2021-01 | September 2021

ISBN: 978-92-76-41099-7, ISSN: 2315-3113

Competition *policy brief*

Competition Policy in Support of Europe's Green Ambition

Alexandra Badea, Marin Bankov, Graça Da Costa, José Elías Cabrera, Senta Marenz, Kevin O'Connor, Ekaterina Rousseva, Johannes Theiss, Andrea Usai, Sofia Vasileiou, Alexander Winterstein, Marc Zedler

In a nutshell

The EU is facing many fundamental challenges to become climate neutral and environmentally sustainable, while pursuing recovery and growth, and ensuring a transition that is fair and just. Since the launch of the European Green Deal in 2019, the EU has intensified its response to these challenges; supported and complemented by competition policy. With specific consultations still ongoing, this policy brief explores how EU competition rules can complement environmental and climate policies more effectively. It summarises the key points taken from the debate launched in September 2020 by Executive Vice-President Margrethe Vestager and provides examples of concrete policy reform across the competition instruments of State aid, antitrust, and merger control.

Context and challenge

In December 2019, the Commission presented the European Green Deal[1] – a roadmap for making the EU's economy sustainable by turning climate and environmental challenges into opportunities across all policy areas, setting out a modern growth strategy, and making the transition just and inclusive for all[2].

The principal challenge is to transform Europe's entire economy to carbon-neutrality by 2050. This implies nothing less than a new economic model – a sustainable economy in balance with our natural environment. This transformation – going hand in hand with the digital transition and the economic recovery from the pandemic – must make Europe's economy not only more sustainable, but also more competitive and resilient.

In order to reach the goals set out in the European Green Deal, everyone, private and public, must play their part. This includes competition enforcers. In September 2020, Executive Vice-President Margrethe Vestager launched a debate on this issue. A call for contributions was published, asking questions about how competition rules and sustainability policies can work together. Around 200 contributions were received from a broad range of stakeholders, including industry, environmental groups, consumer organisations, and competition experts. The contributions received are published on a dedicated webpage[3]. A conference, hosted by Executive Vice-President Margrethe Vestager, took place on 4 February 2021 that looked at how EU competition rules can play their part to support environmental and climate policies. The conference provided a forum for a broad debate on the issue, which took into account the ideas, suggestions and proposals that the Commission had received.

In parallel to this, DG Competition is conducting specific public consultations for each of the competition rules under revision[4].

Competition policy: to support and complement

Both at European and national levels, the principal response to these transformative challenges comes from the legislators, who are empowered by – and accountable to – the citizens when it comes to societal policy choices and trade-offs.

Well-functioning and fair markets – with competition policy as their guardian and facilitator – are part and parcel of a comprehensive response. In this vein, competition policy supports and complements European solutions at various levels.

Firstly, environmentally ambitious policies will only be effective if markets respond to the new regulatory signals and incentives without creating distortions to competition, and if firms are pushed to innovate by competing intensely and fairly with each other. For example, EU antitrust rules allow companies to

[1] https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en

[2] See the Commission's Communication of 14 July 2021 "Fit for 55: delivering the EU's 2030 Climate Target on the way to climate neutrality", https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0550&from=EN

[3] https://ec.europa.eu/competition-policy/green-gazette_en

[4] https://ec.europa.eu/competition-policy/public-consultations_en

pursue genuinely green initiatives jointly, while preventing 'greenwashing'[5] that would harm consumers.

Secondly, vibrant competition, strong innovation and a well-functioning Single Market are mutually reinforcing. Together, they are at the heart of a *smart industrial policy*, enabling Europe's companies to become global leaders in green technologies, green production processes or green products, through innovation.

Finally, competition policy supports and complements a fair and just transition – aligning it with EU rules and values, and ensuring that nobody is left behind. Taking the example of State aid, the EU's rules support Member States in designing effective support measures while limiting market distortions to the minimum[6].

Consultation and conference: key takeaways

Both the respondents to the consultation and the participants at the conference of 4 February 2021 confirmed that competition policy has an important role to play in delivering the Green Deal objectives, driving green innovation and bringing about the technological revolution required to have sustainable jobs and growth, in line with EU rules and values.

During the conference, it was made clear that competition authorities do not operate in a political vacuum. The ambition to tackle climate change by stepping up Europe's efforts with respect to 2030, with the aim to reach carbon neutrality in 2050 was fully supported. At the same time, since the Green Deal also serves as Europe's growth strategy, it was also considered important to take account of the different situations across Member States, in order to get the transition right and to ensure continued broad political and social acceptance.

