

Competition Policy supporting the Green Deal goal: EEB contribution

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Executive summary

The European Environmental Bureau welcomes the initiative of Vice President and Commissioner Vestager aimed at collecting contributions about the alignment of competition policies and the goals of the European Green Deal (EGD) and its Zero Pollution Ambition (ZPA). This document includes:

- An introduction where we make some general points about the relevance of competition policies for achieving the targets of the EGD.
- **Our contribution concerning the State aid control part.** In Question 1, we detail our views on all the tests and how they could serve the interests of environment and EU communities. Moreover, **we also included other reflection points about other relevant parts of the TFEU that should be kept into account when assessing State aids**, as well as our view on the application of the principle of self-determination of energy mix by Member States. For each test, illustrations on specific cases are included.
- In Question 2, we detail our proposals **to link the provisions of State aids to clear and binding environmental conditionalities**, as well as the **application of the polluters-pay principle** and the inclusion of negative externalities in the calculation of the total amount of aids. Also in this case, specific illustrations are provided;
- Similarly, in Question 3 we detail the conditions that would make environmentally acceptable to provide “green bonuses” to market operators.
- In Question 4, whereas we advocate for taking into account the Taxonomy Regulation, we also recognize that its Delegated Acts are still to be published and, for this reason,

we list a series of proposals beyond the Taxonomy to define positive environmental benefits.

- **Our contribution on Antitrust rules** includes 4 scenarios where cooperation among firms to support the EGD objectives is desirable, in particular concerning the development of services or products serving the EGD, the phasing-out of hampering activities, agreements to limit negative externalities and transportation impacts, and the prevention of behaviours hampering circular economy practices. We provide a comprehensive list of practical illustrations for this part as well.
- **Our contribution on the Merger Control part** considers those practices allowing market operators to conveniently merge stranded assets into “bad companies” to concentrate their activities on profitable assets, as well as the provisions of State aids to continue environmentally harmful activities beyond the timeline dictated by climate science. In this case, an illustration is provided.

Our specific suggestions to DG Competition to align competition policy to the EGD are:

- Reclarifying the whole State aid tests to keep into account ambitious environmental criteria. In this respect, we call DG Competition to go beyond the pure application of article 107 TFEU and consider also other likewise important TFEU articles (e.g. art 11) and EU’s core principles calling for environmental protection.
- Aligning EU competition policy to deliver on the long-term priority objectives and commitments of the Union (a carbon neutral, circular and toxic free society by 2050, as well as achieving the zero pollution ambition) and to take decisions in accordance to the 'zero pollution hierarchy of actions' approach¹.
- Acknowledging the urgency of the climate and environmental crisis we are living by including in the State aid tests ambitious and “beyond EU standards” requirements to agree public money to market operators.
- Including negative externalities, tax exemptions and perpetual obligations in State aid emanations using sound methodologies to calculate them, such as OECD’s Value of Statistical Life.
- Reviewing the anti-trust and copyright legislative frameworks to not penalize environmentally friendly business models, particularly the ones that could spark circular economy practices.
- Clarifying that competition law cannot be used as a shield to withhold environmental performance information.
- Update Commission guidance on anti-trust and procedures against abuse of dominance so that they are in tune with the digital age, support open after-sales and repair markets, and the wider objectives of the green deal/circular economy action plan.

¹ <https://mk0eeborgicuyuctuf7e.kinstacdn.com/wp-content/uploads/2020/11/EEB-feedback-to-the-ZPAP-roadmap.pdf>

Introduction

The European Environmental Bureau welcomes the initiative of Vice President and Commissioner Vestager aimed at collecting contributions about the alignment of competition policies and the goals of the European Green Deal (EGD) and its Zero Pollution Ambition (ZPA).

We consider this alignment a key step towards an ambitious and effective implementation of the EGD, as well as an obligation under Article 11 TFEU. While EU competition policy is a cornerstone of the EU Treaties, it cannot undermine the Union's environmental ambitions, such as efforts to prevent and reduce pollution or halt the loss of nature, strengthen circular economy practices and climate change mitigation measures.

In fact, pollution, the destruction of nature, waste of resources and climate change each have significant economic costs for communities and have a negative impact on the EU's internal market. Consequently, when assessing competition and the internal market, the Commission must uphold its role as the "Guardian of the Treaties" and integrate environmental policy and other Union ambitions to ensure there is full policy coherence.

The EGD offers a once-in-a-lifetime opportunity to strive for a coherent and forward-looking approach on the application of the EU acquis. In these challenging times, the protection and the promotion of the "common interest" has never been more important; nevertheless, the notion of "common interest" needs to be refocused to today's aspirations and citizens' concerns, and it cannot be limited to a better functioning of the EU internal market alone.

The EU competition policy needs to be re-aligned to long-term priority objectives and commitments, namely:

- Achieving a carbon-neutral, circular, and toxic-free society by 2050 at the latest.
- Concretising the EU economy zero-pollution ambition².
- Enforcing rigorously the do no harm "green oath" to each decision of the Commission, irrespectively of whether within the competition policy framework.
- Streamline circular economy practices (such as the reuse, refurbishment, and repair of products) and incorporate the "right to repair" concept, as already stated in the European Green Deal and Circular Economy Action Plan.

In its 8th Environment Action Programme³, the European Commission has re-affirmed as long-term priority objectives set for 2050, "that citizens live well within the planetary boundaries in a regenerative economy where nothing is wasted, no net emissions of greenhouse gases are produced and economic growth is decoupled from resource use and environmental degradation. A healthy environment underpins the well-being of citizens,

² See related input of the EEB to the Zero Pollution Action Plan Roadmap <https://eeb.org/library/eeb-feedback-to-the-zero-pollution-action-plan-roadmap/>

³ <https://ec.europa.eu/environment/pdf/8EAP/2020/10/8EAP-draft.pdf>

biodiversity thrives, and natural capital is protected, restored and valued in ways that enhance resilience to climate change and other environmental risks. The Union sets the pace for ensuring the prosperity of present and future generations globally”.

This environmental and social commitment is coherent with ambitions for a competitive Europe in a global context. The competitiveness of the EU is supported by having resilient and functioning ecosystems providing goods and services to the EU, clean air and water and non-toxic products that help avoid health impacts and knock-on effects on EU industrial performance, and having a liveable climate that avoids allocating billions to climate adaptation that could be better spent elsewhere.

Furthermore, environmental regulation and pricing schemes that internalise externalities (e.g. carbon pricing) create incentives for energy and resource saving, for innovation, and create an impetus for improved EU competitiveness.

Last but not least, growth or competitiveness gains, where built on the destruction of the environment and climate, often prove to be false growth for communities as a whole, and undermine competitiveness elsewhere, whether now or in the future. The whole picture needs to be taken into account, building on the multiple interconnections between economic, social and eco-systems.

One lesson learnt in these difficult times is that EU citizens are striving for more solidarity, more mutual support and protection of the environment and health that concretely delivers more well-being. In this context, also businesses must fully endorse ambitious environmental targets of the Union and play their part without further delays.

We disagree with the sentence in the call for contribution stating that *“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”*. This statement does not consider the influence that competition policy has on businesses activity and the overall impact it has on the environment. The Commission (namely, DG Competition) has a fundamental and crucial role to play in how the environment is protected through the mechanisms of the internal market. Competition policy is also itself a form of “regulation” and it can directly influence the effectiveness of the use of market-based instruments such as taxes, as well as undermine those short-sighted policy approaches where State aids are used by Member States to subsidise harmful activities.

A stronger involvement of DG Competition in fighting climate change, waste of resources and environmental degradation is especially necessary considered that economic behaviours only pursue the efficiency of economic systems with a dogmatic pretext that it corresponds to societal well-being. This leads to the alarming and morally unacceptable situation where externalities of the market failures are borne by the environment, society and future generations. The integration of environmental policies is not only essential to fix market failures, but also to preserve key societal interests (the “common interests”) such as the right to breathe clean air, drink pure water and eat healthy food.

