

Action Plan:

European Competition Policy Ready for the Green Deal

by Sven Giegold MEP

14 July 2021

The European Green Deal “aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050”. A fair and prosperous society can only exist within the boundaries of this planet. Climate science tells us that Europe will have to achieve carbon neutrality much earlier than 2050 in order to contribute its fair share towards the 1.5 degree Paris target. Therefore, our prosperity going forward hinges on our ability to build a carbon neutral economy fast enough while delivering economic and social benefits. In order to achieve the rapid transformation which is needed, all relevant policy areas have to deliver what they can. European competition policy has a strong potential to contribute to the implementation of the Green Deal. With this action plan we suggest a number of policy orientations and associated policies. Together they deliver the needed greening of competition policy. Ultimately, we need to create a market environment where competition acts as a lever for green innovation.

EU competition policy must be in line with the Union’s climate and biodiversity targets.

“Competition policy must [...] be in line with the priorities outlined in the European Green Deal and the objectives of the Paris Agreement.”

- European Parliament, 2019 Report on Competition Policy (2019/2131(INI)) (Recital B)

In order to contribute to the Green Deal, the fundamental principle guiding EU competition policy must be its compatibility with the climate and biodiversity targets the European Union has set itself. At the very least, competition policy should not contravene these targets, at best, it enables us to fulfil our commitments faster and at a lower cost to society. Our political ambition should be not to spend one more cent of taxpayer money on predictable stranded assets. Instead, competition policy should aid the transformation to a fair and prosperous society, as set out in the Green Deal.

We need a horizontal obligation to assess the environmental impact of all state aid.

The purpose of the European internal market is to ensure prosperity and sustainable development. But climate change and biodiversity loss caused by our economic activities are threatening our prosperity. Therefore, state aid which is not consistent with the Green Deal

cannot be seen as consistent with our internal market. It should generally not be allowed. The ruling of the Grand Chamber of the Court of Justice in the Hinkley Point C case on the inadmissibility of state aid for an activity in the nuclear power sector which does not comply with European environmental law obligations is highly noteworthy in this regard.¹ Thus, the application of environmental criteria must not be limited to the revised Climate, Energy and Environmental State aid guidelines (CEEAG), currently known as the Environmental Protection and Energy State aid guidelines (EEAG). Rigorous environmental criteria should be included in all of the following state aid guidelines:

- General Block Exemption Regulation
- De minimis Regulation
- Guidelines on regional State aid
- Guidelines on aid to agriculture and forestry
- Guidelines on aid to fisheries and aquaculture
- Framework for State aid for research and development and innovation
- Communication on important projects of common European interest
- Guidelines on State aid to promote risk finance investments
- Guidelines on State aid to airports and airlines
- Guidelines on State aid for rescuing and restructuring
- Guidelines on State aid to maritime transport
- Short term export credit Communication
- Railways Guidelines

To take one concrete example, the General Block Exemptions Regulation (GBER) outlines the criteria under which Member States can grant state aid without prior approval by the European Commission. Considering their environmental impact, aid granted to airports and maritime ports to maintain or increase their capacity must be excluded from the scope of the GBER. The Commission states in its revised Guidelines on regional State aid presented on 19 April state that it “will pay particular attention to Article 3 of the EU Taxonomy Regulation (EU) 2020/852 of the European Parliament and of the Council, including the ‘Do no significant harm’ principle, or other comparable methodologies” (Paragraph 105). However, it stops short of making demonstrated compliance with these sustainability criteria a prerequisite for eligibility to regional state aid.

EU competition policy must aim for socially and environmentally fair prices.

If the Green Deal is to be a success, we have to ensure that the many companies which already have sustainable business models no longer face an uphill battle against directly or indirectly subsidised fossil industry. Currently, many companies with sustainable business models are at a pricing or at a general competitiveness disadvantage, compared to those who pollute the environment and over-use natural resources. Therefore, the objective of competition policy should be to foster a market environment where prices are socially and environmentally fair. In order to make the Green Deal a reality, socially and environmentally fair prices need to become the norm in our internal market. From my perspective, this means three things: First, a complete and rapid phase-out of all harmful subsidies. Second, the

¹ Judgment of the Court (Grand Chamber) of 22 September 2020, Austria v. Commission, C-594/18 P, ECLI:EU:C:2020:742, <https://curia.europa.eu/juris/liste.jsf?num=C-594/18>.

internalisation of external costs - like we already do to some extent with environmental taxation and the European Emissions Trading System (ETS). Lastly, as long as competition is not yet fair, because the external prices are not yet internalised, we need to allow for green compensation in at least some cases. Let me develop these points further.

