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EU Merger Control and Climate Action: The Struggle for the Proper Framework

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ABSTRACT

The EU has set itself an ambitious agenda to tackle climate change. Competition policy, including merger review, is called upon to play its part. Based on an analysis of the Commission's practice, this paper identifies the key framework issues for the consideration of climate change concerns in merger control and the parameters for addressing them under the EU Merger Regulation and in the light of the European Treaties. One focus is on the implications of the differentiated allocation of regulatory powers. It is argued that a distinction must be made between scenarios in which the climate change argument is used to justify stricter or conceptually extended merger control and those in which it is argued that merger control should need to be relaxed for climate change reasons. With regard to the first scenario, shifts of a normative nature can be observed and are indeed called for, but these take place within the consumer welfare paradigm and it remains the case that the protection of competition is the sole overriding principle of the EU Merger Regulation. In contrast, in the second scenario, merger-specific positive effects on climate concerns need to be considered even if they are not captured by the consumer welfare paradigm.

Keywords: antitrust law, merger control, climate change, environmental sustainability

JEL classification: K21, K32

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1 Introduction

Climate change has plunged humanity into an existential crisis. The survival of our civilization will depend on the action we take to respond. Humanity must not lose the chance to turn the tide in time because of petty, formalistic concerns and an unthinking adherence to the status quo. Under the European Green Deal,[1] every EU policy must contribute to the overall goal of making the EU climate-neutral by 2050. This call for climate action also applies to EU merger control, a cornerstone of EU competition law. The relevance of merger policy has been demonstrated, for example, by its impact on the circular economy, energy efficiency and innovation, which is crucial, for example, in the transition to a low-carbon economy and the protection of biodiversity.

The protection of consumer welfare in the markets affected by a proposed merger has become the most important guiding principle of merger control. The regulation of negative externalities has been relegated to other areas of regulation, notably environmental law. Looking at the EU Merger Regulation (EUMR),[2] however, there are several elements to which climate concerns may be relevant and into which this aspect could be integrated: the criteria for assessing mergers under the substantive impediment to effective competition (SIEC) test pursuant to Article 2(2) and (3) EUMR, including sub-elements of the test such as market definition and market power, or a possible efficiency defence. Furthermore, climate change concerns could be taken into account in the proposal of any commitments that support the Commission's decision to clear a merger.

The overall aim of this paper is to identify the key framework issues for the consideration of climate change concerns in merger practice and the parameters for addressing them. The 'framework' with which I am concerned here is twofold: it refers both to the requirements of the EUMR, which governs the merger practice of the EU Commission, and to the EU constitutional requirements within which the EUMR must be applied. The following study is based on an analysis of the EU Commission's practice[3] with regard to whether and how climate protection aspects have been taken into account.

Particular attention will be paid to whether the consideration of climate protection concerns can be understood as an expression of a normative shift. Roughly three approaches seem conceivable here:[4]

- First, it may be that the implementation of the consumer welfare paradigm has been adapted but the approach itself has not been questioned. This could include, for example, taking into account identified changes in consumer preferences, or changing the time horizon, the standard of evidence, etc. for identifying potential impacts on consumer welfare.

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[1] European Commission, The European Green Deal, COM(2019) 640 final, pp. 15–19 ('Mainstreaming sustainability in all EU policies').

[2] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ 2004 L 24/1.

[3] An overview of relevant decision practice can be found, for example, in Badea et al. (2021), pp. 6–7, and in Lecchi (2023), pp. 74–79.

[4] For similar conceptual approaches and options, albeit with a focus on sustainability agreements, see Ackermann (2023), pp. 11–15; Monti (2020), pp. 128–130.

- Second, a change in the welfare standard could result from the inclusion of the creation or avoidance of negative externalities in the substantive assessment of mergers. The approach thus goes beyond the conventional consumer welfare framework for analysing the effects of a merger.
- Third, it is conceivable that merger control proceedings could be used to directly promote and implement climate protection measures. This would openly declare climate protection to be an objective of merger review in its own right, alongside the protection of competition. This would create scope for moving away from the welfare paradigm and for an open balancing of the objectives of protecting competition and climate protection based on qualitative criteria.

Below, I will outline my findings in five main steps. First, I will analyse Commission practice on the role of climate protection and environmental sustainability in market definition, the identification of unilateral price effects and risks to innovation competition (Section 2). Second, I will show that the Commission refuses to consider climate protection an independent objective of merger control under the EUMR, and I will discuss what implications this has and does not have (Section 3). Third, I will examine an area where the Commission's practice is not yet clear: scenarios in which climate change considerations might require a relaxation, rather than a tightening, of a (competition-only) merger standard (Section 4). Fourth, I will look at the scope for Member States to clear or block mergers on climate change grounds, alongside or on the basis of the EUMR (Section 5). Fifth, I will explain how these findings can be understood in the light of the EU's constitutional framework with its differentiated distribution of regulatory powers (Section 6). Section 7 concludes.