For instance, whereas EU policy efforts towards decarbonisation, circular economy and depollution are proceeding at an unprecedented speed, the competition legislative framework is simply not keeping the pace, with the risk of seeing discrepancies between the two frameworks that could hamper the outcomes of the green EU ambitions.

We think that the implementation of the European Green Deal and of the Zero Pollution Ambition needs a decisive shift in terms of consideration of what the “common interest” is. In light of the present climate, environmental and health crisis, it is hardly acceptable to see public money going to guarantee stable revenues to harmful activities for decades, as in the recent Hinkley Point ruling by the European Court of Justice.

On the same note, it is equally unacceptable to see market practices that simply do not consider the necessity to save resources and increase the lifetime of products. In this respect, reducing the overall environmental footprint of products by encouraging the production of more durable, repairable and reusable products will reduce the whole footprint of the EU economy, as well as reduce its dependency on imports of critical raw materials.

This paper aims to respond to the specific questions posed by the Commission; however, the examples and explanations provided are not exhaustive. It is evident that the integration of environmental policy in competition policy must begin with a much closer cooperation and frequent dialogue between the Commission services themselves to address the many apparent contradictions in their policies.

For instance, the very recent Commission proposal to amend the Aarhus Regulation, which is intended to increase the opportunities for NGOs to challenge Commission decisions that harm the environment, fails to strike out the exception from its scope the decisions by the Commission made under competition rules (Article 2(2)(a) of Regulation No. 1367/2006). If the Commission is serious about aligning its competition policy to the EGD, or indeed with any environmental ambition at all, it should at least accept to be held accountable for the potentially destructive decisions it takes under competition rules.

Part 1: State aid control

Question 1

Notion of “common interest”

We fully agree that the common interest should be at the centre of any State aid provision. Nevertheless, we think that the notion of common interest must change; *the concept of “common interest” suggests that more is at stake in international law than the individual self-interest of States. Such notion might hold the key to transforming international law away from the dominance of sovereignty into a system **which truly serves the interest of the “community”, including all relevant actors.***⁴

Serving the interest of the community does not mean only preserving the internal market, but above all guaranteeing to Europeans the right to live in a healthy and safe environment and on a climate-neutral planet. Consequently, the notion of common interest should be enlarged to reflect the Climate Neutrality and Zero Pollution ambitions of the EU, as well as to ensure that EU action is compatible with the objectives set in international agreements such as the Paris Agreement, Minamata Convention on mercury, Sustainable Development Goals etc.

Moreover, the “common interest” should not be limited to the territorial scope of the EU or to Member States’ ones, but also consider whether taking a favourable or negative decision on a given State aid notification will set a precedent negatively affecting the reputation of the decision making of the EU, as well as triggering negative impacts beyond the boundaries of the Member State asking for the aid.

For instance, air and water pollution knows no borders (fig. 1 and 2); for this reason, European communities must be protected regardless of the country they live in and State aids provisions must not be agreed to those activities harming them. When asked to assess State aid proposals, the Commission shall consider the whole EU interest.

According to the Hinkley Point case ruling, State aids shall not pursue the common interest as an objective but, instead, they shall not “*adversely affect trading conditions to an extent contrary to the common interest*”. Nevertheless, by extending the boundaries of the common interest test as suggested, the provision of State aids will better reflect the challenges we are dealing with, such as globalization, environment degradation and climate change.

Moreover, the reduction of harmful emissions, the protection of water (availability and quality) and the prevention of long-lasting liabilities are a well-defined objective of common interest, as evidenced by the numerous statements made by the European institutions and the legislative acts adopted. It has also been recognised by the Commission as an objective that

⁴ Wolfgang Benedek, Koen De Feyter, Matthias C. Kettmann, Christina Voigt, The common interest in international law, as in <https://intersentia.com/en/the-common-interest-in-international-law.html>

can justify the grant of aid for the closure of coal fired power plants (e.g. as per the Dutch state aid closure decision⁵).



Figure 1 (left) and 2 (right): both figures show the impact of coal-related PM 2.5 pollution on countries that have already phased out coal, namely Belgium, Austria and Sweden. On the left, the impact of 4 German coal power plants, on the right the impact of Chveletice plant in Czechia on Austria. (source: Europe Beyond Coal)

Notion of common interest: illustration on industrial pollution and energy generation

When it comes to industrial pollution and energy generation, the general objective of the provision of State aid shall be the reduction of greenhouse gas emissions and environmental pollution, and the reduction of negative environmental impacts to air, water, and soil. The current State aid guidelines for energy and environment apply in this context. The aid mechanism shall thereof be assessed against the following conditions and decision tree⁴:

- The aid scheme does not harm any of the environmental objectives of the Sustainable Finance Taxonomy as laid out in the Regulation (EU) 2020/852/EU of the European Parliament and of the Council on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088. **This means that the aid regime should be fully consistent and rated against the promotion and compatibility of all 6 environmental objectives** (art. 9) and relevant technical screening criteria defined in that Regulation. This would enable to assess the “best value for money” test⁶.
- Prior to accepting a State aid mechanism approach, the Commission should require the demonstration that the same intended outcome cannot be reached through alternative approaches, such as taxation or legislation.

⁵ https://ec.europa.eu/commission/presscorner/detail/en/ip_20_863

⁶ <https://eeb.org/library/make-the-just-transition-mechanism-work-for-a-greener-europe/>

- The default baseline assessment should consider a full implementation of relevant “Union Standards”. State aid should therefore demonstrate an “incentive effect”, i.e. achieve better than Union Standards performance levels outcomes.
- State Aid schemes should first require a full internalisation of negative externalities through mechanisms based on the implementation of the polluter pays principle should be exhausted first, prior to relying on public funds.
- The “do no harm” principle is fully applied by the Commission through requiring compatibility with all the relevant provisions of the Treaty, in particular art. 191 and policy objectives set under the EU green Deal and the upcoming 8th EAP.
- Where a conflict between different policy objectives arise (e.g. free trade or internal market objectives versus public interests set under art. 191 of the TFEU), the environmental protection acquis objectives must prevail over the specific internal market or competition rules, and therefore have to be changed accordingly. This is indeed required under the integration principle of Article 11 TFEU. Economic failures (internal market, competition) can be remediated, restored or overcome by economic actors adapting to new situations and whilst this is not the case for life on earth. The necessity to preserve and protect sustainable living conditions for all living being should never be compromised by economic concepts.

Remedying market failures

First, the Commission should keep into account the fact that environmental pollution is a negative externality, which is a market failure in itself. According to a report commissioned by JURI Committee⁷, since polluting companies do not feel the negative consequences of the harm they inflict outside of their enterprise, this is described as an external effect imposing costs rather than benefits on third parties.

Such negative external effects can create a market failure. If polluters are not forced to pay for the external effects they create through their activities, social costs created by pollution would not be incorporated in the relative products and services of the market operator. Since the externality is not taken into account and the polluter does not invest in pollution abatement, relative prices will be too low and consumers will demand too much of a product or service that creates high costs for society. **Decisions failing to prevent and control pollution at source create, in other words, a market failure.** Companies would in that hypothesis be *allowed to externalize costs, in other words to impose the costs of pollution on society.*

So, remediating market failures not only means to reduce environmental degradation by making companies paying the right price for the environmental damages they cause, but also reconsider their business models to prevent the generation of negative environmental

⁷ [IPOL | Policy Department for Citizens' Rights and Constitutional Affairs, Environmental liability of companies](#)

impacts. And the market failure is in turn a “governance failure” if and where government policy (EU or national) does not address the market failure which creates incentives to destroy nature, create pollution or drive climate change.

