Climate Protection and Sustainability Considerations in Merger Review

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Introduction

The substantive assessment of a merger transaction under various competition laws has traditionally resided in the question of whether the transaction has resulted, will result or is likely to result in a substantial lessening of competition. Where it is found that the merger transaction leads or is likely to lead to a substantial lessening of competition, some jurisdictions additionally consider whether the transaction may be allowed in view of the efficiency benefits which may result therefrom or on public interest considerations. The public interest considerations vary across jurisdictions. The latter approach is cast in line with the fundamental goal of competition law, which seeks to protect and promote consumer welfare and consumer welfare has traditionally been measured in terms of price, quality and innovation[1].

However, as our planet is facing unprecedented crises, sanitary and environmental alike, there are 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. The environmental risks that the world is facing due to climate change are unanimously acknowledged by all countries[2] and significant efforts are being invested by Governments to either undo the harm or to reduce the damages in order to protect our environment and resources. In the wake of these efforts while environmental factors were initially viewed as non-pecuniary and therefore non-quantifiable[3], it is apposite to highlight that some competition enforcers are now giving due regard to the use of competition law to foster climate neutral, green and environmentally friendly economies. For instance, in 2019, the French Competition Authority along with seven other French administrative bodies joined forces to assess how to factor the urgency of climate change in their respective mandates[4]. Further, at the level of the European Union Commission, Commissioner Vestager, Vice-President of the European Union Commission explicitly recognized the role that competition enforcers have to play in the European Green Deal. The European Symposium on how competition policy can support the Green Deal bears testimony to the commitment of competition enforcers towards a sustainable planet and sustainability initiatives. The Bundeskarthellamt also held a virtual meeting on "Open markets and sustainable economic activity – public interest objectives as a challenge for

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[1] Angus Reston & Mark Sansom, (2020) "'Green competition law' – a changing enforcement climate?" Freshfields Bruckhaus Deringer https://sustainability.freshfields.com/post/102g6wo/green-competition-law-a-changing-enforcement-climate

[2] Annemargaret Connolly and Thomas D. Goslin, Weil, Gotshal & Manges LLP, (2019) "Climate Change Considerations In M&A Transactions" Lexis Nexis www.lexisnexis.com/lexis-practical-guidance/the-journal/b/pa/posts/climate-change-considerations-in-m-a-transactions accessed 28th April 2021

[3] Angus Reston & Mark Sansom, supra n. 1

[4] Authorite de la Concurrence, (2020) "Eight French regulators publish a working paper on their role and tools in the face of climate change" www.autoritedelaconcurrence.fr/en/press-release/eight-french-regulators-publish-working-paper-their-role-and-tools-face-climate accessed 5th May 2021

competition law practice" on 1st October 2020[5]. At the meeting, Professor Dr Konrad Ost, Vice-President of the Bundeskartellamt acknowledged that "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"[6]. Environmental considerations are now being included by some competition agencies in the consumer welfare equation; sustainability is enjoined to competition assessment with the aim of using competition law and policy as a tool to mitigate the pernicious effects of climate change, be it when considering horizontal cooperation agreements between competitors or when reviewing merger transactions[7]. At the COMESA level, the provisions of the COMESA Competition Regulations in relation to mergers and acquisitions do not however per se allow the COMESA Competition Commission to consider the impact of the transaction on the environment when assessing a notified transaction.

This paper aims to expound on the interaction between competition policy and sustainability objectives and the extent to which such considerations can influence the assessment of merger transactions. The paper is structured as follows: the first part provides a note on the interaction between competition policy and sustainability objectives; the second part discusses how sustainability considerations are finding their ways in merger assessments and the third part concludes.

1. Interaction between competition policy and sustainability objectives

As countries are fixing themselves the objective to bridge the gap between developed and developing countries, with a decent standard of living and fair purchasing power for all, this simultaneously raises the question of development for the greater good, yes, but at what cost? When as Governments and citizens we reflect on the future that is envisaged for us and for the future generations, it certainly not envisaged seeing a grey layer of dust and dirt between us and the sky, breathing air polluted by industrial smokes or eating seafood coming from waters in which toxic industrial waste and chemicals have been dumped. The 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. The damage caused to the environment has resulted in considerable climate change. Climate change is an impeding urgent danger which lies on the world and the risks are high and the consequences can be devastating. The ozone layer has been weakened, which is causing an increase in the world's temperature and with this, comes *inter-alia* the impending risk of the melting of icebergs in Antarctica and increased sea levels, which may not only destroy irreversibly the fauna and flora of Antarctica continent but can also sub-merge countries which are on lower altitudes. The world can no longer stay blind to the climate emergency and "business as usual" can no longer be the

