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Will the new EUMR Guidelines be a significant impediment to sustainability?

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ABSTRACT

This article examines the European Commission's review of its Merger Guidelines in the context of EVP Ribera's mandate to 'modernise' competition policy to support the EU's sustainability objectives. While recent decisional practice and the Commission's Consultation signal growing attention to sustainability considerations, the Consultation offers little clarity on how sustainability-related efficiencies will be incorporated in the revised Merger Guidelines. We argue that, without a modernised approach to efficiencies, EU merger control risks discouraging transactions that contribute to the policy goals of the Clean Industrial Deal.

Introduction

The European Commission (the "Commission") is preparing to revise its decades-old Horizontal [1] and Non-Horizontal [2] Merger Guidelines (HMG and NHMG, respectively; together, the "Merger Guidelines"), and expects to adopt such revised guidelines in the fourth quarter of 2027. [3] Between 8 May and 3 September 2025, the Commission conducted a public consultation (the "Consultation"), with an in-depth questionnaire (the "In-depth Questionnaire") highlighting seven key areas, including, notably, "sustainability and clean technologies" and "efficiencies."

This review will not be a simple update. In her mission letter to Teresa Ribera, the Executive Vice-President (EVP) for a Clean, Just and Competitive Transition, [4] Commission President Ursula von der Leyen mandated EVP Ribera to "*modernise the EU's competition policy to ensure it supports European companies to innovate, compete and lead world-wide and contributes to* [the EU's] *wider objectives on competitiveness and sustainability, social fairness and security*." [5] EU merger control policy, in particular, "*should give adequate weight to the European economy's more acute needs in respect of resilience, efficiency and innovation*." [6]

It is not clear from the Consultation how the Commission plans to deliver on these objectives. The In-depth Questionnaire noted the "*growing interplay between competition, innovation and sustainability considerations* [which] *should trigger a reflection on merger control's contribution to European sustainability objectives*" [7] and merger control's role "*in allowing procompetitive mergers that have the potential to deliver on and/or support these objectives*." [8] However, the Commission only considers potential benefits from a notified merger (i.e., efficiencies) if it has already determined that the merger risks impeding effective competition. The Merger Guidelines set the bar for an "efficiency defence" so high that the Commission has never approved a merger on the basis of expected efficiencies. Nonetheless, rather than considering how the revised Merger Guidelines might afford greater consideration for a notified merger's benefits, the Consultation envisages a further tightening of requirements compared to the current guidelines.

The failure to consider new approaches to merger benefits seems especially unfortunate in relation to sustainability. Indeed, the increased focus on sustainability in market definition and competitive assessment without a similar consideration for potential environmental benefits may, paradoxically, increase the likelihood of "green" mergers being challenged, even if they would enable companies to achieve the scale needed to advance the EU's sustainability goals. We argue that a fresh approach to efficiencies may offer the best path for the Commission to achieve EVP Ribera's mission to

1. Communication from the Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5 (HMG).

2. Communication from the Commission, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, p. 6 (NHMG).

3. Eur. Comm., press release IP/25/1141 of 8 May 2025, Commission seeks feedback on the review of EU merger guidelines.

4. Eur. Comm., Teresa Ribera, https://commission.europa.eu/about/organisation/college-commissioners/teresa-ribera_en.

5. U. von der Leyen, Mission Letter to Teresa Ribera Rodríguez, Executive Vice-President-designate for a Clean, Just and Competitive Transition, 17 September 2024, at 6, published on the European Commission's website (Mission Letter).

6. Ibid.

7. Eur. Comm., Topic D: Sustainability & clean technologies, In-depth Questionnaire, 8 May 2025, ¶ 72.

8. Ibid. ¶ 68.

further integrate EU merger policy into the Clean Industrial Deal and the other sustainability objectives identified in EVP Ribera's Mission Letter.

In the following sections, we first review how the Commission has incorporated sustainability considerations into its analysis and the potential counter-intuitive effects of these developments. Then, we discuss ways in which changes to the treatment of sustainability benefits in efficiency claims could help the Commission deliver on its mandate to modernise EU merger control without the need for amendments to the EU Merger Regulation (EUMR) or fundamental changes to the Commission's assessment framework. Finally, we briefly discuss the potential relevance of merger remedies.

Sustainability considerations and the law of unintended consequences?

