Is green becoming a grey area? A discussion on sustainability and merger control

Tristan Lécuyer* and Annabelle Leclercq+

Abstract: The European Commission recently published revised horizontal guidelines that specify the conditions under which cooperation agreements that deliver significant sustainability benefits may be exempted. This is in sharp contrast with merger control where no change to the current framework has been considered. This article therefore assesses the extent to which current EU merger control is well suited to deal with the impact that mergers may have on sustainability. A review of all EU merger cases from the past 10 years shows that the current framework focuses on direct consumers’ preferences. As such, it ignores both positive and negative externalities mergers may have on sustainability. This article sets out a potential analytical framework to consider these externalities in merger assessment but concludes that properly considering them is likely to raise practical challenges. Driving change in companies’ behaviours and consumer preferences through regulation may be a better instrument to support sustainability objectives.

Keywords: sustainability, competition, merger control, externalities, consumer preferences, regulation

1. Introduction

Faced with the growing challenges raised by global warming and other environmental issues, many observers have called on competition policy to play a greater role in the EU’s quest for a more sustainable economic model. Recent initiatives by the European Commission on this matter include revised Guidelines on State aid and the introduction of a new Sustainability chapter in the updated Horizontal Guidelines. The latter notably specifies the conditions under which cooperation agreements between competing firms may be exempted if they deliver significant sustainability benefits.

This is in sharp contrast with merger control where no change to the current framework has been implemented to consider potential sustainability benefits. Instead, the Commission’s assessment seems very much focused on ensuring that mergers do not eliminate competition between firms for the development of more sustainable products. A recent case in point is Norsk Hydro/Alumetal where the Commission opened an in-depth investigation on the grounds that the merger may result in the elimination of a growing competitor able to supply green aluminium products in a context where ‘access to [these] products is essential to achieve our objectives of fighting climate change’.2

This article therefore assesses the extent to which the current EU merger control is well suited to deal with the impact that mergers may have on sustainability. It contributes to this discussion by identifying all EU merger decisions where sustainability was discussed in the past 10 years. Based on a detailed review of all relevant decisions, we then propose a typology to understand how, and to what extent, the current framework for merger control has allowed the Commission to consider sustainability in the past. As part of this analysis, we present some early lessons on the green theories of harm and green efficiency claims that were considered by the Commission.

---

* Partner at competition economics consultancy RBB Economics, based in RBB’s Brussels, Belgium and Paris, France offices.

+ Associate Principal at competition economics consultancy RBB Economics, based in RBB’s Brussels, Belgium office.


2 See EC Phase II opening press release for Norsk Hydro/Alumetal (European Commission, ‘Mergers: Commission opens in-depth investigation into Hydro’s proposed acquisition of Alumetal’ (6 October 2022), available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6013 (accessed 14 September 2023). This merger was subsequently cleared unconditionally, as announced by the EC on 4 May 2023 (see https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2566 (accessed 14 September 2023)).
The current framework focuses on direct consumers’ preferences and ignores environmental externalities

One of our main findings is that, in line with the consumer welfare principles, the current framework focuses on direct consumers’ preferences and ignores environmental externalities. It therefore ignores potential harm and benefits that go beyond the priorities set by consumers’ demand and willingness to pay. However, as we show in this article, mergers may generate economic externalities that can have a broader impact on the environment.

This raises the question as to whether EU merger control should consider harm and benefits that go beyond direct consumers when it comes to sustainability. In order to shed light on this question, we explore in this article a potential analytical framework to take into account environmental externalities in merger assessment. We find that properly considering these externalities in a potential revised framework is likely to raise practical challenges.

In light of these difficulties, we conclude that driving change in companies’ behaviours and consumer preferences through regulation may be a better instrument to support sustainability objectives.

2. A review of EU merger cases with sustainability considerations

As the link between merger control and sustainability is becoming increasingly debated, we investigate the extent to which the Commission has placed an interest in considering sustainability in its assessment of mergers. Through a systematic review of merger decisions from the past 10 years, we identify those decisions that discuss sustainability, and present the various ways in which these considerations fit within the Commission’s assessment. On this basis, we present some early lessons on the green theories of harm and green efficiency claims that were considered by the Commission.


4 In practice, merger decisions were excluded from the sample if they included less than 20 relevant green words or less than 3 families of green words (e.g., ‘sustainability’ and ‘sustainable’ are part of a same family).

