ERT

Expert Paper

ERT Response on Competition policy contributing to the Green Deal

November 2020

Executive summary

The Working Group on Competition Policy of the European Round Table for Industry (ERT) welcomes the reflection on the relationship between competition policy and the Green Deal and strongly believes that competition law should be adapted to facilitate the achievement of the objectives under the Green Deal.

ERT encourages the Commission to play a lead role so as to ensure a consistent approach across the EU and globally.

State aid

i. ERT calls on the Commission to design a state aid temporary framework or specific guidelines to ensure:
   a. A swift implementation of Next Generation EU funds and national recovery plans to generate rapid and effective investment to truly deliver a green recovery; and
   b. A level playing field between companies competing on the merits in different Member States, as well as in the context of the EU Emission Trading System, and in countering the distortive impact of foreign subsidies.

Antitrust

ii. ERT considers that a broad range of collaborative agreements, including horizontal agreements between competitors, will be both necessary and effective to deliver EU Green Deal objectives. EU block exemption regulations should facilitate sustainability initiatives.
iii. Given the scale and urgency of the climate challenge, there is an urgent need for specific written Guidance or Guidelines indicating that the Commission encourages collaboration for the purposes of the Green Deal. It is essential that the Commission counteracts the perception that horizontal cooperation will be viewed with suspicion: boldness is required if climate change is to be averted.

Merger control

iv. ERT calls on the Commission to simplify the merger control process as much as possible to reduce the burden in relation to straightforward cases that contribute to Green Deal objectives.
v. In its substantive assessment, the Commission should take into account the interests of future consumers and society at large when weighing the sustainability benefits of a transaction, without relegating that analysis (only) to an efficiencies defence.

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1. Introduction

1.1 Background

1.1.1 The Working Group on Competition Policy of the European Round Table for Industry (ERT) welcomes this consultation on the role of competition policy in contributing to the European Green Deal. This paper sets out the initial feedback that we may further develop in the run-up to the conference that the Commission is organising in early 2021.

1.1.2 ERT agrees that competition law should play a vital role in achieving the Commission's Green Deal objectives. We signalled the need for adaptations in ERT's 2019 flagship publication "Competing at Scale".[1] Our recent publication on "Putting EU Industry Strategy into action" also makes clear that the European Commission and the EU Member States must do more to support the competitiveness of the EU and European businesses[2]. This entails ensuring that competition policy enables companies to meet the Green Deal objectives whilst preserving a global level playing field.

1.1.3 Competition policy can stimulate innovation, economic growth, and competitiveness in helping the economy adapt to the imperative of tackling climate change, provided it promotes predictability, transparency, and legal certainty. With these goals in mind, it is appropriate and timely to consider how best to adapt competition policy to the Green Deal, recognising that this will involve significant and coordinated transformation efforts across many sectors of the economy.

1.2 The lead role of the European Commission

1.2.1 ERT encourages the Commission to play a lead role to ensure a consistent approach across the EU, and to engage internationally since climate change and sustainability require an urgent, cross-border and aligned response.

1.2.2 ERT welcomes the contributions of the Dutch and Greek competition authorities on this important subject and commends the innovative thinking of both authorities. It also welcomes the programmatic statements of the UK and French competition authorities.

1.2.3 There is a risk for divergent approaches between not only the Commission and national authorities but also between national authorities themselves (compare for example the different positions of the Dutch and German authorities on the matter). As experience has shown, divergence (e.g. on vertical issues such as the criteria for selective distribution agreements) increases business uncertainty and, in a worst-case scenario, forces companies to adapt their commercial strategies in a country by country approach which adds unnecessary costs, complexities and inefficiencies, and undermines the integrity of the Single Market.

1.2.4 In adjusting its policies and implementation priorities to promote pro-competitive conduct in line with the Green Deal, it will be important that the Commission ensures a high level of scientific expertise and concomitant transparency to be represented in its policy and case-handling teams when considering sustainability goals (also the expertise of environmental economics could be considered where relevant). This should go beyond the existing inter-service consultations, potentially with experts from the corresponding sector-specific Directorate General embedded in teams depending on the complexity and specificity of particular cases.

