission is analysing thoroughly whether the strategic reserve complies with State aid rules and the EU Electricity Market Rules. [73]

But more generally, in the absence of sector-specific State aid rules,[74] the Commission could **take the lead to establish uniform conditions** for support to the closure of coal-fired power plants throughout the EU. A uniform framework designed by the Commission in line with the relevant EU policies and regulations in the areas of environmental protection, energy and climate, as well as with the Green Deal, would **provide legal certainty** by clarifying the conditions the Commission considers relevant and that Member States will have to comply with, for aid for the closure of coal and lignite plants to be considered compatible with the internal market; **increase the (social) acceptance** of regions and societies affected by transiting away from coal-fired power generation, by showing that Member States are treated equally but should **be adopted on time** before most Member States have designed their support strategies.

ClientEarth believes such a framework should aim at setting eligible costs and aid intensities that are **sufficiently limited** in order to provide both **a clear incentive** for coal and lignite plants to close definitively **before 2030** while **protecting workers'** rights and ensuring that environmental damages are remedied in accordance with the polluter pays principle.

Fossil gas

No State aid should continue to be channelled into gas energy projects with operational lifespans of decades, entailing important stranded asset risks. Instead, compliance with the Paris Agreement, which requires the elimination of nearly all greenhouse gas emissions by 2050, requires new generation capacity to be sustainable; hence, EU and national funds should be channelled to projects that will maximise the necessary emission reductions. It should also be stressed that gas cannot be regarded as a satisfactory bridging fuel because it is highly polluting and unnecessary as concluded in a recent report by Oil Change International (on the basis of IPCC, IEA and Bloomberg data).[75] ClientEarth refers *mutadis mutandis* to its recent legal analysis showing that funding for gas by Members States in the framework of the Recovery and Resilience Facility is incompatible with their international and European legal obligations.[76]

Recommendation: just as it is the case for oil infrastructure, we call on the Commission to include in the EEAG a **presumption that no state aid is needed for gas infrastructure projects**. In any case, the scrutiny applied to it shall be considerably increased: the Commission shall investigate whether security of supply is indeed a legitimate objective to be pursued by the notifying Member State and take genuinely environmental effects into consideration when assessing the compatibility of the aid.

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and August 2020 (Registration: 2020/099243)

[72] ClientEarth letter to the Commission alerting about the missed reduction targets, 23 January 2019

[73] P-004686/2020 Answer given by Executive Vice-President Vestager on behalf of the Commission (23.10.2020)

[74] The Council Decision 2010/787/EU of 10 December 2010 (ibid.) provides State aid assessment criteria only for coal mines and not coal-fired power plants

[75] Oil Change International, "*Burning the gas 'bridge fuel' myth: Why gas is not clean, cheap, or necessary*", May 2019

[76] ClientEarth, Letter to BUDG –ECON Joint Committee - Recovery and Resilience Facility funding for gas projects, 8 November 2020

2.2.5 Other heavily polluting industries

Aid to electro-intensive users

Compensations for indirect emissions costs under the ETS State aid Guidelines aim at addressing risks of carbon leakage for industries but they also exempt them from internalising their emissions costs and from shifting to cleaner energy supply – maintaining a market safety net for fossil fuels. As ClientEarth has pointed out in its contribution to the revision of the ETS State aid guidelines in March 2020[77], the Commission has not evidenced a risk of carbon leakage that would justify the continuous grant of aid to the categories of eligible industries. Besides the lack of conditionality to those aid (still after the new ETS State aid guidelines for 2021[78]), eligible industries receive aid from various sources and for allegedly various purpose but end up cumulating them – and thus are largely relieved from costs they should be bearing.

For example in Flanders, from a review made of six large energy intensive users (Ineos, Total, Borealis, Exxon Mobil, BASF; and Arcelor Mittal), it appears that they cumulate at least the following types of aid[79]:

- **ETS allowances**: Surplus free allowances decreased since the recent ETS reforms but remain. The consequence is that companies can sell these allowances (and gain money) or keep them (and use them to pollute further without paying for extra allowances).
- **Compensation for indirect emissions costs**: those compensations increased. This type of aid enables recipients to alleviate their energy bills (and thus their general costs) since they are partially exonerated from paying the full cost of their energy that includes an ETS component if energy comes from a producer subject to ETS such as gas or coal. The authors of the report found that the companies **were overcompensated** since they receive more money than the actual extra costs they incur and pass on to final consumers.
- **Various exemptions**: those companies are also exempted from various energy taxes and from paying a surcharge serving to finance support to offshore wind. They also seem to be exempted from costs of natural gas for CHP. They also receive reductions from excise duties for natural gas and electricity.
- **Green certificates**: the higher the energy consumption of the company, the less green certificates they are required to hold. According to the report, the EIUs end up paying 20 times less than average households.
- **Other various exemptions from property taxes etc**.

These exemptions and charges reductions for industrial stakeholders not only undermine the polluter pays principle but also affect support for transition towards a decarbonised energy system since they further increase energy costs for consumers. They have to compensate the funding gaps in national budgets for the energy transition, whereas the CEP puts consumers and citizens at the heart of the EU energy strategy. The lack of transparency and fair distribution of costs might also exacerbate lack of public acceptation of energy costs.

Paradoxically, smaller scale energy market players (such as energy communities), which face difficulty in accessing the market[80], are not sufficiently supported through the State aid framework.

[77] ClientEarth's response to the consultation on the draft ETS State aid guidelines, March 2020
[78] ClientEarth will develop its analysis of these guidelines in the context of the revision of the EEAG, since there are parallels to make with the regime of exemptions for energy intensive users in the EEAG.
[79] Bond Better Leefmilieu, Greenpeace, Arbeid&Milieu, "From a defensive to an offensive industrial climate policy The support policy for the energy-intensive industry examined", 17 June 2020
[80] We refer to developments in Annex.

Aid to petrochemicals and plastics producers

The worldwide and European plastic pollution crisis is the result of oversupply of plastic. That oversupply, in turn, is in large part the result of the links with fossil oil and gas. In the past, by-products of the processing of oil and gas for fuel became the feedstock for the production of plastic; but increasingly, plastics is the growth driver for fossil fuels i.e. plastics are transitioning from “Plan B” to “Plan A”. Current State aid rules and practice do not limit aid to those industries and actually support their development, through investment and operating aid.

Just as one iconic example: Ineos, one of the world’s largest petrochemical producers, is investing in a new €3bn plastic pellets producing facility located in the Port of Antwerp (Belgium) called “Project One”. Ineos group is the beneficiary of multiple aid measures. Only mentioning the ones disbursed by various Belgian authorities in Flanders: a large guarantee allocated by PMV - a financial institution controlled by the Flemish Region[81] - that was not authorised by the Commission according to our knowledge; another €16 million in educational support[82], ecology support (investment-related subsidy)[83] and for research & development. Ineos was also beneficiary of indirect cost compensations under a scheme designed under the ETS State aid guidelines[84] and presumably also from a cap on financing support for renewables and cogeneration of heat and power[85], since it is amongst eligible industries. This is in addition to services and the construction of a port infrastructure to the benefit of Ineos provided by the Port of Antwerp.

Fisheries

In the **fisheries sector**, the Commission should not allow further subsidies which contribute to **fishing overcapacity**. These types of subsidies include in particular construction of fishing vessel as it increases the number of vessels competing for limited resources in a situation where these resources are still scarce and are not fished at sustainable levels in the EU but also worldwide. Other types of subsidies in this sector should be allocated subject to certain conditions. We refer to the Annex to this contribution in this respect.

Forestry biomass and food-based biofuels

Any direct or indirect form of aid to **forestry biomass** should be **prohibited**. Though the REDII still wrongfully considers biomass as a “renewable energy source”, it is now demonstrated that large-scale biomass projects can nonetheless have serious detrimental impacts on biodiversity and the carbon storage

[81] In its decisions authorising State aid in the context of the COVID-19 pandemic, the Commission assumed that measures granted through PMV constituted State resources; likewise for VINNOF, an innovation investment vehicle subsidiary of PMV. See Commission decision SA.57132(2020/N) – Belgium COVID-19: Flemish subordinated loan scheme for start-ups, scale-ups and SMEs and on SA. N 281/2005 – Belgium Flemish Innovation Fund (VINNOF)
[82] For an amount that seems to exceed thresholds in the GBER.
[83] It is plausible that these aid stem from schemes (Ecologiepremie +, Innovatiesteun or Strategische ecologiesteun) that were designed under the GBER.
[84] See e.g. https://webgate.ec.europa.eu/competition/transparency/public/aidAward/show/17706 and https://webgate.ec.europa.eu/competition/transparency/public/aidAward/show/190632
[85]Commission’s decision on SA. 52367 of 16 September 2019: “instead of paying these costs via their electricity bill, the eligible undertakings are paying a maximum of 4% or 0.5% of their GVA, which constitutes a reduction to their contribution to the financing of support to RES producers and CHP installations. Therefore, by applying GVA cap the State forgoes state revenues and the GVA cap provides an advantage to the eligible electricity consumers. By paying this charge, EIUs are being exempted from the general system described in recitals (4)-(9) of the quota obligation paid indirectly by all the other undertakings via their suppliers, which is financing support to RES. producers and CHP installations. By virtue of those exemptions, they are relieved of the general system that they would normally have had to pay on the electricity consumed.”

potential of land used to source the fuel.[86] As for forestry biomass in particular, burning this feedstock led to increase in carbon emissions and global temperature, while creating significant air pollution and emitting toxic fine particles.[87] Moreover, there is a high risk of widespread conversion of coal plants to run on biomass. Such conversions, as well as new large-scale biomass projects, typically rely on State aid. For these reasons, we call on the Commission to **restrict aid to conversions** from coal to biomass plants and operation of biomass installations; and to completely **ban any support to forestry biomass**. *See Annex.*

The prohibition of operating **aid to food-based biofuels** must be maintained for environmental and climate purposes, but also as a matter of compliance with the REDII[88].

For other topics, the following recommendations can be made:

Energy consumption: remove aid to energy intensive users that dis-incentivise them from reducing their level of energy consumption or switch energy source e.g. free allowances, compensations for indirect CO_2 costs, reductions from paying support to renewable energy sources, exemptions or reductions from environmental taxes. The State aid framework should thus contribute to a more transparent and fairer distribution of energy costs between consumers and industry stakeholders, while fully integrating energy intensive users into national funding base towards the energy transition.

Aid to infrastructure that is known to be environmentally harmful (greenhouse gas emissions, air, water and soil pollution) should be subject to very strict compliance with the law and environmental impact assessments covering the full life-cycle of the project. For example, the environmental impacts of offshore renewable energy projects shall be duly assessed in accordance with existing rules, including the Espoo Convention on environmental impact assessment in a transboundary context, Directive 2001/42/EC on Strategic Environmental Assessments, etc. The design, construction, operation and maintenance, decommission and recycling of the offshore renewable energy projects must be planned and executed in alignment with the Circular economy Action Plan to ensure the overall sustainability of their whole lifecycle.

Aid to chemical and petrochemical companies should not be allowed when their output are harmful substances or products. The aid should be limited to investments or operations in the non-harmful outputs, with requirement for the undertaking to separate its account to avoid cross-subsidisation. When an output/product is going to be banned in a foreseeable manner (e.g. an EU or national regulation was passed and will enter in force by a certain date), all aid to the production of this output should stop; it may require separating accounts as proposed above.

In general, State aid measures should be subject to **high environmental standards.** Member States should be encouraged, or commit to, grant aid only to those undertakings that at least meet their environmental standards (to the exception of aid which purpose is a significantly early implementation of new standards).

