

The Competition and Consumer Protection Commission (“CCPC”) welcomes the opportunity to respond to the European Commission’s public outreach as input to the debate on how competition policy can contribute to the objectives of the Green Deal. There is growing discussion amongst competition agencies including the CCPC on how competition policy can contribute to national sustainability goals. The CCPC has provided answers to the relevant questions to the public outreach under the Antitrust Rules and Merger Control headings below.

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).**

To begin with, to date, the CCPC has not been notified of any actual examples of agreements which might lead to desirable cooperation between firms in the Republic of Ireland (“Ireland”) to support the Green Deal objectives but could not be implemented due to EU antitrust risks. One possible reason that National Competition Authorities (“NCAs”) are not seeing many actual examples could be that this is an area of emerging importance and firms may be assessing which types of agreement to enter and the potential implications for breaching competition law; there may be other reasons too.

The CCPC considers that competition in and of itself can lead to green outcomes. Competition can lead to even greater sustainability benefits when the social costs of polluting by firms are internalised through, for example, taxation or cap and trade systems. When taxation internalises the social cost of polluting, by, for example, a carbon tax on the amount of carbon emitted in the production process, firms are disincentivised from polluting and might attempt to reduce their emissions to a greater degree than when the true costs of polluting are not internalised through such a tax. Firms may also look to greener ways of production to reduce costs. In the ordinary course of business, firms will attempt to reduce their costs and with effective competition in the market these incentives may be magnified as business will be taken from the firms with the more inefficient business processes by the more efficient firms. In Ireland there has been an attempt to internalise some of the social costs of polluting through both taxes (such as the carbon tax) and the EU cap and trade system, as well as through regulation.¹ Maintaining effective competition in the market can be

¹ The CCPC is aware that there are a number of legislative developments planned by the European Commission which will provide a further basis for regulation to achieve environmental objectives (e.g. proposed sustainable product policy).

an effective way by which competition policy can contribute to the objectives of the Green Deal while also ensuring that consumers realise some of these benefits.

The CCPC is aware that the new SME Strategy ('An SME Strategy for a sustainable and digital Europe') will foster circular industrial collaboration among SMEs building on training, advice under the Enterprise Europe Network on cluster collaboration, and on knowledge transfer via the European Resource Efficiency Knowledge Centre.² Furthermore, the 'New Industrial Strategy for Europe' is expected to deliver a focus on a range of specific technologies and industrial eco-systems.³ These developments can be expected to provide a framework within which firms can help to achieve the objectives of the Green Deal.

There may also be circumstances where an agreement between firms may be a more effective means of supporting the objectives of the Green Deal. As mentioned earlier, the CCPC has not come across any such examples of cooperation in Ireland, but an international example of such an agreement would be the 1999 European Commission decision to declare that Article 81(1) of the EC Treaty (now "Article 101") is inapplicable to an agreement between some members of an association of manufacturers of domestic appliances and national trade associations (the "CECED decision"). In its decision, the Commission considered the individual economic benefits, such as reduced electricity usage, and also the collective environmental benefits, such as reduced carbon emissions. The Commission found that the benefits to consumers outweighed the costs and that the restrictions were not excessive. In that case a greener outcome was the result of cooperation among firms which was allowed as the benefits to consumers outweighed the costs. This is an example where antitrust rules and green objectives work very well together.

Theoretically there could be a number of agreements between firms or decisions by associations of firms which follow the same lines as the CECED decision where undertakings agree not to produce or import the most polluting versions of their products but where these agreements do not eliminate competition and consumers get a fair share of the benefits. This illustrates that the current interpretation and application of the competition rules does not stand in the way of such agreements being put in place.

- 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...)?**

² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A103%3AFIN>

³ https://ec.europa.eu/info/sites/info/files/communication-eu-industrial-strategy-march-2020_en.pdf

At this stage it is not obviously clear what tools should be used to provide clarification on the kinds of agreements which serve the objectives of the Green Deal without restricting competition. There might be a need for a mixture of tools. We note that the Commission's Horizontal Guidelines currently provide detailed guidance on a number of cooperation agreements, including information exchange, research and development, etc. One option is to include sustainability agreements in the Horizontal Guidelines with detailed guidance on how such agreements should be assessed. Examples can also be provided to show what kind of agreements are allowed and which are not. The CCPC is also aware that the Authority for Consumers and Markets (“ACM”) has issued draft Horizontal Guidelines which would employ a broader definition of the ‘fair share of benefits’ to consumers in order to specifically capture environmental objectives⁴.

There may be a perception that antitrust rules are getting in the way of legitimate cooperation agreements which may support the objectives of the Green Deal and it may be the case that these agreements would not necessarily be blocked by competition rules. The perception of a competition law impediment could be one reason why NCAs have not encountered any actual examples of agreements which support the Green Deal objectives and do not restrict competition. The CCPC supports the view of other NCAs which have suggested that it might be a worthwhile exercise for the Commission and NCAs to invite firms and associations to get in touch with them by providing examples of agreements which they would like to implement but they feel that the current interpretation of competition rules could impede. A call for firms to get in touch might lead to a better understanding of the issues that need to be addressed in a guidance document.

It might also be a worthy initiative to re-educate the public on the kinds of sustainability agreements that are not likely to cause competition concerns and therefore are not restricted under EU competition rules and those agreements that may benefit from the 101 (3) exemption.

- 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?).**

⁴ <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf>

Our initial take on this, without having actual examples to look at, is that most agreements would fall within the scope of the current enforcement practices, taking, for example, the CECED decision. In this respect, it might be useful for the Commission to provide guidelines/guidance on how, under the traditional interpretation of the competition rules, NCAs could assess agreements which attempt to support the Green Deal objectives, as it indicated it would consider in its review of the Horizontal Block Exemptions and Horizontal co-operation guidelines. At this stage, the current enforcement tools may be adequate in accommodating agreements with Green Deal objectives in relation to the production of goods or services. However where we look at the Green Deal objectives which are wider than the production of goods and services, other national agencies or government departments may be more appropriately placed to deal with those issues and ensure that society is not adversely effected. Under these circumstances, NCAs would deal with competition issues while appropriate agencies or departments would deal with other green deal objectives.

In Ireland, using it as one example, we have witnessed a great deal of greening of our electricity generation sector in recent years in particular. The competition rules continue to apply to this sector and they have not impeded the process of achieving the objective of the greening of electricity generation.

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?**

The CCPC has not encountered any actual examples where a merger between firms resulted in less choice for consumers of environmentally friendly products or technologies. One theoretical scenario is where a “killer acquisition” is implemented by an incumbent which is attempting to keep a disrupting technology from the market and disrupting their business. In such a scenario, the disrupter’s products and/or technologies may not become available to the consumers because of the acquisition. This may be similar to what can happen in some digital markets.

- 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?**

The CCPC considers that an efficient and effective merger review regime which supports concentrations with green objectives which are unlikely to cause

competition concerns could contribute to the objectives of the Green Deal. Such mergers could be cleared quickly with relatively little uncertainty for the firms involved allowing them to contribute to the objectives of the Green Deal.

In instances where a concentration could have led to the reduction in choice of eco-friendly products and an adverse effect on consumers, an effective merger regime would help in contributing to the objectives of the Green Deal by obtaining appropriate remedies.

There could also be scenarios where merging parties may raise claims of environmental efficiencies in a potentially problematic concentration. The European Commission and NCAs may have to consider whether additional guidance is required or whether the approach in *CECED* could be applied in the context of a merger review for assessing environmental related efficiencies.