CNMC
COMISIÓN NACIONAL DE LOS MERCADOS Y LA COMPETENCIA

COMPETITION POLICY SUPPORTING THE GREEN DEAL

CALL FOR CONTRIBUTIONS

- Sustainability (not only environmental, but also economic and social) is a priority objective on the public agenda for the coming years and requires **commitment and adaptation of all public policies, including competition policy**.
- **The CNMC has already incorporated the Sustainable Development Goals (SDGs) as one of the priority axes of its Action Plan** and intends to incorporate them into the next Strategic Plan to support all its actions, establishing indicators for this.
- **Competition policy has its highest added value in its objective nature and specializes** in economic efficiency and consumer benefit. It does not weigh the interests of different social groups, but objective and preferably measurable benefits and damages. The criteria for substantive analysis of competition authorities' decisions are subject to what is established by law and to review by the courts.
- **The contribution of competition policy to sustainability objectives must be responsible and based on its limits and possibilities**, and must not create unfounded expectations. For example, it is more approachable to reorient authorities' work priorities towards SDG projects than to modify the criteria for substantive analysis of their competition decisions.
- **The integration of sustainability objectives into the substantive analysis of competition decisions raises complex issues to be resolved,** such as the measurement of efficiencies or the costs and benefits analysis**.** There is a **risk of divergent interpretations** between the different competition policy actors. **An active role for the EC by drawing up guidelines (and exemption regulations, where appropriate) is essential** in order to increase the coherence of competition policy, give economic operators greater certainty and to avoid fragmentation of the internal market as a result of divergent actions by Member States**.**
- **Sustainability goals should not undermine effective competition in the EU**. There must be rigorous control of State aid in order to prevent the different capacities of Member States to implement State aid from fragmenting the internal market. Sustainability objectives should in no case be used to laundering cartels or authorising concentrations solely on the basis of environmental efficiencies.
- There are mechanisms to **exceptionally modulate the substantive application of competition policy in certain areas and sectors**, such as the possibility of legal protection for certain behaviour or the ability of some Governments to modify a decision on a business concentration on the basis of sustainability criteria. The more these modulations conform to **common EU level guidelines** level guidelines (e.g. through exemption regulations), the less divergences will appear on the internal market.
- The integration of environmental considerations into competition authorities requires **the strengthening of the professional profiles trained** in this area within the Competition Authorities.

1. Introduction

The relationship between competition rules and sustainability is one of the most relevant issues for the competition authorities' agenda in the coming years, not only from the environmental point of view but also in their social and economic dimensions.

The importance of sustainability entails the obligation that all public policies must, as far as possible, integrate and adapt to sustainability goals. In environmental matters, this is particularly relevant because of the level of ambition of public goals[1]. On the other hand, we must not forget that Article 37 of the Charter of Rights of the European Union, as well as Article 45 of the Spanish Constitution, recognize the right of everyone to enjoy an adequate environment.

Competition policy does not have sustainability among its primary objectives, but the efficiency and smooth functioning of markets for the benefit of consumers. However, sustainable development, as the EU objective in accordance with Article 3.3 of the TEU and the cross-sectional nature of environmental policy, determine the need for all policies, including competition policy, to contribute to the achievement of these objectives. At present, competition policy already has its own impact on achieving sustainability by fostering technological innovation and encouraging competition between firms to provide consumers with more sustainable products and services. Sustainability should be seen as a differential factor of competitiveness that is in favour of consumers and which competition policy must strengthen.

Thus, the implementation of competition policy can contribute to achieving the Sustainable Development Goals (SDGs)[2] by different ways. First, competition favours access to goods and services for the most vulnerable consumers by providing cheaper and more consumer-friendly goods and services. Secondly, competition stimulates productivity and job creation, which contributes to the inclusion of the most disadvantaged segments of the population. Thirdly, competition encourages business and innovation strategies that are compatible

[1] The framework for action on climate and energy up to 2030 includes a number of EU goals and policy objectives for the period 2021-2030. The key goals for 2030 are:
- at least a 40% reduction in greenhouse gas emissions (compared with 1990)
- at least a 32% share of renewable energy
- at least a 32.5% improvement in energy efficiency

[2] In 2015, the United Nations General Assembly adopted Resolution 70/1 entitled 'Transforming our world: the 2030 Agenda for Sustainable Development'. The 2030 Agenda sets out 17 goals with 169 targets covering the economic, social and environmental field of sustainable development to be achieved in that year.

with the SDGs, all the more relevant to consumer decisions[3]. Fourth, the competition advocacy function helps the public sector adopt more efficient regulations for achieving the SDGs[4].

However, the CNMC believes that competition policy can play a more active role in promoting sustainability and achieving SDG objectives within the current legal framework, which we consider fit to promote a renewed competition policy committed to sustainability.

The 2020 Action Plan of the CNMC has one of its main axes in contributing to the achievement of the SDGs of the 2030 Agenda. In fact, one of the CNMC's objectives for 2020 is to give visibility to the contribution of its actions to the SDGs[5]. The CNMC plans to introduce sustainability objectives as one of the cornerstones of its new multi-annual Strategic Plan, currently in the process of elaboration.

A Competition Authority may introduce sustainability objectives into its actions in two main ways. First, the Authority can focus its efforts and give greater visibility to those most relevant actions from a sustainability perspective (e.g. studies or investigations in the sectors most critical to achieving sustainability commitments). Secondly, the Authority may adapt its analysis criteria in its decisions to the sustainability objectives, explicitly identifying in its analysis those actions that benefit sustainability (or being particularly intransigent with actions that harm it) according to established legal guidelines and control of their proceedings by the courts. In both cases, it must be accompanied by indicators to assess the degree of fulfilment of these objectives and the CNMC's commitment to them.

