Bird & Bird

What about sustainability aspects in merger control?

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20 September 2022

Introduction

Sustainability has thus far not been a key topic for the assessment of concentrations by the European Commission or National Competition Authorities when it comes to merger control.

The chairman of the Dutch Competition Authority ("**ACM**"), Martijn Snoep, for example, mentioned during a webinar organised by the Dutch branch of ICC at the end of 2021 that the ACM is more reluctant to accept 'green efficiencies' (efficiencies leading to a reduction in environmental damage) in merger control cases. This is because the approval of a merger brings a structural change to the competitive structure in the relevant market(s). If the claimed environmental efficiencies do not materialise, or materialise only to an insufficient extent, the concentration is still irreversible, and the hands of the authority are basically tied.

In this article, we will go a bit more in-depth into the role that sustainability could – and perhaps should – play in merger control.

State of play

In its Policy Brief of September 2021 the European Commission described how competition policy can support and complement the Green Deal. The policy brief also reflects on contributions of stakeholders on the question of how competition rules and sustainability policies can work together.

In terms of merger control, the key takeaways of these contributions are:

1. The EU Merger Regulation and its enforcement by the Commission support the objectives of the Green Deal;
2. There is a need to take into account consumer preferences for sustainable products, services and/or technologies as a differentiating factor in general and in market definition in particular;
3. The Commission should enforce and pursue innovation theories of harm as a means of preventing the loss of green innovation;
4. Green killer acquisitions (the killer acquisition of an undertaking active in green innovation) are a concern as such acquisitions usually fall below the usual notification thresholds;
5. Applying a longer time horizon over all social benefits of an acquisition should be considered;
6. The Commission should be wary of accepting out-of-market efficiencies; and
7. Sustainability considerations should be part of the remedy design.

The Commission took these contributions into consideration and basically concludes that the existing merger control framework already allows it to take into account sustainability considerations. It is mainly a matter of policy and application (and we are eager to see how this plays out). The Commission considers that:

- It is reflecting on issues related to consumer preferences for sustainable products, which it already applies in its enforcement practice, in the context of the ongoing revision of the market definition notice;
- Article 22 Merger Regulation and its Guidance has a potential role to play in preventing green killer acquisitions;
- It has already enforced and pursued innovation theories of harm and could apply this in terms of protecting innovations benefiting the environment on a much broader level. The innovation theories of harm can be used to address competition concerns regarding innovation efforts related to environmental technologies;
- It does not have the mandate to intervene in mergers solely because they are likely to harm the environment;
- Green efficiencies could be taken into account in the existing legal framework;
- There are already examples of remedies that have had a positive effect on the environment (like *GE/Alstom*). Also, where sustainability is an important parameter of competition or there are concerns about innovation competition, this may have to be reflected in the remedies.

In relation to the loss of green innovation as a theory of harm, we point to a Dutch example of a merger case in which this might play a (key) factor. It concerns the proposed acquisition of waste-management company AEB by AVR. The assessment is currently in phase 2 (meaning that a permit is required and accordingly requested) as the ACM decided that it could not clear the acquisition in phase 1. The ACM *inter alia* points out that the concentration could lead to a less powerful incentive to invest in sustainability (green innovation) and that this will be further assessed in phase 2. It is interesting to find out what role green innovation will eventually play in the final assessment of concentration.

Similar approaches have already been taken also by other National Competition Authorities. As a matter of example, the German Competition Authority has cleared the *Milba/Zollern* merger on the assumption that the merger-specific environmental externalities were such as to outweigh the initial competition concerns.

Focus areas and potential concerns

The above considerations thus show that it is now a matter of fact that sustainability goals set by governments in Europe have led to intense pressure on public and private players to invest in the green economy and make the necessary changes to their business models in a view to make them environmentally sustainable. Therefore, environmental factors are now frequently a driver of merger & acquisition strategies.

However, the objective of sustainable development should not be deemed as an objective alien to and separate from competition policy. Mergers, acquisitions, or joint ventures may bring positive consequences for competition, but they can also be harmful for the environment leading to undesirable outcomes.

Obviously, no issues would arise if/when the competition protection does not conflict with the environmental objectives to enhance the “Green Deal”.

Conversely, when the merger contributes to climate protection but at the same time significantly impedes effective competition in the market, the question becomes how such conflict can be resolved and, in particular, which part of the merger control analysis could be affected by the current sustainability priorities set by the European Commission.

As highlighted above, the conflict between competition and environment concerns has emerged in particular with reference to the so-called “green killer acquisitions”, which may thus be used as a departure point to identify the aspects that shall be taken into account by competition enforcers when assessing mergers.

Green killer acquisitions are indeed showing that the criteria under which mergers should be assessed in order to take into account the environmental externalities need to be revamped.

If, on the one side, the balancing act shall remain anchored to the evaluation of the benefits for the consumers and on the merger efficiencies, on the other side such notions should acquire a new – and wider – meaning.

In particular, environmental externalities may be considered as economic merger-specific efficiencies rebalancing the negative impact that the merger may have on the competition in the market (so-called “efficiency arguments”). Yet, the positive compensative effect brought by environmental efficiencies may not be fully evaluated under the usual merger control criteria.

The environmental externalities that a green merger may create may indeed be of such a nature to fall outside the scope of the relevant market and actually benefit a wider range of subjects, that may not be restricted to a limited territorial area. In other words, the antitrust notion of “consumer” may well be stretched to the wider notion of “society”. With the further consequence that the positive effects that the merger may have on the environment shall be assessed on the long-term rather than over a limited time span.

At the same time, greater accent shall be placed on the role played by “green innovation”. In practice, killer acquisitions are indeed a way for big companies to block from the outset the innovative processes that small emerging companies are bringing to the market. Yet if the innovative elements that may be put at risk by the merger refer to new sustainable processes, the negative impact on both consumers’ welfare and the environment is evident.

A solution to that aspect of concern may be found in the remedies that acquiring companies can propose to antitrust enforcers. The negative consequences on the environment may indeed be lowered if the acquiring companies commit to internalise in their business models the green innovative processes developed by the target-companies.

Conclusion

The considerations made above may thus lead us to the following conclusions:

1. The Merger Regulation does not stand in the way of taking into account sustainability aspects as it is 'technical neutral'. It all depends on a shift in policy and courage of competition authorities to make this shift.
2. As times are changing in terms of awareness and consumer preference towards sustainable products, services and technologies, competition authorities have no choice but to take this into account.
3. Green innovation shall certainly be taken into account in the future – but if the loss of green innovation is already perceived as a risk, it remains to be clarified how this criteria will be related to competition concerns in the assessment of practical cases and how it will actually be enforced (remedies may be a way for antitrust enforcers to monitor the effective exploitation of green innovation processes, but an objective guidance is needed to ensure a coherent approach).
4. If green efficiencies are to be taken into account, a longer time horizon is essential for the benefits to materialise, as well as a wider assessment overcoming the usual competition notion of consumers.
5. The protection of the environment and objective of reaching the sustainability goals is important for us all: the strict inter-market concept is not helpful or in line with what we should be achieving as a society.

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