

Competition Newsflash

September 2021



COMPETITION POLICY IN SUPPORT OF EUROPE'S GREEN AMBITION

Introduction

On 10 September 2021, the EU watchdog for competition, the Directorate-General Competition ("DG COMP") of the European Commission, published the main results of the public consultation launched in 2020 while highlighting the interactions between competition rules and sustainability policies in part of the Green Deal.

In December 2019, the European Commission presented the European Green Deal, *i.e.*, 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.

According to DG COMP, environmentally ambitious policies will only be effective if markets respond to the new regulatory signals and incentives without creating distortion to competition, and if firms are pushed to innovate by competing intensely and fairly with each other.

Policy reforms

1. State aid

DG COMP seeks to provide more room to EU Member States to make sustainable investments while discouraging public supports of polluting projects.

Therefore, DG COMP is revising State aid rules to bring them into line with the objectives pursued by the Green Deal.

For instance, the new Climate, Energy and Environment Aid Guidelines ("CEEAG") under discussions contemplates extending the scope of the exemption to new areas (industry, clean mobility, circularity, and biodiversity) and to all technologies that can deliver the Green Deal (renewable and low carbon hydrogen). It will also entail higher aid amounts, new aids instruments and several forms of supports.

The targeted revision of the General Block Exemption Regulation ("GBER") will also complement the CEEAG by facilitating further the granting of State aid – without prior approval by the Commission – in those areas important for the green transition. Moreover, the State aid rules on Important Projects of Common European Interest is also considered as a tool to foster green innovations (*e.g.*, projects on batteries).

2. Antitrust rules

According to DG COMP, antitrust enforcement can support the green transition, by protecting the competition that drives companies to innovate more and to operate in a more sustainable manner.

First, companies can take sustainable initiatives that do not necessarily restrict competition within the meaning of Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), like the conclusion of a joint production/purchasing agreements or standard setting.

Secondly, DG COMP will clarify how sustainability benefits can be considered to assess whether an anti-competitive agreement may be authorized under Article 101(3) TFEU. According to DG COMP, sustainability agreements could bring qualitative efficiencies (like replacing a non-sustainable product by a sustainable one) that

can outweigh the anti-competitive effects of the agreement and compensate consumers for the harm suffered. For instance, an agreement that seeks to replace plastic with wood in toys will increase the quality and the value that consumers attribute to the product.

Thirdly, DG COMP indicates that sustainability benefits from an agreement should not necessarily take the form of a direct or immediately noticeable product quality improvement or cost saving. According to DG COMP, if consumers appreciate the sustainability benefits related to the production or the distribution of a product while being ready to pay a higher price for this reason, these benefits can be taken into account in the assessment under Article 101(3) TFEU.

Fourthly, DG COMP explains that the anti-competitive effects and the benefits of an agreement should be assessed within the relevant market (“in-market” assessment). Negative and positive effects may be assessed on a distinct market provided that the group of consumers affected by the practice and the group of benefiting consumers are substantially the same. Antitrust enforcement remains thus anchored to the consumer welfare standard while allowing sustainability benefits accruing for the benefit as society as a whole to be taken into account as long as these benefits also accrue to the harmed consumers in the relevant market.

Fifthly, as Article 101(3) TFEU requires that the agreement is indispensable for the claimed benefits. The Commission considers that there may be instances where the market failure related to market power is necessary to generate sustainable benefits and competitors need therefore to cooperate. However, the Commission also considers that if consumers do value sustainable products, profit-maximizing companies are expected to offer such product without cooperating.

3. Merger control rules

There are several policy tools in merger control such as the revision of the Notice on market definition reflecting consumer preferences for sustainable products or the referral mechanism under Article 22 European Union Merger Regulation (“EUMR”) preventing green “killer acquisition”.

Moreover, the Commission already takes into account the preferences of consumers for sustainable products in the competitive assessment as a parameter of differentiation which affects closeness of competition.

The current goal of the Commission is to increase the use of these tools in its assessment.

Practical implications

Competitors should be particularly cautious when they contemplate to enter into agreements with the aim to reach sustainable and environmental goals. Their agreements should be carefully analyzed in light of the applicable legal framework to determine whether they are compliant with competition law. Specifically, economic efficiencies to the benefit of consumers should be identified. It can be particularly helpful to discuss with the competent competition authority before implementing an agreement. The EU Commission shows its willingness to extend the scope of efficiencies to environmental sustainability that can be considered to assess whether agreements between competitors are compliant with competition law. But, in the meantime, even though the wide economic and legal context should always be taken into account, a cautious approach is still needed as these sustainable benefits must accrue to the harmed consumers in the relevant market.



Laure Bersou
Counsel

laure.bersou@strelia.com



Chloé Lemenne
Trainee

chloe.leminen@strelia.com