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Green Deal and Merger Control Sustainability – A Killer Deal Rationale?

Part Four of our Series on Competition Policy and the Green Deal

Markus Röhrig, Lukas Ritzenhoff and Malcolm Tiffin-Richards report on the latest developments from the European capital of competition law.

As the Commission's recent Conference on Competition Policy and the Green Deal ended, the regulator drew the conclusion that the current merger control rules are "broadly fit for purpose" within the context of sustainability. How precisely merger control policy can play an active role in achieving sustainability goals remains unclear, however. The Commission presents the protection of innovation in sustainable technologies as a way in which merger control policy can have a positive impact on Green Deal objectives. In furtherance of this cause, as Chief Competition Economist Pierre Régibeau puts it, the Commission will be particularly vigilant towards green "killer acquisitions".[1] On the other side of the scale, companies see opportunity in presenting a green deal rationale to defend their transactions. Veolia, for example, frames its tender offer for Suez as the formation of a Green European champion: *"it could become a major advantage in the implementation of the Green Deal and of the European recovery plan, and it is a perfect match for the ambitions of the European Commission".*[2]

This fourth and last instalment of our series on EU competition law and sustainability provides a discussion of the role of sustainability in merger control enforcement and policy. It raises the question which parts of the merger control analysis could be affected by the current sustainability priorities of the Commission. Will acquisitions of innovative green competitors be prohibited? What would an innovation sustainability theory of harm look like? Would the Commission consider clearing transactions if they can show benefits for sustainability?

1 Reference is made to comments made verbally by Chief Competition Economist Pierre Régibeau during the Competition Open Day of the OECD, which took place on 24 February 2021.

2 See Key terms of Veolia's draft offer document, Section 1.1.5 under https://www.veolia.com/en/veolia-group/finance/financial-information/press-releases/pr-key-terms-veolias-draft-offer-document.

Status Quo: Fit for a Sustainable Purpose?

The EUMR does not currently specifically address sustainability. Mergers which result in a significant impediment to effective competition under the SIEC test face prohibition. However, under Recital 23 of the EUMR, the Commission must consider the general framework of promoting a sustainable development of economic activities as set out in the treaties – thus opening the door for the consideration of sustainability in merger control. Further, the Horizontal Merger Guidelines expressly mention innovation as one of the criteria for the competitive assessment.

So far there have been only a limited number of merger control decisions which at least tangentially deal with sustainability considerations. Two such recent decisions are Novelis/Aleris[3] and Aurubis/Metallo[4]. In Novelis/Aleris, the Commission considered sustainability as part of its product market definition and remedy consideration. The Commission considered a separate relevant product market for certain aluminium products that were predominantly used for the production of fuel-efficient vehicles. In Aurubis/Metallo, the Commission set out that a well-functioning copper recycling industry to which both companies belonged, *"is key to meet the future needs of European industry and to limit the impact on the environment"*.[5] In its decision, the Commission considered the markets definition (e.g. procurement of copper scrap for smelting and refining), theories of harm (e.g. reduction of incentive to recycle), and countervailing technological synergies (e.g. improving metal valorisation), within the competitive framework of the copper recycling industry.

Sustainability Criteria in Merger Control

These decisions show that sustainability can already play a role in the merger control analysis. Sustainability can, at least in theory, be taken into account in a multitude of ways, throughout the merger control analysis. In the following we explore how sustainability can affect market definition, theory of harm, justification or remedies.

Sustainability Market Definition

Market definition sets the stage for the determination of whether a transaction leads to high levels of concentration on the relevant markets. The Commission may take sustainability factors into account in determining whether consumers consider green or "fair trade" products substitutable with other products. For example, consumers might view organic foods as non-substitutable with conventional foods and suppliers may have difficulties switching from conventional to organic food production. Such an analysis could lead to narrower "green" markets being identified as a relevant segment of the markets for products. As seen in the cited recent case law, sustainability aspects have already been introduced into the product market definition. The German Federal Cartel Office (FCO), treats renewable sources separately from conventional energy generation, though mainly

3 Commission Decision of 1 October 2019, Novelis/Aleris, COMP/M.9076.

4 Commission Decision of 4 May 2020, Aurubis/Metallo, COMP/M.9409.

5 See press release: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_801.

due to differences in regulation. Potentially this could lead to higher levels of concentration being identified in green market segments. The risk of prohibition could increase for green companies acquiring competitors offering substitutable green technologies or products, even within a much wider overall market. At the same time, conventional companies possibly could be able to acquire companies active in (separate) green markets without incurring high market share additions.

Sustainability aspects could similarly affect the geographic market definition. Particularly for green products, certain consumers are eager to source locally in order to reduce their personal carbon footprint. Accordingly, the Commission might – against the trend for conventional products in a globalized world – consider narrower geographic markets for certain types of sustainable products.