Secondly, when addressing market failures, the Commission shall also assess **whether market operators have put in place any possible means to tackle adverse market conditions or has intentionally delayed action to continue business as usual and then take advantage of State aids.**

This means that the following pre-condition check list is to be fulfilled by the Member State:

- Implementation of relevant ‘Union Standards’ have been implemented to their full potential for the economic actor concerned, even if those Union Standards are not mandatory.
- Compliance with relevant environmental quality objectives by the economic beneficiary of the aid is demonstrated and satisfactory at the EU level, not only the country where the economic activity subject to state aid is operating.

Remedying market failures: illustration for pending state aid decision on German coal phase out notification

Concerning hard coal and lignite, as a matter of fact the collapse of their market has been under way for years. According to Ember think tank, coal economics has started going down years ago and May 2019 marked the non-return point⁸. The raise of carbon pricing towards 30 € per tonne⁹ made clear that a coal-to-renewable switch was desirable not only under an environmental point of view, but also economic.

In this respect, the cases of Germany and Poland are emblematic: in Germany, the gross profit of the lignite fleet collapsed by 54% in the first half of 2019, with a loss of 664 million €, and no lignite unit being able to cover their full fixed costs¹⁰. In Poland, pre-existing dynamics¹¹ only aggravated the economics of hard coal and lignite production and made impossible for market operators to go on with their business as usual.

Last but not least, as the gap between power price and carbon price keeps narrowing and the European Green Deal is being implemented, lignite will remain loss-making over the medium-term, and could lose 1.8 billion € over 2020-2022. Covid-19 has simply accelerated

⁸ <https://ember-climate.org/project/coal-collapse/>

⁹ <https://ember-climate.org/data/carbon-price-viewer/>

¹⁰ <https://ember-climate.org/project/the-lignite-cash-cow/>

¹¹ http://energy.instrat.pl/generation_by_fuel

an already existing trend: according to the IEA¹², “power sector revenues are set to fall by about 7% worldwide in 2020, though coal-fired power is likely to be hit harder.”

Yet, despite clear economic, environmental and policy (e.g. EU ETS has been set up in 2005) signals, coal market operators failed to act to clean their energy generation capacity

Appropriateness

State aids shall be considered appropriate when **Member States have implemented all the necessary measures relating to indirect operation aid**. Member States proposing State aids must first demonstrate they have taken all the necessary actions within their competence, such as regulatory measures or fiscal instruments, that would make the recurrence to State aid schemes under Article 107 TFEU not necessary or only considered as a last resort of state intervention, notably:

- market operators benefitting from State aids do not benefit from other financial support schemes or indirect support schemes enabling the status quo, such as capacity markets or other operating aids,
- the Member State has taken actions to internalise external costs generated by the given economic activity throughout its life cycle, such as through taxes, pollution charges or other equivalent measures.
- pollution prevention standards have been rigorously enforced first, and beyond the minimal EU “legally allowed” levels.

Appropriateness: illustration for coal combustion and iron & steel

Market operators needing State aids commit to implement specific actions for their coal capacity, such as full implementation of EU state of the art performance standards (EU LCP BREF). In particular, for coal power plants:

- For plants > 300 MW/th, permit conditions are aligned to the strictest LCP-BREF criteria; the maximum tolerable annual emission limits to air are: NO_x 85 mg/Nm³, SO₂ 10 mg/Nm³ and mercury 1 µg/Nm³, to be complied with by August 2021 at the latest;
- Compliance with the following minimal net energy efficiency levels:
 - > 43% for lignite fired boilers > 600 MW/th
 - > 46% for hard coal fired boilers > 600 MW/th

¹² <https://www.iea.org/reports/world-energy-investment-2020/key-findings>

> 61% for natural gas fired CCGT > 600 MW/th

To be complied with by August 2021 at the latest.

- Where market operators use local or imported hard coal, they shall demonstrate that the sourced fuel is subject to robust methane capture and monitoring requirements. For active or unused coal mines, this includes the obligation to monitor methane emissions by adequate LDAR measures, capture methane, seal mines and a general prohibition of flaring and venting. The conditions are considered as fulfilled if either a national legislation, standard, or permit condition is requiring those standards to be met and this legal requirement is legally in force in that country.
- In any case, State aids shall be used as last resort to accelerate the closure of coal-fired power plants that are still profitable or have prospects of profitability well beyond 2030. **Moreover, State aids shall be limited to those coal-fired power plants that close definitively by 31 December 2029 at the latest.** Conversions to other fossil fuels (including oil, shale gas, fossil gas, peat, gasoline, residues from refining activities, biomass) or waste shall not be admissible, as not in line with the European Green Deal objectives.

Concerning iron and steel industry:

- The potential of conversion to electric arc furnace route has been considered not technically and economically feasible, the recycling rate of scrap metal for crude steel production in the country in relation to steel consumed in the EU is exceeding the best performing levels (e.g. 80%) of total estimated scrap metal availability¹³ and necessary policies have been put in place to prevent contamination by copper and lead.
- The aid relates to the direct reduction steel making using hydrogen produced through the electrolysis route, where the share of renewables is set at meaningful rates (e.g. at least 50%).
- The aid only concerns additional investments needed that will achieve overperformance to the relevant "Unions Standard".

The conditions are considered as fulfilled if either a national legislation, standard, or permit condition is requiring those standards to be met and this legal requirement is legally in force in that country.

¹³ According to the industry, the current rate is rather around 56%. EURIC (2018). <https://www.euric-aisbl.eu/position-papers/download/591/335/32>

Incentive effect

Incentive effect shall be demonstrated using already-existing evidence at the time of the State aid request (e.g. internal documents) demonstrating that the aid is necessary, proportional, and will not be used to implement already agreed decisions and anticipated business scenarios / business-as-usual for the activity concerned. For instance, State aid shall not be granted to beneficiaries that already committed to close a facility (e.g. a coal power plant or mine) by a given date independently of State aid provision. Moreover:

- the aid shall substantially contribute to the achievement of the environmental objectives in the meaning of Article 3(a) of Regulation 2020(852),
- the aid shall demonstrate beyond 'Union Standards' performance, as well as an innovation effect / co-benefits for wider economic actors (e.g. replication effect at EU level),
- the market operators benefitting from the aid shall demonstrate that the aid was requested under finance mechanisms based on the polluter pays principle (e.g. the Innovation Fund or others similar schemes) and that the financial resources under that scheme have been exhausted prior to resorting to public funding mechanisms such as state aid. In those cases, the Commission should expect the aid scheme to deliver the same performance and funding application criteria as set in those funding schemes. (e.g. to reach at least the level required by the relevant technical screening criteria developed under this scheme in accordance with Commission delegated regulation 2019/856¹⁴)

The first two criteria are cumulative. Where the last criterion is not met due to absence of application by market operators or due to ongoing screening, the Commission must assess the provision of State aids against its compatibility with the objectives set out under available funding schemes criteria, and consider the State aid scheme proposal as a "support project" for the purpose of its assessment against relevant EU funding schemes.

Proportionality

State aids shall be considerate proportional whenever they include the economic assessment (and subtraction from the aid) of negative externalities to water, air and soil, subsidies and tax exemptions granted to market operators, as well as exemption from liabilities.

The aid must provide "best value for money" in terms of alternative use of that same amount of financial resources to deliver a similar level of desired objective by the proposed aid (appropriateness and incentive effects criteria), such as in the case of energy generation:

¹⁴ EU Innovation Fund

- the possibility to substitute the equivalent energy supply of the displaced asset through improved energy efficiency measures (e.g. housing, state investment in substitute heat alternatives which would enable to not rely on the displaced asset),
- the possibility to substitute the equivalent energy supply of the displaced asset through imports,
- the effect of allocation of the proposed aid to other beneficiaries, with the aim to support renewable energy generation (e.g. through feed in tariffs or direct payments to RES projects),
- the overall impact on job creation, eco-innovation, compatibility with relevant environmental quality standards as to the various alternative options concerned (e.g. scale, conditions and beneficiary of proposed aid schemes),
- other potential effects of supporting a given activity on the environment, health, competition, and EU level playing field,
- assessment on how the aid scheme and options considered constitutes an “enabling activity” in the meaning of Article 16 of Regulation 2020(852).

