

Kluwer Competition Law Blog

The European Green Deal & Competition Policy – Call for contributions on how EU competition rules and sustainability policies can work together

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On 13 October 2020, the European Commission (EC) published a [call](#) for contributions to gather ideas on how EU competition rules (State aid, antitrust, and merger control) and sustainability policies can best work together. The aim is to gather the widest set of views possible to determine how the competition rules should be amended (if need be) to help facilitate the transition to a green economy.

The deadline for contributions is 20 November 2020. The contributions will feed into a conference taking place in early 2021.

The call for contributions is an important opportunity for interested stakeholders to shape EC enforcement policy in this area:

- The consultation is ultimately expected to lead to (at least) the revision of existing “soft law” or the issuance of new guidance. EC guidance papers are updated infrequently (i.e., every 10-15 years). The present debate may therefore have long-lasting implications for enforcement policy in this area.
- Somewhat unusually, the EC consultation takes place at a time where there has been much academic debate but very little case law to guide policy choices. The EC is therefore working with something of a blank canvas, making stakeholder contributions all the more important.
- The EC guidance is likely to steer Member State domestic law and enforcement policy. The EC is not the only authority looking into this issue (see, e.g., recent papers and projects by the Dutch, French, German and Hellenic competition authorities). However, the EC’s call for contributions is an important step towards EU-level harmonisation around a set of common principles.

The Development

- EU Commissioner Margrethe Vestager made clear in a recent [speech](#) that EU competition policy shall support the European Green Deal and the efforts to make the EU climate-neutral by 2050.
- In order to determine how competition policy can best support this objective, the EC has published a call for contributions covering the three pillars of EU competition rules:

- **State aid**, which can help facilitate green investments.
- **Antitrust**, which can further the European Green Deal objectives by sanctioning, e.g., undue restrictions in the development or roll-out of clean technologies.
- **Merger control**, which can ensure that the competitive pressure between companies to innovate on sustainability aspects is not removed.
- The EC is open to additional ideas about ways these three pillars can be used in the fight against climate change.
- The call for contributions makes clear that EU competition law is a complement to other tools to facilitate the transition to a green economy, not a primary tool. Regulation and taxation are the main drivers for change as they directly impact how companies operate on the market. The transition to a green economy will therefore be achieved — *inter alia* — through legislative instruments such as the European Climate Law, which proposes a legally binding target of net-zero greenhouse gas emissions by 2050.

Idea Boxes

Competition is already a green policy tool (e.g., it drives innovation that develops new technologies and is a powerful incentive to use scarce resources efficiently). But the EC is calling for additional ideas to help the green transition.

State Aid

Europe will need considerable sustainable investment going forward. State aid rules can support green objectives via several mechanisms, such as rewards for positive contributions or consequences for actions that harm the environment, as illustrated by the carrot and stick philosophy.

- **Carrot.** The EC is considering incentivising governments that think green (e.g., by giving them a “green bonus”, allowing them to use more State aid for projects that make a genuine contribution to sustainable development, or extending the rules on use of competitive tenders in the renewable energy area to other areas currently in the Environmental and Energy State aid Guidelines – EEAG 2014). In this regard, the EC wants to know whether positive environmental benefits should be defined by reference to the pre-existing EU taxonomy on sustainable development or by reference to other instruments.
- **Stick.** The EC is considering amending the existing EEAG 2014 rules so that State aid that leads to environmental harm or allows polluting factories or power plants to operate either cannot be approved or is capped at certain amounts.

The EC is currently evaluating the relevant State aid guidelines, including the EEAG 2014 and the EU Emission Trading System State aid Guidelines. The guidelines, prolonged in 2019, will be revised by 2021 to reflect the policy objectives of the European Green Deal.

Antitrust

In order to incentivise businesses to take on their share of responsibility and facilitate the transition to a green economy, the EC is exploring several avenues, including:

- Whether antitrust guidelines for “green cooperation” between competitors are necessary. The EC could either adopt specific guidelines or insert a chapter in the upcoming horizontal guidelines (as was the case in the 2001 horizontal guidelines).
- Issuing “comfort letters”. The EC seems ready to revitalise the comfort letter tool beyond COVID-19 and extend it to issues of green cooperation. This is a noteworthy change of policy given that, prior to the COVID-19 pandemic, the EC had not issued a comfort letter in almost two decades and had consistently expressed the view that they were no longer a part of its enforcement toolkit.
 - The EC issued a comfort letter in April 2020 in order to allow coordination in the pharmaceutical industry to increase production and to improve the supply of urgently needed critical hospital medicines to treat COVID-19 patients.

The EC is seeking feedback on desirable cooperation between competitors that cannot be implemented due to EU antitrust risk (especially the high level of fines in case of a breach) and whether the pursuit of the European Green Deal objectives justifies an ad hoc treatment of competitor collaboration.

Rules may need to be clarified to determine when anti-competitive practices that also constitute breaches of environmental law or restrict sustainable development can constitute an abuse of dominant position. For example, could “greenwashing” — i.e., conveying a false impression of how environmentally friendly a product is — amount to an abuse? There are currently no precedents on this issue in the EU. The Dutch Competition Authority (ACM) recently published [five rules of thumb](#) against misleading practices of companies involving sustainability claims but did not state that a breach of those rules could amount to an abuse of dominance. Unfortunately, the call for contributions focuses on agreements between competitors and not on single firm dominance. This is, therefore, an area of antitrust that will remain a moving target, and at this stage, only future enforcement will provide additional guidance.

