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The Role of Companies in the Strategic Turn of EU Competition Law

FERNANDO PASTOR-MERCHANTE*

I. Introduction

The purpose of this chapter is to reflect upon the role of companies in the transformational change that competition law and policy is currently going through in the European Union (EU). The main causes of the disruption are well known. The EU's commitment to tackling global warming and climate change, as expressed in the European Green Deal, affects EU competition law and policy.[1] The weight that environmental considerations should have in antitrust and merger control remains controversial,[2] but the movement towards a greener EU competition policy has gained track over the last few years.[3] The objective of transforming the EU economy to make it more sustainable goes hand in hand with the objective of adapting it to the new digital reality.[4] The ramifications of the so-called digital transition are also felt in the area of competition law, if only because of the need to rethink how some of its most basic tenets apply in

* Associate Professor of Administrative Law, IE University Law School and IE/Pérez-Llorca Chair of Commercial Law, Fernando.Pastor@ie.edu. Research reported in this chapter was partially funded by the Spanish *Agencia Estatal de Investigación* (AEI) – 10.13039/501100011033 – Grant No. PID2020-115834RA-C33.

[1] Commission, 'The European Green Deal' (Communication) COM(2019) 640 final.

[2] MP Schinkel and L Treuren, 'Green Antitrust: (More) Friendly Fire in the Fight Against Climate Change' (*Amsterdam Law School Research Paper No 72/2020*).

[3] See, eg, G Monti, 'Four Options for a Greener Competition Law' (2020) 11 *Journal of European Competition Law and Practice* 124; K Majcher and V Robertson, 'The Twin Transition to a Green and Digital Economy: The Role for EU Competition Law' (*Graz Law Working Paper No 05/2022*). See also OECD, 'Environmental considerations in competition enforcement, OECD Competition Committee Discussion Paper': www.oecd.org/daf/competition/environmental-considerations-in-competition-enforcement.htm.

[4] Commission, 'Shaping Europe's Digital Future' (Communication) COM(2020) 67 final; Commission, 'Digital Compass: The European Way for the Digital Decade' (Communication) COM(2021) 118 final.

the digital sphere.[5] Finally, as a result of the recent COVID-19 and Ukrainian crises, the EU has embraced the goal of improving the resilience of its industry.[6] In sum, the challenge is to ensure that EU competition policy remains 'fit for purpose' while contributing to the transition towards a 'green, digital and resilient single market'.[7] Because of the structural and long-term implications of this challenge, it is apposite to refer to this transformative moment as the 'strategic' turn in EU competition law.

Companies cannot be alien to these developments because they are the 'subjects' of EU competition law.[8] Companies are, in practice, the main addressees of the prohibitions of anticompetitive agreements and abuse of dominant position of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). They are also the main target of the EU Merger Control Regulation.[9] As the standard beneficiaries of State aid measures, companies are also central to this branch of EU competition law, even if its rules target Member States rather than private undertakings. Consequently, the involvement of companies in the strategic turn of EU competition law is of paramount importance if the changes 'are to work and be accepted'.[10] In other words, their involvement is necessary in order to preserve the effectiveness of EU competition law and policy, but also from the perspective of the legitimacy of the transformation process. Indeed, the EU legal order places great value upon the principles of openness and participation, which are now enshrined in Article 11 of the Treaty on European Union (TEU). Thus, if EU competition law and policy is to transform itself, companies should necessarily partake in the process.

In order to analyse their actual and potential contribution to the process, the chapter maps out the different avenues through which companies can bring their input to the strategic reshaping of the Commission's competition policy. The chapter considers their role in the definition of this policy through the administrative rule-making and soft-law initiatives of the Commission, as well as in the actual enforcement of EU competition law and policy. The participatory opportunities enjoyed by companies in the enforcement of EU competition law are a function of the position that they occupy within the procedures launched by the Commission, which is why the chapter addresses separately the roles

[5] J Cremer, Y Montjoye and H Schweitzer, 'Competition Policy for the Digital Era: Final Report' (2019): www.ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

[6] Commission, 'A New Industrial Strategy for Europe' (Communication) COM(2021) 102 final.

[7] Commission, 'A Competition Policy Fit for New Challenges' (Communication) COM(2021) 713 final.

[8] W Wouters, 'The Undertaking as Subject of EC Competition Law and the Imputation of Infringements to Natural or Legal persons' (2000) 25 *European Law Review* 99, 100, who discusses the differences between the concepts of 'undertaking' and 'company' – a relevant discussion that I overlook here. See also C Townley, 'The Concept of an "Undertaking": The Boundaries of the Corporation – A Discussion of Agency, Employees and Subsidiaries' in G Amato and CD Ehlermann (eds), *EC Competition Law: A Critical Assessment* (Oxford, Hart Publishing, 2007).

[9] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/01.

[10] Commission, 'The European Green Deal' (n 1 above) 2.

of investigated and third-party companies. Needless to say, the institutional specificities of the three areas of EU competition law also condition the role that companies can play under each of them. The analysis pays close attention to those specificities throughout the chapter. Finally, the chapter only touches upon the role of companies in the judicial review of competition law decisions tangentially since the topic is addressed more squarely in the next chapter.[11]

II. The Role of Companies in the Definition of EU Competition Policy Through Administrative Rule-Making Procedures

As is well known, the foundational provisions of EU competition law have primary law status, because they are codified in Articles 101 to 109 TFEU. It is on the basis of these provisions that the EU legislator has fleshed out the substantive and institutional rules that govern the three areas of EU competition law. However, EU primary and secondary law leave the Commission a wide margin of discretion in the definition of its policy in all three areas.[12] This is something that the Commission does through its enforcement endeavours, but also through an intense administrative rule-making activity. Administrative rule-making is here understood in its broader sense, as a phenomenon that encompasses the definition of competition policy through the legislative initiatives of the Commission, through its regulatory acts, and through its communications, guidelines and other soft-law instruments.[13]

Soft-law instruments are particularly important in that regard, because they play a crucial role in the definition of EU competition policy. In the area of antitrust, the Commission's dense web of soft-law instruments performs a key steering function within the European Competition Network.[14] Similarly, soft-law plays an important role in the control of concentrations, making up for the absence of substantive guidelines in the Merger Control Regulation.[15] Soft-law has also been key in the juridification of the State aid discipline and in the emergence of an actual EU State aid policy.[16] Moreover, soft-law has a significant role to play

[11] See P Nicolaides, 'The Response of EU Courts to Society's Digital & Green Challenges in the Field of Competition and State aid', Ch 8 in this volume.

