Competition contributing to the European Green Deal

#EUGreenDeal

Competition Policy supporting the Green Deal

Call for contributions

Introduction

The European Green Deal aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy. The goal is for Europe to be the first climate neutral continent by 2050, where economic growth is decoupled from resource use. The coronavirus pandemic makes those ambitions even more relevant. The European Commission has put forward a major recovery plan for Europe to help repair the economic and social damage brought by the pandemic and to kick-start the European recovery in line with the twin green and digital transition goals.

As Executive Vice President Vestager has underlined: "To succeed, everyone in Europe will have to play their part – every individual, every public authority. And that includes competition enforcers."

The goal of EU competition rules is to promote and protect effective competition in markets, delivering efficient outcomes to the benefit of consumers. Competitive markets encourage firms to produce at the lowest cost, to invest efficiently and to innovate and adopt more energy-efficient technologies. Such competitive pressure is a powerful incentive to use our planet's scarce resources efficiently, and it complements environmental and climate policies and regulation aimed at internalising environmental costs. By helping to achieve efficient and competitive market outcomes, competition policy hence contributes by itself to the effectiveness of green policies.

Competition policy is not in the lead when it comes to fighting climate change and protecting the environment. There are better, much more effective ways, such as regulation and taxation. Competition policy, however, can complement regulation and the question is how it could do that most effectively. The Commission is responsible for the enforcement of competition rules based on its competences under the Treaty and existing EU secondary legislation, under the close supervision of the EU Courts. This means that, short of any changes in the existing legal framework, competition policy's contribution to the Green Deal can only take place within these clearly-defined boundaries. .

The purpose of this call for contributions is to gather ideas and proposals from everyone with a stake in this issue, including competition experts, academia, industry, environmental groups and consumer organisations. The contributions will feed into a conference early next year that will bring those different perspectives together.

Part 1: State aid control

State aid rules allow support for the priority axes of the Green Deal (decarbonisation, energy efficiency, sustainable mobility, circular economy, zero pollution ambition). They have facilitated green investments whilst limiting distortive effects of state subsidies in the past, and are currently open for review to see whether they can do so even better in the future[1]. These reviews will be the basis to

[1] These guidelines and State aid rules will be subject to public consultations available on https://ec.europa.eu/competition/consultations/open.html

provide a fully updated enabling framework for public authorities to contribute to the objectives of the transition to a green economy, while making the most efficient use of limited public funds.

State aid control relates to the assessment of the compatibility of an aid measure with the internal market. The assessment of the compatibility of an aid measure has traditionally been about balancing its negative effects on trade and competition in the common market with its positive effects in terms of a contribution to the achievement of a well-defined objective of common interest. Balancing these effects takes into account the impact of the aid by means of a test that traditionally has been broken down into the criteria listed below[2].

- The aid measure must be aimed at a well-defined objective of common interest.
- The aid must bring about a material improvement that the market cannot deliver itself, for example by remedying a market failure or addressing an equity or cohesion concern.
- The aid must be an appropriate policy instrument to address the policy objective concerned.
- The aid must have an incentive effect, i.e. change the behaviour of the undertaking in such a way that it engages in additional activity that it would not carry out without the aid.
- The aid measure must be proportionate, i.e. limited to the minimum necessary to induce the additional investment or activity.
- The distortions of competition and effect on trade between Member States must be sufficiently limited, so that the overall balance is positive.
- The relevant decisions and information about the aid awards must be made public (transparency).

As input to the debate on how State aid control and environmental and climate policies work together – and how they could do that even better, please consider the following questions:

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.
2. If you consider that lower levels of State aid, or fewer State aid measures, should be approved for activities with a negative environmental impact, what are your ideas for how that should be done?
    a. For projects that have a negative environmental impact, what ways are there for Member States or the beneficiary to mitigate the negative effects? (For instance: if a broadband/railway investment could impact biodiversity, how could it be ensured that such biodiversity is preserved during the works; or if a hydro power plant would put fish populations at risk, how could fish be protected?)
3. If you consider that more State aid to support environmental objectives should be allowed, what are your ideas on how that should be done?

[2] The possible impact of the ruling by the Court of Justice in case C 594/18 P, Austria v Commission, (hereinafter “Hinkley Point”) of 22 September 2020 will need to be considered.

   a. Should this take the form of allowing more aid (or aid on easier terms) for environmentally beneficial projects than for comparable projects which do not bring the same benefits ("green bonus")? If so, how should this green bonus be defined?

   b. Which criteria should inform the assessment of a green bonus? Could you give concrete examples where, in your view, a green bonus would be justified, compared to examples where it would not be justified? Please provide reasons explaining your choice.

4. How should we define positive environmental benefits?

   a. Should it be by reference to the EU taxonomy[3] and, if yes, should it be by reference to all sustainability criteria of the EU taxonomy? Or would any kind of environmental benefit be sufficient?