5 Think for example of common expressions such as ‘sustainability of cooperation’ or ‘circular catchment area’.

2.1. A growing interest for sustainability in merger control?

As economists, we are naturally drawn to more quantitative analyses. We therefore investigate the link between merger and sustainability through a data science-driven methodology. Our proposed approach consists of an automated textual review of all Phase I and Phase II EU merger decisions from the past 10 years, that is 860 decisions for the former and 70 decisions for the latter. For each of these decisions, our algorithm counts the number of instances that a shortlist of environmentally related words appear (e.g., the words ‘renewable’, ‘carbon emissions’, ‘sustainability’).

Only the most relevant decisions were retained by excluding those that did not account for a sufficient overall number of green words or for a sufficient variety of green words. The resulting sample of decisions has then been refined through a case-by-case review which allowed to ensure that these ‘green’ words were used in the right context. This allowed us to exclude ‘false positives’, i.e. decisions in which the so-called ‘green words’ are not used to describe anything remotely related to the environment.

Similarly, we have identified ‘false negative’ decisions which did not initially appear in our sample but are nevertheless mentioned in the relevant literature.

Through this methodology, we obtain a sample of 21 merger decisions that discuss sustainability. To visually appreciate whether a growing importance is given to this matter, these 21 decisions are plotted in Figure 1 below on the basis of the number of relevant green words identified in the decision text.

Although based on a relatively small sample, this figure seems to indicate that the Commission’s focus on sustainability in merger control has been growing. As the number of ‘green cases’ has increased over time (13 out of 21 cases occurred in the last five years), the importance of sustainability considerations in decisions has also been more prominent in recent years as illustrated by a greater number of decisions with around or more than 80 ‘green words’. Importantly, this analysis does not capture the recent KPS Capital Partners/Real Alloy Europe and Norsk Hydro/Alumetal decisions which are yet to be published as we write this article. Given the importance

3 We have added the Cases M.7220 Chiquita Brands International/Fyffes, M.7292 DEMB/Mondelez/Charger OpCo, M.7510 Olam/ADM Cocoa Business, M.8829 Total Produce/Dole and M.9730 PCA/PSA to the sample as the words used to describe environmental considerations are slightly different than those considered in the proposed methodology such that the use of restrictive filters excluded those decisions from the sample. In particular, while these decisions discuss the relevance of defining distinct product markets for ‘greener’ products (e.g. bananas, cocoa beans, coffee), the decision refers to ‘non-conventional’, ‘organic’ and ‘fair trade’ products (or uses abbreviations to describe low-emission vehicles in the case of PCA/PSA).
that sustainability considerations seem to have played in the assessment of these two cases, chances are that their inclusion would reinforce the observed upward trend.

This does not mean however that all these decisions cover similar situations. As we explain in the following, the Commission did not place the same weight nor give the same role to sustainability in the assessment of these cases.

### 2.2. A proposed typology

In order to assess the precise role given to sustainability considerations by the Commission, we have reviewed in detail each of these 21 decisions and have developed a proposed typology that is presented in Table 1. We use ticks when environmental considerations play a role in the Commission’s assessment and crosses when sustainability was not discussed. Question marks reflect a potential disconnect between the Commission’s statements and the actual decision (see below for more details). Lessons to draw from this analysis are discussed next.

### 2.3. Early lessons on green theories of harm

Whilst the TFEU requires the Commission to take into consideration a plurality of objectives, including the protection of the environment, EU Merger Regulation is a

![Figure 1 Number of relevant 'green' words identified in the sample of 21 decisions](https://www.elgaronline.com/)

*Source: Textual analysis of EU merger decisions over the past 10 years*

---

Table 1: Case-by-case review of the role played by environmental considerations in merger decisions

<table>
<thead>
<tr>
<th>Decision</th>
<th>Year</th>
<th>Are the Parties’ core activities ‘green’?</th>
<th>Green-specific assessment of potential anticompetitive effects</th>
<th>Green-specific efficiency claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chiquita/Fyffes</td>
<td>2014</td>
<td>✗</td>
<td>✗</td>
<td>✗</td>
</tr>
<tr>
<td>Holcim/Lafarge</td>
<td>2014</td>
<td>✗</td>
<td>✗</td>
<td>✗</td>
</tr>
<tr>
<td>DEMB/Mondelez/Charger OpCo</td>
<td>2014</td>
<td>✗</td>
<td>✗</td>
<td>✗</td>
</tr>
</tbody>
</table>

(continued)
On Topic: Sustainability and Competition Law

The table below presents a case-by-case review of the role played by environmental considerations in merger decisions (continued):

Table 1 Case-by-case review of the role played by environmental considerations in merger decisions (continued)