Sustainability considerations have played a greater role in the Commission's EUMR assessments for several years, particularly in market definition and competitive assessment. For example, the Commission's 2024 *Competition Policy Brief* (the "2024 Policy Brief") identified sustainability as a key non-price parameter influencing market definition, competitive assessment, remedies and risks of killer acquisitions and efficiencies. [9] Previously, the Commission devoted an issue of the *Competition Merger Brief* (the "2023 Merger Brief") to "Green Mergers & Acquisitions Deals." [10] Sustainability considerations were also incorporated into the Commission's 2024 notice on market definition ("the 2024 Market Definition Notice"). [11]

Market definition

As noted, the 2024 Market Definition Notice discusses sustainability as a parameter of differentiation in market definition. [12] In particular, where consumer preferences differentiate among products based on sustainability attributes, sustainability considerations may lead to narrower product or geographic markets. This effect is observed in several recent cases discussed in the 2024 Policy Brief and the 2023 Merger Brief:

- In *Norsk Hydro/Alumetal*, [13] the Commission examined whether low-carbon solid advanced aluminium foundry constituted a separate product market from non-low-carbon products, based on consumer demand for more sustainable recycled production. While the Commission left the issue open, it found that whether the product was low carbon was a relevant differentiator at both the product and geographic levels.
- In *KPS Capital Partners/Real Alloy Europe*, [14] the Commission considered the merger's impact on market segments differentiated by the sustainability attributes of recycling technology.
- In *Marine Harvest/Morpol*, [15] the Commission found that UK retailers preferred Scottish over Norwegian salmon, partly due to greater control over sustainability and environmental standards.

Competitive assessment

Sustainability considerations also play a growing role in the Commission's assessment of theories of harm. The In-depth Questionnaire noted that, "[i]*n the context of merger control, the Commission may consider environmental and sustainability concerns as long as they are linked to the competitive dynamics and market realities at play. In fact, competitive markets support and often go hand-in-hand with green tech efforts to invest and innovate*." [16] We next discuss sustainability considerations in the context of unilateral and coordinated effects.

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9. Eur. Comm., *Competition Policy Brief*, Issue 1/2024, April 2024 (2024 Policy Brief).

10. Eur. Comm., *Competition Merger Brief*, Issue 2/2023, September 2023 (2023 Merger Brief).

11. Communication from the Commission, Notice on the definition of the relevant market for the purposes of Union competition law, C/2024/1645, OJ C 202, 22.2.2024, p. 1 (2024 Market Definition Notice).

12. Ibid. ¶ 15.

13. Eur. Comm., decision C(2023) 2821 final of 4 May 2023, *Norsk Hydro/Alumetal*, case M.10658 (*Norsk Hydro/Alumetal*); OJ C 2024/7525, 23.12.2024 (summary); OJ C 2024/7524, 23.12.2024 (Final Report of the Hearing Officer); 2023 Merger Brief, *supra* note 10, at 7–9.

14. Eur. Comm., decision C(2022) 7602 final of 19 October 2022, *KPS Capital Partners/Real Alloy Europe*, case M.10702 (*KPS/Real Alloy*).

15. Eur. Comm., decision C(2013) 6449 final of 30 September 2013, *Marine Harvest/Morpol*, case M.6850, ¶ 42.

16. Topic D: Sustainability & clean technologies, In-depth Questionnaire, *supra* note 7, ¶ 73 (footnotes omitted).

Horizontal mergers. In the Commission's review of horizontal mergers, sustainability considerations have influenced the assessment of closeness of competition under a traditional unilateral effects analysis and have figured in innovation theories of harm, particularly in the context of incentives to innovate and pipeline products. [17] For example:

- In *Norsk Hydro/Alumetal*, [18] to address concerns that the merger would eliminate an important supplier of recycled, low-carbon foundry alloys, the Commission relied on "*saved emission shares*" to quantify the CO2 impact of aluminium foundry production and assess the availability of low-carbon alloy producers following the merger. The Commission found that, although Hydro was an important "green" producer due to its reliance on renewable energy for production, it was less "green" than recyclers, and sufficient low-carbon alternatives remained. In addition, the parties were not seen as close competitors due to their differing production methods.
- In *Sika/MBCC*, [19] the Commission focused on whether the merger between the two construction chemical producers would reduce innovation competition in the production of sustainable technologies, such as low-emission admixtures or recycled concrete. The Commission relied on an analysis of the patent portfolios of both the companies and their competitors to assess R&D strength and overlap, ultimately concluding that the transaction would have reduced incentives to innovate, particularly in relation to sustainability.

The Commission has also expressed concerns about so-called killer acquisitions in this connection, noting that these may be particularly relevant for the development of "green" innovation. [20] For example, large firms may acquire small climate technology innovators to potentially discontinue or deprioritise their innovations. [21] These deals may not meet the EUMR's notification thresholds, but Member State authorities can refer them to the Commission under Article 22 EUMR if the transaction triggers mandatory national filing requirements or an authority exercises available "call-in" powers.