State aid control

More specifically, concerning State aid control, the respondents to the public consultation clearly emphasised the key role of State aid policy to support the Green Deal objectives.

In particular, a large number of stakeholders emphasised the need to limit drastically access to State aid funding for fossil fuel producers. They called for a systematic assessment of environmental impacts in State aid procedures and greening conditionality.

More generally, a consensus emerged on calling for clear and simple State aid rules to provide Member States and stakeholders with legal certainty and thus indicate to businesses the way forward. In the same spirit, respondents called for increased transparency on any State aid initiatives that are potentially harmful to the environment.

In addition, many respondents mentioned the importance of innovation to support the green transition and the necessity of adapting the State aid rulebook to enhance the possibilities for R&D&I support.

Finally, many stakeholders recalled the green potential of vigorous enforcement of State aid control, which preserves the level playing field and rewards lean, innovative and resource-efficient companies.

Antitrust

With regard to antitrust, the responses to the call for contributions indicated a demand for more clarity on how the pursuit of sustainability objectives affects antitrust assessment. Many respondents were concerned that, in the absence of clarity, the risk of breaching the competition rules would prevent them from investing in sustainable products or processes.

Companies flagged in particular the need for more clarity on the assessment of types of cooperation agreements that they consider essential for pursuing sustainability objectives. Those include industry-wide agreements to phase out unsustainable products and unsustainable and/or unethical modes of production; joint procurement of sustainable input products; joint R&D&I and production agreements, in the context of which information may need to be exchanged; and setting industry standards for the use of sustainable products and green technologies. At the same time, stakeholders appear to have difficulties providing real-life examples of sustainability initiatives that are hampered by the potential risk of the application of competition rules.

Some respondents considered that in order to take due account of sustainability benefits, changes need to be introduced in the assessment under Article 101 (3) TFEU. In this regard, it was argued that the scope of relevant benefits needs to be extended to non-economic benefits as well as to benefits that occur outside the relevant, investigated markets. Some suggest that the notion of "consumers" needs to be expanded to encompass not only users of the products but also citizens and society as a whole. Others expressed a preference for a flexible interpretation of the notion of "fair share" to allow benefits from an agreement to be credited even if they do not fully compensate for the harm suffered by consumers in the market. Some even questioned the soundness of a consumer welfare standard as an underlying principle of competition law and policy.

Against this, other respondents, in particular consumer associations and some national competition authorities, saw potential risks related to broadening the scope of the exemption under Article 101(3) TFEU, and in particular flagged the negative impact this may have on incentives to innovate, on consumers and on the effectiveness of enforcement.

Those issues were also central to the discussion at the conference, where the panellists predominantly pointed to the risks of accommodating "out-of-market" benefits.

[5] This refers to agreements or initiatives with no genuine environmental impact but negative effects on competition.

[6] This is, for example, the case in the Regional Aid Guidelines, which include an aid intensity "bonus" for certain areas eligible under the Just Transition Fund.

Stakeholders also put forward ideas on ways in which the rules can be clarified. Suggestions were made to use block exemption regulations, to have an open door policy allowing businesses to share their concerns with the Commission and to introduce regulatory sandboxes.[7] Many referred to the benefit of having general guidelines as well as specific guidance, on a case-by-case basis. The possible use of positive decisions (finding non-applicability of the competition rules) where appropriate was also flagged.

Merger control

With regard to merger control, both the respondents to the call for contributions and the conference participants considered that the European Merger Regulation ("EUMR")[8] and its enforcement by the Commission support the objectives of the Green Deal. However, they also highlighted a number of important issues for merger enforcement.

Several submissions to the call for contributions mentioned the need to take into account consumer preferences for sustainable products, services and/or technologies as a differentiating factor in general and in market definition in particular.

The significance of innovation for the implementation of the Green Deal's objectives was particularly emphasised. More specifically, there is a broad consensus that the Commission should enforce and pursue innovation theories of harm as much as possible in merger cases, as a means of preventing the loss of "green" innovation.