<table>
<thead>
<tr>
<th>Decision</th>
<th>Year</th>
<th>Are the Parties' core activities 'green'?</th>
<th>Green-specific assessment of potential anticompetitive effects</th>
<th>Green-specific efficiency claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Olam/ADM Cocoa Business</td>
<td>2015</td>
<td>☒</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>GE/Alstom</td>
<td>2015</td>
<td>☒</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>Dow/Dupont</td>
<td>2017</td>
<td>☒</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>Bayer/Monsanto</td>
<td>2018</td>
<td>☒</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>Total Produce/ Dole Food</td>
<td>2018</td>
<td>☒</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>Tata Steel/ Thyssenkrupp</td>
<td>2019</td>
<td>☒</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>E.ON/Innogy</td>
<td>2019</td>
<td>☒</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>Novelis/Aleris</td>
<td>2019</td>
<td>☒</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>Siemens/Senvion/ Ria Blades</td>
<td>2019</td>
<td>☒</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>AMG/Shell</td>
<td>2020</td>
<td>☒</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>Peab/YIT'S Paving</td>
<td>2020</td>
<td>☒</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>Aurubis/Metallo</td>
<td>2020</td>
<td>☒</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>PKN Orlen/ Grupa Lotos</td>
<td>2020</td>
<td>☒</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>FCA/PSA</td>
<td>2020</td>
<td>☒</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>Schwarz/Suez</td>
<td>2021</td>
<td>☒</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>Aperam/ELG Haniel</td>
<td>2021</td>
<td>☒</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>Veolia/Suez</td>
<td>2021</td>
<td>☒</td>
<td>☒</td>
<td>☒</td>
</tr>
<tr>
<td>Cargotec/ Konecranes</td>
<td>2022</td>
<td>☒</td>
<td>☒</td>
<td>☒</td>
</tr>
</tbody>
</table>

legal instrument specifically meant to ensure that competition is not distorted. Therefore, the Commission is entitled to take into consideration sustainability in its assessment of mergers only when related to potential competition harm or benefit. This point was made very clear by the Commission in Bayer/Monsanto.

It seems therefore important to understand how, and to what extent, the current framework for merger control has allowed the Commission to consider sustainability in the past. To do so, we set out below some early lessons on the green-specific concerns that we identified using the typology set out in Table 1.

a. Market definition

One of our key takeaways is that the Commission raises ‘green’ concerns when consumer preferences are changing towards more sustainable alternatives. This change in demand can emanate from consumers’ greater awareness of the environmental impact of their products, such as in the case of the merger between Dow and Dupont.

9 See Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1, recital 24 where it is made clear that the control of concentrations is permitted 'in order to ensure a system of undistorted competition in the common market'.

10 Case M.8084 Bayer/Monsanto [2018], para 3017.
consumption or be driven by environmental regulation (e.g., stricter norms on car CO₂ emissions). In such cases, the Commission can take into consideration this change in consumer preferences through the market definition exercise, either from a product or a geographic perspective.

We have seen such discussions on market definition materialise in 15 of the 21 decisions where sustainability was discussed. In 11 of them, the Commission considered whether defining a distinct relevant market for sustainable products could be warranted. In 6 of them, the Commission assessed whether sustainability considerations could impact the definition of the relevant geographic market.

From a product market perspective, the Commission discussed, in 2014 already, the relevance of defining distinct markets for more environmentally friendly bananas and coffee in Chiquita Brands International/Fyffes and DEMB/Mondelez/Charger OpCo respectively. This was because some consumers had a preference for organic and fair-trade products harvested in a way that protects the environment. More recently, in FCA/PSA, the Commission discussed the relevance of defining a distinct market for low-emission vehicles. It ultimately left this question open as the impact on the competitive assessment would be minimal given that sales of such vehicles in the EEA were still limited at the time. Although the decisions have not yet been published as we write, the Commission’s statements in KPS Capital Partners/Real Alloy Europe and Norsk Hydro/Alumetal suggest that a potential distinct relevant market for recycled products was considered in these two cases.

From a geographic market perspective, consumers may for instance place a greater importance on the environmental cost of transporting goods, leading to narrower geographic markets. In Schwarz/Suez, the Commission defined a national market for the sorting of lightweight packaging notably on the basis that consumers were mindful of the environmental cost for transporting waste on a longer distance (outside of the relevant country). Similar discussions took place in relation to the definition of the geographic market in AMG/Shell and PKN Orlen/Grupa Lotos. The definition of the relevant geographic market may also depend on whether environmental regulations are homogenous across geographies. As an example, the GE/Alstom decision discusses the existence of differentiated environmental regulations for gas turbines across the world and whether it leads to differentiated regional demand.

b. Closeness of competition

In addition to affecting market definition, a change in consumer preferences may result in sustainability becoming an increasingly important parameter of differentiation between competing firms. In such cases, our review indicates that the Commission takes into account sustainability considerations in its analysis of closeness of competition. We identify four decisions where this is the case as set out in Table 1 above. One example is GE/Alstom where the fact that the parties’ gas turbines were associated to lower pollutant emissions played a role (amongst other criteria) in the findings that the parties’ offerings were relatively close.