Vertical mergers. While vertical mergers are traditionally considered less likely to impede competition than horizontal mergers, [22] they can raise significant concerns when they result in foreclosure of access to critical sustainable inputs. For example:

- In *KPS Capital Partners/Real Alloy Europe*, [23] the Commission assessed risks in the supply of secondary wrought aluminium and key recycling byproducts such as dross and salt slag. It found that the merged entity, with strong positions in both upstream and downstream markets, could foreclose rivals' access to critical inputs. Furthermore, consumers were unlikely to switch to non-recycled aluminium due to higher costs and CO2 emissions, reinforcing the distinction between the two products.

Coordinated effects. While sustainability considerations have thus far primarily featured in the assessment of unilateral effects, they may also be relevant to coordinated effects, i.e., the risk of explicit or tacit collusion by post-merger firms. Sustainability considerations may influence this assessment by increasing the risk of coordination—for example, if the eliminated party had previously competed aggressively on sustainability attributes—or by reducing it, where such attributes increase heterogeneity across the remaining firms.

Unintended consequences?

As described above, the Commission's decisional practice increasingly treats sustainability as a non-price parameter of competition for the purposes of market definition and competitive assessment. As a result, sustainability considerations may lead to the definition of narrower markets, or to "green" competitors being considered closer competitors within a broader market, particularly in mergers involving "greener" and "less green" competitors. Therefore, unless environmental benefits are

17. 2024 Policy Brief, *supra* note 9, at 5.

18. *Norsk Hydro/Alumetal*, *supra* note 13, ¶¶ 318–319; 2023 Merger Brief, *supra* note 10, at 7–8.

19. Eur. Comm., decision C(2023) 1048 final of 8 February 2023, *Sika/MBCC Group*, case M. 10560; OJ C 2024/5909, 30.9.2024 (*Sika/MBCC*).

20. 2023 Merger Brief, *supra* note 10, at 1, 6.

21. For example, between 2020 and 2024, large oil and gas companies have emerged as the most active acquirers of climate technology start-ups. Sightline Climate, Climate Tech Investment Trends: 2024, January 2025; Jefferies, The Climate Tech Investment Landscape – A Deep Dive, 21 February 2024.

22. NHMG, *supra* note 2, ¶¶ 11–19.

23. *KPS/Real Alloy*, *supra* note 14, ¶¶ 135, 140, 157.

similarly taken into account as efficiencies, the Commission's approach may disadvantage transactions involving "green" parties or "green" products, increasing the risk of "false positives"—that is, transactions that are blocked but that, if cleared, would, on balance, benefit consumers.

For example, in transactions involving two sustainability-oriented companies, defining narrower product markets limited to more sustainable products may result in higher combined market shares and larger market share increments than if non-sustainable alternatives were included in the same market. Alternatively, in a broader market encompassing both sustainable and traditional products, merging "green" companies may be viewed as close competitors. By contrast, in a merger between a "green" company and a "less-green" company, the Commission may find that the parties operate in different product markets or innovation spaces, with no overlapping products or pipelines, or consider them distant competitors within a broader market. Paradoxically, therefore, a large traditional industry player acquiring a "green" new entrant may face a lower risk of prohibition than a merger between two smaller "green" companies attempting to achieve the scale necessary to compete with traditional incumbents.

Notifying parties caught in such a catch-22 could, in principle, raise an "efficiency defence," as the parties could attempt to show that their transaction would create efficiencies sufficient to outweigh any competitive harm. As discussed in more detail below, however, "green" merging parties are unlikely to be able to invoke sustainability-related benefits under the Merger Guidelines criteria.

The efficiency "defence" and sustainability benefits

While the HMG do not explicitly mention sustainability benefits, the Commission has stated that "[e]*fficiencies can* (. . .) *result in the development of newer technologies, novel 'green' products and more generally 'green' innovations*" [24] and that sustainability benefits can be considered within the usual framework for evaluating efficiencies.

As noted, however, the Commission has never approved a merger under the EUMR on the basis of efficiencies. The HMG state that the Commission considers efficiency benefits if they (i) benefit consumers in the relevant markets "*where it is otherwise likely that competition concerns would occur*," (ii) occur in a timely manner [25], [26], (iii) are merger specific, and (iv) are verifiable. [27] The NHMG also acknowledge the potential for efficiencies to counteract anti-competitive effects in non-horizontal mergers, but merely cross-reference the HMG for details and do not address whether—and, if so, how—the HMG criteria may differ in the context of vertical mergers. [28]

Whether competition authorities need to consider efficiencies more meaningfully is a topic of ongoing debate, and commentators have highlighted sustainability benefits as particularly ill-suited to the HMG's narrow criteria. [29] Sustainability benefits are often more challenging to quantify and materialise over longer timeframes, rendering them potentially difficult to verify. Although the Consultation invited input on how EU merger policy may support broader EU objectives, including sustainability, it did not explicitly call for reflection on the criteria set out in the HMG or potential variations in the evaluation of efficiency claims outside of the horizontal merger context. In fact, the In-depth Questionnaire appeared to adopt a more restrictive approach to out-of-market efficiencies than the current Merger Guidelines.

