

Response to the European Commission's Competition Policy supporting the Green Deal

Call for contributions

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I welcome the Commission's initiative to attract comments on its push for a better alignment between the EU competition policy and the Union's environmental and sustainability aspirations. It is high time to consider hipster antitrust as perfectly mainstream.

This brief only considers Parts 2 and 3 of the Call (Antitrust and Merger control rules), and in fact cherry-picks only one theme hinted at by Part 3: the issue of relevant market definition and assigning a role to the environmentally friendly or sustainability product features in the market definition assessment². Unlike the Call, I do not see this issue pertinent only in the area of merger control; the relevant market definition is in EU competition law also a critical step in the assessment of dominance under Article 102 TFEU³. The relevant market definition is, arguably, less relevant for assessment of anticompetitive agreements under article 101 TFEU, but may play an important role in certain circumstances and in the application of certain principles, such as block exemption thresholds.

The issue of sustainability agreements as well as various aspects of Article 102 TFEU enforcement and merger control from the sustainability perspective have been extensively considered elsewhere⁴, but the potential importance of the relevant market definition in this context has been, to my knowledge, so far overlooked. I therefore respond to the following Call's Part 3 question from the perspective of merger control but also Article 102 TFEU:

2. Do you consider that merger enforcement could better contribute to protecting the environment and the sustainability objectives of the Green Deal? If so, please explain how?

The Call summarizes the Commission's approach set out in its Notice on the definition of relevant market for the purposes of Community competition law (1997) ("MDN") that the relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. The Commission is currently in the process of reviewing the MDN with the view of adopting a new notice in 2021⁵.

The MDN is, and surely also its future version will be, as a matter of law or fact followed by competition authorities, courts and practitioners in multiple EU Member States and possibly beyond. I agree with the Call's proposition that even though the MDN contains no such explicit mention, environmentally friendly characteristics or sustainability product features can be associated with higher product quality and constitute a differentiating factor in the eyes of consumers. I am aware of at least one recent case from my jurisdiction (Czech Republic) in which the national competition authority considered an environmentally friendly aspect of a service to play a role in its relevant market definition (case *Czech*

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² Introduction to Part 3 of the Call notes: "Market definition is a tool to identify and define the spaces in which firms compete. Delineating markets in both product and geographic dimensions allows the establishment of the framework of assessment of the impact of a transaction on competition and consumer welfare. A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. In this respect, environmentally friendly characteristics or sustainability product features can be associated with higher product quality and constitute a differentiating factor in the eyes of consumers".

³ See Court of Justice of the EU Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207, paragraph 10, see also DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, December 2005, paragraph 11.

⁴ For a good recent overview of the approach towards environmental and sustainability issues in EU competition law and policy see, e.g., Simon Holmes, *Climate change, sustainability, and competition law*, Journal of Antitrust Enforcement, 2020, 8, 354–405; Advance Access Publication Date: 13 April 2020.

⁵ https://ec.europa.eu/competition/consultations/2020_market_definition_notice/index_en.html

*Railways (exclusionary discrimination))*⁶. As regards the critical question of substitutability between the modes of transporting high-volume freight by rail and by road, a number of surveyed customers responded that the increased use of transport by road would lead to a higher environmental impact and impact on the living conditions of citizens in concerned municipalities. Conversely, the use of railway transport services would, in their opinion, decrease the environmental burden. Several customers attributed the factor of road transport's impact on environment the same level of importance as cost-effectiveness and other economic factors. The competition authority duly noted this (and noted that the number of customers worried about the environment has been increasing) and defined the rail cargo transportation services as a separate relevant product market, which played a decisive role in finding of Czech Railways' dominance and abuse.

With this in mind, I trust that there may be room to "promote" environmental and sustainability factors to be taken up by antitrust enforcers more systematically in their assessment of demand substitution at the relevant market definition stage. After all, the MDN postulates that the concept of relevant market is closely related to the objectives pursued under Community competition policy⁷. There seems to be nothing that would suggest that environmental/sustainability factors would be somehow incompatible with the SSNIP framework often used for that purpose⁸. But one can easily imagine the environmental concerns also being a limiting (or motivating) factor for suppliers' switching decisions; in other words, environmental preferences can play a role from the supply-side substitution perspective as well⁹.

Clearly, any qualitative or quantitative evidence for competition authorities' assessment of the role of environmental factors from the demand-side perspective (if any) should be constructed in a way not to create or perpetuate customer bias, such as when designing customer surveys. The demand-side reaction estimation (and proof) should always reflect the actual ("relevant") market and real market structure and dynamics, not a policy objective construct of antitrust regulators. A reasonable approach would be to assess sustainability factors in cases of products/services that are genuinely related to these issues directly or via their supply chain. In no event competition authorities should be given a loophole to fish for environmental factors in the investigated undertakings' portfolio just to find an artificial reason to prohibit a merger.