Even in the case where there is not yet a clear consumer preference for sustainable products, the Commission seems to still pay close attention to dynamic competition and whether the Parties may be particularly well placed to compete against one another for sustainable alternatives in the future. In Cargotec/Konecranes for instance, the Commission raised the concern that the Parties were the main developers of electric/hybrid vehicles, and that no competitor was ahead of them in any meaningful way.

c. Innovation

In Dow/Dupont and Bayer/Monsanto, the Commission publicly stated that part of the rationale for intervention was to protect innovation for more sustainable products. However, we find it difficult to come to the

---

11 Case M.7220 Chiquita Brands International/Fyffes [2014], section 4.1.2.5 and Case M.7292 DEMB/Mondelez/Charger OpCo [2014], section 7.3. In Chiquita/Fyffes, the Commission defined a distinct market for non-conventional bananas (conclusion that was reiterated in Total Produce/Dole). In DEMB/Mondelez/Charger OpCo however, the Commission ultimately concluded that it was not necessary to define distinct markets.
12 Case M.9730 FCA/PSA [2020], para 34.
13 See EC clearance press release for KPS Capital Partners/Real Alloy Europe and EC Phase II opening press release for Norsk Hydro/Alumetal.
14 Case M.10047 Schwarz Group/Suez Waste Management Companies [2021], paras 56-58.
15 In AMG/Shell, the Commission concluded that the geographic market for the recycling of spent resid catalysts (SRCs) can be EEA or EMEA-wide taking into consideration that refiners are mindful of GHG emissions and therefore prefer recyclers that are located at shorter distances (Case M.9623 AMG/Shell/JV [2020], paras 51-52). With regards to PKN Orlen/Grupo Lotos, the Commission concluded that the geographic market for into-plane supply of jet fuel was restricted to each specific airport notably on the basis that the practice of tankering is avoided because not environmentally friendly (Case M.9014 PKN Orlen/Grupa Lotos [2020], para 1048).
16 Case M.7278 General Electric/Alstom [2015], section 7.3.5.5. The Commission however concluded that the definition of the relevant geographic market could be left open.
17 Case M.7278 General Electric/Alstom [2015], paras 512 and 610.
18 Case M.10078 Cargotec/Konecranes [2022], paras 1401-1416.
19 This is clear from the Commission press releases and quotes from Commissioner Margrethe Vestager discussing these two cases: ‘We need effective competition in this sector so companies are pushed to develop products that are ever safer for people and better for the environment’
same conclusion after reading these decisions carefully. Instead, it is clear from the two decisions that the development of more sustainable products was not at all core to the assessment.\textsuperscript{20}

The Commission does not seem to have explored additional innovation theories of harm in more recent decisions.

d. Purchasing

With the growing importance of sustainability for society, the need for economic circularity and further recycling becomes more and more critical. This implies that products which had no (or negative) market value previously (e.g., waste or scrap) are now being increasingly reused and therefore become important input to various production processes. In this context, one can wonder if this is likely to trigger the Commission to pursue purchasing theories of harm.

One and perhaps the only recent illustration is Aurubis/Metallo, where the Commission raised the concern that this merger between the two largest purchasers of copper scrap could give rise to significant buyer power, which in turn would have decreased the value of copper scrap. The Commission’s theory of harm was that, by reducing the price of scrap, the merger could increase the costs of primary good producers (since they would receive less for the scrap that results from their manufacturing activity). According to the Commission, this could in turn lead to an increase in the price of many industrial products, thereby harming consumers.\textsuperscript{21} Furthermore, the Commission considered that the decrease in value of scrap could also decrease the incentive for scrap to be recycled in the first place.\textsuperscript{22}

At this point, this decision appears to be an outlier. Indeed, although the Aperam/ELG Haniel, KPS Capital Partners/Real Alloy Europe and Norsk Hydro/Alumetal cases also covered metal scrap and its use as an input for recycling, the Commission does not seem to have raised similar concerns.

In summary, our review of EU merger decisions suggests that sustainability considerations have not led to any novel theory of harm (perhaps with the exception of Aurubis/Metallo). Instead, over the past 10 years, EU enforcement has aimed to ensure that there would be no reduction in competition for sustainable products through its traditional merger control framework.