This appears to be a missed opportunity. Indeed, short of a statutory amendment or a comprehensive overhaul of the Commission's analytical framework, [30] a fresh approach to the efficiency defence may offer the most promising means of incorporating the policy priorities outlined in the Mission Letter into EU merger policy. Improvements could be made across several dimensions, including in the treatment

24. 2024 Policy Brief, *supra* note 9, at 13 (footnotes omitted).

25. HMG, *supra* note 1, ¶ 79.

26. Ibid. ¶ 84.

27. Ibid. ¶ 86.

28. NHMG, *supra* note 2, ¶ 21.

29. OECD, Efficiencies in Merger Control, *OECD Roundtables on Competition Policy Papers*, No. 321, 5 May 2025 (OECD Efficiencies Paper), at 33.

30. Other approaches could include introducing the possibility of a public-interest override into the EUMR, following the example of several Member States, or integrating the efficiency analysis into the competitive assessment. *See* OECD Efficiencies Paper, *supra* note 29, at 31.

of the so-called out-of-market benefits, the timeframe for assessing efficiencies and the metrics and evidence used in the quantitative and qualitative assessment of sustainability benefits and remedies. More generally, we argue that the current Merger Guidelines' approach to the burden of proof should be re-examined, including in the sustainability context. We discuss these potential improvements in the following section.

Benefits to consumers

Out-of-market efficiencies. The In-depth Questionnaire stated that, "[i]*n line with the* Mastercard *case law, where efficiencies arise outside of the affected markets, these efficiencies can only be accepted by the Commission if the benefits cover substantially the same customers otherwise harmed by the merger*." [31] This position aligns with the Horizontal Guidelines (HGL), [32] although the HGL's approach is disputed. [33]

However, the *Mastercard* case law does not apply in the EUMR context. The Commission acknowledged in its note for the OECD roundtable on efficiencies in merger control that the *Mastercard* analysis of out-of-market benefits applies only "*by analogy*," [34] but it did not elaborate on why such an analogy would be appropriate. Indeed, we argue that this analogy is not appropriate. In the context of Article 101 of the Treaty on the Functioning of the European Union (TFEU) considered in *Mastercard*, the Article 101(3) TFEU efficiencies analysis is applied to an existing agreement, decision or concerted practice found to have infringed Article 101(1) TFEU. In the EUMR context, the Commission bears the burden of showing that a notified concentration risks creating a significant impediment to effective competition (SIEC), taking account of "*any substantiated and likely efficiencies put forward*" by the parties (Recital 29 EUMR). This exercise entails a necessarily uncertain assessment of future effects, with no finding (or even inference) that the transaction parties have or would infringe EU law. The analogy seems especially inappropriate in the context of vertical or conglomerate mergers, where competitive harms and benefits, by definition, affect different consumers in different markets. At a minimum, the relevance of *Mastercard* in the EUMR context merits further consideration.

This restrictive approach to the treatment of out-of-market benefits is also not required by the EUMR. Recital 29 states that "[i]*t is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers*." [35] The phrase "in particular" indicates that benefits other than consumer benefits may be considered. *A fortiori*, Recital 29 does not require excluding from consideration benefits to consumers other than those at risk of suffering competitive harm. Greater flexibility would be particularly important for the assessment of "green" mergers. Sustainability benefits often relate to externalities that span multiple markets and stakeholders. In vertical mergers, such benefits may accrue in multiple vertically related product or geographic markets, potentially involving distinct consumer groups.

Unfortunately, the Consultation did not seek input on whether the Commission should maintain, or even reinforce, its restrictive stance on out-of-market sustainability benefits. This omission is striking, particularly given that "[e]*nvironmental and similar efficiencies are often 'out of market'* [and] [s]*everal competition authorities have vigorously argued that environmental crises are so severe and urgent that environmental efficiencies deserve special treatment*." [36] Instead, the Consultation incorrectly

31. Eur. Comm., Topic F: Efficiencies, In-depth Questionnaire, 8 May 2025, ¶ 104; 2023 Merger Brief, *supra* note 10, at 5.

32. Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 259, 21.7.2023, p. 1 (HGL), ¶ 583 ("*Although the weighing of the positive and negative effects of the restrictive agreements is normally done within the relevant market to which the agreement relates, where two markets are related, efficiencies generated on separate markets can be taken into account, provided that the group of consumers that is affected by the restriction and that benefits from the efficiencies is substantially the same*").