2 What We See in the Commission's Practice (1): Stricter Merger Control – Protecting the Climate Under the Consumer Welfare Paradigm

Through an analysis of the Commission's merger practice, this section will identify the different legal parameters used to take climate change and environmental sustainability into account in merger control. It is true that in individual scenarios there may be trade-offs between climate protection and other facets of environmental sustainability: the construction of wind turbines may harm bird populations or marine life. The extraction of mineral resources, which seems essential to the energy transition, can threaten biodiversity. However, these trade-offs can be disregarded when analysing the role of these 'green' objectives in relation to the protection of competition. The key normative (framework) questions are indeed identical.[5]

[5] However, in individual cases where there is room for manoeuvre, the implementation of 'green' policy objectives can be made more difficult by trade-offs, for example between the expansion of renewable energy and the protection of biodiversity.

2.1 Observable Consumer Preferences for Climate Action: Market Definition and Closeness of Competition

2.1.1 Market Definition as an Analytical Step for the Assessment of Market Power

The assessment of market power is an essential element of merger control. In EU practice, which at this stage is in line with many other jurisdictions, market definition appears to be a practically mandatory analytical step[6] to assess whether a concentration would (or would not) significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.[7]

In several decisions the Commission has defined product markets with a view to sustainability or resource efficiency as parameters of competition. For example, the Commission's assumption was that there were separate markets for conventional bananas on the one hand and organic and fairtrade bananas on the other.[8] This assessment was based on surveys of retailers, who were asked to give their own views but also to estimate what end consumers preferred. According to the questionnaires analysed, conventional and non-conventional bananas are not seen as substitutes.[9] It was also found that retailers typically award supply contracts on a differentiated basis and that there are significant conversion costs on the producer side. Retailers organize separate tenders for fair trade bananas and for organic/double-label bananas, as opposed to conventional bananas.[10] A range of suppliers have specialized in organic and/or fairtrade bananas[11] and the production and import of the different types of banana varies considerably. Switching to organic production requires a change in the production process, and switching to fair trade requires compliance with specific standards.[12] However, we do not find any statements on end consumers' willingness to pay.

The market definition substantially affected the market shares of the notifying parties in Germany.[13] As one of the parties (Chiquita) was not active in the supply of fair trade or organic bananas at the time, the parties' combined market share of conventional bananas in 2011 was in the range of 30 to 40 per cent in the public version of the decision, as opposed to 5 to 10 per cent in the fair trade or organic segment and 20 to 30 per cent for all types of banana.[14] Ultimately, however, this was not decisive for the assessment of the merger because the market power of the notifying parties was counterbalanced by strong buying

[6] See CJEU, Case C-68/94, *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission*, ECLI:EU:C:1998:148, para. 143; Case T-342/99, *Airtours v Commission*, ECLI:EU:T:2004:192, para. 19; Case T-151/05, *NVV and Others v Commission*, ECLI:EU:T:2009:144, para. 51. See also European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2004 C 31/5 ('Horizontal Merger Guidelines'), para. 10.

[7] See Article 2(2) and (3) EUMR.

[8] Case COMP/M.7220 (3 Oct 2014), *Chiquita Brands International/Fyffes ('Banana Industry')*, para. 73.

[9] Id., paras 67–68.

[10] Id., para. 66.

[11] Id., para. 69.

[12] Id., paras 70–71.

[13] See also Commission Notice on the Definition of the Relevant Market for the Purposes of Union Competition Law (C/2024/1645), paras 15 and 50.

[14] Id., para. 245 with Table 12.

power on the part of retailers and the presence of three competitors with market shares above 10 per cent.[15]

In another decision, the Commission assumed that a distinction should be made between organic and conventional salmon production. This was based on different price levels and the consumer perception that organic salmon is healthier and perceived as a premium product. In contrast to the banana case, the Commission left the final market definition open.[16] This is also the case for a decision on cocoa beans, even though the Commission found strong indications that separate markets should be defined for certified and/or traceable cocoa beans. The former refers to beans that have been certified by third-party organizations for good agricultural, environmental and social practices, while the latter refers to beans whose supply chain can be traced back to individual farmers. The Commission noted the higher investment costs and longer timeframes for setting up procurement operations for non-standard beans, that these beans tended to be supplied on the basis of long-term contracts (as opposed to spot trading) and that they were sold at a premium price, paid to farmers and cooperatives.[17]

In a merger involving salt slag recycling services, the Commission noted that the use of zero-waste technology is perceived as an advantage by many customers, but nevertheless concluded that the scope of the product market is salt slag recycling, irrespective of the technology used.[18]

As far as can be seen, this consideration of sustainability in the Commission's market definition has not yet been decisive in the assessment of a merger. However, a relevant example can be found in France. In the *Carrefour France/Bio c'Bon* case, the Autorité de la concurrence examined effects on a separate upstream market for the supply of organic food[19] and a separate market for the retail distribution of (predominantly) organic food products, which is restricted to supermarkets and hypermarkets.[20] While the narrow market definition did not lead to the transaction being expected to cause harm to competition in the upstream supply markets,[21] it did require the parties to agree to the divestment of a number of stores in order to avoid an excessive concentration of the retail distribution of organic food products in 10 identified areas.[22]

Similar considerations can also lead to a narrow geographical market definition.[23] Consumers may prefer local or regional products because they see them as more climate-friendly,

