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## Sustainability factors in merger control assessments: Do ambitious efforts fall short of expectations?

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## ABSTRACT

Sustainable development has emerged as a principal focal point of economic life over the last decade. Given the increasing pressure in this area, the policymakers are now trying to mobilize each and every policy tool at their disposal in pursuing sustainability targets, including competition policy. However, certain competition authorities and practitioners raise their concerns over pursuing a sustainability agenda through competition law due to the potential drawbacks in the long run, whereas a large number of scholars oppose these criticisms on the grounds of public policy objectives. In practice, certain steps have been taken in the competition legislation so far; however, the draft legislative initiatives have not yet become binding legislation, or those being implemented have not borne fruit yet. To that end, this paper discusses these ambitious efforts from a merger control perspective.

*Au cours de la dernière décennie, le développement durable s'est imposé comme un point central de la vie économique. Compte tenu de la pression croissante dans ce domaine, les décideurs politiques tentent désormais de mobiliser tous les outils politiques à leur disposition pour atteindre les objectifs de durabilité, y compris la politique de concurrence. Toutefois, certaines autorités de la concurrence et certains praticiens s'inquiètent de la poursuite d'un programme de durabilité par le biais du droit de la concurrence en raison des inconvénients potentiels à long terme, tandis qu'un grand nombre d'universitaires s'opposent à ces critiques en invoquant des objectifs de politique publique. Dans la pratique, certaines mesures ont été prises jusqu'à présent dans la législation sur la concurrence; toutefois, les projets d'initiatives législatives ne sont pas encore devenus des lois contraignantes, ou celles qui sont mises en œuvre n'ont pas encore porté leurs fruits. À cette fin, le présent document examine ces efforts ambitieux du point de vue du contrôle des fusions.*

# Sustainability factors in merger control assessments: Do ambitious efforts fall short of expectations?

## I. General overview

1. The Sustainable Development Goals (SDGs) is an ambitious plan which aims to meet the urgent environmental, political, and economic challenges facing our world. This plan, adopted at the UN Sustainable Development Summit in September 2015, includes 17 sustainable development goals and 169 targets, aiming to achieve human rights for all, to protect the planet from degradation and take urgent action on climate change so that the planet can support the needs of the present and future generations. “[The SDGs] are integrated and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental.”<sup>1</sup> All of the UN Member States adopted the plan in 2015 and pledged to “[t]ake bold and transformative steps which are urgently needed to shift the world on to a sustainable and resilient path”<sup>2</sup> as part of the 2030 Agenda for Sustainable Development.

2. In today's world, competition law has become an indispensable part of economic life, as the economic system would not be able to effectively function without it. Even just in the past decade, new competition laws have proliferated in response to greater vertical and horizontal market interpenetration in developed countries.<sup>3</sup> Given the effectiveness of competition rules in guiding economic life, a large number of scholars and practitioners consider them as a potential tool to mitigate sustainability concerns and to support the SDGs in many different ways. Certain scholars advocate that competition law in itself indirectly helps to achieve sustainable development by improving economic governance and stimulating

1 UN General Assembly Resolution 70/1 of 21.10.2015, Transforming our world: the 2030 Agenda for Sustainable Development, Preamble, ¶ 3, U.N. Doc. A/RES/70/1.

2 Ibid., ¶ 2.

3 A. I. Gavil, W. E. Kovacic, J. B. Baker, Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy (St. Paul: West, 2002), p. 38.

innovation and constant product improvement.<sup>4</sup> It goes without saying that competition law contributes to efficiency, promotes innovation, and leads to wider product choice and better quality, thereby improving consumer welfare and general public welfare. By correcting market failures, competition policies allow firms to become more efficient, increase innovation and widen consumer choice and product quality.<sup>5</sup> On the other hand, there is still room for competition law to directly support sustainable development and to address public policy concerns, in addition to pursuing conventional economic objectives.

3. In pursuing sustainable public goals, generally, the requirement is an active public intervention to market dynamics through competition law or other instruments; otherwise, all efforts made in this regard would be condemned to fail due to market failures. One of the significant market failures that require an external intervention is negative externalities, which are not fully quantified into production costs and consequently, their costs are borne by unrelated third parties. The paradoxical behavior of end users who trade-off future gains with short-term benefits is another concern that causes market failures. Being unaware of future risks (information asymmetries) or unable to bear the costs, the end users may give up sustainable products or services, in consideration of short-term benefits such as enjoying low-priced products or services. Another reason which gives rise to market failure is the coordination problems stemming from independent choices seeking to maximize individual welfare without taking into account what others do.<sup>6</sup> To avoid any potential market failure, sustainable development requires a holistic approach to competition law tools in all of the fields (agreements, abuse of dominant position, merger control and State aid), which could effectively address certain market failure concerns.