[86] Duncan Brack, Chatham House, *Woody Biomass for Power and Heat: Impacts on the Global Climate* (2017),; and Sterman, et al., *Does Replacing Coal with Wood Lower CO2 Emissions? Dynamic Lifecycle Analysis of Wood Bioenergy* (2018)
[87] See our recommendations on the EEAG in annex.
[88] EEAG, para. 113

2.3 Question 3: tools for better supporting environmental objectives

2.3.1 Question 3.a: on the principle and definition of a green bonus

As mentioned above, a primary concern is to remove, limit and condition aid to activities that have a harmful environmental impact in order to create or restore a level playing field for those activities that internalise environmental costs (e.g. by paying for their emissions allowances and adapting to higher environmental standards) and bring substantial improvements to the market in terms of innovation (e.g. energy efficiency services, eco-friendly products), flexibility (e.g. demand response operators, decentralisation solutions) and citizen-led solutions (e.g. renewable energy communities). This would **re-channel public funds** and State aid to those activities that are in line with the Green Deal objectives while limiting costs of the transition for taxpayers, by using public money to objectives of true general interest.

Nevertheless, ClientEarth welcomes the Commission's proposal to define a "green bonus" that could increase or facilitate the granting of aid to projects and activities that have an environmental benefit. We had proposed this idea in our contribution to the revision of the regional aid guidelines in September 2020[89] and in our report of October 2020 "A State Aid Framework for a Green Recovery".

As the Commission suggests, a "green bonus" could take the form of "more aid" (e.g. increased aid intensities) or aid on easier terms for a project that has positive environmental benefits.

If to be increased, aid intensities should be based on benchmarks, such as *increased* state of the art, *increased* environmental protection or innovation, **compared to those already envisaged in the Green Deal –** this is because the Green Deal objective shall be considered "mandatory" and **the new standards.** The aid intensities could be progressively increased when a beneficiary's project or activity meets one or several sustainability criteria (e.g. by 5% for one criterion, 10% for two criteria etc.) of the benchmark to be used (see our reservations on using the Taxonomy Regulation under question 4).

However, one would need to address the situations for which an aid intensity of 100% is already possible and ensure that aid is capped at 100% whilst still incentivising *green**er*** projects through a bonus.

This is why **alternative and possibly complementary options** (other than an increase of aid intensity) are also interesting to consider. For example, **a lower percentage of private financial contribution** could be allowed for environmentally beneficial projects.[90] Defining eligible costs of certain activities by their funding gap, as the Commission proposes in the Sustainable Europe Investment Plan (p. 13), is also helpful for projects that struggle to reach a certain development stage.

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[89] For instance, ClientEarth proposed to amend recital 180 of the draft regional aid guidelines as follows (our proposal underlined): The maximum aid intensities laid down in paragraph 179 may be increased by up to 20 percentage points in outermost regions that have a GDP per capita below or equal to 75% of the EU 27 average or by up to 10 percentage points in other outermost regions. The same increase shall be available for green bonus projects. It should generally be available in 'a' areas; in the outermost regions mentioned in Sentence 1, the two increases may be cumulated.

[90] See e.g. Communication on State aid for IPCEIs, para. 38 where a significant contribution from the private sector is encouraged.

2.3.2 Question 3.b: on the criteria that should inform the assessment of a green bonus

As we had mentioned in our response to the targeted consultation on the EEAG in July 2019 about the methodology of increasing the level of aid intensity permitted for SMEs, investments located in assisted areas and eco-innovation set by paragraph 78 EEAG, we support the criteria that only projects that **substantially improve the state of the art** and are expected to bring **significant environmental benefits** are eligible to such increase of aid intensity. Such an increase of aid intensity should incentivise aid and, more widely, investment in those projects that clearly aim at driving the change towards a more sustainable future. The notions of "state of the art" and "significant environmental benefits" are evolving with the evolution of techniques and standards. However, the Commission has used these notions so far and a degree of flexibility can be appropriate, with a baseline. As mentioned above, one should consider that the Green Deal sets the new standards when it comes to technological deployment, to be exceeded.

Concrete examples of green bonus projects would be, for instance, R&D&I projects in the production of decarbonised and environmentally-sustainable fuels as well as **zero-emissions** vehicle technologies[91] In agriculture, examples of green bonus projects would be investments for nature-based solutions and an eco-system-based approach. As provided by "A Clean Planet for all", indeed, "[c]arbon sinks are as important as reducing emissions. Maintaining and further increasing the natural sink of forests, soils, and agricultural lands and coastal wetlands is crucial for the success of the Strategy, as it allows the offsetting of residual emissions from sectors where decarbonisation is the most challenging, including agriculture itself. In this context nature based solutions and ecosystem-based approaches often provide multiple benefits regarding water management, biodiversity and enhanced climate resilience."[92] Still in agriculture, while on one side the development of small farms in itself would not be considered a green bonus project, on the other hand, where an investment is aimed at improving the sustainability of an agricultural holding, linked to agri-environmental climate commitments and organic farming, could fall under the category of green bonus project. More specifically regarding the energy sector, promoting **renewables energy communities** and self-consumption should be eligible to green bonus, as they are a way to produce more renewable energy locally and to move towards a cleaner, more flexible and decentralised energy system (which are objectives of the Clean Energy for All Package), while achieving higher acceptance for Green Deal-induced chances by citizens.

On the contrary, a green bonus would not be justified when the sustainability of an activity is not clearly determined; there should not be a presumption of sustainability and the assessment should be informed by scientific evidence that an activity provide clear environmental benefits throughout its lifecycle. That is notably not the case for forestry biomass which, despite being classified in the EU Renewable Energy Directive as a renewable source of energy, is far from being renewable 1:1 and is highly emissive of greenhouse gas emissions (taking into account the removal of carbon sinks, shipping across oceans and combustion).

[91] This would go beyond the "A Clean Planet for all" communication (p.19) in which the Commission provided "*EU research should focus on transformational carbon-neutral solutions in areas such as electrification (renewables, smart networks and batteries), hydrogen and fuel cells, energy storage, carbon-neutral transformation of energy intensive industries, the circular economy, the bio-economy and sustainable intensification of agriculture and forestry*."

[92] See fn. **Error! Bookmark not defined.**, p. 14.

2.4 Question 4: How to define positive environmental benefits? Is the EU Taxonomy for sustainable activities an adequate reference?

Sustainability claims

The notion of positive environmental benefits should at least be informed by the Green Deal, which sets out the different goals of the EU in its plan to make its economy sustainable. The goals of the Green Deal are further detailed in other Commission's documents, as the Sustainable Europe Investment Plan, the "A Clean Planet for all" communication, the "Farm to Fork Strategy" communication, the EU strategies on hydrogen, biodiversity, adaptation to climate change[93] and the reduction of methane emissions. The upcoming Zero Pollution Action plan should also inform on the relevant standards and acceptable practices and activities. A full life-cycle analysis of activities and products should be conducted.

Nevertheless, the Commission would need to consider carefully claims that an activity, project or product is sustainable and this should be informed by science. False claims, or at least "greenwashing", should obviously not be eligible to a more favourable State aid regime, be it a green bonus or else. As examples of investments or products in the plastic industry, which are often claimed to be innovative and contributing to reaching the Green Deal objectives whilst they have negative impacts on the environment:

- A carbon capture initiative taking place in the Port of Antwerp, designed to compensate for the emissions of the chemical cluster there. This system is already being used as an opportunity to build more polluting industry. One of the main issues is that even if carbon dioxide emissions are captured, this makes no impact on the other kinds of pollution arising from such industry, or the fact that some of the products produced there may be harmful/toxic/cause environmental harm and harm to human health.
- "Bio-based plastics"
- Biodegradable plastics – often these will only actually biodegrade in very specific conditions, often not naturally occurring. They are not always recyclable and can end up in recycling streams and contaminate a whole batch of plastic that can then not be recycled.
- Compostable plastics – often the industrial composting facilities required to compost these materials are not actually available as a waste collection option. Consumers wrongly assume that these plastics are harmless, as they think they will decompose in landfill, which they will not. For plastics that are compostable at home, many consumers don't have access to home composting. Also, the general evidence as to the compostability of such products under normal composting conditions is uncertain.
- Chemical recycling – problems include emissions, toxic by-products, carbon intensity, health risks. It is also used to turn plastic back into fossil fuels for energy.
- False claims of reusability for products that cannot be reused safely or practically.
- Plastics lobby focusing the issue as being one of "littering", and placing emphasis on downstream environmental problems, by proposing solutions such as "ocean clean-ups", which make no difference to the root of the problem.
- Lifecycle assessments promoting plastic as "greener" than alternatives – lack of standardisation in lifecycle assessments resulting in incorrect conclusions being shared that plastic is less environmentally harmful than alternatives, due to lighter weight making it more efficient to transport etc., failing to take into account the full spectrum of environmental impacts throughout the plastic lifecycle.

[93] The adoption of this EU strategy is planned for the first quarter of 2021, see here.

Taxonomy Regulation

Public finance should be at least as **exemplary**, and preferably much more, than private finance. Member States have direct binding commitments to reduce their greenhouse gas emissions and protect their populations' environment and health, *inter alia*, and should direct their spending efforts to the pursuit of those goals, rather than financing activities cancelling those efforts.

The question of using the Taxonomy Regulation ("TR") to define "positive environmental benefits" for state aid measures remains ambiguous at this stage. While the idea seems interesting, especially given the broad climate change adaptation, mitigation and other environmental objectives identified under the TR[94], the Commission has not yet adopted its delegated acts for the implementation of the TR. We do not know yet what technical screening criteria will be used for determining under which conditions a specific economic activity is considered as environmentally sustainable.

There is thus a risk that some economic activities included in the scope of the technical screening criteria will not actually be sustainable (e.g. electricity generation from gas). We also have concerns with regard to a general lack of proper control and verification of the implementation of the technical screening criteria. Moreover, private investments that are not classified as sustainable under the TR are not prohibited whereas State aid should end for activities that directly contradict the Green Deal such as those based on fossil fuels - this is all the more important since those activities will, thanks to the TR, increasingly struggle to access private finance and would need to rely on public funds if they want to survive.[95]

Lastly, the "do no harm" standard in the Green Deal appears – and hopefully will be implemented in that manner – more ambitious than the "do no *significant* harm" in the TR.

ClientEarth remains therefore very cautious as to using the TR as a benchmark to determine positive environmental benefits of State aid measures. In any case, the State aid framework should not consider the TR as a reference if its implementation is not in line with the Paris agreement, the 2050 climate neutrality objective as well as the principle of "no not harm" and the phasing out of fossil fuel as it is set in the Green Deal.

[94] See Article 9 of the Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 i.e. Climate change mitigation, climate change adaptation, sustainable use and protection of water and marine resources, transition to a circular economy, prevention and control and restoration of biodiversity and ecosystem

[95] This lack of access to private finance also diminishes the possibility for Member States to avail themselves of the market economy investor principle and thus most of their financing measures to fossil fuels should be considered as granting the beneficiaries an advantage.

3 Antitrust rules

At the outset, ClientEarth would like to make two observations on antitrust rules and sustainability agreements. First, many forms of cooperation between undertakings are allowed under antitrust rules; for agreements restrictive of competition, the Commission has the tools to allow sustainability agreements by adopting a broader approach. Second, many companies appear to have an overdeveloped fear of antitrust risk. This phenomenon can only be reduced by the Commission issuing additional guidance.

The following section shares ClientEarth's thoughts on two aspects that did not make it into the Commission's call for contributions, namely how to address (i) environmentally harmful agreements and (ii) sustainability claims and associated risks of greenwashing.

