

Competition Policy supporting the Green Deal

Part 1: State aid control

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.

On December 11, 2019, the European Commission issued a communication entitled The European Green Deal, which is a plan to build a sustainable economy in the European Union. This plan is based on ambitious climate and environmental goals, involving Member States and their citizens in the fight against climate degradation and environmental protection.

The review of state aid rules should first and foremost take into account the challenges of the transition towards climate neutrality and a low-carbon economy and ensure that state aid rules are consistent with EU climate policy. However, it should be noted that the levels of market development, as well as the costs of transformation in individual Member States are different, and therefore these differences should not be without an impact on state aid rules. Therefore, it seems necessary to take into account the element of justice in the conditions of admissibility of state aid, both in the case of horizontal rules (such as aid for environmental protection) and regional rules.

For companies that have to make a significant effort to increase the level of environmental protection or achieve energy-related goals, and for those companies that, due to costs, would not undertake changes without public support, additional bonuses in the allowable aid intensities could be an effective incentive. Moreover, the introduction of additional bonuses in aid for environmental protection and energy-related objectives for regions which, due to the unfavorable energy mix (significant share of fossil energy), are exposed to much higher transformation costs, will allow to take into account such an important element of fairness in bearing the costs of achieving climate neutrality.

To achieve the goal of energy transformation, it is of great importance that the European Commission recognize public aid for zero-emission sources as admissible, which also means nuclear energy. The need for the EU to maintain control and sovereignty in value chains that will be key to achieving the EU's strategic goals, such

as the transition to a low-carbon economy or the empowerment of European actors in the areas of innovation and digitization, is another essential element in pursuing the goals of the Green Deal Policy. In particular, this concerns the sustainable and stable supply of strategically important raw materials such as coke for steel production or copper, but also the development of breakthrough technologies to ensure the EU economy's sovereignty. In this context, important projects of common European interest (IPCEI - Important Projects of Common European Interest) as well as a change of approach to energy-intensive industries seem to be an adequate mechanism.

Considering the need for much greater control and sovereignty of the EU and Member States in value chains, the energy-intensive industry should also be "protected", so that the climate transformation does not lead to further divestments and the location of enterprises outside the EU. This weakens the position of the EU and has an additional negative impact on centers whose local economy and local labor market depend on companies operating there. Energy-intensive industries should be supported, for example by integrating these sectors in the regional aid system and allowing them to benefit from investment aid to substantially improve their production process. The inclusion of energy-intensive sectors in the scope of regional investment aid would be in line with the EU's ambitious climate agenda and would support territorially sustainable development.

However, an effective transformation towards a climate-neutral economy requires a properly structured support. For this purpose, the Just Transition Mechanism was established. One of the three pillars of the Mechanism is the Just Transition Fund (hereinafter: JTF). The JTF supports the objective of "Investing for jobs and growth" in all Member States. The JTF only supports activities that are directly related to its specific objective, which is to enable regions and citizens to mitigate the social, economic and environmental impacts of the transition towards a climate-neutral economy and contribute to the implementation of territorial just transition plans. The JTF will be implemented under the Cohesion Policy programs.

In the opinion of the Polish authorities, public aid supporting transformation processes should constitute a real incentive to introduce changes, not only in the case of enterprises not having sufficient funds to finance them, but also for enterprises not experiencing problems, operating in sectors that contribute to environmental degradation. In particular, they will be reluctant to introduce costly pro-environmental solutions, unless the support offered proves sufficiently attractive.

Thus, in the opinion of the Polish authorities, the implementation of the Green Deal policy should also involve an appropriate amendment to the provisions on state aid. Further information on this is provided in the answer to question 3.

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?)

N/A

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?
 - 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.

In the opinion of the Polish authorities, in order to efficiently and effectively implement the Green Deal policy, it is necessary to urgently amend the current state aid regulations and to properly design future ones. In particular, new aid allocations should be introduced for funds from the JTF.

The Polish authorities would like to point out that the current provisions of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain types of aid compatible with the internal market pursuant to Art. 107 and 108 of the Treaty (EU Official Journal L 187 of 26.6.2014, as amended, hereinafter: GBER) will be in force until 31 December 2023, while almost all aid schemes exempted under the GBER will remain exempt for a six-month adjustment period, i.e. until 30 June 2024. The exception are programs assuming the granting of regional aid, the exemption of which expires on the date of expiry of approved regional aid maps, i.e. on 31 December 2021, when the period of application of the Guidelines on national regional aid for 2014-2020 (hereinafter: Regional Guidelines) expires. At the same time, from 1 January 2022 until the entry into force of the new regulation on group inclusions, regional aid can be granted on the basis of the existing GBER, but on the basis of the new regional aid map in force from 2022.