4. On the other hand, high economic growth and the quadrupling population over the last century have coerced current value chains to be redesigned. Masses of people using the Earth's finite resources create problems by reducing long-term potential growth.<sup>7</sup> Private actors, therefore, shift their traditional corporate policies aiming to increase their profits at any cost, and embrace more sustainable methods spanning environment-friendly technologies, gender equality initiatives and decent work conditions for their workforce. The growing need for capital and professional cooperation between private actors to attain the SDGs requires effective merger control mechanisms, hence the need for a forward-looking legislative framework in the merger control field,

4 GEHRING, M. W, 8 SUSTAINABLE COMPETITION LAW, IN SUSTAINABLE JUSTICE, BRILL NIJHOFF, LEIDEN, THE NETHERLAND, 2004, pp. 124-125.

5 Trade and Development Board, Intergovernmental Group of Experts on Competition Law and Policy Fourteenth session, U.N. Doc. TD/B/C.I/CLP/27, 2014, p. 1.

6 M. Dolmans, Sustainable Competition Policy, *CLPD Competition Law and Policy Debate* 6, Issue 1 (2020), pp. 5-7.

7 E. Wesley, F. Peterson, The Role of Population in Economic Growth, *Sage Journals* 7, Issue 4 (2017), DOI: 10.1177/2158244017736094; See also E. Linden, Remember the population bomb? It's still ticking, *New York Times*, 2017, <https://www.nytimes.com/2017/06/15/opinion/sunday/remember-the-population-bomb-its-still-ticking.html>.

for the last decade.<sup>8</sup> In this respect, the sustainability concerns require us to reconsider the tools available in the current competition legislation, and to construe it with a forward-looking approach. This paper aims to explore the extent to which efforts have achieved and discusses the lack of guidance with respect to sustainability in merger control appraisals.

## II. Worldwide efforts

5. Environmental degradation has become an urgent matter that should be addressed with effective and immediate solutions. Water pollution, biodiversity loss, food insecurity and population displacement have reached levels that this world has never experienced before. To tackle this environmental problem, the European Union (EU) engaged in an ambitious action plan which aims to boost the efficient use of resources by moving to a clean, circular economy, restore biodiversity and cut pollution.<sup>9</sup> To make Europe the first climate-neutral continent by 2050, the EU aims to mobilize each and every policy tool at its disposal, including competition policy. In this regard, the EU considers amending or replacing the two horizontal block exemption regulations expiring on 31 December 2022, as well as the Commission Notice on the definition of relevant market, likely in a way that better serves sustainability goals, as requested by national competition authorities during the evaluation process.<sup>10</sup> Competition policy, however, is not expected to replace environmental laws or green investments in the near future; rather, the EU aims to apply competition rules “in ways that better support the Green Deal”<sup>11</sup> by taking into account sustainability factors in competition analyses to the utmost extent possible.

6. The impact of the Green Deal did not remain limited to the EU level, as it also had a broad repercussion in the prominent Member States, especially in the field of competition policy. The French Competition Authority announced a comprehensive list of priorities for 2021, in which it commits to integrate sustainable development in its decision-making practice and to support companies

8 D. Metz, A. Fischl, Towards a more sustainable approach in European competition law? A discussion based on the example of merger control in the aviation industry, *Aviation and Competition Law Research Blog*, 2019, p. 3 <https://www.aviationandcompetition.com/blog/towards-a-more-sustainable-approach-in-european-competition-law-a-discussion-based-on-the-example-of-merger-control-in-the-aviation-industry>.

9 Communication from the Commission, The European Green Deal, COM(2019) 640 final, 11.12.2019.

10 Eur. Comm., Summary of the contributions of National Competition Authorities to the evaluation of the R&D and the Specialisation Block Exemption Regulations and the Commission Guidelines on Horizontal Cooperation Agreements, 2020, p. 11, [https://ec.europa.eu/competition/consultations/2019\\_hbers/NCA\\_summary.pdf](https://ec.europa.eu/competition/consultations/2019_hbers/NCA_summary.pdf); Eur. Comm., Summary of the contributions of the National Competition Authorities to the Evaluation of the Market Definition Notice, 2020, p. 10, [https://ec.europa.eu/competition/consultations/2020\\_market\\_definition\\_notice/summary\\_of\\_contributions\\_NCA.pdf](https://ec.europa.eu/competition/consultations/2020_market_definition_notice/summary_of_contributions_NCA.pdf). For example, certain national competition authorities declared that sustainability should be included into the Commission Notice on the definition of relevant market as an element of consumer preferences.