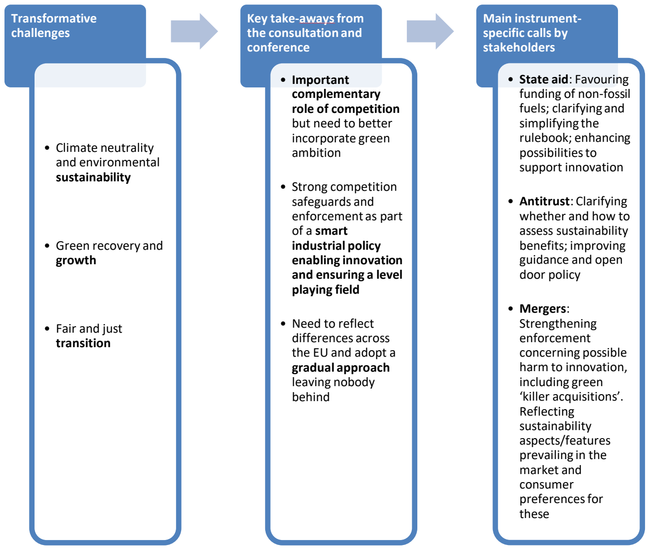
A particular concern was raised about incumbent companies with a strong market position that do not pursue environmentally friendly business strategies, and could engage in the "killer" acquisition of an undertaking active in "green" innovation. This is even more of a concern if, as may well be the case, most of the "green" innovation is carried out by smaller players, and concentration could fall below the usual notification thresholds at the level of the EU and of the Member States.

Concerning efficiencies, as in the case of antitrust, some respondents to the call for contributions pointed out that a longer time horizon over all social benefits should also be considered. Others argued that we should be wary of accepting out-of-market efficiencies, as mergers may potentially reduce incentives for the merging companies to develop green products, services or technologies.

Several respondents discussed the possibility of raising concerns when there is a direct harm to the environment. Moreover, some respondents to the call suggested that sustainability considerations should be part of the remedy design and that the Commission should accept the greenest remedy, or even impose remedies to deal with any possible environmental harm.

Concrete follow-up: policy reform

The rich feedback received over the past year is fostering new initiatives and on-going policy reform work-streams. The following sub-sections provide examples in each of the three competition instruments.



State aid control

The new Climate, Energy and Environment Aid Guidelines ("CEEAG") and the revision of the related sections of the General Block Exemption Regulation ("GBER") will open up and support to a maximum, and in a more flexible and future-proof manner than the 2014 Energy and Environment Aid Guidelines, those aid measures that are consistent with the Green Deal. The current CEEAG proposal envisages in particular, extending the scope of the guidelines to new areas (industry, clean mobility, circularity and biodiversity) and to all technologies that can deliver the Green Deal (e.g. renewable and low carbon hydrogen, e-storage). It also proposes higher aid amounts (100% of financing gap), new aid instruments (operating aid in new areas) and various forms of support such as carbon contracts for difference, where the reference price is linked to the Emissions Trading System (ETS) price.

Specifically, as regards the decarbonisation goals, the new CEEAG propose to discourage aid to projects involving the most polluting fossil fuels (e.g. coal, lignite, oil and diesel) and to gas producing

---

7 Concrete frameworks which, by providing a structured context for experimentation, enable where appropriate in a real-world environment the testing of innovative technologies, products, services or approaches for a limited time and in a limited part of a sector or area under regulatory supervision ensuring that appropriate safeguards are in place.

8 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)

lock-in effects. They also propose to introduce a mandatory calculation of the environmental protection cost (i.e. the subsidy per tonne of CO2 equivalent emissions avoided compared to the counterfactual) for most categories of aid, to ensure that aid is targeted at projects that bring genuine decarbonisation benefits in a cost effective and pro-competitive manner.

Aid to energy intensive users is proposed to be partially aligned to the ETS Aid Guidelines, leading to fewer eligible sectors, reduced aid intensity and greening conditionality for aid beneficiaries.

The CEEAG also aim to enhance transparency with new public consultation requirements (e.g. for the design of large decarbonisation aid schemes). The proposal includes competition safeguards, by including tenders as a starting point for decarbonisation measures involving comparable technologies, in order to avoid hidden favouritism and overcompensation in the selection of beneficiaries. Aid to non-green infrastructure projects (such as natural gas-based projects or CNG-LNG recharging infrastructure) may be allowed if it contributes to achieving the Union's 2030 climate target and 2050 climate neutrality target, and does not lead to stranded assets and demand for polluting products. They would also have to be notified to the Commission in accordance with State aid rules.