The GBER may provide a legal basis for the distribution of JTF funds, but the standard aid intensity levels are assessed as not encouraging investments in areas covered by equitable transformation plans. Given that the current GBER will remain in force for another 3 years, it should be ensured that it provides a comprehensive legal basis for supporting projects under the JTF and complementary projects co-financed by the ESI Funds for the period 2021-2027. Therefore, it would be desirable to introduce a provision directly regulating the provision of assistance under the JTFs (as proposed below), which will allow the implementation of the JTF to begin as early as 2021. If this would not be possible, consideration should be given to the possibility of increasing the aid intensity levels (by 15 percentage points) or the allowable value of aid for projects implemented with the support of JTFs and in areas covered by territorial equitable transformation plans, including projects not necessarily part of those plans, which will be financed from sources other than JTFs, being complementary to projects supported from them.

To ensure consistency and legal certainty throughout the programming period, the provisions of the new GBER (for the years of 2024-2027) should, in principle, be consistent with the current GBER. At the same time, as noted above, the new GBER should include provisions relating to the implementation of JTFs (e.g. as proposed below). Different aid allocations in areas covered by territorial fair transition plans and financed from sources other than JTFs should also provide for the possibility to grant an increased aid intensity (by 15 percentage points) or allowable aid value.

At the same time, the Polish authorities emphasize the need to adapt other provisions governing the principles of admissibility of state aid accordingly. In the case of the Regional Guidelines, Guidelines on State aid for environmental protection and energy-related objectives in the years 2014-2020 (EU Official Journal C 200 of 28.6.2014) and the Framework for State aid for research and development and innovation (EU Official Journal C 198 of 27.6.2014), in the opinion of the Polish authorities, it is necessary to introduce specific conditions for granting aid financed from JTFs funds. Moreover, the above mentioned legal acts, in particular the Guidelines on State aid for environmental protection and energy-related objectives for 2014-2020, should provide for a simplified notification procedure for aid/individual aid schemes within the JTFs. The regional guidelines in their current form will be valid until December 31, 2021. From 1 January 2022, the new Regional Aid Guidelines, a draft of which was presented by the European Commission in July 2020, will enter into force. The draft essentially reproduces the solutions of the current Regional Guidelines and does not introduce specific solutions dedicated to the implementation of JTFs.

Proposed wording of the GBER provision regulating the provision of assistance in the field of JTF:

Article X1

(1) Aid for projects aimed at mitigating the social, economic and environmental consequences of the transition to a climate-neutral economy and contributing to the implementation of territorial plans for equitable transformation shall be compatible with the internal market within the meaning of Article 107(3) of the Treaty and shall be exempt from the notification requirement of Article 108(3) of the Treaty if the conditions laid down in this Article and in Chapter I are fulfilled.

(2) Projects aimed at mitigating the social, economic and environmental impacts of the transition to a climate-neutral economy and contributing to the implementation of the territorial fair transition plans referred to in (...) should meet the following criteria:

(a) are co-financed by the Just Transition Fund;

(b) support the implementation of the equitable territorial transformation plan referred to in Article (...) of Regulation [JTF] and where support for productive investments is granted to undertakings other than SMEs or support for investments is granted to achieve a reduction of greenhouse gas emissions from activities listed in Annex I to Directive 2003/87/EC, those investments have been approved as part of the equitable territorial transformation plan.

3. The eligible costs are the total costs of the project to the extent and in the amount resulting from the Regulation [JTF].

Article X2

The aid intensity for projects aimed at mitigating the social, economic and environmental consequences of the transition to a climate-neutral economy carried out in areas covered by JTF plans contributing to the implementation of them but not financed under the Just Transformation Fund may be increased by a maximum of 15 percentage points with respect to the aid intensity appropriate to the relevant aid purposes set out in this Regulation, to a level not exceeding 100% of the eligible project costs.

4. How should we define positive environmental benefits?

a) Should it be by reference to the EU taxonomy³ 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?

N/A

Part 2: Antitrust rules

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).

The Polish competition authority has not yet investigated the case which would involve the agreement (or any other form of cooperation) between undertakings where such agreement (or cooperation) was to be justified on the grounds of 'sustainability' or 'environmental protection'. Therefore, it is difficult to address this question providing the real-life examples.