11 M. Vestager, Eur. Comm., Executive Vice-President, The Green Deal and competition policy, 22.09.2020 [https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en).

willing to benefit from guidance on this subject.<sup>12</sup> Further, with a holistic approach towards sustainability, France spread these efforts to other public authorities and thus, nine French regulators held a meeting on 16 December 2019, to discuss incorporating climate objectives into their strategic priorities and operational activities. The main conclusions drawn up in the meeting were (i) using the tools available to address shared issues: introducing an incentive scheme, keeping the public well informed and combating greenwashing; (ii) working together and sharing expertise on climate issues; (iii) pooling their resources and experience on climate issues; and (iv) reporting progress made on a regular basis.<sup>13</sup>

7. The Green Deal has also found an echo on the other side of the English Channel in the 2020/2021 annual plan of the United Kingdom (UK)'s Competition and Markets Authority (CMA). Without making bold statements, the CMA has pledged to consider how it can act in a way that supports the transition to a low-carbon economy and to make an effort to understand how climate change affects markets. As its French counterpart has done, the CMA has also put tackling the “greenwashing” in its 2021 agenda.<sup>14</sup>

8. With a view to implementing the Green Deal and launching a dialogue to integrate sustainability into assessment methods in the field of competition, Greece's Competition Commission has published a discussion paper on sustainability and competition law, as well.<sup>15</sup> The paper sheds light on the convergence areas and conflicts between sustainable development and competition law, particularly from the perspectives of agreements, abusive practices and merger control aspects. Greece's Competition Commission intends to adopt guidelines on sustainability, following the completion of the public consultation process with the industry and other stakeholders in the near future.<sup>16</sup>

9. The Dutch Competition Authority (ACM), on the other hand, has taken remarkable steps in the pursuit of a sustainable competition policy and launched a public consultation for the draft guidelines.<sup>17</sup> The guidelines explain the ACM's perspective on the collaboration between undertakings with respect to sustainability and

the cartel prohibition, in order to offer more clarity on the room undertakings may have for such collaboration. It is noteworthy that the ACM has excluded merger control assessments from its draft guidelines, focusing on merely cartel prohibitions laid down under Article 101 TFEU. It is, however, still possible to derive lessons for merger control assessments from the guidelines. Besides, the report jointly commissioned by the ACM and Greece's Competition Commission in January 2021 brings forward new valuation methods to measure social benefits arising out of sustainability agreements. Although it excludes merger control assessments and abuse of dominance from the scope, the report follows a similar approach and implicitly suggests that the trade-off analysis pertaining to agreements is also applicable to other fields of competition law, including concentrations.<sup>18</sup>

10. Rather than taking a sole stance, the Nordic Competition Authorities engaged in a collaborative work and issued a joint report on sustainability matters.<sup>19</sup> The report raises main concerns relating to the pursuit of sustainability goals through competition law and points out several risks which may arise out of the sustainability agenda followed by the EU. The Nordic authorities caution the rule-makers that firms incurring higher costs would tend to concentrate and, therefore, the resulting increase in market concentration would lead to significant welfare costs due to lack of competition. Another point argued by the Nordic authorities is that environmental standards stricter than they are efficient may raise the entry barriers, so that newcomers would face higher production costs and red-tape sunk costs as a result of more stringent standards they have to comply with. The Nordic authorities also put emphasis on the risk factors in the EU's sustainability agenda, such as potential abuse of environmental concerns by incumbent firms—in other words, use of environmental concerns as an excuse for their anti-competitive behaviors. In line with the Nordic Competition Authorities, the Electricity Sector Report<sup>20</sup> issued by Turkey's Competition Authority (TCA) raises similar concerns and draws attention to the risks arising out of market interventions with sustainability purposes, which may give rise to compatibility problems and, therefore, market failures.

11. In short, even though certain steps have been taken in the competition legislation with regard to sustainability matters, so far, they fall short of expectations, either because the draft legislative initiatives have not yet become binding legislation or those being implemented have not borne fruit yet. On the other hand, there

12 See Fr. NCA, press release of 23.12.2020, After a very active 2020, the Autorité de la concurrence announces its priorities for 2021, which will focus on the digital economy, <https://www.autoritedelaconcurrence.fr/en/press-release/after-very-active-2020-autorite-de-la-concurrence-announces-its-priorities-2021-which>.

13 See Fr. NCA, press release of 19.12.2019, Independent public and administrative authorities develop their collaboration on the challenges of climate warming, <https://www.autoritedelaconcurrence.fr/en/press-release/independent-public-and-administrative-authorities-develop-their-collaboration>.

14 CMA, Competition and Markets Authority Annual Plan, 2020/21, 2020, p. 3.

15 Hellenic Competition Commission, Draft Staff Discussion Paper on Sustainability Issues and Competition Law, [https://www.epant.gr/files/2020/Staff\\_Discussion\\_paper.pdf](https://www.epant.gr/files/2020/Staff_Discussion_paper.pdf).

16 Hellenic Competition Commission, Competition Law & Sustainability, Available on Hellenic Competition Commission's website: <https://www.epant.gr/en/enimerosi/competition-law-sustainability.html>.

17 Netherlands Authority for Consumers and Markets, Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law, 2021, <https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law>.

18 R. Inderst, E. Sartzetakis and A. Xepapadeas, Technical Report on Sustainability and Competition, Netherlands Authority for Consumers and Markets & Hellenic Competition Commission, 2021, p. 2 (“*In general, competition law and its enforcement may address sustainability concerns in various contexts, e.g. in the assessment of mergers and acquisitions, abuse of market dominance (Article 102 TFEU), or agreements between competitors (Article 101 TFEU). In this context, delimiting the applicable scope of the analyzed trade-off is not essential!*”).