33. For a discussion of out-of-market benefits related to sustainability agreements, *see* M. Dolmans, W. Lin and J. Hollis, Sustainability and Net Zero climate agreements – a transatlantic antitrust perspective, *Competition Law & Policy Debate*, Vol. 8, Issue 2, 2023, pp. 63–80; ACM, Legal Memo, What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context, 27 September 2021.

34. OECD, Efficiencies in Merger Control – Note by the European Union, Working Party No. 3 on Co-operation and Enforcement, DAF/COMP/WP3/WD(2025)19, 20 May 2025 (Note by the European Union), footnote 10.

35. *See* Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EUMR), OJ L 24, 29.1.2004, Recital 29.

stated as a fact that the *Mastercard* case law prohibits consideration of out-of-market benefits.

Timeliness. Both the HMG and the In-depth Questionnaire state that efficiencies should be "*timely*," typically meaning that they are achieved within a three-to-five-year timeframe. The In-depth Questionnaire sought input on whether this timeframe is appropriate and whether it should vary across industries. [37] But the Consultation did not consider whether the appropriate timeframe for assessing benefits may also depend on the nature of the benefit itself, as well as on the characteristics of the industry involved.

This narrow notion of timeliness risks undervaluing sustainability-related benefits, which typically materialise over a longer time horizon. [38] Indeed, such benefits—or harms—may compound over time through feedback loops, magnifying their future value. [39] The OECD has noted that "[d]*ynamic efficiencies tend to materialise in the long run, thus being excluded by strict criteria on how timely the efficiencies should be*." [40] Thus, applying an artificial cutoff of three to five years is particularly ill-suited to dynamic efficiencies, including those related to sustainability. Moreover, the three-to-five-year timeframe is not required by the EUMR itself.

Applying an artificial cutoff to the assessment of sustainability benefits in the EUMR context also conflicts with the approach taken in other domains. Regulators and investors routinely account for long-term sustainability gains. [41] Similarly, research institutions tasked with the empirical assessment and projection of sustainability-related benefits and harms routinely publish quantitative evaluations over longer periods. [42]

Verifiability. The current HMG state that efficiencies should be "*verifiable*," "*quantified*" and "*likely to materialise*." [43] However, the HGL take a more flexible approach, noting that "*there is currently little experience with measuring and quantifying collective benefits*," and "[w]*here there is no available data that allows for a quantitative analysis* (. . .)*, other evidence may be considered, provided that it shows a clearly identifiable positive impact on consumers in the relevant market, not a marginal one*." [44] Similarly, the In-depth Questionnaire stated that, "[w]*here reasonably possible, efficiencies should be quantified. If this is not possible, it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one*." [45] This approach mirrors the efforts of other competition authorities (Austria, Greece, the Netherlands and the UK), which have incorporated environmental benefits in their competitive assessments by relying more on qualitative estimates. [46]

The Consultation sought input on the types of sustainability benefits that mergers may generate, and the metrics and evidence that can be used to assess them. A natural resource is the HGL, which include an extensive discussion of sustainability-related benefits and the available metrics and evidence for assessing them. These learnings can—and should—be incorporated into the revised Merger Guidelines.

In addition, the Commission should consider drawing on tools from environmental and behavioural economics to support the quantification of such benefits. For example, methods from environmental economics are routinely used to estimate the economic value of unmarketable environmental goods, either directly or indirectly. [47] Moreover,

36. OECD, Out-of-Market Efficiencies in Competition Enforcement, *OECD Roundtables on Competition Policy Papers*, No. 305, 3 November 2023 (OECD Out-of-Market Efficiencies Paper), at 34.

37. Topic F: Efficiencies, In-depth Questionnaire, *supra* note 31, ¶ 105.

38. For example, the UK government's third five-year assessment of the risks of climate change in the UK identifies risks by 2050 and 2080. UK Government, UK Climate Change Risk Assessment 2022, 17 January 2022.

39. W. J. Ripple, C. Wolf, T. M. Lenton, J. W. Gregg, S. M. Natali, P B. Duffy, J. Rockström and H. J. Schellnhuber, Many risky feedback loops amplify the need for climate action, *One Earth*, Vol. 6, Issue 2, 2023, pp. 86–91.

40. OECD Efficiencies Paper, *supra* note 29, at 23; OECD Out-of-Market Efficiencies Paper, *supra* note 36, at 32.

41. For example, the UK government's Green Finance Strategy emphasises the importance of integrating long-term sustainability factors into financial decision-making. UK Government, Transforming finance for a greener future: 2019 green finance strategy, 11 April 2023. Economic tools to evaluate the benefits and costs of a transaction in the future include, for example, assessing future benefits under a variety of scenarios and probability weighting that present value of those scenarios, using time-varying discount rates or assessing future benefits by way of a social cost of carbon (SCC) that incorporates the value of uncertainty.