3.1 Addressing environmentally harmful cooperation

ClientEarth notes that the consultation on antitrust rules does not address, contrary to what is done for State aid, the need for a more cautious assessment of agreements for activities harmful for the environment. On the statement of objections sent to BMW, Daimler and Volkswagen for restricting competition on emission cleaning technology, Commissioner Vestager said: "*Companies can cooperate in many ways to improve the quality of their products. However, EU Competition rules do not allow them to collude on exactly the opposite: not to improve their products, not to compete on quality (…) As a result, European Consumers may have been denied the opportunity to buy cars with the best available technology*". [96]

The following two examples, even though not directly falling under Article 101 TFEU, are relevant to illustrate how sustainability should become an integrant part of the Union's reasoning when addressing cooperation between undertakings.

Example 1: Pooling agreements between car manufacturers to meet CO_2 emissions reductions targets

EU legislation itself organises cooperation agreements that **may limit improvements of the level of environmental protection** and would not otherwise be authorised under Article 101(3) TFEU.

This is notably the case of Article 6 Regulation (EU) 2019/631[97] that allows car manufacturers to enter into pooling agreements to achieve CO_2 emission targets together[98] - by derogation to the principle that each car manufacturer is individually responsible for achieving certain CO_2 emissions reductions targets based on its fleet of passenger cars and light vehicles (Article 4).

[96] Press release on pending case AT.40178 (BMW, Daimler, VW on emission cleaning technology), IP/19/2008.
[97] Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO_2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) No 510/2011, OJ L111/13.
[98] Regulation (EU) 2019/631 provides for several safeguards on antitrust, see Article 6(5), "*Manufacturers may enter into pooling arrangements provided that their agreements comply with Articles 101 and 102 TFEU and that they allow open, transparent and non-discriminatory participation on commercially reasonable terms by any manufacturer requesting membership of the pool*". In addition, "*all members of a pool shall in particular ensure that neither data sharing nor information exchange may occur in the context of their pooling arrangement, except in respect of the following information: (a) the average specific emissions of CO2; (b) the specific emissions target; (c) the total number of vehicles registered*".

Concretely, a car manufacturer that overachieves the CO_2 emission targets (due to a high share of electric vehicles in its fleet) can pool with an underachieving car manufacturer on "*commercially reasonable terms*" (which remain confidential). It means that the underachieving car manufacturer has a lesser incentive to invest in developing new, cleaner vehicles as it can avoid paying the legal "*excess emission premium*" (i.e. fines) and the associated reputational damage, by entering into a confidential and presumably less costly pooling agreements. Many car manufacturers have signed up for such pooling agreements (11 open pooling agreements have been created so far).[99] For instance, on the FCA (Fiat Chrysler Automobile) - Tesla pool Transport & Environment reports that the pool "*is expected to overcomply both in 2020 and 2021, thanks to Tesla's electric car sales. FCA has been a clear laggard for electrification due to underinvestment and thus fully relies on its pooling agreement with Tesla to comply. Without Tesla we calculate that FCA would miss the target by 17 g/km (10 g/km from the Tesla BEVs and 7 g/km thanks to the super-credits). In the scenario where FCA registers about 600,000 cars in 2020, the total fine would have been 60 one billion euros.*"[100]

It is certain that regulation is better placed than competition law or other tools to reduce vehicles emissions by setting mandatory reductions targets, as Article 4 Regulation 2019/631 does.[101] However, since Article 6 dis-incentivises renewals of vehicles fleets towards cleaner ones[102], the pool formation undermines the objectives of the Green Deal.[103] Secondly, if the legal basis for such pooling agreement were removed, they would be unlawful (for breaching the obligation on car manufacturers to meet their targets individually). Thirdly should such pooling agreement be constituted nonetheless, it would amount to a clear **restriction of competition by object**: instead of competing on the merits to achieve compliance with an environmental standard, which would stimulate innovation, the overachieving car manufacturer agrees to "share" its highly effective standard compliance to the benefit of the highly polluting non-compliant competitor. Such cooperation could not be justified under Article 101(3) TFEU and would, as an aggravating factor, be harmful for the environment.

In any case, even when a pooling agreement is validly constituted under Article 6 Regulation 2019/631, antitrust risks appear: as said above, **sensitive commercial information** (on development of technologies and sales, for example) could easily be exchanged beyond the allowed items (relating, mainly, to the level of emissions of each fleet over a limited duration); and if the **pool entrance fee** is lower than the cost of adapting a fleet to the CO_2 emissions reduction standard, consumers will pay the (environmental) price of an agreement that is slowing down innovation and the reduction of CO_2 emissions, to the detriment of a competitive market of zero emissions vehicles that would also drive their price downwards. These anticompetitive aspects of a pooling shall be caught by Articles 101 and 102 TFEU and the Commission should be particularly vigilant in this respect.

[99] The public register for open pooling agreements; Closed pooling agreements, which are pools between manufacturers part of the same group of connected manufacturers, are not published in the public register.
[100] Transport & Environment, Report "*Mission (almost) accomplished: Carmakers' race to meet the 2020/21 CO_2 targets and the EU electric cars market*", p.73,
[101] This is without prejudice of ClientEarth's opinion on the ambition of the targets or other provisions of that Regulation.
[102] Transport & environment report, Report "*Mission (almost) accomplished: Carmakers' race to meet the 2020/21 CO_2 targets and the EU electric cars market*", p.43: "*As a result of additional pool formation, the actual EV sales across Europe could decrease as laggards would sell EVs while the carmakers like Tesla would probably have sold a similar amount of electric cars anyway. T&E estimates that* ***the formation of new pools can bring down the overall share of EV by a few tenths of percentage point.***"
[103] Communication from the Commission, The European Green Deal, COM/2019/640 final, p.11: "*By 2025, about 1 million public recharging and refuelling stations will be needed for the 13 million zero- and low-emission vehicles expected on European roads.(…) The Commission will also propose to revise by June 2021 the legislation on CO2 emission performance standards for cars and vans, to ensure a clear pathway from 2025 onwards towards zero-emission mobility.*"

Example 2: Ensuring consistency of antitrust decision with new sustainability rules: the examples of the DE-DK1 interconnector and the Greek lignite case

The consultation does not focus on **Article 102 TFEU**. Indeed, this Article has been successfully used to date as a sword to promote sustainability at least in energy markets, for example through the decision of the DE/DK1 Interconnector. Although, the reasoning of the decision does not include a narrative on sustainability, the outcome of the commitments is to strengthen the latter through the enhancement of competition in the interconnectors, which allows cross border flows and better integration of renewables with benefits for the environment and consumers. It is noteworthy that this decision was aligned with the draft Clean Energy provisions of the recast Electricity Market Regulation. Moreover, the decision clearly states that the concerned party will have to comply with stricter rules and regulations adopted at Union level. [104]

This approach was not followed, however, in the Greek lignite case, weakening the strength of Article 102 TFEU as a tool to tackle abusive behaviours that have an impact on sustainability. In 2018, the Commission adopted a commitment decision to implement its 2008 Antitrust decision.[105] As explained by ClientEarth and other stakeholders, the latter decision was already outdated for several reasons and its implementation through the commitments decision jeopardised the implementation of the under draft Clean Energy Package rules or the Energy Union Strategy and the transition of Greece to a cleaner future. Moreover, it could potentially put cleaner alternatives at a competitive disadvantage vis-à-vis lignite. Although Greece has announced and planned a lignite phase out, the Commission still insists on the implementation of the 2008 outdated antitrust decision. In our view, the Commission should be more flexible and re-examine this decision and similar decisions in the light of the Clean Energy Package rules, the Green Deal and the draft Climate law to avoid inconsistencies and meaningfully continue using Article 102 TFEU as a sustainability sword.

In conclusion, like it did in the DE-DK1 Interconnector case, the Commission could proactively engage with upcoming legislative changes to promote sustainability when examining pending Antitrust cases, either in the context of Articles 101, 102, 106 TFEU or in the form of reviewing existing decisions that are susceptible to jeopardising the environmental and climate objectives of the Union.

3.1.1 Addressing greenwashing

As awareness of environmental issues increases, there is an increased demand from consumers for green products and services. In this sense, environmental or "green" claims evoking the minor or reduced environmental impact of the products or services offered, are becoming an important advertising tool for companies that can significantly impact consumers' purchase choices. However, it is not often possible for consumers to verify the truthfulness of sustainability claims made by companies.[106] False or misleading sustainability claims, so-called "**greenwashing**"[107], harm the consumers' confidence that the businesses' claims are true. This also results in unfair competition with businesses that actually offer truly sustainable products or services, sometimes at a higher price since those products generally internalise a higher environmental cost. Until consumers are able to choose between real eco-friendly items and those which

[104] Decision AT. 40461, paragraph 96
[105] Case COMP/B-1/38.700, decisions of 17 April 2018 and 5 March 2008 respectively
[106] ACM, "ACM draws up rules of thumb for sustainability claims", 22.09.2020
[107] ClientEarth article on corporate greenwashing

are not, businesses genuinely investing in going "green" cannot be properly rewarded by their customers and suffer a competitive disadvantage.[108]

For instance, ClientEarth recently made a complaint to the UK National Contact Point for the OECD Guidelines for Multinational Enterprises that BP's global advertising misled the public in the way it presented its low-carbon energy activities, including their scale relative to BP's fossil fuel extraction activities. As a result, BP ended its misleading advertisement campaign.[109] More examples of greenwashing are cited under question 4 in the part on State aid and can of course also occur in the framework of cooperation agreements between undertakings.

ClientEarth welcomes the Dutch[110] and UK[111] competition authorities' initiatives to increase awareness and legal certainty regarding sustainability claims. However, ClientEarth believes that a common approach at EU level is urgently needed. In this respect, the Commission shall make sure that the claims businesses make about the reduction of their carbon footprint or sustainability are in compliance with the Green Deal and do not mislead consumers.[112] By taking inspiration from the "rules of thumb" drawn up by the Dutch competition authority,[113] the Commission should safeguard that companies making sustainability claims pass a "**greenwashing test**" whereby they shall (i) substantiate such claims with sound updated science; (ii) make clear which sustainability benefits their products or services offer and be honest and specific about their efforts with regard to sustainability; and (iii) use of fair visual claims and labels that to not confuse consumers[114] when comparing products or services.