Competition Authorities are also specialized agencies, which do not weigh the interests of different social groups but, in their decisions, apply statutory criteria for the smooth functioning of markets and consumer benefit.

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3 The greater the market failures (externalities, public goods, and asymmetric information, mainly), the lower the sensitivity of consumer decisions to these objectives and the worse the market allocation in terms of social welfare.

4 Efficient economic regulation is that which, if it must restrict competition, does so in compliance with the principles of necessity and proportionality. These principles share a similar nature to the principles that make up the *balancing tes*t for the compatibility of State aid.

5 Specifically, actions 4.10, 4.11, 4.12 and 4.13 of the Plan provide for, respectively: Identify how the actions of the CNMC contribute to the SDGs of the 2030 Agenda', 'Develop a digital tool to identify, monitor and report compliance by the CNMC with the actions associated with SDGs at least once a year', 'Create a specific mailbox for internal and external communication on the contribution of the CNMC to compliance with the SDGs' and 'Develop a communication strategy regarding the CNMC's contribution to the SDGs'.

Consideration of the impact on the sustainability objectives of economic operators' actions in decisions on State aid, restrictive behaviour and concentrations raises very complex questions[6]. Although competition and sustainability are generally complementary, sometimes this is not the case, so a socially satisfactory balance must be achieved between both. The necessity and proportionality test is the best way to determine this breakeven point[7].

For these reasons, the CNMC considers that any change in the substantive criteria for competition analysis for sustainability considerations should be in accordance with four clear principles:

1) **Provide predictability to economic operators** so that they have the necessary certainty as to how the Authorities will assess their actions under competition law. Otherwise, actions that can improve sustainability will be discouraged.

2) **Maintain consistency in the interpretation of competition rules within the EU**, avoiding both fragmentation of the internal market and that operators could expect different results from competition analyses depending on who is the Authority (or the judge) carrying out the analysis.

3) **Maintain effective competition in the internal market**, avoiding business practices and operations that are restrictive of competition and distortions of competition in the internal market caused by State aid. It is a question of 'fine tuning' in competition policy to incorporate environmental sustainability considerations, not a radical transformation of the existing legal framework.

[6] There are currently multiple interpretations of the concept of sustainable development and they all share that, in order to achieve it, the measures to be considered must be economically viable, respect the environment and be socially equitable. Despite this recognition of the need for an integrated interpretation of these three dimensions, such a definition is not unambiguously interpreted in all areas. It is therefore absolutely essential to determine how the concept of sustainability will be interpreted in competition policy. For example, when considering a sustainability agreement between competitors, what will be taken into account when assessing the agreement for sustainability purposes: Only the environmental benefits or improvements that this entails or also the justice or social equity component? What kind of efficiencies will be taken into account? Those that only mean environmental improvement? What is considered as environmental improvement? Is animal welfare included within this concept? Does it also incorporate social criteria? How would one assess an agreement between competitors involving significant environmental improvement in terms of reducing diffuse air pollution from livestock farming, but which, on the other hand, as a result of the costs of certification to join that agreement, could result in the disappearance of the small farmers unable to bear such costs of certification?

[7] If an action restricts competition, it must do so because it is necessary to ensure an imperative reason in the general interest (principle of necessity) and in the least harmful way possible (principle of proportionality).

4) **Maintain coherence of competition rules as a whole**, preventing increased sensitivity to sustainability issues from undermining the coherence of competition rules (e.g. questioning consumer efficiency and benefit objectives, both in the short and long term).

Finally, it should not be overlooked that a proactive action on sustainability by the Competition Authorities requires a higher level of specialization in these issues, both from the point of view of trained professional profiles and from the point of view of evaluation methodologies.

This contribution focuses on the relationship between competition rules and the SDGs in their environmental sense, following the consultation raised by the European Commission.

Following the structure set out in the consultation, the first section focuses on State aid, the second on anti-competitive practices, and the third on control of concentrations.

2. State aid control

Question 1: What are the main changes you would like to see in the current State aid rulebook to make sure it fully supports the Green Deal? Where possible, please provide examples where you consider that current State aid rules do not sufficiently support the greening of the economy and/or where current State aid rules enable support that runs counter to environmental objectives.

Public aid is one of the most effective mechanisms for resolving certain market failures (mainly externalities, public goods and asymmetric information) which make it difficult for the market to reach optimal allocations from the point of view of environmental sustainability.

However, public aid can also distort competition in markets and the functioning of the internal market in the EU. They are therefore subject to the control of State aid. This control is based on a necessity and proportionality analysis, under which the positive and negative effects of State aid are assessed and contested and accepted only when the former dominates over the latter.

As regards State aid, the risk of inconsistent application of the rules between Member States is minimal, since control is exercised exclusively by the European Commission. In addition, there is a high predictability of the interpretation of

environmental rules, including the existence of specific guidelines on State aid in the field of environmental protection and energy[8].

However, one of the main features of State aid control is that State aid may distort competition between Member States' undertakings and encourage competition between them in favour of their undertakings, which undermines the EU internal market.