19 Joint report by the Nordic Competition Authorities (Denmark, Finland, Iceland, Norway, Sweden, Greenland, Faroe Islands), Competition policy and green growth: interactions and challenges: 2010, pp. 16–17.

20 Turkish Competition Authority, Electricity Wholesale Market and Retail Market Sector Inquiry, 2015, pp. 3–133.

are still ongoing discussions on the incorporation of sustainability matters into competition laws all over the world. But one thing is clear: any guidelines to clarify the sustainability-related issues and the decisional practice by the competition authorities would pave the way for private initiatives to address the sustainability concerns through competition laws. Only then significant progress would be made.

## III. Factoring in sustainability into merger control assessments

12. As an integral part of economic life, the competition policy has a large number of tools at its disposal, which could directly support sustainable development, in addition to performing its traditional duties for the functioning of the economy. That said, promoting sustainability by means of competition law may require using the traditional tools in more creative ways<sup>21</sup> and/or adapting them to sustainability-related matters by analogy<sup>22</sup> under certain circumstances. In this section, we aim to look for such creative ways to achieve the SDGs through merger control rules under different legal systems, as well as the new trends and policy preferences promoted by the national competition authorities.

### 1. Legislative initiatives

13. As a possible solution to support sustainable mergers under European merger control law, Simon Holmes draws a fivefold framework, all of which may be useful in their particular context. The first option put forward by Holmes suggests that the neutral wording of Article 2(1)<sup>23</sup> of the European Council Merger Regulation No. 139/2004 (EUMR) does not mandate any compensatory technical or economic progress; it rather sets out progress as a factor required to be taken into account in assessments. Read together with paragraph 76

of the Horizontal Merger Guidelines,<sup>24</sup> which sets forth an overall competitive appraisal of the merger, the current legislation allows the Commission to take into account sustainability-related matters in merger control assessments. The second option proposes the assessment of environmental factors as efficiencies, on the basis of Recital 23 of the EUMR, which requires merger appraisals to be placed within the framework of the fundamental objectives referred to in the constitutional provisions of the treaties. Allowing those mergers detrimental to the environment but dealing with the problems they cause through remedies in the course of the substantive assessment under Article 2 of EUMR (particularly Article 2(1)(b))<sup>25</sup> is another alternative suggested by Holmes. The fourth option brought forward is employing Article 21(4) of the EUMR,<sup>26</sup> which allows the Member States to take “appropriate measures to protect legitimate interests” other than competition concerns. However, such interests (other than those listed in the said article, i.e., public security, plurality of the media and prudential rules) must first be communicated to the Commission by the Member State and be recognized by the Commission as legitimate interests. In fact, a broad interpretation of the public security in a way that encompasses sustainability or, more specifically, environmental concerns or delineation of a brand-new legitimate interest stand as equally doable options behind the Commission.<sup>27</sup> Finally, the last suggestion to address sustainability concerns is through national merger control rules, which already take sustainability into account to some extent in their merger assessments.<sup>28</sup>

14. In addition to Holmes’ methods above, Burnside et al. brought forward another alternative, which aims at pursuing sustainability concerns through the foreign direct investment screening laws at the EU level. Burnside et al. stress that at national level, certain countries such as France, Austria, and Slovenia have already incorporated such tools in their national legislation, for example, for the security of food supply or protection of public health. Therefore, a deal that may be significantly detrimental to the environment may be treated within the scope of such policy goals.<sup>29</sup>

21 OECD, Sustainability & Competition Law and Policy – Background Note by Julian Nowag, DAF/COMP(2020)3, 7.1.2021, p. 14.

22 S. Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press, 2011), p. 144.

23 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, Art 2(1): “Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market. In making this appraisal, the Commission shall take into account: (a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith [sic] the Community; (b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition.”

24 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, pp. 5–18 (Horizontal Merger Guidelines).

25 See *supra* note 23.

26 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings: “Notwithstanding paragraphs 2 and 3, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law. Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph. Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within 25 working days of that communication.”

27 A. Burnside, M. De Backer, D. Strohl, Can Environmental Interests Trump An EUMR Decision?, in *Competition Law, Climate Change & Environmental Sustainability*, S. Holmes, D. Middelschulte, M. Snoep (New York: Concurrences, 2021), p. 149.

28 S. Holmes, Climate Change, Sustainability, and Competition Law, *Journal of Antitrust Enforcement* 8, Issue 2 (2020), pp. 389–397.

29 *supra* note 27, pp. 151–152.