In theory, any cooperation between undertakings which aimed at meeting environment-related challenges could contribute to the fulfilment of Green Deal objectives. Hence, the coordinated practices which would strength the consumer protection, workers' rights or environmental measures should be welcomed and deemed beneficial. It is now time for the European competition law framework to officially recognize that common investments such as joint ventures, purchasing or production agreements may be also justified on the ground of sustainability. Competition law should support such initiatives even if, to some extent, those "green initiatives" might restrict intra-brand competition. Having said that, the main aim of the European antitrust is to protect the rivalry process between competition. Therefore, any co-operation (even if justified on the ground of Green Deal assumptions) which would eliminate competition in respect of a substantial part of the geographical market should not escape the 101 prohibition.

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...)?

As the Commission has already emphasized on numerous occasions, the objectives of the Green Deal cannot be achieved solely by the competition law-framework. Competition law can, however, support the Green Deal objectives by adjusting the application of the current competition-law policies. To achieve that, the Commission must provide further clarification on the exemptions (so called "safe-harbour") for those agreements that would escape the Article 101-prohibition since they could contribute to the idea of "greener Europe."

Regulation 330/2010 regarding vertical agreements and concerned practices as well as Regulation 1217/2010 and Regulation 1218/2010 on horizontal agreements do not cover the issue of sustainability or environmental protection. When reviewing those policies, (since they respectively expire on May 2022, December 2022, December 2022) the Commission should recognize the need to provide the general guidelines which could adjust the application and the scope of Article 101. The new set of rules should establish the criteria concerning circumstances of agreements between undertakings allowed, if those agreements would aim to contribute to Green Deal assumptions. However, the Guidelines should not be too descriptive and too detailed so that they shall create some room to manoeuvre and allow both the Commission and the national competition authorities to apply the “green exemption” in a flexible way.

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?).

Firstly, the current competition law framework should only be adjusted, instead of being radically changed in the light of Green Deal. As already stated, the Commission should alter the scope of Article 101 (3) in a way that it could apply to those forms of collaboration that could also support the “green objectives”. To achieve that the guidelines on the application of Article 101 (3) regarding both: vertical and horizontal collaboration should be reviewed.

When deciding if the specific green-collaboration would justify the restrictive nature of the agreement, the importance of the outcome of such cooperation should be analyzed in the first place. Namely, if the benefit of the green-collaboration falls within the long-term assumptions provided under Green Deal, such an agreement could be exempted from the prohibition (e.g. the agreement which leads to transition to climate neutrality). In other words, the competition rules should now permit the high-profile sustainability co-operation, which firstly, create the prolonged benefit and secondly, pass it to the environment.

Also, it must be recognized that if the idea of green or sustainable products will not be sufficiently valued by customers, they will not be willing to pay for it. Consequently, the Commission should consider whether to impose a specific duty on those undertakings that would like to benefit from the “green exemption”. For instance, undertakings that conclude a green agreement, should be automatically

bound to raise the customers' awareness regarding the positives outcomes of their coordinated practices. Such an obligation could enable customers to make more sustainable decisions and provide explanation for the increase in price of the specific product. Ideally, customers are willing to pay for the specific goods (or service) more than they used to, as they know that the increase in price is further passed to the environment, animal welfare or human rights.

Part 3: Merger control

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?

At the very beginning, it should be noted that the provisions on the control of concentrations of undertakings are general regulations, not sector-specific regulations and apply to all sectors of the economy. Therefore, in the light of the merger control regulations, undertakings operating in the field of production / sale of environmentally friendly products or technologies are generally treated in the same way as producers / sellers of other products.

It is not difficult to imagine situations in which concentration of enterprises could be harmful to consumers by limiting their choice of environmentally friendly products or technologies. In general, any concentration is beneficial to both consumers and the economy as a whole, as it contributes to lower operating costs and innovation, but will also be harmful in some cases. Such cases are, for example, concentrations of companies with large market shares in terms of environmentally friendly products or technologies. Agreeing to such a concentration could result in less choice for consumers, a reduction in innovation and an increase in the prices of the products offered.

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?

Enforcement of concentration regulations does not translate directly into the protection of the environment and the achievement of sustainable development objectives contained in the Green Deal. Of course, you can imagine the situation that was indicated, for example, in response to the first point. However, it does not seem that concentration control regulations can make a comprehensive contribution to environmental protection.



It should be noted that the role of competition authorities in merger control matters is somewhat passive (authorities assess concentrations that have been notified to them; however, they have no direct influence on, for example, which company is to be taken over by another company).

Nevertheless, in the context of this question, an example may be indicated when the concentration contributes to a significant restriction of competition, and the antitrust authority withdraws from the prohibition due to the rule of reason (the overall benefits resulting from the concentration are greater than the negative effects resulting from a significant restriction of competition; such benefits could be e.g. contributing to environmental protection). This would be an example of concentration enforcement contributing to environmental protection.

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