Proportionality: illustration on market operators wanting to phase out coal assets

Whenever Member States agree State aids to market operators wanting to phase out coal assets, the following aspects needs to be addressed to internalise external costs:

- GHG damage costs due to continued operation, where the CO₂ cost level is set to 100 €/tonne.
- Air pollution damage costs, where the Value of Statistical Life (VSL) adapted to the recommended OECD levels and adapted to inflation must be applied, unless a national taxation system is in place that recovers the equivalent costs.
- Water pollution costs and other water service costs. This shall notably cover indirect costs of water supply, such as compliance with relevant drinking water standards affected by the continuation of the activity in question. The costs shall reflect the external damage paid by its use and should in no way be less than competing energy providers. Where the origin of the water source / body is the same, the fee shall be at least at the same level applied in another country for a user of that same water source / body.
- Damage costs to habitats, soil fertility and crop fertility in the surrounding of the site.
- Other remediation costs due to operation of the activity that are of global nature, such as sedimentation of mercury to surface waters or dealing with other chemicals of concern (impacts / depollution).

The Member State must provide the necessary evidence and methodology used in relation to cost internalisation assessment. Where no estimation can be made, the Commission shall further develop guidance on how cost internalisation can be achieved, in line with scientifically sound standards.

In any case, **State aids shall not be considered proportioned when rewarding business as usual practices, nor prolonging operation beyond the Return of Investment (ROI) point.** The Commission should assess documentation (e.g. internal documents) reporting how operations will be changed following the provisions of State aids and, in case the plan will not be respected by market operators, shall be able to claim the money back.

In this respect, what is happening in Germany and in the pending German State aid decision on coal phase out is a classic example: whereas the German government has agreed to pay LEAG (coal operator) 1.75 billion € to phase out its coal capacity by 31.12.2038, in May 2020 an analysis by ClientEarth¹⁵ has showed that LEAG's business as usual (as drafted in its business plan) won't be affected by the provision of financial aids by the State. The report even showed that 6 coal units (Jänschwalde C & D, Boxberg N & P, Schwarze Pumpe A & B) will prolong their operations by one year.

Transparency

The following pieces of information shall be made publicly available in an easy-to-search web-portal:

- the full text of the approved provision of State aids, including the outcome of the assessment process according to the previous points,
- the amount agreed and for which measures (e.g. retraining of workers),
- the date of closure of the concerned coal power plants,
- the rating of the effectiveness of various policy options considered to achieve the same objective pursued by the given objective,
- rating criteria and conclusions as to the "best value for money" and common interest test.

In some cases **competition law is used as an excuse to prevent an open information exchange aimed for benchmarking of industrial actors such as energy efficiency, resource and fuel consumption or to set Union Standards on the basis of production volumes of a given industrial activity.**

This has happened in the context of the EU BREF review process, often with the Commission (DG JRC) siding with the industry to withhold information on the basis that this could be

¹⁵ Coal phase-out compensation for LEAG, <https://www.documents.clientearth.org/wp-content/uploads/library/2020-06-16-legality-of-compensation-for-leag-under-german-coal-phase-out-ce-en.pdf>

considered confidential business information by the information holders. The practical effect is extremely negative, namely:

- not identifying the potential on improvement potential of the various industries and economic actors,
- failing to set EU BAT standards due to “lack of data”, thereby even rewarding those actors not willing to share information on those issues,
- increasing the information asymmetry between polluter and enforcer, as well as between polluter and communities, which could also raise barriers to access justice by impacted communities and NGOs.

It should be clarified by DG COMP that installation specific information relating to energy efficiency and resource consumption used for the context to improve and strengthen Union Standards should never be allowed to be claimed as confidential and exempt from CBI (competition) rules restricting the sharing of this information. Article 101 TFEU provides derogations to the restrictive competition principles if information serves to promote progress, which is clearly the objective of EU BREFs.

Other relevant points:

- **The provision of State aids shall not overrule the application of other equally fundamental principles at the basis of the EU Treaty, such as the precautionary principle, the preventive action principle and the polluters-pay principle (art. 191 (2) TFEU).** For instance, under no circumstances shall State aids be granted to cover costs related to mine remediation. The polluters-pay principle requires that mine operators shall carry the burden of remediating the damages done to the environment during mining activities, which often continue for decades and are well known, allowing market operators to plan in advance remediation activities, such as the continuous management of freshwaters and groundwaters and the recultivation of the mining area. Where appropriate, the Commission shall also assess whether proper measures have been taken by Member States and market operators to prevent insolvency risks (e.g. compulsory solvency guarantees or unlimited shareholder liability), or market operators negligently have not taken care of environmental damages surpassing the value of their assets, resulting in the externalisation of harm to tax payers and the environment, or even abused the intrinsic insolvency legislative loopholes to put ultra-hazardous activities into separate legal entities, as a result of which market operators in fact organise their own insolvency.
- Measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take measures for non-economic environmental reasons (art. 191 (2) TFEU). **Here the Treaty was quite ahead of times and correctly affirms that Member States should be able to take measures that might go beyond (and even against) pure economic considerations**

to pursue environmental protection. It is the case, for instance, of Member States willing to phase out fossil fuels to make room for clean energy sources. Regrettably, instead, we are observing market operators fighting this right by asking for multi-billionaire public contributions to phase out fossil fuels or support nuclear power stations, by using the provisions included in the Energy Charter Treaty.

- **Whereas Member States' principle of self-determination of its own energy mix is in itself right, it shall be judged against equally (or even more) important rights, such as the right to breathe clean air and clean water availability carried by citizens living in the whole EU.** As stated in the first point of this document, the notion of States individually pursuing exclusively their own interests is outdated; in an increasing globalized world and with the European Union progressing towards closer forms of integration, the interests of the EU community shall be kept in higher consideration. In this respect, the right of self-determining their own energy mix by a single Member State shall be checked against the EU citizens' right to breathe clean air and to dispose of an adequate amount of clean water and shall not be narrowly considered as purely a matter of national reach.
- **Moreover, the Commission should also assess whether the above-mentioned principle is pursued by governments without interferences coming from market operators.** As a matter of fact, not only are we observing blatant interferences by market operators challenging this right in front of the Energy Charter Treaty (ECT)¹⁶, we are also seeing how this menace is conditioning the sovereignty of Member States to define their energy mix while pursuing the EU climate goals.

Illustration: self-determination to determine energy mix and the Energy Charter Treaty

The recent piece of legislation adopted by the German Parliament on July 3rd 2020 even includes a clause according to which lignite operators waive their rights to bring an Investor-State Dispute Settlement (ISDS) in the context of the German coal phase-out¹⁷. This is problematic for several reasons:

- The German government liberty to pursue its energy strategy is heavily influenced by the possibility of market operators to claim multi-billionaire compensations.
- The German government is obliged to provide lignite operators with an amount of public money (4.35 billion €) **not reflecting the dire situation of lignite economics.**

¹⁶ For instance Uniper vs NL: <https://www.climatechangenews.com/2020/05/21/uniper-uses-investment-treaty-fight-netherlands-coal-phaseout/>

¹⁷ ClientEarth, *The German lignite phase-out contract and investment arbitration*

- The compensation is not even included in a law, but in a contract without the involvement of the German Parliament, raising concerns of transparency and democratic legitimacy.
- This represents a dangerous and negative precedent that could be used by other lignite-reliant countries (e.g. Poland and the Czech Republic).

