

# Commission's current considerations on competition policy: new Communication addressing new challenges

On 18 November 2021, the European Commission (hereinafter the "Commission") published a Communication on "A competition policy fit for new challenges" (hereinafter the "Communication"). The Communication provides an illustrative consolidation of the current work streams – both at the enforcement and the regulatory level – in the Commission's efforts to update competition policy on the path towards the green and digital transitions (the "twin transitions"), with an emphasis on the resilience of the Single Market, against the backdrop of the COVID-19 crisis.

The Communication lays out the Commission's vision on:

- (i) the path forward regarding a **progressive phase-out of crisis measures adopted under the State aid Temporary Framework** to tackle the challenges generated by the COVID-19 pandemic, accompanied by **measures to kick-start and crowd-in private investment** in the recovery phase; and
- (ii) the **contribution of the ongoing review of competition policy and competition enforcement to the EU's efforts to deliver on the green and digital transitions** within the context of the Single Market.

## The State aid Temporary Framework as a building block for recovery

With the COVID-19 pandemic came a need for extraordinary public support measures to tackle the economy-wide economic challenges. The necessary flexibility to achieve this in a way that conforms with EU State aid rules was provided by the State aid Temporary Framework, on the basis of which the Commission has adopted more than 670 decisions approving over EUR 3 trillion of State aid in all 27 EU Member States across various economic sectors.

With the Communication, the Commission has adopted a sixth amendment of the Temporary Framework, extending the existing measures until 30 June 2022 to allow for a coordinated phase-out, to avoid a situation whereby businesses would be abruptly cut off from still necessary public support.

The sixth amendment also introduces new tools to kick-start and crowd-in private investment "for a faster, greener and more digital recovery", namely:

- **Investment support towards sustainable recovery** (until 31 December 2022), enabling Member States to provide incentives for private investments in sustainable and "future-proof" projects, such as (indicatively): roll-out/upgrade of digital infrastructure, replacement of old machinery by more efficient or less polluting equipment, investments in circular economy etc.
- **Solvency support** (until 31 December 2023), enabling Member States to leverage private funds for investments in SMEs (including start-ups and small midcaps), in order to tackle the problem of increasing indebtedness levels (e.g. State guarantees to investment funds dedicated to investments in SMEs).

## The contribution of EU competition law to the twin (green and digital) transitions

The Communication also delineates the Commission's vision on how competition policy can fit in with and facilitate the transition to a more green and digital EU economy, along two main works streams: (i) channeling public support – in the form of State aid – towards green and digitization initiatives; and (ii) shaping antitrust enforcement and merger control in a way that accommodates the twin transitions.

On the **State aid front**, the Communication highlights recent developments in the EU's regulatory framework on State aid, specifically recent and ongoing revisions of the Energy and Environmental State Aid Guidelines, the General Block Exemption Regulation ("GBER"), the Communication on Important Projects of Common European Interest (the revised version of which was adopted by the Commission on 25 November 2021 and will apply from 1 January 2022) and the Regional Aid Guidelines, all of which actively push towards the facilitation of the European Green Deal (e.g. emissions reduction target of at least 55% by 2030 compared to 1990 levels).

Moreover, the Communication notes that the Broadband State Aid Guidelines and the GBER rules already facilitate the roll-out of broadband networks in a targeted and sustainable manner, where private providers are unlikely to invest or to deliver the adequate level of infrastructure for fast evolving customer needs. The ongoing revision of the Broadband State Aid Guidelines aims to further facilitate the deployment and take-up of broadband networks to increase connectivity, with an envisaged extension also to investments in mobile infrastructure, thereby accelerating the digital transition.

On the **antitrust** front, the Communication reiterates the Commission's recent enforcement record against anti-competitive practices by dominant digital players, and highlights the ongoing developments in the direction of tackling competition law concerns in the digital sector, both in the enforcement sphere (e.g. first imposition of interim measures by the

Commission in an antitrust case after almost two decades, in Case AT.40608 – *Broadcom*, accompanied by the Commission's stated intention to continue using this tool) and the regulatory sphere (notably in the form of the Digital Markets Act (DMA), currently undergoing the legislative process, which is expected to set *ex ante* rules applicable to companies designated as "gatekeepers").

What is more, in light of the increasing importance that data plays in the digital era, the Communication underlines the ongoing revision of the Horizontal Cooperation Guidelines to provide updated guidance on data sharing. Similarly, the revised Vertical Block Exemption Regulation will provide much-needed guidance on the dos and don'ts of novel supply and distribution models, in light of the rapid rise of e-commerce in the last decade.

Interestingly, the Communication also stipulates the Commission's readiness to provide guidance to facilitate pro-competitive agreements, under which any potential harm to consumers is outweighed by benefits, either green or digital, which would otherwise not be obtained. On this note, the Commission also stresses the ongoing revision of the Horizontal and Vertical Block Exemption Regulations and corresponding Guidelines, to update the tools necessary to enable such pro-competitive agreements (e.g. R&D agreements or collaborations to prevent shortages of critical medicines or to address bottlenecks in vaccine production).

On **merger control**, the Communication makes due reference to the Commission's recently published guidance on the application of Article 22 of the EU Merger Regulation (Regulation 139/2004), to encourage, where appropriate, Member States to refer to the Commission potentially problematic transactions for review, even if those transactions do not meet national merger control notification thresholds. This is a policy move targeting specifically acquisitions of innovative digital companies with significant competitive potential that is not adequately reflected by their turnover alone.

### Takeaways

This Communication does not put forth substantively new Commission policies. It is nevertheless remarkable in that it presents, in a consolidated manner, the numerous ways in which the Commission is actively pursuing a revision of competition policy across all the areas on which it has competence (antitrust, merger control and State aid), and all this through the prism of the green and digital transitions. From the recent or ongoing revision of virtually all of the EU competition law instruments, to the antitrust enforcement focus on digital markets and the post-pandemic overhaul of the State aid regulatory framework, the Commission is currently in a process of significantly reshaping the image of EU competition law. This process generates both: a need for heightened vigilance by companies in the EU, to ensure continued competition law compliance in a continuously evolving regulatory and enforcement landscape;

and potential opportunities for investments in green and digital initiatives, which are expected to increasingly benefit from flexible public support schemes. In connection to the last point, it is notable that the EU Recovery and Resilience Facility, whose aim is to mitigate the economic and social impact of the COVID-19 pandemic, is strongly focused on preparing European economies for the challenges and opportunities of the twin transitions, thus enhancing sustainability and resilience (48 projects, with a budget of EUR 2.76 billion, have already been approved for inclusion in Greece's Recovery and Resilience Plan). As noted in the Communication, at least 37% of the Recovery and Resilience Facility funds allocated to Member States must be climate measures that contribute to the green transition, while at least 20% of the funds must be used for measures contributing to the digital transition.

### Contact us



**Stamatis Drakakakis**

Partner

s.drakakakis@zeya.com



**Argyris Papaefthymiou**

Associate

a.papaefthymiou@zeya.com

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280 Kifissias Ave., 152 32 Halandri, Athens, Greece  
newsletters@zeya.com  
Tel.: (+30) 210 696.70.00 | Fax: (+30) 210 699.46.40

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