



# Climate Protection and Sustainability Considerations in Merger Reviews

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# Outline

- Introduction
- Sustainability: why should we be concerned?
- Can sustainability be factored in competition law assessments?
- Sustainability in merger assessments
- Final words

# Introduction

- Our planet is facing unprecedented crises, sanitary and environmental alike
  - Calls for competition law to reflect on the manner its enforcement can be used as a tool to foster *sustainability*, for the benefit of all
- Sustainability here is environmental sustainability
  - Environmental protection
  - How to ensure that the environment is not further degraded, and resources not depleted to cater to humanity's present needs.
- Environmental risks that the world is facing due to climate change are unanimously acknowledged by all countries
- Environmental factors were initially viewed as non-pecuniary and therefore non-quantifiable
- Certain competition enforcers are now giving due regard to the use of competition law to foster climate neutral, green and environmentally friendly economies


# Introduction

*“Competition law and competition authorities come into play whenever companies seek ways to cooperate in sustainability matters. One question in this respect is how to take greater account of sustainability aspects in assessments under competition law and in this way increase legal certainty for companies”*

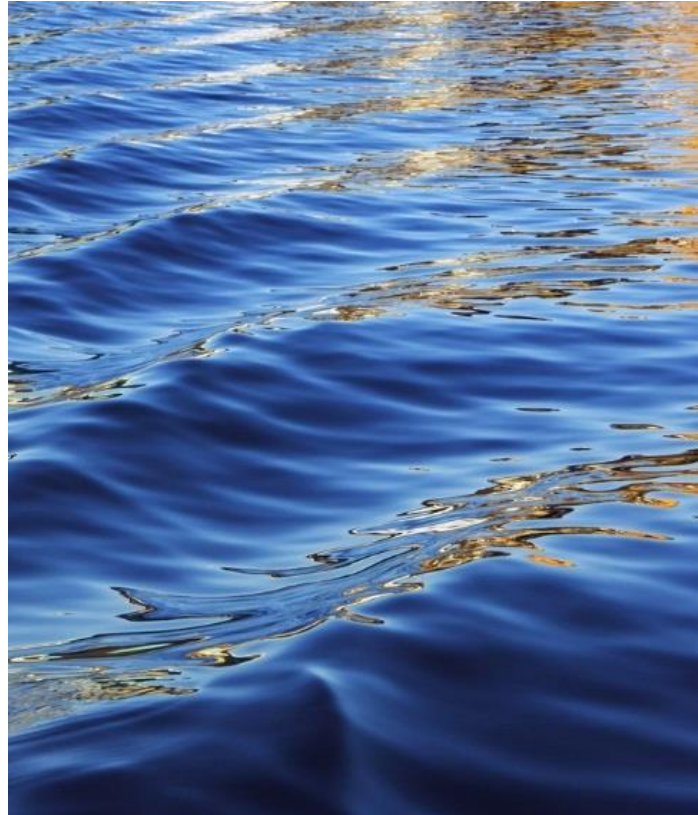
Professor Dr Konrad Ost, Vice-President of the Bundeskartellamt

# Introduction

- Substantive Assessment of Mergers: SLC or likely SLC
- Efficiency grounds or public interest grounds.
- Approach cast in approach is cast in line with the fundamental goal of competition law
  - protect and promote consumer welfare
  - traditionally been measured in terms of price, quality and innovation



Sustainability: why  
should we be  
concerned?



# Sustainability: why should we be concerned?

- Development for the greater good should not have significant costs to the environment.
- Costs of economic development and industrialization including increased greenhouse gas emissions have been high on the environment and have caused considerable impact on the world's climate.
- Climate change is an impending urgent danger which lies on the world.
- Increased consciousness by Governments and citizens of the harm caused to world's environment
- Concerns of the environmental crisis are no longer a first world consideration only
- Measures by developing countries to foster environmental sustainability



Can sustainability be factored in competition law assessments?





## Sustainability considerations in Competition Law Assessments

- Can competition law assist in achieving sustainability goals?
- Can the narrow objective of competition law of maximising individual utility be stretched to the protection of the environment?
- Competition Law to be part of the solution
- Ultimate objective of competition law: enhance consumer welfare
- What is “consumer welfare”?
  - price, output, choice, quality and innovation (only)?
- Competition adds value to consumers’ lives
- Obtain more utility than their expenditure on a certain good or service
- Prevent the transfer of consumer surplus to producers

## Sustainability considerations in Competition Law Assessments

- Environmental crisis: negative externality?
- Essence of competition law lies in remedying externalities and market failures
- Disregarding environmental considerations in the implementation of competition policy will entail a negative externality
- Environmental consideration, despite being a non-economic factor, can be compatible with competition law
- Green collaborative agreements: a collusive agreement?