Other similar cases are:

- The agreement between the UK government and NNBG investors to provide compensatory payments for a possible early shutdown of Hinkley Point C nuclear power station. Even though the European Court of Justice considered the aids as compatible with the internal market, in our opinion the provision of guaranteed revenues to market operators to cover a possible decision by a sovereign government to change its energy policy looks like limiting the right of Member States to self-determine its energy mix.
- Vattenfall suing the German government for 4.7 billion € in front of the ISDS tribunal for pursuing its nuclear phase-out plan¹⁸. Again, the liberty of a Member State to decide its own energy mix is threatened by a massive public compensation payment.

- **Concerning the agricultural sector, State aids should be agreed only when they are in line with the Farm to Fork strategy.** The future Guidelines for State aid in the agricultural and forestry sectors and in rural areas must be used as an instrument to achieve the objectives enounced in the Farm to Fork Strategy, including: reaching the objective of at least 25% of the EU's agricultural land under organic farming by 2030, reducing the use of fertilizers by at least 20% by 2030 and reducing the use of more hazardous pesticides by 50% by 2030.

European Green Deal's objective can only be achieved if our farming sectors become more environmentally friendly and more resilient to external shocks, including market disruption. The livestock sector is often the most negatively impacted and face systemic crisis, therefore it is crucial to assist farmers to transition way from livestock intensive systems towards more resilient multi-production systems.

This is particularly relevant to reach the climate neutrality by 2050 and to reduce air and water pollution. For instance, in its recent Methane Strategy the European Commission recognized that the agricultural sector accounts for 54% of the total methane emissions in the EU – of this share, enteric fermentation of ruminants (belching and flatulence) accounts for about 81%. **Thus, State aids to the livestock**

¹⁸ Vattenfall vs DE: <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/467/vattenfall-v-germany-ii->

sector shall be conditional to beneficiary 'transition towards a more resilient farming systems and to a maximum stocking density.

The maximum stocking density shall be such as not to exceed the limit of 170 kg of nitrogen per year and hectare of 'agricultural area'. To determine the appropriate density of livestock referred to above, the competent authority shall set out the livestock units equivalent to the above limit, the relevant national provisions adopted pursuant to Directive 91/676/EEC. **In that sense, State aid should be granted to farms not harming our environment and envisaging to decrease their numbers of animals.** Today, this is particularly relevant concerning the Irish livestock sector that must receive millions of state aids in case of hard Brexit.

Finally, the agricultural sector has the particularity of being supported by specific state aids due to market failures caused by weather and other meteorological factors, such as droughts and natural disasters. Even if we do not oppose State aids granted to correct these market failures, **we believe that such aids should integrate environmental and climate criteria.**

Member States should be authorized to grant them to farmers only if they also define conditions to make eligible farms more resilient. This should also apply when Member States grant State aids to farmers suffering from external economic shocks. For instance, several Member States attributed State aids to farm in the context of the COVID-19 crisis. Such aids should be provided under well-defined conditions, such as following the do not harm principle and including environmental and climate criteria to help farmers to transition towards a more resilient farming system.

Question 2

Concerning market operators active in the field of energy generation (in particular lignite):

- **Every provision of State aids to support fossil fuels phase-out shall include clear and binding conditionalities linked to performances improving the state-of-the-art Union standards levels** (e.g. "new plant" lower BAT-AELs ranges and better than the higher BAT-AEELs for energy efficiency set in the Best Available Techniques, LCP BREF¹⁹), in order to reduce the emission of harmful pollutants, as well as EU wide compliance with relevant EQS objectives of the beneficiary and its subsidiaries. The adoption of LCP BREF requirements shall include binding phase-out dates for the concerned plants (31.12.2029 for lignite and 31.12.2039 for fossil gas).

¹⁹ <https://www.eea.europa.eu/themes/air/links/guidance-and-tools/eu-best-available-technology-reference>

- The polluters-pay principle should be applied rigorously, in particular concerning mining activities (see point below).
- Any activity not complying with the technical screening criteria set under the Taxonomy should be excluded.
- Negative externalities shall be considered and subtracted when calculating the total amount of State aids to agree. As negative externalities we mean:
 - **Tax exemptions:** for instance, in some countries lignite operators are exempted to pay for the water they use to cool down their plants or the water they drain to keep mines dry, breaching a clear requirement of the Water Framework Directive (cost recovery principle). A recent report released by the EEB²⁰ shows the magnitude of the problem when it comes to water abstraction: for instance, the German company MIBRAG would have to pay about 3 million € per year for the water it abstracts for its Profen mine alone, whereas for LEAG the sum would be at least 11 million € per year.
 - **Health costs due to air pollution:** hard coal and lignite thermal combustion plants are responsible for 60% of the EU's point source CO₂ emissions and cause more than 18.000 premature deaths in Europe due to the release of sulphur dioxide, nitrous oxide and fine particulate matter²¹. According to OECD²², Values for one Statistical Life (VSL) in the EU vary between 1 million and 2 million €, which means that the costs associated with premature deaths caused by hard coal and lignite plants is between 18 billion and 36 billion € every year. According to Europe Beyond Coal database²³, it is possible to assess the estimated premature deaths caused by a single market operator²⁴ as well as a single plant, making it possible to subtract from State aids provisions the corresponding amounts.
 - **Costs due to soil pollution, water drainage and water pollution:** lignite mining also requires the removal of large amounts of soil to reach down to the brown coal, causing landscape devastation and soil pollution. Turów mine in Poland represents a good example to show the combined impact of mining and its cost to the community: in Turów, each year 8 million tons of coal and 32 million m³ of overburden are extracted²⁵. Moreover, 40 liters of water per second are drained to keep the pit dry, with an estimated cost for the communities living nearby the mine of 55 million €, equivalent to the cost spent

²⁰ EEB, 2020, Mind the gap

²¹ HEAL, 2013, The Unpaid Health Bill: How coal power plants make us sick

²² OECD, 2011, Valuing Mortality Risk Reductions in Regulatory Analysis of Environmental, Health and Transport Policies: Policy Implications <https://www.oecd.org/env/tools-evaluation/48279549.pdf>

²³ <https://beyond-coal.eu/database/>

²⁴ EBC, 2019, The Last Gasp: <https://beyond-coal.eu/last-gasp/>

²⁵ PGE GiEK, Kopalnia Węgla Brunatnego Turów (Turów Brown Coal Mine), <https://pgegiek.pl/Nasze-oddzialy/Kopalnia-Wegla-Brunatnego-Turow>

on measures to protect drinking water sources²⁶. LEAG's lignite mining activities in Lausitz, Brandenburg, do not allow the regional supply of drinking water to respect the sulphate pollution limits; treatments to make the water drinkable for local communities is estimated between 0.55 and 0.7575 €/m³, whereas an upgrade of the drinking water treatment facility in Müllrose is estimated to cost 10 million €²⁷.

- **Mining perpetual obligations:** under no circumstances shall phasing out mining activities benefit of State aids. The impact of mining is perpetual; for instance, in Germany the hard coal mining activities in the Ruhr generate "perpetual obligations", a burden that requires enormous financial resources. The highest share of those, so called "eternity costs", are due to water management (pumping of water) and polders management. The RAG Stiftung (a post hard coal mining fund managed by Evonik) covers annual costs of 280 million € to cover remediations, of which 200 million € are used for pit water management related expenses.

Regrettably, up to now the Commission has not considered negative externalities in its State aids assessments. On the contrary, in two cases concerning Poland²⁸ **fee exemptions (water service cost recovery) have been considered only as an unnecessary flow of funds, paying no attention to the environmental damages caused by such exemptions in terms of impacts on water bodies.** This is completely counter to the principle of the EU Environmental Protection Acquis such as the Water Framework Directive, which requires the cost recovery principle to be implemented and applied, irrespective of whether the operator is a public or private entity.