3.1.2 Availability of existing tools to capture harmful agreements (fines)

As mentioned above, competition law tools are already broad and flexible enough to adapt to most cooperation agreements, should they have a positive or a negative environmental impact. In respect of the latter, the Commission would already be in a position to take into account environmental considerations when **fining** parties guilty of an anticompetitive behaviour (individually or in cooperation) that also harm the Green Deal objectives (including instances of greenwashing or false sustainability claims to justify a sustainable horizontal agreement). Points 22 and 25 of the current fining guidelines[115] already allow the Commission, in our opinion:

108 CMA; "CMA to examine of 'eco-friendly` claims are misleading", 2.11.2020.; The CMA recently announced that it will investigate descriptions and labels used to promote products and services claiming to be 'eco-friendly', and whether they could mislead consumers and that it intended "*to publish guidance for businesses next Summer to help them support the transition to a low carbon economy without misleading consumers*".
109 More information on ClientEarth's action against BP greenwashing is available here
110 ACM, Draft Guidelines on Sustainability claims, 22.09.2020
111 Businesses shall be transparent in the way that they market goods and services in relation to any claims made about environmental impact. CMA; "CMA to examine if 'eco-friendly` claims are misleading", 2.11.2020. Additional information on the CMA's initiative is available here
112 The Italian Competition Authority ("ICA") identified specific criteria for the legality of claims, stating that "green" claims contained in advertising message must (i) precisely and unambiguously reflect the environmental benefits of the relevant product, (ii) be scientifically verifiable and (iii) be communicated correctly. PS11400 Italian Competition Authority, ENI: fined 5 million euros for misleading advertising in its diesel+ campaign, 20 December 2019.
113 ACM, Draft Guidelines on Sustainability claims, 22.09.2020
114 For instance by using a certain type of packaging or logo implying that the product is sustainable whereas this is not the case.
115 Guidelines on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation No 1/2003, OJ C201/2 of 1.9.2006

- When determining the proportion of the value of sales to be taken into account (up to 30% pursuant to point 21) under point 22,[116] to apply a higher factor for environmentally harmful agreements[117] (either by taking into account the harm to the environment under the "nature of the infringement" or as a separate, additional "factor", possible due to the open nature of the list in point 22 ("a number of factors, such as (…)");

- To apply an additional amount for deterrence (the so-called "entry fee"), as already foreseen in point 25[118] for anticompetitive agreements that also prevent innovation, greener products or services from entering the market.[119]

For the sake of legal certainty and guidance, the Commission could review its fining guidelines to explicitly mention those possibilities.[120]

3.2 Questions 1 & 3: Cooperation between undertakings and justifying restrictive agreements under the auspices of the Green Deal

As a preliminary remark, the last sentence of question 3 suggests a contradiction between Green Deal objectives and other important policy goals, such as job creation and social objectives, which is not our interpretation of the Green Deal. The Green Deal recognises that, together with sustainability objectives, the Commission should address competitiveness of European industries, inclusive growth, the issue of energy poverty and the purchase power of consumers. In this regard, ClientEarth agrees with the following statement: "[*I]t is sometimes suggested that it is a 'slippery slope', if we take into account climate change/environmental factors. What of other important policies to be found within the EU in the treaties?*

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[116] Guidelines on the method of setting fines: "*22. In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.* " (emphasis added).

[117] This would also be in line with the following statement by at-the-time Commission Vice President Vestager, a few days after the Commission opened the investigation against the German car manufacturers, as mentioned above: "*a cartel that holds back innovation is every bit as illegal as one that fixes prices.*"(Speech at Global Antitrust Enforcement Symposium, Georgetown University Law Centre, 25 September 2018, available here. It would also suggest that the Commission could consider an extension of point 23 of the Fining Guidelines to expressly include infringements leading to environmental harm, which reads as follows: "*Horizontal price-fixing, market-sharing and output-limitation agreements* (…)*, which are usually secret, are, by their very nature, among the most harmful restrictions of competition. As a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale.*"

[118] Guidelines on the method of setting fines: "25 *In addition, irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15 % and 25 % of the value of sales as defined in Section A above in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements. The Commission may also apply such an additional amount in the case of other infringements.* (…)" [emphasis added]

[119] Guidelines on the method of setting fines: "*In addition, irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15 % and 25 % of the value of sales as defined in Section A above in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output- limitation agreements. The Commission may also apply such an additional amount in the case of other infringements. For the purpose of deciding the proportion of the value of sales to be considered in a given case, the Commission will have regard to a number of factors, in particular those referred in point 22.*"

[120] Another option would be to consider harm to the environment as an aggravating factor. However, this would be much less effective, because this would only lead to relatively small increases of fines compared to the factors directly influencing the basic amount of the fine that are discussed here, and therefore would not be dissuasive enough.

(e.g. social and employment issues)? My answer to this is twofold. First, climate change is an existential threat to humanity and if we are going to single out any one area for particular consideration, it must be the fight against climate change. Secondly, other (important) issues must stand or fall on their own merits when assessed under competition law-but we must not let any difficulties which arise undermine the correct assessment of agreements to fighting climate change under competition law."[121]

On competition law specifically and as indicated before, ClientEarth shares the opinion noted by the literature[122] and the Dutch Competition Authority Draft Guidelines[123] and Greek Competition Authority Discussion Paper[124] that competition law has an important role in facilitating sustainability projects.

As a matter of principle, undertakings should be incentivised to stop competing on exploiting externalities that harm the environment and drive climate change. Instead, they should be incentivised to compete on how to reduce and internalise externalities. Guidance is needed on situations where honest individual producers are willing to invest in more climate-friendly production, but are held back by the fear that they will be undercut by competitors who do not invest in reducing their footprint or by cheaper imports.[125]

ClientEarth underlines that many ways to cooperate around sustainability projects **are already possible** under antitrust law as many agreements are unlikely to restrict competition at all (point 3.2.1). Also, for those sustainability agreements which may restrict competition, the Commission **already has the legal tools** to integrate environmental considerations in the enforcement under Article 101 TFEU, but needs to **adapt its interpretation and in its enforcement practice** (point 3.2.2).

3.2.1 Many sustainability agreements do not or are unlikely to restrict competition

For several sustainability agreements, restrictions of competition are unlikely. This had already been foreseen in the 2001 Horizontal Guidelines,[126] which can be used to interpret the 2010 Guidelines[127] when they do not contain sufficient guidance. A horizontal agreement is considered unlikely to restrict competition if: (i) it does not place any individual obligation on the parties, or if the parties only commit to loosely contributing to a sector-wide environmental target, (ii) it stipulates environmental performance with no effect on product and production diversity and (iii) it gives rise to genuine market creation. As noted by the literature,[128] the JAMA and KAMA[129] agreements concerned the ambition of car manufacturers to reduce their emissions but did not impose a precise obligation as to the methods of achieving this. The Dutch competition authority[130] also refers to a non-binding agreement that incentivise participants to contribute to a sustainability objective by setting agreed targets to reduce CO_2 emissions. In the informal

[121] Holmes, Climate Change and Competition Law – OECD Note, Hearing on Sustainability and Competition, DAF/COMP/WD(2020)94, 27 October 2020, para. 32
[122] Dolmans, idem; see also Holmes, idem pp. 354-358
[123] ACM, Draft Guidelines on Sustainability claims, 22.09.2020
[124]Hellenic Competition Commission, "Competition Law and Sustainability", 17.09.2020
[125] M. Dolmans, "*Sustainable Competition Policy*", Competition Law and Policy Debate CLPD, Vol 5, Issue 4 and Vol 6 issue 1, March 2020
[126] Commission Notice, Guidelines on the applicability of article 81 of the EC Treaty to horizontal cooperation agreements, OJ C 003, 06/01/2001, p.2, para. 7
[127] Communication from the Commission, Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14/1/2011
[128] Holmes, "*idem*, p. 369
[129] JAMA and KAMA XXVIII the Report on Competition Policy (1998). These agreements differentiate from car manufacturers pooling agreements mentioned above in that the latter aim at grouping to reach a target that should in principle be achieved individually rather than finding ways to decrease emissions of vehicles fleets by innovation.
[130] ACM, Draft Guidelines "Sustainability agreements. Opportunities within competition law", para. 21

ACEA case[131], the members only agreed on a sector-wide objective to reduce CO_2 emissions without specific obligations for the members individually. Another example is that of codes of conduct promoting environmentally-conscious practices, including joint standards and certification labels.[132]

With regard to cooperation at the R&D or technology-setting phase, there is usually also no antitrust risk associated with standardization agreements. Standard setting, provided certain conditions are met, is generally seen as generally pro-competitive and unlikely to violate EU competition rules.[133] Accordingly, standardization agreements for sustainability should be considered pro-competitive, especially when they relate to common quality requirements for more sustainable upstream products, e.g. sustainable fuels, RES electricity production.

Moreover, also agreements aimed at improving product quality and replacing products that are produced in a less sustainable manner (for instance, agreements that are aimed at a more efficient use of packaging materials or at no longer using a certain type of environmentally harmful packaging) have been suggested by the Dutch ACM to be in general considered as not restricting competition.[134] ClientEarth agrees with the ACM that "*agreements that are solely aimed at promoting product quality, product diversity, innovation or market introductions of new products should in most cases considered to be procompetitive*".[135] However, agreements to remove certain products from the market should, for the sake of legal certainty, remain subject to Article 101(1) TFEU but should, in case they concern eliminating polluting production or removing less environmentally friendly products from the market, be easily exempted under Article 101(3) TFEU.[136]

Furthermore, agreements per which participants exchange information that would enable them to identify possible violations of labour laws (e.g. on child labour and minimum wages), environmental rules (e.g. banning illegal logging) and fair-trade rules by their respective suppliers or distributors – as part of their due diligence throughout their supply chain - should not be considered to restrict competition.[137]

3.2.2 A different interpretation of article 101(3) TFEU provides sufficient room to exempt certain sustainability agreements

The introduction of Regulation 1/2003 had a rather negative impact on the integration of environmental considerations under Article 101(3) TFEU. Indeed, before 2004, a positive stance with regard to the integration of environmental protection requirements had slowly been adopted in the application of Article 101(3) TFEU. The Commission's discretion in reconciling competition law with public interest objectives, such as environmental protection, was supported by the Court. [138] In this respect, ClientEarth refers to the following cases:

[131] Commission Press Release, Commitment by European Car Manufacturers to reduce CO2 emissions from passenger cars complies with EU Competition rules, IP/98/865
[132] See also Commission Notice, Guidelines on the applicability of article 81 of the EC Treaty to horizontal cooperation agreements, OJ C 003, 06/01/2001, p.2, para. 185
[133] Communication from the Commission, Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14/1/2011, para. 277-286
[134] ACM, Draft Guidelines "Sustainability agreements. Opportunities within competition law", paragraph 21
[135] *Ibid.*, paragraph 17, See also the Commission's 2001 Horizontal Guidelines (fn. 132 above), paragraphs 186 f
[136] Dolmans, idem, p. 16; Holmes, idem, p. 371 ff.
[137] ACM, Draft Guidelines "Sustainability agreements. Opportunities within competition law", para. 23
[138] Hans Vedder, *Competition Law and environmental protection in Europe: towards sustainability?*, Groningen, Europa Law Publishing, 2003, p.168; Heike Schweitzer, "*Competition law and public policy, the example of article 81*", EUI working papers Law, 2007/30, p.6

- In *CECED*[139], regarding an agreement to remove certain older, less efficient models of laundry machines from the market, the Commission clearly stated that not just individual economic benefits to customers from lower energy bills, but also the collective environmental benefits had to be taken into account.

- In *Philips/Osram*, the Commission acknowledged that the concept of "technical and economic progress" would include the use of cleaner facilities resulting in "*less air pollution, and consequently in direct and indirect benefits for consumers from reduced negative externalities*"[140]

- In *Exxon/Shell*[141] (although this may have been a case of greenwashing, hence the importance for the Commission to verify this), the Commission acknowledged that avoiding environmental risks is to be perceived as beneficial by many consumers.

- In the *DSD* case[142], the Commission made a qualitative assessment of an agreement creating a new market of plastic waste management resulting in cost savings and lower prices for consumers, despite setting an exclusivity.

This positive trend was unfortunately plumped in 2004 (entry into force of Regulation 1/2003) as decision-making practice adopted a stricter economization of the benefits, a high threshold for the quantification under the first condition of article 101(3) TFEU and a narrower scope of the concept "consumer", making it harder for environmental benefits to be subsumed under article 101(3) TFEU. This change of approach can also be explained by the fact that (i) it was felt unfeasible for NCA's to exercise a broad discretion to balance EU policy objectives (which could even result in a re-nationalisation of competition law whereby the antitrust rules could be set aside or used to pursue hidden national public interests)[143], and (ii) public interest considerations could become a standard defence for cartel cases; indeed, airlines and car producers could argue that the government policies do not internalise enough environmental externalities, and that an increase of prices or a limit of output brings society closer to the optimal outcome concerning transport.[144]

ClientEarth believes the Commission has the right legal tools to positively address sustainability agreements but, in light of the Green Deal, should revise its decision-making practice to allow greater environmental consideration. It should adopt a broader and more holistic interpretation of the conditions of Article 101(3) TFEU, inspired by the case law described above prior to Regulation 1/2003.