The targeted revision of the GBER adopted by the Commission on 23 July 2021[9], together with a further review expected in the first half of 2022[10], will complement the CEEAG by introducing State aid provisions to facilitate further the granting of State aid - without prior approval by the Commission – in those areas important for the green transition.

The proposals on the CEEAG and the GBER will also contribute to the shift to sustainable and smart mobility, e.g. by providing favourable conditions for aid for the acquisition of zero/low carbon emission vehicles and for investments in low carbon recharging and refuelling infrastructures.

Finally, and importantly, the CEEAG and the GBER will allow aid to improve energy efficiency in buildings (residential, commercial and industrial, subject to conditions), as well as improving resource efficiency and the circular economy by for example, broadening the scope of aid to the recycling of waste, by-products and raw materials.

The new CEEAG[11] is set to enter into force on 1 January 2022.

The State aid rules on Important Projects of Common European interest ("IPCEI") promote intensive cross-border collaborations between Member States and industry, to enable breakthrough innovation in strategic value chains.[12] They can foster the development of new technologies and production processes in all areas of the economy that can contribute to the Green Deal objectives (for example decarbonisation or a clean and circular economy), where the market alone would not deliver. IPCEIs may also be used to support the construction and operation of large-scale cross-border green infrastructure projects and research and development projects, that will also help achieve those objectives.

In the past two years, the Commission has approved two IPCEIs on batteries. The first, approved in 2019[13], enables EUR 3.2 billion in support from seven Member States, expected to unlock an additional EUR 5 billion in private investments, for the development of highly innovative and sustainable technologies for longer lasting, shorter charging lithium-ion batteries. The second, approved in 2021[14], enables EUR 2.9 million in support from 12 Member States, which in turn is expected to unlock an additional EUR 9 billion in private investments. This project will cover the entire battery value chain from the refining of raw materials, design and manufacturing of battery cells and packs, and finally the recovery and recycling of raw materials in a circular economy, with a strong focus on sustainability.

These projects demonstrate the importance of this instrument for pooling together public and private resources for advancing technologies that will contribute to the greening of the economy, enabling European companies to take a leading role in the development of these technologies, while limiting competition distortions to the minimum. Strong innovation capabilities in strategic value chains contribute to the resilience of the EU economy.

Furthermore, on 17 December 2020, 22 Member States and Norway committed to IPCEIs in support of cleaner hydrogen value chains, agreeing that those projects should cover the full value chain — from renewable and low-carbon hydrogen production to hydrogen storage, transmission and distribution, and hydrogen application notably in industrial sectors.

The on-going revision of the IPCEI rules[15] aims, among other things, to facilitate the inclusion of a wider scope of participants (in particular SMEs), to link the nature of investments to the "*Do No Significant Harm*" principle, and to adapt these rules to the objectives of the Green Deal. The revision will clarify the conditions under which Member States can pool public and

[9] https://ec.europa.eu/commission/presscorner/detail/en/QANDA_21_3805

[10] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12810-State-subsidies-exemptions-to-approval-requirement-for-the-Green-Deal-and-EU-industrial-and-digital-Strategies_en

[11] https://ec.europa.eu/competition-policy/public-consultations/2021-ceeag_en

[12] According to the 2014 IPCEI communication, IPCEIs must, in particular, (i) contribute significantly to one or more EU objectives (ii) involve several EU Member States (iii) involve co-financing by the beneficiaries (iv) generate positive spillover effects across the EU (v) observe the principle of the phasing out of environmental harmful subsidies. The benefits of the IPCEI should be not be confined to just one Member State or the beneficiary.

[13] https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6705

[14] https://ec.europa.eu/commission/presscorner/detail/en/IP_21_226

[15] https://ec.europa.eu/competition-policy/public-consultations/2021-ipcei_en

private resources for developing highly innovative projects in key sectors, in a timely and pro-competitive manner. In the revised draft IPECI guidelines, innovation is only one element among others to consider when evaluating the importance of the project.

More generally, as the revision of the State aid rules progresses, all relevant guidelines[16] will aim to ensure consistency with the *"do no harm"* green oath set out in the Green Deal, while respecting the EU Treaty conditions on competition. In this context, the EU Taxonomy and its delegated acts[17], as they develop, will provide valuable screening criteria.