[12] H Hofmann, 'Negotiated and Non-negotiated Administrative Rule-making: The Example of Competition Policy' (2006) 43 *Common Market Law Review* 153.

[13] J Mendes, 'Executive Rule-making: Procedures in Between Constitutional Principles and Constitutional Entrenchment' in C Harlow, P Leino and G Cananea (eds), *Research Handbook on EU Administrative Law* (Cheltenham, Edward Elgar, 2017) 371 and 377.

[14] O Stefan, *Soft Law in Court: Competition, State Aid and the Court of Justice of the European Union* (Alphen aan den Rijn, Wolters Kluwer, 2013) 26.

[15] Hofmann, 'Negotiated and Non-negotiated Administrative Rule-making' (n 12 above) 154.

[16] M Cini, 'The Soft Law Approach: Commission Rule-making in the EU's State Aid Regime' (2001) 8 *Journal of European Public Policy* 192; M Blauberger, 'Of "Good" and "Bad" Subsidies: European State aid Control through Soft and Hard Law' (2009) 32 *West European Politics* 719.

in the specific context of the strategic turn of EU law, since the Commission has made (and is likely to continue making) extensive use of this type of instrument in order to steer the transition towards a green, digital and resilient single market. Indeed, the Commission announced its commitment to this objective and its new strategic priorities in communications such as the European Green Deal,[17] the 2030 Digital Compass[18] and the New Industrial Strategy for Europe.[19] Finally, the Commission has laid out the implications of the green and digital transitions for EU competition law and policy in its communication on 'A competition policy fit for new challenges', where it also announced a revision of antitrust, merger control and State aid guidelines in light of its new strategic priorities.[20]

As is well known, EU primary law does not confer upon companies the right to participate in the Commission's rule-making procedures. The reference judgment in that regard remains *Atlanta*, where the Court held that the Treaty does not recognise any 'right to be heard prior to the adoption of a legislative act',[21] a holding that is generally understood to apply to legislative and non-legislative acts alike.[22] However, the *Atlanta* doctrine has not impeded the development of a widespread consultation practice in the context of the rule-making initiatives of the Commission, fuelled by the better regulation agenda launched more than 20 years ago by the White Paper on Governance.[23] One of the main objectives of the better regulation agenda is to improve the quality of EU legislation and public consultations plays an important role in that context, as a means of gathering evidence to inform the policymaking of the Commission[24] and of promoting 'trust in the European Union'.[25] Stakeholder participation normally takes place along a three-phase consultation process, which allows the Commission to receive feedback on its initiatives.[26] From the perspective of companies, public consultations are an opportunity to voice their concerns and to bring their input to the policy-making initiatives of the Commission.

Companies have been able to do that in the context of the general consultations launched by the Commission on the impact that the green and digital transition could have in the area of competition law. For example, following the publication of the European Green Deal, the Commission launched a public consultation on how competition policy could contribute to achieving the objectives set in

[17] Commission, 'The European Green Deal' (n 1 above).
[18] Commission, 'A New Industrial Strategy for Europe (n 6 above).
[19] Commission, 'Digital Compass' (n 4 above).
[20] Commission, 'A Competition Policy Fit for New Challenges' (n 7 above).
[21] Case C-104/97 P *Atlanta AG and others v Commission* [1999] EU:C:1999:498, para 35.
[22] Mendes, 'Executive Rule-making' (n 13 above) 386; L Senden and T Brink, *Checks and Balances of Soft EU Rule-Making* (Brussels, Parliament Policy Department, 2012) 31.
[23] Commission, 'European Governance – A White Paper' (White Paper) COM(2001) 428 final.
[24] Commission, 'Better Regulation Guidelines' (Staff Working Document) SWD(2017) 350 final, 13.
[25] Commission, 'Better regulation: Joining forces to make better laws' (Communication) COM(2021) 219 final, 4.
[26] Commission, 'Better Regulation toolbox – November 2021 edition': https://commission.europa.eu/system/files/2023-02/br_toolbox-nov_2021_en.pdf, 438.

that plan.[27] The call contained questions covering the three areas of competition law and the Commission gathered submissions by many stakeholders, including numerous companies.[28] The Commission also launched a public consultation on the 2030 Digital Compass, seeking input in order to operationalise the vision presented in that communication. Of the 101 submissions received, 60 per cent were submitted on behalf of companies or business associations.[29] More to the point, there was a parallel consultation process for the Digital Services Act package and the New Competition Tool, with the objective of gathering feedback on the competition law problems raised by large, digital gatekeeper platforms and on the need to set up a new complementary tool to strengthen competition enforcement in digital markets. Again, more than 60 per cent of the submissions received were submitted on behalf of companies or business associations.[30] Granted, these figures only reflect the relative amount of submissions made by companies in the public consultations carried out by the Commission in the field of EU competition law (rather than the actual impact of those submissions upon the Commission's competition policy). Still, they show that companies can and do routinely avail themselves of this opportunity to voice their interests in the shaping of EU competition policy.

As announced in the communication on 'A competition policy fit for new challenges', the Commission is currently engaged in an ambitious revision of its soft-law armoury in light of the new strategic priorities. This is yet another opportunity for companies to try to influence the strategic reshaping of the Commission's competition policy. For example, in the field of antitrust the Commission recently concluded a public consultation on the revision of the Horizontal Guidelines in order to adapt them to the green and digital transitions.[31] Similarly, the Commission launched a public consultation on the Notice on the definition of relevant market, which is relevant in antitrust and merger control.[32] The main goal of the process was to adapt the notice to the challenges

[27] Commission, Directorate-General for Competition, Competition policy brief 2021-01, September 2021, https://data.europa.eu/doi/10.2763/962262.

