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Unit A.2: Mergers Case Support and Policy
European Commission
Directorate-General for Competition
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By email: COMP-REVISION-OF-THE-MARKET-DEFINITION-NOTICE@ec.europa.eu

To the attention of Unit A.2: Mergers Case Support and Policy

Subject: HT.5789 Review of the market definition notice

ClientEarth considers that wherever market definition is used, it is essential that it properly factors in actions to fight climate change, environmental protection, biodiversity, and wider sustainability considerations. Most obviously, it is necessary to internalise in the competition analysis sustainability considerations when looking at each of demand substitutability, supply substitutability and potential competition.

As with digital markets, the boundaries between sustainable and less/not sustainable products may not be as clear cut as they may be in a more traditional, less digital, less sustainable, economy. Whether or not a given sustainable and non-sustainable product are in the same market will vary across sectors, product markets, geographies and, importantly, over time. This latter point is particularly important as consumers become more aware of, and better informed about, sustainability considerations.

- Paragraphs 15, 16 & 52 – This is relevant to the welcome consideration of “the time period considered”, “expected transitions in the structure of a market” and “evidence of past substitution”. It is potentially relevant to the analysis of both demand and supply side factors (see further below) and may make it more, or less, likely that a sustainable product is in the same market as a less or non-sustainable one. One obvious aspect of this is that historic evidence of substitution between products may not be reliable.
- Paragraph 12 – We very much welcome the express recognition that durability and sustainability are aspects of quality and thus a parameter of competition to be envisaged when examining the evidence and the most relevant parameters in the choice of customers (paragraphs 29 and 51). We would suggest that (consistent with paragraphs 594 to 600 of the Commission’s draft horizontal guidelines) express reference was also made here to the relevance of consumer’s appreciation of the impact of their sustainable consumption on others: i.e. the “individual non-use value” of the product. This is clearly relevant to the question as to whether sustainable and non (or less) sustainable products are, or are not, substitutes. This would add to the coherence of the two instruments.

- Paragraph 73 – Sustainability is also helpfully referred to in this paragraph in the context of “distance-related factors and transport costs”. An example that could be added at the end of the paragraph is where consumers are concerned about the impact of their purchases on the environment for example in the case of heavy or bulky products resulting in greater lorry/plane/ship movements/emissions and the case of “food miles”.
- Paragraph 28 – On the demand-side, it is indeed necessary to consider the position of consumers and, in particular, the value they place on sustainability factors including, for example, their willingness to pay. In our view, greater consideration should be given on the demand-side to behavioural economics, recognised consumer biases, and actual consumer behaviour. This will assist when determining whether or not more sustainable, and less sustainable, products are, or are not, in the same relevant market.
- Paragraphs 29-33 – Again, as with the digital economy, price should indeed not be considered the only, or even the most important, parameter for market definition in all cases. The SSNIP test may also overestimate the market power of sustainable producers (and more quickly lead to a false appearance of market power and an apparent significant impact on competition). This is because it may suggest that sustainable products are a market unto themselves because a SSNIP for sustainable products does not cause consumers to switch to non-sustainable products. However, the reason for that may not be that sustainable producers have market power, but that a sustainable product has a quality aspect (sustainability) that justifies that price increase in the eyes of consumers.
- Footnote 48 – In some instances, it will be important to check whether the prices being taken into account should be just the prevailing market prices. It is well recognised in both merger and dominance cases that the prevailing price might already have been substantially increased due to the dominance of the company (or companies) concerned (the so-called “Cellophane Fallacy”).

Similarly, the market price may not be a “true price” if it excludes environmental costs which have been left out of account and which have been imposed on society (so-called “externalities”). Consideration should be given to using so-called “environmental” or “shadow” prices – prices that express the value that society assigns to the harm of, among other things, pollutive emissions and greenhouse gas emissions.¹ It may also be possible to integrate this into a SSNIP test – using true prices rather than narrow market prices.

- Paragraphs 35, 36 & 39 – On the supply-side, it will often be important to consider factors such as the cost, and timescale, for switching between more sustainable, and less sustainable, products (and vice versa). For some transitions, this is easier than for others (such as biological farming). It may be particularly important to consider supply-side substitutability (and not focus exclusively on the demand-side) in the case of sustainable products where suppliers can (properly and lawfully) price discriminate by selling a sustainable product at a premium to the non-sustainable product. In the case of potential

¹ See, for example, paragraphs 57 and following in the ACM draft guidelines on sustainability agreements, dated 26 January 2021, available at <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf>.

competition, it will therefore be particularly important to consider the timescale in which sustainable products may come on stream.

- Section 3.4. – We would strongly encourage the Commission to expand its traditional sources of evidence and analysis to include evidence from organisations such as NGOs, environmental agencies and those bodies within the Commission and government responsible for environmental policy. They will often be an invaluable potential source of evidence including evidence of actual consumer behaviour, likely changes in the market, and on environmental costs and benefits. In this context, we welcome the express reference to NGOs and government authorities in paragraph 78 and to sector specific regulators in paragraph 81. We suggest that express reference is also made here to environmental protection agencies (particularly as they may have a different legal status in the systems of different member states).

Yours sincerely,

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