42. For example, the World Energy Outlook annually examines different potential scenarios for the future of energy until 2050. *See*, for example, International Energy Agency, World Energy Outlook 2024, October 2024.

43. HMG, *supra* note 1, ¶ 86.

44. HGL, *supra* note 32, ¶ 589.

45. Topic F: Efficiencies, In-depth Questionnaire, *supra* note 31, ¶ 109.

46. OECD Efficiencies Paper, *supra* note 29, at 33.

47. "Direct techniques," such as stated preference methods, hedonic pricing

incorporating insights from behavioural economics can help address some of the limitations of stated preference techniques, particularly by accounting for information asymmetries and consumers' behavioural biases in the elicitation of willingness-to-pay or willingness-to-accept metrics. [48] Finally, environmental economics research has benefited from methodological and data advancements, including improved techniques for estimating the economic effects of temperature change and economic damage associated with environmental harm, [49] as well as greater access to high-quality data [50] and projections produced by leading research institutions and regulatory agencies. [51]

Indeed, sustainability-related benefits—often long-term, without a direct price effect and associated with public goods—present challenges for traditional competition assessment tools. Although the revised Merger Guidelines should draw on guidance from the HGL and incorporate insights from other domains regarding the verification and quantification of such benefits, there is no compelling reason for the Commission to require that efficiencies be quantified, particularly given that it is not required to quantify an SIEC. [52]

Therefore, the revised Merger Guidelines should allow for the consideration of sustainability benefits that are non-quantified or may not be quantifiable at all. For example, under the Autoriteit Consument & Markt's (ACM) Policy Rule, if an "*initial investigation shows that it is plausible that the agreement is necessary for achieving the environmental benefits and that such benefits sufficiently outweigh the potential competitive disadvantages*," [53] the ACM does not consider a more detailed investigation to be expedient. Similarly, the Competition and Markets Authority's (CMA) Green Agreements Guidance takes a lighter-touch approach to "*climate change agreements*" based on the "*sheer magnitude of the risk that climate change represents (including the need for urgent action)*." [54]

Finally, the Commission takes the view that, "[t]*he burden of proof for demonstrating efficiencies is on the notifying parties*." [55] This statement is not supported by the EUMR. Recital 29 of the EUMR refers to "*any substantiated and likely efficiencies put forward by the undertakings concerned*," noting that "*the efficiencies brought about by the concentration* [may] *counteract the effects on competition, and* (. . .) *that, as a consequence, the concentration would not significantly impede effective competition*." [56] Thus, while it is for the parties to "*put forward*" efficiency claims, together with supporting evidence, the burden of proof to show that a concentration risks creating a SIEC (taking account of such claims) remains with the Commission. [57] *In line with*

and averting behaviour methods, seek to measure the monetary value of the environmental good itself, typically through a proxy market that provides insight into individuals' preferences over that good. "Stated preference" methods elicit individuals' preferences over attributes of a good directly, through contingent valuation methods or choice experiments. The "averting behaviour" method exploits individuals' willingness-to-pay for avoiding the effects of negative environmental changes, while "hedonic pricing" estimates the value of an unmarketed environmental service as a measurable attribute of a marketed good. On the other hand, "indirect techniques" estimate the relationship between the environmental commodity and an outcome, and value individuals' preferences over that outcome. For example, the "production function" method relies on the relationship between environmental attributes and the output level of economic activity, estimating the shadow (market) price of the environmental change. Regulators' guidelines for policy impact analyses describe these methods in detail. U.S. Environmental Protection Agency, Guidelines for Preparing Economic Analyses, May 2014; C. Dosi, Environmental values, valuation methods and natural disaster damage assessment, June 2001.

48. For example, insights from behavioural economics allow researchers to disentangle the behavioural influences underpinning consumers' monetary valuation of a good, such as behavioural inattention (i.e. they are simply unaware of certain aspects of the decision), response bias (i.e. they say what they think others expect them to say), framing (i.e. the researchers phrase the question to elicit a specific answer), and others. HGL, *supra* note 32, ¶ 579.

49. M. Burke, S. M. Hsiang and E. Miguel, Global non-linear effect of temperature on economic production, *Nature*, Vol. 527, 2015, pp. 235–239; C. D. Kolstad and F. C. Moore, Estimating the Economic Impacts of Climate Change Using Weather Observations, *NBER Working Paper* 25537, February 2019; A. Bilal and D. E. Känzig, The Macroeconomic Impact of Climate Change: Global vs. Local Temperature, *NBER Working Paper* 32450, September 2025.

