

VALENTIN MAUBOUSSIN

November 11th, 2020

Directorate-General for Competition European Commission
Place Madou/Madouplein 1 1210 Bruxelles/Brussel Belgium

Dear European Commission,

I am contacting you in reference to your call for contributions to make EU Competition Policy more sustainable, in line with the Commission's Green Deal. The call for contributions that you have organised invites EU competition law experts to submit various suggestions regarding the greener enforcement of state aid policies, Article 101 TFEU, and the Merger Control regulation. The enforcement of Article 102 TFEU concerning 'abuse of dominant position' is left out, implying that there is no improvement needed in this field to make the enforcement of Article 102 TFEU more sustainable as well. That is a pity, as several reforms can be implemented to slightly reform the enforcement of Article 102 TFEU in accordance with a greener political agenda. Simon Holmes, who is well-known in the combined fields of competition law and environmental protection, actually makes several proposals in his recent article "Climate change, sustainability, and competition law" to make the enforcement of Article 102 TFEU more sustainable. He suggests, for example, refusing to grant access to an essential facility to a user who intends to use the facility for environmentally unfriendly purpose as a defence to an allegation of 'refusal to supply', or the possibility of offering exceptionally low prices for a good to generate trial of a new environmentally friendly product in regards to predatory pricing abuses.¹

To substantiate Holmes' article, I believe that other arguments also exist to support a more sustainable enforcement of Article 102 TFEU. Please find below my suggestions:

Are there circumstances in which the pursuit of Green Deal objectives would justify condoning a *prima facie* abusive conduct?

It may be very expensive and unprofitable for undertakings to be more environmentally friendly. Companies can sometimes hardly change their production paradigm to become more sustainable while remaining competitive vis-à-vis their competitors. Taking into consideration that dominant undertakings may have more capabilities and resources to bring environmental transformations to the market they compete in, temporary restrictions to competition could be necessary to incentivise environmental-oriented market structural changes. These restrictions to competition could facilitate the dominant undertakings' process of internalising environmental and social costs while dominant firms undertake capital investments to modify their production process or produce goods that better respect the environment. Nevertheless, these restrictions to competition should obviously be limited in time to what is necessary to cushion the impact of this transformation. These restrictions to competition should preferably be imposed during a short time frame to ensure that there is a high likelihood that these

¹ Simon Holmes, 'Climate change, sustainability, and competition law' [2020] JAE, 1ff, 35-36

environmental benefits materialise and incur a low impact upon the competitive structure of markets.

Why would it be necessary?

Giving some exemptions to dominant undertakings to truly undertake a change towards a non-carbon based production system might actually be necessary when we have reached a political dead-end. Indeed, Member States often disagree with the implementation of more stringent environmental measures at the EU level, leading to minimal harmonisation. Meanwhile, Member States could impose more stringent national environmental measures than what EU law requires, a process named green-plating, but the regulatory competition paradigm that moulds law-making within the EU usually leads to a race to the bottom rather than green-plating. As a result, drastic environmental measures would make it more difficult for national undertakings to compete with their foreign competitors beyond their national borders if their country introduced harsher environmental policies. This example demonstrates that public authorities cannot sometimes regulate markets in a manner that contributes to the public interest, whereas dominant undertakings may be the only actors qualified to do so if public authorities empower them with the capabilities they need.

How should we assess environmental justifications?

Unlike the assessment framework of objective necessities justifications, the extent of environmental benefits, in respect to the negative impact of the conduct of dominant undertakings on competition, is primordial and should be mathematically measured. For instance, in terms of softening climate change consequences, restrictions to competition that could prevent a 0.01 degree rise of temperature in 20 years should be evaluated more leniently than similar restrictions that would contribute only to a 0.000001 degree reduction of temperature in 20 years.

For these reasons, environmental defences would be better assessed in accordance with the criteria of efficiency gains justifications, by balancing positive environmental effects with the negative impact of a dominant undertaking's conduct on competition and consumer welfare. This test is planned to be followed in the same fashion by the Dutch Competition Authority, ACM (Authority for Consumers and Markets), in accordance with its draft guidelines regarding sustainability agreements, when it analyses environmental justifications in accordance with Article 101 TFEU.² The ACM plans to analyse whether the benefits that the proposed collaboration aims to achieve, such as lower carbon emissions, outweigh the negative impact of this collaboration, which includes, for instance, higher prices for consumers. Therefore, from paragraph 28° to 30° of the guidelines on the enforcement of Article 102 TFEU, every sentence including the word 'efficiency' could be rephrased to 'economic and environmental efficiencies'.

However, in some specific situations, the assessment framework of environmental efficiency gains could differently evaluate justifications of this nature, with more simplified conditions, on the basis of the traditional proportionality test which applies to objective necessities justifications (1° The objective is real and does not disguise a commercial interest; 2° The

² 'ACM opens up more opportunities for businesses to collaborate to achieve climate goals' (Authority for Consumers and Markets, 9 July 2020) <<https://www.acm.nl/en/publications/draft-guidelinesustainability-agreements>>

conduct is suitable to achieve the objective; 3° There are no less restrictive manners to achieve the objective). Such an assessment framework with simplified conditions could be well-suited to review claims that are advanced by dominant undertakings when those are not overly dominant in their markets, and when the environmental benefits of their conduct clearly outweigh its disadvantages on competition, with little need to conduct extensive and complex examinations to reach this conclusion.

Thank you for your time and consideration as you read all my proposals, I am looking forward to discussing with you more profoundly on the matter at hand if there is a need, for example, to elaborate more on these proposals.

Sincerely,

Valentin Mauboussin