From a competition policy perspective, defining narrow markets might result in more mergers being prohibited or conditioned because the merging parties that supply less environmentally friendly products or services could be found having more market power in their respective markets. Similarly, more undertakings could be found dominant, such as in the Czech Railways' case. With dominance, the "special responsibility" status "not to allow their conduct to impair genuine undistorted competition" is

⁶ Czech Office for the Protection of Competition decision of 26 June 2018 (case no. S0220/2006/DP) and appellate decision of 10 December 2018 (case no. R122/2018/HS) finding an abuse of dominant position by České dráhy, a.s. in the market for rail cargo transport services for transport of substrates in high/bulk volumes in the territory of the Czech Republic by applying dissimilar conditions to equivalent transactions with providers of rail logistic services (exclusionary discrimination).

⁷ Paragraph 10.

⁸ In paragraph 20, the MDN considers that "[t]he assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer. One way of making this determination can be viewed as a speculative experiment, postulating a hypothetical small, lasting change in relative prices and evaluating the likely reactions of customers to that increase. The exercise of market definition focuses on prices for operational and practical purposes, and more precisely on demand substitution arising from small, permanent changes in relative prices. This concept can provide clear indications as to the evidence that is relevant in defining markets."

⁹ In paragraph 20, the MDN considers that the "[s]upply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved. Such an impact in terms of effectiveness and immediacy is equivalent to the demand substitution effect."

attributed to undertakings¹⁰, which could positively lead to further constraints on their potential unsustainable behaviour¹¹.

The main issue with my suggested approach is that it cuts both-ways: a firm that pioneered environmentally friendly products or services could find itself isolated on a narrow relevant product market just because its competitors have been unable to keep up and offer the quality comparable from the customers' perspective. This might be less of an issue under Article 102 TFEU. In fact, in the above mentioned *Michelin I* case, Michelin argued (supported by the French Government) that finding of its dominance was "penalizing it for the quality of its products and services". The Court of Justice rejected this, however, holding that "a finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility"¹². The answer is less straightforward in merger control cases and could in practice lead to the "first mover" competitive – or rather regulatory – disadvantage¹³. Competition authorities should be able to disregard the first mover factor in justified cases. On the other hand, the approach suggested could perhaps contribute to more regulatory oversight over the so-called killer acquisitions of innovative companies thanks to EU Member States' rules, which base merger control jurisdiction on the share of supply in combination or alternatively to turnover thresholds (such as the UK, Spain, or possibly in the future Slovakia¹⁴).

With this in mind, I therefore suggest that promoting the environmental and sustainability factors in the relevant market definition guidance and in the Commission's decisional practice could help to "nudge" national competition authorities and practitioners in their more systematic approach to these factors across the antitrust practice areas, but mainly in merger control and abuse of dominance cases. The MDN's pending review is an excellent opportunity for this. It might also be an easily and well-transferrable good practice for other stakeholders.

Proposal for action: promote environmental and sustainability factors as factors relevant in the Commission's assessment of relevant markets in the new market definition notice and decisional practice.

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¹⁰ Case 322/81, *Michelin v Commission* [1983] ECR 3461, para. 57.

¹¹ See the Simon Holmes above in N4 for a plethora of ways how Article 102 TFEU could be used as sword to promote sustainability policies.

¹² Case 322/81, *Michelin v Commission* [1983] ECR 3461, para. 57. A similar argument could be raised by Czech Railways in the case mentioned supra in N6: Czech Railways were found dominant in a narrow relevant market which did not include road transport services also thanks to the environmental impact factor. In other words, the dominant undertaking was the one offering more environmentally friendly service. But this is only a matter of perspective: Czech Railways were found to abuse their dominant position by applying objectively unjustified discriminatory conditions in their transactions with rail transport logistic companies operating on a downstream market (final customers could arrange transport of their freight either directly with transport service providers such as Czech Railways, or indirectly through the downstream logistic services providers). By excluding competitors, the Czech Railways' abuse could therefore damage the competitive structure in the market for more environmentally-friendly services. In distorted market conditions, some final customers would eventually shift to road transport services, resulting in a net negative effect for the environment. So from this perspective, the case ended very well.

¹³ Simon Holmes in N4 above provides a good example of the 'first mover disadvantage': the German discount retailer, Lidl, decided only to sell Fairtrade bananas in Germany, but competitors did not follow and Lidl lost sales resulting in a reluctant reversal of the decision only 8 months later.

¹⁴ A draft statute introducing a 40% market share threshold in addition to a fairly low turnover threshold for a notifiable concentration is pending consultations with stakeholders.