50. For example, the UK Government's Department for Environment, Food and Global Affairs compiles environmental data. Advanced analytics on sustainability metrics are provided by software companies (e.g. Watershed) and traditional data providers (e.g. Bloomberg Climate Data).

51. For example, sources include the International Energy Agency's World Energy Outlooks; the United Nations Intergovernmental Panel on Climate Change's reports, which outline global climate scenarios, impacts and mitigation pathways; and national or regional climate assessments, such as those published by the European Environment Agency. These sources inform climate policy, adaptation strategies and risk management across sectors globally, and could therefore be relied on in merger assessments.

52. In one case, the Commission prohibited a transaction even though efficiencies identified by the parties were quantified, while anticipated competitive harms were not. Eur. Comm., decision C(2012) 440 final of 1 February 2012, *Deutsche Börse/NYSE Euronext*, case M.6166, ¶ 1335.

53. ACM, Policy rule, ACM's oversight of sustainability agreements, ACM/UIT/596876, 4 October 2023 (English translation), ¶ 23.

54. CMA, Green Agreements Guidance: Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements, CMA 185, 12 October 2023, ¶ 1.11.

55. Note by the European Union, *supra* note 34, ¶ 8.

56. EUMR, *supra* note 35, Recital 29.

Recital 29, Section 11 of the Commission's Form CO requires the parties to provide efficiency claims, [s]{hould [they] {wish the Commission specifically to consider (...) *whether efficiency gains generated by the concentration are likely to enhance the ability and incentive of the new entity to act pro-competitively for the benefit of consumers*," [58] but does not purport to reverse the burden of proof.

Similarly, the current Merger Guidelines do not place the burden of proving efficiencies on the notifying parties. The HMG state that, "[i]*n order to assess the foreseeable impact* (. . .) *of a merger on the relevant markets, the Commission analyses its possible anti-competitive effects and the relevant countervailing factors such as buyer power, the extent of entry barriers and possible efficiencies put forward by the parties*." [59] The NHMG also provide that, "[i]*n its assessment, the Commission will consider both the possible anti-competitive effects arising from the merger and the possible pro-competitive effects stemming from substantiated efficiencies benefiting consumers*." [60]

57. In *CK Telecoms*, the European Court of Justice found that "*to acknowledge that all concentrations give rise to 'standard' efficiencies would amount to creating a presumption, and therefore a reversal of the burden of proof, in respect of a particular category of efficiencies, whereas, as is apparent from paragraphs 238 and 239 of the present judgment, that burden is borne by the undertakings. (. . .) The reversal of the burden of proof entailed by acknowledging a presumption that all concentrations give rise to such efficiencies would prejudice [the] balance [established by the EU legislature]." CJEU, 13 July 2023, Commission v. CK Telecoms UK Investments Ltd., case C-376/20 P, EU:C:2023:561, ¶¶ 243, 245. However, paragraphs 238 and 239 do not state that the EUMR reverses the burden of proof as regards efficiencies. They state that "[i]t is apparent from recital 29 of Regulation No 139/2004 that, in order to determine the impact of a concentration on competition in the internal market, account should be taken of likely efficiencies put forward by the undertakings concerned. (. . .) It is also apparent from Section 9 of Annex I to Regulation No 802/2004 that it is for the undertaking concerned to provide a description of each of those claimed efficiencies, together with supporting documents." Ibid. ¶¶ 238–239. In other words, CK Telecom recognises that Recital 29 EUMR and Section 11 Form CO place a burden of production on the notifying parties, not the burden of proof. The Court's dictum in paragraph 243, where it rejects a proposed presumption in favour of efficiencies, does not accurately reflect paragraphs 238–239, which describe the parties' burden of production when asserting that expected efficiencies outweigh potential harms from a concentration.*

58. Commission Implementing Regulation (EU) 2023/914 of 20 April 2024, OJ L 119, 5.5.2023, p. 22. Similarly, a dominant undertaking in an Article 102 TFEU case is not required to submit economic evidence showing that its conduct in question was not capable of producing alleged foreclosure effects. However, if such economic evidence is submitted, the Commission is required to engage with that evidence and prove the infringement to the requisite legal standard. Cf., CJEU, 6 September 2017, *Intel Corporation Inc. v. European Commission*, case C-413/14 P, EU:C:2017:632, ¶¶ 138-149.