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[15] Id., paras 248–252.
[16] Case COMP/M.6850 (30 Sept 2013), *Marine Harvest/Morpol*, paras 61–62.
[17] Case COMP/M.7510 (10 June 2015), *OLAM/ADM Cocoa Business*, paras 15–19.
[18] Case COMP/M.10702 (19 Oct 2022), *KPS Capital Partners/Real Alloy Europe*, paras 59–61.
[19] Autorité de la Concurrence, Décision n° 21-DCC-161 du 10 septembre 2021 relative à la prise de contrôle exclusif de certaines activités du groupe Bio c' Bon par la société Carrefour France (Carrefour France/Bio c' Bon), paras 14–19 (https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2021-10/20-188_publique_decision_21dcc161_0.pdf).
[20] Id., paras 23–41.
[21] Id., para. 65.
[22] Id., paras 200–208.
[23] Market Definition Notice (n 13), para. 72.

because of lower transport costs[24] or simply because they assume that local or regional producers are more environmentally aware.

A narrow market definition, driven by consumer preferences for more sustainable, climate-friendly products, will lead to a more rigorous assessment of potential competitive harm from mergers in relation to these products. How can this contribute to climate protection? If, because of competitive pressure, climate-friendly products are made available to consumers at more favourable conditions, they will be consumed on a larger scale. Protection of competition and climate action converge.

The consideration of climate change concerns in market definition is therefore an example of adjustments in merger control; however, they do not reflect normative shifts in the merger control framework. The fact that consumer preferences for climate-friendly products need to be taken into account in market definition is nothing that should surprise observers. However, it does require sensitivity to such changes in consumer preferences and the recognition of environmental sustainability as a non-price parameter of competition.[25]

It should therefore be noted that here, as elsewhere in competition practice, market definition analyses must be based on actual identifiable consumer behaviour. It is therefore crucial to establish that consumers have a clear demand for, and are willing to pay more for, products marketed as 'organic', 'fair trade', 'green' etc., without it being necessary or even appropriate, in the view of the competition authority, to determine whether such a label is 'justified' in each individual case on the basis of the way in which a product is produced or distributed. Market definition takes consumer preferences as it finds it; it is not the place for the exposure of greenwashing.

2.1.2 Closeness of Competition and Unilateral (Price) Effects in Differentiated Products

Preferences for climate- and environment-friendly products may in some contexts not be strong enough to justify the delineation of a separate market but they may still be strong enough to be relevant for assessing the possible unilateral effects of a merger. Such unilateral effects give merging parties scope to raise prices and, therefore, have to be considered when applying the SIEC test. This scope to raise prices is known to be a possible result of a merger because the positive effects on a firm's profits caused by a price increase by one of its competitors (which at the same time faces a reduction in volume) are internalized by their merger. A key parameter in predicting the extent of such unilateral effects is the closeness of the notifying parties: the stronger their ex ante rivalry (technically

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[24] See, for example, Case COMP/M.10047 (14 April 2021), *Schwarz Group/Suez Waste Management Companies*, para. 56 ('The information available, notably calls for tenders and their specifications, shows that next to transport costs, the environmental cost of transport is also a factor taken into account by customers in awarding tenders. Sorters with more distant [lightweight packaging] sorting plants are sometimes penalised, through a correction of the price quoted or through negative points for quality, not only because of higher transport costs but also for environmental reasons related to the increased CO2 emissions associated with longer transport').

[25] See Market Definition Notice (n 13), para. 3 ('[C]ompetition policy … can complement the Union's regulatory framework on environmental sustainability by taking into account sustainability factors to the extent relevant to the competition assessment, including as part of market definition').

measured by the so-called diversion ratios), the more likely it is that significant unilateral effects will result from their merger.

In assessing the closeness of competition, climate-related factors may play an important role. This was the case in *Schwarz Group/Suez Waste Management Companies*, for example. Both companies were active in a number of countries along the entire waste management chain. The Commission was particularly concerned about the merger's impact on the market for sorting light packaging in the Netherlands. Without any divestment commitments, the merged entity would have become by far the largest provider. With regard to competitive pressure from providers located relatively far away from the municipalities where the waste is generated, the Commission stated that:

> plants located at greater distances from the collection points than the Parties' plants may also be seen as environmentally less efficient than the local ones … [D]istance is … a relevant factor for customers when assessing the environmental efficiency or transport sustainability of the different offers submitted in a tender. Longer transport distances imply more CO2 emissions and therefore higher long-term environmental costs. Customers accounting for close to half of demand openly admitted this preference, citing reasons linked to sustainability and environmental reasons and, expressly, the need to reduce CO2 emissions and to minimise environmental costs.[26]

This was one of the reasons for the Commission's view that the parties 'appear to be particularly close competitors, and possibly the closest to each other'.[27] The Commission's assessment ultimately led to significant remedial action. The Schwarz Group had to agree to sell its entire light packaging sorting business in the Netherlands.