2.4. Early lessons on green efficiencies

Another important takeaway from our analysis of the EU merger decisions is the limited efficiency claims brought forward by the merging parties in relation to environmental benefits.

In the only three instances where environmental efficiencies were claimed over the last 10 years, these were discarded by the Commission notably on the basis that efficiencies were not substantiated. This does not come as a surprise given how rarely efficiencies are accepted by the Commission. As such, the observed lack of success for environmental efficiencies is in line with the high burden of proof required from the merging parties in general. However, it could also be that the current framework for evaluating efficiencies is not adequate for environmental efficiencies particularly, as we discuss in the next section.

It remains that, unlike in other areas of competition law where green initiatives have been recently taken,\textsuperscript{23} there seems to be no effort to take into account potential environmental benefits of mergers.

3. Suitability of the current EU merger control to consider the impact of mergers on sustainability

Having reviewed the types of anticompetitive effects and potential benefits (or lack thereof) that have been explored so far by the Commission in merger cases with a sustainability component, we now turn to the question of whether the current EU merger control allows to properly take into account the impact of mergers on sustainability.

We start by explaining that the current framework, in line with traditional consumer welfare principles, focuses on the preferences of ‘direct consumers’, i.e. consumers within the relevant market. It therefore ignores potential harm and benefits that go beyond the priorities set by consumers’ demand and willingness to pay. We then

\textsuperscript{20} We found merely one paragraph in each decision that very superficially mention this topic: Case M.7932 Dow/Dupont [2017], para 1980 and Case M.8084 Bayer/Monsanto [2018], para 3011.


\textsuperscript{22} Case M.9409 Aurubis/Metallo Group Holding [2020], para 361.

\textsuperscript{23} See fn 1.
set out how mergers may generate economic externalities that have a broader impact on the environment than what is currently captured by the focus on consumers’ preferences. This raises the question as to whether competition authorities should consider harm and benefits that go beyond direct consumers when it comes to sustainability. As we will see, economists have started to take hold of the topic in the context of horizontal agreements and – as often perhaps – have different views on this. While some argue that competition policy should seek to internalize environmental externalities, others point to the benefits of keeping separate instruments to deal with sustainability objectives. In what follows, we apply these concepts to mergers and discuss the pros and cons of a potential new framework to take into account environmental externalities in the context of a merger.

### 3.1. The current framework focuses on direct consumers’ preferences and ignores environmental externalities

As evidenced by our review of EU precedents in the previous section, the current framework allows the Commission to consider cases where direct consumers value sustainable products. In such cases, sustainability is accounted for in the merger assessment through the market definition exercise or as a relevant parameter of competition in the competitive assessment.

This finding is consistent with recent communications by competition authorities. In its Staff Working Document on Market Definition for example, the Commission makes it clear that in instances where ‘there are [...] consumers [...] who take purchasing decisions based on whether products are sustainable or not, the market definition may reflect a potential inclusion of the range of possible non-price aspects of competition that firms may use to win customers is wide, and terms such as ‘quality’ should be interpreted broadly’. Similarly, the CMA in its Updated Merger Assessment Guidelines notes that ‘the range of possible non-price aspects of competition that firms may use to win customers is wide, and terms such as ‘quality’ should be interpreted broadly’. Amongst the non-price aspects of competition, the CMA lists ‘the sustainability of a product or service’. Competition authorities therefore use a broader definition of quality to account for consumers’ preferences for sustainable products.

However, when consumers lack such preferences for sustainable products, the current approach does not capture the broader impact that a merger may have on the environment. Think about a merger between two producers of polluting products that would increase innovation and result in improved – but also more polluting – products being brought to market. Under the current framework, this merger would be cleared if there is customer demand for these polluting products and the merger would not raise price or deteriorate quality. What is important here is that, from a consumer perspective, a ‘better’ product might be a more polluting product (for instance, a bigger car that emits more CO₂ emissions or a particularly strong pesticide).

In other words, the current framework does not account for what economists call externalities. Externalities occur when the consumption (or production) of one economic agent affects the utility of another economic agent without this being reflected in market prices and allocations. They can be negative – for instance, a smoker on a café’s terrace may decrease the utility of other customers nearby – or positive – for instance, planting flowers in one’s backyard may increase the utility of neighbours who enjoy a nicer view.

**Mergers may also be associated with significant externalities that can have an impact on sustainability**

Mergers may also be associated with significant externalities that can have an impact on sustainability. Think for example of a merger in the forestry industry that would result in increased output post-merger, and hence lower prices, due to merger-specific synergies. Under the current framework, this merger would be seen favourably as it increases consumer welfare. However, increased output would be achieved through a greater number of trees being cut, which arguably constitutes a negative externality on the environment. As an illustration of positive externalities this time, let us consider a merger between two energy producers where part of the merger rationale is to close a particularly polluting power plant.