Part 2: Antitrust rules

EU antitrust rules prohibit anticompetitive practices by companies, such as anticompetitive agreements or abuses of a dominant position. Antitrust rules are applied in parallel by the European Commission, national competition authorities and national courts.

EU antitrust rules already contribute to the Green Deal objectives by sanctioning restrictive behaviour such as restrictions in the development or roll-out of clean technologies or foreclosing access to essential infrastructure, such as power transmission lines, which is key for the roll-out of off-shore wind parks and other renewable energy sources. EU antitrust rules also contribute to Green Deal objectives by facilitating energy flowing freely across borders based on competition between energy operators and a more efficient use of natural resources. Enforcement action relating to transport can also contribute to the greening of the industry and economy.

Businesses can contribute to the Green Deal by joining efforts to go beyond binding standards. Standardisation agreements frequently produce significant positive effects, in particular, by enabling the development of new and improved products or markets, or improved conditions of supply. When agreeing on standards, companies can put in place safeguards ensuring that the benefits of a standard do not come with unnecessary restrictions on healthy competition. For example, a standard should be applied in a transparent and non-discriminatory manner; it should be accessible to all interested companies, including those that also want to use alternative standards or technologies; and it should not allow for exchange of commercially sensitive information or cover up for cartels.[4]

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[3] The EU Taxonomy Regulation (Regulation (EU) 2020/852 of 18 June 2020, OJ L 198, 22.6.2020, p. 13) establishes an EU classification system to facilitate sustainable investment. Under the EU taxonomy, most economic activities will be screened and criteria will be determined (on the level of emissions, on recycling rates, water management requirements, etc) per activity area to determine whether it can be labelled as sustainable by investors and asset managers. While it does not apply to State aid, the classification could provide partial guidance as to the identification of projects with high environmental benefits or with high sustainability score.

[4] See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11/1 of 14.1.2011 (Horizontal Cooperation Guidelines), paras 280- 283 and para 293.

Agreements pursuing sustainability objectives may also in principle enjoy the benefit of the Commission's block exemption regulations (BERs)[5] so long as they do not contain hard-core restrictions and when the joint market shares of the parties to the agreement do not exceed specific thresholds.

The current debate aims to identify whether there are remaining barriers to desirable agreements supporting Green Deal objectives and if so, how such barriers can best be addressed.

As input to the debate on how antitrust policy and environmental and climate policies work together – and how they could do that even better, please consider the following questions:

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

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…)?

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?).

Part 3: Merger control

Under the EU Merger Regulation, the Commission has a mandate to assess whether corporate reorganisations, namely mergers and acquisitions of a certain size, significantly impede effective competition in the internal market. Such reorganisations are generally welcome to the extent that they do not produce harmful effects and contribute to increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the EU.

The Commission is tasked to ensure that these transactions do not, however, result in lasting damage to competition in the internal market. A merger could result in lasting damage to competition, for example, by removing competitive constraints between firms. Specifically, mergers can eliminate the pressure between firms to innovate on sustainability aspects of some products or production processes, in particular in markets where the latter are an important factor of competition.

Consumer preferences are a key aspect in the assessment of the effects of a merger, in terms both of identifying the relevant product markets and analysing the extent to which the merging companies

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[5] Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.
OJ L 102, 23.4.2010, p.1-7; Commission Regulation No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of research and development agreements, OJ L 335, 18.12.2010, p. 36; Commission Regulation No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements
OJ L 335, 18.12.2010, p. 43.

compete against each other and against other firms. Today, environmental and sustainability considerations play an ever-increasing role in this respect.

Market definition is a tool to identify and define the spaces in which firms compete. Delineating markets in both product and geographic dimensions allows the establishment of the framework of assessment of the impact of a transaction on competition and consumer welfare.[6] A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'. In this respect, environmentally friendly characteristics or sustainability product features can be associated with higher product quality and constitute a differentiating factor in the eyes of consumers.

Research and advances in technology are fundamental for economic progress. The goal of promoting sustainable development requires protecting and encouraging innovation, so that firms come up with new and better technologies, products or know-how that can help, for instance, to reduce the levels of emissions or bring other sustainability or environmental improvements. Merger control makes sure that there is no loss of innovation caused by mergers between rivals, that would otherwise continue bringing benefits.

As input to the debate on how merger policy and environmental and climate policies work together – and how they could do that even better, please consider the following questions:

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?

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?

Practicalities:

This document contains a number of questions, grouped into three parts - each covering one of the three competition law instruments: antitrust, State aid control and merger control.

In your contributions, you may want to reply to all or only certain parts or questions. In doing so, please make sure your reply addresses precisely the question concerned. Please provide concrete examples as well as quantification whenever possible.

In case your contribution exceeds 20 pages, please add an executive summary.

Please send your contributions to COMP-GREEN-DEAL@ec.europa.eu by 20 November 2020.

Please provide only non-confidential information.

[6] See the guidance contained in the Commission notice on the definition of relevant market for the purposes of Community competition law [Official Journal C 372 of 9.12.1997].