

Competition Policy and The Green Deal

**AIM Submission to the EU Commission
call for contributions on Competition
Policy supporting the Green Deal**

20 November 2020

1. Introduction

The European Brands Association (AIM), is pleased to offer its first observations to the European Commission (the Commission) in response to its consultation on the Competition Policy supporting the Green Deal.

AIM represents over 2,500 consumer goods manufacturers who innovate, create and invest across the European Union. AIM's mission is to create for brands an environment of fair and vigorous competition, fostering innovation and guaranteeing maximum value to consumers¹.

AIM members fully subscribe to the objective of the Green Deal and the new Circular Economy Action Plan to mobilise industry towards a clean, circular and climate neutral economy and are fully committed to support the objectives formulated by the Commission in this context.

Our contribution to this call for submissions will focus on Part 2, Antitrust Rules².

Competition policy guarantees effective competition between businesses. Indeed, effective competition has fostered innovation, including in the areas that fall within the remit of the Green Deal and the Circular Economy Action Plan. Many companies compete on the sustainable solutions they have developed and wish to be rewarded for by their customers.

There are, however, situations where it is not possible for an individual business to do this on its own, due to a level of investments that may be too heavy to bear for an individual player, or in situations where horizontal and vertical collaboration are key to effect systemic change (e.g. on climate change and human rights). This also refers to situations where going alone entails substantial risk of competition from others that do not take a particular transformative step towards achieving any of the objectives of the Green Deal or the Circular Economy Action plan. It may also concern one competitor sharing green innovations with another competitor, having decided the social good created by such collaboration outweighs any potential loss of competitive advantage. It is in this context that companies may have to collaborate and agree on ways forward that have not been addressed in any Commission guidance on the application of Article 101(1) or 101(3) TFEU as available to businesses today.

It is against this background that AIM wholeheartedly welcomes the Commission's initiative.

2. Part 2: Antitrust Rules

2.1 The Need for Clarification

The climate crisis is the defining issue of our time. AIM members consider that voluntary self-commitments made by individual businesses are not sufficient to grapple with it, and large-scale sustainability projects resulting from cooperation between businesses may be required.

However, AIM is concerned that the existing rules and guidance, including the Article 101(3) Guidelines, the Horizontal Block Exemption Regulations and the Horizontal Guidelines, provide insufficient guidance and

¹ <https://www.aim.be/members/>

² https://ec.europa.eu/competition/information/green_deal/index_en.html

comfort to agreements of a far-reaching nature that are entered into in support of the Green Deal and of the principles of the Circular Economy Action Plan. Such lack of guidance leads to legal uncertainty, which could hamper businesses' willingness to engage in green collaboration initiatives.

AIM therefore asks the Commission to provide increased clarity with regard to sustainability agreements.

2.2 Examples

In response to the Commission's first question in Part 2, AIM provides (i) a few examples of desirable cooperation between firms to support Green Deal objectives that faced challenges when being implemented, due to EU antitrust risks and (ii) the reasons why in these examples cooperation rather than competition between firms leads to greener outcomes (e.g. greener products or production processes).

The AIM members have a unique perspective on the entire value chain, being involved in the design, development, production, movement and distribution of the products. The issues that can be referred to in this debate range from data and research to some of the crucial challenges in the area of recoverable and recyclable packaging for food and non-food products. Logistics is another area where sustainability efficiencies may be achieved. When it comes to social and workers' rights, which are also covered by the Green Deal and part of the broader EU debate on supply chain due diligence, cooperation between companies to solve systemic human rights issues is also a key lever that allows companies to respect their corporate responsibility duties.

Example 1:

Data and sustainability: One of the key roles of brand manufacturers is research and development, bringing innovation and progress, as well as transparency into the supply chains. The examples are many, from the development of new products, to ensuring existing raw materials remain sustainable (when facing possible extinction) to developing new health solutions. This is the case for all product categories, from food to nonfood to health. Putting in place a framework that incentivizes data and research collaboration, including among competitors and distributors, can have important benefits and drive progress. In addition, being able to share such data can also play an important role in ensuring consumers are informed and enabled to make more sustainable choices.