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139 Case IV.F.1/36.718.CECED, 24/1/1999, para. 56; In the CECED decision the Commission considered the first and second conditions of Article 101(3) TFEU together. It stated that the agreement led to savings on electricity bills for individuals and that it was not possible to determine the effect on the selling price. The Commission found that the benefits brought by the agreement to society would be more than seven times bigger than the increased purchase costs of greener machines and concluded that the agreement is likely to contribute significantly to technical and economic progress and thereby expanded its conception of economic efficiency to include environmental benefits.
140 Case IV/34.252, Philips/Osram, 21/12/1994, para 25 and 27
141 Case IV/33.640, Exxon/Shell, 18/5/1994, para 71
142 Case COMP D3/34493, DSD, 20/4/2001, para 142 ff
143 Rein Wesseling, "*The draft-regulation modernising the competition rules: the Commission is married to one idea*", *European Law Review,* 2001, p. 373; Donal Casey, "*Desintegration: environmental protection and article 81 EC*", European Law Journal, 2009, p.375
144 Office of Fair Trading, "Roundtable discussion on Article 101(3) of the Treaty on the Functioning of the European Union – Synopsis of the event proceedings", 2010, p.6

- The first condition: improvement and progress

With regard to the first condition, which requires an improvement of production or distribution of goods or the promotion of technical or economic progress, the current decision-making practice is too focused on the "economic" factor, which implies that environmental benefits have to translate into pure economic benefits. Although this can be the case, especially when taking into account the cost of climate change, it is not always possible to evaluate these. Hence**, a less strict economic interpretation and focus on all limbs of the condition (not only on economic progress)** would allow genuine agreements to combat climate change and other environmental harm to meet this condition.[145]

- The second condition: a fair share for consumers

The concept of **benefits to "consumers" must be interpreted more broadly**. In certain cases, **societal benefits, delayed benefits** (long-term approach) and even benefits for **future generations**[146] (which are central to the concept of sustainability itself) should be taken into account when assessing environmental agreements. For instance, a sizeable, collective benefit derived from reducing greenhouse gas emissions will benefit society, as a whole as well as future generations, and not just a narrow group of purchasers.

ClientEarth would like to express its doubts regarding the standard used by the Dutch ACM in the *Chicken of Tomorrow* case. The "willingness to pay standard" applied by the ACM[147] might not be very robust in ensuring the best outcome for the environment. Indeed, consumer's willingness to pay for more sustainable products is mixed today due to the lack of transparency about the costs of negative externalities and the mistrust consumers have in the justification for price increases of more sustainable products (as well as risks of greenwashing). ClientEarth understands that ACM representatives recently claimed that they would not necessarily apply this standard when assessing a sustainability agreement, as they have done in at least one important environmental beneficial initiative to close down coal power plants[148] as, for instance, the elimination of negative externalities in the form of GHG emission reductions benefits society at large.

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[145] For a full legal assessment: S. Holmes, "*Climate change, sustainability, and competition law*", Journal of Antitrust Enforcement, 2020, 8, p. 362, pp. 372-374

[146] Communication from the Commission, Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14/1/2011, para. 87 - 90. As regards the Commission's approach (para. 88) to discount future societal benefits, ClientEarth would like to point out that in the case of GHG emission reductions, due to the rising societal costs of carbon emissions, such discounting should not occur.

[147] As the Dutch Authority stressed in the case "*Chicken of Tomorrow*", consumers might to some extent be willing to pay for certain sustainability measures. In principle, there is therefore scope for agreements between competitors on sustainability issues to be exempted under the competition rules even if prices were to increase. However, in order to allow these agreements under competition rules, consumers need to place a sufficiently high value on the benefits that the sustainability initiatives give rise to. This was not found to be the case in the said case. ACM, Case ACM/DM/2014/206028, "*Chicken of tomorrow*", 26 January 2015

[148] In 2013, the ACM appears to have blocked an agreement between energy companies to close down five coal power plants, as part of the "Dutch Energy Agreement", because it "*on balance, harms consumers, and offers too few environmental benefits*". The deal would have involved "*closing down five coal power plants, approximately 10 percent of the Dutch production capacity of electricity. This would lead to an increase of consumer electricity prices.* (…) *Since the positive environmental benefits are not substantial enough to offset the higher energy bills for Dutch consumers, the deal as currently included in the Energy Agreement must therefore be considered to be in violation of Dutch competition rules.* (…) [The claim of a possible reduction of CO_2 emissions] *is cancelled out by the fact that these emission rights can be used elsewhere in the European market for CO2 emission rights. Emissions are thus not reduced but are merely transferred elsewhere.*"**.** Press release available here; Although in this case, also the possibility of a transfer of CO_2 emission rights elsewhere will have contributed to the prohibition decision.

An agreement that restores a more reasonable balance of costs and benefits, and improves fairness overall in accordance with the "polluter pays" principle, must by definition be deemed to allow "*a fair share of the resulting benefit*." It should also be allowed to apply a broader standard in some circumstances to take into account indirect benefits such as (i) benefits in other markets or (ii) benefits to society at large, e.g. collective environmental benefits and the elimination of negative externalities.[149]

As regards **societal benefits**, the ACM has suggested that if: (i) the agreement aims to prevent or limit any obvious environmental damage, and (ii) the agreement helps to efficiently comply with an international or national standard to prevent environmental damage to which the Dutch Government is bound, users will, as a rule, reap the benefits in the same way as the rest of society (for example, less pollution improving health conditions). According to the ACM, as long as the price increase to users is lower than expected benefits for society as a whole[150] (and the other three conditions of Article 101(3) are fulfilled), this type of agreement can be exempted. It depends on an explicit legal requirement by which the state is bound which therefore embeds a redistribution between users and non-users in a democratic process. Such agreements would not necessarily fully compensate the increased price to the users of the product affected but arguably this is not required by the term "fair". Specifically, in relation to recognised globally tangible environmental benefits, such an approach could factor in negative externalities which might be fairer for users and non-users of the affected products. Non-users otherwise necessarily bear the cost of such negative externalities.[151] Establishing whether the price increase to users is lower than the expected benefits for society as a whole raises the question of quantification of costs and benefits[152], provided environmental benefits are quantifiable.

However, this type of "fair share" reasoning could not be accepted in the same way for all sustainability agreements or other social issues which restrict competition and harm consumers and do not internalise negative externalities in the same way as environmental protection improvements. Whilst they may have laudable aims, if the group of EU consumers affected by agreements on, for example, animal welfare or fair wages for third country workers (e.g. small farmers), would not sufficiently value the improvements they bring about, i.e. be willing to pay the resulting increased prices, this would be stretching the law too far from the consumer welfare test into an undefinable and ambiguous welfare test, susceptible to politicisation and corporate capture. In case competition law is not the best vehicle to achieve such important goals, this can be legitimately done through regulation.

It follows that, when looking at restrictive agreements, the Commission should conduct a comprehensive assessment in light of its different objectives. Restrictive agreements that create greener products should **be assessed for a possible increase of costs for consumers**. In conducting such assessment, the Commission must not lose out of sight that some benefits, that might compensate for the price increase, might not be quantifiable (e.g. clean air), and consider the social cost of greenhouse gas emissions and pollution nowadays and in the future. Since such cost will grow exponentially from now to 2050,[153]

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[149] This has apparently also already been considered within the Commission. See Albæk, Consumer Welfare in EU Competition Policy, pp.70-74.

[150] In other words, where for example consumers of a restrictive agreement represent only 30% of the population, in deciding whether the price increase to these affected consumers is outweighed by the societal benefit, for this type of environmental agreement one would weigh up the price increase to consumers against 100%, not 30%, of the benefits to society.

[151] Nowag, Sustainability & Competition Background, OECD Note 2020, para 3.

[152] The ACM suggests that quantification is not necessary in every case, ACM Guidelines on Sustainability Agreements, para 45 ff. Nor would it be necessary to seek exact quantification in every case which may result in misleading precision. A "sanity check" order of magnitude may suffice to determine that there are genuine benefits to consumers.

[153] See Institute for Policy Integrity, "Expert Consensus on the Economics of Climate Change", figure 15.

moderate price increases today might be outweighed due to the increasing social cost of carbon emissions in the future.

3.3 Question 2: Need for clarifying the rules and providing guidance

3.3.1 Clarifications and comfort should be given on characteristics of agreements that serve the Green Deal

ClientEarth recognises that the self-assessment procedure under Regulation 1/2003[154] (replacing the too burdensome previous regime of notification and authorisation)[155] brought about, in principle, a positive change in the way in which Article 101 TFEU was enforced. That said, the introduction of Regulation 1/2003 also had a negative impact on transparency and lead to a lack of guidance regarding what is allowed and what it not allowed under competition law. This leads to undertakings being overcautious and not engaging as much as they could on cooperation that could bring about innovation and various improvements to the quality of products and services.

Hence, ClientEarth welcomes the Dutch[156] and Greek[157] competition authorities' initiatives which set out some guidance on sustainability *agreements*. However, a common EU approach providing more guidance is urgently needed, as is demonstrated by the following examples.

For instance, companies wanting to cooperate with the aim to find safer alternatives to dangerous chemicals are concerned that they will be found to be colluding in violation of article 101 TFEU and tend to forget that they could be exempted if they were considered as R&D&I project. Another example of how antitrust risks can hang as the Damocles sword over SMEs collaborating to improve the sustainability of their practices, related to the creation of the Sustainable Seafood Coalition ("the SSC"), a pre-competitive platform in the UK to which ClientEarth provided assistance. The SSC's vision is that all fish and seafood sold in the UK comes from sustainable sources. The SSC has made it possible for businesses to improve their sourcing for the good of the environment by offering a practical and collaborative way of demonstrating good sourcing practices. The SSC had to seek (expensive) advice from competition law experts on multiple occasions:

- In May 2011, SSC members feared that their Codes of Conduct may be a "labelling cartel".
- In September 2011, SSC members relied on the Roundtable on Sustainable Palm Oil for guidance on competition law as they were having similar questions.
- In November 2012 and June 2013, antitrust rules were at the centre of discussions about the design of the SSC's Codes of Conduct, particularly in relation to the costs of audits, which, if too high, could exclude certain smaller businesses – which some members saw as potentially infringing competition law.
- In November 2015, members noted the need to anonymise and/or aggregate information shared through the SSC in order to avoid antitrust issues.

[154] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25.
[155] The previous enforcement regime, under Regulation 17, which dated from 1962, was indeed characterised by a centralised notification and authorisation system for Article 101(3) TFEU.
[156] ACM, Draft Guidelines on Sustainability claims, 22.09.2020.
[157] Hellenic Competition Commission, "Competition law and sustainability", 2020 (undated).

- In June 2018, when discussing whether to support a particular benchmarking tool to provide transparency between labelling and seafood certification programmes, there were concerns that this might have implications under competition law.
- In November 2019, when discussing the creation of an online platform, members recognised the need for guidance and protocols to avoid breaches of competition law.

ClientEarth is also leading a similar effort of commercialisation of sustainable seafood in Spain through *Plataforma por la Sostenibilidad Pesquera*, which focuses on creating industry support for the development of fishery improvement projects in the key fisheries where Spanish retailers source from. It is likely that without proper guidance, the same concerns will arise there as within the British platform.

