

Environment Has Become a Global Merger Control Issue

By **Caroline Boisvert** (December 17, 2021)

Numerous competition authorities around the world are now considering environmental issues in merger review and conduct investigations.

For example, under the Biden Administration, the Federal Trade Commission has started including questions about sustainability in merger investigations.

In March, the European Commission began investigating potentially predatory pricing by Greece's largest electricity supplier, noting that the conduct "might have distorted competition and slowed down investment into the generation of greener energy," according to a news release.[1]



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The U.K.'s Competition and Markets Authority recently asked stakeholders for input on how the U.K. competition regime can better support sustainability goals.[2] And in Austria, 2021 amendments to the Cartel and Competition Act added sustainability criteria for the very first time.

A recent roundtable, hosted by the Organization for Economic Cooperation and Development, and its accompanying country submissions provide valuable insights for companies and practitioners seeking to understand agency approaches to these new — or, in some cases, increasingly considered — factors.

Specifically, the roundtable examined whether and to what extent competition authorities ought to play a role in supporting and incentivizing environmental sustainability efforts. It also explored "the practical approaches that competition authorities can take when assessing cases with an environmental dimension." [3]

While the roundtable was a closed-door, off-the-record event, the country submissions and speaker presentations are publicly available on the OECD's website.[4]

Below are key takeaways from submissions by various countries and the Business and Industry Advisory Committee to the OECD.

Background — Competition Authorities' Role in Environmental Sustainability

Competition enforcement may not immediately come to mind as the most natural instrument for environmental protection. As candidly recognized in the roundtable's background note:

One may see competition policies as intrinsically at odds with environmental protection, because their economic objectives are usually associated with increasing output and lowering prices, which supports overconsumption of limited environmental resources.[5]

Nevertheless, participants' submissions reflect general agreement that contributions from the private sector are key to reaching environmental objectives and that, as a result, competition authorities ought to play some role in supporting those initiatives.

If competition authorities are to weigh environmental considerations, the difficulty lies in making that analysis administrable. Administrability is crucial to companies' ability to anticipate the role that environmental considerations will play in competition authorities' evaluation of cooperation agreements, mergers, and other conduct.

The background note thus identifies four main challenges facing competition authorities seeking to incorporate environmental considerations into the traditional competitive assessment framework:

1. Determination of "which and to what extent environmental effects may be taken into account";
2. Decisions on the possibility of taking into account, the "environmental efficiencies that benefit consumers other than those directly affected by the anticompetitive conduct or transaction (including future consumers)";
3. Knowledge about "which timeframe to adopt for the consideration of environmental effects or efficiencies"; and
4. Quantification and balance of "environmental effects with other types of effects or efficiencies." [6]

Participants' submissions discussed how they and their competition authorities are thinking about these issues and outlined some of the actions they have already taken. This article focuses on participants' ideas and past actions in two key areas:

- Cooperation agreements; and
- Merger control.

Environmental Considerations in Cooperation Agreements

Participants recognized that cooperative arrangements among companies seeking to work towards certain environmental goals — such as phasing out unsustainable products or self-imposing heightened targets for emissions or recycling — can have several benefits.

For example, such arrangements are larger-scale and have a greater impact than any business acting individually. Moreover, collaborations may diminish any first-mover disadvantage, whereby a company may be reluctant to independently innovate towards sustainability for fear of being undercut by competitors.

Some companies have suggested that despite the potential benefits, existing competition law has a "chilling effect" that "may push companies to refrain from collaborating on sustainable initiatives." [7]

To take it one step further, the OECD's "Building Back Better Trade" publication identified several high-profile enforcement actions, such as the U.S. Department of Justice's 2019 antitrust investigation into an agreement between car manufacturers and the state of California to apply stricter emissions standards, as "simply exacerbat[ing]" these fears. [8] Accordingly, many participants' submissions illustrated what they intend to do, or have already done, to address these concerns.

The European Union, for example, explains that it still gathering information and assessing

how to best account for environmental considerations within the competitive framework. Even in this phase, however, the EU suggests that sustainability benefits can be assessed as qualitative efficiencies, and it attempts to provide clarity on what that assessment might look like.

For example, while the EU has not changed the fundamental principle that anticompetitive effects and benefits are analyzed "within the confines of each relevant market," it suggests that "[b]enefits achieved on separate markets can possibly be taken into account provided that the group of consumers affected by the restriction and the group of benefitting consumers are substantially the same."^[9]

This would be the case where, for example, an agreement led to a substantial reduction in pollution that would benefit all of society — thus necessarily including all of the harmed consumers.^[10]

Austria has gone even further towards identifying how environmental considerations come into play in the analysis of cooperation agreements. In September, Austria amended its Cartel Act to include a sustainability exemption.

