

EU Commission Call for Contributions on “Competition Policy Supporting the Green Deal”

October 19, 2020

On October 13, 2020, the European Commission published a call for contributions to determine if and how EU competition policy can better support the European Green Deal.

The European Green Deal is a comprehensive action plan aimed at making Europe the world’s first climate neutral continent by 2050.¹ On September 22, 2020, Mrs. Vestager explained that “[t]o succeed, everyone in Europe will have to play their part – every individual, every business, every public authority. And that includes competition enforcers.”²

The Commission encourages companies from all business sectors to provide examples of sustainability initiatives they are pursuing, or would like to pursue. The deadline is November 20, 2020. The goal is to harmonize competition policy EEA-wide.

Scope of the discussion

While acknowledging that competition policy cannot replace environmental laws and regulation, or green investments, this call for contributions aims at understanding how EU competition law can complement the proposed EU Climate Law and extended emissions trading scheme.

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For more information on the European Green Deal, please visit our [dedicated webpage](#).

¹ See the Commission’s press release of December 11, 2019, “[The European Green Deal sets out how to make Europe the first climate-neutral continent by 2050, boosting the economy, improving people’s health and quality of life, caring for nature, and leaving no one behind](#)”. The Commission also published a dedicated page on “[A European Green Deal](#)”.

² See M. Vestager’s speech of September 22, 2020, “[The Green Deal and Competition Policy](#)”.



Contributions are expected to cover all areas of competition policy:³

- **State aid.** The Commission asks whether, in the context of the upcoming consultation on the revision of State aid rules, sustainable objectives should be better taken into account. In particular, stakeholders are expected to discuss whether to amend the Guidelines on State aid for environmental protection and energy to limit or ban aid for activities with negative environmental impact and/or enhancing State aid for environmentally beneficial projects (like the so-called “green bonus” for projects that genuinely contribute to sustainable development).
- **Antitrust.** The Commission asks whether specific guidelines and/or treatment should apply to horizontal and vertical agreements between undertakings pursuing the Green Deal objectives. The comments the Commission received on the consultation on the Guidelines for Horizontal Agreements indicate a demand for better and more permissive guidance on sustainability agreements.⁴ The Commission does not explicitly call for comments on abuse of dominance rules, but does not exclude comments this area either.
- **Merger control.** The Commission calls for suggestions as to how merger control rules can better contribute to protecting the sustainability objectives of the Green Deal.

The rising debate on sustainability and competition policy

A key question in this debate is whether competition rules should be applied in a way that takes into account

market failures and environmental price externalities, *i.e.*, environmental and climate change-related costs which are not reflected in market prices, but borne by the society as a whole.⁵

In merger control, this might lead the Commission to consider, for instance, that a positive environmental impact of a concentration, such as decreased carbon emissions or lower pollution, could constitute an efficiency, and could be taken into account as an element equivalent to a price reduction or quality improvement.

Regarding antitrust, the debate will likely focus on whether it is appropriate to facilitate coordination between undertakings on environmental issues, in particular by applying the principles underpinning the *Albany* and *Wouters* cases,⁶ or allowing the exemption under Article 101(3) TFEU of certain anticompetitive agreements that bring significant environmental benefits.

The Commission’s call for comments follows discussions initiated by several national competition authorities in Europe. In May 2020, the French competition authority joined other French regulators in an attempt to coordinate policies to combat climate change.⁷ On July 9, 2020, the Netherlands Authority for Consumers and Markets (ACM) published draft sustainability guidelines containing a proposed approach for assessing the compatibility of sustainability initiatives with competition law.⁸ On September 17, 2020, the Hellenic Competition Commission launched a dialogue on how to assess business practices taking into account their impact on the environment, with a staff discussion paper on

³ See the call for contributions’ supporting document “Competition Policy Supporting the Green Deal – [Call for Contributions](#)”.

⁴ See [Factual summary](#) of the contributions received during the public consultation on the evaluation of the two block exemption regulations and the guidelines on horizontal cooperation agreements, 2020.

⁵ See « [Sustainable Competition Policy](#) », M. Dolmans, CLPD Competition Law and Policy Debate Vol 5, Issue 4 and Vol 6 issue 1, March 2020, pp. 5-6.

⁶ Case C-67/96, Judgment of the Court of 21 September 1999, *Albany*, ECLI:EU:C:1999:430; Case C-309/99, *Wouters*, Judgment of the Court of 19 February 2002, ECLI:EU:C:2002:98.

⁷ See [Accord De Paris Et Urgence Climatique: Enjeux De Régulation](#), May 2020.

⁸ See the Dutch Competition Authority’s [press release](#) of September 22, 2020, “ACM publishes for consultation its draft guidelines regarding sustainability claims”. See ACM [draft Guidelines](#) “Sustainability Agreements – Opportunities within Competition Law,” of July 9, 2020.

sustainability issues and competition law.⁹ On October 1, 2020, the German *Bundeskartellamt* held a meeting on the theme “Open markets and sustainable economic activity”, notably discussing how to take greater account of sustainability aspects in competition analysis,¹⁰ and published a somewhat conservative working paper.¹¹ The UK CMA has indicated that it will “*aim to support businesses in adapting to climate change while ensuring that markets remain competitive and open to disruptive innovation.*”¹²

Conclusion

This call for contributions takes place in the broader context of the ambitious reform of competition law initiated by the European Commission (including the so-called New Competition Tool and the Digital Services Act package which aim at addressing the challenges of the digital economy, as well as the proposed new instrument to deal with distortive effects of foreign subsidies). It raises the essential question of whether harm to the climate or the environment should be included in the notion of “consumer welfare” that drives competition law enforcement. It also questions the perceived limits of competition policy and the opportunity of assigning new objectives to antitrust rules.

The deadline for sending contributions will expire on November 20, 2020. The Commission has already announced that a conference will take place in early 2021 to bring together the different perspectives on this important topic.

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⁹ See the Greek Authority’s [press release](#) of September 17, 2020 and the Staff Discussion Paper. The video of the debate can be viewed [here](#).

¹⁰ See the *Bundeskartellamt*’s [press release](#) of October 5, 2020.

¹¹ [Offene Märkte und nachhaltiges Wirtschaften – Gemeinwohlziele als Herausforderung für die Kartellrechtspraxis](#).

¹² CMA [Annual Plan](#) consultation 2020/21.