Antitrust looms large when undertakings consider pre-competitive collaboration to improve sustainability. Members of sustainability platforms may hesitate, for example, to take a view formally and collectively on the soundness of certification schemes, on the viability of certain product sources such as fisheries, or of certain products, because of fears of being seen as a cartel. The result is that pre-competitive platforms are less ambitious than they could be and consequently, they do not realise their objectives of more sustainable business practices.

Conversely, ClientEarth has experienced that in a regulatory context (e.g. approval of chemicals in the EU), companies tend to make unfounded **confidentiality claims** alleging that some information requested from them by administrative authorities are business secrets that should not be disclosed and wrongfully argue that the publication thereof would be an infringement of competition law. Public authorities with insufficient knowledge about competition law[158] do not challenge these unfounded claims and, as a consequence, valuable information on polluting products remains unduly protected by confidentiality.

It is clear that the ability to seek guidance from the Commission or national competition authorities can offer reassurance that allows platforms such as the SSC to succeed. Also, legal advice might not always be available or affordable, particularly when NGOs are seeking to inspire relatively small companies to engage in pre-competitive sustainable collaboration.

3.3.2 Clarifications and comfort can be given in different forms

Most importantly, due to the apparent lack of legal certainty and wide-spread fear to violate antitrust rules when cooperating to achieve environmental/climate protection objectives, any sort of guidance and comfort that the Commission can provide is welcome. While national competition authorities might be a first port of call for certain undertakings in need of guidance it is, in the interest of EU-wide coherence of rules – and to avoid forum-shopping, important that the Commission leads with clear guidance on how it would assess cooperation initiatives with environmental/climate protection objectives. Different situations may call for different types of guidance. Therefore, the below list of possible ways of providing guidance/comfort should not be seen as an order of priority and the instruments could be combined:

- A first way of providing guidance, which could be relied on by undertakings fairly quickly, could consist in publishing a **Commission notice** (communication) on the specific application of the current horizontal cooperation agreement guidelines to sustainability agreements with examples.

- Secondly, in its **revision of the horizontal cooperation agreement guidelines**, the Commission should provide more examples of cooperation for environmental projects, either by adopting a

[158] Or due to lack of resources to analyse those claims in detail and challenge them.

separate chapter on environmental agreements or by providing specific examples under each section addressing a type of cooperation agreement as in the current guidelines (in particular regarding R&D&I, standardization, production and specialization).

- Thirdly, **block exemption regulations**,[159] which define certain agreements allowed under antitrust rules, can contribute to legal certainty.[160]

- Fourthly, the Commission could more often resort to **issuing comfort letters** (not just in extremely limited circumstances). When used, ClientEarth insists on the publication of such comfort letters, as it has been done for the Commission's comfort letter of 8 April 2020,[161] in order to increase transparency and enhance the effectiveness of the Commission's guidance for the industry concerned as well as other sectors.

- Fifthly, comfort can also be given by the Commission to undertakings through **ad hoc informal guidance** (which may come in various forms). In informal discussions with businesses about envisaged agreements, the Commission can provide clarifications on the characteristics of agreements that serve the objectives of the Green Deal without restricting competition. For sizeable cooperation initiatives with high environmental benefits, the Commission should be ready to engage in an informal guidance process, at the end of which the Commission would ideally issue a guidance letter, a non-confidential version of which would also be made publicly available. Although such informal guidance does not create a formal precedent, similar cooperation initiatives should require less informal guidance due to a higher level of comfort about the Commission's approach.

- Sixthly, in relation to the informal guidance provided by the Commission, ClientEarth suggests to add a specific chapter in its **annual activity report** on relevant informal guidance (indicating it does not have the value of precedent) given by the Commission in relation to sustainability agreements.

- Seventhly, **a voluntary notification procedure for negative attest** (similar to the one provided by the EP's proposal for a new Article 210a of the CAP Regulation) could be are welcome also in other industries. Such negative attest should be published in the same way as any other antitrust decision.

- Finally, to the extent not yet implemented, an **online helpdesk** could be set up at the level of national competition authorities and the Commission to guide undertakings with questions on sustainability cooperation plans towards the right public information and/or competent person(s); an online **FAQ/Q&A** regularly updated is another possibility.

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[159] Given the urgent need to address climate change, in addition to the existing agreement-specific block exemptions, a new block exemption should be considered for a defined category of sustainability agreements (regarding environmental protection and to fight climate change). Of course, this will not be easy to implement, because there are many different types of agreements that might have to be used in this regard, such as joint production, specialization, R&D). As views start to differ across jurisdictions, such instrument would allow for coherence on how to achieve this important social goal while ensuring competition compliance.
[160] These, however, should, to exclude any misperceptions, be accompanied by a clear communication that not falling within the block exemption regulation does not necessarily mean that an initiative is anticompetitive – it would instead just be subject to self-assessment and, possibly, one of the informal guidance options discussed below.
[161] Commission's comfort letter to Medicines for Europe, 08.04.2020, COMP/OG – D(2020/044003)

4 Merger control

4.1 Question 1: Mergers reducing environmentally-friendly choices

Mergers between firms could be harmful to consumers when they can be expected to raise the environmental cost that consumers pay, which is not reflected in the market price in monetary terms or in quality.[162] Under Article 2(1)(b) EU Merger Regulation (EUMR)[163], also taking into account the overarching Treaties provisions mentioned above (Articles 11 and 12 TFEU in particular), the Commission has to consider in its compatibility assessment of a concentration, "*the interests of the intermediate and ultimate consumers*", and "*the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition*."

ClientEarth does not agree with the Commission's reasoning in Bayer/Monsanto, a merger between powerful actors which have a clear interest in delaying the transition to sustainable agriculture, that Article 2(1) EUMR does not allow it to take environmental and human health considerations into account in merger control.[164] On the contrary, as supported by the Greek competition authority[165] and the literature[166], environmental and sustainability considerations shall be taken into account under the umbrella of "economic progress". Indeed, the element of "*development of technical and economic progress provided that it is to consumers' advantage"* already allows to take the sustainability aspects of a proposed transaction into account.[167] "Economic progress" under Article 101(3) TFEU includes for instance producing new machinery, still at the price of the predecessor model, that emits only half of the predecessor model's greenhouse gas emissions. In addition, this can be deemed "technical progress."[168]

Also, based on a broader reading of the consumer welfare standard, e.g. including society at large as well as future consumers (whose exposure to climate change might be greater than the exposure of current consumers),[169] taking into account "*the interests of the intermediate and ultimate consumers*" could be a basis for considering the sustainability aspects of a proposed transaction.

Therefore, the circumstances in which the Commission shall find a significant impediment in effective competition ("SIEC") might be more extensive than in the Commission's view in a number of cases. For instance, in the following cases, a purely competition-based assessment alone should find a SIEC: environmental "killer acquisitions" occurring if an acquirer plans, or has the incentive, to shut down a target's cleaner production facilities or to purchase a small, innovative start-up company whose disruptive

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162 Dolmans, idem, p. 12

163 Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) OJ L 24, 29.1.2004, pp. 1 ff

164 Commission Decision in Case M.8084 – *Bayer/Monsanto*, 21.3.2018, recitals 3010-3022. In any event, agrodiversification ties together competitive parameters of choices and biodiversity concerns. Concentrated businesses endanger seed biodiversity and increase the risks in terms of reduced product variety, which represents a loss of consumer welfare also from a competition perspective.

165 Hellenic Competition Commission, "*Competition law and sustainability",* available, p. 39

166 Holmes, "*Climate change, sustainability, and competition law*", Journal of Antitrust Enforcement, 2020, 8, p. 391

167 Holmes, idem, p. 390; Dolmans, p. 16; HCC, pp. 32 f

168 Holmes, idem, pp. 390 and 372, also referring to the Commission's CECED decision, OJ L 187 of 26.7.2000, pp. 47 ff., recital 48

169 Holmes, idem, pp. 354 (374 f.); Dolmans, idem, pp. 22 f.; Kingston, "Greening EU Competition Law and Policy", Cambridge University Press, 2012, pp. 171 ff.; Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, points 85, 87 and 88; HCC, pp. 31 f

and more environmentally friendly business model might in the future have challenged the acquirer's business model.

We underline that mergers between undertakings active on an environmentally-friendly product market can also reduce the consumer's choice of alternatives, by strengthening the market power of the merging entities. This is notably the case of mergers between renewable energy operators or between a renewable energy operator and an entity that controls the distribution of electricity, like the recent asset swap between RWE and E.ON in Germany, by which E.ON acquired RWE's Innogy to focus on the distribution and retail supply of electricity and gas and by which RWE acquired E.ON upstream electricity generation and wholesale activities.[170]. This is typically a case of a vertical integration that is reinforcing a dominant market actor to the ultimate detriment of both the liberalisation of the market and competition with smaller renewable energy companies actors.

The Commission shall also find a SIEC if a merger can demonstrably be expected to increase appreciably negative externalities (e.g. carbon emissions – which would be equivalent to a price increase to all consumers for the product in question, or impact biodiversity – a concern which had for instance been raised with regards to the Bayer/Monsanto merger[171]), in the absence of restraints by effective competition from greener competitors, opposition from consumers, or Government regulation. This could be the case of merged firms expected to increase output or gain market share at the expense of cleaner rivals. When such a case occurs, the Commission should look at the net price per unit produced. If the Commission finds that such price, taking into account the social cost of emissions, increases, it shall prohibit the merger or approve it only with commitments.

Moreover, a SIEC may be found not only in situations where greenhouse gas emissions are increased as a result of the merger, but also where, as a consequence of the merger, the necessary emission reductions will not take place or not to the extent they would in the counterfactual situation – somewhat similar to the risks of Article 6 Regulation 2019/631 organising car manufacturers pooling, mentioned in the antitrust section above.

ClientEarth believes that the Commission, in order to quantify the cost of environmental externalities and analyse the climate impact of a merger, should adopt an evidence-based analysis. In particular, pollution and emissions can be assigned a value, as proposed in the literature.[172]

4.2 Question 2: Improvements required to merger control

As indicated under question 1, "*economic progress (…) to the consumer's advantage"* under Article 2(1)(b) EUMR shall be interpreted to include environmental and sustainability considerations. In addition, in order to provide more clarity, ClientEarth recommends to **amend the legitimate interest clause** under Article 21(4) EUMR to extend its application to the Commission and explicitly encompass sustainability goals, as follows (our proposals underlined):

> *"Notwithstanding paragraphs 2 and 3, <u>the Commission and</u> Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.*

[170] Commission Decisions in cases M.8870 – E.ON / INNOGY, C(2019) 6530 final, 17.9.2019, and M.8771 – *RWE / E.ON Assets*, C(2019) final, 26.2.2019
[171] *Ibid.*, recital 3007
[172] Dolmans, idem, p. 13 ff

> *Public security, environmental protection, public health, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.*"

Furthermore, ClientEarth believes that one necessary way of integrating the objectives of the European Green Deal in merger control is by including, in the assessment of a transaction, the "real costs" of the negative externalities to society. This will be possible, for instance, by taking into account the social costs of CO_2 or other greenhouse gas emissions (reflecting the marginal cost to society of these emissions).

