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COMPETITION POLICY SUPPORTING THE EUROPEAN GREEN DEAL

E3G RESPONSE TO CALL FOR CONTRIBUTIONS (NOV 2020)

We thank the European Commission for the opportunity to express our views on how competition policy could better support the European Green Deal. This call for contributions is an important step in kick-starting this critical debate and in providing more guidance as to what extent and under which circumstances competition policy should be adapted to support the transition towards a climate-neutral European economy. We welcome this consultation as a strong demonstration of the fact that the European Commission takes this issue seriously and is committed to implementing necessary changes to competition laws, policies and procedures.

Overview

Competition policy is one of the Commission's most vital areas of economic competence. It uses it to prevent cartels, assess mergers, constrain dominant firms and evaluate state aid. All of this is done in the name of keeping prices low for consumers and ensuring a level playing field within the single market. The Commission has a vast amount of discretion in this area. Its ruling on any given case comes down its interpretation of the law, which is primarily set out in guidelines it drafts without European Parliament or Council involvement.

Competition law is hugely important for climate policy. It governs where money flows in the economy, the power of fossil fuel incumbents, the efficiency of markets, the ability of firms to cooperate and the amount and direction of public and private investment. Crucially, it plays a valuable role in opening markets to low carbon innovation by giving legal clarity and up-front certainty to investors.

However, competition policy has also, at times, presented a barrier to climate action. State aid has been used to reinforce the dominant market positions of fossil fuel incumbents, through capacity mechanisms, and to subsidise power costs for energy-intensive industries. Competition policy has constrained businesses in their attempts to collaborate to make their supply chains more sustainable. Mergers have been approved or rejected without consideration of their impact on the environment.

These examples illustrate the strong tension implicit in the relationship between climate and competition policy. Competition policy can be strongly supportive of climate objectives: lowering barriers to entry and ensuring a level playing field between fossil fuel incumbents and smaller low carbon disruptors, ensuring that price signals reflecting environmental externalities are effectively transmitted to consumers. At the same time, climate policy may itself affect competition negatively. Competition authorities, therefore, also intervene in the practice and enforcement of climate policies to prevent any possible distortions, for example, limiting public funding and support for clean technologies.

In the context of worsening climate impacts, there have been growing concerns over how this relationship plays out in practice, how we define competition and whether we need to redefine it in the context of planetary safety and the pace of changed required to ensure it. The current approach to competition policy is, for example, premised on a set of goals that may no longer be comprehensive enough in the context of climate change and the macro-economic, resource scarcity, and social challenges it creates. Two questions illustrate this challenge.

- **First, what counts as consumer welfare?** A narrow definition of consumer welfare as entirely driven by low prices hides the fact that consumers can suffer from environmental degradation even while prices fall. The Commission has faced calls from many sides, not least the European Parliament, to broaden the consumer welfare test so that it goes beyond price-efficiency to include the ability to consume goods and services without destroying the environment.[1]
- **Second, what is the relative importance of competitive markets versus other public policy goals?** Some would argue that climate policy goals can only be considered within competition policy to the extent that they can be measured in economic terms and contribute to consumer welfare. Others believe that there are some goals, of which achieving climate safety is a key one, which may trump the goal of 'ideal' market structures.

A number of competition authorities in Europe have started exploring what it might mean to give greater weight to sustainability factors when assessing the impact of measures on consumer welfare. The Dutch competition authority proposed new draft guidelines to make it easier for companies to cooperate on

[1] http://www.europarl.europa.eu/doceo/document/TA-8-2019-0062_EN.html?redirect

producing greener products.[2] The Greek competition authority recently published a paper on how competition policy can contribute more to the green transition.[3]

But finding a new equilibrium is going to be a challenge. Competition authorities are grappling with how to balance and quantify the economic impacts they generally take into account, such as higher prices for consumers, against environmental impacts. There is also the danger of greenwashing and the value of scrutiny and competitive markets for driving more sustainable practices. More guidance will be needed from policymakers as to what extent and under which circumstances competition policy should be adapted to support the green transition.

E3G welcomes the Commission's call for contributions on how competition policy can support the Green Deal. We believe there is a role for competition policy in helping to lay the groundwork for a European Green Deal. Competition policy may not set the political agenda or lead when it comes to the climate-neutral transition, but it should strongly support that agenda and, at the very least, not inhibit action to combat climate change. This does not mean watering down existing guidance or providing loopholes for anti-competitive behaviour. Tough competition rules are one of Europe's strengths. This is about providing coherence and predictability for businesses and governments in the transition to climate-neutrality.