[28] Speech by M Vestager, 'Competition Policy in Support of the Green Deal' (IBA Competition Conference, 10 September 2021).

[29] Commission, 'Summary Report on the targeted consultation on the 2030 Digital Compass: the European way for the Digital Decade' (2021).

[30] Commission, 'Summary Report on the open public consultation on the Digital Services Act Package': https://digital-strategy.ec.europa.eu/en/library/summary-report-open-public-consultation-digital-services-act-package and Commission, 'The new complementary tool to strengthen competition enforcement': www.ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition -enforcement_en.

[31] Commission, 'Public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines (2022): https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en.

[32] Commission, 'Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997' (Staff Working Document) SWD(2021) 199 final.

raised by digital markets.[33] Many State aid guidelines have undergone similar consultation processes, including the Climate, Energy and Environmental Aid Guidelines[34] and the Regional Aid Guidelines.[35]

Soft-law instruments are not the only ones subject to public consultations, which is why some of the recent legislative and regulatory initiatives of the Commission in the field of EU competition policy have also been subject to this process. At the time of writing, there is an open call for evidence on the evaluation of EU antitrust rules (namely, Regulation 1/2003[36] and its implementing Regulation 773/2004[37]). The goal is to assess the antitrust legal framework in light of the experience gained over 20 years of application and to identify gaps or opportunities generated by the most important changes occurring throughout that period, with specific reference to the digitalisation of the global economy.[38] Earlier this year, the Commission conducted a public consultation on the revision of the State aid General Block Exemption Regulation in light of the European Green Deal and Industrial and Digital Strategies.[39]

The participation of companies in administrative rule-making procedures is not exempt from difficulties. The leverage that individual companies may exert through this channel is probably minimal because the process is conceived as an information-gathering device with little procedural guarantees in their favour. Moreover, consultation processes in the adoption of soft-law instruments are known to be unsystematic.[40] This is in no small part due to the tendency to dispense with them in times of crisis, as illustrated by the lack of transparency regarding the consultation processes undergone by the State aid and antitrust temporary frameworks and by their successive updates approved in the course of the recent COVID-19 crisis.[41] Still, stakeholder consultations are an important information-aggregating tool that allows administrative authorities to gather feedback on their proposals from affected stakeholders. This is particularly important

[33] Commission, 'Support study accompanying the evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law' (2021): https://competition-policy.ec.europa.eu/system/files/2021-06/kd0221712enn_market_definition_notice_2021_1.pdf.

[34] Commission, 'Public consultation on the revised Climate, Energy and Environmental Aid Guidelines (CEEAG)': https://competition-policy.ec.europa.eu/public-consultations/2021-ceeag_en.

[35] Commission, 'Review of the Regional Aid Guidelines (RAG) 2014–2020': https://competition-policy.ec.europa.eu/public-consultations/2020-rag_en.

[36] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L01/1.

[37] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18.

[38] Call for evidence on the evaluation of EU antitrust procedural rules (2022): https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13431-EU-antitrust-procedural-rules-evaluation_en.

[39] Commission, 'Public consultation of the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines': https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en.

[40] M Eliantonio and O Stefan, 'The Elusive Legitimacy of EU Soft Law: An Analysis of Consultation and Participation in the Process of Adopting COVID-19 Soft Law in the EU' (2021) 12 *European Journal of Risk Regulation* 159, 165.

[41] ibid 172.

when they venture into uncharted waters, which is the direction in which the strategic turn of EU competition law seems to be leading the Commission. This may explain the numerous consultation processes launched in connection to the green and digital transitions and, more generally, the eagerness of the Commission to gather stakeholder input in this context. Thus, their limitations notwithstanding, stakeholder consultations are the first tool that companies have at their disposal to try to influence the strategic reshaping of EU competition policy

III. The Position of Investigated Companies in the Enforcement of EU Competition Law

A. The Position of Companies in the Enforcement of EU State Aid Law

Administrative rule-making plays a key role in the definition of EU competition policy. However, EU competition policy is also defined through the enforcement endeavours of the Commission. The role of companies in that regard depends to a great extent on whether they are the target of the Commission's investigations and procedures (investigated companies) or not (third-party companies). This section focuses on the former, while the next one focuses on the latter. Before going any further, though, it is necessary to make a few preliminary observations regarding the peculiar position of companies in the area of State aid.

Companies can have high stakes in the enforcement of State aid rules, especially when they are the actual or potential beneficiaries of State aid: for example, when the main issue at stake in a procedure is whether they are entitled to receiving some form of state financial support or, even more so, whether they should return the subsidy or financial advantage that they have already received.[42] And yet, no matter how high their stakes, companies are never the formal target of State aid procedures. This is because one of the distinctive features of the discipline is that the addressees of State aid rules and procedures are Member States, rather than companies or other private stakeholders. Far from being a mere formality, this proposition has far-reaching implications. The main one is the 'bilateral' character of the system of State aid control: the idea that the administration of the rules on State aid unfolds as an exclusive dialogue between the Commission and the affected Member State.[43] The upshot is that the only actors protected by the rights

[42] E Rivery, S Thibault-Liger and J Derenne, 'Procedure' in J Derenne and M Merola (eds), *Economic Analysis of State Aid Rules. Contributions and Limits* (Berlin, Lexxion, 2007) 190.

[43] Opinion of Advocate General Mengozzi in Case C-487/06 P *British Aggregates Association v Commission* [2008] EU:C:2008:419, para 74.

of the defence in the area of State aid are Member States themselves.[44] The other side of the coin is that companies always have the status of third party and hence limited information and participatory rights.[45]

The status of private parties in State aid procedures is a contentious issue, especially with regard to beneficiary companies. Their peripheral role is premised on the assumption that their interest is aligned with the interest of the granting Member State, which makes it unnecessary to give them voice. However, the assumption does not always hold true, if only because the financial impact of negative and recovery decisions falls exclusively upon the shoulders of those companies. This is the reason why the position of beneficiary companies within State aid procedures is very controversial.[46] In any event, their position cannot be compared to the position of investigated companies in the two other areas of EU competition law (antitrust and merger control), which is why the peculiar position of beneficiary companies in State aid proceedings will not be considered any further in this section.