We need to end all remaining subsidies for fossil fuels and its infrastructure. Climate science tells us very clearly how quickly we need to reduce greenhouse gas emissions. There is no time anymore for investments into so-called bridge technologies such as fossil gas nor for investments into technologies which take too long to build and to develop, such as nuclear. Several points for action present themselves:

1. The European Parliament adopted its negotiating position for the EU Climate Law on 7 October 2020. The European Parliament demanded that the EU and the Member States phase out all direct and indirect fossil fuel subsidies by 31 December 2025 at the latest. This call from the European Parliament is key to the fulfilment of the Green Deal objectives, but this much needed provision was unfortunately not included in the final climate law. Therefore, the Parliament repeated this demand in a resolution on the 8th European Environmental Action Programme on 8 July 2021. In order to meet our climate objectives, nuclear and fossil fuels-based energy must urgently fall under the scope of the revised Climate, Energy and Environmental State aid guidelines (CEEAG) and may only be granted following strict efficiency, necessity and cost effectiveness tests, considering the necessary decarbonisation of our energy systems in line with the Paris Agreement.
2. State aid to support the phase out of coal must be demonstrated to be the most cost-effective way to reach environmental targets, again considering all costs and externalities concerned, as well as the evolution of markets and climate policies. In this context, calculations about the expected evolution of carbon prices which are used to determine the cost effectiveness of an aid measure must be made transparent to the public. It is not good enough to show that a state aid measure has a positive environmental impact - for example by supporting a switch from coal or oil to gas or biomass. Before aid is granted, realistic impact assessments and comparisons with alternatives must be presented to show that state aid is given to the most cost-effective and sustainable long-term solution, in line with science and the Green Deal objectives. In this vein, the sum of €4.35 billion which the German Government announced to pay to RWE and LEAG for the closure of lignite power plants by 2038 should be found incompatible with the internal market - already under the existing rules.
3. With regard to fossil fuel infrastructure, it should be clear that they cannot receive any more state aid, nor be included in the list of projects of common European interest (PCI). This corresponds to the European Ombudswoman's decision regarding the elaboration of the PCI list of 17 November 2020: *"Given the EU's objectives concerning climate change and sustainability, it is regrettable that gas projects were included on previous PCI lists, without having their sustainability properly assessed."* Indeed, the Commission itself acknowledges that *"The continued policy support for [cross-border natural gas infrastructure] projects is no longer justified considering the improvements in infrastructure connections, technological developments and market functioning achieved over the past years and in view of the expected decline in natural gas demand to fulfil our climate ambition and decarbonisation objectives."*²

² Q&A on the revision of the TEN-E regulation, question 6, https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2393.

Fair pricing, fair competition.

A market can only deliver ecological outcomes if products which are best for the environment and for society are also the most accessible to consumers. Consumer prices must reflect a product's or service's environmental and social impact. The yardstick for successful competition policy should thus be its ability to support the development of conditions for markets which are more ecologically efficient. State aid rules, antitrust rules and merger-control rules should all be aligned with this goal.

While competition policy should include estimated external costs in its assessment, it is not up to competition policy to develop pricing mechanisms which internalise previously external environmental and social costs. However, **where efforts to price in negative externalities already exist, competition policy should support these efforts** - not counteract them. In particular this is valid for the ETS. Under current state aid rules, insufficiently targeted and over-generous handouts of free pollution permits, as well as (over-)compensation for indirect costs, are a serious impediment to the decarbonisation of major industries, as was concluded by the European Court of Auditors last year³. The first steps to move towards fairer pricing should be:

1. When free handouts are provided, it must be ensured that the recipients do not pass through costs to consumers and reap windfall profits while championing climate inaction. They should also be more finely targeted to industries which are at a particularly high risk of carbon leakage. While the European Commission's review of the ETS Guidelines in September 2020, which narrowed the list of eligible industries, has to be applauded, the Commission should equally make use of the provision for another review in 2025 to ensure that free handouts are reduced to the absolute minimum and phased out as soon as possible.
2. Compensation for indirect costs should not give energy inefficient producers an advantage over more energy efficient ones.
3. Once a Carbon Border Adjustment Mechanism has been implemented at EU level, state aid to energy-intensive industries should be phased out in order to allow for the ETS to become fully effective.
4. Any reductions, exemptions from paying costs and levies, or indirect compensation of costs, should be subject to the beneficiary industries making ambitious and effective investments in energy efficiency and renewable energy development without the use of state aid to cover those costs.