State aid control

State aid rules are in place to prevent member states from distorting competition, for instance by supporting their own industries or propping up failing sectors. In practice, the impact has been mixed. The EEAG for instance have given Member States space to accelerate the deployment of renewable energy. In 2018, excluding aid to agriculture, fisheries and railways, about 55% of total state aid expenditure was aimed at environmental and energy savings.[4] However, its impact on increasing small-scale renewables has been limited. At the same time, large amounts of state aid are still being granted to activities that have a negative

[2] ACM, Draft Guidelines on Sustainability claims, 22.09.2020, available at: **https://www.acm.nl/sites/default/files/documents/2020-09/acm-publishes-for-consultation-its-draft-guidelines-regarding-sustainability-claims.pdf**

[3] Hellenic Competition Commission, "Competition law and sustainability", available at: **https://www.epant.gr/en/enimerosi/competition-law-sustainability.html**

[4] Linklaters (2020) **Competition and sustainability: Evolving industrial and State aid policies to fuel green initiatives**

impact on the environment. State aid guidelines have been used to reinforce the dominant market positions of fossil fuel incumbents, through capacity mechanisms,[5] and to subsidise power costs for energy-intensive industries.

Moreover, in the context of the COVID-19 pandemic, state aid rules have been temporarily loosened to give member states room to stabilise their economies.[6] The European Commission has been approving government plans to support companies, including airline bail outs, without attaching any green conditions to this aid. The latest update of the guidelines includes an obligation on large companies to report on how aid received will be aligned with the green and digital transitions but no further requirements at this stage, though the European Commission has called on member states to ensure that state bailouts have green conditions attached.[7] Some member states have done so, for example France in its state aid for Air France, but there is a risk of large sums of money going to carbon-intensive sectors in the absence of EU-wide guidance on green conditions.

Further issues lie in the administrative processes surrounding state aid. Gaps in transparency make it very difficult for the civil society to gather evidence on the use of state aid for low carbon technology deployment and restrict civil society in aiding the effectiveness of the Commission's use of state aid.[8]

There is only limited time to reduce emissions and keep the impacts of runaway climate change in check. This challenge raises questions about the ability of DG Competition's legal machinery to keep up with changing technologies and markets. The prime example is the European Commission's approval of a raft of national capacity schemes, markets to finance back-up power generation. Many of these were approved without taking sufficient account of recent electricity market developments, including the emergence of demand side response technologies, which in many cases rendered these schemes redundant.[9]

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[5] Littlecott, C. (2014) **Keeping coal alive and kicking: Hidden subsidies and preferential treatment in the UK Capacity Market**

[6] European Commission (2020) Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak

[7] Euractiv (2020) EU decides: No green strings attached on cash to virus-hit firms; Business Green (2020) EU urges member states to attach green conditions to State Aid, after revamped rules omit mandatory climate conditions

[8] **https://www.documents.clientearth.org/wp-content/uploads/library/2015-08-26-the-effect-of-state-aid-governance-on-eu-climate-and-energy-policy-ce-en.pdf**

[9] **https://www.euractiv.com/section/electricity/opinion/uk-capacity-market-deja-vu-a-solution-thats-still-in-search-of-a-problem/**

In the context of complex and fast-moving energy and clean technology markets, DG Competition may not be adequately equipped to assess the implications of new technologies. To be an effective broker, it needs to have access to up-to-date and science-based information. This could be achieved by DG Competition investing in the resources and analytical tools required, or relying on a separate expert body providing independent, evidence-based opinion and guidance.

While the need to move quickly has to be balanced against the need for regulatory certainty and for due process, DG Competition may need to rethink the timeframe and the burden of proof for its decisions. It takes the Commission an average of two years to investigate a potential state aid infraction. This is a long period if we consider how rapidly energy markets evolve and has been cited as a key barrier to the deployment of renewable energy.[10]

Specific questions in consultation

1. **What are the main changes you would like to see in the current State aid rulebook to make sure it fully supports the Green Deal?**

Alignment with European Green Deal objectives. The European Green Deal sets the objective of reaching climate neutrality by 2050 and a green oath of “do no harm” that should be upheld in the state aid rulebook. In practice this means:

- Systematic checks of compliance with environmental laws;
- Specific “do no significant harm” checks on state aid decisions;
- Introduction of exclusion lists of activities that have been established as harmful;
- Consideration impact over long timeframes;
- Consideration of negative and positive externalities when assessing notions of common interest and proportionality of aid, including impact on economic resilience.