Whereas the act's prior version permitted certain cartels that allowed "consumers a fair share of the resulting benefits," the amended version clarifies that "[c]onsumers shall ... be considered to have a fair share if the profit arising from [the collaboration] contributes significantly to an environmentally sustainable or climate-neutral economy."^[10]

Austria's approach seems to expand the consumer welfare standard somewhat, recognizing that sustainability has broader benefits and applying a more societal welfare lens. But despite its incorporation of environmental sustainability into the law, Austria explains that it, too, is still grappling with whether agreements that partially restrict competition may be permissible on the basis of broader sustainability benefits, and it acknowledges that quantifying those benefits remains a challenge.^[12]

Environmental Considerations in Merger Control

Collaborations are not the only context in which environmental considerations may come into play — participants' submissions reflect that they are grappling with accounting for sustainability in the merger control context, too. Whereas mergers, like certain collaborations, may bring about environmental efficiencies, there are also drawbacks to consider. For example, the EU identified a "particular concern" about "incumbent companies with a strong market position that do not pursue environmentally friendly business strategies ... engag[ing] in the 'killer' acquisition of an undertaking active in 'green' innovation."^[13]

One merger control topic that resulted in particularly interesting commentary was how environmental considerations may affect the market definition analysis. The background note provides one example, mentioning that the FTC and the French Competition Authority both concluded that certain natural/organic foods are not substitutes for their more conventional counterparts.^[14]

The FTC's determination was in the ready-to-eat cereal context — there, the FTC reasoned that the ready-to-eat cereal market excludes natural and organic cereal because the organic products are sourced differently, are healthier and have more expensive inputs, and are "consequently priced significantly higher than their conventional counterparts."^[15]

That organic and conventional products may constitute separate markets reveals how increased consumer demand for sustainable products might impact merger analysis. Nevertheless, there are many products and services for which consumer demand for sustainable options might be underweighted because their environmental impact is difficult to discern.[16]

This is exemplified in South Africa's submission, which discusses a merger where "market definition hinged partly on whether customers of the merging parties considered the environmental sustainability of waste management processes as a significant factor when choosing a healthcare waste management supplier." [17] The Competition Commission's final analysis showed that because sustainability was only one of a number of factors that customers weighed, the two processes were sufficiently interchangeable and thus part of the same market.[18]

Comparing South Africa's market definition experience for healthcare waste management to the U.S.'s experience for ready-to-eat cereal suggests that consumer demand for sustainable products is currently less likely to impact market definitions for mergers in more complex product markets.

In other words, consumer preference for sustainable options is less likely to affect merger analysis where consumers have imperfect information about production and distribution processes or otherwise encounter difficulties in assessing a product's sustainability level. Nonetheless, as the EU submission recognizes, over time there is likely to be "stronger demand by individuals, companies and society as a whole for more sustainable products, services and technology." [19]

Conclusion

In response to these recent developments — and absent further and more concrete guidance from competition authorities — companies and practitioners should pay close attention to environmental considerations when evaluating new collaborations or mergers.

For example, businesses should anticipate the possibility of sustainability-related questions in FTC merger reviews and be prepared to provide environmental impact studies.

Moreover, companies should be aware of the type of conduct currently receiving greater scrutiny, such as acquisitions of businesses engaged in green innovation, or greenwashing cartels whereby companies may mask what the OECD called "anticompetitive intentions with sustainability claims." [20]

Finally, to the extent competition authorities are seeking input from stakeholders on how to account for environmental factors, companies should consider providing feedback to help shape future changes in competition law.

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[1] Press Release, European Commission, Antitrust: Commission opens investigation into PPC's behavior in the Greek wholesale electricity market (Mar. 16, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1205.

[2] See Competition & Markets Authority, Environmental sustainability and the competition and consumer law regimes (Sept. 29, 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1021364/CFI_-_sustainability_advice_.pdf.

[3] Environmental Considerations in Competition Enforcement, OECD, <https://www.oecd.org/daf/competition/environmental-considerations-in-competition-enforcement.htm>.

[4] Id.

[5] OECD (2021), Environmental considerations in competition enforcement, OECD Competition Committee Discussion Paper ("Background Note"), at 10, <https://www.oecd.org/daf/competition/environmental-considerations-in-competition-enforcement-2021.pdf>.

[6] Id. at 6.

[7] Id. at 8.

[8] Note by the Business and Industry Advisory Committee to the OECD, Environmental Considerations in Competition Enforcement, ¶ 22, DAF/COMP/WD(2021)58, [https://one.oecd.org/document/DAF/COMP/WD\(2021\)58/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2021)58/en/pdf).

[9] Note by the European Union, Environmental Considerations in Competition Enforcement, at 6, DAF/COMP/WD(2021)51, [https://one.oecd.org/document/DAF/COMP/WD\(2021\)51/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2021)51/en/pdf).

[10] See id.

[11] Note by Austria, Environmental Considerations in Competition Enforcement, ¶ 2, DAF/COMP/WD(2021)46, [https://one.oecd.org/document/DAF/COMP/WD\(2021\)46/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2021)46/en/pdf).

[12] Id. ¶ 7.

[13] Note by the European Union at 3.

[14] Background Note at 34.

[15] Compl. ¶ 21, Federal Trade Commission, Docket No. 9388 (Dec. 19, 2019), <https://www.ftc.gov/system/files/documents/cases/d09388posttreehousecomplaint.pdf>.

[16] See Background Note ¶ 38 at 11.

[17] Note by South Africa, Environmental Considerations in Competition Enforcement, ¶ 18, DAF/COMP/WD(2021)53, [https://one.oecd.org/document/DAF/COMP/WD\(2021\)53/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2021)53/en/pdf).

[18] Id. ¶ 20.

[19] Note by the European Union at 7.

[20] Background Note at ¶ 101 at 22.