59. HMG, *supra* note 1, ¶ 12 (footnote omitted).

60. NHMG, *supra* note 2, ¶ 21 (footnote omitted).

Remedies

Finally, the Commission's approach to merger remedies is summarised in its 2008 Notice on remedies acceptable under the EUMR (the "Remedies Notice"), [61] rather than in the Merger Guidelines. As with market definition, the role of sustainability considerations in EUMR remedies falls outside the scope of the Consultation. Unlike the 2024 Market Definition Notice, however, the Remedies Notice is more than 15 years old. An update to the Remedies Notice—alongside the Merger Guidelines—would provide greater clarity.

The Remedies Notice does not explicitly address sustainability, and Commission officials have noted that "*the Commission has no power to unilaterally impose or choose the 'greenest' remedy among several alternatives. Moreover, as the Commission does not have any mandate to intervene in merger cases in the absence of harm to competition, it would not have the power to accept or impose remedies that solely address possible environmental harm that does not also translate into competitive harm*." [62]

Nonetheless, the Commission's recent decisional practice indicates that sustainability considerations can influence both the design of merger remedies and the assessment of a proposed divestiture buyer's suitability, particularly when competition concerns relate to innovation. The In-depth Questionnaire noted that "*the Commission accepted remedies that preserved access to key 'circular' inputs for the market at large*" where transactions could "*result in market power at key junctures of the supply chain, reducing access by other companies to key assets in a circular economy*." [63]

Remedies can also play a useful role where the Commission doubts whether sustainability benefits will materialise. The OECD Efficiencies Paper notes that remedies "*can be designed to ensure that the efficiencies claimed will actually materialise, for instance by the merging parties explicitly committing*

61. Communication from the Commission, Notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004, OJ C 267, 22.10.2008, p. 1 (Remedies Notice).

62. 2023 Merger Brief, *supra* note 10, at 5 (footnotes omitted).

63. Topic D: Sustainability & clean technologies, In-depth Questionnaire, *supra* note 7, ¶ 76 (footnotes omitted).

to achieve them. (. . .) Efficiencies may also complement remedies. Instead of designing remedies solely to help efficiencies materialise, considering remedies and efficiencies together may lead the authority to authorise a transaction." [64]

Using remedies to reinforce or complement an efficiency defence would align with practice in the UK. In a recent decision, the CMA accepted a legally binding commitment by the merging parties to invest in order to ensure that the claimed efficiencies would materialise. [65] Such an approach would also be in line with the Draghi report's recommendations. For example, in relation to the telecommunications sector, the Draghi report recommends "*increas*[ing] *the weight of innovation and investment commitments* (. . .) [i]*n the EU's rules for clearing mergers*." [66] It also urges that, "*in devising its remedies, DG COMP should also aim not to weaken, and, whenever possible, to enhance security and resiliency*." [67] The same principle can be extended to sustainability and clean technologies, areas where the Draghi report laments the "*inability to scale up in the EU*." [68]

Conclusion

The Merger Guidelines review offers the Commission a timely opportunity to modernise its treatment of sustainability considerations in merger assessments in alignment with the EU objectives outlined in the Mission Letter and related policy frameworks. Paradoxically, however, the greater emphasis on sustainability as a parameter of competition within the existing EUMR framework—particularly in market definition and competitive assessment—could have the unintended consequence that the Commission challenges mergers between innovative "green" companies seeking to achieve competitive scale. EU merger control could therefore become a barrier to transactions with potential to advance the EU's sustainability objectives.

Within the current EUMR assessment framework, the most promising approach to avoiding such consequences while advancing EU sustainability objectives may be to rethink the Commission's approach to the assessment of efficiencies. Several avenues are available. Specifically, we recommend that the Commission reconsider its approach to the treatment of consumer benefits (especially out-of-market and benefits that may be difficult to quantify), timeliness (to eliminate arbitrary cutoffs and account for long-term effects) and verifiability (including harmonising guidance on required evidence for competitive harms and efficiency benefits and reassessing the burden of proof where parties raise an efficiency defence). In addition, the revised Merger Guidelines should not only incorporate learnings of the HGL on the types of evidence relevant to sustainability benefits, but consider going further, for example further including types of evidence the Commission and other authorities rely upon in other contexts.

* The views expressed in this article are solely those of the authors and do not necessarily reflect those of Analysis Group or its clients, nor those of Norton Rose Fulbright or its clients. The authors thank Arushi Sahay for her excellent research assistance in the preparation of this article.

64. OECD Efficiencies Paper, *supra* note 29, at 13.

65. CMA, Anticipated Joint Venture between Vodafone Group and CK Hutchison – Final Report, case ME/7064/23, 5 December 2024, ¶ 8.

66. M. Draghi, The future of European competitiveness: A competitiveness strategy for Europe, Report prepared for the European Commission, September 2024, Part B: In-depth analysis and recommendations, at 75.

67. Ibid. at 301.

68. Ibid. at 119.

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