The assessment of the closeness of competition must therefore take into account consumer preferences for climate-friendly and environmentally sustainable products. This should be based on consumers' preferences as reflected in their actual behaviour in the market. Normative shortcuts should be avoided: assuming that Dutch law requires municipalities to take climate change concerns into account when purchasing waste management services, this could at best be an indication of their actual behaviour. Therefore, as in the case of market definition, this is not a question of a normative shift in the assessment of competition. Protecting competition and protecting the climate go hand in hand: recognizing that municipalities are interested in reducing CO_2 emissions and therefore want to avoid long distances between waste collection points and waste treatment plants, the Commission has ensured that sufficient competition is maintained between suppliers that meet these criteria, thereby satisfying customers' demand for the most 'green' waste disposal at the best possible conditions. The Commission's intervention was able to prevent a merger from increasing the price of environmentally sustainable products through unilateral (price) effects.

2.2 Sharpening of Tools Within the Consumer Welfare Paradigm: Protection of Competition for Green Innovation

If a merger may reduce the potential for innovation in a market, the European Commission must take this into account in its assessment. This is not new and is indeed required by

[26] Case COMP/M.10047 (14 April 2021), *Schwarz Group/Suez Waste Management Companies*, para. 118.
[27] Id., para. 123.

Article 2(1) EUMR,[28] but the Commission has used the protection of environmental sustainability as an impetus to strengthen the protection of competition in innovation. Particularly noteworthy are decisions in the agrochemicals sector, where risks to innovation competition have led to significant commitments. Moreover, the Commission has used the *Norsk Hydro/Alumetal* case to make clear that it is prepared to protect innovation competition against so-called ‘killer acquisitions’.

2.2.1 Elimination of Close Competition in ‘Innovation Spaces’ as a Stand-Alone Theory of Harm (Dow/Dupont and Bayer/Monsanto)

In two key decisions in the field of agrochemicals, the Commission has made it clear that innovation is intrinsically linked to environmental sustainability: when companies develop more effective active ingredients for pesticides, fungicides or herbicides, the same level of crop protection can be achieved with less toxicity. These more sustainable crop protection solutions help to protect biodiversity and the environment, and therefore justify a stronger focus on the protection of the race for innovation:

> The Commission has, in particular, paid specific attention in its review to ensure that post-Transaction innovation in the agroindustry sector is preserved as the key for the emergence of more effective, healthier, safer and more environmentally-friendly products.[29]

The Commission took the opportunity to implement a more sophisticated and indeed sharper concept of how the elimination of close competition in innovation can lead to merger-induced harm to innovation. It identified ‘innovation spaces’ to explain how rivalry between firms is a driver of innovation. The basic idea is that, by measuring overlapping research efforts, incentives to eliminate or reduce research and development (R&D) investments after the merger can be identified.[30] The Commission used an approach that modelled the reduced incentives to innovate in a loose analogy to the analysis of unilateral price effects: one driver of innovation is the ability to capture sales from competitors with new and improved products (‘business stealing effect’). At the same time, a firm must also consider ‘cannibalization effects’, as sales of its existing products will also decline. However, when firms that compete closely in innovative products merge, they may internalize the negative externalities that the other merging party imposes on its profits through innovation efforts. In other words, after the merger, each merging party may gain little or nothing by capturing the other’s sales by developing and marketing an innovative product. In more technical terms, the ability of the merging firms to internalize the business stealing effect will increase the opportunity cost of the cannibalization effect and reduce the merged firm’s incentives to innovate.[31]

This effect could be expected to be larger the more likely it is that an innovation investment by one of the merging parties could lead to the capture of sales from the other merging party, i.e. the higher the ‘innovation diversion ratio’. This in turn depends to a large extent on the degree of innovation competition between these companies, which is reflected in the R&D

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[28] Article 2(1)(b) EUMR (‘[T]he Commission shall take into account … the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition’).

[29] Case COMP/M.8084 (21 March 2018), *Bayer/Monsanto*, para. 3011. See also Case COMP/M.7932 (27 March 2017), *Dow/DuPont*, paras 1977, 1980.

[30] See for an overview of the Commissions line of reasoning Deutscher and Makris (2023), pp. 364–368.

[31] Case COMP/M.7932 (27 March 2017), *Dow/DuPont*, paras 2002, 2043, 3017–3022; Case COMP/M.8084 (21 March 2018), *Bayer/Monsanto*, paras 281, 1041.

approaches, research lines, pipeline products etc. pursued.[32] In addition, there is the 'second-order effect' that, if the merged entity's incentives to innovate are reduced for the above reasons, the competitive pressure to innovate vis-à-vis the non-merging parties in the market will also be reduced and the market as a whole might be less inclined to innovate.[33]

In both cases, the Commission found that the merging parties are indeed close competitors for innovation in herbicides, pesticides and fungicides. After the merger, they would therefore have strong incentives to stop costly duplicative pipeline projects and to reduce duplicative R&D infrastructure, so that the innovative capacity of the merged entity would be lower than the combined capacity of the merging parties before the merger.[34] The Commission did not see a sufficient counterbalance in terms of efficiency gains from innovation.

In the end, the Commission cleared both mergers, subject to rather strict remedies. In the *Dow/DuPont* case, for example, the Commission noted that the notifying parties were two of the five firms in the world active in the entire R&D process in the agrochemicals sector. The parties had to divest almost all of DuPont's global R&D organization and pipeline. This was intended to enable the purchaser to emerge as a new, fully integrated R&D competitor in the global agrochemicals market.