The goals of the Green Deal can also be pursued by allowing environmentally beneficial mergers, even if they raise the immediate market prices in monetary terms. However in order for such price rises to be both justified from a market perspective and **socially acceptable**, they should be **temporary and strictly limited** to internalising environmental costs of production (and thus does not cause windfall profits). The Commission should request commitments from the parties to the concentration to that effect; allowing a more favourable (e.g. cheaper) product access for vulnerable consumer groups could also be considered. Examples of such mergers would be deals lowering polluting outputs or reducing the environmental cost to society per unit produced. These deals lead indeed to a decrease of the net price, including social cost.

Annex: Recommendations for revising certain State aid guidelines

1 Guidelines on State aid for environmental protection and energy

Capacity mechanisms

As the Commission acknowledges in its Fitness Check report of 30 October 2020, the EEAG and application thereof to generation/resource adequacy measures since 2014 have not prevented environmentally harmful subsidies. On the contrary, the Polish capacity mechanism supports “coal to a great extent”, as per the Commission’s decision authorising the aid; the British, Italian and planned Belgian market-wide schemes have been designed to encourage the maintaining of existing and building of new gas capacity. Paragraph (220) EEAG that should be applied as verifying that Member States have not on the one hand, alternative and cleaner solutions to ensure security of supply than a capacity mechanism and, on the other hand, that a scheme is designed as limiting environmentally harmful subsidies, has not been seriously applied by the Commission so far.

The EEAG will need to be adapted in conformity with Chapter IV of the EU Electricity Market Regulation providing new rules to assess the need for, and design of, resource adequacy measures. The energy efficiency first principle, as detailed below, should also be an integrant part of the assessment for the need and design of these schemes, as provided for in the Governance of the Energy Union Regulation.

But in line with the Green Deal objectives that include decarbonisation objectives, the EEAG should make current paragraph (220) EEAG truly operational. Technology-neutrality of capacity mechanisms should not be a dogma when fossil fuels are locked in by long term contracts. Besides, if fossil fuel capacity, mainly gas (since coal will soon be excluded by law), could not be built without any capacity contract, they cannot be considered an economically sustainable solution to ensure security of supply in a country.

Biomass

The current EU energy and State aid frameworks consider biomass as a renewable and carbon-neutral energy source.[173] As such, aid to biomass benefit from the regime and exemptions for renewable energy in the EEAG.[174] Even more, Member States can also provide operating aid for existing biomass plants after their depreciation, which is generally not allowed under State aid rules.[175]

[173] E.g. the REDII and the EEAG include biomass in the definition of energy from renewable source.

[174] See EEAG, para.125 and para.127

[175] See EEAG, para.132 and seq.

This lenient approach towards biomass has clearly helped its significant deployment in the EU in the past years.[176] Biomass is today the most important source of renewable energy in the EU, with **forestry being the main feedstock for biomass.**[177]

This is however **not in line** with the 2030 climate and energy target as well as the Green Deal objectives. The EU State aid framework (as well as the EU energy policy framework as a whole) does not take into account the **external environmental costs of biomass**. Scientific evidence shows that burning biomass forestry leads to greenhouse gas emissions – in addition to deforestation – which contributes to increasing global temperature.[178] Moreover, burning wood also creates significant air pollution and emission of fine particles (i.e. NOx, PM_{10}, $PM_{2.5}$ and VOC) particularly toxic for human health.[179] Another effect of supporting biomass is **market distortions,** since aid granted to biomass are not used for the development of cleaner renewable alternatives more able to achieve decarbonisation in the long term[180].

For all these reasons, we call on the Commission to align the current EEAG to the EU new climate ambition and the 2050 climate neutrality objective by: (1) removing forestry biomass from the definition of energy from renewable source; (2) **prohibiting operating aid to forestry biomass** and allowing aid only to sources of energy that are actually renewable, such as wind or solar; (3) controlling external costs (i.e. greenhouse gas emissions) and potential distortive market effects of support to biomass in light of the 2050 climate neutrality objective; (4) increasing monitoring of the various supports to biomass based on different instruments thus to avoid distortion on the renewable energy market.

Renewable energy communities

Although the Green Deal puts **citizens at the heart of the energy transition** and the Clean Energy for all Europeans Package (CEP) explicitly recognizes the specific characteristics of renewable energy communities[181] as well as their environmental, economic and social benefits[182], the current State aid framework does not allow their full development on the EU energy market. In the latest report on the fitness check of state aid guidelines, the Commission confirms this by stating that the EEAG need to be adjusted, fine-tuned or potentially aligned with new CEP rules, including treatment of self-consumption and energy communities in RES schemes.[183]

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[176] Between 2005 and 2017, the use of wood and other solid biomass for heat and electricity in the EU28 increased by 43 per cent from 66.2 Mtoe (Million tonnes of oil equivalent) to 94.4 Mtoe. See Linde Zuidema, *State Aid for solid biomass: the case for improved scrutiny*, EUI working paper, LAW 2020/13 Department of Law

[177] https://publications.jrc.ec.europa.eu/repository/bitstream/JRC109354/biomass_4_energy_brief_online_1.pdf

[178] https://www.businessgreen.com/opinion/3031766/when-will-the-biomass-bubble-burst

[179] Capizzi, Das, et al. (2019). Renewable energy in Europe – 2019, recent growth and knock-on effects. (European Topic Centre on Climate Change Mitigation and Energy, 2019/8)

[180] Linde Zuidema, State Aid for solid biomass: the case for improved scrutiny, EUI working paper, Department of Law, LAW 2020/13

[181] As the REDII clearly underlines, "*the specific characteristics of local renewable energy communities in terms of size, ownership structure and the number of projects can hamper their competition on an equal footing with large-scale players, namely competitors with larger projects or portfolios*" (§ 71 of the REDII)

[182] See the REDII, §70 which acknowledges that renewable energy community bring particular added-value on the energy market in terms of local acceptance of renewable energy project and access to additional private capital which results in local investment that traditional market players cannot provide. As the REDII stresses: "*Such local involvement is all the more crucial in a context of increasing renewable energy capacity*"

[183] Annex 8 of the Commission staff working document, Fitness check of the 2012 State aid modernisation package, railways guidelines and short-term export credit insurance, Annex SWD(2020) 257 final, 30.10.2020, page 104

The EEAG's shift from feed-in tariffs to feed-in premium with market-based auctions has made it much more difficult for renewable energy communities to finance their projects. The EEAG's thresholds exempting smaller projects and enabling aid in the form of FIT[184] or exemption to bidding procedures[185] are not high enough as these projects develop.

As stressed by the Commission in the public consultation on the EEAG, bidding procedures may increase the administrative burden and costs in particular for smaller participants. This is particularly true for renewable energy communities, not only because of their size but also of their ownership structure.[186] In addition to the usual costs borne by applicants, renewable energy communities face additional costs related to the time and budget dedicated to local mobilisation and dialogue specific to democratic decision-making structures. Moreover, due to their unique characteristics, renewable energy communities do not have the same means to reduce risks for investors and thus access to capital financing compared to companies and profit-oriented market players. While the REDII defines primary purpose of renewable energy community as to "provide environmental, economic or social community benefits […] rather than financial profits" for their shareholders or members[187], bidding procedures often focus on economic criteria without taking sufficient account of social or environmental aspects of projects. This is mainly due to the capital-intensive nature of renewable energy projects but restricts access to state aid almost exclusively to traditional economic market players.[188] The lack of certainty about success of bidding procedures (compared to feed-in tariffs) is also an obstacle to access to finance for feasibility studies, permits and other administrative procedures.

The EEAG thus need to be adapted to improve the integration of renewable energy communities into the energy market and ensure a level–playing field while contributing to the empowerment of citizens towards decarbonisation in line with the CEP. The revision of the EEAG should also support the implementation by Member States of an enabling framework for renewable energy communities as required by Article 22(4) REDII.

The Commission should therefore consider the following options: (1) increasing the level of **thresholds** for exempting renewable energy community from bidding procedures[189], (2) dedicating a **special regime** for renewable energy communities in the EEAG. The EEAG could explicitly set specific auctions for renewable energy communities (i.e. reserving a certain quantity of capacity to be procured only from renewable energy community projects) or totally exempt them from bidding procedures to apply feed-in mechanisms only. The idea of a specific "**green bonus**" developed above under question 3 in the State aid-related section could also well apply to them.

[184] See para.125 and 127 of the EEAG

[185] See para.127 of the EEAG

[186] See Article 2 (16) (b) of the REDII: The shareholders or members of renewable energy communities shall be natural persons, SMEs or local authorities, including municipalities

[187] Article 2 (16) (c) of the REDII

[188] For example, within the third tendering period for onshore wind energy in France only one project with participatory investment was selected out of the twenty-one

[189] See §127 of the EEAG

Hydrogen

The Hydrogen Strategy released in July 2020 presents the revision of the EEAG as an "*opportunity to create a comprehensive enabling framework to advance the European Green Deal and in particular decarbonisation, including with respect to hydrogen*".[190] The Commission also announced significant financial support for both renewable and low carbon hydrogen[191] and some projects are foreseen to be adopted under the IPCEI Communication (also to be revised).

Although renewable hydrogen is a promising solution for sectors and activities that are not easy to decarbonise (e.g. shipping and aviation), the exact role of renewable hydrogen in the energy system of the future remains unclear. It is still linked to notable inefficiencies and high costs when compared to direct (renewables-based) electrification. At this stage, the future availability at scale of renewable hydrogen volume is not guaranteed: overestimating it, while not investing in already existing and available renewable energy capacity, may lead to the continued use of fossil gas in the future in contradiction with the Green Deal objectives.

Moreover, reaching the Hydrogen Strategy objectives[192] will require significant additional renewable energy production capacity, which will not be used for other purposes. This is why some Member States are calling for "additionality" in the renewable hydrogen production and in particular ask that renewable hydrogen is only produced "*when the average of renewable electricity on the national grid is above a baseline or when renewable electricity production exceeds demand*"[193].

Furthermore, allowing state aid to fossil-based hydrogen is not consistent with the Paris Agreement, the 2050-climate neutrality objective, as well as the principle of "do not harm" set out in the Green Deal communication. Fossil fuels-based hydrogen production emits large volume of carbon because of its reliance on fossil gas; moreover, CCS-plant based are very unlikely to be available at scale until the 2030s.[194] While the Commission is considering the introduction of certificates of guarantees of origins to support low-carbon hydrogen, it is still unclear whether this system was efficient to attract significant investments in the renewable energy sector.[195] Some Member States also raised concerns over risks of greenwashing in the case where a producer connects an electrolyser to the electricity grid while purchasing fossil-fuel based electricity from the local grid and buying renewable guarantees of origin to sell hydrogen on the market.[196]

Therefore, we call on the Commission to exclude any direct or indirect support to hydrogen that is not fully renewable, in accordance with the purpose in the Renewable Electricity Directive II of promoting renewable

190 Communication from the Commission, A hydrogen strategy for a climate-neutral Europe, COM(2020) 301 final

191 The Commission announced amounts reaching respectively 180 to 400 billion EUR and 3 to 18 billion EUR. *Ibidem*, p. 2

192 40 GW of renewable hydrogen electrolysers by 2030.

193 See "Additionnality in renewable hydrogen production", Joint contribution from AT, DK, ES, IE, LU and PT, 9 November 2020 (not published)

194 See e.g. https://policy.friendsoftheearth.uk/insight/role-hydrogen-our-low-carbon-transition; https://www.globalwitness.org/en/blog/why-blue-hydrogen-is-fossil-fuel-industry-greenwash-and-wont-fix-the-climate/

195 See e.g. Jaap Jansen, "Does the EU renewable energy sector still need a guarantees of origin market?", Policy insights, No 2017-27, July 2017, page 5; Ákos Hamburger, "Is guarantee of origin really an effective energy policy tool in Europe? A critical approach", Society and Economy; December 2019, 41(4):487-507

196 See "Additionnality in renewable hydrogen production", Joint contribution from AT, DK, ES, IE, LU and PT, 9 November 2020 (not published)

energies.[197] Under the terminology of the Hydrogen Strategy[198], this would entail excluding any support to "electricity-based hydrogen", "fossil-based hydrogen", "fossil-based hydrogen with carbon capture", "low carbon hydrogen" and "hydrogen-derived synthetic fuels".