1.3 Scope

1.3.1 ERT invites the Commission to clarify whether sustainability projects going beyond the Green Deal objectives will also be considered in its review.[3]

2. State aid

2.1 Context

2.1.1 ERT welcomes the emphasis on environmental sustainability and digitisation (recognising the large overlap between the two) in the EU's recovery package. The anticipated level of public and private investment required to decarbonise the economy and overcome related market failures effectively amounts to an industrial revolution. Clear state

1 ERT, "Competing at Scale – EU Competition Policy fit for the Global Stage", October 2019. See: https://ert.eu/documents/competing-at-scale-eu-competition-policy-fit-for-the-global-stage/: "it is increasingly necessary for companies to cooperate to meet sustainability" (p. 14) and "introduce greater flexibility in state aid rules/guidelines to reduce global competitive disadvantages and to open up for even more research and first-market deployment of breakthrough innovations, especially in key strategic areas (e.g. climate-neutral technologies)" (p. 18).
2 ERT, "Putting EU Industry into Action – KPIs for tracking progress and benchmarking competitiveness", November 2020. See: https://ert.eu/documents/kpis4industrialstrategy/
3 For example, the draft Dutch guidelines draw a distinction between environmental-damage agreements and other sustainability agreements. Furthermore, there is a lively debate on whether considering benefits to society should also be relevant in assessing cooperation in complementary areas, such as improved living and working standards, eliminating child labour, increasing the health benefits of products, and increasing educational and training opportunities.

aid rules will be key to strengthen the European industry's ability for the green transition.

2.1.2 The Commission should enable state aid for sustainability goals while ensuring a level playing field between companies in the different Member States. The Commission should take into account different means and technologies suitable to achieve the ambitions. A "pick-the-winner" approach should be avoided and European businesses should continue to compete on the merits.

2.1.3 The green transition requires the deployment of new technologies, building low-carbon production facilities, and the roll-out of decarbonisation technologies. These activities will require increased investments and additional operational costs for the European industry. Hence, it will be required to enable higher aid intensities and increased amounts of state aid for green transition projects than currently allowed.

2.1.4 Bearing additional costs related to the transition to the Green Deal whilst competing globally will be challenging for European industry, particularly in the absence of a global level playing field, when climate change obligations and subsidy control are more stringent in the EU than elsewhere.[4]

2.1.5 The state aid rules need to be revised to take into account the European industry's global competitiveness by:

a. increasing support to "green projects"

b. alleviating regulatory costs that are not borne by competing industries worldwide. Such costs would otherwise hamper the European industry's ability to invest in green technologies and in reality increase carbon leakage.

2.1.6 When assessing the legality of state aid under today's rules, the main factor is the effects on trade and competition within the internal market. However, for state aid rules to be effective in supporting the green transition, the aid must be made available also for industries located in the EU that are very exposed to trade. The subsidies as well as non-existing or less demanding climate policies in non-EU countries constitute distortions for competition in international markets. For trade-exposed industries in the EU, the effects on their global competitiveness should be the key factor when assessing aid. In this context, the traditional notion of partial, degressive and limited aid should be reconsidered.

2.1.7 State aid revision should aim to:

a. enable electrification to the extent that it is economically and technically feasible,

b. decarbonise the gas mix to provide a low-carbon energy supply to hard-to-abate industrial sectors and transport,

c. support energy-efficient industrial processes and help decarbonise heat generation and supply,

d. promote innovative projects, new technologies, and digital solutions including those that enable energy system integration and increase flexibility,

e. lower net carbon emissions in a short timeframe (even if not yet at the optimal level that could be reached in the longer term). Since time is of the essence when addressing climate change, state aid rules should also promote solutions in a transition phase, and

f. support projects in other critical areas than the energy sector, such as in agriculture, logistics, and packaging.

2.1.8 Urgent changes are required to ensure that the Next Generation EU (NGEU) funds and national recovery plans can be implemented quickly to truly deliver a green recovery. Member States must commit around €115 bn between 2021-2023 on Green Deal relevant projects. This will require innovation and exceptional speed on the part of Member States and industry.

2.2 Recommendations

2.2.1 The ***Energy and Environmental Protection Guidelines (EEAG)***, the ***General Block Exemption Regulation (GBER)***, and the ***Communication on Important Projects of Common European Interest (IPCEI)*** are not adequate or sufficient to rapidly enable the development and implementation of new technologies, and the energy systems integration required to accelerate the decarbonisation of all economic sectors by 2030.

4 See the January 2019 OECD Report "Measuring distortions in international markets" regarding the magnitude of world-wide general subsidies in process industries. In this context, the European Commission's White Paper on foreign subsidies is welcomed. These reflections should also specifically address the Green Deal objectives.

2.2.2 This exceptional challenge of enabling investment rapidly under the NGEU funds requires an exceptional response from the Commission. DG COMP should issue a temporary framework or specific guidelines to cover all priority areas flagged in the Annual Sustainable Growth Strategy and Staff Working Document as European flagships. We recommend the following:

a) Clean energy must become more affordable for citizens and industrial consumers

2.2.1 The Energy and Environmental Protection Guidelines (EEAG), the General Block Exemption Regulation (GBER), and the Communication on Important Projects of Common European Interest (IPCEI) are not adequate or sufficient to rapidly enable the development and implementation of new technologies, and the energy systems integration required to accelerate the decarbonisation of all economic sectors by 2030.