On the basis of the above, the review of the State aid control framework to facilitate the achievement of environmental sustainability objectives may, in principle, be carried out by the following ways:

- Make it easier to process notifications of environmental State aid (similar to the Temporary Framework for State aid for covid-19[9]), which can be achieved, inter alia, by speeding up the processing of certain environmental aid notification procedures or by increasing the processing of certain environmental aid notification procedures the predictability of European Commission evaluations on specific projects.
- To establish lower (greater) requirements, from the point of view of its impact on competition, for the approval of State aid with a positive (negative) impact on the environment.

Facilitating the processing of environmental aid by streamlining procedures or by reviewing the State Aid Guidelines may have a positive impact on this type of aid without significantly affecting competition[10]. In particular, the CNMC considers that it would be advisable to facilitate the processing of aid for self-consumption and sustainable mobility in the transport sector, as discussed below.

However, the imposition of lower (or greater) requirements, from the point of view of its effects on competition, on certain aid, depending on their positive (or negative) impact on the environment, implies altering the balance in the control of State aid, which raises several considerations.

Firstly, the control of State aid has a fundamentally economic nature as regards the prospective analysis of the effects of the notified projects[11]. Introducing an environmental dimension into the assessment[12] can make it difficult for the

8 Guidelines on State aid for environmental protection and energy 2014-2020.
9 Temporary Framework to support the economy in the context of the coronavirus outbreak.
10 In particular, the Guidelines on State aid for environmental protection and energy 2014-2020.
11 This is without prejudice to the fact that control has a wider dimension. For example, the Communication on State Aid Modernisation includes as an objective of control 'to foster sustainable, smart and inclusive growth in a competitive internal market'.
12 For example, if the European Commission is required to choose between a certain degree of damage to competition and certain advantages for the environment.

European Commission to weigh costs and benefits and reduce legal certainty about its decisions.

Secondly, greater laxity in the competition impact of environmental aid can have a negative impact on the EU's internal market. It is essential that the control of State aid be rigorously maintained in order to prevent environmental aid from favouring the creation of national champions or from placing undertakings in a given Member State in a position of competitive advantage over those of other States.

Thirdly, the control of State aid is a fundamental mechanism for balancing companies in EU Member States. More relaxed control may distort competition in the internal market by favouring companies in countries with greater financial capacity, which would be in a better competitive position and would appropriate an inequitable share of the gains derived from the internal market. An example of the different capacities between Member States is the differences between countries in the levels of aid granted during the covid-19 pandemic[13].

It is therefore a matter of ensuring that there is a level playing field in the granting of aid, allowing each country to reflect its concern for sustainability without causing distortions of competition in the internal market. Thus, differences will continue to exist between Member States in terms of the amount of aid each target for environmental objectives, but the aim is to prevent such differences from distorting competition by giving advantage to firms in the Member States with greater financial capacity over the rest. For example, a new approach that prioritizes consumer aid presents a priori a lower risk of distortion of competition than granting aid to large producers.

Therefore, the European Commission should carry out a careful assessment of the risks involved in changing the current regulatory framework for State aid and maintain strict control over environmental State aid which has a negative impact on competition. Any opening of control over this type of State aid allowing competition between Member States should be compensated by mechanisms to balance Member States' financial capacities.

Possible areas of improvement in the Guidelines:

As a result of the experience gained through the analysis of regulation with particular attention to its potential impact on competition, the CNMC has identified

[13] In the present context, there are huge differences in the amount of aid granted by the different Member States, which is linked to the budgetary space available to them, as well as the respective size of their economies. This reality will certainly lead to a competitive distortion between them due to the different level of public aid granted during the covid-19 Temporary Framework, affecting the 'level playing field' in the internal market.

three areas (energy consumer, sustainable mobility and energy sector) which can be assessed by the EC in its task of strengthening competition policy in the field of aid as a complement to the regulation to achieve the objectives of the Green Deal.

In the first two cases, these are aid which could, depending on their particular configuration, fit into the *de minimis* regulation or may qualify for GBER regulation. However, the inclusion of these types of aid to small producers and consumers in the Guidelines which, in a more sectorial and detailed manner, address incentives to the energy and environmental sector would clarify and support the use of such incentives and would balance the approach of the Guidelines between large and small producers. In any event, the 'state aid' instrument should be reserved to the envisaged assumptions, such as internalisation of externalities, but in no case to correct imbalances resulting from inefficient investments.

a) *The consumer at the heart of the energy transition (especially the figure of the self-consumer).*

In line with other EU initiatives[14], it aims to strengthen consumer rights by enabling consumers to have a real influence on their energy footprint, whether through smart meters, controlling household bills or making investments to produce their own renewable energy, which in turn feeds to the network. Both direct aid to consumers and aid for the production and development of innovative technologies are positive for these purposes.

In this sense, the regulatory framework for promoting the **deployment of self-consumption** is of paramount importance and thereby contributing decisively to the use of renewable energy sources at the domestic level[15]. It should be noted that the penetration of self-consumption in Spain had not reached the same level of development as in other EU Member States with the least available resource (e.g. Germany) due in large part to the fact that national regulation presented complex administrative procedures and economic disadvantages (such as popularly called the *sun tax*[16]) which discouraged its use.