The current enforcement approach means that companies have to seek guidance/comfort on a case-by-case basis for such types of collaboration; this is burdensome and costly. It is clear that a general approach is necessary in order to address some of the challenges observed in this area (platforms' dominance, etc.).

Example 2:

Throughout the industry, there are many ongoing projects that focus on the recovery and recycling of packaging waste, both with regard to the systems to be used to achieve the highest degree of recovery and recycling, but also with regard to the types of packaging used.

Since the solutions envisaged may – particularly initially- lead to higher, not lower costs, and corresponding downstream prices, any agreement on such jointly developed solutions could be deemed to have a negative impact on consumers following the reasoning based on traditional competitive theories of harm.

This would be the case for the implementation of costly new technologies for the marking, identification and subsequent recovery of plastic wastes.

Example 3:

The same could be true if the industry, by agreement, were to agree to no longer rely on particular types of packaging products in favour of other products, e.g. if this would lead to a higher degree of recovery and recycling. This might be seen as reducing consumer choice, or again, increasing consumer prices, while the underlying objective is the achievement of sustainability objectives.

Example 4:

Outside the area of packaging, AIM members have on occasion explored collaboration with regard to logistics. This could lead to an optimization of logistics capacity, e.g. avoiding that half-empty or empty trucks populate our roads and pollute the atmosphere. Particularly for those products for which logistics make up a serious part of total cost, the commonality of cost that would result from such logistics collaboration might cause such a project to fall short of meeting the criteria of Article 101(3) TFEU under current guidance.

Another example covers AIM members' collaborative on-the-ground efforts, often with suppliers, in certain regions and on certain commodities, to foster the respect of social and workers' rights as part of the overall effort to implement the UN Guiding Principles on Business and Human Rights and to root out systemic human rights abuses. As part of the overall debate on mandatory human rights due diligence, EU competition rules may need adaptation to support enabling environments for collaboration globally to advance better human rights outcomes.

For all of the situations described above, specific guidance on the role of sustainability objectives in the framework of an efficiency analysis, could support and strengthen the legitimacy of each of these projects and promote participation of those players who might otherwise be reluctant to do so under present guidance.

2.3 Issues that Require Clarification

AIM members would like to receive further clarification and comfort on the characteristics of agreements that serve the objectives of the Green Deal and that may be deemed not to unduly restrict competition.

AIM is of the opinion that competition law should not prevent or slow down genuine sustainability agreements. However, for projects in support of sustainability objectives to be successful, they often need to be large-scale and carried by a broad cross-section of the industry. This will often lift any combined market shares above the safe harbour thresholds set out in various instruments, including in the De Minimis Notice. Therefore, complex self-assessments become necessary, and more often than not, the outcome of the assessments are not black-and-white.

The Commission may therefore wish to consider the following instruments:

- Regulations and guidelines, including revision of the Horizontal Block Exemption Regulations and Horizontal Guidelines as well as revision of the Vertical Block Exemption Regulation and the Vertical Guidelines (the latter's Inception Impact Assessment specially mentions the European Green Deal);
- Guidance regarding the integration of "environmental protection" within Article 101(3) TFEU (e.g. specify whether "environmental protection" be seen as part of "technical and economic process");

- Guidance (e.g. in the form of ‘comfort letters’) in individual cases concerning novel issues; and
- Communication on enforcement priorities.

These forms should not be mutually exclusive.

In addition, in formulating the above instruments, the Commission may wish to consider providing clear guidance on the weight of the various theories of harm that would potentially off-set any gains from a sustainability perspective. Bringing in policy objectives into the assessment, could potentially lead to a comparison of apples (economic considerations such as higher prices, costs) and oranges (meeting policy objectives of the Green deal). This makes it particularly difficult to come to a conclusive assessment with a certain degree of confidence.

2.4 Restrictive Sustainable Agreements that Should be Justified

There are also green collective initiatives that may potentially be considered as restrictions by object, such as an agreed industry-wide transition to more environmentally friendly material that is more costly than the conventional material or exclusion of suppliers that are not willing to comply with certain criteria.