2.2.3 The success of the decarbonisation efforts of industry and particularly energy-intensive sectors is directly dependent on higher electrification or decarbonisation based on renewables, improvements in energy efficiency, the transitional use of energy sources like natural gas, and sufficient incentives to invest in new production facilities, which mainly should rely on decarbonised energy sources or processes allowing carbon capture and subsequent storage or usage of carbon.

2.2.4 But in order to send energy consumers the right price signals to switch from fossil fuels, the energy price should not be burdened with levies and excessive taxation and must foster the competitiveness of energy-intensive European industry. That means covering the price differential compared with non-EU regions that do not bear the same tax burdens and alleviating the social aspects by making or keeping energy affordable for all consumers.

2.2.5 State aid can contribute to this objective by replacing current financing of renewables through levies on the energy price by direct grants out of the general state budget to the extent still required and allowing a tax reduction on energy below the minimum threshold in the Energy Taxation Directive for other green fuels.

2.2.6 Regarding the fiscal burden on energy, the Energy Taxation Directive should allow a reduced level of taxation on green energy (both electricity and clean gases (biomethane and renewable hydrogen) and minimisation of additional levies and other costs on electricity prices that are not directly related to supply should be authorised as compatible state aid for certain uses (e.g. electricity used in electrolysers).

b) Expand the guidelines to include new and clean technologies (such as hydrogen, biogas, etc...)

- **Expand the definition of energy infrastructure in GBER**

2.2.7 The ambition to reduce emissions by 55% by 2030 must be backed with appropriate funding. The GBER should be amended to reflect the central role of energy infrastructure to advance and foster energy systems integration and achieve decarbonisation objectives in a cost-efficient manner for all sectors.

2.2.8 The current definition of energy infrastructure is too restrictive. It should at the very least be expanded to include in particular: (i) electric vehicle charging infrastructure, (ii) retrofit works for gas grids to become hydrogen-ready, (iii) storage solutions or investments in demand-side management solutions, and (iv) other innovative infrastructures to be developed in the future. The provisions should include flexibility to support thermal storage and connected power-to-heat and heat pump technologies as well as other technologies. A broader definition would facilitate a more holistic approach to required infrastructure development, rather than one based on traditional silos.

2.2.9 Likewise, the restriction of aid to assisted areas in Article 48(2) GBER should be lifted. It is based on the traditional thinking that investment for energy infrastructure only requires support in less developed EU regions. To hasten decarbonisation, we must accelerate investments, for instance, in grid reinforcement or digitalisation in all areas where there is a significant renewable generation that needs to be integrated, where consumer demand is high, or where hydrogen-production facilities are built. The restriction of aid to assisted areas is counterproductive to the objectives of the Green Deal and should be removed.

2.2.10 Improved, fit-for-purpose funding conditions should be adopted, such as authorising investment and operating aid for certain green transition projects. Also, digitalisation is a prerequisite for the future decentralised and decarbonised economy. Digitalisation contributes to the twin objective of green and digital transformation. Where digitalisation projects imply higher operating expenditure, this should be reflected in the revised state aid rules by allowing more generous grants of operating aid in relation to the environmental transition.

- **Broaden the scope of EEAG to include new decarbonisation technologies**

2.2.11 The scope of the EEAG should be expanded to support the roll-out of other decarbonisation technologies e.g. hydrogen production and use, sustainable aviation fuels and carbon capture and storage projects. This would help strengthen Europe's international leadership in these areas and at the same time prevent an undue burden associated with the uptake of these technologies by European industries, relative to competitors from other regions who may not face such costs.

2.2.12 In particular, the upcoming revision of the EEAG should set the right framework for ambitious Contracts for Difference (CCfDs) to be implemented at the national and sectorial level. The EEAG should be revised to introduce CCfDs and clarify the criteria that are necessary for the transformation of industrial sectors, allowing compensation for the entire transformation cost, and accepting long-term duration of CCfDs, tailored to the specificity of industrial sectors with very long investment cycles. In this context, sector-specific decarbonisation project contracts are appropriate to reflect the different financial situations, abatement potential, and added value for decarbonisation

- **EEAG Review should maintain exemptions for energy-intensive industries if the electricity price is not relieved of levies and taxes**

2.2.13 If the electricity price is not stripped of policy-related levies and taxes, the reductions and exemptions for energy-intensive firms (provided for by Section 3.7 of the EEAG) must be at least fully maintained. Furthermore, capacity mechanisms[5] provide support for renewable energy production and use. Companies that are paying for such capacity mechanisms through their power bills should be eligible for the same kind of reduction or exemption that Section 3.7 of the EEAG provides.