Under the current framework, this merger would be seen
as anticompetitive as it would reduce the quantity of energy supplied, and therefore leads to higher prices for consumers. However, from a broader perspective, this merger would generate a positive externality since the plant closure would reduce CO₂ emissions which benefits society as a whole.²⁸

This highlights the dichotomy between competition policy objectives and sustainability objectives that may occur when it comes to products and services whose consumption (or production) have a detrimental effect on the environment.²⁹ If as a result of a merger for instance, the price of a particularly polluting product increases or if its quality decreases, this could decrease demand for that particular product and cause diversion towards potentially more sustainable alternatives (including market exit). In that case, could a detrimental effect on competition be considered a ‘good thing’ from a broader perspective? Note that the underlying economic mechanism is not novel and corresponds to the logic applied by governments when setting high taxes on goods that have adverse health effects for instance.³⁰

**The current framework will only consider the share of harm and benefits that goes to direct consumers**

It follows from the above that, in situations where sustainability objectives and preferences from direct consumers are not aligned, the environmental externalities generated by a merger are not taken into account in the current merger control. However, even when they are aligned, the current framework will only consider the share of harm and benefits that goes to direct consumers. Think about a merger between two car manufacturers who convince the Commission that the merger generates substantial efficiency gains through a faster and more efficient development of cars that emit less CO₂.³¹ Assuming customers value such innovation, a proper assessment of the merger under the current framework should take into account this quality improvement as a procompetitive effect and weigh this against potential anticompetitive effects (for instance, price increases). This assessment will nevertheless underestimate the broader social benefits these efficiencies have on the environment. Indeed, lower emission cars benefit not only direct consumers who access a better product but also give rise to positive externalities for society as a whole in the form of reduced CO₂ emissions.

Reciprocally, anticompetitive effects may be understated by the current framework if the merger leads to a broader impact on the environment than the impact it has on direct consumers (e.g., a loss of innovation for lower emission cars will deteriorate consumer welfare but the broader negative impact it has on CO₂ emissions will not be considered in the merger assessment).

A relevant question is therefore whether potential harm and benefits generated by a merger should be extended to consumers beyond those directly affected by the merger. In what follows, we discuss different views as to whether the EU merger control should be adjusted to consider the broader effects that mergers may have on the environment.

### 3.2. Should the EU merger control consider harm and benefits that go beyond direct consumers?

Numerous discussions have taken place in recent years amongst competition practitioners as to whether, and how, sustainability benefits that go beyond direct consumers’ preferences should be considered in the assessment of cooperation agreements between competitors.³² To date, several competition authorities – including the European Commission – have adjusted their horizontal guidelines to take into account these potential benefits.³³ This is in sharp contrast with merger control where, as explained previously, environmental externalities are not covered by the current framework.

Another interesting parallel with horizontal agreements is the fact that the discussion around sustainability

---

²⁸ This positive externality can also be described as reducing a negative externality in the sense that the merger reduces the negative externality of pollution.

²⁹ See OECD, ‘Environmental Considerations in Competition Enforcement’, Background Paper by the Secretariat (2021) for a more detailed discussion on this.

³⁰ Many countries have higher taxes on products such as tobacco or alcohol for instance in order to discourage consumption, but also Pigouvian (type) taxes to reduce negative externalities of the kind discussed here, e.g., excise taxes on petrol or the payment of ETS emission rights.

³¹ According to paragraph 78 of its Horizontal Merger Guidelines, efficiencies need to satisfy three criteria to be taken into account in the assessment of mergers: efficiencies need to benefit consumers, be verifiable and merger-specific.

³² See the introduction of M.P. Schinkel and L. Treuren, ‘Green antitrust: Friendly fire in the fight against climate change’ (2021) Competition Law, Climate Change & Environmental Sustainability, Concurrences; as well as section 2.1.2 of OECD, ‘Environmental Considerations in Competition Enforcement’, Background Paper by the Secretariat (2021) for a summary of these discussions.

³³ In addition to the EC (see fn 1), consider ACM, ‘Draft Guidelines “Sustainability Agreements”’ (2020) and CMA, ‘Draft Guidance of the application of the Chapter I of prohibition in the Competition Act 1998 to environmental sustainability agreements’ (2023) CMA177.
focused on the positive externalities that an agreement may generate for society (i.e., the so-called collective benefits), but little has been said about potential negative externalities that an agreement may generate. The above example of a merger in the forestry industry that would result in more trees being cut – despite greater output and lower prices – could well apply to a cooperation agreement. It is unclear as to why, in this hypothetical example, competition policy should not seek to consider negative externalities if it does so for positive externalities.