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[5] Bundeskarthellamt, "Sustainability initiatives and competition law practice – virtual meeting of the Working Group on Competition Law" www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2020/05_10_2020_AKK_2020.html accessed 13th May 2021

[6] Bundeskarthellamt, supra n. 5

7 Angus Reston & Mark Sansom, (2020), "'Green' competition law – a changing enforcement climate?" Freshfields Bruckhaus Deringer LLP https://sustainability.freshfields.com/post/102g6wo/green-competition-law-a-changing-enforcement-climate Accessed 7th May 2021

order of the day[8]. Development is therefore desired but only to the extent that it is sustainable and does no more harm to our already world's fragile ecosystem. Governments and citizens alike are increasingly conscious of the harm already caused to the world's environment and measures are being designed and implemented to limit the damages and mitigate the impending damages. Concerns on the environmental crisis are no longer a first world consideration only. Developing countries are also implementing measures to save the environment. For example, the Government of Mauritius recently banned the use of single-use plastic since April 2021. In the same vein, the COMESA Industrialisation Strategy 2017 – 2026, explicitly reckons "promot[ing] environmental sustainability in industrial development"[9] as one of the key areas for industrial development, with the vision of having a "globally competitive environmental-friendly, diversified industrial sector"[10] and urges Member States to "ensure that economic and social growth is supported within a sustainable environment so that industrial expansion does not jeopardise the well-being of future generations"[11].

The responsibility to fight global warming and climate change is therefore a shared one, where policy makers, private enterprises and citizens have the moral responsibility to contribute. If each citizen opts to use energy efficient domestic appliances or chooses vehicles with less carbon dioxide emissions to protect our planet, this will create impetus for private enterprises to produce such products. The latter private efforts have however to blend within a wider regulatory objective and policy which aim for enhanced protection of the environment. While there are policies formulated by Governments with direct impact on the environment and the protection of the environmental features as a priority on the agenda of Governments, much emphasis is also being laid on other tools which can indirectly contribute to attaining "environmental sustainability"[12]. In this vein, focus has been laid recently on the extent to which competition law can assist in achieving sustainability goals. Sustainability considerations have been considered by the European Commission when considering state aid and horizontal cooperation agreements under Article 101 of the Treaty of the Functioning of the European Commission ("TFEU"). It has been posited that competition law needs not stand in the way of environment friendly cooperation agreements and can hence also be part of the solution[13].

Competition law is enforced with the ultimate objective of enhancing consumer welfare. While competition legislations may have not defined the term "consumer welfare", consumer welfare has traditionally been measured in terms of price, output, choice, quality and innovation and competition essentially adds value to consumers' lives where consumers obtain more utility than their expenditure on a certain good or service. Competition law has hence been used as a mechanism to protect consumer surplus and prevent "the transfer of consumer surplus to producers" [14]. However, as the world is fighting its battle against environmental crises and climate change, the agenda of Governments, policy makers and competition enforcers has considered

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[8] Simon Holmes, (2020) "Climate Change, Sustainability and Competition Law" Journal of Antitrust Enforcement

[9] COMESA Industrialisation Strategy 2017 – 2026 www.comesa.int/wp-content/uploads/2020/10/COMESA-Industrial-Strategy-Final-Eng_.pdf accessed 13th May 2021

[10] COMESA Industrialisation Strategy 2017 – 2026 supra n. 9

[11] COMESA Industrialisation Strategy 2017 – 2026 supra n. 9

[12] Tembinkosi Bonakele, "Competition Law, Climate Change & Environmental Sustainability"

[13] Simon Holmes supra n. 8

14 Prof. dr. Hans Vedder, Arletta Gorecka & Fabian Richter (2020), "A Competition Policy to Support the Green Deal"

whether competition law can be used as a tool to improve social welfare. It has been queried whether the somehow narrow objective of competition law of maximising individual utility can be stretched to the protection of the environment. It has been posited that the essence of competition law lies in remedying externalities[15] and market failures. The impending environmental crisis being a negative externality, it has been argued that competition regulation can equally be instrumental in fostering an environmental protection policy[16] such that "disregarding environmental considerations in the implementation of competition policy [will entail] a negative externality" [17]. The compatibility of environmental considerations within competition policy has thus been found but so long as this non-economic consideration does not hinder the objective of competition policy[18].