Merger Control

The call for contributions is less thorough in relation to merger control than State aid and antitrust and simply asks whether merger enforcement could better contribute to protecting environmental and sustainability objectives without hinting at how this could be done.

- Merger assessment is therefore not likely to drastically change in the coming years in respect to sustainability. At best, there may be an increased focus on market definition and whether sustainable-conscious products and services constitute a separate relevant market warranting a specific analysis.

The extent to which sustainability issues should be taken into account when assessing mergers and acquisitions should be further considered. Such considerations are not currently a central element of EU merger control, although they may feature indirectly in the agencies’ substantive analysis depending on the industry context.

- For example, in the analysis of merger control in relation to coffee production, the EC considered

environmental elements of the focal products as part of its demand-side substitution assessment, i.e., whether organic, fair trade and other certified coffees should be distinguished from conventional coffee, because organic products are perceived as healthier, feel more environmentally sustainable, contribute to sustainable development, or have a higher quality.

However, advocates of reform have argued for a more comprehensive consideration of environmental issues, for example through analysis of the environmental impact of a deal as projected in the merging parties' business plans and internal documents.

The Big Picture

Current Initiatives

Historically, the EC and the Member States have tended to promote environmental, social, and governance (ESG) goals — including measures to transition to a green economy — through sector-specific regulation (e.g., the European Green Deal, the European Fund for Strategic Investments, and the Action Plan on Sustainable Finance) and enforcement of State aid rules (e.g., promoting renewable energy projects, ending coal mines exploitation, promoting greener practices in transport, etc.). With isolated exceptions, the authorities have not used EU antitrust and merger rules to further these aims. However, there is an emerging academic and policy debate about whether EU competition law should play a more prominent role in promoting sustainable business practices.

During a conference at the end of 2019, Commissioner Vestager [argued](#) that “businesses have a vital role in helping to create markets that are sustainable in many different ways. And competition policy should support them in doing that”. In the same spirit, Olivier Guersent, the top EU competition official, has stated that “we will probably need [...] to move toward more guidance in antitrust”. This need had already been highlighted by businesses in response to the ongoing EU revision of the horizontal rules and accompanying guidelines. In its [factual summary](#) of the responses received in the framework of the revision, DG COMP noted that “the most important development according to respondents [...] is climate change and the corresponding challenging environmental and sustainability goals. Respondents believe that this results in increased demand from consumers and businesses for sustainable, ethical and environmentally friendly business practices”.

The ACM adopted [draft guidelines](#) targeting sustainability agreements (see KCL blogpost [here](#)). According to the ACM's new guidelines, sustainability agreements will not be anticompetitive if they “do not or not appreciably affect competition on the basis of key competition parameters”, including, for example, price, quality, diversity, service, and the distribution method. Final guidelines are expected before the end of 2020.

Other national authorities are engaged in research in this area. For example, the UK Competition and Markets Authority has indicated that it will draw inspiration from the ACM guidelines and is “keen to support businesses in adapting to climate change while ensuring that markets remain open to the kind of disruptive innovation that can also assist in climate change and sustainability goals”. In Germany, the Bundeskartellamt issued a [background paper](#) on sustainability initiatives and

competition law, stating that self-regulation (such as sustainability agreements) will only exceptionally be justified. In France, eight French regulators — including the French Competition Authority — published a [working paper](#) on their role and tools in the face of climate change.

Risks of Divergence and Division?

National competition authorities focussing on sustainability and competition is salutary. However, different initiatives covering the same topic may become a source of divergences within the EU. The European Competition Network — the forum in which the EC and the national competition authorities in all Member States cooperate with each other — will have a key role to ensure consistency in this regard.

The EU's call for contributions (and upcoming conference) is an important step towards further EU-level harmonisation of these various initiatives around a set of common principles, e.g., either by issuing specific guidelines or with a test case using, for example, Article 10 of Regulation 1/2003 (according to which competition rules do not apply to specific agreements or behaviour).

Climate change is a global issue that demands a coordinated response. Some competitor collaboration at a global level may be necessary to tackle the most pressing issues. The EC may exempt some collaborations (e.g., through a comfort letter). Whether other key regulators in the rest of the world will echo the EU position — or will consider such collaboration anticompetitive under national law — remains to be seen. Similarly, as long as other countries do not share the same ambitions as those in the EU, there is a risk of carbon leakage, either because production is transferred from the EU to countries with a lower ambition for emission reduction, or because EU products are replaced by more carbon-intensive imports. If this risk materialises, there will be no reduction in global emissions, frustrating the efforts of the EU.

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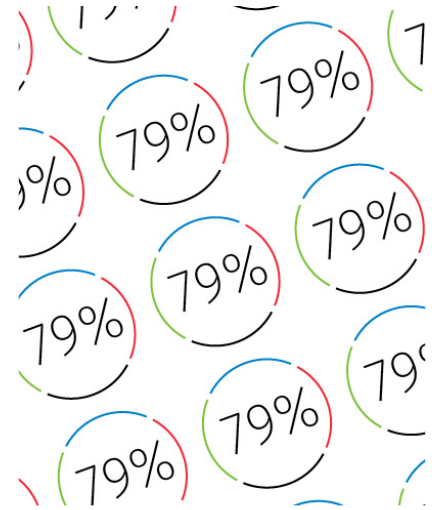
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