B. The Special Position of Notifying Companies in Merger Control Procedures

The peripheral role assigned to beneficiary companies in State aid proceedings stands in stark contrast with the central role played by investigated companies in the two other areas of EU competition law. This is not to say that the position of investigated companies in EU antitrust and merger control procedures is identical. There are some important institutional differences between both areas, especially since the decentralisation of EU antitrust enforcement operated through Regulation 1/2003. Prior to the reform, the Commission had a monopoly over the application of the exemptions laid down by current Article 101(3) TFEU. Things changed dramatically after the reform, because national competition authorities and national courts acquired the ability to apply that provision in full. From an institutional and procedural perspective, this set EU antitrust and merger control apart along two different dimensions.

The first dimension concerns the allocation of powers between the Commission and national authorities. The system of EU merger control is heavily centralised, since the Commission has exclusive jurisdiction over concentrations of EU dimension, as defined in Article 1(2) of the Merger Control Regulation. Indeed, the thresholds that define the EU dimension of concentrations operate as a jurisdictional demarcation line between the powers of the Commission and national

[44] Joined Cases C-74/00 and 75/00 *Falck SpA and Acciaierie di Bolzano SpA v Commission* [2002] EU:C:2002:524, para 81.

[45] Case C-276/03 P *Scott v Commission* [2005] EU:C:2005:590, para 34.

[46] See eg, L Hancher, 'The Administrative Procedure. The Privileged Dialogue' in H Hofmann and C Micheau (eds), *State Aid Law of the European Union* (Oxford, Oxford University Press, 2016).

competition authorities, which project themselves upon different operations in accordance with the 'one-stop shop principle'.[47] On the contrary, the current system of EU antitrust enforcement is truly decentralised, in the sense that the Commission and national competition authorities share the task of ensuring compliance with EU antitrust rules and of taking action against companies that violate its provisions. The focus of this chapter is on the enforcement of EU competition law by the Commission itself. However, the interaction between companies and national competition authorities is also relevant – and the analysis conducted here could certainly be extended to that context.

The second dimension has to do with the timing of the Commission's intervention in antitrust and merger control procedures. The system of EU merger control is based on the notification of concentrations and on the need to obtain the greenlight of the Commission prior to their conclusion. On the contrary, the system of EU antitrust enforcement no longer relies on notifications and on the Commission's ex ante supervision. The contrast between the ex ante design of the system of EU merger control and the ex post design of the system of EU antitrust enforcement obviously affects the position of investigated companies under their respective provisions.

Indeed, the involvement of notifying companies in merger control procedures is more intense than the involvement of investigated companies in antitrust, if only because the merger control procedure is designed as a dialogue between the Commission and notifying parties. Although the Commission welcomes preliminary informal contacts, the most important element in that dialogue is the information provided by the parties in their notification forms. Notification forms can be very detailed, so much so that they can be thought of more as a 'report' than as 'just a form'.[48] This is important, because it means that notifying companies can use them to channel their 'submissions regarding the relevant market, the competitive context of the notified operation, and the effects of that operation'[49] – and, in this manner, try to frame the subsequent analysis of the Commission.

From the perspective of the strategic turn in EU competition law, this means that companies have a key role to play in the green and digital reshaping of EU merger control. Albeit in passing, the Commission acknowledged this fact in the communication on 'A competition policy fit for new challenges', where it noted that the environmental considerations can only be taken into account in merger control procedures 'to the extent that they are put forward by the parties'.[50] The seminal *Philips-Osram* case offers a good illustration thereof, since the green

[47] See, eg, M Kekelekis, *The EC Merger Control Regulation: Rights of Defence. A Critical Analysis of DG COMP Practice and Community Courts' Jurisprudence* (Alphen aan den Rijn, Kluwer Law International, 2006) 29.

[48] LO Blanco (ed), *EU Competition Procedure* 3rd edn (Oxford, Oxford University Press, 2013) 743.

[49] ibid.

[50] Commission, 'A Competition Policy Fit for New Challenges' (n 7 above) 11.

synergies that the Commission considered in clearing the temporary joint venture proposed by both companies were put forward by the parties.[51] Of course, this is not to say that the Commission is bound by the parties' submissions. However, if merger control is to go through a green and digital transition, notifying companies have a key role to play in producing the evidence and shaping the theories of harm that fuel the transition.

C. The Rights of the Defence and the Transactionalisation of EU Competition Law

There are thus fundamental differences between the positions occupied by notifying or investigated companies in the areas of EU antitrust and merger control. Yet there are also certain elements that blur these differences – or, at least, the implications that they have from the perspective of the leverage that companies can exert over the outcome of administrative procedures in both areas.

The first such element is the information and participatory rights that companies derive from the rights of the defence. Indeed, notifying companies (in the case of merger control) and investigated companies (in the case of antitrust) are protected by the bundle of rights that EU administrative law groups under the generic reference to the rights of the defence.[52] As is well known, the ultimate purpose of these rights is to ensure that private parties can participate in administrative procedures in a meaningful way or, to put it differently, that they can have 'an effective influence on the outcome of the decision'.[53]

The second element that blurs the differences between the position of companies in merger control and antitrust is the so-called 'transactionalisation' of EU competition law, which refers to the multiplication of negotiated or cooperative elements within the procedures for the enforcement of this area of EU law.[54] This is yet another consequence of the reform operated by Regulation 1/2003, one of whose novelties was the introduction of the possibility to close antitrust investigations through the so-called commitment decisions foreseen in Article 9 of that regulation. Commitment decisions allow the Commission to close an investigation without fines, when it considers that the remedies voluntarily offered by investigated companies are appropriate to address the competitive concerns that

[51] See eg, Commission Decision of 21 December 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement (Case IV/34.252 – Philips Osram) [1994] OJ L378/37.