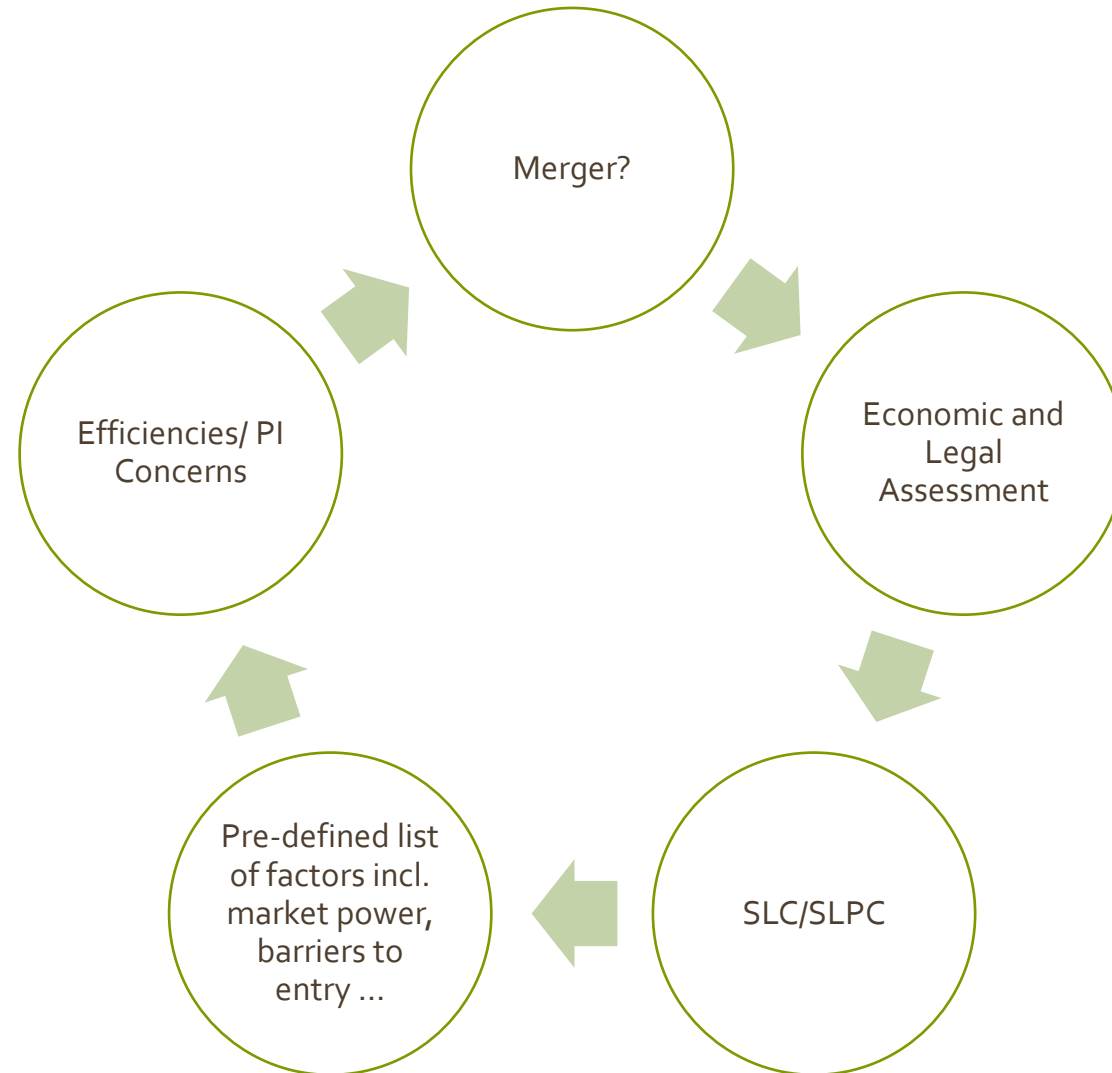
## Sustainability considerations in Competition Law Assessments

- Such agreements cannot however be used as covers to facilitate cartels
- A.I.S.E - Henkel AG & Co. KGaA, Procter & Gamble International S.à.r.l. and Unilever PLC coordinate with the object of ensuring that none of them will use the environmental initiative to gain a competitive advantage and gain market shares



# Sustainability in Merger assessments

# Core Assessment of Merger Transaction



# Sustainability in Merger Assessments

- Climate change and environmental considerations are also finding their way in merger transactions and merger control
- Enterprises are voluntarily taking steps to modify their production processes or are adopting sustainable initiatives
- Competition agencies are also conscious of their role to play to protect the environment, fight climate change and enhance sustainability
- Assessment of mergers used to be limited to a focus on the economic consideration of consumer welfare, measured in terms of price, choice and quality which is now being extended to innovation

# Sustainability in Merger Assessments

- **Dow/Dupont merger** – DG Comp not only concerned with the impact that the transaction will have on prices and output, but also assessed how the transaction will negatively impact innovation in pesticides
- Innovation in pesticides is important as farmers value new products that are less toxic
- Transaction approved on the condition that DuPont divests its global pesticide business, including its research and development organisation
- Commissioner Vestager “we need effective competition in [the pesticides sector] so companies are pushed to develop products that are safer for people and better for the environment”