14 *'A New Deal for Europe's Energy Consumers'* or *'Clean Energy for all Europeans'.*

15 Reports IPN/DE/011/15 and IPN/CNMC/005/19 are available in this regard.

16 Royal Decree 900/2015 established that consumers who make self-consumption should pay the charges associated with the costs of the electricity system and a charge for other services in the system, which was defined as the payment to be made for the backup function that the whole electricity system performs to make self-consumption possible. Royal Decree-Law 15/2018 amends Royal Decree 900/2015 and introduces three fundamental principles that will govern this activity: (i) the right to self-consume electricity without charges is recognised; (ii) the right to shared self-consumption by one or more consumers is recognised to take advantage of

The key role of the figure of self-consumption is underlined by its clear impact on decarbonisation of the economy (thanks to the boost of renewables penetration and reduction of greenhouse gas emissions), the competitiveness of industry and employment (especially locally as a distributed activity), as well as in the domestic sector, as consumers may see the price of their electricity supply bills reduced.

In addition, from the perspective of the principles of efficient economic regulation and competition advocacy, self-consumption has positive elements as it can introduce relevant competitive tension in the wholesale and retail markets. This, in turn, may encourage more efficient prices in both markets as it serves to discipline, at least indirectly, to the electrical system when the costs of the power system are high enough that, with much lower economies of scale and grid, the self-consumption option is economically profitable.

b) *Sustainable mobility in the transport sector*

The commitment to more environmentally friendly means of mobility must be a key factor in reducing pollution. However, the deployment of the electric vehicle requires the development of a relevant number of charging stations.

Both the Recovery, Transformation and Resilience Plan prepared by the Presidency of the Government in October 2020 and sent to the EU Commission, and the National Integrated Energy and Climate Plan 2021-2030 prepared by the Ministry for Ecological Transition and Demographic Challenge in January 2020, and also sent and approved in this case by the EU Commission, set out targets for increasing electromobility (penetration of 5 million units of electric vehicles by 2030), and as a consequence, the promotion of the development of electric recharge infrastructure. To do this, starting from the liberalization of activity and charging infrastructures (Royal Decree-Law 15/2018), regulatory and economic measures (incentives) are proposed to develop a public and private network of charging stations.

However, it seems necessary that the rest of the road infrastructure away from the population centres also have a sufficient number of charging stations to facilitate interurban movement. Otherwise, there will be no take-off from the electric vehicle at levels that really have a positive impact in environmental terms.

This can be transferred at national level, but also at international level for all cross-border journeys involving one or more of the EU Member States, without precluding that support can also be produced in the latter with public funds from the Union itself.

economies of scale; and (iii) the principle of administrative and technical simplification is introduced, especially for small power plants.

In the same way as in the case of self-consumption aid, irrespective of whether some of the investments necessary for the establishment of interurban charging stations could fall within existing categories of *de minimis* or exemption aid, it seems reasonable that the Environmental Sector Guidelines should cover lines in this regard, given its potential impact on the internal market, in so far as it will facilitate movement between Member States effectively, promoting a strengthening of the freedom of movement of persons and goods.

c) *Focus resources on energy sector projects with less access to finance.*

Moreover, in the energy sector, additional public incentives are not considered necessary for project promoters and companies carrying out activities aligned with the EU taxonomy, or for their financiers, if they are carried out using mature technologies and benefiting from stable and transparent income schemes. This is the case, for example, of electricity distribution activity, and renewable generation with mature technologies.

However, there is a need for additional public incentives for project promoters and companies operating in the energy sector aligned with the EU taxonomy, as well as for their financiers, who do not benefit from these schemes and that are not developed using mature technologies. These projects and activities are at greater risk, and are more difficult to finance, despite the potential advantage of being aligned with the EU taxonomy, and thus being able to access green loans or be financed by green bonds.

Within public incentives, guarantees for a percentage of the loan financed by the project are considered interesting, as they act as a risk-reduction mechanism for the funder, and facilitate access to financing for the promoter. Considering that guarantees are granted only by a percentage (e.g. 20%), the promoter continues to be highly linked to the success of the project. Moreover, if it succeeds, as a guarantee it would not entail any public expenditure, unlike direct subsidies.

Question 2: If you consider that lower levels of State aid, or fewer State aid measures, should be approved for activities with a negative environmental impact, what are your ideas for how that should be done?

The Environment and Energy Aid Guidelines 2014-2020 do not include aid for the extraction of fossil fuels, but maintain the possibility of granting subsidies to certain industrial or productive sectors that may use fuels of this nature (although, in some cases, under the conditionality of their progressive elimination).

The lack of maturity of some technologies may have technically justified such a more conservative approach. However, given the level of ambition of the sustainability objectives and the maturity achieved with certain clean

technologies, which make it possible to replace the use of fossil fuels, it seems reasonable to consider eliminating incentives for productive activities that rely on fossil fuels where it is technically possible to use clean energies.

Question 4: How should we define positive environmental benefits?

Achieving environmental sustainability objectives should be supported by more instruments in addition to public aid (including regulation, tax incentives, or public procurement). Given the relevance of public procurement, its use as a public policy (strategic public procurement) can be an equally effective tool to curb climate change and support EU environmental policy, encouraging its implementation with the aim of reducing emissions and carbon footprint[17].

From this point of view, two ways of action can be proposed:

Firstly, when the construction of energy infrastructures financed from State resources can be operated by a limited number of operators, this must be considered an economic activity and may be considered State aid if the requirements normally demanded by the ECJ apply (State origin, selective advantage, distortion of competition, affected trade).

Although this doctrine is more focused on other types of infrastructure (airports, ports, roads...), the Commission would do well to be vigilant on the energy sector, traditionally more disconnected from State aid rules until a few years ago. Moreover, the fact that some of these projects can be implemented in public-private partnership projects[18] should not hinder such a review process.