So, what is new and what is not new about the Commission's approach in these two landmark cases? And how does it relate to the protection of environmental sustainability and climate change? There are three aspects to consider.

First, the Commission has adopted a new theoretical basis for pursuing an innovation theory of harm.[35] On this basis, it has for the first time implemented reduced innovation competition as an independent theory of harm, i.e. without recourse to price effects. In doing so, the Commission referred to the normative weight of environmental sustainability concerns. It can be assumed that it would apply this approach to other industries in a similar way if it identified risks to innovation competition, for example in relation to climate-friendly technologies or products.

Second, in *Dow/DuPont* and *Bayer/Monsanto* the Commission focused on innovative capacity, effort and results. The novelties in protecting innovation competition thus lie within the traditional consumer welfare paradigm.[36] What is new, however, is that innovation is now subject to a more precise set of instruments. As a result, there is a prospect that the protection of innovation will be given greater weight than in the past, when the focus was on

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[32] Case COMP/M.7932 (27 March 2017), *Dow/DuPont*, paras 2000–19, 3287–89; Case COMP/M.8084 (21 March 2018), *Bayer/Monsanto*, paras 281, 1164–1170, 1088, 1093, 1113, 1124, 1164, 1685, 1979.

[33] Case COMP/M.7932 (27 March 2017), *Dow/DuPont*, paras 2005, 2044–2045, 3239, 3244, 3292.

[34] Case COMP/M.7932 (27 March 2017), *Dow/DuPont*, paras 3284–3297; Case COMP/M.8084 (21 March 2018), *Bayer/Monsanto*, paras 878–888, 1263–1273.

[35] In its attempt to develop a concept of unilateral effects on innovation competition, the Commission relied on studies by Motta and Tarantino (2017) and by Federico et al. (2017, 2018). At the time of writing these articles, Valletti was the chief economist in the Directorate-General for Competition at the European Commission (2016–2019). Federico and Langus were members of the chief economist's team. Their model was contested, however, by Denicolò and Polo (2018), (2019). Federico et al.'s (2017) analysis and conclusions, however, were challenged by Denicolò and Polo (2018, 2019), who showed that a merger, even between close rivals in innovation competition, may have an overall positive effect on innovation through the elimination of duplication of R&D expenditure. See also Jullien and Lefouili (2018) (discussing the Federico et al. (2017)/Denicolò et al. (2018) debate on pp. 375–376).

[36] Deutscher and Makris (2023), pp. 368–376.

price and output effects, simply because there is a more straightforward way to implement these concerns.

Third, within the consumer welfare paradigm, we may therefore observe a considerable shift in the relevant time horizon. Traditionally, in the pharmaceutical and agrochemical sectors, for example, time horizons of typically two to three years and a maximum of five years have been used to analyse manufacturers' product pipelines. By contrast, a focus on (short-term effects on) innovation capacity implicitly leads to a longer time horizon. This protects the interests of consumers who, in 10 or 15 years or more, will be buying products whose quality will be determined by innovation decisions taken now.[37]

2.2.2 Acquisition of Nascent Competitors: Eliminating Potentially Disruptive Innovations at an Early Stage

It is not a new finding that the acquisition of start-ups and small, emerging companies (often with no, or at least no significant, turnover) by established companies is a cause for concern, particularly in terms of competition for innovation. On the one hand, this can be detrimental if the R&D efforts of the target company are discontinued, thereby suppressing or preventing innovations that have been or can be achieved. On the other hand, the acquirer can integrate the R&D of the target company but terminate its own innovation projects in return (a scenario that is referred to as a 'reverse-killer acquisition'[38]). In both scenarios, the innovation potential available in the market or in the companies cannot be fully exploited.

With regard to climate protection and the promotion of environmental sustainability, a scenario was outlined in which a (particularly) innovative sustainable start-up company could be acquired in order to take this innovation off the market and continue production with 'dirty' technology ('green killer acquisitions'). In addition, there is certainly a weakening of competition for 'green innovation', where companies buy up emerging 'green' competitors in order to reduce or even discontinue their own innovation projects for sustainable technologies. Pierre Régibeau, then chief economist at the Directorate-General for Competition, was quoted as saying that the Commission would be 'particularly vigilant' against such 'killer acquisitions'.[39]

Although there has not yet been a Commission decision discussing these aspects, the acquisition of Alumetal by Norsk Hydro has been analysed from the perspective of a possible 'green killer' acquisition. Norsk Hydro is a Norwegian company active in the entire aluminium value chain, from bauxite mining and aluminium production – and the generation of the (significant) amounts of energy required for this – to aluminium recycling. The firm has a leading position in the production of aluminium foundry alloys as an end product, which are mainly supplied to the automotive industry. Alumetal is a Polish company that also produces aluminium foundry alloys but specializes in the production of aluminium master alloys (a precursor to aluminium foundry alloys) based on aluminium recycling.

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[37] See Case COMP/M.7932 (27 March 2017), *Dow/DuPont*, paras 2032–2034.

