

AGFW's position paper on the 2020 Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law

SD, 8th October 2020

The AGFW, the German association on district heating and cooling and CHP (Combined Heat and Power), welcomes the possibility to voice its opinion on the evaluation of the Commissions relevant market definition Notice. In the light of the Commissions recent proposal of stepping up Europe's 2030 climate ambition, the AGFW would like to take advantage of the opportunity provided by this evaluation in order to highlight the potential role of the European competition legal framework in facilitating Europe's green energy transition.

Accordingly, AGFW's contribution will lay out how adjustments to the present definition notice, in line with the Commissions climate ambitions, could initiate crucial impulses for a market-economy driven decarbonisation by helping to establish a level-playing field among the competitors in the European heating and cooling sector. As such, this position paper should therefore also be seen as a contribution to the Commissions efforts of mainstreaming climate action across the entire regulatory framework by further embedding the "do no harm" principles within the fundamental interpretative guidelines of European competition law. The two key areas within the present normative design of the notice which AGFW has identified as the potential regulatory enablers for such a climate-minded approach to competitive market design, concern the product dimension of the market definition as well as the external coherence of the Notice with other existing and upcoming EU legislation.

Regarding the current practice of evidence based market definition along product related factors, AGFW argues in favour of including a number of contra-indicative factors to a narrow product definition that would allow for a better reflection of the competitive characteristics of the European heating and cooling market as well as similarly structured system-markets in other sectors. Therefore, with respect to reference number 42 "*Barriers and costs associated with switching demand to potential substitutes*", AGFW would like to highlight that the existence of considerable barriers to substitution can be a fundamental and natural characteristic of certain markets with competing product-systems that are as such already fully priced into the existing market structure, so that the economic effects of comparably high substitution costs are internally balanced by likewise long amortisation periods and contracting schemes. Within such market structures it would be better to shift away from a simple calculation of the raw investment costs necessary for substitution and instead analyse the historical competitive dynamic of the respective market as a whole. Accordingly, a crucial indicator for such markets could be the vitality of upfront competition for new consumers and especially those re-entering the market and whether this competition, in accordance with reference number 43 of the Notice, is also found to influence existing consumer relations, preventing potential price discrimination of certain consumer groups. Such a nuanced approach to the product dimension of markets would not only be in line with the Commissions perspective on consumer welfare as well as anti-trust doctrines but also better reflect the long-term competitive cycles of markets, in which the supply relationship is an essential and inseparable characteristic of the product in question. AGFW therefore proposes that within markets of different competing systems of the same product with naturally considerable barriers to substitution, reference number 42 should be amended to refer to the perspective of new consumers entering or re-entering the market. Alternatively,

AGFW proposes to offset potential costs of substitution against their reflection within the existing market structure such as contracting agreements.

The second aspect which the AGFW would like to highlight is the importance of the Notice external coherence with existing and upcoming legislation in the field of climate and energy policies especially regarding the proposed “mainstreaming” of climate action. With respect to the European heating and cooling market the Commission regularly refers to the industry as a single entity within her climate and energy legislation. Consistently transposing this single market definition into the corpus of European competition law would thereby not only strengthen the overall coherence of European legislation but furthermore underscore the Commissions own climate ambitions. Since in the present absence of a thorough CO2 pricing mechanism a narrow market definition in our sector is especially beneficial for CO2 intensive competitors, AGFW would like to emphasise that this would lead to the politically undesirable outcome in which a product-system that is being strongly promoted within climate and energy legislation is obstructed in expanding its market share against high emitting competing systems through an artificially uneven competitive environment. Moreover, European market abuse doctrines would likewise force district heating operators which are considered to hold a dominant position to lower their prices by residing to the use of carbon intensive fuels and therewith undermine European climate policies. Aligning the future market definition Notice with the Commissions climate ambitions by broadening the present product dimension in such a way as to allow for the definition of a single heating market would thus also strengthen the market based transformation process within the green energy transition.