[17] This is apparent from the Directives of the European Parliament and of the Council 2014/23/EU and 2014/24/EU and, at national level, Article 1.3 of Law 9/2017 of 8 November on Public Sector Contracts, transposing into the Spanish legal order the Directives of the European Parliament and of the Council 2014/23/EU and 2014/24/EU of 26 of the European Parliament and of the Council 2014/23/EU and 2014/24/EU, of 26 February 2014, that states: '*Social and environmental criteria will be incorporated in all public procurement in a transversal and mandatory manner, provided that they are related to the object of the contract, in the conviction that their inclusion provides a better quality/price ratio in the contractual service, as well as greater and better efficiency in the use of public funds. Access to public procurement will also be facilitated for small and medium-sized enterprises and social economy enterprises'.*

[18] A good example is found in the report CNMC IPN 13/20 APL -Draft Law on waste and contaminated soil in relation to the self-sufficiency and proximity of the integrated state network of facilities-, which enables public administrations to take appropriate measures to establish an integrated state network of disposal and recovery facilities for mixed household waste, as well as to justifiably limit transfers to protect this network. The CNMC recommends that private sector involvement should be provided wherever possible to complement the network of public facilities, in order to avoid a possible lack of capacity and to encourage trade between EU Member States. This measure undoubtedly contributes to the objectives of the 'Green Deal' by focusing on the maximum capacity of waste disposal and recovery facilities.

On the other hand, public procurement rules offer different possibilities to internalise environmental aspects into ordinary public tender documents[19], not necessarily in the energy sector. This window of opportunity, which undoubtedly presents enormous positive aspects, also presents certain risks insofar as it contains advantages for certain operators in terms of the design of those specifications which may be similar to State aid[20].

In this regard, the CNMC stressed the importance that these environmental criteria should be related to the subject matter of the contract, be objective and respectful of the underlying principles of public procurement (including the safeguarding of free competition, transparency and non-discrimination), and be included, together with the weighting given to them, in the relevant specification.

To minimise the risks of some subjectivity in design, it seems reasonable to use objectification mechanisms, in particular a common EU-wide taxonomy[21] that identifies whether each of the activities concerned can be classified as sustainable on the basis of certain requirements (level of recycling, level of emissions, use and management of water...), with measures taken accordingly to promote those activities with the worst results in this regard.

In this regard, it should be recalled that the EU taxonomy defines the criteria for determining whether an activity is 'green' as understood by the European Commission, that is, in a way that is aligned with the EU's decarbonisation and sustainability strategy and policies[22]. It prevents 'Greenwashing', that is, companies, investment funds, etc., calling themselves 'green' without being so. In addition, taxonomy will be a tool to be used in sustainable finance, considering the European Commission's objectives of promoting the channelling of public and

19 For example, solvency criteria, adjudication criteria and special conditions of execution.

20 Spain has an ecological public procurement plan 2018-2025: https://www.miteco.gob.es/es/ministerio/planes-estrategias/plan-de-contratacion-publica-ecologica/

21 Regulation (EU) 2020/852 of 18 June 2020, OJ L 198, 22.6.2020.

22 The group that advised the European Commission (Technical Expert Group, TEG), whose mandate ended in September 2020, has analysed a number of economic activities, and within them, part of the activities of the electricity and gas sector. The recommendation it has made to the EU, after public consultation, is that activities such as the production of photovoltaic, wind, hydraulics and other renewable electricity, the transport and distribution of electricity in a decarbonisation trajectory system (the one with more than 67% of new installed power with emissions below 100 gCO_2/kWh, as is the case in Spain), electricity storage, storage of 'green' hydrogen (if it is produced without CO2 emissions), adaptation of the gas transmission and distribution network whose purpose is the integration of 'green' hydrogen and other renewable gases, infrastructure to develop hydrogen and other renewable gases, infrastructure to develop charging points for the electric vehicle, and electricity generation emitting less than 100 gCO_2/kWh, are aligned with the taxonomy. This may allow these activities and projects to be financed with green bonds (Green Bond EU Standard) and green loans (Green Loans), which are expected to be in greater demand by investors, as well as to channel economic funds, both public and private, towards projects and activities aligned with the taxonomy, to the detriment of others.

private funds into investments and activities that contribute to sustainability objectives.

Consideration should also be given to the European strategy whereby the European Investment Bank finances assets and companies aligned with the EU taxonomy, something which shall be taken into account in the distribution of grants and European funds. On the other hand, there is work on transversal actions of very diverse weight, such as requiring the directors of companies to have a variable percentage of their remuneration not tied to economic objectives, so that they concentrate more in the long term; obliging banks to offer green funds and products within the options available; intervening to ensure that insurers include climate change risks both in their policies and in the coverage they offer in their policies (otherwise, in the event of a disaster, regulated companies would have to face costs and pressure to transfer them to the consumer), etc.

Therefore, it is considered that environmental benefits should be defined according to unified concepts and consistently with the sustainability criteria identified by the latter (i.e. in accordance with the principles of necessity and proportionality); and that the use of the EU taxonomy[23] contributes to this.

3. Antitrust rules

Question 1: Provide actual or theoretical examples of desirable cooperation between firms to support Green Deal objectives that could not be implemented due to EU antitrust risks. In particular, please explain the circumstances in which cooperation rather than competition between firms leads to greener outcomes (e.g. greener products or production processes).