It is unclear as to why […] competition policy should not seek to consider negative externalities if it does so for positive externalities

In what follows, we build on the existing debate around horizontal agreements but consider both positive and negative externalities when discussing whether a change in the current EU merger control is needed to take into account the broader impact mergers may have on sustainability. More specifically, we discuss in turn:

- The challenges associated with a potential theoretical framework that would seek to internalize the externalities mergers may have on sustainability.
- The merits of keeping separate instruments and relying on regulation to change consumers’ preferences and companies’ behaviours.

a. Challenges associated with a potential revised framework for merger control

Despite initial declarations of intent from the former EU Chief Economist Pierre Régibeau to ‘consider […] green efficiencies [that] tend by definition to be mostly out of market’, little has been done so far by the Commission to take into account environmental externalities in merger assessment.34 How would the internalization of such externalities work in practice compared to the current test?

We set out below in Figure 2 what a potential revised framework would look like. We start from the traditional framework where a significant impediment to effective competition (SIEC) is found if the increase in price (represented below by the difference between the price post-merger \( P_M \) and the price in the counterfactual \( P_{CF} \)) or the reduction in quality, innovation or choice (represented below by the difference between the consumer valuation of quality in the counterfactual \( Q_{CF} \) and the consumer valuation of quality post-merger \( Q_M \)) brought by the merger exceeds merger-specific efficiencies.35 Considering environmental externalities would consist in adding negative environmental externalities (i.e., the out-of-market harm that goes beyond direct consumers) in the left-hand side of the equation and positive environmental externalities (i.e., the out-of-market benefits that go beyond direct consumers) in the right-hand side of the equation.36

Although conceptually straightforward, this potential revision of the framework raises significant hurdles in practice.

Traditional framework

A merger leads to a SIEC if \((P_M - P_{CF}) + (Q_{CF} - Q_M) > E_{FM}\)

Potential revised framework taking into account externalities

A merger leads to a SIEC if \((P_M - P_{CF}) + (Q_{CF} - Q_M) + |\text{Negative externalities}| > E_{FM} + \text{Positive externalities}\)

Figure 2 Potential revised framework

34 Hellenic Competition Commission, ‘Sustainable development and competition law: Towards a Green Growth regulatory osmosis’ (28 September 2020, online event).

35 One important practical difficulty here is that price, consumer valuation of quality and merger-specific efficiencies all need to be measured in comparable units (e.g., monetary value) for this test to be feasible.

36 From a mathematical perspective, negative externalities are expressed as an absolute value since they are expected to have a negative sign.
First, how to quantify externalities? Similar to the practical difficulties raised by the quantification of non-price effects of mergers, environmental externalities are not easily quantifiable. Potential techniques used in environmental economics can help, but challenges are likely to remain for the following reasons. In cases where some customers at least have a willingness to pay for more sustainable products, the value of the quality improvement can be proxied by revealed or stated preferences for these products. For instance, if some consumers are willing to pay a premium for more sustainable bananas, an efficiency leading to a greater number of sustainable bananas could be quantified using hedonic pricing techniques or surveys. However, the issue about externalities is precisely that they occur in situations where consumers do not have a willingness to pay for sustainability. These techniques are therefore of little to no help in these circumstances.

Some other methods are nevertheless available to quantify externalities that relate to greenhouse gas emissions. In particular, environmental social cost-benefit analyses often rely on the ‘shadow price’ of greenhouse gas in order to measure the monetary value of social welfare loss caused to the environment by one additional unit of emission. The advantage of relying on such estimates is that they are widely available in the public domain. Applied to a merger context, it is therefore conceivable to estimate the value of an externality by applying the shadow price to the level of CO2 emissions a merger would save for instance. However, this concept is not easily transposable to other types of efficiencies a merger may give rise to (for instance, if a merger results in less polluted water).

Second, where to stop? As evident from the aforementioned examples, the impact of externalities on sustainability may be very broad in scope. A relevant question for merger control is therefore which beneficiaries (in case of positive externalities) or ‘victims’ (in case of negative externalities) should be considered in the assessment. This point is an interesting divide between the Dutch and the EU approach when it comes to sustainability benefits of horizontal agreements. While the ACM guidelines make it clear that – for environmental-damage agreements – it will take into account the total benefits including ‘for others than merely those of the users’, the EC guidelines are more restrictive in so far as they indicate taking into account collective benefits ‘where consumers in the relevant market substantially overlap with, or form part of the group of beneficiaries outside the relevant market’.

