BUSINESSEUROPE

POSITION PAPER

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Competition Policy supporting the Green Deal
Commission Call for Contributions

Introduction

BUSINESSEUROPE is committed to making the Green Deal a success. Reaching climate neutrality by around mid-century will require huge transformative investments by both the public and private sectors. European businesses should be supported in their transformation towards climate neutrality, sustainable growth, job creation and prosperity and competition policy has an important role to play in achieving this.

Competition policy should ensure that effective competition between companies exists. As such it contributes to efficient markets, investments, and innovation, also to develop market-based sustainable solutions and technologies to reach Green Deal objectives. Competition is the driving force of achieving results also when it comes to sustainability and the environment considering that companies' primary driving force is to be competitive and achieve results in the most efficient manner. As such, competition policy complements specific legislative actions to reach Green Deal objectives and it is important that the Commission plays a leading role in this debate engaging with other national and international authorities to ensure a consistent approach across the EU, and globally.

The existing legislative framework regarding competition and the existing body of case law and practice, give the Commission significant discretion to protect effective competition in markets and ensure efficiency and innovation allowing companies to reach Green Deal objectives. However, there is a need for more guidance and clarity to encourage companies to collaborate in certain situations and pursue environmental and sustainability objectives.

As regards EU State aid policy, it should support good aid, such as aid to reach Green Deal objectives, while fundamentally safeguarding a market driven European economy. The State aid rules give the Member States considerable opportunity to support projects that contribute to the Green Deal but the relevant rules and frameworks can be improved to reduce administrative burdens and encourage investment in sustainable projects whilst ensuring that any distortive effects of the subsidies are limited.

Hereunder, we set out these points in more detail.

Antitrust rules

EU antitrust rules are fundamental for ensuring effective competition between companies, protecting consumers and contributing to job creation, growth and investment. They also ensure that companies that are investing in sustainable technologies and innovation can expect to reap the benefits thereof without fear of being unfairly crowded out by cartels or dominant companies abusing their position.

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EU antitrust rules allow companies to contribute to the Green Deal by joining efforts to go beyond binding standards and conclude agreements to pursue sustainability objectives when this is justified, for example in cases where cooperation is a better model than competition, typically when projects are very big in scope, requiring different kind of competences and skills, possibly from different sectors, or where cooperation is necessary to achieve sustainability goals.

However, there is a real risk that companies will refrain from cooperating in such cases if they have undue fear that they could be infringing competition rules considering that normally it will be for the parties themselves to assess whether collaboration is compatible with competition laws. To avoid such legal uncertainty - and a potential underinvestment in a sustainable project - the Commission should give clear and detailed guidance, including examples, when, and under what conditions, cooperation for sustainability reasons is acceptable.

In its submission to the evaluation of the rules on horizontal cooperation, BUSINESSEUROPE stated that EU rules on horizonal cooperation should encourage companies to collaborate to carry out joint technology development or achieve objectives of other EU policies (e.g. environmental and sustainability objectives). Existing policy should improve and provide more legal certainty for companies that want to develop new projects. This might be done for example through guidance letters, "no infringement" decisions, or clearer criteria in the Horizontal Block Exemption Regulations and the Guidelines on Horizontal Cooperation, standalone guidelines, or new Block Exemption Regulations. By jointly investing in sustainable solutions, businesses can contribute to the green transition. More clarity and opportunities for companies to make sustainability agreements, bearing in mind the principles of proportionality and subsidiarity, lightens the burden of the *first mover disadvantage* and thus makes accomplishing climate goals easier for companies and therewith for the EU as a whole.

The Commission should clarify and broaden which types of cooperation for environmental or sustainability reasons are permitted and how these should be assessed under the current competition law framework including indication of the circumstances in which sustainability projects will likely fall outside the scope of Article 101(1) TFEU, rather than defaulting to a detailed Article 101(3) analysis. In particular, the assessment of sustainability agreements under Article 101(3) should build on, and develop existing precedent that acknowledges that the harm caused to competition should be weighed against the benefits, including environmental benefits, brought to the wider society and move away from a narrow assessment that only takes account of the benefits that accrue specifically to consumers in the market where the co-operation is taking place. This approach to Article 101(3) is necessary under the Treaty in light of the environmental obligations therein.