In these two proceedings, the Polish authorities informed the Commission that *"pursuant to amendments to the Coal Mining Industry Act, which entered into force on 1 January 2018, SRK has been exempted from water service charges payable to a newly created State-owned company, Państwowe Gospodarstwo Wodnego Wody Polskie (the "PGW Wody Polskie"). Poland explained that SRK was also exempt from these fees before...."* The Commission eventually agreed the State aids, considering *"that the proposed exemption falls under the eligible costs for category under paragraph (f) of the Annex to the Council Decision as provided therein. This sends a counter-productive signal to member states as to the implementation of the polluter pays (here water cost recovery) principle"*.

²⁶ Liberec region, press statement, 8 October 2020, <https://www.kraj-lbc.cz/aktuality/odhady-ceskych-nakladu-vzniklych-v-souvislosti-s-polskym-dolem-turow-dosahuji-miliardy-a-pul-vycislily-je-vodarenske-spolecnosti-n1084378.htm>

²⁷ De Tagespiegel, article published 23 May 2020, <https://www.tagesspiegel.de/berlin/alarmstufe-braun-in-der-spree-umweltverbaende-warnen-vor-oekologischer-katastrophe/25853136.html>

²⁸ State Aid SA.46891 (2017/N) –Poland and SA. 52832(2019/N) – Poland

Question 3

“Green bonuses” could be agreed to activities meeting all the following criteria:

- Full compliance with the technical screening criteria set under the Taxonomy Regulation.
- Performances beyond “Union standards”.
- Compatibility of the activity or objective pursued against the “best value for money” test.
- The bonus provides a true incentive effect that can be replicated at the EU level.

Concerning the second point, **Germany is a good example of how market operators are financially benefitting by not implementing high-standard emission controls.** German utilities are already benefiting from very significant direct and indirect subsidies to fossil fuels, quantified in 5.6 billion € per year in terms of health and other air pollution related costs. Germany could save up to 5.4 billion € per year in air pollution damage cost by just enforcing the strictest air pollution limits for large combustion plants laid down by EU regulation, and requiring operators to meet tested and economically achievable best available techniques²⁹. On the contrary, Germany is lagging by applying the absolute minimum level of protection allowed by EU pollution rules.

Only where the criteria above have been met, a “green bonus” can be considered, which should be proportional to the scale of the public benefits generated by the state aid scheme considered.

Illustration: green bonuses and energy generation from fossil fuels

“Green bonuses” in the energy production from fossil fuels might be granted when:

- The project is compatible with the EU’s Zero Pollution Ambition by 2050, while satisfying all the relevant Taxonomy objectives (no negative cross-media effect)³⁰.
- Lignite power plants are phased out by 31.12.2029 and fossil gas power plants by 31.12.2039.
- The resources are spent to cover costs related to workforce early retirement, retraining, adaptation, and health-related allowances.

²⁹ <https://meta.eeb.org/2020/01/29/money-for-nothing-germany-multi-billion-euro-gift-to-europes-biggest-polluters/>

³⁰ See more relevant points as to the definition of “zero pollution ” and common goals to consider in the EEB input to ZPAP Roadmap <https://eeb.org/library/eeb-feedback-to-the-zero-pollution-action-plan-roadmap/>

Question 4

Firstly, we want to point out that environmental benefits are assessed through a **Strategic Environmental Assessment (SEA)**³¹, a decision support process aimed at ensuring that environmental and, possibly, other sustainability aspects are considered effectively in policies.

Secondly, whereas references to the EU Taxonomy will be, in principle, highly welcomed, we would wait for the outcomes of the Platform on Sustainable Finance, which is currently defining the technical specifics. In any case, **environmental benefits shall be precisely defined and concur in a measurable way to the European Green Deal and the Zero Pollution Ambition**; in this respect, an “exclusion list” of non-fundable kinds of projects shall be clarified, as well as a “decision tree” of preferred kinds of projects³².

In principle, any aid regime should be fully consistent and rated against the promotion and compatibility of all 6 environmental objectives of the Taxonomy (Article 9) and relevant technical screening criteria defined in that Regulation. This would enable to assess the “best value for money” test in a coherent manner. But, since the Taxonomy Delegated Acts are still under development at the time of this consultation, **we think that in any case State aid shall maintain the consistency with the ambitious EU’s EGD and ZPA targets, as stated in Q1.**

However, we find that the “do no significant harm” criterion is not adequate, since the lack of action (e.g. not remediating market failures) also produces harmful effects. Effectiveness ratings as to policy options considered, going beyond competition law, need to be fully accounted for. This should also take account of the effect of a decision taken that goes beyond the territorial scope of the state aid measure proposed (see related answers in Q2 and Q3).

³¹ <https://ec.europa.eu/environment/eia/sea-legalcontext.htm>

³² <https://eeb.org/library/make-the-just-transition-mechanism-work-for-a-greener-europe/>

Part 2: Antitrust rules

Question 1

It sounds implausible, or even impossible, that desirable cooperation supporting the EGD would be hampered or stifled by current EU antitrust legislation. Three general scenarios for such cooperation can be envisaged:

- Joint development (of products, services or technologies) serving the EGD.
- Agreed phase-out serving the EGD.
- Geographical agreements to limit transportation cost and externalities.
- Preventing behaviours hampering circular economy practices.

Scenario 1 is common practice and can hardly be construed to violate antitrust rules on the basis of TFEU Art. 101 (1). To the contrary, such initiatives are explicitly allowed under TFEU Art. 101 (3), on the basis of “promoting technical [...] progress”, provided that consumers are allowed a fair share or the resulting benefit. This resulting benefit may be e.g. cleaner air, a more circular economy, better prospects for the planetary future. TFEU Art. 101 (3) would benefit such clarification, although an amendment would be difficult to enact. It should be added that this clarification can already be derived from Decision 2004/C 101/08, guidelines 85-88).

Scenario 2 is less common and it could appear to violate TFEU Art. 101 (1.b) “limit or control production”; however here the exemption under TFEU Art. 101 (3) would also be applicable under the same conditions as in scenario 1.

Scenario 3 is more hypothetical. Applying the exemption could be more difficult as some consumers would be inflicted short-term and local disadvantages (limited choice and possibly higher prices due to limited competition), while benefits would apply to others more long-term and less locally (lower GHG emissions, lower use of non-renewable resources). However, the abovementioned guidelines 85-88 would also clarify this situation favourably.

Attainment of the EGD objectives may be hampered, however, by two further elements under current rules:

- Mergers (cf. Part 3) allow consolidation up to oligopolies, thereby strongly restricting the number of competitors on the market. Oligopolies generally do not promote better functioning markets and (justified or not) accusations of violations of TFEU Art. 102 are all the likelier.
- Currently, many commonly agreed activities between economic actors effectively clash with TFEU Art. 101 (1.b). The limitation or control may be intentional or not; however, it is often the result of e.g. lobbying for higher emission limits or of the development of technical standards (of which only the positive effects are mentioned in the

Commission's paper). The former results in lower technical development and investment (e.g. better process equipment or abatement techniques); the latter may result in legislators not using technological capabilities to their full potential (e.g. regarding techniques to quantify problematic substances in effluents or goods, where legislators often give preference to industry standards over methods available on the free market or in public institutions, and which are often of better quality or more affordable).

Scenario 4 can be seen in different sectors of the economy including electronics and medical devices. Activities such as refurbishment and repair were explicitly identified as an opportunity in the European Green Deal and the Circular Economy Action Plan. The European Commission has already started to develop policy options to support repair activities through various initiatives: the sustainable product policy initiative, empowering the consumer for the green transition initiative, the ecodesign and energy labelling framework, and the circular ICT initiative. While these policies target product requirements and consumer law – a perspective based on competition policy is missing.

The examples included here demonstrate existing practices which may be hindering progress on repair and the circular economy:

- Direct legal action and intimidation of independent repair actors.
- Preventing access to online sales avenues for repair actors (e.g., by blocking ads or by removing re-sellers from dominant platforms which represent a significant share of the market).
- Using a combination of software, hardware and trademark/copyright law to make independent repairs technically increasingly challenging or illegal.