As previously announced, it is important to define at this point how the concept of sustainability will be interpreted. Operators should be clear about how competition authorities are going to interpret concepts that are often not only ambiguous, but also too broad or vague and need to be narrowed down. We need

[23] The criteria that an economic activity must meet in order to be considered environmentally sustainable are that: (a) it contributes substantially to one or more of the environmental objectives laid down by the Regulation; (b) it does not cause any significant damage to any of these environmental objectives; (c) it is carried out in accordance with certain minimum guarantees (e.g., the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights); (d) it conforms to the technical selection criteria established by the Commission.
In particular, the six environmental objectives set out in the Taxonomy Regulation are: (I) Climate change mitigation; (II) Climate change adaptation; (III) Sustainable use and protection of water and marine resources; (IV) Transition to a circular economy; (V) Pollution prevention and control; (VI) Protection and restoration of biodiversity and ecosystems.

common definitions and interpretations to ensure the 'level playing field' and the legal certainty that operators need.

Once this concept has been defined, clarified and unified at EU level, it may be possible to define which desirable agreements in terms of sustainability may not be taking place as a result of current competition law enforcement.

Such agreements could be, by way of example and without the intention of being exhaustive, either production agreements to reduce emissions or other waste; or agreements to meet certain binding environmental pollution reduction targets; or even agreements proposing an improvement of the legal objectives that promote environmentally conscious business behaviour or based on other qualitative sustainability criteria; agreements related to the production of sustainable goods; and certification or standardisation agreements.

In principle, if these agreements entail a clear environmental improvement and do not imply a restriction of the essential parameters of competition, it shall be understood that there would be no problem in implementing them according to the existing legal framework. However, even if it does not constitute a legal impediment or a prohibition to execute them, the absence of a specific regulation on them, and therefore of parameters on which to base their analysis by the competition authorities, can lead to a major constraint on their development, given the legal uncertainty on which operators have to act. This is an obstacle that could be eliminated by explicit regulation determining when such agreements would not fall within the scope of Article 101.1.

Sustainability agreements containing **provisions that, in addition to a clear environmental benefit, involve a restriction of competition** which determines the application of the parameters of Article 101.3, are clearly limited by the current legal framework. A review of the current interpretation of concepts such as consumer and equitable sharing of profits, as well as the design or adaptation of cost analyses so as to accommodate the assessment of qualitative criteria and the accounting of externalities, is required in order that such agreements could meet the requirements of article 101.3

Ultimately, an example of an agreement that could hardly be achieved within the current legal framework, but which could be accommodated in the proposed amendments and brought up, would be sectorial agreements or agreements between competitors which set quantifiable environmental improvement targets but also the technical means for achieving this (so they would not fall within the definition of 'loose agreement' in the previous JAMA & KAMA), or those agreements which entail a price increase and where a deal between competitors

is clearly not being disguised in order to raise prices or not compete in other parameters typical of sound competition (such as quality or innovation).

Question 2: Should further clarifications and comfort be given on the characteristics of agreements that serve the objectives of the Green Deal without restricting competition? If so, in which form should such clarifications be given (general policy guidelines, case-by-case assessment, communication on enforcement priorities…)?

There are no specific forecasts legal provisions on sustainability agreements under existing national and EU competition legislation. Therefore, when competition authorities are required to assess agreements pursuing sustainability objectives, they should do so under the general framework applicable in any competition analysis. If the agreement restricts competition, the authority shall assess the direct economic benefits (cost savings, innovation, quality and other efficiencies arising from the agreement) for consumers and users directly affected by the agreement. Likewise, companies wishing to carry out a cooperation agreement must 'self-evaluate' in accordance with national and EU case-law and doctrine on restrictive competition agreements, since the possibility of obtaining prior authorisation of that agreement disappeared with the so-called modernisation of competition policy both at European Union level (through Regulation 1/2003) and national level (with the elimination of unique authorisations after the adoption of Law 15/2007).

As noted above, the current legal framework governing competition policy should be considered fit to enhance a sustainable and competitive economy in the EU, although for this to do so it is considered necessary to reinterpret some essential concepts of such application, as well as to readjust the way markets and efficiencies are analysed on the part of competition authorities.

It is therefore considered that **the problem of the current legal framework lies essentially in the lack of legal certainty** for operators with regard to the possibility of carrying out agreements between competitors on sustainability, as they are not explicitly covered either in the Block Exemption Regulations or in the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (hereinafter referred to as HGL). Thus, the guidelines themselves state that there is no specific provision on environmental agreements in them, and that such agreements

should be analysed in accordance with standardisation agreements, to the extent that environmental agreements usually entail some standardisation[24].

Therefore, the lack of legal certainty provided by the current legal framework for sustainability agreements can be a major obstacle to their development. The problem is not that the current competition legal framework does not allow horizontal cooperation agreements with sustainable objectives, but the lack of legal certainty necessary to encourage the implementation of these agreements. This is a very important obstacle to their development because in many cases operators choose not to collaborate in order to avoid the antitrust risk, as they do not know how competition authorities will assess these agreements.

Competition authorities must work to provide operators with a legal framework that ensures the necessary legal certainty so that operators are clear in advance about which agreements are to be considered compatible with competition law, which agreements will require a case-by-case analysis, and which agreements are to be considered incompatible with competition law.

In the light of the above, **the appropriate legal response to this problem must in any event be given at EU level.** Otherwise there would be a risk of compartmentalising the markets, which may result in a situation where the same type of agreement could be considered anticompetitive in one Member State and not in another. On the other hand, given the transnational nature of sustainability and environment issues, it would make no sense for the solution to be sought at the national level. Global problems require global solutions.