There is a space for carbon contracts for difference. As long as environmental standards are not yet strict and pricing is not yet fair, states must be allowed to go into specific forms of cooperation to help companies to invest into sustainable business models. Under these conditions, carbon contracts for difference should not be seen as harmful state aid. Rather, if designed well, they can be a sensible policy measure to offset structural impediments to the green transformation. It should be clear that carbon contracts for difference should only be awarded to renewable technologies which contribute to our climate objectives and can be part of a carbon neutral economy. Contracts for difference in the renewable energy sector

³ Special Report 18/2020: "The EU's Emissions Trading System: free allocation of allowances needed better targeting", <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=54392>.

can encourage project financing and investments by providing long-term stable income for developers while offering consumers a predictable price for their electricity use. That way, carbon contracts for difference can shield both sellers and buyers from price volatility.

As the European Parliament has highlighted in its 2018 Report on Competition Policy, *“the legally binding commitments undertaken by the Member States as part of the Paris Climate Agreement will not be realised without concrete state measures to promote and create incentives for and enable the production and use of renewable energy”* (Paragraph 49).

We should not, however, pamper our industry. Support to industry to spur investments into the green transition must be cost-effective and measures such as the proposed Carbon Border Adjustment Mechanism, the free allocation of pollution permits under the ETS and carbon contracts for difference should not overlap. Overall, policy-makers should take into account the long-term, macro-level cost of the transition when developing support strategies for industry.

The foreseeable impact of mergers and acquisitions on public goods should be considered as well.

Merger control should actively encompass environmental protection concerns: acquisitions such as Bayer/Monsanto cannot be acceptable considering the foreseeable adverse impact on the environment and public health, which are principles protected by the Treaties. As the European Parliament highlighted in its 2018 Report on Competition Policy (2018/2102(INI)), *“the far-reaching concentration of the food supply chain [is] [...] to the detriment of consumers, farmers, the environment and biodiversity alike; [...] [it] re-direct[s] trends in innovation away from the adoption of a production model which is respectful of the environment and biodiversity”* (Paragraph 40, see also Paragraph 82).

As the European Parliament highlighted in its 2019 Report on Competition Policy (Paragraph 45), the Commission should issue guidance on the interpretation of what constitutes a “significant impediment to effective competition” under Article 2 of the EU Merger Regulation, in order to allow regulators to take into account the social and environmental costs of proposed consolidations. This would enable the European Commission to prevent mergers in case a proposed consolidation can be expected to have an adverse impact on principles protected by the Treaties. However, this must not mean that public goods can be used to justify a merger which could endanger fair competition in a sector of the economy: Fair competition in the internal market, based on environmentally and socially fair prices, will reward companies championing the Green Deal. Favouring designated European Champions to the detriment of fair competition is ill-advised.

EU competition policy must embrace the involvement of citizens, companies and civil society in order to help fulfil the promises of the Green Deal.

The European Green Deal vows to place citizens at the heart of the energy transition. In order to honour this commitment and **empower renewable energy communities to the**

greatest possible extent, the GBER and EEAG need to be revised accordingly: Where necessary, they need to be aligned with the rules set out under the Clean Energy for All Europeans Package. In particular, the Commission should increase the thresholds below which renewable energy communities are exempt from compulsory bidding procedures under the CEEAG and create a separate chapter for financial and administrative support for renewable energy communities. The revision of the EEAG and the GBER must also be in line with the support for renewable energy communities outlined in Article 22 of the Renewable Energy Directive II (REDII). Ideally, the revised EEAG and the GBER would support the implementation of a comprehensive enabling framework for renewable energy communities across Member States, thus helping Member States to fulfil their obligation under Article 22(4) REDII. Greater flexibility for citizen-generated renewable energy has also been explicitly called for by the European Parliament in its 2018 Report on Competition Policy (Paragraph 49). In order to achieve the Green Deal objectives, renewable energy communities such as citizen energy cooperatives must be allowed to thrive without overly harsh limits under the state aid framework or unnecessary bureaucracy.

If companies come together to set minimum standards with regard to environmental and social conditions in third countries, they should be allowed to do so without being told it's a cartel. Towards this end, the horizontal guidelines on the application of Article 101(3) TFEU should be revised, in order to provide further guidance on collaborations which “*contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit*” in light of the Green Deal. In particular, environmental and social benefits should be taken into account, as well as long-term benefits which can be expected to arise when companies jointly set minimum standards. This is important because the Green Deal also has an external dimension, particularly when it comes to fair trade. To give an example, supermarkets should be able to jointly set a minimum price for the purchase of fair trade goods, in order to ensure producers receive a fair price for their products. Similarly, food cooperatives should be allowed to work together in order to strengthen farmers’ position in the food supply chain. As the European Parliament has pointed out, such collective activities are vital for the attainment of objectives defined under CAP and should therefore be considered compatible with Article 101 TFEU (2018 Report on Competition Policy, Paragraph 71). To ensure the interpretation of the relevant treaty provisions in the interests of consumers and the public, such collaboration should be subject to prior agreement from the European Commission.