2.2.14 Exemptions from levies imposed on electricity users to finance renewable energy production (for instance feed-in tariffs) should be broadened to sector and process level and reflect the new realities of the market. In particular, they should apply to each of the different ways of achieving low carbon electricity integration, including grid-procurement, on-site generation, hybrid set-ups, or power purchase agreements.

2.2.15 These exemptions are vital to maintaining a competitive environment for European industry vis-à-vis producers from third countries. Without these exemptions, Europe-based firms would face the imminent risk of losing market share to competitors in third countries where no comparable climate protection measures are in place, further accelerating the carbon and investment leakage already occurring today.

2.2.16 To mitigate this threat, specific provisions for industrial sectors most exposed to the risk of carbon leakage should be maintained (paragraphs 188 and 189 of the EEAG) to remove any risk of overcompensation or market distortion.

- **EU ETS State Aid guidelines**

2.2.17 Due to the higher EU climate ambition of reducing emissions by 55% by 2030, CO2 prices are expected to increase steeply. Until there is a global level playing field, adequate measures to compensate electro-intensive users for the indirect CO2 costs must be maintained. The Commission's recently revised ***EU Emissions Trading System State aid guidelines (ETS Guidelines)*** aimed at reducing the risk of carbon leakage related to indirect ETS costs through electricity prices from 2021 through to 2030 do not go far enough, not least given the additional economic pressure caused by the Covid pandemic.

5 Capacity mechanisms are measures taken by Member States to ensure that electricity supply can match demand in the medium and long term. They require power plants to be available for generating electricity when needed, i.e. to fill the expected capacity gap and ensure security of supply at times when electricity from renewables is not available in sufficient quantities. In return, these power plants receive payment for availability (in addition to payment for electricity being taken-off) thus creating an additional cost for users.

2.2.18 The ERT welcomes the Commission's acknowledgment that it will evaluate a revision or adaptation of the ETS Guidelines following the broader review of climate-related policy instruments, including the initiative for the creation of a Carbon Border Adjustment Mechanism. Adaptation will almost certainly be required to increase aid thresholds to meet the challenges that are already identified to provide stable investment conditions.

c) Important Projects of Common European Interest (IPCEI)

2.2.19 IPCEI projects supporting the Green Deal currently risk being held up by a lack of clarity on the eligibility criteria.

2.2.20 Paragraph 23 of the ***Communication on criteria for the analysis of the compatibility with the internal market of state aid to promote the execution of IPCEI (IPCEI Communication)*** mentions environmental goals as a possible driver for IPCEI. DG COMP could give more guidance on the actual requirements from a state aid perspective including the types of projects likely to be in scope.

2.2.21 Furthermore, the IPCEI Communication provides that spill-over effects generated by IPCEIs must be thoroughly evidenced, including detailed information on the factual and counterfactual scenarios. Also, it must be demonstrated that spill-over effects benefit companies other than the state aid beneficiaries themselves, economic sectors other than the beneficiaries' economic sector (or sectors at different levels of the value chain), and the Member States other than those granting the aid. It is necessary to reflect on whether these exacting standards should be lowered in relation to projects in support of the energy transition. Alternatively, contributions to the energy transition could be added to the general positive indicators set out in the IPCEI Communication (para. 20).

d) EU Taxonomy Regulation

2.2.22 The delegated acts necessary for the full application of the EU taxonomy framework are currently still under development. Reference to the EU taxonomy should be considered under EU and national state aid decisions only if the technical criteria are realistic as well as achievable and embed all environmental, social and governance (ESG) dimensions of sustainability. At this stage, it is challenging to evaluate the EU Taxonomy Regulation as a reference to define positive environmental benefits.

2.2.23 Furthermore, the EU Taxonomy Regulation currently does not cover all sectors and it only partly covers the sectors that are eligible within its scope. The taxonomy does neither target R&D nor technology development. Projects that could have high environmental benefits may currently fall outside the taxonomy. Therefore, restricting the definition of positive environmental benefits to the EU taxonomy in its current shape would be too narrow and would not reach the intended effects.

3 Antitrust

3.1 Context

3.1.1 ERT supports the elaboration of additional guidance and clarity to encourage and enable European businesses, including competitors where relevant, to work together to achieve bold sustainability goals which either cannot be achieved unilaterally or can be more effectively pursued through joint efforts.

3.1.2 In this context, ERT calls on the Commission to indicate the circumstances in which sustainability projects will likely fall outside the scope of Article 101(1), rather than defaulting to a detailed Article 101(3) effects analysis (there is little room for a "by object" approach). A strong message that sustainability collaboration is actively encouraged is necessary to change the perception that competition authorities view such collaboration with suspicion as potential disguised cartels. Concrete dedicated guidance would stimulate private investment and business involvement in achieving the EU Green Deal objectives. An overly conservative approach or continued lack of specific guidance would severely hamper the achievement of rapid decarbonisation that is needed to meet European and international environmental goals.