[52] See eg, Case C-413/06 P *Bertelsmann AG and others v Commission* [2008] EU:C:2008:392, para 62 (merger control) and Case C-204/00 P *Aalborg Portland and others v Commission* [2004] EU:C:2004:6, para 66 (antitrust).

[53] EB de La Serre, 'Procedural Justice in the European Community Case-Law Concerning the Rights of the Defense: Essentialist and Instrumental Trends' (2006) 12 *European Public Law* 225, 233.

[54] D Geradin and E Mattioli, 'The Transactionalisation of EU Competition Law: A Positive Development?' (2017) 8 *Journal of European Competition Law and Practice* 634.

justified the launching of the investigation in the first place. These decisions may offer certain advantages in novel cases, such as those that drive the strategic turn of EU competition law. On the one hand, because of their negotiated genesis, the remedies imposed in commitment decisions may be more effective in addressing novel and often complex problems, for which the Commission has little experience. On the other hand, commitment decisions are better aligned with the principle of legitimate expectations, insofar as they allow companies to escape fines and the risk of follow-on litigation for practices whose anticompetitive effects may not have been clear beforehand. Of course, commitment decisions are not exempt from difficulties, both from the perspective of investigated companies (because of the risk that they accept remedies that the Commission would not be able to impose unilaterally) and from the perspective of the discipline (because this practice reduces administrative and judicial precedents, which may interfere with its evolution).[55]

Although commitment decisions are not available in hardcore cartel cases, there is also some room for cooperation between the Commission and companies in this type of case. Indeed, companies may also acknowledge their liability and make 'settlement' submissions in the course of cartel investigations.[56] Unlike decisions adopted under Article 9, settlement decisions declare the existence of an infringement, for which they impose a fine. However, companies may obtain a reduction of up to 10 per cent in the amount of the fine. This is precisely how the Commission put an end to its investigation into the car emissions cartel, which is a standard reference in the green antitrust context.[57] In that case, the Commission found that Daimler, BMW and Volkswagen had colluded in breach of Article 101 TFEU, by agreeing to stick to minimum standards imposed by EU environmental legislation rather than developing more ambitious nitrogen oxide cleaning technologies. The case is a good illustration of the potential advantages of cooperation in cases raising novel issues, since this was the first prosecution launched against a cartel on the sole basis of the limitations imposed upon potential technical development (rather than upon price, quality or market partitioning).

[55] See, eg, M Wathelet, 'Commitment Decisions and the Paucity of Precedent' (2015) 6 *Journal of European Competition Law and Practice* 553; A Gautier and N Petit, 'Optimal Enforcement of Competition Policy: the Commitments Procedure Under Uncertainty' (2018) 45 *European Journal of Law and Economics* 195; N Dunne, 'A "Tunney Act for Europe"? Settlement and the Re-Judicialisation of European Commission Enforcement' (2020) 11 *Journal of European Competition Law and Practice* 423.

[56] Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases [2008] OJ L171/3; Commission, 'Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases' [2008] OJ C167/1.

[57] Commission Decision of 8 July 2021 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40178 Car Emissions) [2021] OJ C458/16.

The discussion of the cooperative elements present in the enforcement of EU antitrust law cannot conclude without a reference to the possibility for companies to seek informal guidance from the Commission when they have doubts as to the compatibility with the EU antitrust rules of a certain agreement or practice.[58] The possibility to request so-called 'guidance letters' can be of particular relevance when circumstances change, and companies and regulators face new problems and challenges. This is the reason why the Commission encouraged companies to make use of this possibility in the context of the COVID-19 crisis, expressing its willingness

> to provide such guidance and comfort to undertakings or associations of undertakings in order to facilitate initiatives that need to be swiftly implemented in order to effectively tackle the COVID-19 outbreak, notably where there may still be uncertainty about whether such initiatives are compatible with EU competition law.[59]

For the same reasons, Commissioner for Competition Vestager recently expressed the willingness of the Commission to provide companies with guidance in the context of the novel problems raised by the so-called green transition.[60]

IV. The Role of Companies as Third Parties in the Enforcement of EU Competition Law

A. The Instrumental Value of Third-Party Companies in the Enforcement of EU Competition Law

As the main addressees of antitrust and merger control provisions, companies often occupy the position of investigated parties in the enforcement of EU competition law. However, companies may occupy other positions. The purpose of this section is to reflect upon the role that companies play when they act as third parties. In antitrust and merger control, this is the position of all companies acting in any capacity other than as notifying or investigated companies. In State aid, for the reasons explained earlier, this is the position of all companies without exception.

In principle, the procedural position of third-party companies is weaker, because their involvement in the enforcement of EU competition law is primarily conceived in instrumental terms: as an opportunity for the Commission to gather additional evidence, rather than as an opportunity for third-party companies to defend their interests. In other words, third-party companies are first and

[58] Commission, 'Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases' (guidance letters) [2004] OJ C101/78.

[59] Commission, 'Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak 2020/C' 116 L/02 (Communication) [2020] OJ C116l/7.