The assessment of environmental factors by competition agencies has been noteworthy. Typical collaborative green agreements have been assessed by the European Commission under Article 101 of the TFEU. The latter legal provision prohibits all agreements, decisions by associations of undertakings and concerted practices which prevent, restrict or distort competition unless such agreements meet the requirements of Article 101(3) of the TFEU. Article 101(3) negates the application of Article 101(1) and (2) of the TFEU to those agreements which *inter alia* contribute "to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of resulting benefit …and which are indispensable agreements which do not eliminate competition substantially[19]. A literal application of Article 101 of the TFEU results in holding green collaborations between competitors in breach of Article 101 and hence void, given that environmental considerations do not feature explicitly within the exceptions provided at Article 101(3). The main theories of harm associated with such agreements are that they increase "barriers to entry or exit and firms' sunk costs"[20] decrease competitive pressure and may create conducive conditions for the participating enterprises engaged in collusive behaviours. In view of the latter theories of harm, such agreements may hence distort competition significantly. However, a purposive interpretation could feature such collaborations within the umbrella of the wordings "improving the production or distribution of goods" or "promoting technical or economic progress"; the share of benefit attributable to consumers from such agreements being that they are able to benefit from a cleaner and better environment and considering the urgency to address the environmental crisis and fight climate change, such agreements are indispensable. It is apposite to highlight that the European Commission has itself as far back as 1995, acknowledged that environmental considerations may "contribut[e] to improving production or distribution or to promoting economic or technical progress" such that its assessment "weighs up the restrictions of competition arising out of an agreement against the environmental objectives of the agreement and applies the principle of proportionality in accordance with Article [101(3)]"[21].

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15 Jesper Fredborg Hurić-Larsen & Angela Münch (2016), "Competition and Environmental Policy in the EU: Old Foes, New Friends?" J Ind Compet Trade
[16] Jesper Fredborg Hurić-Larsen & Angela Münch supra n. 15
[17] Jesper Fredborg Hurić-Larsen & Angela Münch supra n. 15
18 OECD (2011) Annual report on competition policy developments in the European Union
[19] Article 101 (3)(a) and (b) of the TFEU
[20] Jesper Fredborg Hurić-Larsen & Angela Münch supra n. 15
[21] European Commission, (1995) "XXV Report on Competition Policy" (Brussels/Luxembourg), cited in Competition Policy supporting the Green Deal Baker McKenzie response to the call for contributions

Investments into green technology are usually massive and this can be beyond the means of one single enterprise. The incentives to undertake such initiatives are usually higher if done at the level of associations or collaboratively by a number of enterprises. The collaboration can also take the form of a joint investment into research and development to produce an environmentally friendly technology to be used by the collaborating parties or the industry. While there is no clear guidance on how competition agencies will apply competition law to such arrangements, it is legitimate to expect that such agreements cannot be used as covers to facilitate anti-competitive agreements. In this vein, the European Commission investigated a suspected cartel among producers of laundry detergents, members of the 'Association Internationale de la savonnerie, de la détergence et des produits d'entretien', which stemmed from an initial effort by the producers to protect the environment by inter alia, reducing energy consumption per wash cycle, weight of consumed detergents and weight of packaging. The Association developed a Code of Good Environmental Practice for Household Laundry Detergents. While the association's efforts were to be limited to encouraging a sustainable laundry detergent consumption by households, with no collusive intent, the association unfortunately provided a platform to the three producers, namely Henkel AG & Co. KGaA, Procter & Gamble International S.à.r.l. and Unilever PLC to coordinate with the object of ensuring that none of them will use the environmental initiative to gain a competitive advantage and gain market shares. The European Commission found that the parties had exchanged information on prices and trading conditions and coordinated packaging decisions and were found to be in breach of Article 81 (now 101) of the TFEU. In its assessment of the agreement, the European Commission did not factor in the benefits to the environment resulting from the agreement to reduce consumption of laundry detergents and in packaging of the product.