Also, certain agreed standards, cross-industry commitments to adhere to standards stricter than the law, and joint voluntary investments or payments to offset negative environmental impact may potentially fall under Article 101(1) TFEU.

However, if their objective is genuinely to promote sustainability objectives (e.g. the reduction of greenhouse gas emissions; the preservation and restoration of ecosystems and biodiversity; a fair, healthy and environmentally-friendly food system; a zero pollution ambition for a toxic free environment, fostering social and workers’ rights in supply chains), they should fall outside the scope of Article 101(1) TFEU or otherwise be justified under Article 101(3) TFEU.

In this regard, it would be valuable to have clarifications on whether the *Wouters*³ doctrine (or the non-applicability test for article 101 (1) TFEU) can apply to sustainable agreements, and if so, to what types of sustainable agreements.

In a similar vein, it would certainly be helpful if the Commission can make it clearer that sustainability benefits, such as biodegradability and animal welfare, can be qualified as “qualitative efficiencies” under Article 101(3) TFEU.

Conclusion:

AIM members also believe that it is time to expand the scope of qualitative efficiencies under Article 101(3) TFEU to include reductions of negative externalities, such as air pollution and plastic pollution, thereby also enlarging the scope of “consumers” to include not only future users of the products concerned but also consumers who are not users of the products concerned, i.e. a society as a whole, with respect to sustainability agreements.

AIM and its members are looking forward to engaging more closely with the Commission on its effort with regard to this project going forward and are available to provide further input, should the Commission have any particular questions with regard to the above.

³ Judgment of the Court of Justice of 19 February 2002 in C-309/99 - *Wouters and Others*: ECLI:EU:C:2002:98.

About AIM

AIM is the European Brands Association representing brand manufacturers in Europe on key issues which affect their ability to design, distribute and market their brands.

AIM comprises 2500 businesses ranging from SMEs to multinationals, directly or indirectly through its corporate and national association members. Our members are united in their purpose to build strong, evocative brands, placing the consumer at the heart of everything they do.

AIM's mission is to create for brands an environment of fair and vigorous competition, fostering innovation and guaranteeing maximum value to consumers now and for generations to come. Building sustainable and trusted brands drives investment, creativity and innovation to meet and exceed consumer expectations. AIM's corporate members alone invested €14 billion in Research & Development in Europe in 2014, placing them fifth in the EU ranking of R&D investment.

AIM's corporate members

AB InBev • Arla Foods • Bacardi Limited • Barilla • Beiersdorf • Bel Group • BIC • Chanel • Coca-Cola • Colgate-Palmolive • Coty • Danone • Diageo • Dr. Oetker • Essity • Estée Lauder • Ferrero • FHCS/Vileda • FrieslandCampina • General Mills • GlaxoSmithKline • Heineken • Henkel • Jacobs Douwe Egberts • Johnson & Johnson • Kellogg • The Kraft Heinz Company • LEGO Group • Levi Strauss & Co. • Lindt & Sprüngli • L'Oréal • LVMH • Mars • McCain Foods • McCormick • Mondelez • Nestlé • Nike • Nomad Foods Europe • Orkla • PepsiCo • Pernod Ricard • Procter & Gamble • Puma • Reckitt Benckiser • Royal Philips • Sanofi • Savencia Fromage & Dairy • SC Johnson • Signify • Unilever

AIM's national association members

Austria Markenartikelverband • Belgilux BABM • Czech Republic CSZV • Finland FFDIF • France ILEC • Germany Markenverband • Greece EllhnikoV SundesmoV Biomhcaniwn Epwnumwn Proiontwn • Hungary Márkás Termékeket Gyártók Magyarországi Egyesülete • Ireland Food & Drink Federation • Italy Centromarca • MLDK • Netherlands FNLI • Norway DLF • Portugal Centromarca • Russia RusBrand • Spain Promarca • Slovakia SZZV • Sweden DLF • Switzerland Promarca • United Kingdom British Brands Group

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