The guidance should indicate what qualitative criteria will be relevant under this assessment, for example, it should include taking account of the benefit of doing something now/more promptly than would otherwise be the case. There should be clear explanations on methodology (i.e. what are companies expected to demonstrate and with what methods or standards should companies substantiate sustainability claims). Such methods should be reasonably easy to apply and not impose heavy burdens on companies that would make the sustainability agreement in practice too uncertain and unattractive to enter into.

In addition, the Commission and national competition authorities should be willing to provide specific guidance regarding concrete projects to companies if they so wish. Companies need clarity and legal certainty to pursue sustainable initiatives given that often such projects involve significant investments.

Pro-active guidance is also important, to inform and clarify the rules and to reach out to companies that are not already engaged in or actively planning some kind of cooperation effort or companies that have not yet thought of this as an alternative to engaging in projects that might be too big for them to take on individually but where they can play a small but important role in a bigger cluster of companies acting together.

EU competition policy should also encourage temporary collaboration between companies (consortia) to make more effective bids for contracts to reach Green Deal objectives. Such consortia of companies would be eligible for tender, enabling it to bid for the larger contracts that have become more and more the normal situation. Consortia have many advantages in big contracts because they can increase their economic and financial standing and minimise the risk whilst combining and complementing their technical and professional expertise. Current strict competition law enforcement in some Member States can discourage such collaboration between companies because of the legal uncertainty and risk of breaching the rules. This could lead to fewer bids and/or less competitive bids or even to single bids in a tender procedure. Therefore, the Commission should provide more clarity on how companies can enter into a consortium and engage in joint bidding to compete more effectively without falling foul of competition rules, and especially on when joint bidding agreements are to be analysed on the basis of their effects and under what circumstances, if any, such agreements may be considered as by object restrictions.

Lastly, the Commission and national competition authorities should consider granting immunity from fines when the undertakings concerned have followed the guidance in good faith. This will provide an extra level of comfort.

Merger policy

BUSINESSEUROPE firmly believes that EU merger control should assess the effects on competition of a merger or acquisition regardless of the sustainability effects of the concentration or acquisition. In this context, the fundamentals of the Commission Notice on the definition of relevant market for the purposes of Community competition law are still valid, as we stated in our position paper on the evaluation of the Notice. The relevant perspective should be that of the consumer and the fundamental question to be posed should be what products consumers consider as substitutes and testing this by assessing what happens when prices change.

BUSINESSEUROPE also does not favour any changes to the thresholds for mergers or acquisitions with a potential harmful impact on the environment. Current thresholds are relatively simple and predictable and should be maintained. An expansion of EU merger control would cause disproportionate burdens. The number of cases to be reviewed by the Commission and requests for guidance on filing requirements would increase, increasing the workload of the Commission as well. Simple turnover thresholds should be retained as any other thresholds (e.g. based on transaction value or market shares) are unclear leading to uncertainty. Objectively determinable thresholds are essential for parties to a concentration to establish whether the transaction triggers merger filing requirements and minimise case-by-case consultations and disputes.

EU merger control, even regarding simpler transactions, generally places significant procedural burdens on companies and is too formalistic and costly for the merging parties, as well as for third parties, competitors or customers of the merging parties. In view of the very large number of cases which are cleared by the Commission, EU merger control should be streamlined, e.g. by lifting the pre-notification requirement in simple cases, introducing time limits for pre-notification procedures in other cases, gradually abolishing the Form CO and replacing it with a more flexible approach led by the actual needs of the individual case but without compromising legal certainty. This would encourage mergers and acquisitions that would lead to more innovation, for example to reach Green Deal objectives.

As regards the definition of markets, it is also important to realise that in situations where markets are rapidly evolving, for example in the case of certain green technologies, that dominance is often temporary. In such cases, the Commission should adopt a dynamic analysis and long-term view of the markets when appraising the existence of competitive pressure. In rapidly evolving markets, entry can be easy and quick so the Commission should take potential competition into account when defining the relevant market.

State aid

EU State aid rules should support good aid, such as aid to reach Green Deal objectives, whilst fundamentally safeguarding a market driven European economy. The State aid rules give the Member States considerable opportunity to support projects that contribute to the Green Deal and it is important that any distortive effects of the subsidies are limited.