Given the magnitude of the current debate on sustainability and environment, and the growing concern about these issues, it could be considered to develop a specific block exemption regulation for this type of agreements that should be completed in order to provide adequate advice to economic operators with the inclusion of an ad hoc chapter relating to sustainability agreements in the HGLs.

Therefore, it is considered that the best way to end the current legal uncertainty about sustainability agreements and their compatibility with competition law would be by **incorporating a specific regulation of such agreements into a Block exemption regulation and a specific chapter in the Commission's**

[24] Specifically, the footnote (1) to Paragraph 18 of the Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements in force since 2011 states that *'standard-setting in the environment sector, which was the main focus of the former chapter on environmental agreements, is more appropriately dealt with in the standardisation chapter of these guidelines. In general, depending on the competition issues "environmental agreements" give rise to, they are to be assessed under the relevant chapter of these guidelines, be it the chapter on R&D, production, commercialisation or standardisation agreements.'*

guidelines on horizontal cooperation agreements which are being reviewed precisely now.

The proposed solution should provide economic operators with sufficient security to eliminate their reluctance to explore and cooperate in the implementation of such agreements by guaranteeing them the necessary legal certainty.

The Guidelines should first contain a definition of what is meant by sustainability agreements. It should be explicitly and clearly set out what they include and what they do not include. That is, whether the considerations to be assessed by competition authorities are limited to purely environmental aspects or also include other aspects of sustainability such as social considerations. Similarly, even if limited to environmental issues, the scope of environmental considerations should be delimited in advance. The risks involved by an excessively broad definition of sustainability agreements within competition law ('enforcement') cannot be ignored.

The HGL should include a list of sustainability agreements that would not fall within the scope of Article 101.1; sustainability agreements that would be analysed under Article 101.3; and sustainability agreements that would in no case be considered compatible with competition law (black clauses). In this regard, the work done in the draft guidelines for sustainability agreements drawn up by the Dutch Authority as well as the Staff Discussion Paper on Sustainability issues and competition law of the Greek Competition Authority, can be a good starting point.

The guidelines should also contain definitions of all concepts that must be redefined or reinterpreted and unified at EU level when analysing these agreements, so that competition policy can play as a lever for sustainability. For instance, the concepts of 'consumer' and 'equitable sharing of benefits'. It should be considered whether, in order to determine that equitable distribution of profits, it is possible to take into account the global society -and not only consumers in the market concerned, as it has been done until now- when the benefits of such agreements have an impact on society as a whole. Whether the concept of consumer encompasses current consumers or also future consumers who are going to benefit from these environmental improvements, or if consumers in other countries shall be included, as the environment knows no borders.

Work should be done on a common methodology for the valuation of effects and efficiencies of sustainability agreements that establishes common standards and common calculation methodologies to assess the positive externalities of agreements, qualitative elements, etc. (in line with the one established on emissions).

An informal consultation system for operators, such as the 'sandbox' proposed in the Greek working paper or the informal consultation system set out in the Dutch guidelines could be assessed, as well as the issue of comfort letters. That is, a system that allows operators to consult their doubts with the competition authorities, while ensuring that they will not be sanctioned for it. However, such a system would have to be an informal consultation system rather than an authorisation system, as otherwise it would be contrary to the logic of the 2003 modernisation process which eliminated the figure of unique authorisations in the EC, and subsequently did so in Spain in 2007.

On the other hand, recent experience with cooperation agreements to deal with the consequences of COVID-19 has also shown the usefulness of the so-called *comfort letters*, which enable competition authorities to identify red lines in proposals for agreements submitted to them for consultation before their materialisation. While the process of modernising competition policy involved the transition from a system of authorisation of agreements to one of self-assessment by the companies themselves, the advisory functions of competition authorities (in particular those provided for in Article 5.2 of Law 3/2013 in the case of the CNMC) could contribute to provide legal certainty to environmental sustainability agreements in order to minimise their possible restrictions on competition. All this should be accompanied by the establishment of a mechanism for sharing experiences between the different NCAs and the Commission -such as the one established to address the consequences of COVID- in order to ensure coherence and consistency in the implementation of competition rules for such agreements within the EU.

In any case, there is a consensus on one issue: sustainability objectives can never be an excuse for cartels' greenwashing or for authorising mergers solely on the basis of environmental efficiencies, if they do not compensate for the effects of the operation. Operators claiming the application of the exemption provided for in the legislation should do so on the basis of clear evidence and legitimacy.

Question 3: Are there circumstances in which the pursuit of Green Deal objectives would justify restrictive agreements beyond the current enforcement practice? If so, please explain how the current enforcement practice could be developed to accommodate such agreements (i.e. which Green Deal objectives would warrant a specific treatment of restrictive agreements? How can the pursuit of Green Deal objectives be differentiated from other important policy objectives such as job creation or other social objectives?).

There might be circumstances in which the achievement of the Green Deal objectives would justify restrictive agreements beyond the current enforcement practice, but there is a clear limit that should be respected: as stated in the previous response, sustainability objectives **can never be an excuse to authorize cartels.** In this regard, we could cite the precedent known as 'Dieselgate'[25] in which the Commission preliminarily considered that BMW, Daimler and VW would have participated in a collusive agreement, contrary to competition rules, aimed to limit the development and innovation of emission reduction technology for new diesel and gasoline powered cars sold in the European Economic Area. In this respect, Commissioner Vestager pointed out that 'companies could collaborate in many ways to improve the quality of their products, but European competition law does not allow collusion for just the opposite, not improving products or competing on quality'.