## 2. Practice

**15.** Although the options above have not been employed in full yet, the early signs of sustainability-related assessments have already appeared in the field of quality and innovation competition. In its *Dow/Dupont* decision,<sup>30</sup> the Commission carried out an in-depth assessment for innovation competition within the different levels of the market. In the section dedicated to the assessment of theory of harm, it underlined the importance of protecting the environment, human health, and product safety within the scope of innovation concerns. In the decision, the theory of harm set forth by the Commission “went beyond the ‘short-term’ harm to innovation competition that would likely come with the discontinuation of overlapping lines of research and early pipeline products which target the same innovation spaces. It developed a medium and long-term theory of harm which resulted from the lower overall incentives of the merged entity to innovate as compared to those of the merging parties separately before the transaction. The merger transaction also had a ‘structural effect’ as the merged entity pursued less discovery work, less lines of research, less development and registration work and ultimately brought less innovative active ingredients to the market than the merging parties would have done in the absence of the merger.”<sup>31</sup>

**16.** This trend was followed by the Commission in the *Bayer/Monsanto* concentration,<sup>32</sup> where sustainability concerns were examined in the context of innovation competition. The proposed transaction concerned the takeover of Monsanto by Bayer for an acquisition price of approximately USD 66 billion. The transaction was expected to create the global number one integrated player in the seeds and traits, pesticides, and digital farming markets. The merger would not only increase industry concentration and entrench market power leading to higher prices for farmers, but it would also steer the farmers further into unsustainable industrial agricultural methods such as the use of pesticides.<sup>33</sup> The Commission addressed these sustainability concerns in the context of possible innovation harms, in particular with regard to innovation efforts and innovation outputs,<sup>34</sup> thus indirectly prioritized the sustainable economy through the existing competition tools at its disposal.

**17.** As demonstrated in the merger decisions above, innovation competition has also been a prominent concern of the Commission in the anti-competitive agreements lately. In 2018, an investigation was initiated into five German automobile manufacturers for participating in a collusive scheme to limit the development and roll-out

of emission cleaning technology in new diesel and petrol passenger cars sold in the European Economic Area (EEA), in other words, for restricting competition on innovation.<sup>35</sup> Although it is unlikely that the main concern that will be addressed through this investigation will be sustainability itself, the investigation would indirectly contribute to the development of environment-friendly technologies, since potential restriction of innovation in green technologies is at stake. A similar anti-competitive agreement restricting the innovation competition was reviewed by the French Competition Authority in 2017. The collusive scheme engaged by the French floor covering producers over nine years involved, among others, a non-competition agreement on communication relating to the environmental performance of their products. The French Authority considered this agreement as a disincentive for manufacturers to innovate products characterized by better environmental performances, and the investigation resulted in a record fine of over EUR 300 million.<sup>36</sup>

**18.** That said, Europe is not a pioneer in addressing sustainability concerns through innovation competition. As early as 2009, the US Federal Trade Commission (FTC) launched an in-depth examination into the prospective *Panasonic/Sanyo* concentration.<sup>37</sup> The main sustainability concern in the case was the development of critical batteries and battery technology, which are essential for a sustainable energy transition. With purely innovation-driven purposes, the FTC required the divestiture of certain assets to maintain the competition in the critical batteries market and imposed, amongst other remedies, an obligation to transfer the IP rights regarding NiMH batteries to Fujitsu to ensure innovation competition,<sup>38</sup> and to allow sustainable technologies to flourish in the market in the coming years.

**19.** Another trend that recently emerged in the merger control area is the assessment of sustainable products in a market separate from the traditional ones, on the basis of their characteristics. This practice may potentially pave the way for new market definitions concerning sustainable products, rather than assessing them along with traditional products being generally produced with cheaper methods and components. The Commission’s *Aleris/Novelis* decision may be deemed a milestone in this respect. Following an in-depth investigation of the deal which combines Novelis, the largest producer of aluminum automotive body sheets worldwide, with Aleris, an established supplier of the same product, the Commission found that aluminum flat-rolled products, such as aluminum automotive body sheets used in the automotive industry, are in a separate market than

<sup>30</sup> Eur. Comm., dec. Art. 8(2), R. 139/2004 of 27.3.2017, *Dow/DuPont*, case M.7932 (merger).

<sup>31</sup> I. Lianos, Polycentric Competition Law, Centre for Law, Economics and Society *Research Paper Series*: 4/2018 (2018), p. 21.

<sup>32</sup> Eur. Comm., dec. Art. 8(2), R. 139/2004 of 21.3.2018, *Bayer/Monsanto*, case M.8084 (merger).

<sup>33</sup> African Center for Biodiversity, *The Bayer-Monsanto Merger: Implications for South Africa’s Agricultural Future and its Smallholder Farmers*, 2017, p. 26.

<sup>34</sup> See *supra* note 24.

<sup>35</sup> See European Commission, press release IP/19/2008 of 5.4.2019, Antitrust: Commission sends Statement of Objections to BMW, Daimler and VW for restricting competition on emission cleaning technology [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_2008](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2008) (cartels).

<sup>36</sup> Fr. NCA, dec. No. 17-D-20 of 18.10.2017 regarding practices implemented in the hard-wearing floor coverings sector (cartels).