[38] The term has originally been coined in the context of acquisitions by digital gatekeepers. See Crawford et al. (2020).

[39] See MLex, 'Green "killer acquisitions" to face EU vigilance', Régibeau says (24 Feb 2021) (https://mlexmarketinsight.com/news/insight/green-killer-acquisitions-to-face-eu-vigilance-r-gibeau-says) (accessed 4 April 2024).

The competitiveness of the aluminium foundry alloys market was central to the assessment of the acquisition. Commissioner Vestager had already given a 'green touch' to this aspect in the press release on the Phase II (in-depth) investigation, stressing that the availability of 'competitively priced green aluminium products' was essential to the fight against climate change. Indeed, the press release contained a reference to a suspected 'green killer acquisition':

> The Commission has preliminary concerns that, by acquiring Alumetal, Norsk Hydro … may eliminate a growing competitor able to bring cheaper and advanced recycled aluminium products to the market.[40]

In the Commission's view, it was therefore conceivable that Norsk Hydro might want to acquire a small competitor in order to slow down its emergence as a supplier of aluminium precursors based on sustainable recycled production. However, its investigation did not confirm any competition risks and it cleared the transaction without conditions.[41] Commissioner Vestager was quoted as saying:

> Green aluminium is a key lever to decarbonise industrial processes … Our in-depth investigation has shown that the proposed acquisition … will not have a negative impact on the competitive landscape for certain aluminium products. Especially green ones, which will remain widely available to customers at competitive prices.[42]

Both the statement by Régibeau quoted above and the statements made in connection with the opening of the Phase II investigation in *Norsk Hydro/Alumetal* show that the Commission has the acquisition of nascent and emerging competitors on its radar as a threat to innovation competition and is prepared to attach particular importance to this threat in the context of climate protection and the protection of environmental sustainability.

Tighter control over the acquisition of nascent and emerging competitors has the potential to protect a different facet of innovation competition from the *Dow/DuPont* or *Bayer/Monsanto* approach. While the latter is about identifiable and definable 'innovation spaces' and the established rivalry typically of larger incumbents, the former is about maintaining open access to new innovation pathways combined with the hope of disruptive innovation that can successfully challenge the incumbents.[43] In the context of climate change and the need to decarbonize industry, it is certainly plausible to attach particular importance to the protection of potentially disruptive, revolutionary technologies.

However, implementation poses serious challenges. First of all, there is the question of whether the relevant acquisitions can be reviewed by the Commission. As the target companies in the relevant scenarios typically have low turnovers in the internal market, the thresholds of Article 1 EUMR will often not be exceeded. From the Commission's point of view, the possibility of referrals under Article 22 EUMR may provide an appropriate mechanism to bring these mergers to Brussels for review.[44] The ECJ will decide in the near future whether this will also be possible in cases in which the intended acquisitions do not

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[40] European Commission, Press Release (6 October 2022), Mergers: Commission opens in-depth investigation into Hydro's proposed acquisition of Alumetal.

[41] European Commission, Press Release (4 May 2023), Mergers: Commission clears Hydro's acquisition of Alumetal.

[42] See https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2566 (accessed 4 April 2024).

[43] Rubinfeld and Hoven (2001), p. 72.

[44] See Badea et al. (2021), pp. 6–7; Deutscher and Makris (2023), pp. 392–393.

exceed the national thresholds.[45] In any case, the effectiveness of this mechanism will depend on the willingness of Member States to cooperate in individual cases. Moreover, undertakings will (permanently) face a higher degree of legal uncertainty. In contrast, the introduction of a transaction value threshold in Article 1 EUMR would ensure a practicable and robust coverage of the relevant cases.[46]

What is more remarkable, however, is that, although it is in principle undisputed that it can be a rational and coherent business strategy to prevent potential competition by acquiring up-and-coming competitors,[47] it will usually be difficult for an authority to identify the truly problematic cases and to prove with sufficient certainty the harm to (future) competition. Thus, while strengthened control of nascent competitor acquisitions to protect innovation competition is legitimate within the conventional consumer paradigm, a workable analytical framework may require certain normative adjustments:[48] on the one hand, this may concern the time horizon to be considered, which needs to be extended significantly. On the other hand, it may also be appropriate to lower the standard of proof and/or to shift the burden of proof to the notifying parties in certain situations.

3 What We See in the Commission's Practice (2): Climate Protection Is Not a Stand-Alone Merger Control Objective

In the *Bayer/Monsanto* case, the European Commission made it clear that the overriding objective of merger control is the protection of undistorted competition. Other public interest objectives – such as climate protection or environmental sustainability – can only be included indirectly or implicitly. This argument is first traced here, before exploring how much room for manoeuvre this might still leave for including negative externalities in the consumer welfare paradigm.