To take an illustrative example, think about a horizontal agreement between chemical producers aiming at reducing water pollution in region A but that would result in a price increase for consumers in region B (for the sake of the argument, let us assume these are export products that are not consumed in region A). Under the ACM approach, positive externalities of this agreement on the environment should be considered in the assessment but not under the EC approach (no overlap between consumers in region B and beneficiaries of the reduction in polluted water in region A).

Another, but not less straightforward, question is what time horizon to consider. Arguably the effects on the environment may continue being felt in the long-term and even encompass future generations, which raises significant practical difficulties when trying to weigh these effects against any loss of competition in the next two to three years for instance.

b. Merits of keeping separate instruments

In light of the significant practical difficulties raised by the quantification of externalities, it is worth exploring another option: keep separate instruments with, on the one hand, regulation dealing with sustainability objectives and, on the other hand, merger control focusing on the impact of mergers on direct consumer preferences. Several arguments are in favour of this alternative.

First, it would avoid diversion of resources by competition authorities from their core focus to assess environmental externalities from mergers – a task for which they may not be well equipped to deal with. Furthermore, there is also a risk of overloading merger control with the identification, and quantification, of


38 Hedonic pricing corresponds to techniques used to derive the value customers allocate to a specific feature based on a price comparison of products which are similar but differ in this specific feature. For instance, any premium in house prices in a clean area compared to a polluted area may provide insights on the ‘price of clean air’.

39 van Dijk (fn 37).


externalities for a wide variety of topics. This ‘slippery slope’ may lead to merger control being swamped with the assessment of merger effects that go well beyond its core mandate.

Second, it would avoid facing a difficult trade-off between competition policy and sustainability objectives in cases where the two are not aligned. One important implication of the potential revised framework set out previously is that there could be cases where:

- a merger that does not result in a lessening of competition could be blocked on the basis that it would be detrimental to the environment; and vice-versa
- a merger that results in a lessening of competition could be cleared on the grounds that it would provide broader benefits to the environment.

In the first case, this would constitute a drastic departure from the current test as it would mean that the Commission would have the mandate to block a merger that would have no detrimental effects to direct customers. On top of being a risky path to follow for the fairness and the predictability of merger control in Europe, serious doubts would exist as to how able can competition authorities be to deal with such cases that fall well beyond their area of expertise.

In the second case, legitimate questions could be raised as to whether this would not amount to replacing one market failure (i.e., the fact that these environmental benefits would not exist absent the merger) by another market failure in the form of accrued market power.

Finally, and perhaps more importantly, environmental regulation could act as a driver to change consumer preferences and companies’ behaviours towards more sustainable alternatives. As regulation would impact these preferences and behaviours, growing demand for more sustainable products would naturally drive competition. Assuming that regulation is appropriate and well-designed, this means that misalignments between the consumer welfare principles and environmental externalities of mergers should reduce.

4. Conclusion

As discussed throughout this article, the current EU merger control focuses on consumer preferences and therefore only takes into account the impact of mergers on sustainability when there is a demand for sustainable products. As such, it ignores both positive and negative externalities mergers may have on sustainability.

While we have explored in this article a potential analytical framework to take into account environmental externalities in merger assessment, we find that properly considering these externalities is likely to raise practical challenges. In light of these difficulties, driving change in companies’ behaviours and consumer preferences through regulation may be a better instrument to support sustainability objectives rather than seeking to internalize externalities.

Nevertheless, EU merger control still has an important role to play to ensure both that:

- no reduction of competition for sustainable products will happen following a merger; and that
- merger-specific efficiencies that may bring more sustainable products to (direct) customers are taken into account.

So far, the Commission has focused on the former. It will be interesting to see whether the high stakes of sustainability make the Commission revisit its practice on the latter.

Environmental regulation could act as a driver to change consumer preferences and companies’ behaviours towards more sustainable alternatives

42 For instance, the 2030 UN Agenda for Sustainable Development identifies 17 Sustainable Development Goals and not less than 169 Targets that go from the increase in health financing and the recruitment, development, training and retention of health workforce (target 3.c) to supporting least developed countries in building sustainable and resilient buildings through the use of local materials (target 11.c).

43 van Dijk (fn 37).

44 See S. Thomas, ‘Normative Goals in Merger Control: Why Merger Control Should Not Attempt to Achieve “Better” Outcomes than Competition’ (2020) for a detailed discussion on whether merger control should seek to achieve a wider set of objectives than competition.

45 This question has been notably raised for horizontal agreements in L. Peperkorn, ‘Competition Policy is not a Stopgap!’ (2021) 12(6) Journal of European Competition Law & Practice 415–418.