[60] Speech by M Vestager, 'Competition Policy in Support of the Green Deal' (IBA Competition Conference, 10 September 2021).

foremost a source of information for the Commission, whose investigatory powers include requests for information, interviews, and inspections (Articles 18–20 of Regulation 1/2003 and Articles 11–13 of the EU Merger Control Regulation). Although these tools can serve to obtain additional information from investigated parties, they are often also used to incorporate into the administrative record evidence gathered from third-party companies.[61]

As far as State aid investigations are concerned, Member States remain the main source of information for the Commission. However, the latest reforms of the procedural legislation applicable in that field have strengthened the information-gathering powers of the Commission vis-à-vis companies.[62] As a result, the Commission is now empowered to request market information from companies in standard State aid procedures (Article 7 Procedural Regulation (PR)), as well as in the context of its cross-border investigations into specific sectors or aid instruments (Article 25(1) PR). These new powers are subject to certain limitations, but they qualify the bilateral character of State aid procedures, since they amount to a recognition that the information provided by Member States is often insufficient to assess the full range of implications of this type of measure.[63]

The fact that third-party companies are primarily seen as a source of information for the Commission does not mean that they are completely deprived of agency. The most interesting area on this front is probably State aid law, because the right of third parties to take an active role in the enforcement of its provisions is enshrined in the treaty itself. Indeed, Article 108(2) TFEU recognises the right of 'concerned' third parties to submit comments in the second phase of State aid procedure. Albeit not enshrined in primary law, third-party companies may also participate in antitrust and merger control procedures. Their status has been developed through secondary legislation. In the case of antitrust, Article 27(3) of Regulation 1/2003 provides that third parties may request to be heard and that the Commission shall grant those applications when they 'show a sufficient interest'. Article 18 of the Merger Control Regulation affords third-party companies with similar rights in merger control procedures.

Granted, the leverage that companies may exert in their capacity as third parties cannot be compared to the power of influence of notifying and investigated companies, since their information and participation rights are more limited. However, these rights give them the possibility to shape the content of the administrative file. This may be more important than it seems, especially in subsequent litigation, given the importance attached to the duty of care (also known as the

[61] See eg, Commission Decision of 17 December 2020 declaring a concentration to be compatible with the internal market and the EEA agreement (Case M.9660 Google/Fitbit) [2021] OJ C194/7, paras 20–24.

[62] Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ 204/15, repealed by Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9.

[63] Hofmann and Micheau, *State Aid Law of the European Union* (n 46 above) 366–67.

duty of diligent and impartial examination) and to the reasons-giving requirement in the judicial review of competition decisions. Both standards basically assess the rationality of Commission's decisions in light of the information compiled in the administrative file,[64] which is why they somewhat make up for the limited involvement of third parties in administrative procedures.[65] Thus, despite its limitations, the right to participate in antitrust, merger control and State aid procedures is one of the avenues that third-party companies have at their disposal to try to shape EU competition policy.

This avenue may be particularly relevant in times of change, as a tool that allows companies to exert some influence over the outcome of disruptive cases that can define the course of EU competition law and policy. This is probably the reason why recent digital antitrust cases, such as the parallel proceedings launched against Google for abuse of dominant position, mobilised numerous third-party companies. Besides submitting written comments, some of these companies were granted the opportunity to meet with the Commission (and Google actually took issue with this fact, complaining that the Commission had allegedly failed to provide it with adequate access to the minutes of those meetings, a plea dismissed by the Commission).[66]

The structure of the State aid procedure, which is closed to the input of third parties during the first phase, means that in some cases it is not feasible for third-party companies to participate in the administrative procedure. When that happens, lodging an action of annulment against clearing decisions adopted at the end of the preliminary phase may be the only option for them. A good illustration thereof is Ryanair's multifront battle against State aid schemes for the airline sector approved during the COVID-19 pandemic. In the case of Germany's State aid in favour of Condor, France's State aid in favour of KLM and Portugal's State aid in favour of TAP, Ryanair did not participate in the administrative examination of these measures, which had been duly notified by the Member States. However, it subsequently challenged the decisions of the Commission not to take objections and the General Court annulled them.[67] Although the decisions were annulled

[64] F Pastor-Merchante, 'Por qué lo llaman procedimiento cuando quieren decir expediente? Sobre las funciones dogmáticas del expediente administrativo' (2021) 4 *Teoría y Método. Revista de Derecho Público* 153, 169.

[65] L Azoulai, 'Les garanties procedurales en droit communautaire: recherches sur la procédure et le bon gouvernment' (*PhD Thesis, European University Institute, 2000*) 237.

[66] Commission Decision of 27 June 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39740 – Google Search (Shopping)) [2018] OJ C9/11, para 118 ff, which was upheld for the most part in Case T-612/17 *Google v Commission* (*Google Shopping*) [2021] EU:T:2021:763. Appeal pending in Case C-48/22 P *Google Alphabet v Commission* (pending); Commission Decision of 18 July 2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.40099 – Google Android) [2019] OJ C402/19, para 52 ff; Commission Decision of 20 March 2019 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.40411 Google Search AdSense) [2020] OJ C369/6, para 62 ff.

[67] Case T-665/20 *Ryanair v Commission (Condor)* [2021] EU:T:2021:344; Case T-643/20 *Ryanair v Commission (KLM; Covid-19)* [2021] EU:T:2021:286; Case T-465/20 *Ryanair v Commission (TAP; Covid-19)* [2021] EU:T:2021:284.

on insufficient reasoning grounds, the ultimate purpose of Ryanair's action was to force the Commission to go through the second phase of the procedure and to gather comments from itself and other third parties if it were to approve the contested State aid schemes.

B. The Role of Companies as Complainants

Third-party companies may play an even more active role in the enforcement of EU competition law when they lodge complaints with the Commission. Both Regulation 1/2003 and the State aid procedural regulation allow interested third parties to lodge complaints, as a means of bringing to the Commission's attention infringements that could otherwise go unnoticed (Article 7(2) of Regulation 1/2003 and Article 24(2) PR). The procedure for handling complaints is roughly equivalent in both areas, given the Commission's obligation to allow third parties to provide additional information when their submissions are deemed to be incomplete (Article 7 of Commission Regulation 773/2004 and Article 24 PR), although antitrust legislation foresees a closer involvement of complainants in the procedure (Article 6 of Commission Regulation 773/2004). The EU Merger Control Regulation does not foresee any role for complaints in that area, although the European judicature has made it clear that the Commission is also bound to examine complaints related to concentrations of EU dimension.[68]

One of the most significant considerations to assess the leverage that companies can exert through complaints is the degree of 'enforcement discretion' – if any – enjoyed by administrative authorities (ie, the ability not to act on certain complaints). In the areas of antitrust and merger control, it is settled case law that the Commission is not obliged to take a position on the merits of complaints. The other side of the coin is that the Commission is entitled to develop and implement its own enforcement agenda and to refrain from investigating complaints that fail to meet that agenda. Of course, the enforcement discretion of the Commission is not unfettered because the famous *Automec II* judgment requires the Commission to examine complaints carefully and to provide complainants with a reasoned explanation whenever it closes the file without a fully-fledged investigation of their allegations[69] The same limitations apply in merger control.[70]

The status of complainants in State aid cases is less clear. The reference case is *Athinaïki Techniki*, where the Court essentially imported to the realm of State aid the procedure for the handling of complaints foreseen in antitrust.[71] The problem is that the *Athinaïki Techniki* judgment did not clarify whether that decision had to address the merits of the complaint or whether it could be an *Automec II*-type

[68] Case C-170/02 P *Schlüsselverlag J S Moser and Others v Commission* [2003] EU:C:2003:501, para 27.