Overall, the Energy and Environmental Aid Guidelines have promoted coherence and clarity at EU level. The amount of granted aid in the energy and environmental field has risen over the last years, often in the form of tax reductions or exemptions. This is at least partly due to more ambitious targets in this area. Existing exemptions in the Guidelines relating to environmental taxes, energy taxation, and the funding of support for energy from renewable sources, but also from cost pass-through of renewable technologies, should be preserved – and strengthened - to provide the right framework for European companies, especially energy intensive ones, to remain competitive vis-à-vis their main global competitors.

The green transition requires deployment of new technologies, building low-carbon production facilities, roll-out of decarbonisation technologies etc. which will require increased investments and additional costs for industries in Europe. This situation justifies higher aid intensities and increased amounts of State aid for green transition projects than the current rules allow for. EU industry which competes globally will not be able to bear all of the costs related to transition to the Green Deal, particularly not in the absence of a global level playing field when it comes to climate change obligations and subsidy control in specific.

The State aid rules, therefore, need to be revised to reflect this global reality by a) increasing support to “green projects” and b) defining European industries’ global competitiveness as an objective of common interests. This can be achieved by removing or reducing regulatory costs not borne by competing industries world-wide. Such costs would hamper European industry’s ability to invest in green technologies and de facto increase carbon leakage.

The new Energy and Environmental Aid Guidelines should allow for additional reduction from the future extra costs resulting from financing the EU Green Deal and the higher climate ambition. These costs include for instance direct funding support for additional infrastructure, storage that enables the targeted renewable electricity uptake in the power mix. Further, reductions in capacity mechanisms surcharges, system balancing costs and extra network investments should also be allowed.

We also regret that the current rules only allow support for capital expenditures (capex) and not for operating expenditures (opex). Introducing new green solutions and technologies in the market often requires continuous support necessary to bridge the so called "valley of death" for new undertakings.

Also, considering that the cost of renewable energy technologies has lowered recently in relation to Member States' choices regarding the renewable support schemes architecture, the Guidelines must ensure that these reductions are reflected in the maximum aid allowed. Designed schemes can be a barrier to a more cost-effective competitive deployment of solutions, such as renewables. The EU should therefore provide guidance on how well-designed national policies should work and monitor the implementation of such guidance. This guidance should also ensure that the Commission does not exceed its powers providing legal certainty and trust in investment protection.

Environmental agreements between industrial organisations and the governments within the framework of the Energy and Environmental Aid Guidelines could be important measures to help achieve the goals of the Green Deal. These agreements encourage and inspire companies to go green by adapting measures that help them to stay competitive. The Commission should address this more actively both within and outside the State aid framework. Alternative approaches to fulfilling the goals of new relevant legislation following the Green Deal should be explored.

Improving financing for research, development and innovation (RDI) and ensuring that innovative ideas can be turned into products and services that create growth and jobs are also crucial to strengthening Europe's competitiveness and achieving the Green Deal objectives. It is therefore important that any EU funding, centrally managed by the Commission, either directly or indirectly, and not subject to any discretion by Member States, does not qualify as State resources and hence not constitute State aid, and that the relevant State aid rules are consistent with the different instruments. One of the biggest shortcomings of the RDI Framework is the fact that the global dimension is not getting enough attention. In general, countries outside the EU do not have comparable constraints on RDI support and the Commission should address this more actively.

In this context, it should also be considered to relax State aid rules for the incubation of new markets and businesses provided support is limited to address a market failure to avoid that the State acts as a private investor. When it comes to the generation of new markets through the introduction of radically new products and offerings, applicable State aid rules should make it possible to help companies assume early market leadership. Governments should be allowed to help companies in such emerging fields to overcome the so-called "valley of death".

Regarding the incentive effect, in practice it is very difficult to prove that aid for RDI induces a company to pursue research that it would not otherwise have pursued. The investment decision of an R&D project is based on multiple factors that can hardly be distinguished from each other. The subsidy alone often does not lead to a decision to invest, but reduces risks, speeds-up the process, stimulates collaboration with other companies etc. Fulfilling this requirement can be extremely difficult and burdensome for companies and Member States, for example when multiple R&D project run simultaneously or the firm's contribution to a single project is relatively small compared to the firm's overall R&D budget. There should thus be less strict criteria on evidence related to the requirement that certain RDI activities are carried out in addition to normal day-to-day operations, also in view of the fact that competitors located outside the EU do not suffer from comparable constraints. Lastly, it is important that the clearance procedure is sufficiently speedy as this directly affects the time-to-market of research and innovation efforts.