Increased transparency. The current state aid approval process is extremely opaque, with the public only having limited access to details of state aid cases, and often long after the decisions are taken. Increased transparency would not only

10 https://ec.europa.eu/energy/sites/ener/files/documents/CE_Delft_3D59_Mid_term_evaluation_of_The_RED_DEF.PDF

build trust in the decision-making process, as well as enhance its quality by inviting further evidence by civil society or the public at large.

2. **If you consider that lower levels of State aid, or fewer State aid measures, should be approved for activities with a negative environmental impact, what are your ideas for how that should be done?**

In order to deliver the vision of the European Green Deal and the “do no harm” principle, the EU must address the multiple and systemic market failures benefitting environmentally harmful activities, and phase out aid to such activities.

E3G will be happy to provide more detailed input on specific guidelines. Here are some initial reflections on this question.

Consider of a broad set of alternatives. Member States should be required to demonstrate that they have considered a broad set of alternatives delivering the same objectives, and that they have opted for the best one. For instance, when evaluating aid for a gas or biomass-fired cogeneration plant, alternatives to consider include energy efficiency, deep renovation, heat pumps, demand-side response, renewable energy.

Assess compatibility with the EU’s sustainability objectives. Incremental change is not sufficient to meet the EU’s climate and environmental objectives. Whilst switching from coal to gas, or retrofitting fossil-fuel fired cogeneration plants, may have positive environmental effects, granting aid to such endeavours ultimately prolong the EU’s dependence on fossil fuels. Since the EEAG was approved in 2014, a disproportionate amount of the decisions on energy efficiency measures have been for cogeneration and CHP measures that extend the lifetime of fossil-fuel assets. The Commission should assess compatibility with the EU’s climate neutrality objectives, taking into account the whole lifetime of projects likely to receive aid, rather than be satisfied with marginal improvements.

Exclude aid to fossil fuels. The Commission is committed to phase out fossil fuel subsidies and has proposed to make fossil fuels ineligible for public support, for instance in the Just Transition Fund. A state aid rulebook aligning with the European Green Deal would include an explicit exclusion list covering the most environmentally harmful activities, including fossil fuels. This would also contribute to removing market failures preventing the uptake of clean alternatives.

Guidance for the closure of coal-fired plant. An increasing number of Member States are planning to close their coal fleet in the next decade. Germany is also making progress towards a phase out, currently planned for 2038, and even Poland is planning to reduce its reliance on coal. Providing legal certainty on the conditions for driving a managed exit from coal would go a long way in encouraging coal-reliant countries in their efforts and managing the social impacts of plant closures. The Commission should develop an aid framework for the closure of coal-fired power plants in the EU.

Add green conditionalities to aid for environmentally harmful activities. Too much of the support provided so far has had no incentive effect or effective social targeting. If aid is granted to environmentally harmful activities, at the very least a strict requirement should be put on beneficiaries to report on their efforts to align their activities with the green and digital transitions.

3. **If you consider that more State aid to support environmental objectives should be allowed, what are your ideas on how that should be done?**

The main priority is to remove aid to environmentally harmful activities. However support for environmental objectives could be necessary to drive innovation and to compensate for market failures and systemic bias.

4. **How should we define positive environmental benefits?**

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

The European Commission should consider defining positive environmental benefits with reference to all sustainability criteria in the EU taxonomy. There is, of course, currently some uncertainty surrounding the final definition of sustainability criteria in the taxonomy. The draft Delegated Act has only just been published and is still subject to public consultation before it will be adopted by the European Parliament and the Council of the EU.

As they stand now, the criteria still raise some concerns from an environmental standpoint. Sources of concern include the potential use of natural gas, as well as thresholds in the manufacturing, construction, agriculture, forestry and bioenergy sectors.

To manage the current uncertainty, the Commission should issue some interim guidance on criteria that are not yet developed and introduce safeguards (exclusion lists) to ensure that investments in these sectors are truly sustainable, in line with the 2050 climate neutrality goal, and the "do no harm" principle.

> **In the short term**, while the temporary state aid framework is in place, the European Commission could require Member States to **only give aid to large companies in carbon-intensive sectors** in instances where they have **climate-neutral transition plans** in place or on the basis of commitments to meet emissions and material usage reduction targets. It could also impose conditions on specific types of state aid, e.g. requiring any car-scrappage schemes to promote purchases of electric vehicles.