A fair and inclusive green transition must ensure that everyone is on board. The Regional aid Guidelines, adopted on 19 April 2021, focus on productive investments, and represent an important tool to ensure a "just transition" that addresses different needs and economic realities across Member States. In particular, the guidelines provide additional support possibilities in certain less developed areas that also face transition challenges. Moreover, the possibility of combining regional aid with aid under the CEEAG, the general increase in aid intensities, and the increased difficulty in providing compatible aid to the coal and lignite sector, will facilitate the attainment of the Green Deal objectives.

Moving forward, evaluation and/or future revision of the State aid rules in other sectors, including in transport, will draw on the above decarbonisation ambitions, facilitating as much as possible the shift to carbon neutral technologies and fuels.

The current State aid frameworks in agriculture, forestry, fisheries and aquaculture are well equipped to contribute to the Green Deal objectives, in particular in relation to the *Farm to Fork, Biodiversity and Forest strategies.* The revision of these rules (entry into force planned for 2023), will continue to support Member States in their effort to promote greener production in agriculture, to enhance the ecological value of forests, to limit the impact of fishing on the maritime environment and to adapt fishing to the protection of species.

Importantly, the State aid rules have and will play a fundamental role in the context of the recovery from the Covid-19 crisis. In order to steer investments towards greening objectives, the Recovery and Resilience Facility ("RRF") requires that at least 37% of allocation to national plans should support the green transition. Of the 18 national spending plans the Commission has endorsed at the time of writing, most are exceeding that target, with at least 40% of funds allocated in support of the green transition. The Commission is providing guidance to Member States in various forms in order to ensure that State aid rules, where they apply, will facilitate this process.

[16] The Guidelines reviewed in the Green Deal context include: EEAG, RAG, IPCEI, RDI RF and relevant GBER sections.

[17] The EU Taxonomy and the delegated acts form part of the Sustainable finance package (https://ec.europa.eu/info/publications/210421-sustainable-finance-communication_en)

Antitrust

Antitrust enforcement contributes to the pursuit of sustainability objectives by promoting and protecting competitive markets. By prohibiting anticompetitive practices, it ensures that prices remain cost-reflective and companies face incentives to come up with efficient and sustainable solutions. The Commission intends to continue to enforce Articles 101 and 102 TFEU vigorously in all sectors of the economy so that European consumers can enjoy products of the highest quality at competitive prices.

At the same time, the Commission acknowledges that in order to encourage companies to jointly invest, identify solutions, produce, and distribute sustainable products, more guidance is needed on the circumstances in which such cooperation complies with antitrust rules. The Commission intends to provide such guidance in the context of the on-going revisions of its guidelines on horizontal cooperation and vertical agreements. To inform the policy revision and ensure that guidance can be as concrete as possible, companies are encouraged to approach the Commission with their projects. At this stage, and in light of the feedback received from stakeholders, the Commission considers that clarifications can be provided on the following aspects of antitrust assessment.

First, the Commission considers it important to clarify that there are various ways for companies to engage in sustainability initiatives without restricting competition in the meaning of Article 101(1) TFEU. Concrete examples illustrating how sustainability objectives can be pursued safely by different types of cooperation agreements, (e.g. joint production or purchasing agreements, standard setting, etc.), could give reassurance to businesses and unlock investments.

Second, as any agreement restricting competition can be exempted under Article 101(3) TFEU if the benefits ensuing from them outweigh the restrictive effects on competition, it will be useful to clarify how sustainability benefits can be taken into account in the assessment under Article 101(3) TFEU and when they can compensate consumers for the harm suffered.

In this regard, it will be useful to clarify that sustainability benefits can be assessed as qualitative efficiencies, which form part of the assessment under Article 101(3) TFEU. For example, an agreement to replace a non-sustainable product with a sustainable one may result in an increased quality or longevity of a product and thus increase the value that consumers attribute to that product. (e.g., replacing plastic with wood in toys or using recycled materials for clothing). Moreover, agreements that pursue sustainable benefits can also have related cost efficiencies that can be passed on to consumers. For example, agreements seeking to reduce plastic packaging or condense plastic bottles may reduce the cost for materials, transport and storage and outweigh the cost increase related to production with modern condensing technology.

Third, sustainability benefits do not necessarily need to take the form of a direct or immediately noticeable product quality improvement or cost saving. As long as the users of the product concerned appreciate the sustainability benefits related to the way the products are produced or distributed, and are ready to pay a higher price for this reason alone, such benefits can be taken into account in the assessment. For example, consumers may appreciate a particular brand of coffee not because it tastes better but because it is produced sustainably, or opt for a particular washing powder, not because it cleans better but because it contaminates the water less.