3.1.3 ERT encourages the Commission to clearly signal its willingness to engage with business in a timely and effective manner to enable prompt progress on the myriad of complex investments and collaborations required, without placing an undue administrative burden on business in the process. Agility and flexibility will be key.

3.2 Horizontal Cooperation - Block Exemptions and Guidelines

3.2.1 ERT appreciates the legal certainty provided by block exemptions for reasons explained below. But block exemptions are of little value in relation to decarbonisation efforts that require most of, if not all operators in a given industry sector, to make concerted efforts to change. That is due to their limiting market share thresholds (and potential difficulties in defining the likely relevant market), and because of the traditional and outdated distrustful approach to horizontal collaboration. The urgent need for action on the Green Deal is such that the Commission should not wait for the revision of the Horizontal Guidelines to issue the bold guidance that is required to unlock investment.

3.2.2 We invite the Commission in the short-term to consider, and provide clear statement on, the likelihood of the following sorts of horizontal agreements being pro-competitive (subject to the basic principles of good faith, transparency, openness, information sharing and proportionality):

a. Projects to reduce ecological footprint, e.g. by reducing carbon emissions, energy consumption and the use of plastics, improving agricultural methods to reduce emissions, and by encouraging composting projects,

b. Projects to increase the commercial viability of implementing circular economies, driving re-use, recyclability, and recycling, such as harmonised approaches to packaging or the fixing of levies to support more widespread and efficient recycling activities,

c. Infrastructure and related cost-sharing to meet Green Deal goals,

d. Minimum mandatory standards to reduce environmental impact,

e. Collaborations to create new alternative fuel pathways and other high-risk transformation projects that require significant investments and scale,

f. Initiatives between companies to agree on common standards and reporting obligations with, and conduct joint audits on, their common suppliers to assess their Green Deal credentials,

g. Agreements between competitors where they commit to respect environmental laws and commit to only using compliant suppliers and other business partners,

h. Agreements between competitors to adopt standardised “green” taxonomy or classification in relation to sustainability claims, and eco-labelling of products, and

i. Projects which are endorsed or supported by national and/or EU public authorities and agencies as contributing to achieving the objectives of the energy transition.

3.2.3 In addition, it would be helpful to have clearer guidelines in relation to the competition law risk of exchanges of information between competitors for sustainability projects.

a) Demonstrating the Need for Sustainability Cooperation

3.2.4 When analysing different forms of horizontal co-operation, the Commission may ask companies to demonstrate why cooperation between two or more industry actors is necessary. However, the analysis should not be limited to whether individual companies can or cannot undertake a project unilaterally, but look at whether the cooperation is necessary to, or significantly increases their ability to, amongst others:

a. achieve minimum viable scale to compete at global level through the creation of new environmentally friendly digital or analogue propositions for consumers and industry,

b. achieve a minimum viable scale for sustainability projects (e.g. recycling),

c. allow a quicker and/or more effective implementation of initiatives to fight climate change,

d. allow the emergence of alternatives to current technologies, infrastructures, and processes that enhance competition and innovation,

e. promote alternatives to carbon-intensive ways of doing business and/or the use of technologies to decarbonise these business models (e.g. through carbon capture),

f. drive improvements in consumer welfare, environmental protection and delivering a single market, and

g. create infrastructure efficiencies that would improve energy efficiency and reduce the ecological footprint.

b) Quantification of Benefits vs Costs

3.2.5 Traditional economic analysis focusing on pricing is not sufficient in promoting the Green Deal. The Commission must develop guidance on the possible methods of measuring the positive impact of sustainability, not just in respect of the short-term interests of consumers, but factoring in long term benefits for society at large.

3.2.6 To the extent possible, there should be an acknowledgment that bona fide sustainability initiatives have a positive impact to avoid imposing an excessive burden on companies in terms of economic analysis. The connection between the initiative and the Green Deal could, amongst others, be demonstrated through the measurable factors under the EU Taxonomy Regulation.

3.2.7 When balancing costs and benefits, there is no legal requirement to prove that consumers who may suffer a disadvantage (e.g. a price increase) be "fully compensated" for the disadvantage. Over-emphasis on short-term price effects can be a barrier to sustainability projects: ERT suggests that the importance of benefits to society at large should be given much greater weight, and the short-term impact on in-market consumers should not be over-emphasised.