The Commission should also pay attention to the abovementioned risk of unfair distribution of costs. Only hydrogen users (e.g. industrial stakeholders) should carry the cost for the production, transport and storage of hydrogen and not households and citizens.

In general also, whether operating aid for hydrogen will be needed would need to be assessed carefully in light of foreseeable (increasing) demand.

Energy-efficiency-first principle

Energy efficiency is a priority to decarbonise the energy system by 2050 under the Green Deal communication.[199] The Commission recognised the energy efficiency first principle as a guiding principle for EU energy policy[200] and it must be, as per the Governance of the Energy Union Regulation, driving Member States' energy planning, policy and investment decisions (notably for energy security, energy infrastructure and market integration decisions).[201] The Energy System Integration Strategy released in July 2020 also insist on applying the energy efficiency first principle consistently across the whole energy system.[202]

However, the EU is unlikely to meet its 2020 energy efficiency target[203] and risks not reaching the 2030 target in the context of the proposed new climate ambition of the EU.

As the revision of the State aid framework should reflect the objectives of the Green Deal and provide a fully updated enabling framework for a cost-effective deployment of clean energy, the EEAG should contribute to strengthen this principle and its full implementation by Member States in line with the definition provided by the Governance Regulation.

ClientEarth recommends that the energy efficiency first principle be included in the recitals and core paragraphs of the EEAG, in particular as a baseline for assessing whether a measure in the energy sector is necessary, in particular aid measures for resource adequacy and energy infrastructure.

Energy infrastructure

Amend paragraph (208) EEAG as underlined: "*For oil <u>and gas</u> infrastructure projects, the Commission presumes that there is no need for State aid*."

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[197] Art. 1 of the REDII

[198] Communication from the Commission, A hydrogen strategy for a climate-neutral Europe, p. 3

[199] Communication from the Commission, The European Green Deal, COM/2019/640 final, page 6

[200] See combined evaluation roadmap / inception impact assessment of the Review of the Directive 2012/27/EU on energy efficiency, 4th August 2020

[201] Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, OJ L 328, 21.12.2018, p. 1–77, recital (64) and Article 2(18)

[202] Communication from the Commission, Powering a climate-neutral economy: An EU Strategy for Energy System Integration, COM(2020) 299 final, page 5

[203] Communication from the Commission, Stepping up Europe's 2030 climate ambition Investing in a climate-neutral future for the benefit of our people, COM/2020/562 final

2 Regional Aid Guidelines

ClientEarth replied to the consultation on the review of the Regional Aid Guidelines on 30 September 2020.**[204]** In particular, in its submission ClientEarth proposed (*inter alia*):

- that the Commission goes further and extends the statement in point 11 of the draft guidelines (considering aid to coal and lignite to be incompatible with the internal market) to other fossil fuels. Indeed, support to the construction of new fossil fuel installations creates a lock-in risk that is also incompatible with the objectives of the European Green Deal and will prevent the EU from meeting its 2030 targets, as increased under the proposed European Climate Law;

- to increase aid intensity for "green bonus projects" that we defined as projects making a genuine contribution to the European Green Deal goals.

3 RDI Framework

Examples of changes to be implemented in the RDI Framework under review, in order to make sure the State aid rulebook fully supports the Green Deal, are the following:

- The definition of "aid for innovation clusters"[205] should read: "*aid for innovation clusters, which aims at tackling market failures linked with coordination problems hampering the development of clusters, or limiting the interactions and knowledge flows within and between clusters. State aid could contribute to resolving this problem, first by supporting the investment in open and shared infrastructures for innovation clusters, and second by supporting, for no longer than ten years, the operation of clusters for the enhancement of collaboration, networking and learning. A funding period of more than ten years can be granted to support the development of sustainable clusters*".

- A definition for "green bonus projects" should be added. We propose to add: "*'green bonus project' means a project that makes a genuine contribution to the European Green Deal goals*." Examples could usefully be provided based on the outcome of the present consultation.

- Under the section on "Contribution to a well-defined objective of common interest",[206] to clarify that "*The general objective of R&D&I aid is the promotion of R&D&I in the Union. In doing so, R&D&I aid should contribute to the achievement of the objectives set out in the Union's Digital strategy and the European Green Deal*."

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204 https://www.clientearth.org/latest/documents/response-to-the-consultation-on-the-review-of-the-regional-aid-guidelines/
205 In the current RDI Framework, under paragraph 12(e)
206 In the current RDI Framework, under paragraphs 42 ff

- Under the section on "Appropriateness of the aid measure",[207] to clarify that: "Aid for R&D&I can be authorised as an exception to the general prohibition of State aid, when it is necessary to achieve an objective of common interest. An important element in this respect is therefore whether and to what extent aid for R&D&I can be considered an appropriate instrument to increase R&D&I activities, given that other less distortive instruments may achieve the same results. In line with the Green Deal objectives, with Article 37 of the Charter of Fundamental Rights of the European Union, requiring that "a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development", as well as Articles 11 and 7 of the TFEU, the term "less distortive" in this sense also has to be understood to imply that the State aid measure cannot be allowed to distort competition to the disadvantage of market participants that offer "less environmentally harmful" solutions to achieve the same outcome" (the underlined sentence is our addition to the Framework currently in force).

- Under the section on "Cumulation of aid",[208] make clear that "where a Union funding is combined with State aid, the total amount of public funding awarded in relation to the same eligible costs must, however (and except in the case of green bonus projects) not exceed the most favourable funding rate laid down in the applicable rules of Union law". To clarify as well that "aid for R&D&I may, except in the case of green bonus projects, not be cumulated with de minimis support in respect of the same eligible costs if that would result in an aid intensity exceeding those laid down in this framework." (the underlined parts are our addition the Framework currently in force).

- Under the section on "Manifest negative effects",[209] to add that "in principle, an aid measure and the context in which it is applied need to be analysed to identify the extent to which it can be deemed distortive. However, certain situations can be identified where the negative effects manifestly outweigh any positive effects (for instance where an aid measure risks to make it harder to achieve a European Green Deal goal), meaning that aid cannot be found compatible with the internal market." (the underlined part is our addition the Framework currently in force).

- To amend the section on "Transparency"[210] on the model of the section on transparency under the draft Regional State aid guidelines.

- To change the annex on maximum aid intensities,[211] to account for an increase up to certain percentage points in case of aid for green bonus projects[212], with regards to aid for R&D projects and innovation aid for SME. To amend the same annex also to account for an increase up to certain percentage points in case of aid for green bonus projects.

[207] In the current RDI Framework, under paragraphs 56 ff
[208] In the current RDI Framework, under paragraphs 83 ff
[209] In the current RDI Framework, under paragraphs 103 ff
[210] In the current RDI Framework, under paragraph 119
[211] In the current RDI Framework, Annex II
[212] The figures would need to be defined based on the outcome of this consultation.

4 State aid and subsidies for fisheries

State aid and subsidies[213] for fisheries are regulated in particular by the EMFF and the Fisheries State aid guidelines.[214]

In 2018, the Commission modified the guidelines and allowed to grant state aid to finance the **construction of new fishing vessels** in the outermost regions. Subsidies for the construction of fishing vessels are harmful as they increase the number of vessels competing for limited resources in a situation where these resources are still scarce and are not fished at sustainable levels in the EU but also worldwide. In addition, scientific assessment of the stocks in outermost regions is not reliable so that the real state of the stocks and marine environment is not precisely known. Together with other NGOs, ClientEarth criticised heavily this modification, which paved the way to the introduction of those types of aid in the negotiations proposals of the Council and European Parliament for the future EMFF.

Harmful subsidies are mainly those subsidies that contribute to **fishing overcapacity**. Fishing overcapacity is when too much technology and effort are deployed to catch finite fish stocks, and thus directly lead to overfishing. These subsidies aim at **building new vessels**, increasing the **efficiency of fishing gears**, implement **fuel subsidies**, or are subsidies provided to fishing companies and vessels that engage in **detrimental practices** such as marine habitat degradation, slavery, that catch large proportion of species not intended for sale (i.e. bycatch) or threatened/endangered species. Other subsidies may have harmful effects on the fisheries sector or the fish stocks and wider marine environment. These subsidies artificially maintain fishers in the sector or push new fishers to enter the sector while stocks are still overfished.

But not all subsidies are "harmful". On the contrary, certain subsidies lead to investment in natural capital assets. They include, for instance, subsidies aimed at improving monitoring, control and surveillance programs of fishing vessels and more generally subsidies supporting fisheries management, fisheries research and development, and fishery habitat enhancement programs.

Thus we recommend that the following aid or subsidy measures are no longer allowed[215]:

- Subsidies that contribute to fishing overcapacity and potentially overfishing: construction of new fishing vessels, modernisation of fishing vessels that lead to increasing the capacity of the vessels to catch fish including engine replacement;
- Subsidies that aim at supporting fishers to enter the fisheries sector. Overfishing is a global and pressing issue and pushing people to enter the sector without solving the sustainability issue will only exacerbate this problem;
- Subsidies that aim at supporting fishers permanently exiting the fisheries sector without diversifying into a new sector of activity. In the past, it has been impossible to track down whether fishers really

[213] Since State aid have a limited scope in fisheries due to most of the subsidies regime coming from the EMFF, we address them together in this section under the heading "subsidies".
[214] Communication from the Commission — Guidelines for the examination of State aid to the fishery and aquaculture sector, *OJ C 217, 2.7.2015, p. 1; Communication from the Commission amending the Guidelines for the examination of State aid to the fishery and aquaculture sector*, *C/2018/7667, OJ C 422, 22.11.2018, p. 1*

[215] See also ClientEarth's reply to the European Commission's public consultation on the road map on state aid in the Fisheries and Aquaculture sector, May 2019; ClientEarth's response to the Commission's public consultation on the State aid instruments applicable to the fishery and aquaculture sector, September 2019

stopped fishing and for a large number of cases the subsidies granted were directly reinvested in the sector in new fishing vessels or fisheries businesses;

- Subsidies aiming at supporting fishers during the closure of activities due to biological crisis or seasonal closures[216] because these subsidies have the effect of maintaining artificially fishers in the sector despite the unsustainability of the fishing resources targeted;
- Fuel tax exemptions.

Other aid measures or subsidies should be also granted under specific conditions:

- Subsidies aiming at supporting the diversification of fishers outside the fisheries sector since they push them to maintain parallel activities artificially despite the lack of resources. This can only be supported if strict conditions are in place such as complete exit from the fisheries sector of the beneficiaries of aid;
- Subsidies aiming at increasing safety on board only if those investments only aim at increasing the quality of the working conditions or safety conditions and do not increase the ability of the vessel to catch fish e.g. increasing the engine power of the boat which leads fishers to take more risk to be more competitive (staying longer at sea or going further) and to fish more;
- Subsidies should be granted as a matter of priority to small artisanal fleets over large-scale industry including retailers;
- Large-scale industrial fleet should only be supported to develop more sustainable practices;
- Subsidies aiming at supporting investments in fisheries businesses should be as a priority financed through loans and repayable advances rather than through direct subsidies.

[216] In technical terms seasonal closures are period where the fishers would not fish anyway because there is no fish or because its spawning seasons.