



Replies of the Romanian Competition Council to the Call for Contributions

on

Competition Policy supporting the Green Deal

Introduction

The European Green Deal aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy. The goal is for Europe to be the first climate neutral continent by 2050, where economic growth is decoupled from resource use. The coronavirus pandemic makes those ambitions even more relevant. The European Commission has put forward a major recovery plan for Europe to help repair the economic and social damage brought by the pandemic and to kick-start the European recovery in line with the twin green and digital transition goals.

As Executive Vice President Vestager has underlined: “To succeed, everyone in Europe will have to play their part – every individual, every public authority. And that includes competition enforcers.”

The goal of EU competition rules is to promote and protect effective competition in markets, delivering efficient outcomes to the benefit of consumers. Competitive markets encourage firms to produce at the lowest cost, to invest efficiently and to innovate and adopt more energy-efficient technologies. Such competitive pressure is a powerful incentive to use our planet’s scarce resources efficiently, and it complements environmental and climate policies and regulation aimed at internalising environmental costs. By helping to achieve efficient and competitive market outcomes, competition policy hence contributes by itself to the effectiveness of green policies. 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. Competition policy, however, can complement regulation and the question is how it could do that most effectively. The Commission is responsible for the enforcement of competition rules based on its competences under the Treaty and existing EU secondary legislation, under the close supervision of the EU Courts. This means that, short of any changes in the existing legal framework, competition policy’s contribution to the Green Deal can only take place within these clearly-defined boundaries.

The purpose of this call for contributions is to gather ideas and proposals from everyone with a stake in this issue, including competition experts, academia, industry, environmental groups and consumer organisations. The contributions will feed into a conference early next year that will bring those different perspectives together.

Part 1: State aid control

State aid rules allow support for the priority axes of the Green Deal (decarbonisation, energy efficiency, sustainable mobility, circular economy, zero pollution ambition). They have facilitated green investments whilst limiting distortive effects of state subsidies in the past, and are currently open for review to see whether they can do so even better in the future. These reviews will be the basis to provide a fully updated enabling framework for public authorities to contribute to the objectives of the transition to a green economy, while making the most efficient use of limited public funds. State aid control relates to the assessment of the compatibility of an aid measure with the internal market. The assessment of the compatibility of an aid measure has traditionally been about balancing its negative effects on trade and competition in the common market with its positive effects in terms of a contribution to the achievement of a well-defined objective of common interest. Balancing these effects takes into account the impact of the aid by means of a test that traditionally has been broken down into the criteria listed below.

- The aid measure must be aimed at a well-defined objective of common interest.
- The aid must bring about a material improvement that the market cannot deliver itself, for example by remedying a market failure or addressing an equity or cohesion concern.
- The aid must be an appropriate policy instrument to address the policy objective concerned. • The aid must have an incentive effect, i.e. change the behaviour of the undertaking in such a way that it engages in additional activity that it would not carry out without the aid.
- The aid measure must be proportionate, i.e. limited to the minimum necessary to induce the additional investment or activity.
- The distortions of competition and effect on trade between Member States must be sufficiently limited, so that the overall balance is positive.
- The relevant decisions and information about the aid awards must be made public (transparency).

As input to the debate on how State aid control and environmental and climate policies work together – and how they could do that even better, please consider the following questions:

N.B.

The competent public authorities should be consulted as well, such as the Ministry of Economy (including the component on Energy), the Ministry of Environment, Waters and Forests, the Administration of the Environmental Fund, since, as known, the state aid providers have information on the difficulties encountered or which could become problematic from the perspective of the European Green Deal. At the same time, these institutions can provide a concrete example, as requested by the European Commission. As such, the Romanian Competition Council launched the 4 questions on the state aid topic, in consultation with the public authorities, as mentioned above.

1. What are the main changes you would like to see in the current State aid rulebook to make sure it fully supports the Green Deal? Where possible, please provide examples where you consider that current State aid rules do not sufficiently support the greening of the economy and/or where current State aid rules enable support that runs counter to environmental objectives.

Reply:

State aid policy has the potential to make a significant contribution to achieving the long-term goals of the European Green Deal, to achieve climate neutrality, by 2050, therefore, amendments to the EU legal framework might be needed in this regard.

The objectives of the European Green Deal on decarbonisation, energy efficiency, sustainable mobility, circular economy, zero-pollution strategy are difficult to achieve without the state intervention at the outset, in order to boost investments that would not have been achieved without state aid. This entails the creation of new state aid tools, with aid intensities at the highest possible level, in order to increase the incentive effect.

From the perspective of the state aid rules, we believe that the best option for the legal anchoring of the new state aid measures is to insert them in the Block Exemption Regulation, in order to stimulate investments that will allow the transition to a green economy.

As stated in the “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Investment Plan for a Sustainable Europe - European Green Deal Investment Plan”, the state aid rules should ensure greater flexibility, with a view to the transition to a climate-neutral economy, including by waiving the requirement to assess the eligible costs of an investment in relation to the counterfactual (less environmentally friendly) scenario and using, in particular, the funding gap as an alternative when setting aid intensities.