In this context, the Commission could consider creating a "Green Bonus" to raise maximum State aid intensities or introduce more flexibility on the maximum aid intensity thresholds where the aided project contributes directly to the achievement of the Green deal objectives. For example, a bonus of X (+10%) for R&D&I for all industrial sectors when the research is targeted at the development of technologies enabling the achievement of Green Deal objectives or favouring the digital transition of the sector. The Commission could also widen the eligible cost base (full costs including indirect costs) in order to better reflect the real costs incurred by the companies when the project contributes directly to the achievement of Green deal objectives or allow for a more favourable treatment of levels of research/maturity closer to the market (new definition to include within the scope of the Framework the first industrial deployments, pre-commercial or non-marketable prototypes). Another suggestion could be relaxation of the conditions for triggering the 15% bonus for the collaborative project (possibly work on the notion of SME (group ownership) and/or the condition relating to collaboration).

More should be done to encourage public investment in large research and innovation projects of common European interests (IPCEI) that contribute to the Green Deal objectives and also growth, jobs and EU global competitiveness, while fundamentally safeguarding a market and company driven European economy. This is not about "picking winners" but about filling the funding gap and correcting a market failure because the high risks involved with such projects daunt private investors.

Administrative burdens should be reduced and decision-making speeded-up. For example, requiring a comprehensive description of a counterfactual scenario which corresponds to the situation where no aid is awarded (point 29 of the Communication) is unduly burdensome. Procedures required to activate the instrument should also be simplified. Although the Commission expects to maintain control over all individual funding from Member States participating in the Common European Project (as this funding is admitted to a greater extent than the ordinary State aid limits), one single notification procedure should be required so all subsequent public funding should be considered as automatically eligible once the Common Project has been approved as a whole whilst the Member States are responsible for all the State aid that will be granted on this basis. It is also crucial to shorten the timing of the approval procedures, making them faster, especially in fields where innovation cycles are very short.

Although the Commission will take a more favourable approach if the project involves co-financing by a Union fund (see section 3.2.2 letter f of the IPCEI Communication), it is necessary that the combination of the various types of available financing is fostered through greater alignment of rules and procedures to support the project not only through national resources, but also through funding by European Institutions (Commission, EIB, etc.), both directly managed (such as, for example, those of Horizon Europe) and indirectly (such as those of the structural funds).

Lastly, in order to increase the interest of enterprises in projects that contribute to the Green Deal objectives, it is also essential to strike a balance between the requirements relating to the search for a spill over effect, the dissemination of the results of the research established by the Commission as conditions of compatibility of the IPCEI, and the preservation of the interest of the project from an industrial and economic point of view (in particular the protection of intellectual property rights). Such conditions may hinder the development of disruptive technological solutions in the fight against climate change. It is also necessary to clarify the legal framework applicable to cooperation between companies within the framework of an IPCEI regarding antitrust and merger control.

EU Taxonomy

At this stage, the added value of using EU Taxonomy as a reference for State aid to define positive environmental benefits is highly questionable. The EU Taxonomy has the potential to become a relevant classification tool for projects and technologies that are high performers within the sectors that are covered. However, the taxonomy is still very much under development. For instance, draft technical screening criteria for climate objectives are focused on some sectors, and only target certain sectoral activities that are within the Taxonomy sectors' scope. Furthermore, these criteria will only become applicable as from 2022 and will be further complemented by technical screening criteria for environmental objectives 3-6 that will only be proposed at the end of next year and become applicable as from 2023.

Therefore, to restrict the definition of positive environmental benefits to EU taxonomy for State aid is far too premature and risks not reaching the intended effects (i.e. supporting the transition of the economy).

The taxonomy can, in principle, play a role in the context of public spending but only if the technical criteria are sound and follow an inclusive approach that does not lead to the exclusion of sectors and technologies that have a crucial role to play in the transition. For these reasons, only once the framework and the criteria are finalised and some experience on the impact on capital markets has been drawn, we believe that it will be relevant to consider whether there is a role for the Taxonomy to play for public spending.

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