3.1 *Bayer/Monsanto*: Under EU Merger Rules, the Commission Can Only Intervene to Protect Competition

Could the Commission prohibit a merger if and because it would have a negative impact on climate and environmental sustainability? In the *Bayer/Monsanto* case, the Commission found reason to take a position on this issue. In the run-up to the decision, the Directorate-General for Competition was warned that the merger would consolidate the chosen path of global industrialized agricultural production. This would further reduce biodiversity and damage the environment.[49] On the one hand, the Commission acknowledged that it was obliged to take other objectives enshrined in EU primary law into account when enforcing competition policy and, therefore, also in merger practice:

[45] Case C-611/22 P, *Illumina v Commission*. In this case, the parties are appealing against the judgment of the General Court in Case T-227/21 *Illumina v Commission* EU:T:2022:447, in which the court upheld the Commission's broad interpretation of Article 22 EUMR. The case concerns the acquisition of Grail by Illumina. See Commission Decision C(2021) 2847 final of 19 April 2021; Commission Decisions of C(2021) 2848 final, C(2021) 2949 final, C(2021) 2851 final, C(2021) 2854 final, and C(2021) 2855 final of 19 April 2021.

[46] See Franck et al. (2021), pp. 24–25.

[47] See Cunningham et al. (2021).

[48] Deutscher and Makris (2023), pp. 396–398.

[49] Case COMP/M.8084 (21 March 2018), *Bayer/Monsanto*, paras 3006–3007, 3009; Deutscher and Makris (2023), pp. 356–358.

> The TFEU requires the Commission to take into consideration a plurality of objectives including human health, environment and consumer protection.[50]

This follows from the horizontal clauses of the Treaty, in particular Articles 7, 9, 11 and 12 TFEU, and is also set out in recital 23 of the EUMR.[51] The Commission then goes on to say that it takes this into account by considering how a lessening of competition affects these wider objectives:

> [T]he Commission is mindful of the potential implications of a possibly reduction of competition caused by the Transaction on … environmental protection and climate.[52]

The way in which a merger is assessed from a competition perspective is thus also influenced by other public interest objectives such as climate protection and environmental sustainability. However, these other objectives, in addition to the protection of undistorted competition, may not (directly) influence whether a merger can be blocked:

> [T]he Merger Regulation does not empower the Commission to intervene against a merger on grounds other than the protection of competition.[53]

The EUMR therefore does not empower the Commission to balance the protection of undistorted competition against the achievement of other non-competitive objectives in the event of a conflict.

3.2 Implications: Six Key Takeaways on Reduction of Competition, Consumer Welfare and Negative Externalities

The above raises the question of the implications for merger analysis: which climate-related arguments will the Commission take into account, and which will it not? In my view, six key takeaways can be derived from this.

First, effects in climate and environmental sustainability can and, in fact, need to be taken into account when analysing, weighing, and balancing the potential effects of a merger on competition. The Commission itself set an example in the *Bayer/Monsanto* case by strengthening the protection of innovation competition, in particular because a high level of innovation in the market concerned was seen as serving a sustainable agricultural economy.[54] Tighter control of the acquisition of nascent competitors[55] is also part of this. It is also linked to a more rigorous assessment of competition, through narrower market definitions[56] or taking into account preferences for climate- and environment-friendly products when estimating unilateral price effects.[57] In all of these scenarios, enhanced competition can benefit climate, environmental sustainability and biodiversity by making products that are improved in line with these objectives available to consumers at more favourable conditions.

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[50] Case COMP/M.8084 (21 March 2018), *Bayer/Monsanto*, para. 3010.
[51] Id., paras 3010–3011. Article 23 EUMR reads: '[T]he Commission must place its appraisal [of concentrations with a Community dimension] within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty establishing the European Community and Article 2 of the Treaty on European Union.'
[52] Case COMP/M.8084 (21 March 2018), *Bayer/Monsanto*, para. 3011.
[53] Id., para. 3017.
[54] See above n 29 and accompanying text.
[55] See above Section 2.2.2.
[56] See above Section 2.1.1.
[57] See above Section 2.1.2.

Second, it is understood that the Commission will not take into account in its assessment whether a merger has adverse effects on the climate that are not related to a reduction of competition. This could be the case, for example, if a merger leads to production efficiencies and, consequently, to an increase in volume that results in an increase in CO_2 emissions. This is consistent with the fact that in the *Bayer/Monsanto* case the Commission did not carry out detailed analyses of the climate and environmental impacts of the merger as such. It did not consider the argument that the merger (including the innovation spaces protected by the Commission for the development of less toxic pesticides, herbicides and fungicides) would consolidate the conventional paradigm of industrial agriculture at the expense of agricultural diversity and sustainability and would therefore be detrimental in the long term in terms of climate protection and environmental sustainability.[58]

Third, the Commission's statements stand in the way of attempts to include in the consumer welfare analysis negative externalities, such as climate and environmental damage, which are detrimental to the public at large or at least essentially detrimental to consumers outside the markets under consideration. To enable (and legitimize) such analyses, there are various approaches available that could be used to measure the value that consumers in the market affected by the merger would place on avoiding these externalities.[59] Such analyses and assessments could lead to a merger being challenged even though it is expected to lead to lower prices or innovative products in the affected market. However, this is ruled out by the Commission's statements in the *Bayer/Monsanto* case, as the 'reduction of competition' link would be missing: a negative external effect would then be cured, albeit measured in terms of the welfare of consumers in the market. However, the Commission's focus on the protection of undistorted competition as the (only) overriding guiding principle should be understood as an endorsement of the fact that merger control does not empower the Commission to address all forms of market failure that may be associated with a merger.