3.2.8 Likewise, over-emphasis on the outcome of an assessment of consumer willingness to pay for a product which becomes more costly (at least in the short term) due to a sustainability initiative is also a risk. ERT considers that the test of current customers' 'willingness to pay' is not the only or best test because it takes no account of:

a. behavioural biases, such as irrationally preferring small immediate benefits, such as a small reduction in the price, above much larger future benefits, such as no depletion of a certain resource (which could benefit in-market consumers and society as a whole),

b. longer-term improvements/efficiencies,

c. the fact that in many cases, business (perhaps spurred on by government, and informed by environmental scientists and economists) will need to lead the way, with consumers potentially lagging behind in understanding and valuing the environmental improvements/efficiencies, and

d. the fact that today many prices may not be correctly priced as the environmental impact of such products (carbon-emissions, packaging waste, etc..) has, to date, been externalised and left for future generations to pay.

3.2.9 ERT considers that future benefits to society are of particular importance when it comes to assessing sustainability agreements. The need to consider future generations is central to the very concept of sustainability. The Commission's Article 101(3) Exemption Guidelines of 2004 confirm that future benefits are relevant (albeit with discounting for the fact that these benefits will only arise in the future). In the environmental context, discounting for future benefits is not appropriate given the societal and economic costs of climate change if drastic action is not taken.

3.2.10 Where quantification of benefits to society is not possible, or where a realistic measure cannot be applied, this should not be an insurmountable hurdle to encouraging sustainability projects. Pragmatic and common-sense approaches should be found.

3.2.11 ERT encourages the Commission to build on the approach suggested by the Dutch competition authority in its sustainability guidelines whereby quantification of environmental benefits is not necessary if the undertakings involved have a limited combined market share, or if the harm to competition is smaller than the benefits of the agreement.

c) Indispensability

3.2.12 Guidance would be useful on how/when the Commission is satisfied that a sustainability agreement does not include restrictions that are unrelated or unnecessary to the fulfilment of its objective benefits.

3.2.13 The Commission has been through this thought process in relation to sustainability benefits. In CECED[6] the Commission was satisfied that industry-wide targets, information campaigns, and ecolabels would not have been a viable way of achieving the same objectives as the restrictions under consideration.

6 2000/475/EC: Commission Decision of 24 January 1999. See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32000D0475

3.2.14 It would also be useful if the Commission could share its thinking in relation to other justifications, including:

a. where a restriction is needed to overcome a first-mover disadvantage (e.g. by avoiding free-riding on investments to set up an eco-label),

b. to achieve economies of scale to set up and monitor a standard, or

c. where individual businesses – even with strong market positions – lack the necessary leverage to induce systemic changes required in the supply chain.

3.3 Block Exemption Regulations ("BERs"): where to expand

3.3.1 In the current geopolitical climate, legal certainty from the Commission and the Member States is paramount to enable European companies to innovate to successfully and sustainably meet the opportunities and interlinked challenges of the digital and climate change era. Despite the rigidity of block exemptions and the challenge of adapting them in response to the changing dynamic of a fast-moving economy, European companies that are active globally also rely on the amplified legal certainty provided by BERs that have earned international recognition and inspire the adoption of similar standards elsewhere.

3.3.2 As underlined in the ERT Expert Paper in response to the Commission consultation on Horizontal Cooperation, ERT supports the need for more flexibility, pragmatism, and clarification on the topic of sustainability in the upcoming revisions of the ***Horizontal Cooperation Agreements Guidelines (Horizontal Guidelines)*** as well as the various ***Block Exemption Regulations (BERs)***. The revised rules should contribute to creating an environment in which dynamic collaborative innovation can flourish in pursuit of Europe's Green Deal goals.

3.3.3 ERT encourages the Commission to bring the following categories of agreement under the safe harbour of a BER (whether existing or new). In doing so, since the sustainability agenda is transboundary by nature and requires action from all companies in any given sector, we encourage the Commission to consider abandoning the traditional market share thresholds, at least in certain situations.

a) Standardisation and sustainability agreements

3.3.4 Sustainability agreements and related standardisation should benefit from a BER safe harbour where the agreements have net pro-competitive effects, for instance, in markets where the only alternatives are proprietary solutions of dominant companies, or where companies need to agree on certain standards to achieve defined environmental objectives. In this respect, the Commission should consider examples and scenarios of when it is justifiable for companies to agree:

a. to adhere to the same standard, i.e. the standard can only work in practice if all market players implement the same standard, vs

b. a minimum standard, thereby ensuring companies can exceed that standard, and accordingly maintain a vector of competition.

b) Joint Audit initiatives

3.3.5 To create sustainable value chain models, companies need reliable information on their suppliers' environmental footprint (e.g. emissions), their approach to measuring and reporting this footprint, and compliance with sustainability standards. Performing the audits and assessments needed to obtain such information can be costly and time-consuming. There are clear efficiencies in companies working together to agree on an approach to measuring and reporting, build fair and transparent audit processes, conduct these audits, and share the results including the performance of identified suppliers.

c) Research and development (R&D) agreements

3.3.6 Much more flexibility is required to incentivise broad collaboration and innovation that is required in today's dynamic economy, especially when it comes to sustainability.

