Greener European Competition Policy takes a more definite shape

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Back in July, we published an article tackling the interplay between sustainability objectives and EU competition policy. There, we mainly focused on the "antitrust" aspect of the issue and sought to provide a comprehensive insight, particularly on the current policies of the EU Commission in pursuit of the EU Green Deal objectives. [1]

Whilst composing our article, we attempted to give space to variety of content concerning the issue from different sources. One of which was the debate launched during the forum following the conference that took place on 4 February 2021.[2] Commission Executive Vice-President Margrethe Vestager brought together a broad range of participants in the debate where they mainly addressed the question of how EU competition rules can better support environmental and climate policies. Secondly, we referred to selected contributions of a wide range of stakeholders out of 200 that were submitted as a response to the EU Commission's Call for Contributions on Competition Policy Supporting the Green

[1] https://www.lexology.com/library/detail.aspx?g=b42c9648-d51b-4584-b714-d40d043ea740
[2] https://ec.europa.eu/competition-policy/green-gazette/conference-2021_en

Deal.[3] Finally, we evaluated the stances adopted by various National Competition Authorities based upon their published guidelines and assessments on a case-by-case basis.

At this juncture, we would like to go ahead and look at recent developments in the field of EU Competition Law. Following the 25th IBA Competition Conference the Commission released a Competition Policy brief where the main takeaways of the contributions are flagged, and clear signals of policy reform are presented. [4]

Co-authored by 12 Directorate General for Competition officials, the Competition Policy Brief re-acknowledges the need to transform Europe's economy to carbon neutrality by 2050, which calls for a brand-new economic model urgently necessitating a roadmap for a modern growth strategy. While rendering the new economic model more sustainable, it should be kept as resilient and competitive as before, if not more so. Environmentally friendly policies should be put in place in a way that creates incentives for firms not only to increasingly engage in sustainable initiatives and green innovation but also to compete fiercely and fairly with each other while doing so.

Below are the key points outlined in the Competition Policy Brief encompassing all three aspects of the EU Competition policy toolbox.

A- State Aid Control

Common points raised by the contributors:

Both the contributors of the consultation and the participants at the conference held in February 2021 confirmed that competition policy plays a significant part in the pursuit of Green Deal objectives. A wide range of stakeholders underlined the need to limit access to State aid funding by fossil fuel producers. Consequently, the Commission was called upon to require increased transparency if state aid funding is to be granted to an initiative that is not contributing to the green transition. The necessity of adapting the State aid rulebook to encourage increased support for R&D&I activities was also pointed out. For many stakeholders, state aid should contribute to levelling the playfield between market participants while rewarding green, innovative, and resource-efficient companies.

Further developments on State aid rules:

Two important steps were taken by the Commission following the communication:

1- The proposal of revised guidelines on State aid for environmental protection and

[3] https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf
[4] https://ec.europa.eu/competition-policy/index/news/competition-policy-brief-12021-policy-support-europes-green-ambition-2021-09-10_en

energy ("Energy and Environmental State aid guidelines" or "EEAG"). It was indicated that the revised guidelines will be entitled Climate, Energy and Environmental State aid guidelines (CEEAG).[5]

2- The Commission also welcomed the revision of some sections of the General Block Exemption Regulation (GBER)[6].

<u>What is going to be covered under the Climate, Energy and Environmental State aid guidelines?</u>

At first glance, the new CEEAG:

- proposes guidelines for new areas and technologies that can lead the way in the green transition,
- introduces higher aid amounts, new aid instruments and various forms of support,
- discourages aid given to projects that use or produce the principal polluting fossil fuels,
- suggests a mandatory calculation of the environmental production costs,
- proposes that non-green infrastructure projects (e.g. based on natural gas) may be allowed under specific circumstances.