<sup>37</sup> Federal Trade Commission, dec. No. C-4274 of 24.11.2009, *Panasonic/Sanyo* (merger).

<sup>38</sup> *Ibid.*, 13.

other aluminum products,<sup>39</sup> as they are predominantly used for the production of fuel-efficient vehicles with reduced emissions. This forward-looking market assessment is a concrete step towards the new merger control approach of the EU, early signs of which were seen in its call for contributions on competition policy and the Green Deal.<sup>40</sup> It is important to note that the French Competition Authority, in line with the Commission's *Aleris/Novelis* decision, had considered the environmental performance of products as a product differentiation factor in its *Tarkett et al.* decision, as early as 2017.<sup>41</sup>

**20.** The recent developments in Germany, on the other hand, prove the functionality of national merger control rules in addressing sustainability concerns. A joint venture to be established between two German hydrodynamic plain bearing producers, which was previously blocked by Germany's Competition Authority, was allowed with the ministerial approval mechanism in 2019.<sup>42</sup> The German Federal Minister of Economics justified its decision with the environmental gains of the deal and the potential contribution to energy transition and climate protection, such as reduced fuel consumption and noise reduction, outweighing the competitive disadvantages. The environmental policy objectives were considered as an overriding general public interest prevailing over the competition restraints identified by the Competition Authority. This promising case indicates a large room for improvement at the national level. It should be noted that various regimes outside the EU also allow for a wider range of issues (particularly social and sustainability concerns) to be taken into account in merger control assessments, such as South Africa and Spain.<sup>43</sup>

## IV. Sustainability metrics in merger control assessments

**21.** Sustainability has always been a controversial topic especially in determining what is sustainable and whether it is sustainable enough.

**22.** In terms of ecology, each energy source somehow generates negative externalities for uninvolved individuals and contributes to environmental degradation. Even the

most environment-friendly technologies such as solar panels are produced with highly toxic components and materials. Wind turbines cause the death of thousands of birds due to sound waves attracting flying animals. Hydroelectric dams are rather clean but may threaten the natural habitats of fishes as well as aquatic life. Nuclear energy centrals produce hazardous radioactive wastes which are difficult to store. And finally, fossil fuels such as petrol, coal and natural gas release carbon into the atmosphere at varying levels.<sup>44</sup>

**23.** When it comes to working conditions, the International Labour Organization sets forth certain policy goals which span eradication of forced labor, protection of labor rights, promotion of safe and secure working conditions, and achievement of higher levels of economic productivity through diversification, technological upgrading and innovation.<sup>45</sup> However, these broad and vague objectives leave the achievement of sustainable goals to the discretion of stakeholders, whether they aim to meet the SDGs or not.

**24.** That being said, having become a prominent parameter in competition law over the last decade, sustainability concerns now coerce the competition authorities to rule on whether a merger is sustainable or not, in each specific merger control case. It, therefore, falls upon the competition authorities to gauge what is sustainable and whether it is sustainable enough, as was the case in *The Chicken of Tomorrow*. That said, given that the current merger control tools are designed to measure the effect of concentrations based on parameters such as price, pursuing sustainability goals through current mechanisms is highly controversial.

**25.** To that end, measuring to what extent a merger is sustainable would fall in the scope of efficiency considerations, where the authorities are expected to assess whether the transaction generates efficiencies outweighing its potential negative effects. In fact, the authorities are now considering how this could be done in practice; they are expected to give clear guidance in the near future.<sup>46</sup> In the current merger control system, efficiency considerations generally relate to efficiencies that may reduce the costs of products, thereby final prices. To that end, one option would be to extend the scope of efficiency considerations and incorporate sustainability assessments within such considerations. To that end, sustainability assessments may be designed as one of the pillars of efficiency analyses in the merger control regimes, where authorities would require concrete studies and evidence showing the sustainability aspects of the transactions.

<sup>39</sup> See European Commission, press release IR/19/5949 of 1.10.2019, Mergers: Commission clears Novelis' acquisition of Aleris, subject to conditions [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_5949](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_5949) (merger).

<sup>40</sup> See European Commission, Competition Policy supporting the Green Deal Call for contributions, 2020, p. 5 ("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.") [https://ec.europa.eu/competition/information/green\\_deal/call\\_for\\_contributions\\_en.pdf](https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf).

<sup>41</sup> *Supra* note 36.

<sup>42</sup> The German Federal Ministry of Economics and Technology, dec. No. Gesch.-Z.: IB 2 – 20302/14–02 of 19.08.2019, *Mibal/Zollern*.

<sup>43</sup> See *supra* note 29, p. 397.

<sup>44</sup> C. Y. C. Koon, Is natural gas a sustainable option?, Ontario Tech University, 2014, available at <https://sites.ontariotechu.ca/sustainabilitytoday/blog-posts/blog-posts/2014/09/Is-Natural-Gas-A-Sustainable-Option.php> (last visit 2.7.2021).