Additionally, competition agencies are also bringing their contribution in making competition policy a tool to slow down the fast-escalating degradation of our planet. The Netherlands Competition Commission's draft guidelines on Sustainability Agreements published in July 2020 provide that parties who consult the Commission prior to implementing agreements aimed at enhancing sustainability will be exempt from financial penalties if the agreement is thereafter found to be in breach of the national competition law.

2. Factoring in sustainability considerations in merger assessment

The core assessment of merger transactions has always been an enlightened legal and economic question and lies in whether the transaction is or is likely to lead to a substantial lessening of competition. While jurisdictions may have brought variations to this substantive test, for instance, the COMESA Competition Regulations consider whether a merger is likely or not to "prevent or lessen competition"[22], the European Union Merger Regulations considers whether "a concentration with a Community dimension which would significantly impede effective competition, in the common market or in a substantial part thereof…"[23]; this assessment is always subjected to a pre-defined list of factors in the competition legislation. The set of factors is usually exhaustively listed and include the creation of a position of market power as in the case of the European Union Merger Regulations, import competition, barriers to entry, countervailing buying power, the market characteristics, level of concentration and history of collusion. Where the

[22] Article 25(1) of the COMESA Competition Regulations 2004

[23] Article 1(3) of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings

transaction is found to lead to a substantial lessening of competition, certain competition laws require the assessment to factor in the efficiencies[24] resulting from the transaction, prior to remedying same. Other jurisdictions include the concept of public interest in their merger regulation framework. Public interest considerations are matters of public policy which are considered of political, national or socio-economic importance by the legislator[25]. While the spectrum and definition of public interest may differ across jurisdictions, the concept is usually wider than the concept of efficiencies and may be also be defined as sector-specific[26], aiming to correct historical economic distortions[27] and economic considerations[28]. The scope of public interest is usually pre-defined in the competition legislation.

With the impending climate urgency, climate change and environmental considerations are also finding their way in merger transactions and merger control. Enterprises are either voluntarily taking steps to modify their production processes to reduce the emission of greenhouse effects[29] or are adopting sustainable initiatives including sourcing sustainably-produced raw materials, recyclable packaging, investing in recyclable energy and carbon-efficient production methods. As elaborated earlier, competition agencies are also conscious of their role to play to protect the environment, fight climate change and enhance sustainability. If initially sustainability factors were considered in the realm of anti-competitive agreements, such considerations, albeit non-economic, are also being considered in merger reviews. The 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. The European Commission considered the impediment to innovation as a theory of harm in its assessment of the Dow/Dupont merger[30], two chemical producing companies. The European Commission was 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. The European Commission opined that innovation in pesticides is important as farmers value new products that are less toxic but more efficient against pests which usually build resistance against the active ingredients of pesticides over time. The European Commission assessment concluded that the transaction

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[24] Section 50 of the Competition Act of Mauritius requires the Competition Commission, Mauritius, to factor in the off-setting public benefits listed at sub-section (4) thereof prior to remedying a merger which has resulted or likely to result in a substantial lessening of competition. Such off-setting public benefits have been defined as the benefits to be gained in respect of the safety of goods and services; efficiency with which goods are produced, supplied or distributed or services supplied development and use of new and improved foods and services in the means of production and distribution and promotion of technological and economic progress and the benefits are to be shared by consumers and business in general.

[25] OECD Working Party No. 3 on Co-operation and Enforcement, (2016) “Executive Summary of the Roundtable on Public Interest Consideration in Merger Control”

[26] The Enterprise Act 2002 of United Kingdom for instance includes media specific public interests

[27] Section 12A(3) of the Competition Act 89 of 1998 of South Africa requires the Competition Commission or Competition Tribunal to consider the effects of a merger on “the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive”.

[28] Section 12A(3) of the Competition Act 89 of 1998 of South Africa requires the Competition Commission or Competition Tribunal to consider the effects of a merger on “the ability of national industries to compete in international markets”.

[29] Annemargaret Connolly & Thomas D Goslin, (2019) “Climate Change Considerations in M&A Transactions” Weil, Gotshall & Manges LLP, Lexis Nexis

[30] Case M.7932 Dow/DuPont

would remove the parties' incentives to discontinue costly development efforts, reduce the merged entity's ability and incentive to innovate as compared to each of the party prior to the transaction. The transaction was approved on the condition that DuPont divests its global pesticide business, including its research and development organisation. Commissioner Vestager explicitly recognised the need to safeguard the environment in her statement on the commission's investigation by stating: "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"[31].