3.3.7 The current R&D BER is not fit for purpose. The 25% market share threshold is too constraining. Parties should not be treated as competitors in the innovation space unless their innovation efforts are in direct competition with one another, and the notion of potential competition should remain grounded on likely and foreseeable market entry. Determining the relevant market(s) and the potential effects on competition are particularly difficult if companies are looking for step-change innovation that may even create a new market.

3.3.8 Paid-for "outsourced" R&D arrangements should be categorised as vertical relationships, similar to subcontracting. Many concepts under the R&D BER, such as the "access rights" under Article 3 introduce unnecessary complexity and are not in keeping with the reality of vertical relationships or the dynamism of research today.

3.3.9 Also, the constraints around "joint exploitation" of results need an overhaul: under the current rules, agreeing on price or output is not allowed except if parties sell through a joint sales organisation. Where parties have made significant investments in co-developing a new green product, as a general rule, they should be able to share profits and determine pricing where there is no joint sales organisation.

3.3.10 Accordingly, the ERT urges the Commission to simplify and extend the R&D block exemption to encourage R&D cooperation for sustainability objectives.

d) Joint production and commercialisation agreements should be covered by a block exemption and, in particular:

3.3.11 Certain types of infrastructure sharing agreements are a usual and effective way for companies to co-invest and deploy infrastructure (such as telecommunications networks) across Europe. In many cases, they generate substantial efficiencies, cost-savings, and reducing environmental impact. The benefits for consumers are clear: increased coverage and investment in innovation to deliver high quality and speedier networks.

a. For example, ultra-fast fibre and 5G networks are key to drive the de-carbonisation of economies while at the same time reducing the emissions of the digital sector. Moreover, the Covid-19 crisis has shown that the networks in some parts of the EU need to be improved, as many operators and networks cannot provide enough capacity nor are they able to manage network traffic for higher demands. In satisfying all these demands, in many cases, the massive investment required for network deployment with ambitious expectations from public authorities and consumers regarding roll-out timing and coverage will not be possible to achieve without infrastructure sharing agreements among operators to ensure business sustainability, improve the efficiency of energy consumption, reduce environmental impact and satisfy high-quality connectivity demand in accordance with regulatory obligations.

b. Similarly, the energy sector increasingly requires cooperation among market players for the development or retrofitting of new or existing infrastructures needed for the transportation and storage of new or traditional sources of energy (e.g. transportation of power from large offshore wind farms, hydrogen and/or carbon transportation and storage, etc.).

3.3.12 Data sharing and data pooling agreements when aimed at contributing to sustainability goals could justify an exemption under certain requirements. For instance, telecom and energy operators alike are increasingly using Big Data and Artificial Intelligence applications to optimise system performance to make networks as sustainable and cost-efficient as possible. The data transmitted by smart meters are used for the targeted implementation of energy efficiency solutions, such as the application of standby mode to limit energy consumption when traffic is slow. There are many examples of efficient data sharing between operators in different sectors of the economy in relation to collaborations on green projects (e.g. finding new zero-carbon fuels for air or sea transport for example).

3.4 Approach to enforcement

3.4.1 ERT supports the approach proposed by the Dutch competition authority in its draft guidelines, that no penalty will be imposed if the firms agree to amend or adjust their cooperation after discussion with the Commission, where existing guidelines have been followed in good faith, or where the arrangements have been discussed with a competition authority in advance without any major

risks having been identified.

3.5 Providing informal guidance

3.5.1 ERT reiterates its proposal made in its Expert Paper on Horizontal Cooperation on 12 February 2020 that, in relation to cooperation in support of the energy transition, the Commission should consider how best to provide informal guidance on a case-by-case basis, as we understand has happened for the life science and automotive industry since the Covid-19 pandemic.

3.5.2 The Commission could encourage companies to make more use of informal (confidential) meetings to examine specific questions relating to horizontal cooperation projects. For such a guidance process to be effective and manageable from the Commission's perspective, the process should be voluntary, and limited in terms of both the information provided and the time taken for issuance of the guidance. It is not desirable to create a burdensome, lengthy process, especially in fast-moving markets.

3.5.3 As indicated earlier, such informal guidance needs to be encouraged by the adoption of written Guidance or Guidelines indicating that the Commission welcomes collaboration for the purposes of the Green Deal.

4 Merger control

4.1 Context

4.1.1 Including sustainability impact under the Commission's merger control framework would be a win-win-win: to the benefit of the society, the involved parties as well as the Commission and its Green Deal track record.

4.1.2 Without any major overhaul of the rules, there are some procedural improvements and substantive clarifications that could be made to make the merger control process more streamlined and efficient. The Commission should consider comfort letters, guidelines, publications, and/or more regular updates to the Consolidated Jurisdictional Notice as potential vehicles for policy updates on how sustainability is factored into the merger review.