# Sustainability in Merger Assessments

- Room for sustainability considerations in the definition of public interest
- If this is not the case, sustainability can be considered when
  - assessing the theories of harm related to the transaction, including the impact of the transaction on innovation
  - assessing the efficiencies, including the “green efficiencies” that the transaction can bring
- Arubis/Metallo Merger –
  - Aurubis - processing of copper scrap
  - Metallo - recycling and processing of non-ferrous metals and refining copper scrap
  - parties are important buyers of copper scrap in the European Economic Area



# Sustainability in Merger Assessments

- Arubis/Metallo Merger –
  - whether the transaction can harm competition in the copper scrap market
  - whether it can raise the merged entity buyer power, conferring upon it the ability to impose lower prices for the copper scrap it purchases which may result in collectors of copper scrap having less incentives and ability to invest and collect copper scrap
- Assessment of the DG Comp also delved into analysing its effects on the conditions of competition in the copper recycling markets and concluding that it would not lead to any harmful effect on the latter market or disincentivise the collection of scrap copper.

# Sustainability in Merger Assessments

- Arubis/Metallo Merger –

*“a well-functioning circular economy in copper is important to ensure a sustainable usage of resources in the context of the European Green Deal”*

Commissioner Vestager

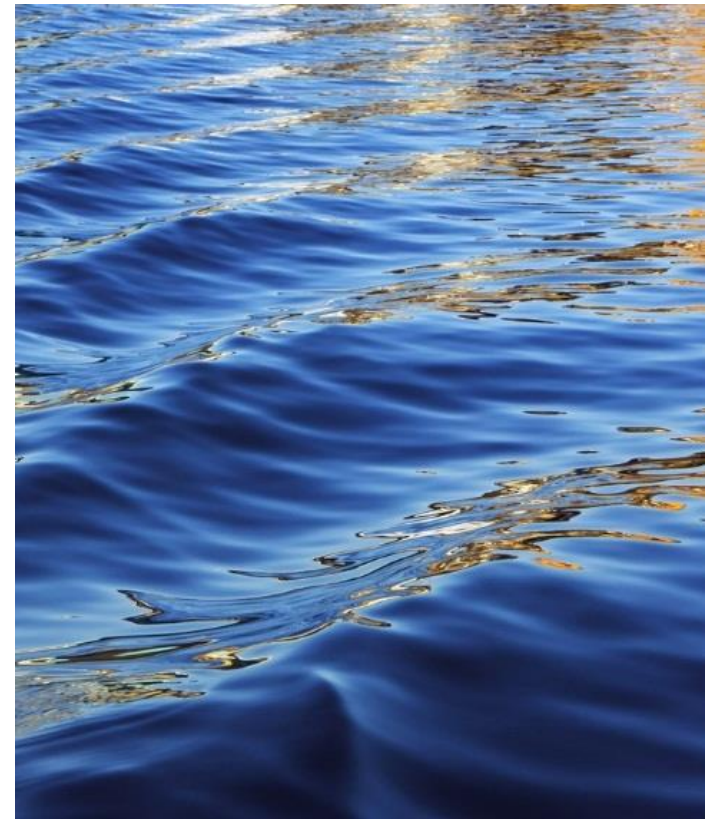
# Sustainability in Merger Assessments

- Can be considered when defining the relevant market
- **Chiquita Brands International/ Fyffes** - European Commission explicitly recognised the categorisation of bananas according to their certifications in terms of Fairtrade
- A separate market for organic and/or Fairtrade bananas as opposed to conventional bananas
- Competition Commission of South Africa in the merger involving **Averda SA** - Are incineration technology and thermal desorption interchangeable in the disposal of pharmaceutical waste (where both can be appropriate for the pharmaceutical waste?)
- Assessment found that while incinerators do have technology in place (in the form of filtration systems) to assist in reducing the pollutants emerging from treating pharmaceutical waste, incinerator operators remain cognisant of ensuring that an optimal mix of healthcare risk waste treated is achieved to allow for incinerating facilities to not breach their air emissions targets

# Sustainability in Merger Assessments

- Joint venture between Miba and Zollern
  - Prohibited in 2019 by Bundeskartellamt
  - Competition on the markets for hydrodynamic plain bearings for large engines in ships, locomotives and generating sets would be impaired
- Section 42 (1) German Competition Act – Minister can exceptionally approve an otherwise prohibited merger on grounds of public interest
- Parties argued the preservation of technical know-how and innovation potential as one of the public interest grounds
- Joint venture produced hydrodynamic plain bearings for large engines in ships, locomotives and generating sets, which have the potential of reducing emissions

# Final Words



## Final Words

- COMESA Competition Commission has not had to weigh sustainability considerations till date
- Absent clear legislative provisions, a purposive interpretation may allow sustainability considerations to be brought under public interest in terms of “**quality and variety of commodities and services**” under Article 26 (4)(b) of the Regulations or “**the development of new commodities**” under Article 26 (4)(c) of the Regulations.
- Competition can drive enterprises to innovate and produce sustainable products and may encourage enterprises to invest in greener technologies in their manufacturing processes.
- Competition agencies are becoming more aware of their responsibility in using competition law as a tool for a sustainable future.



# Thank you!

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