<sup>45</sup> International Labour Organization, Decent Work and the 2030 Agenda for Sustainable Development, [https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-lisbon/documents/event/wcms\\_667247.pdf](https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-lisbon/documents/event/wcms_667247.pdf).

<sup>46</sup> N. Kar, E. Cochrane, B. Spring, Environmental Sustainability and EU Merger Control: EU Competition Policy's Dark Horse to Support Green Investment, in *Competition Law, Climate Change & Environmental Sustainability*, p. 131.

**26.** Given the nature of the current competition law tools as explained above, any attempt to pursue sustainability goals through merger control would require proactive efforts by competition authorities within the meaning of legislative efforts encompassing sustainability considerations. In the absence of such efforts, current tools would be condemned to fail in pursuing sustainability goals.

**27.** In this respect, the Hellenic Competition Authority, which is one of the pioneers in assessing environmental benefits in terms of competition laws, suggests, in the discussion paper of 2021, making carefully designed willingness-to-pay (“WTP”) surveys that will encompass dynamic processes and will address all affected interests in order to monetize environmental benefits of products and services. WTP surveys aiming to calculate the value of a consumer gain or loss, through a survey of a sample of consumers, by testing their “willingness to pay” when they are faced with a hypothetical consumption choice-set, are considered as an option by the Hellenic Authority. However, it draws attention to the shortcomings of WTP surveys in terms of non-price parameters such as aesthetic, societal or ethical values. Moreover, the over-reliance on revealed preferences in WTP surveys is argued to rule out all social processes other than the marketplace.<sup>47</sup>

**28.** On the other hand, the UK’s competition authority, one of the few authorities who have confirmed the incorporation of sustainability into the assessment of efficiencies, has not provided any tangible guidance with respect to the quantification of sustainability in its Merger Guidelines updated in 2021.

**29.** The assessment of sustainability is quite a complex issue where sustainability indicators come into play. Although the technical aspects of such indicators fall outside of the scope of this paper, certain experts stress that “[a] *given indicator does not say anything about sustainability, unless a reference value such as thresholds is given to it.*” In fact, the indicators are simply rating systems that are prone to generate results based on the examiners’ preferences. Choice of model, weighting mechanism and treatment of missing value are always shaped around the policy goals sought by the concerned authority.<sup>48</sup> Therefore, it falls upon the competition authorities to provide clear guidance and set out key indicators beforehand for private initiatives to factor in the sustainability efficiencies in merger controls. In the absence of tangible guidance, the efforts made towards sustainability would be doomed to failure.<sup>49</sup>

<sup>47</sup> *Supra* note 15, pp. 12–13

<sup>48</sup> E. Lancker, P. Nijkamp, A policy scenario analysis of sustainable agricultural development options: a case study for Nepal, *Impact Assessment and Project Appraisal* 18, Issue 2 (2000), pp. 111–124.

<sup>49</sup> The Commission’s Directorate General for Competition has engaged in the topic of sustainability efficiencies within merger control together with a volunteer team. These efforts have not yielded results yet. Moreover, in general, the role of volunteering is being discussed as an effective tool in achieving these goals in the EU compared to the efforts made by public institutions, which can be seen in the studies of the European Economic and Social Committee, which is the advisory body to the EU. The Committee promotes volunteering by way of organizing conferences, speech on the role of volunteering. See, e.g., <https://www.eesc.europa.eu/en/agenda/our-events/events/role-volunteering-implementation-un-sustainable-development-goals>.

**30.** Another key element that will come into play in merger control assessments in the coming days is ESG (environmental, social and governance) records of the concerned undertakings.<sup>50</sup> These records would likely guide the competition authorities to assess how sincere the undertaking is in the sustainability defenses. Therefore, for example, an undertaking that has not adopted the environment-friendly manufacturing methods reducing the carbon emission by 10% would not be able to rely on the sustainability defenses that would contribute to the carbon cuts by 2%. However, the competition authorities, or any other public institutions, have not set any reliable record keeping or reporting standard yet, either.

## V. Conclusion

**31.** Business as usual is not an option<sup>51</sup> in a world facing poverty, environmental degradation and human rights violation, as stated by Juan Somavia, director of the International Labour Organization, in Johannesburg, as early as 2002. Climate change has now reached dangerous levels that threaten the stable functioning of Earth’s life-support systems, which are indispensable for future human development. Extreme poverty is expected to affect between 8.9% and 9.4% of the world’s population in 2021, according to the biennial Poverty and Shared Prosperity Report.<sup>52</sup> To overcome these problems, the SDGs draw a promising framework for stakeholders in almost all policy areas with a holistic approach. However, it is a challenging task to meet these ambitious objectives while addressing the potential interactions between different fields.<sup>53</sup> For instance, some approaches to introducing environment-friendly technologies into production processes may come at a significant cost for those living below the poverty line, in turn putting environment-friendly production itself at risk in the long term. Therefore, it is crucial to consider the potential drawbacks in the long run and in each field before taking action.

