

Competition contributing to the European Green Deal – EuroCommerce contribution to the debate

EuroCommerce supports the direction set in the European Green Deal. Retailers and wholesalers understand that challenges are significant and are in many ways pioneering by providing consumers with sustainable choices at an affordable price, and developing sustainable business practices, such as recyclable packaging¹, CO2 neutral stores and investing in electrical delivery fleets. They do however also face challenges in driving this transition in a sector with high fixed costs and low margins and realise that the challenge is such that they need to cooperate with peers, suppliers and other stakeholders to have a real impact.

Companies need legal certainty, clear incentives, and scale to invest in a fundamental business transformation with a long payback such as those needed under the Green Deal. They need public support to facilitate the transition and invest in new technology, to support investment in infrastructure and to promote research in greener technologies.

Competition policy is already supporting the green transition, by helping to achieve effective and competitive outcomes for consumers and by ensuring that companies compete on sustainability aspects. Nevertheless, there is scope for more clarity to allow further cooperation with peers and supply chain partners, help address the first mover disadvantage, facilitate the transition in a competitive environment and offer consumers a wider choice of sustainable options. We thank the Commission for the opportunity to comment on how competition policy can support sustainability efforts in the most effective way.

Our response focuses first on questions relative to antitrust rules. We will then comment on the other aspects of the consultation, namely state aid control and mergers.

Antitrust rules

Antitrust rules play an important role in contributing to the Green Deal objectives. Promoting competition remains the best way to ensure that companies have incentives to increase efficiencies, innovate and benefit consumers. Anti-trust rules already provide conditions for cooperation under the existing Horizontal Guidelines and the Block Exemption Regulations but clearer and more targeted guidance on sustainability objectives can help promote and incentivise further cooperation between stakeholders and help further promote sustainability solutions.

Retailers and wholesalers fully support the green transition. They already contribute with many initiatives but oftentimes need to collaborate with other retailers and wholesalers as well as their suppliers to make an effective contribution. Cooperation can also be necessary due to the large scale of sustainability investments that are needed or because national governments require retailers and wholesalers to take joint action. In each of these cases, lack of legal certainty on how to cooperate compliantly can quickly become a real obstacle. The Chicken of Tomorrow initiative in the Netherlands is a case in point.

In other cases, such as the Initiative Tierwohl and the joint initiative on plastic bags in Germany, uncertainty has been overcome and the initiatives are already having a positive impact. It is worth investigating how further guidance can help limit red tape and bureaucracy around such sustainability initiatives.

¹ <https://circulareconomy.europa.eu/platform/en/news-and-events/all-events/eu-circular-talks-packaging-retail-sector>

Ensuring more legal clarity regarding sustainability cooperation can help companies overcome the “first mover disadvantage” that they are currently facing, and which slows down the needed investments in and development of new sustainable solutions.

Today, sustainability is only covered explicitly in the context of standardization agreements as part of the Horizontal Guidelines. Companies should be able to establish codes of conduct, common standards or non-binding labels (e.g. regarding manufacturing methods or raw materials) supporting Green Deal objectives, as long as development of such standards/codes/labels are transparent, and they are open to all parties who meet objective criteria. The Horizontal Guidelines underline the importance of standardization agreements to be open, voluntary and avoid foreclosure of competition and that access to the standards should be based on fair, reasonable and non-discriminatory terms. The existing guidance is helpful but might not be sufficient alone.

Sustainability cooperation between competitors can and should however go beyond standardization agreements and retail and wholesale would benefit greatly from further guidance on how to perform case-by-case competition assessments in the context of sustainability cooperation. The report from the Nordic Competition Authorities on Competition Policy and Green Growth² recognizes that “*certain information exchanges amongst competitors may either be necessary or practical in order to achieve environmental beneficial outcomes*”. The Commission should ensure legal certainty to avoid situations like the detergent cartel³ where the original purpose of the cooperation was green (the reduction of packaging and waste), but the implementation led to sanctions for price fixing. The Dutch Competition Authority’s recent guidance⁴ in this area is a first attempt, but it has also led to further questions. Furthermore, we would like to point to the Bundeskartellamt’s background document on the topic, which provides a helpful overview of relevant methodologies and existing case law⁵.

We recommend that sustainability benefits are explicitly included as potential efficiency gains under article 101(3), as a parameter of competition equal to lower prices, higher quality or better service and that the following aspects are clarified:

- provide a methodology/guidance on how to measure consumer benefits in relation to sustainability as well as on how to measure the difference with other competing products (e.g. eco-design, choice of material, lifecycle assessments etc.) to help address risks of green washing;
- how to consider future consumer benefits and future sustainability burdens in competitive assessments, how to demonstrate that a “fair share” of the benefits are going to consumers, and to what extent benefits to other citizens than consumers can be taken into account.

In concrete terms, further clarification would be helpful on the extent to which companies acting on the same level can:

- develop joint initiatives, such as joint awareness campaigns, to promote more sustainable products towards their customers;
- cooperate on the eco-design of products, e.g. as joint Research and Development activity;
- exchange information on the choice of materials without developing products together;
- develop together innovative and more sustainable components/input material (such material could be made available to other competitors in their choice of material for finished products);
- share data to establish the environmental performance of input materials;
- define common criteria for their supplier panels to improve sustainability performance -e.g. by establishing restrictive lists of chemical substances that can be used by common suppliers.