Cooperation among firms in this field would greatly improve the durability of products. This can serve multiple objectives in the context of the green deal:

- **Environmental:** reduce premature obsolescence and the overall environmental footprint of the economy by extending product lifetimes - including as part of the drive towards digitalization.
- **Social:** give consumers access to more durable, reusable and repairable products, creating local or regional jobs, supporting social enterprises, engaging populations in sustainable consumption, providing opportunities for reskilling
- **Economic:** reduce the life cycle cost of key products for consumers and public authorities, support a revitalisation of European remanufacturing sector, reduce dependency on imports for critical raw materials (such as those contained in electronic products).

Illustration 1: Amazon and Apple deal removes independent refurbishers from world's largest online marketplace.

In 2018, Apple and Amazon struck a deal which would permit the sale of new Apple products on Amazon's e-commerce platform. The deal included an agreement which would remove most third-party resellers of Apple's products on Amazon's marketplace – resellers in this case should be understood as independent businesses who repair and resell Apple products. The requirements set in the deal were that a) resellers would only be permitted to host their products on Amazon's market place if they purchases USD 2.5 million of Apple refurbished inventory every 90 days or from a major retailer with over 5 billion USD in annual sales, and b) that the resellers must become Apple authorized provider of repairs and have a physical retail space which customers can go to.

One article analysing this deal suggests that these conditions cannot be met by most refurbished phone resellers, that the average price of products has consequently increased, and that older models of device were no longer available³³. The deal was recently announced to be subject to anti-trust investigations in Germany³⁴.

Illustration 2: Norwegian Supreme Court ruling on Apple vs Henrik Huseby.

On the 3rd June 2020 one independent smartphone repairer lost his legal battle against Apple in Norway's Supreme Court. Huseby was accused of importing counterfeit iPhone screens to repair phones. Refurbishers in Europe often import screens assembled in China, where fresh glass is applied to original Apple displays with cracked glass. Huseby argued he used "refurbished" screens and that Apple does not make refurbished or original spare parts available to independent repairers, so he had no alternative. The technicalities of the case came down to trademark infringement, as many Apple components are marked with a very small "Apple" logo invisible to consumers. It was reported that Apple in Norway charges 1 959.75 NOK (185 EU) for mail-in service to replace the screen in an iPhone 6s, Apple's authorised repair services in Norway charge 2699 NOK (255 EU), more than three times as much as Huseby charges, 800 NOK (75 EU)³⁵. Regardless of the outcome, the case provides another example of how competition in after sales markets for electronics can be stifled.

Illustration 3: Google advertisement blocks on independent repair.

A further barrier to repair is limited access to repair service providers. Google has been criticized by independent repairers for banning independent repairers from advertising through its search engine. This issue was brought to the attention of Commissioner Vestager

³³ <https://www.theverge.com/2019/5/21/18624846/amazon-marketplace-apple-deal-iphones-mac-third-party-sellers-john-bumstead>

³⁴ <https://www.bloomberg.com/news/articles/2020-10-29/amazon-apple-probed-by-germany-over-online-sales-curbs>

³⁵ <https://repair.eu/news/apple-crushes-one-man-repair-shop/>

by Germany repair group Runder-Tisch-Reparatur in their letter of 21 June 2019³⁶. In the USA, NGO US PIRG submitted a letter with 7.000 signatures to Google calling for an end to its ban on electronic repair ads and sent a letter to the Federal Trade Commission. US PIRG stated that some repair shops reported drops in revenues of as much as 70 percent after Google removed their ads³⁷. Runder-Tisch-Reparatur argued that Google was abusing its dominance on the market.

Illustration 4: New ecodesign requirements and the definition of “professional repairer”.

In October 2019 the European Commission formally adopted the new ecodesign requirements for household appliances, which incorporated for the first time requirements for material efficiency, including reparability. The requirements, notably access to spare parts and repair manuals, are most comprehensive for “professional repairers” in contrast to “end users” who have access to more limited provisions. The definition of professional repairer is however left open to member states to implement through registries, or by manufacturers themselves. Independent actors and campaigners are concerned that national registries are unlikely to be established and OEMs will determine who they grant access to. Ecodesign and material efficiency requirements are currently under development for additional products such as smartphones and computers. Overall, these new measures should help to make aftersales markets for electronics more open, however the technicality presented by the definition of professional repairer could severely limit their effectiveness. The forthcoming sustainable products initiative will also likely extend this style of provisions to wider product groups than just electronics.

Illustration 5: Software lock outs, serialisation and Digital Rights Management.

Besides attributes of the physical design of a device, such as disassembly sequence and the use of non-proprietary tools, **other barriers exist such as software and legal measures**. Software lock outs and serialisation are an increasingly common occurrence on consumer electronics and prevent repair by independent actors without access to OEM software and diagnostic tools. In a review of repair services in the US, NGO US PIRG identified that “on the latest iPhones, even battery and screen replacement repairs now require special diagnostic software to fully complete, software no manufacturer provides”. Independent assessments of the reparability of the iPhone 12 (Apple’s most recent model) have identified that pairing of parts to the phone makes repairs impossible if not carried out by an Apple-

³⁶ https://runder-tisch-reparatur.de/wp-content/uploads/2019/06/Open-letter_Google-threatens-existence-of-independent-repair-service-providers-1.pdf

³⁷ <https://uspirg.org/blogs/blog/usp/banning-fix-google-continues-blocking-third-party-repair-ads>

authorized repair provider^{38 39}. For example, when unpaired parts are replaced functions such as the camera stop working. Similar issues have also been observed on the Samsung A51 since a software update in September 2020 - whereby a screen replacement disables the fingerprint sensor of the phone⁴⁰. Software locks are currently not considered in existing ecodesign requirements on reparability.

A further issue is that Digital Rights Management and patent protection on software or product information can also present a legal barrier to repair. Analysis of the US market, where the Digital Millennium Copyright Act (DMCA), explains that manufacturers have “aggressively” used intellectual property law to undermine ownership, and monopolise secondary markets for repair and maintenance⁴¹. A widely reported example is the case of John Deere tractors. When a farmer purchases a tractor from John Deere, the company argues that the farmer does not own the tractor but rather they receive “an implied license for the life of the vehicle to operate the vehicle,” subject to “contractual limitations.” Consequently, maintenance and repairs on the tractors cannot legally be performed by the farmers themselves because the engines are managed by onboard computers using software covered by copyright protection.

One analysis of the role of copyright law which inhibits the repair or maintenance of products in Europe concluded: “For independent repair technicians, the prohibition on the circulation of TPM circumvention means is effectively a roadblock to market access. It restricts the ability to lawfully repair or maintain these machines to the dealer or approved technicians only. This limits the options for consumers while creating significant negative effects on competition. ... It may also constitute an abuse of a dominant position by denying an essential facility for the secondary repair and service market.”

In October 2020, the Australian Productivity Commission announced they would investigate Right to Repair including: “The barriers and enablers to competition in repair markets, including analysing any manufacturer-imposed barriers, and the costs and benefits associated with broader application of regulated approaches to right of repair and facilitating legal access to embedded software in consumer and other goods”⁴².

Illustration 6: Medical device repair and maintenance during the Covid-19 pandemic.