4.2 Procedural aspects - simplification

4.2.1 To help companies swiftly implement projects that contribute to the Green Deal objectives, the Commission could consider expanding the scope of the simplified procedure.[7]

4.2.2 For mergers materially contributing to the Green Deal objectives:

a. **Pre-notification should be optional** for straightforward cases such as the creation of greenfield joint ventures (JVs) or brownfield JVs in renewable sectors (e.g. solar and wind farms projects).

b. **Joint ventures that have very limited or no activities in the EU** (as is often the case in e.g. equity investment in renewable energy projects like wind parks etc.) should be exempted from notification or subject to a super-simplified procedure for lack of domestic effect. Such an approach could also serve as a role model for other jurisdictions in avoiding unnecessary bureaucracy.

4.2.3 ERT also encourages the Commission to advocate for other European authorities to follow a similar approach as the Commission, noting, in particular, the German and Austrian regimes which currently require notification at very low thresholds for cooperation projects (also when a joint venture is not "full function").

4.3 Substantive assessment aspects

a) The legal basis for considering sustainability aspects under merger control

4.3.1 Recital 23 of the EUMR suggests that there is an adequate legal basis to take account of sustainability aspects in merger control (in line with Article 3(1), (3), and (5), as well as Articles 7, 9, and 11 TFEU): "the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty establishing the European Community and Article 2 of the Treaty on European Union".

7 In this respect, we reiterate the proposals made in our policy paper "Competing at scale - EU Competition Policy fit for the Global Stage" with respect to merger control jurisdiction and procedure. We look forward to the upcoming consultation of the Commission regarding simplification and will be happy to contribute.

4.3.2 Under Article 2(1)(b) of the EUMR, the Commission in its appraisal whether a notifiable concentration is "compatible with the internal market", takes into account "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."

4.3.3 Based on a broad reading of the consumer welfare standard, and in light of the EU Treaties' articles referring to sustainable development and environmental protection, these criteria are a sufficient basis to include in the analysis the benefits to society at large as well as to future consumers (whose exposure to climate change will be greater than the exposure of current consumers) when considering the sustainability aspects of a proposed transaction.

b) Sustainability impact as part of the initial merger analysis

4.3.4 To determine whether there is a "***significant impediment to effective competition" (SIEC)*** or not, sustainability aspects should already be considered in the initial competitive analysis, i.e. on the "offense" side.

4.3.5 ERT would propose that this approach replaces the Commission's standard approach which would be to take sustainability aspects into account only or primarily as part of an efficiencies defence (see below).

4.3.6 Some further observations in this regard:

a. A SIEC may be excluded or found to be unlikely in relation to mergers that enable product quality, diversity, and/or innovation improvements, e.g. by bringing about the launch of more sustainable products or greener supply chains, which would not have been possible without the merger (or only under materially less favourable conditions/less efficiently). Vertical mergers allowing more important sustainable supply chain efficiencies than would be possible through corresponding cooperation agreements are just one example.

b. Sustainability aspects can be relevant in determining the product market definition, for instance, there may be a need to consider whether "sustainable products" would form part of the same product market as "conventional products", or whether separate markets should be defined.

c. Possible sustainability benefits should be directly weighed against possible restrictive effects, e.g. eliminating polluting production should be directly weighed against a perceived negative impact through a reduction of choice, capacity or output to determine if there is a SIEC.

c) Sustainability impact as an efficiency

4.3.7 Without prejudice to the view expressed above, environmental benefits e.g. in the form of a reduction of greenhouse gas emissions clearly qualify as consumer benefits under paras 79-84 of the ***Commission's Horizontal Merger Guidelines (Merger Guidelines)***.

4.3.8 As regards paras 79 and 83 of the Merger Guidelines, the "timeliness" requirement and the principle that benefits occur in the same relevant markets shouldn't be applied to a reduction of negative externalities such as a demonstrable and significant reduction of greenhouse gas emissions, as it can be said with certainty that such negative environmental externalities benefit society at large and in the long-term (even with higher benefits for "future consumers", due to the increasing costs to society of carbon emissions).

4.3.9 Finally, ERT would appreciate the recognition from the Commission that sustainability is a valid factor to be taken into consideration in considering any remedy package that may be required in any given case.

d) Cross-border deals and the importance of coherent and predictable standards on an international level

4.3.10 Coherent and predictable standards around the world are key to reducing transaction costs and increasing confidence that mergers with demonstrable sustainability benefits should be given the go-ahead. The Commission should reinforce its international cooperation efforts in this context, as sustainability impact is at its core, a cross-border issue that requires strong coherence between jurisdictions and regulators.

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