Fourth, as the antitrust rules have as their objective to protect competition on the market, the assessment of the anticompetitive effects and benefits of a practice are made within the confines of each relevant market. Benefits achieved on separate markets can possibly be taken into account provided that the group of consumers affected by the restriction and the group of benefiting consumers are substantially the same. This ensures that consumers are fully compensated for the harm suffered.

The Commission considers that these are sound principles that ensure that antitrust enforcement remains anchored to the consumer welfare standard and at the same time allows sustainability benefits that accrue for the benefit of society as a whole, to be taken into account. For example, if an agreement leads to a reduction in pollution to the benefit of society, and assuming the benefits are significant, a fair share of them can be apportioned to the harmed consumers – the latter being part of society – and fully compensate them for the harm.

Fifth, as Article 101(3) TFEU requires that the agreement is indispensable for the claimed benefits, it would be helpful to address the question of when and how market failures would prevent the free market from generating benefits and would thus necessitate an agreement between companies. The Commission is mindful that there may be instances where companies need to get together in order to override a first mover disadvantage and nudge consumers towards using more expensive sustainable products, instead of cheaper but polluting ones. At the same time, if consumers do value sustainable products, profit-maximizing companies are expected to offer such products independently rather than by cooperating.

Finally, the Commission considers that it would be useful to shed more light on when existing (environmental) regulation already incentivises companies to produce in a sustainable manner and therefore obviates the need for cooperation, and when such incentives are not sufficient to do so.

The Commission continues to reflect on these issues in cooperation with National Competition Authorities and will rely on the feedback received so far as well as from the on-going consultations with stakeholders and experts. The Commission's aim for its revised guidelines is to provide clarity that would enable self-assessment and encourage investments in sustainable products, while preserving the effectiveness of enforcement and ensuring that the consumer welfare standard, which pertains not only to price reduction, but also to quality and innovation, remains at the heart of competition policy.

In parallel, the Commission remains ready to consider requests for individual guidance letters in relation to sustainability initiatives that raise novel issues. In addition, where the public interest so requires, pursuant to Article 10 of Regulation 1/2003, the Commission will also consider adopting decisions finding that the competition rules are not applicable to sustainability initiatives.

Finally, due to the special relationship between the competition rules and agricultural policy set out in the Treaty, the application of the competition rules to sustainability initiatives in the agricultural sector deserves special attention. Green farming methods can mean less pollution from pesticides, less carbon emitted by livestock, and better protection of our biodiversity. At the same time, issues related to climate change exert increasing financial pressure on the farming community across the EU. The new Common Agricultural Policy (CAP) for the period 2023-2027 agreed on in June 2021 aims to tackle these problems through a newly adopted provision in the Common Market Organisation Regulation, one of the building blocks of the CAP.

The provision exempts from the application of Article 101 TFEU sustainability agreements concluded between producers and/or other actors from the food value chain aimed at achieving higher standards than required by law in terms of environmental protection, climate change prevention, animal health and animal welfare. The agriculture-specific derogation applies only if the restrictions of competition resulting from the sustainability agreements in place are indispensable for the achievement of the desired standard, i.e. they do not restrict competition more than is necessary. The derogation provides the opportunity for farmers to adopt greener practices in agriculture in exchange for various benefits (higher prices, longer-term supply relationships, etc.).

The Commission will issue guidelines on the conditions of applicability of the derogation by the beginning of 2024.

Merger control

As regards merger control, a number of ongoing policy work streams already deal with some of the issues raised. In particular, the Commission is further reflecting on issues related to consumer preferences in the context of the on-going revision of the market definition notice. In March 2021, the Commission adopted a guidance paper on the application of the referral mechanism between Member States and the Commission, as set out in Article 22 of the EUMR, with a view to encouraging and accepting more referrals under Article 22 – including when the proposed transaction would not meet the national merger control thresholds.[18] Such a revised approach to referrals is expected to

[18] Communication from the Commission. Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases. Available at

help tackle issues related to possible enforcement gaps for acquisitions of nascent competitors that may lead to a loss of innovation in, for example, a sustainability context.

In its enforcement practice, the Commission already takes into account consumer preferences for sustainable products, either in market definition, to identify in and out-of-market constraints and/or in the competitive assessment as a parameter of differentiation which affects closeness of competition.[19] The Commission expects that these elements will become even more prominent in its assessment given the stronger demand by individuals, companies and society as a whole for more sustainable products, services and technology. This trend is already palpable in waste recycling markets, which are central to the circular economy.[20] In addition, the impact of regulations pushing for more sustainable objectives in the markets analysed will be reflected in the competitive assessment.