Civil society must be given a seat at the table. It is unacceptable that civil society organisations are systematically refused the status of an interested party under Article 1(h) of the Procedural Regulation 2015/1589. The Aarhus Convention Compliance Committee recently found that the European Union fails to comply with Article 9, Paragraphs 3 and 4 of the Aarhus Convention: In the EU, members of the public are currently not able to “challenge decisions on state aid measures taken by the European Commission under article 108(2) TFEU which contravene EU law relating to the environment”⁴ through administrative or judicial procedures (Art. 9(3)). Therefore, no effective remedy is provided for either (Art. 9(4)). The European Parliament had proposed to allow for internal review under the EU Aarhus Regulation but this proposal was not taken up following resistance from the Council.

⁴ Findings and recommendations with regard to communication ACCC/C/2015/128 concerning compliance by the European Union, adopted 17 March 2021, Section IV.A.131(a), https://unece.org/sites/default/files/2021-03/C128_EU_findings_advance%20unedited.pdf.

We are going to closely monitor the next steps taken by the Commission to ensure that access to justice rights are effectively improved as soon as possible. Civil society must be able to challenge state aid decisions which contravene environmental law obligations.

The involvement of the public in competition policy decision-making is key, as decisions pertain directly to the use of public money and to the Green Deal - whose proper implementation citizens, media and civil society should be able to scrutinize. To facilitate citizens' and NGOs' access to legal recourse against aid measures which they allege are in breach of environmental protection obligations, the Commission should expressly communicate the admissibility of such actions before national courts in the revision of its notice on the enforcement of State aid rules by national courts. The admissibility of such actions before national courts should not, however, prejudice the Commission's primary competence to carry out such compatibility checks. Transparency around state aid notifications and assessment processes should be increased more generally.

Overall, the democratic dimension of this area of Union policy should be strengthened. The European Parliament has repeatedly called for greater involvement of its Members in shaping and reviewing the European framework for competition rules going forward (2018 Report on Competition Policy, Paragraph 2; 2019 Report on Competition Policy, Paragraphs 85 and 87). The Conference on the Future of Europe, too, can provide the impetus to move towards the co-decision procedure in matters of competition policy. The rules for state aid, merger control and antitrust are based on normative choices which call for greater parliamentary legitimation. A treaty change to accommodate this need for democratic scrutiny should be considered with urgency. In addition, the ability of citizens to hand in complaints on state aid cases should be strengthened, in accordance with the European Parliament's request to the European Commission (2019 Report on Competition Policy, Paragraph 89).

EU competition policy: greening the digital age

Big digital companies are de facto infrastructure providers in our digitised societies. Obviously open and fair competition should be fostered wherever possible. However, network effects are regularly so important that consumer benefit is best served by monopolies or oligopolies. Therefore, we need ongoing supervision of these quasi-infrastructure elements through an EU Digital Supervisor. This permanent supervision should also have an environmental dimension. Much used algorithms and their datasets should also correspond to the objectives of the Green Deal. We cannot ignore that some of these systems run with algorithms which use excessive energy and electronic resources. Apart from ensuring that large digital companies do not abuse their dual status as platforms and suppliers and minimising data and privacy risks for consumers, such a Supervisor could **ensure that the energy and electronic resources used for the provision of the digital infrastructure are proportionate to the digital services offered.**

EU competition policy for our common future

The good news is: we do not have to choose between the competitiveness of our economy on the one hand and the protection of the environment and safeguarding human wellbeing

on the other. Quite the opposite, fair and open competition is a powerful tool for the attainment of the green transformation. For that we need prices which are socially and environmentally just. Only on the basis of prices which approximate the real cost of an economic activity to nature and society, can competition truly be fair. Achieving such fairness with the much-needed support from competition policy should be our political ambition. The European Union's competition policy has the means to support the development of market conditions which foster sound innovation into our future. Anything else is competition policy for the past.

Sven Giegold, MEP, is co-ordinator of the Greens/EFA group in the Economic and Monetary Committee (ECON) and speaker of Bündnis90/Die Grünen in the European Parliament. The text builds on remarks delivered at the European Commission's online event "Competition policy contributing to the EU Green Deal" on 4 February 2021.