Authorizing non-environmental projects may undermine the ambitious objectives of the Green Deal. As underlined by many respondents, resorting to polluting (even at a lower levels) energy sources should not be considered as an option anymore as the EU strives to be carbon neutral by 2050. While it is true that natural gas is a more innocent alternative source of energy compared to fossil fuels like coal, lignite etc., and it produces lower CO2 emissions, nevertheless, burning natural gas releases methane, which is a strong greenhouse gas that leaks into the atmosphere in substantial amounts.[7]

<u>What is going to change with the revised General Block Exemption Regulation?</u>

The revised GBER is expected to complement the CEEAG and introduce provisions allowing State aid to be granted for areas important for the green transition without prior approval by the Commission. GBER and CEEAG are designed to together contribute to increasingly green and smart progress towards a zero-carbon economy.

On the State aid aspect, the policy brief also states that the rules on Important Projects of Common European Interest (IPCEI) are currently under revision. The revised IPCEI envisaged will put the "Do No Significant Harm" principle at the centre of

[5] https://ec.europa.eu/competition-policy/system/files/2021-06/CEEAG_Draft_communication_EN.pdf
[6] https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_3805
[7] S. Bilgen, Structure and environmental impact of global energy consumption, 2014

investments by market players including SMEs. The revised rules endeavour to stimulate robust innovation and development of new technologies and production processes in various areas of the economy.

B- Antitrust

Common points raised by the contributors:

In terms of antitrust, contributors in general raised concerns regarding the *lack of clarity* on the application of antitrust rules to sustainability agreements. This lack allegedly precludes businesses from engaging in environmentally friendly and sustainable collaborations or initiatives. Many underlined the need for forms of assessment to be applied to different kinds of cooperation agreements to allow the businesses to reach an interim idea of whether a particular agreement is likely to be found compatible with the competition rules or not. Some emphasised that the Commission should adopt a more flexible assessment under Art 101(3) TFEU, broadening the scope of "benefits reaped by the consumers". In this respect, opinions were also put forward regarding the risks of accommodating "out-of-market" benefits. The Commission is urged to embrace an open-door policy allowing undertakings to raise their concerns and to introduce regulatory sandboxes.

Overall, the majority was in favour of both the adoption of general guidelines and the possibility of case-driven guidance (i.e in the form of comfort letters).

Further developments on Antitrust:

9 July 2021 marked the date of the Commission's proposals for a revised Vertical Block Exemption Regulation (VBER) and Draft Vertical Guidelines following a consultation period. The proposals aimed at revising current rules in specific areas where the evaluation pointed to a lack of clarity or the existence of gaps, or where the current rules are no longer suited to market realities.[8]

Furthermore, as the two Horizontal Block Exemption Regulations (HBERs) will expire on 31 December 2022, they are currently under the Commission's review. On this point, Executive Vice-President Margrethe Vestager, referring to the evaluation phase of Commission's review, stated "*the evaluation has identified several areas where the rules are not sufficiently adapted to digitisation and the pursuit of sustainability goals. The Commission will now reflect on how to revise these rules in order to ensure that they remain fit for purpose.*"[9]

As agriculture and rural areas are central to the European Green Deal, the Commission attributes

[8] https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3561
[9] https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2094 , https://ec.europa.eu/competition-policy/public-consultations/2019-hbers_en

particular importance to the sustainability initiatives in the agricultural sector. The new Common Agricultural Policy (CAP) covering the period of 2023-2027 aims to foster a sustainable and competitive agricultural sector through a newly adopted provision in the common Market Organization regulation.[10] The provision suggests that Art 101 shall not be applicable to sustainability agreements between market players in the food value chain aimed at the achievement of sustainability benefits going beyond what is required by law.

Envisaged Policy Reforms to be taken by the Commission:

The Commission further acknowledges the need for more guidance and clarity. It concludes that its guidelines on horizontal and vertical agreements shall be revised in a way enabling self-assessment. Further assurance shall be provided to companies that approach the Commission with their targeted initiatives.