**32.** In the field of competition law, there is a growing need for reconsideration of the currently available competition law tools and improvement of the existing regulations in light of emerging sustainability concerns. In doing so, rather than limiting the boundaries of competition law with traditional objectives, we need to reconcile it with broader constitutional values, as suggested by the Greek Competition Authority.<sup>54</sup> Especially in the merger control area, non-price parameters and realistic cost analysis methods need to be incorporated into assessments so

<sup>50</sup> *Supra* note 46, p. 133.

<sup>51</sup> See United Nations, press release of 29.08.2002, “Business as Usual” Not Option for Fighting Poverty, Environmental Degradation in Next Decade, Summit on Sustainable Development Told, <https://www.un.org/press/en/2002/envdev677.doc.htm>.

<sup>52</sup> The World Bank Group, Reversals of Fortune, Poverty and Shared Prosperity Report, 2020, p. 5.

<sup>53</sup> D. Griggs et al., An integrated framework for sustainable development goals, *Ecology and Society* 19, No. 4 (2014), p. 1.

<sup>54</sup> See *supra* note 15, p. 46.



that the negative externalities and unquantified costs that the public has been incurring could be effectively addressed. Accordingly, economic analyses made in the merger control assessments should also take into account environmental costs and benefits that are reasonably quantifiable to evaluate if the relevant transaction will help maximize consumer welfare.<sup>55</sup> Improvements in technology and environmental economics allow us to calculate the environmental damage and benefits based on voluminous data, and in many cases, on both quantitative and qualitative evidence.<sup>56</sup> For instance, to evaluate future benefits of certain sustainability agreements, the ACM offers to conduct the social cost-benefit analyses used by the Dutch government authorities.<sup>57</sup> In this respect, collaboration with the regulatory authorities in other jurisdictions would also enable the competition authorities to carry out more effective market assessments.

**33.** Among other potential solutions in this regard, reconsideration of the functions performed by the national authorities is the most controversial one. A large number of scholars advocate that national competition authorities should be tasked to safeguard sustainability concerns in addition to carrying out conventional duties, even if it would create an anti-competitive effect. As suggested by Dolmans, requiring competition authorities to analyze sustainability as part of a competitive assessment is neither impossible nor disproportionate.<sup>58</sup> Sustainability is actually an inherent goal of competition law as it simply serves the purpose of welfare maximization in the long run. There are indeed certain well-developed doctrines, which have been deployed in various antitrust cases, such as the objective justification doctrine and the effects doctrine in abuse of dominance assessments and the efficiencies doctrine in merger control assessments. These doctrines may also play a significant part in assessing cases concerning sustainability by analogy.<sup>59</sup> However, the sustainability agenda and implementation of SDGs in antitrust analysis might

also lead to potential shortcomings, such as increases in market concentrations, rise in entry barriers, welfare loss, market failures, that could reach levels threatening even the advancements on that front, as raised by certain competition authorities.<sup>60</sup> To that end, competition authorities should carefully evaluate the specific dynamics of each case and base their sustainability-related assessments on quantifiable parameters to the extent possible.

**34.** That being said, the forward-looking interpretations by certain national authorities have already sparked discussions at both national and international level. These early decisions taken by the relevant competition<sup>61</sup> or other public authorities<sup>62</sup> may be considered as a starting point; however, they are yet far from providing a clear framework for private actors. Bearing this problem in mind, the ACM has taken a bold step with the draft guidelines on sustainability agreements,<sup>63</sup> which is expected to eliminate ambiguities among private actors. As a prominent authority in this area, the ACM's chair signals that they are also ready to draw a roadmap for merger control rules, as they have done for sustainability agreements, once they are filed with a green concentration proposal.<sup>64</sup>

**35.** However, the assessment of sustainability in the merger control area remains to be a controversial topic where the competition authorities are reluctant to take any bold step. Rather than providing tangible indicators for measuring the sustainability efficiencies in merger control assessments, the authorities appear to prefer playing by ear. However, it falls upon the competition authorities to provide clear guidance and set out key indicators beforehand for private initiatives to factor in the sustainability efficiencies in merger controls. In the absence of tangible guidance, the efforts made towards sustainability would be condemned to fail. ■

<sup>55</sup> See *supra* note 18, p.2.

<sup>56</sup> S. Holmes, Consumer welfare, sustainability and competition law goals, *Concurrences* No. 2-2020, art. No. 93496, p. 2, [www.concurrences.com](http://www.concurrences.com).

<sup>57</sup> See *supra* note 17, pp. 11-12.

<sup>58</sup> See *supra* note 6, p. 11.

<sup>59</sup> See *supra* note 22, pp. 126-1628.

<sup>60</sup> See *supra* note 15 p. 34; see also *supra* note 24.

<sup>61</sup> See *supra* note 39.

<sup>62</sup> See *supra* note 45.

<sup>63</sup> See *supra* note 21, p.21

<sup>64</sup> See *supra* note 17,

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