> In **the medium term**, the European Commission could propose extended flexibility for a set of "green" activities where it will continue to approve state aid rapidly to give Member States space to lock-in a greener recovery. In the power and transport sectors, the taxonomy could be used as a guide for which activities could be fast tracked. In the buildings, industry and agriculture sectors the European Commission would need to go beyond the taxonomy to define a list of "no regret" investment options in line with climate neutrality.

> In the **longer term**, once an "unsustainable" taxonomy has been defined, this could be used as a basis for defining activities and sectors for which the European Commission will no longer grant state aid approval.

Anti-trust rules

Tackling climate change is a collective mission to overcome a massive market failure. It is hard for any single company to address the scale of this challenge by itself. Cleaner production technologies, in particular, in heavy industry sectors, are still expensive and investing in these at the scale and speed required to transition the EU economy to climate-neutrality by 2050 may expose an individual company to a serious cost disadvantage over competitors. A single company may also find it difficult to address broader decarbonisation challenges in its supply chain or to carry the costs of R&D for a new innovative process.

We need resource and energy-intensive companies to be exchanging ideas on how best to decarbonise in the shortest period of time, setting ambitious common standards, sending strong signals to their supply chains on what is required and capitalising on economies of scale in bringing down the learning costs for key technologies in pre-competitive areas. In short, the transition to a climate-neutral EU economy will require increased collaboration between private sector players.

However, a recurring theme among private sector players is that they would like to collaborate on sustainability issues, but that competition law presents a barrier to greater cooperation. There is a strong perception that the potential gains of collaborating on these issues is outweighed by the potential risks of falling foul of competition authorities.[11] As a result, many important initiatives that could help accelerate climate action and which would not raise competition concerns are simply not pursued.[12]

Assessing which sustainability collaborations raise competition concerns and need to be prevented and which do not is both a legal and an empirical question. Some sustainability agreements between companies use the guise of environmental benefits to 'greenwash' anti-competitive behaviour (e.g. shutting out certain technologies or sharing competitively sensitive information). Meanwhile other agreements may raise prices for consumers but also deliver substantial environmental benefits to those same consumers. Weighing up the economic costs and benefits against environmental outcomes is as much a question of legal interpretation as it is a case of life cycle assessments and natural capital accounting.

Specific questions in consultation

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.**

No input for now.

2. **Should further clarifications and comfort be given on the characteristics of agreements that serve the objectives of the Green Deal without restricting competition?**

[11] Kar, N. et al. (2020). **Competition and sustainability: How can companies cooperate now?**

[12] Holmes, S. (2019), Climate Change, Sustainability and Competition Law

The Commission's current guidance on cooperation between competitors does not provide the necessary legal certainty for companies to embark on projects required to tackle climate change and deliver ambitious plans to achieve climate neutrality by 2050.

E3G recommends:

- **DG Competition should adopt a standalone block exemption regulation dealing with sustainability agreements and set clearer general policy guidelines for collaboration between competitors on significantly improving sustainability.**

- Clearer guidelines should be complemented **with a helpdesk based in DG Competition to give case-by-case advice to companies and sustainability platforms,** offering improved legal certainty for initiatives aiming to significantly improve environmental and social standards.

- DG Competition should partner with DG Environment and DG Climate to develop **a framework to better incorporate the scientific assessment of environmental benefits into its assessments**.

3. Are there circumstances in which the pursuit of Green Deal objectives would justify restrictive agreements beyond the current enforcement practice?

No input for now.

Merger control

Environmental and sustainability factors are playing an increasing role in companies' M&A strategies.[13] Large companies are looking to acquire smaller, innovative, clean tech companies to bolster their green credentials and expand into low carbon markets. Companies' strategies are being shaped by stronger investor pressure to set ambitious climate goals and implement structural improvements to meet those goals. Economies of scale are going to be critical in bringing down the costs of breakthrough climate-neutral technologies such as renewable hydrogen.