The Commission emphasizes that the sustainability benefits shall be deemed qualitative efficiencies under Art 101(3). This clarification, however, does not go beyond the scope of the 2004 Guidelines. Acknowledging that environmental or sustainability benefits are a form of qualitative efficiency raises the further question of to what extent public interest objectives can be assessed under Art 101(3). The Commission is yet to come up with an assessment method for efficiencies concerning public interests.

Answering a key question in the discussion, the Commission states that sustainability benefits no longer need to take the form of a clear improvement of product quality or lead to cost saving. Here, the Commission places emphasis on consumers' willingness to pay a higher price for a greener product as opposed to its cheaper but polluting alternative. One should be mindful that there is still room for further clarity for the cases where consumers prefer to purchase budget-friendly but non-green products. It must be borne in mind that it might not be possible to render a specific product more sustainable without increasing its cost. If the "consumers' willingness to pay" principle still prevails under such scenario, the market is at risk of remaining substantially restricted to the sustainable alternatives of only certain products.

To ensure that the consumer welfare standard is preserved, the Commission underlines the fact that *out-of-market efficiencies* can be considered only if the group of consumers affected by the restriction is the same as the group of consumers reaping the benefits.

C- Merger Control

[10] https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/new-cap-2023-27_en

Common points raised by the contributors:

A large majority of the respondents found that the European Merger Regulation (EUMR) and its enforcement effectively supports the Green Deal objectives. The Commission, nevertheless, was called upon to pursue innovation theories of harm to prevent merged smaller businesses ceasing their green innovations. It is a fact that green innovations in general are carried out by smaller companies. Thus, the risk of loss of green innovation must be eliminated through merger control when a company with a strong market position that is not engaged in sustainable business strategies merges with a small firm active in green innovation.

The Commission's Response to Discussions:

The Commission refers to previous cases such as *M. 7932 Dow/Dupont*[11] to prove its practices already in place enforcing innovation theories of harm. On the other hand, it is acknowledged that the current legal framework does not enable the Commission to intervene in mergers with potential to harm the environment if there are no further causes for intervention. Here, even though the current framework ensures that the merging parties must state the expected efficiencies from the merger (e.g benefitting consumers), there seems to be a need for further scrutiny by the Commission for mergers that may result in harming the environment or lead to the emergence of unsustainable business practices.

Conclusion

European competition enforcement is undergoing a lively transformation which puts sustainability at the heart of competition law assessments. This transformation was led by the Dutch Competition Authority (ACM)[12] and followed by several other EU Member States' National Competition Authorities (please see our former article for a broader understanding on the issue)[13]. Furthermore, the recently amended Austrian Cartel Act, explicitly including sustainability criteria in Austrian antitrust law for the very first time, entered into force on 10 September 2021.[14] In this changing scenario, the Commission preserves its stance anchoring consumer welfare standard in all three areas of the competition policy. The policy brief illustrates a firm stance taken by the Commission in the perspective of softening its enforcement approach. This is in line with Executive Vice-President Vestager's words at the 25th IBA Competition Conference: *"One of the main messages from our consultation and the conference*

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[11] https://ec.europa.eu/competition/mergers/cases/decisions/m7932_13668_3.pdf
[12] https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements
[13] https://www.lexology.com/library/detail.aspx?g=b42c9648-d51b-4584-b714-d40d043ea740
[14] Federal Act amending the Cartel Act 2005 and the Competition Act (Cartel and Competition Amendment Act 2021 - KaWeRäg 2021, BGBl I 176/2021)

was the need to support the green transition by enforcing our rules more vigorously than ever."

The key takeaways of the policy brief appear to be an expected revision of the two Horizontal Block Exemption Regulations (HBERs); a revised Vertical Block Exemption Regulation (VBER) and Draft Vertical Guidelines; an amended version of the IPCEI rules as a result of their ongoing revision, the proposed Climate, Energy and Environment Aid Guidelines (CEEAG); and, finally, further guidelines on the application of Art 101 TFEU to sustainability agreements, together with the possibility of seeking individual guidance letters on a case-by-case basis for sustainable initiatives.

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