[69] Case T-24/90 *Automec Srl v Commission* [1992] EU:T:1992:97, para 75 and 79. See also Case C-282/95 P *Guérin automobiles v Commission* [1997] EU:C:1997:159.

[70] Case C-170/02 P *Schlüsselverlag J S Moser and Others v Commission* (n 68 above) para 27.

[71] Case C-521/06 P *Athinaïki Techniki AE v Commission* [2008] EU:C:2008:422, para 39.

of decision: namely, a decision laying out the reasons why the allegations made in the complaint would not be investigated. To complicate things even further, the State aid procedural regulation underwent an important reform after the *Athinaïki Techniki* judgment. The reform raised the admissibility bar of State aid complaints, since it introduced stricter standing and formal requirements, as well as the possibility to register as mere market information insufficiently substantiated complaints. However, the reform basically codified the *Athinaïki Techniki* procedure without clarifying the issue, which remains unclear.[72]

The point to note is that the Commission's ability to set priorities and to carry out a selective enforcement strategy is itself a tool that can be used to further certain policies, for example to prioritise investigations having sustainability implications.[73] From this perspective, complainants can be an ally in the strategic turn of EU competition law, when they push the Commission to investigate cases that are relevant from the perspective of its new strategic priorities. For example, some of the best known digital cases decided by the Commission over the last few years had their origin in complaints lodged by third-party companies, including the three famous sanctions imposed on Google for abuse of dominant position in connection to its comparison shopping service,[74] the tying of its search app in the Android store[75] and its search advertising services.[76] At the same time, though, complainants can be an obstacle when they deviate from those objectives, which is where the enforcement discretion of the Commission can come into play.

C. The Role of Third-party Companies in the Enforcement of EU Competition Law before National Competition Authorities and Courts

The discussion so far has focused on the role that third-party companies play in the enforcement of EU competition law by the Commission itself, be it as informants

[72] See, eg, F Pastor-Merchante, 'The Status of Complainants in State Aid Cases: A Look Back into the Athinaïki Techniki Saga' in C Buts and JL Buendia Sierra (eds), *Milestones in State Aid Case Law* 2nd edn (Berlin, Lexxion, 2022) 219– 21; A Sanchez-Graells, 'Digging Itself out of the Hole? A Critical Assessment of the European Commission's Attempt to Revitalize State Aid Enforcement After the Crisis' (2016) 4 *Journal of Antitrust Enforcement* 157; HP Nehl, '2013 Reform of EU State Aid Procedures: How to Exacerbate the Imbalance between Efficiency and Individual Protection' (2014) 13 *European State Aid Law Quarterly* 235, 241; Hofmann and Micheau, *State Aid Law of the European Union* (n 46 above) 361.

[73] OECD, 'Environmental Considerations in Competition Enforcement' (Competition Committee Discussion Paper, 2021) 44.

[74] Commission Decision (n 66 above) in Case AT.39740 Google Search (Shopping), which was upheld for the most part in Case T-612/17 *Google and Alphabet v Commission* [2021] EU:T:2021:763. Appeal pending in Case C-48/22 P.

[75] Commission Decision (n 66 above) in Case AT.40099 (Google Android).

[76] Commission Decision (n 66 above) in Case AT.40411 (Google Search AdSense).

or as complainants. The analysis would not be complete without a reference to the possibility for these companies to resort to national competition authorities or to national courts in order to push for the enforcement of EU competition law against other market players.

One of the consequences of the decentralisation of EU antitrust law operated by Regulation 1/2003 was the empowerment of national competition authorities to enforce EU antitrust law in full. This is relevant from the perspective of our inquiry, for it means that national competition authorities are an alternative forum where third-party companies may lodge complaints against alleged violations of EU antitrust law committed by other undertakings.[77] The corollary is that national competition authorities may also have a role to play in the strategic reshaping of the discipline. The French Competition Authority's investigation into Google's ad tech business offers a good illustration thereof, since the trigger was a complaint lodged by various local publishers.[78] The case resulted in a decision imposing a multi-million fine on Google for breach of Article 102 TFEU and of the corresponding French provisions on abuse of dominant position. The point to note is that the case confronted the French Competition Authority with novel issues pertaining to the application of Article 102 TFEU in the digital context – and that the fine and the commitments that it rendered binding had an impact upon Google's general ad tech strategy in the EU, and not only in France.

The decentralisation of EU antitrust law also transformed the role of national courts in the enforcement of its provisions. Not in vain, one of the goals of the reforms introduced by Regulation 1/2003 was the promotion of private enforcement before national courts as a means of strengthening the effectiveness of the discipline.[79] The idea was that 'companies and individuals should increasingly feel encouraged to make use of private action before national courts in order to defend the subjective rights conferred on them by the EC competition rules'.[80] The importance attached to private enforcement by the EU institutions has not waned over the last two decades, as shown by the adoption and entry into force of the Antitrust Damages Directive, which explicitly enshrines the right to full compensation of antitrust victims.[81] Through its case law, the Court of Justice of

[77] 'Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty' (Notice) [2004] OJ C101/05, paras 19–25.