Increased use rates and bed occupancy during the Covid-19 demanded more frequent repair and maintenance cycles on essential medical devices, such as respirators. In the UK it

³⁸ https://www.youtube.com/watch?v=FY7DtKMBxBw&ab_channel=HughJeffreys

³⁹ <https://www.theverge.com/21546575/iphone-12-reparability-ifixit-interview-kyle-wiens-kay-kay-clapp-vergecast-podcast-interview>

⁴⁰ <https://www.youtube.com/watch?v=oWC-K0GHYBq>

⁴¹ https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ea8a6d93b485d0feb9b5d6b/1588111098207/Report_RightToRepair_HanleyKellowayVaheesan-1.pdf

⁴² <https://www.pc.gov.au/inquiries/current/repair/terms-of-reference>

was estimated that the number of medical devices being put into service during the pandemic has been unprecedented – as much as 50.000 in the Excel Centre or temporary Nightingale Hospital⁴³. Stories of overcapacity hospitals overwhelmed biomedical technicians and medical devices failing were reported in different countries over the course of 2020⁴⁴, such as:

- Well known repair manual depository and community repair platform iFixit was widely reported for developing a dedicated open database⁴⁵ of medical device repair information covering more than 13.000 manuals⁴⁶. While some manufacturers make manuals freely available, others legally challenged iFixit for breaching copyright law⁴⁷.
- One Italian start-up which 3D printed spare parts for ventilators was refused access to design files when trying to address a shortage⁴⁸.
- Some manufacturers made specific allowances during the peak of the Covid crisis releasing schematic information to support increased production and repair⁴⁹. Others were reported to withhold repair manuals during the peak of the pandemic⁵⁰.
- A device developed independently by a hacker in Poland has allowed repair technicians to circumvent software locks on widely used ventilators and bring them back into use⁵¹.

These limited examples suggest further investigation into the potential impact of closed after sales markets in the medical devices sector is warranted. They also illustrate that issues such as access to parts and software lockouts are relevant for a broader set of products than just consumer electronics.

The previous illustrations all demonstrate how dominance in the market for electronics and other product groups can be exerted to prevent the extension of the lifetime of products and, consequently, are counter to the objectives of the European Green Deal.

DG Competition could do more to explore what role competition and antitrust can play in creating a more open and fair market for repair. We suggest this could be done in the following ways:

⁴³ <https://therestartproject.org/news/repair-covid19/>

⁴⁴ <https://www2.deloitte.com/ch/en/pages/life-sciences-and-healthcare/articles/covid19-shapping-future-regulation-of-emergency-medical-equipment-supply.html>

⁴⁵ <https://www.ifixit.com/News/41440/introducing-the-worlds-largest-medical-repair-database-free-for-everyone>

⁴⁶ <https://www.ifixit.com/Device/Ventilator>

⁴⁷ <https://www.eff.org/deeplinks/2020/06/medical-device-repair-again-threatened-copyright-claims>

⁴⁸ <https://www.medicaldevice-network.com/news/3d-printed-valves-covid-19-italy/>

⁴⁹ <https://newsroom.medtronic.com/news-releases/news-release-details/medtronic-shares-ventilation-design-specifications-accelerate>

⁵⁰ https://www.youtube.com/watch?v=OnM1PjGKhk0&feature=emb_logo&ab_channel=VICENews

⁵¹ <https://www.vice.com/en/article/3azv9b/why-repair-techs-are-hacking-ventilators-with-diy-dongles-from-poland>

- Investigate in more detail how dominance may be being executed in after-sales markets for electronics (including estimating the socio-economic and environmental impacts). The examples presented above present a mixture of journalism, independent anecdotal evidence, our own experiences from campaigning on this issue - more thorough analysis is needed including for other product groups.
- Explore whether anti-competitive activities in the after-sales markets can be considered as behaviour which is abusive: e.g. charging excessive prices, refusing to supply input indispensable for competition in an ancillary market, requiring that buyers purchase all units of a particular product from the dominant company (exclusive purchasing).
- Investigate how a balance can be struck between protecting intellectual property and developing a thriving and competitive value retention sector in Europe.
- Update Commission guidance on anti-trust and procedures against abuse of dominance so that they are in tune with the digital age and the objectives of the green deal/circular economy action plan.

Question 2

Any clarification helping the EGC objectives is useful. In the same way the Commission communicated quickly regarding antitrust questions regarding the Covid-19 crisis (2020/C 116 I/02), the Commission should also provide up-dated communication where needed. The scale and the urgency of the problem at hand would hardly justify any delays.

On the other hand, there should be caution for additional comfort given to any agreement that serves the objectives of the EGD. Because the objectives of the EGD can be interpreted and applied broadly, benefits granted to such agreements would likely increase false green claims made by businesses that can endanger healthy competition and consumers as they will be misled by these claims. Any aid needs to be granted according to demonstrated and verifiable environmental benefits.

Question 3

In some cases, competition law needs to go beyond the current right to make agreements, towards an obligation to make such agreements where the benefits for the environment and society clearly outweigh disadvantages for market actors.

Such cases will likely arise in the development of new technologies needed to make the EGD a reality and to ensure some prospects of a prosperous future for the young generations. An example could be the hypothetical event that a technology becomes available for chemical recycling of plastics at an industrial scale. Such a technology could hypothetically allow to recycle materials currently in their use phase that otherwise could not be recycled. This could

(again, hypothetically) lead to enormous savings in materials and energy and contribute to making the economy circular again.

Use of this (hypothetical) technology by other companies would multiply the technology's benefit, but under current policies, the IP rights holder could retain the privilege (e.g. by granting licences at an extortionate price), at the expense of people and the planet's future.

Part 3: Merger control

Question 1

The scrutiny of the Commission on mergers shall closely consider whether they will impede innovative market operators to enter the market with their products or services. This is particularly true when it comes to renewable sources of energy, a market that is scaling up and continuously reducing its prices, allowing more consumers and companies to use clean energy and, by doing so, contributing to reach the EU EGD and ZPAK targets. Moreover, when it comes to the energy market, the following points shall be taken into account:

- Mergers shall not allow market operators that ignored the signals given by the market to get rid of stranded assets, such as coal power plants and mines, and concentrate on profitable ones at the expenses of those market operators that acted in due time.
- Mergers shall not allow continuing operations in the field of energy generation from fossil fuels (particularly hard coal and lignite) and mining beyond 31 December 2029.
- Mergers shall not impact public finances with stranded assets, such as energy generation from fossil fuels and lignite mining. This would reduce the possibility of public authorities to invest in, for instance, limiting the impact of energy transition in coal-reliant areas.

The three conditions are cumulative.

As example, we would provide one concerning Poland. Reportedly⁵², Poland's largest state-owned power companies (PGE, Tauron and Enea) would merge into two groups as part of a planned reform of its coal and energy industry. The two new groups would split the coal ("bad" company) and non-coal ("good" company) operations of the three companies. These reports have been followed by another one affirming that Poland's government found a deal with trade unions to close its coal mines by 2049⁵³.

The possible scenario would see the "bad company" continuing harmful operations on "life support" thanks to public money for almost 30 years, while the "good company" will invest in long-term assets without assuming the burden of a too-late-mover, as it would have been on normal and unassisted market conditions. On the other hand, companies that are eventually recognizing energy-market economics and embracing change (as ZEPAK⁵⁴), would find themselves in the position of sharing the market with companies that did not pass through a hard but necessary restructuring phase, causing a substantial unbalance in the market.

⁵² <https://www.reuters.com/article/us-poland-energy-coal-idUSKBN24Z0SE>

⁵³ <https://uk.reuters.com/article/us-poland-coal-2049/poland-to-close-coal-mines-by-2049-in-deal-with-unions-idUSKCN26G1OU>

⁵⁴ <https://ri.zepak.com.pl/pl/raporty/raporty-biezace/1465-informacja-o-zamiarze-ujecia-w-sprawozdaniach-finansowych-za-pierwsze-polrocze-2020-roku-odpisow-aktualizujacych-wartosc-aktywow-oraz-ich-szacunkowym-wplywie-na-wyniki-finansowe.html>

Contacts

Christian Schaible, christian.schaible@eeb.org (Industrial production and BREF issues)

Riccardo Nigro, riccardo.nigro@eeb.org (Coal and mining issues)

Jean Pierre Schweitzer, jean-pierre.schweitzer@eeb.org, (Circular economy issues)

Morgan Reille, morgan.reille@eeb.org (Agriculture issues)