Where a sustainability agreement restricts competition, it should be considered whether and how the residual competition criteria can be fulfilled through competition on other factors. We believe that cooperation on sustainability elements by a majority of retailers does not necessarily mean that residual competition is being reduced, as long as competition on other elements such as price or quality continue to take place. Eliminating competition on sustainability factors (such as setting a common minimum standard higher than the legal requirement in a certain area) should hence not in

² <https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/competition-policy-and-green-growth.pdf>

³ Case 39579 Consumer detergents

⁴ <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf>

⁵ https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrec ht_2020_Hintergrundpapier.pdf?__blob=publicationFile&v=2

itself be enough to outlaw the cooperation, as long as the cooperating companies continue to compete on other factors such as price or quality. Further guidance on how to make this case-by-case assessment would be welcomed. In particular, it would be helpful if such guidance could specify on which elements companies need to be able to compete on in order to ensure sufficient residual competition.

We see dedicated policy guidance as an appropriate way forward to establish legal clarity for all based on common definitions and creating common understanding of what is “sustainable” to avoid cases of green washing. In addition to this, we would also suggest the Commission to consider making it possible for cooperating companies to get a waiver for their sustainability cooperation in the form of comfort letters. These waivers are available in some member states already and provide the companies with much needed legal certainty.

We are at this point not convinced that it is necessary to outline specific objectives under the Green Deal that would warrant special treatments (question 3). Carving out certain areas would increase the risk of cartelisation and could reduce competitive pressure towards developing new sustainable solutions in those areas. In our opinion, clarifying existing rules as described above and providing individual comfort would be sufficient to give companies the legal certainty needed to contribute to the Green Deal in the areas, they see most fit for them.

We would also ask the Commission to ensure consistency between its policy proposals. In particular, we would encourage the Commission to assess the impact of regulating certain practices as part of the Digital Markets Act (DMA) on the environment. We would ask the Commission to avoid a disconnect between the Green Deal and the DMA, in the same way as the GDPR unintentionally restricts data access remedies under other regulations or competition law. For instance, the DMA should not prevent a company from using its own logistics services where this practice is more efficient and sustainable, or from applying nudging techniques to guide consumers towards more sustainable products.

State aid control

We are of the opinion that the Commission’s state aid rules are fundamentally sound, and we wish to underline the importance of maintaining an assessment based on balancing negative effects on trade and competition in the Single Market with positive contribution to a well-defined objective of common interest (i.e. Green Deal objectives). In this context, we also see room for clarifying, in the criteria for evaluating state aid, how state aid should be subject to a sustainability assessment based on the Green Deal objectives.

We agree that the criteria for state aid control remain sound. State aid should continue to be proportionate and its distortive effect on trade between Member States sufficiently limited, even if it is aimed at fostering Green Deal objectives.

We support using state aid and in particular the recovery funds to overcome market failures and help direct investments to achieve the goals of the Green Deal. In this respect, we call for the recovery plan to support investment aimed at facilitating the green transition in retail and wholesale in areas such as cleaner technology and infrastructure for deliveries; infrastructure for waste collection, sorting, and recycling; research and technology; renovation of buildings incl. green energy for buildings; reducing chemical inputs; as well as training of employees to understand sustainability challenges and technology (green skills).

We would however be reluctant towards any relaxation of state aid control in the form of “green bonuses” to achieve this, if such a bonus opens the door to disproportionate state aid and were to crowd out private investments. To limit these negative effects, it would be important to clearly and narrowly define which “positive environmental effects” would merit any green bonus. As suggested in question 4 the EU taxonomy could be a starting point for developing such limited criteria.

Merger control

EuroCommerce generally find the European Commission merger control policies and market definition methodology fit for purpose even though some adaptation are needed to take into account how

businesses are increasingly becoming omnichannel, selling online and offline, and the emergence of new business models⁶.

In the context of sustainability there could be room for making it more explicit how the effect of a merger on competition relating to sustainability as well as sustainable innovations available to the consumers is assessed (question 1). However, the competition assessment needs to continue to be based on sound economic evidence, and we see no need for specific rules regarding sustainability.

Most importantly, merger control regimes across the EU should continue to focus on encouraging investment where that investment does not have the possibility of resulting in consumer harm, as current thresholds guard against. Any proposed amendments to the merger control regime that would discourage global investment in the EU – e.g. notification of agreements that would have no impact on competition – would generally distort innovation incentives in Europe compared to the rest of the world, with potential negative effects on green and other investments. Merger control rules should ensure legal certainty by maintaining clear thresholds and continue to promote investment in green development and innovation, including by foreign investors⁷.

While product and channel substitution and entry barriers remain important elements to be taken into consideration when assessing consolidation in some industry segments and their impact on future competition, it is also important to consider new and innovative entry.

Furthermore, retailers and wholesalers compete on sustainability dimensions and procedures for state aid control should support them in a fast-moving environment. We would however not see a need to allow more lenient treatment of mergers involving “sustainable” companies (question 2).

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⁶ EuroCommerce response to the public consultation on the Market Definition Notice: https://www.eurocommerce.eu/media/192472/EuroCommerce%20response%20to%20roadmap_FINAL.pdf

⁷ Furthermore, we note that the EU should not further tighten FDI rules, beyond FDI screening of strategic investments (Regulation (EU) 2019/452). Any tightening of these rules could deter foreign direct investments in general, and thus risks undermining our capability to access the capital required to achieve the objectives of the Green Deal.