In any event, it seems that the analysis of this type of agreement in all other scenarios will have to be done on a case-by-case basis, as is happens with grey clauses in the vertical guidelines or with other cooperation agreements that do not automatically comply with the assumptions of Art. 101.3. To do this, it is necessary to consider whether the competition authorities are prepared and have the necessary tools to do so (*'fit for purpose'*):

- As has been pointed out, firstly, it should be determined which **concepts** need to be redefined or reinterpreted in competition law enforcement, in order for competition law to play for sustainability.
- Secondly, **our 'enforcement' tools such as cost and efficiency analyses should be adjusted** so that they are able to calculate and account for the benefits that these agreements bring to society.
- Finally, together with the adaptation of the analysis, there will have to be an adaptation of the **profiles within the competition authorities**, which may require environmental economists, development economists or environmental scientists, among others.

4. Merger control

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

[25] Case AT.40178 Car Emissions

As an example of a concentration in which possible harmful effects on sustainability were analysed, the precedent of the Bayer/ Monsanto concentration (Case M.8084) could be cited. In this case, the Commission concluded not only that the operation would involve a strengthening of the market power in this sector, which could lead to an increase in prices for farmers, but also that it would have a negative impact on the diversity of available seeds and, above all, could lead to an increase in the use of fossil fuels and pesticides, which would adversely affect sustainability. The Commission analysed these aspects in the context of potential damage to innovation, in particular with regard to aspects relating to innovation efforts and their results.

It should be borne in mind that manufacturers of sustainable products, for example, in agriculture and livestock, are often small producers. Consequently, concentrations in these markets can have significant negative effects on these types of products, not only because of the decrease in the variety of sustainable products available, but also for the purposes of the survival of a sustainable rural economy as a result of the creation of large companies dedicated to biological production. On the other hand, mention can also be made of the negative effects that this type of operation could have on rural populations, given the important role that sustainable products are playing in the rural environment as an alternative of economic viability for rural areas and an element of fixation of the population in these areas to avoid their depopulation and abandonment.

Another type of merger of some concern from the point of view of sustainability are the so-called 'killing acquisitions', i.e. operations whose sole or main objective for the acquiring company is to take control of the acquired company in order to avoid the development or commercialisation of a cleaner technology. Generally speaking, the identification of 'killing acquisitions' has become of particular interest in concentration operations on digital markets, but it cannot be ruled out that this type of operation may occur in other sectors or technologies with an impact on sustainable development. Let us imagine, for example, the acquisition of *start-ups* dedicated to the manufacture of batteries by non-renewable generation companies, with the sole aim of paralysing this technology and thus not solving the problem of the intermittency of renewable energies with which they compete in the electricity generation market.

Conversely, concentrations may also be elements that facilitate the appreciation of sustainable assets. To this end, we could cite the Repsol/Viesgo operation[26], in which Repsol reached an agreement with the Macquarie and Wren House funds to buy Viesgo's unregulated low-emission electricity generation businesses, as well as its gas and electricity retailer. Repsol thus becomes a new

[26] File C/0975/18 REPSOL/VIESGO GENERACIÓN.

entrant in the generation market -which comes from the hydrocarbons segment and must carry out an ecological transition to other energy markets (electricity)-, for which it buys exclusively Viesgo's renewable generation assets due to its commitment to clean energies, an area on which Repsol's new strategic investment plan is focused.

Question 2: Do you consider that merger enforcement could better contribute to protecting the environment and the sustainability objectives of the Green Deal? If so, please explain how?

In line with the above, consideration should be given to including sustainability criteria in merger analysis, but as part of the efficiency analysis that must be carried out prior to authorise the merger. Once sustainability is defined as a strategic priority for competition authorities, and if this is included as a cross-cutting element to be taken into account in competition policy, it will be necessary to assess sustainability in all actions of competition authorities and therefore also in the assessment of mergers.

In the same way that competition authorities take into account criteria relating to intellectual property rights when analysing the concentrations and the potential effects of such operations on innovation, the effects of these mergers on sustainability could also be analysed with the same logic in order to be able to assess them jointly in the analysis of the operation. A precedent in this regard would be the Commission's Decision in the Dow/Dupont M.7932 case (2017) in which environmental and public health aspects were taken into account.

This would allow, on the one hand, to assess the efficiencies implied by the concentration in terms of sustainability, but also, for those situations where the concentration was harmful to the environment, to impose conditions which mitigate such negative effects.

On the other hand, it should be recalled that the rules of several countries on mergers provide for the possibility of taking into account in the analysis factors relating to the public interest in its various manifestations. This is the case of Spanish competition law, which reflects the concern for environmental protection and sustainability in Article 10.4. This Article allows the Council of Ministers to assess economic concentrations on the basis of general interest criteria other than competition, including the protection of public safety or health and the protection of the environment, in what has come to be called the third stage of merger control.

While public interest considerations do not form part of the substantive analysis of a merger within the European Union, under Article 21(4) of the EC Merger

Regulation139/2004, Member States may wish to reflect other legitimate interests among which we believe sustainability could be included.

The inclusion of these sustainability considerations in the analysis of mergers would also require a review of the instruments for evaluating them (concepts, tools and profiles, as noted for the evaluation of cooperation agreements).