[78] See, eg, T Höppner, M Volmar and P Westerhoff, 'The French Competition Authority Fines a Big Tech Company €220 Million for Abuse of a Dominant Position Through Self-Preferencing in the Ad Tech Industry' (2021) *Concurrences* No 102324.

[79] Commission, 'White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty' (White Paper) COM(1999) 101 final, paras 25, 36–39 and 46.

[80] Speech by Commissioner M Monti, 'Effective Private Enforcement of EC Competition Law' (Sixth EU Competition Law and Policy Workshop, 1–2 June 2001) 2.

[81] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance [2014] OJ L349/1, Art 3.

the European Union has also contributed to the promotion of private enforcement: for example, holding that under certain conditions, parent companies may be held liable for the antitrust violations committed by their subsidiaries[82] and, conversely, that there are circumstances where subsidiary companies may have to respond for their parent companies' anticompetitive actions.[83]

The trucks cartel saga is a good example of a case with environmental implications where the Commission's infringement decisions gave rise to a considerable volume of national litigation, as a result of the actions for damages brought by the purchasers of the trucks produced by the cartelised firms.[84] Granted, the potential impact of this type of follow-on litigation upon the strategic reshaping of EU antitrust law is limited, because it relies on the determinations made by the Commission or by national competition authorities in their prior infringement decisions. Thus, the most significant changes or novelties – if any – are likely to be found in those decisions. Of course, companies can also bring antitrust suits from scratch, without grounding their actions on any prior infringement decision. However, stand-alone litigation is probably less attractive in general (because of the uncertainty generated by the absence of a prior infringement decision to back up the applicants' claims) and in particular in novel cases (because national courts may be less willing than the Commission or than national competition authorities to entertain new theories of harm).[85] In any event, it is certainly a possibility and there are actually some precedents in the digital context: for example, the action taken by Nekdoktor against the cooperation agreement between Google and the German Federal Ministry of Health.[86]

Private litigation before national courts is also an option for third-party companies in the field of State aid. Indeed, the direct effect of the standstill clause of Article 108(3) TFEU empowers third-party companies to apply for the suspension and recovery of unlawful State aid measures, as well as for the compensation of damages suffered as a result of their implementation.[87] Since the adoption of the first Notice on cooperation,[88] the promotion of private enforcement has had pride of place in the Commission's State aid agenda.[89] As a result of these efforts, the volume of national litigation in the area of State aid

[82] Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions Oy* [2019] EU:C:2019:204.

[83] Case C-882/19 *Sumal SL v Mercedes Benz Trucks España SL* [2021] EU:C:2021:800.

[84] See, eg, F Marcos, 'Truck Cartel Damages Claims: Thousand and Odd Judgments Issued by Spanish Appeal Courts' (*Working Paper Zeitschrift für Europäisches Privatrecht No 1/2023*).

[85] R Podszun, 'Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act' (2022) 13 *Journal of European Competition Law and Practice* 254, 255.

[86] ibid.

[87] Study on the enforcement of State aid rules and decisions by national courts (Luxembourg, Publication Office of the European Union, 2019) 60.

[88] Commission, 'Notice on cooperation between national courts and the Commission in the State aid field' (Notice) [1995] OJ C312/8.

[89] Commission, 'State Aid Action Plan – Less and better targeted state aid: a roadmap for state aid reform 2005–2009' (Consultation Document) COM (2005) 107 final.

has increased.[90] However, it is important to note that national litigation before national courts can only have limited impact upon the making and evolution of EU State aid policy. This is because the main issue at stake in this type of case is the procedural regularity of contested State aid measures (ie, whether they were implemented in violation of the standstill clause), rather than their substantive compatibility (ie, whether they may be lawfully implemented under the public interest exemptions of Articles 107(2) and (3) TFEU). The fact that the Commission retains a monopoly over those provisions necessarily limits the significance that private litigation triggered by third-party companies can have upon the strategic transition of EU State aid policy.

V. Conclusion

The starting point of this chapter was the observation that, if EU competition law is to transform itself, companies should have a say in the process. Without their involvement, the process risks putting the effectiveness of the discipline in peril. Moreover, as the main subjects of EU competition law, the involvement of companies is also necessary to shore up the legitimacy of any process of transformational change, if only because of the constitutional value placed on the principles of openness and stakeholder participation by EU constitutional and administrative law.

It is against this background that the chapter has mapped out the different channels through which companies can bring their input to the strategic reshaping of the Commission's competition policy. The analysis has shown that the first avenue through which companies can bring their input to the transition is through the consultation processes to which the Commission routinely subjects its legislative, regulatory and soft-law initiatives. Of course, EU competition policy is also defined through the enforcement endeavours of the Commission, in the context of which companies also have an important role to play, either as the target of those procedures or as third parties. Although their degree of involvement is different in both scenarios, they have certain tools to voice their concerns and to try to shape the outcome of EU competition procedures, a possibility of particular relevance in the kind of novel or disruptive cases that can redefine the course of EU competition policy.

More importantly, the chapter has also shown that the involvement of companies in the strategic turn of EU competition law is not a mere possibility, but rather an actual reality. It is in the context of the rule-making initiatives of the Commission where this is most obvious, given the numerous consultation

[90] See, eg, F Pastor-Merchante and G Monti, 'The Functions of National Courts in the Private Enforcement of State Aid Law' in PL Parcu, G Monti and M Botta (eds), *EU State Aid Law: Emerging Trends at the National and EU Level* (Cheltenham, Edward Elgar, 2020).

processes that we have recently witnessed in connection to the impact of the green and digital transitions in the area of EU competition law. Indeed, the Commission seems eager to gather the input of companies in the framework of its strategic revision of EU competition policy, which is probably due to the fact that it is venturing into uncharted waters. The chapter has also highlighted the important role played by investigated and third-party companies in some of the cases that are generally considered to be most relevant from the perspective of the strategic turn in EU competition law. These cases show that companies can also be a valuable source of information for the Commission in its attempts to align the enforcement of EU competition law with the objective of achieving a green, digital and resilient internal market.