2. If you consider that lower levels of State aid, or fewer State aid measures, should be approved for activities with a negative environmental impact, what are your ideas for how that should be done?
 - a. For projects that have a negative environmental impact, what ways are there for Member States or the beneficiary to mitigate the negative effects? (For instance: if a broadband/railway investment could impact biodiversity, how could it be ensured that such biodiversity is preserved during the works; or if a hydro power plant would put fish populations at risk, how could fish be protected?)

Reply:

We believe that the principle of proportionality must be applied, in order to achieve a balance between the need to control environmental risk and ensuring economic resilience towards the impact of the structural changes targeted by the objectives of the European Green Deal. We believe that a pragmatic approach is needed that focuses on limiting the aid measure to the minimum necessary to achieve the expected results for projects that may have a negative impact on the environment, while conducting an evaluation process on the potential negative effects of the foreseen investment, as compared to its positive effects.

3. If you consider that more State aid to support environmental objectives should be allowed, what are your ideas on how that should be done?
 - a. Should this take the form of allowing more aid (or aid on easier terms) for environmentally beneficial projects than for comparable projects which do not bring the same benefits (“green bonus”)? If so, how should this green bonus be defined?

Reply:

We consider that granting a "green bonus" has a positive effect, since it could allow Member States to make use of more state aid measures for projects that make a real contribution to the sustainable development.

- b. Which criteria should inform the assessment of a green bonus? Could you give concrete examples where, in your view, a green bonus would be justified, compared to examples where it would not be justified? Please provide reasons explaining your choice.

Reply:

The criteria underlying the assessment of a potential green bonus should be defined in close connection with the criteria for defining positive effects on the environment or reducing negative effects on the environment.

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?

Reply:

Assuming that the Roadmap presented in the European Green Deal covers all sectors of economy, we consider that any environmental benefit must be taken into account, insofar as an investment falls within the definition of a "sustainable investment", in accordance with the environmental objectives set out in the Regulation on taxonomy, namely climate change mitigation, climate change adaptation, sustainable use and protection of water and marine resources, the transition to a circular economy, pollution prevention and control, protection and restoration of biodiversity and ecosystems.

In addition, as set out in the Regulation on Taxonomy, for each environmental objective, uniform criteria should be established on the basis of which it can be determined whether economic activities contribute substantially to that objective.

5. Part 2: Antitrust rules

EU antitrust rules prohibit anticompetitive practices by companies, such as anticompetitive agreements or abuses of a dominant position. Antitrust rules are applied in parallel by the European Commission, national competition authorities and national courts. EU antitrust rules already contribute to the Green Deal objectives by sanctioning restrictive behaviour such as restrictions in the development or roll-out of clean technologies or foreclosing access to essential infrastructure, such as power transmission lines, which is key for the roll-out of off-shore wind parks and other renewable energy sources. EU antitrust rules also contribute to Green Deal objectives by facilitating energy flowing freely across borders based on competition between energy operators and a more efficient use of natural resources. Enforcement action relating to transport can also contribute to the greening of the industry and economy. Businesses can contribute to the Green Deal by joining

efforts to go beyond binding standards. Standardisation agreements frequently produce significant positive effects, in particular, by enabling the development of new and improved products or markets, or improved conditions of supply. When agreeing on standards, companies can put in place safeguards ensuring that the benefits of a standard do not come with unnecessary restrictions on healthy competition. For example, a standard should be applied in a transparent and non-discriminatory manner; it should be accessible to all interested companies, including those that also want to use alternative standards or technologies; and it should not allow for exchange of commercially sensitive information or cover up for cartels. Agreements pursuing sustainability objectives may also in principle enjoy the benefit of the Commission's block exemption regulations (BERs)⁵ so long as they do not contain hard-core restrictions and when the joint market shares of the parties to the agreement do not exceed specific thresholds.

The current debate aims to identify whether there are remaining barriers to desirable agreements supporting Green Deal objectives and if so, how such barriers can best be addressed.

As input to the debate on how antitrust policy and environmental and climate policies work together – and how they could do that even better, please consider the following questions:

1. Please provide actual or theoretical examples of desirable cooperation between firms to support Green Deal objectives that could not be implemented due to EU antitrust risks. In particular, please explain the circumstances in which cooperation rather than competition between firms leads to greener outcomes (e.g. greener products or production processes).

Reply:

Companies have not addressed the Competition Council any request, by now, on evaluation of their intentions to cooperate for the purpose of sustainable objectives regarding environmental protection, from the perspective of the competition law. Moreover, the decision-making practice of the Competition Council is limited in terms of withdrawing the benefit of exemption provided for the Art. 101 (3) TFEU. The decisional practice of the Competition Council indicates, in most cases, on the sanctioning of the anticompetitive behaviour, affecting consumers, through competition restrictions, limiting the access of the potential competitors on the market.

2. Should further clarifications and comfort be given on the characteristics of agreements that serve the objectives of the Green Deal without restricting competition? If so, in which form should such clarifications be given (general policy guidelines, case-by-case assessment, communication on enforcement priorities...)?

