

Consultation response

Competition contributing to the European Green Deal



AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3 trillion in 2019, directly supports more than 4.8 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

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Executive summary

The following provides AmCham EU's response to – and relevant recommendations on – the open consultation titled Competition contributing to the European Green Deal. We ultimately call for transparency in the rules and assessments which will be applied by the EU across the three parts to ensure utmost clarity for companies who share a common goal with the EU to achieve a more sustainable society.

Part 1: State aid control

AmCham EU supports the ongoing review and modernisation of EU state aid rules. It is important to ensure that authorised state aid supports the Green Deal and that aid which would contribute to meeting Green Deal objectives is not otherwise discouraged or prohibited.

We encourage increased use of 'Important Projects of Common European Interest' (IPCEI), in a manner inclusive of international partners and stakeholders with a shared interest of pursuing and achieving green objectives. The procedure to qualify for IPCEI should not be administratively burdensome and innovative companies (disruptors) should be given the chance to qualify for funding under this heading.

In identifying and quantifying relevant benefits, AmCham EU encourages the Commission to take advantage of work that has been done in other areas, for example in the context of environmental impact assessments at EU Member State level, or horizontally (eg, Environmental, Social, Governance and Controversies indicators). Similar processes should be implemented at EU level allowing for centralised oversight and engagement.

AmCham EU draws attention to the EU taxonomy on sustainable finance. This can provide a consistent framework for identifying sustainable assets contributing to energy transition as well as those that may 'do significant harm' to the environment. We have previously outlined recommendations on this topic.¹

AmCham EU respectfully submit that the terminology 'green bonus' versus 'green malus' may be counterproductive. EU state aid should encourage the development of disruptive digital technologies capable of contributing to sustainability objectives.

Part 2: Antitrust rules

Cooperation between firms is critical in supporting Green Deal objectives. Many industrial sectors are undergoing a profound reorganisation of their business to reflect sustainability objectives. To complement their efforts, EU competition law and policy should seek to develop appropriate assessment standards that are practicable and provide a high level of legal certainty.

AmCham EU's circular economy brochure provides industry insights on how new business models around the leasing and mutualisation of manufacturing equipment could contribute to an accelerated energy transition.²

¹ AmCham EU, 'AmCham EU's position on the European Commission's Sustainable Finance package'. 2018, http://www.amchameu.eu/system/files/position_papers/amcham_eu_position_on_sustainable_finance_-_final.pdf

² AmCham EU, 'The Circular Economy: 15 innovative industry solutions that drive a sustainable future'. 2019, http://www.amchameu.eu/sites/default/files/publications/files/circular_economy_2019_digital.pdf

Industrial cooperation to foster a circular economy is an excellent illustration of this, for example where one manufacturing sector makes use of materials considered to be waste products in another sector.

Productive discussions on such issues commonly require extensive sharing of information. For instance, thinking of the example above, sharing of information on the specifications of waste materials in question to understand their usability as raw material in other sectors. Other instances include new business models around leasing and services vs ownership, ie mutualisation of manufacturing equipment as previously mentioned, or take back schemes in the B2B world for example. Developing new business models requires a novel approach to the antitrust assessment of information sharing.

Many forms of cooperation do not restrict competition and are therefore not restricted by EU rules. Examples here include cooperation in relation to the development of non-binding environmentally friendly standards for raw material sourcing, production, recycling etc.

In some cases, however, companies may be discouraged from pursuing non-restrictive cooperation due to a lack of certainty as to whether such cooperation would be deemed restrictive. In this regard AmCham EU encourages the Commission to leverage its ongoing review of its assessment of horizontal and vertical cooperation agreements to offer more guidance on sustainability agreements that are not considered restrictive. Concrete examples to complement such guidance would provide welcome clarity.

In other cases, cooperation between firms may be considered restrictive of competition under Article 101(1) TFEU but satisfies the criteria for exemption under Article 101(3) TFEU. Again, AmCham EU encourages the Commission to take the opportunity of its ongoing review of horizontal and vertical cooperation agreements to provide further guidance on the application of the Article 101(3) criteria to sustainability agreements. The Commission should provide greater clarity on how it will assess the benefits that accrue to society from sustainability agreements but potentially result in competitive harm, for example reduced waste or pollution versus increased prices.

The methodology envisaged by the Netherlands' antitrust authority might provide useful guidance.³ It attempts to provide a clear-cut mechanism thus enabling companies to self-assess. We believe the more such criteria are objectivised, the more legal certainty will they provide for industry. A transparent methodology is key to ensure industries that contribute to the green deal and the EU's autonomy and thus avail of differing standards continue to be measured against the same parameters.

Examples of arrangements where more detailed guidance on the Commission's application of Article 101 TFEU would help companies wishing to engage in beneficial cooperation could include housing and installation companies agreeing to boost zero-energy housing through a joint initiative to make 1,000 homes energy-neutral, or a group of wood processors agreeing to only procure wood from pre-approved regions on a so-called 'green list' that is managed by the undertakings that take part in the initiative; publish from where and from whom they procure wood; invest a portion of their turnover to enforce compliance; mark the sustainable products in a uniform manner; and include a fixed surcharge in the selling price to compensate for the additional costs.

Boosting the contribution potential from innovative young companies is required to maximise the result of efforts in this area. Equal and non-discriminatory access to relevant cooperative arrangements will therefore be critical. To this point, AmCham EU reiterates our encouragement to the Commission to leverage work that has

³ The Netherlands Authority for Consumers and Markets, 'Draft guidelines 'Sustainability Agreements'', 2020. <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf>

been done in other areas, for example in the context of environmental impact assessments recognised by EU Member State governments.

Part 3: Merger control

AmCham EU agrees that a merger could potentially be harmful to consumers if, for example, the merger reduces innovative competition to develop environmentally friendly products and/or technologies. We believe that the Commission already possesses the tools to assess such competitive harms, but would welcome further guidance on how the Commission assesses such effects.

Further guidance would be appropriate on the Commission's assessment of environmental benefits from proposed mergers in connection with its assessment of efficiencies expected to be generated by the merger. For example, a merger that might otherwise be considered restrictive of competition could allow the merged company to develop more environmentally friendly products than it would otherwise be able to do. AmCham EU submits that the work discussed above on assessment of environmental benefits in the context of cooperation agreements could benefit the Commission's assessment of such benefits in the merger context. Further, the work undertaken by other regulators, such as the Netherlands' ACM, may also provide useful guidance in the field of merger control.

AmCham EU notes that the Commission has announced a review of existing merger control practices for 2021 and encourages the Commission to include these issues in its review.