Sustainability Theories of Harm

The Commission is homing in on market behaviour that leads to a restriction of innovation in green technologies. Many of the speakers at the recent conference, and indeed Executive Vice President Vestager herself, emphasized that competition is a necessary and powerful engine for innovation in green technologies.[6]

Under the innovation theory of harm, the Commission has developed tools to analyse long-term dynamic effects including innovation concerns in its merger control policy. Horizontal mergers can in certain circumstances reduce the incentive to innovate to the detriment of current and future consumer welfare. For example the discontinuation of a competing pipeline product reduces innovation and harms the affected consumers. It does not require great leap to apply this theory of harm to green technologies. The Commission would, however, be required to show that it leads to the detriment of consumer welfare, rather than to overall society. This raises the question how the Commission would determine harm to specific consumers caused by environmental degradation rather than classic aspects such as higher costs, reduced consumer choice or lower quality products. For companies, it may be difficult to rebut innovation theories of harm in substantiated manner, given the uncertainties inherently underlying innovation and the secret nature of rivals' research and development projects.

A sustainability theory of harm could also rely on concepts borrowed from the discussion on data protection and merger control law. Privacy (like sustainability), is viewed as a non-price dimension on which companies can compete. The Commission may, for example, consider transactions which reduce data protection as detrimental for competition insofar the transaction reduces the quality of the products (i.e. reducing privacy protection), consumer choice (i.e. fewer alternatives which are privacy friendly) or innovation. In transferring this approach, the Commission could seek to determine whether a transaction has a negative effect on quality, consumer choice or innovation from a sustainability perspective, for example where target companies market their products as sustainable or green alternatives.

6 See Executive Vice President Vestager's speech on the 4 February 2021, here: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-and-green-deal_en.

The spectre of green killer acquisitions has raised special attention. In "killer acquisitions", targets are acquired in order to shut down a potential competitor rather than to integrate its business. The fear is that incumbent companies could thereby drive smaller innovative competitors and start-ups to exit the market. The Commission considers that this would be a particular threat if green innovation is reliant on such smaller innovative market players. Under the related "kill zone" theory, investors and start-ups might even deterred from investing in innovative green competitors in the first place, due to the presence of stronger incumbents.

The discussion of a sustainability theory of harm shows that the relationship between sustainability and consumer welfare is far from clear. For example, transactions without consumer harm, though highly detrimental to the environment (i.e. transactions leading to higher emissions), would not fall under any existing theory of harm under EU merger control law.

Sustainability Defence

Transactions may have beneficial sustainability effects – take for example a joint venture researching and developing green technologies. Companies could attempt to raise a sustainability (efficiency) defences in order to justify the proposed transaction. In order to do so, efficiencies have to (i) benefit consumers, (ii) be merger-specific and (iii) be verifiable. A sustainability efficiency defence would attempt to show that benefits for sustainability outweigh the negative effects of the concentration on competition on a specific product market and are passed on to consumers. However, even a standard efficiency defence argument based on conventional efficiencies is difficult to successfully put forward and substantiate, given the burden of proof on the companies. Within the efficiency defence, it is unclear how potential sustainability benefits for society should be evaluated. Sustainability benefits would need to be translated into economic terms and quantified, an added difficulty for benefits which occur in the future and relate to society as a whole rather than being passed on to an individual group of consumers. Further, sustainability benefits such as reduced emissions achieved by lower output or the closure of plants, could classically be viewed as having a negative effect on consumer welfare.

Sustainability Remedies

The Commission could also take sustainability into account in determining relevant behavioural or structural remedies. However, this would not allow the Commission to arbitrarily attach sustainability conditions (e.g. for the merged entity to invest in green technologies) to a merger clearance decision. A green remedy could only be required in order to entirely remove the "sustainability" competition concern, e.g. by eliminating the harm to green innovation. The Commission could select behavioural or structural remedies from its toolbox to achieve this purpose, such as access to green technologies (for example access to research facilities, IP, data, test results) or the divestment of standalone research and development business units. Given the Commission's emphasis on the importance of green innovation, the Commission could apply the same or a similar framework of analysis as used in innovation remedies in past decisions such as Bayer/Monsanto.[7]

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7 Commission Decision of 11 April 2018, Bayer/Monsanto, COMP/M.8084.

Outlook

The Commission has indicated that it does not currently envisage substantial changes to the current merger control regime. Competition is seen as largely complementary to sustainability. But are competitive markets per se green markets? Given the magnitude of the environmental challenge, and the immediacy of the actions required, a careful look at all possible tools within merger control policy is necessary. Greater transparency as to how the Commission will consider sustainability aspects, if they are to be considered, within the context of its merger control policy would likewise be welcome. The Commission has clearly identified the protection of green innovation as its main goal within the greening of merger control policy. The application of an innovation theory of harm in previous cases could accordingly prove to be a helpful, if intricate, blueprint for the Commission. Even so, how sustainability benefits can be considered, quantified and balanced with the negative effects for consumers caused by a merger between competitors is a source of uncertainty.

Despite the somewhat limited role that merger control policy might have in progressing the sustainability agenda of the Commission, certain changes could nevertheless represent a step forward in furtherance of the EU's ambitious Green Deal's goals. Protection of green innovation is an admirable abstract goal, but within a more precise framework or guidance, the devil will be in the details.

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