Sustainability considerations can feature in the definition of public interest if the legislator chooses to do so. If not, sustainability may be factored in merger assessment at two levels: firstly, when assessing the theories of harm related to the transaction, including the impact of the transaction on innovation and secondly, when assessing the efficiencies, including the "green efficiencies" that the transaction can bring[32]. The European Commission's assessment of the Aurubis proposed acquisition of Metallo delved into analysing whether the transaction can harm competition in the copper scrap market and 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. Copper scrap can be used as an alternative to primary copper concentrate in the production of copper cathodes. Aurubis main activities include the processing of copper scrap and those of Metallo include recycling and processing of non-ferrous metals and refining copper scrap. The parties are important buyers of copper scrap in the European Economic Area. The investigation found that roughly 45% of copper demand in Europe is covered by copper manufactured from copper scrap. The European Commission cleared the transaction after 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. Commissioner Vestager commenting on the decision stated that "a well-functioning circular economy in copper is important to ensure a sustainable usage of resources in the context of the European Green Deal". Arubis AG Executive Board Chairman stated that "recycling is crucial for a sustainable society"[33] and highlighted that "Aurubis und Metallo share values such as sustainability, innovation and cutting-edge technology".

Additionally, sustainability considerations can also be factored in the substantive assessment of merger transactions when the relevant market is being defined. In its assessment of the Chiquita Brands International/ Fyffes[34] transaction, the European Commission explicitly recognised the categorisation of bananas according to their certifications in terms of Fairtrade (i.e. bananas meeting ethical, social and environmental standards, as certified by the Fairtrade Foundation),

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[31] European Commission, (2017) "Mergers: Commission clears merger between Dow and DuPont, subject to conditions"

[32] Dr Nicole Rosenboom & Matthew Johnson (2021), "The role of sustainability in merger control" Oxera www.oxera.com/insights/agenda/articles/the-role-of-sustainability-in-merger-control/ accessed 17th May 2021

[33] DeAnne Toto, (2020) "European Commission approves Aurubis' purchase of Metallo Group" Recycling today www.recyclingtoday.com/article/aurubis-receives-ec-okay-to-purchase-metallo/ accessed 8th June 2021

[34] Case No COMP/M.7220 - Chiquita Brands International/ Fyffes

organic (i.e. bananas meeting the criteria specified in the Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products) or conventional (i.e. bananas that are neither Fairtrade nor organic)[35]. The European Commission identified a separate market for organic and/or Fairtrade bananas as opposed to conventional bananas in Chiquita brands international/Fyffes[36]. In the same vein, the Competition Commission of South Africa in the merger involving Averda SA directed its information gathering from the customers of the merging parties to determine whether incineration technology and thermal desorption were interchangeable in the disposal of pharmaceutical waste. Thermal desorption does not involve the combustion of the pharmaceutical waste. Two out of the three customers responded that they preferred thermal desorption as this was more environmental-friendly.

The relevance of sustainability factors was key in the clearing by the German Economics and Energy Minister of the otherwise prohibited joint venture between Miba and Zollern by the Bundeskartellamt. The joint venture produced hydrodynamic plain bearings for large engines in ships, locomotives and generating sets, which have the potential of reducing emissions. The Minister cleared the joint venture, subject to conditions, on the ground that the benefits that the joint venture yielded to the environment and climate protection outweighed its negative impact on competition.

While the COMESA Competition Commission has not had to weigh sustainability considerations in the assessment of a merger or acquisition and absent clear legislative provisions allowing same, it is posited that 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.

3. Conclusion

Sustainability and climate change considerations are non-economic and non-pecuniary factors which may seem alien to the field of competition regulation. However, as demonstrated in this paper, competition law can be instrumental in our fight against climate change. For instance, 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. Environmental considerations are being factored in competition assessment. If a legislative framework to do so is lacking, it is commendable that competition authorities, for instance, the Netherlands Competition Commission are taking the initiative to develop guidelines which explicitly consider environmental considerations. It is also apposite to highlight that sustainability considerations are not limited to the assessment of anti-competitive agreements but are also being extended to merger reviews.

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[35] Paragraph 61
[36] Paragraph 73