The Commission has already enforced and pursued innovation theories of harm across different sectors, from basic industries to pharma and high technology markets.[21] Looking into broader innovation spaces or the overall level of innovation (for example in case M.7932 Dow/Dupont) can help to protect innovation benefiting the environment on a much broader level. Such an approach could be taken in particular in industries with long innovation cycles. This framework is very much suited to address competition concerns that may result in innovation efforts related to environmental technologies. For instance, this framework could be very useful to protect innovation efforts on environmentally friendly technologies or capabilities when there is a risk of discontinuation of overlapping lines or research, or there is a risk of a reduction of incentives and the ability to achieve the same level or type of innovation.

As for possible environmental harm, under the current legal framework, the Commission does not have a mandate to intervene in mergers solely because they are likely to harm the environment.[22]

The existing legal framework allows for efficiencies submitted by the merging parties to be taken into account. For these purposes *"the efficiencies have to benefit consumers, be merger-specific and be verifiable"*[23]. Under the Horizontal Merger Guidelines, efficiencies should, "*in principle*" occur within the markets where competition concerns are found. The approach to efficiencies in mergers is consistent with that described above for antitrust.

In some instances, remedies have had positive effects on the environment, for instance, in case M.7278 - *GE/Alstom*[24]. In addition, where environmental aspects are considered an important parameter of competition to assess, for example, how closely two merging companies compete in the relevant market, or where the Commission has concerns about innovation competition, this may have to be reflected in the design of remedies.[25] If environmentally friendly products or innovation in this field are important for the competitiveness of the divestment business, specific purchaser criteria may also be necessary to ensure that the purchaser will continue to be able to successfully produce and market such products and continue to innovate in this field.

Conclusion

By keeping markets open, competitive and innovative, competition policy can and will support the objectives of the European Green Deal at all levels. The rich feedback received so far is already informing our policy work, and the specific ongoing consultations with stakeholders and national competition authorities will provide further valuable input.

For example, the Commission will provide further guidance on the application of Article 101 TFEU to sustainability agreements – both in the revised general guidelines and in individual cases, where appropriate. In the area of State aid control, the new Climate, Energy and Environment Aid Guidelines will allow for aid measures in support of the European Green Deal objectives that are more comprehensive, flexible and future-proof. Finally, merger control will remain vigilant when it comes to protecting green innovation and preventing "killer" acquisitions.

As the transformative challenges brought about by climate change will remain with us for a long time, competition policy will continue to evolve, to remain a vital part of the solution.

https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf

[19] See for instance, M.7184 Marine Harvest/Morpol, M.9730 FCA/PSA, M.8829 Total Produce/Dole Food Company, M.7220 Chiquita Brands International/Fyffes and M.7510 Olam/ADM Cocoa Business. among others

[20] As reflected recently, for instance, in case M.10047 Schwarz/Suez.

[21] Some examples of cases where the Commission raised innovation theories of harm include M.8401 J&J/ Actelion, M.7278 General Electric/ Alstom, M.7932 Dow/ Dupont, M.8084 Bayern/ Monsanto, M.6166 DB/ NYSE-Euronext, M.7275 Novartis/ GlaxoSmithKline's oncology business, M.7559 Pfizer/ Hospira, M.7326 Medtronic / Covidien.

[22] See to this effect the reasoning included in *M.8084 Bayer/Monsanto* in Section XIV: Non-Competition Concerns.

[23] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para. 78.

[24] In M.7278 - *GE/Alstom* after an in-depth review, the Commission raised competition concerns for heavy-duty gas turbines. The Commission specifically flagged that the merger would have risked eliminating an important innovator as Alstom's newly developed and highly efficient GT 36 turbine brought important environmental benefits and would have not been commercialized by GE. Ansaldo, the remedy taker, successfully finalized the development of the GT 36 turbine and won bids against Siemens and GE. In addition, Ansaldo continued innovating in this field by using hydrogen as a fuel for the GT 36 turbine, which can significantly decrease CO2 emission. In this example, merger control played a key role in ensuring continued innovation in energy-efficient electricity generation.

[25] For instance, where the concerns relate to innovation, the appropriate remedy may require the divestment of significant parts of the R&D departments.