Reply:

We consider that these elements should be evaluated on a case-by-case basis, to assess the compliance with the provisions of Art. 101 (3) TFEU and Art. 5 (2) of the Competition Law no. 21/1996, republished and amended. However, given that the field of sustainability agreements is relatively new, it raises a number of questions, for example as to the scope of the notion of affected consumers from a different perspective than competition, how to calculate efficiencies, etc. Therefore, we consider important that the general lines might be laid down in a new legal initiative

(such as, regulation), the application of which should be without prejudice to the enforcement of the competition rules.

3. Are there circumstances in which the pursuit of Green Deal objectives would justify restrictive agreements beyond the current enforcement practice? If so, please explain how the current enforcement practice could be developed to accommodate such agreements (i.e. which Green Deal objectives would warrant a specific treatment of restrictive agreements? How can the pursuit of Green Deal objectives be differentiated from other important policy objectives such as job creation or other social objectives?).

Reply:

The Competition Council had not the opportunity to evaluate cases concerning sustainability agreements that pursue environmental or other sustainable objectives, so that it has not identified circumstances that would justify the conclusion of restrictive agreements going beyond the current practice. The evaluation of cooperation agreements with different sustainable objectives, other than those specific to the environmental protection, such as those listed in the Commission's question, would extend the scope of the NCA's analysis. Nevertheless, the national competition law does not apply on the regulatory acts aimed at defending a major public interest, in specific circumstances, as adopted by the competent public authorities.

6. Part 3: Merger control

Under the EU Merger Regulation, the Commission has a mandate to assess whether corporate reorganisations, namely mergers and acquisitions of a certain size, significantly impede effective competition in the internal market. Such reorganisations are generally welcome to the extent that they do not produce harmful effects and contribute to increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the EU. The Commission is tasked to ensure that these transactions do not, however, result in lasting damage to competition in the internal market. A merger could result in lasting damage to competition, for example, by removing competitive constraints between firms. Specifically, mergers can eliminate the pressure between firms to innovate on sustainability aspects of some products or production processes, in particular in markets where the latter are an important factor of competition. Consumer preferences are a key aspect in the assessment of the effects of a merger, in terms both of identifying the relevant product markets and analysing the extent to which the merging companies compete against each other and against other firms. Today, environmental and sustainability considerations play an ever-increasing role in this respect. Market definition is a tool to identify and define the spaces in which firms compete. Delineating markets in both product and geographic dimensions allows the establishment of the framework of assessment of the impact of a transaction on competition and consumer welfare. A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'. In this respect, environmentally friendly characteristics or sustainability product features can be associated with higher product quality and constitute a differentiating factor in the eyes of consumers. Research and advances in technology are fundamental for economic progress. The goal of promoting sustainable development requires protecting and encouraging innovation, so that firms come up with new and

better technologies, products or know-how that can help, for instance, to reduce the levels of emissions or bring other sustainability or environmental improvements. Merger control makes sure that there is no loss of innovation caused by mergers between rivals, that would otherwise continue bringing benefits.

As input to the debate on how merger policy and environmental and climate policies work together – and how they could do that even better, please consider the following questions:

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?

Reply:

In principle, to the extent that consumers are harmed by the proposed transaction, by reducing the range of friendly environmentally products or technologies, as well as a result of significant obstacles to competition on the Romanian market or on a part of it, in particular as a result of the creation or consolidation of a dominant position, the respective transaction could be prohibited, by the decision of the Competition Council, following the specific provisions of the national regime for the evaluation of mergers (art. 11 Competition Law no. 21/1996, republished, and amended).

However, at least with regard to the risk of reduction of the green technologies used, at the moment, we consider that not all the necessary aspects are fully clarified in order to conduct an evaluation, in concrete cases, to show to what extent consumers are harmed, due to the reduction of the ecological technologies used. The Competition Council had not the opportunity to evaluate such issues, so it is not in a position to provide a definitive answer to this question.

2. Do you consider that merger enforcement could better contribute to protecting the environment and the sustainability objectives of the Green Deal? If so, please explain how?

Reply:

Yes, it could be argued, at least in principle, that ensuring compliance with competition rules, including merger assessment, can contribute to the achieving of the objectives of the Green Deal on Environmental Protection and Sustainability. Thus, the consumers may have more chances to access high-performance products or services that pursue sustainable environmental objectives, at competitive prices, by maintaining the level playing field on the markets, with equal conditions of competition for all the participants, in comparison with those markets dominated by one undertaking, with no stimulant to encourage friendly and innovative environmental products.

Practicalities:

This document contains a number of questions, grouped into three parts - each covering one of the three competition law instruments: antitrust, State aid control and merger control. In your contributions, you may want to reply to all or only certain parts or questions.

In doing so, please make sure your reply addresses precisely the question concerned.

Please provide concrete examples as well as quantification whenever possible. In case your contribution exceeds 20 pages, please add an executive summary.

Please send your contributions to COMP-GREEN-DEAL@ec.europa.eu by 20 November 2020. Please provide only non-confidential information.