[13] Kar N. et al. (2020), **Competition and sustainability: Fostering green deals via merger control policy**

However, EU competition policy is still playing catch up on how and to what extent environmental factors should be considered in merger control assessments. The iconic case in this regard is the approval of the Bayer/Monsanto merger where the Commission refused to assess environmental factors, arguing that Article 2(1) of the EU Merger Regulation (EUMR) does not allow it to take environmental considerations into account, despite widespread political pressure from NGOs and the wider public to do so.[14]

While there have been a couple more recent cases in which the Commission is starting to incorporate environmental factors into its assessments, [15] the Commission needs to set out much more explicitly how environmental factors will be factored into merger control assessment going forward.

There is a credible case for doing so:

- **The EU merger control regime allows for scope to consider sustainability criteria.** Article 2(1) of the EU Merger Regulation[16] sets out the criteria the Commission must take into account when evaluating a merger. These include the 'development of technical and economic progress.' Competition authorities and technical experts alike have agreed that environmental and sustainability issues can be taken into account within in that criteria.[17]

- **Positive environmental benefits may be analysed out as efficiencies if they counteract possible negative effects on competition.** These efficiencies would have to benefit consumers, be specific to the merger and verifiable. The last condition is the most challenging as many environmental benefits can be difficult to quantify and may take some time to materialise.

- **Environmental factors could also play a role in the context of remedies.**

[14] Commission Decision in Case M.8084 – *Bayer/Monsanto*, 21.3.2018, recitals 3010-3022. In any event, agrodiversification ties together competitive parameters of choices and biodiversity concerns. Concentrated businesses endanger seed biodiversity and increase the risks in terms of reduced product variety, which represents a loss of consumer welfare also from a competition perspective.

[15] Kar N. et al. (2020), **Competition and sustainability: Fostering green deals via merger control policy**

[16] Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) OJ L 24, 29.1.2004, pp. 1 ff

[17] Hellenic Competition Commission, "Competition law and sustainability", available at: **https://www.epant.gr/en/enimerosi/competition-law-sustainability.html**, p. 39.; Holmes, fn. **Error! Bookmark not defined.**, p. 391.

Clarity from the Commission in this area would also head off the risk of an inconsistent approach to merger control cropping up across Member States as different National Competition Authorities develop their positions. This could be particularly problematic in the case of cross-border M&A cases.

Specific questions in consultation

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?**

There are several situations in which mergers between firms could be harmful to consumers from an environmental perspective. These are instances in which environmental costs may increase for consumers but not be reflected in the market price consumers are paying – therefore, requiring a different and broader interpretation of the consumer welfare standard in merger assessments:

- A merger could restrict competition for other players and customers engaged in activities that are beneficial from an environmental perspective. Customers may face fewer choices in the face of strengthened market power of merging entities. For example, mergers between large renewable energy operators and grid system operators, e.g. the recent merger between RWE and E.ON in Germany, may reduce consumer choice.
- A merger could result in a clean breakthrough technology not being deployed. A larger company may seek to acquire a clean tech start-up which could potentially become a future competitor with plans to simply slow or hold back the development of a key technology – a so-called “killer acquisition.”
- A merger could directly result in negative environmental effects increasing greenhouse gas emissions or creating a situation in which needed emissions reductions do not take place.

A common thread across these different examples is the need for the Commission to better “cost in” environmental and social impacts – both in assessing potential impacts on competition and in selecting remedies to address concerns. The Commission should develop an evidence-based analytical framework to better quantify the cost of environmental externalities and analyse climate impact in merger assessments.

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2. **Do you consider that merger enforcement could better contribute to protecting the environment and the sustainability objectives of the Green Deal?**

E3G believes that one critical way to better integrate the objectives of the European Green Deal in merger enforcement is to include the "real costs" of the negative externalities to society in the assessment of a transaction. The Commission needs to set out much more explicitly how environmental factors will be factored into merger control assessment going forward. In order to provide for more clarity, E3G recommends that the European Commission:

- **Amends the legitimate interest clause under Article 21(4) EUMR to explicitly encompass sustainability goals**.
- **Mandate that mergers be tested for their impacts on sustainability and EU climate goals,** setting out the extent to which the Commission can, within merger control, adopt measures to protect the environment.
- **Agrees a framework to analyse 'out of market green efficiencies' in merger control**.

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About E3G

E3G is an independent climate change think tank accelerating the transition to a climate safe world. E3G builds cross-sectoral coalitions to achieve carefully defined outcomes, chosen for their capacity to leverage change. E3G works closely with like-minded partners in government, politics, business, civil society, science, the media, public interest foundations and elsewhere. In 2018, E3G was ranked the fifth most globally influential environmental think tank for the third year running.

More information is available at **www.e3g.org**.

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