Fourth, the Commission is, however, taking the liberty of making quite significant normative shifts within the consumer welfare paradigm, which may in fact allow the avoidance of negative externalities to become implicitly a matter of merger control. If we take, for example, the tighter control of restrictions on innovation competition in the *Bayer/Monsanto* case or the looming tighter control of acquisitions of nascent competitors, this consideration is based on a significantly extended time horizon. However, if the welfare of consumers in 10 or 15 years, or perhaps even longer, is taken as the yardstick for weighting possible restrictions on innovation competition, and if these effects can be normatively reinforced in the light of the horizontal clauses of the Treaty and recital 23 of the EUMR, then it becomes clear that this approach can potentially provide significant (indirect) protection against negative externalities.

Fifth, the Commission's approach of (indirectly) including climate protection or environmental concerns if they are associated with a restriction of competition in the assessment of mergers in fact allows negative externalities to be taken into account independently of consumer welfare effects. A good illustration of this is the Commission's investigation into

[58] Deutscher and Makris (2023), pp. 370 and 376.
[59] For an overview, see van Dijk (2021), pp. 61–66; Haucap et al. (2023), pp. 238–259.

Aurubis/Metallo, a merger of two companies that were, inter alia, market leaders in the smelting and refining of copper scrap in the European Economic Area. One reason for the Commission's in-depth investigation was that it saw the possibility that the merged entity could have greater buying power in the purchase of copper scrap, which would lead to lower purchase prices and thus reduce the incentive to collect copper scrap and return it to the circular copper economy.[60] This is notable because the Commission appears to have taken it as an independent theory of harm (i.e. without focusing on consumer welfare effects) that the functioning circular economy would be disrupted by buyer power and that this would be accompanied by sustainability losses as recycled copper would be substituted for primary copper in the supply chain. Commissioner Vestager was quoted as saying that:

> [a] well-functioning circular economy in coper is important to ensure a sustainable usage of resources in the context of the European Green Deal. This is why we carried out an in-depth investigation.[61]

Ultimately, however, this did not matter as the Commission concluded that the merger was unlikely to have a significant impact on incentives to invest and innovate in the treatment of copper scrap or to lead to a reduction in the collection of copper scrap.[62]

Sixth and finally, it should be noted that the Commission's statements in the *Bayer/Monsanto* case referred only to preventing negative effects on climate and environmental sustainability through a tendency towards stricter merger control. The question of whether and under which circumstances merger control should be relaxed in order to achieve these objectives was not addressed. This aspect will be analysed next.

4 What We Do Not (Yet) See in the Commission's Practice: Relaxed Merger Control

EU merger practice has often focused on the question of whether, in which contexts and under which conditions a stricter or a conceptually extended merger control is possible or necessary to protect the climate and environmental sustainability. However, contrary to what sometimes has been assumed,[63] these objectives have so far barely played a role in the European Commission's practice as a justification for clearing a merger and thus for a tendency to relax merger control. Here, we will briefly outline three aspects that could lead to such a choice. Finally, we would like to point out that the Commission's option to clear a merger against commitments must not lead to an (implicit) lowering of the standard for the competitive control of mergers to achieve a practical balance with climate protection concerns.

[60] European Commission, Press Release (19 Nov 2019), Mergers: Commission opens in-depth investigation into proposed acquisition of Metallo by Aurubis ('Therefore, at this stage, the Commission is concerned that, following the transaction, the merged entity could hold a dominant position in the procurement of copper scrap for refining, giving it increased buyer power to negotiate lower prices for the copper scarp it purchases. By preventing competition on price, the merger could thus disrupt the normal functioning of the copper recycling industry, lowering the incentives for recyclers to collect and sort copper scrap').

[61] European Commission, Press Release (4 May 2020), Mergers: Commission clears Aurubis' acquisition of Metallo.

[62] Case COMP/M.9409 (4 May 2020), *Aurubis/Metallo Group Holding*, para. 871.

[63] Holmes (2020), p. 391.

4.1 (Green) Efficiency Gains (1): Scaling Up of Green Innovation

Efficiency gains from a merger may compensate for consumer welfare losses resulting from restrictions on competition. In its Merger Guidelines, the Commission requires that efficiencies be substantial, timely, merger-specific and verifiable.[64] As regards the significance of possible efficiencies, the guidelines state that 'the later the efficiencies are expected to materialize in the future, the less weight the Commission can assign to them'.[65] In analogy to the above-mentioned possible tightening of merger control for the protection of innovation,[66] a normative overlap must also be taken into account here: given the importance of climate protection and environmental sustainability emphasized in EU primary law, and recital 23 of the EUMR, 'green' innovations and their potentially significant future benefits for consumers must be given a high profile.

In practice, this could be important if the acquisition of an emerging competitor with an innovative 'green' business idea can help to scale up the idea and thus make the innovation available more quickly. This might be particularly the case in markets where business models benefit from network effects and economies of scale and scope. It is not uncommon for simple barriers to the rapid diffusion of new approaches, such as lack of access to capital or lack of a European or global distribution network, to be overcome by an acquisition by a major player. If, thus, in an individual case concentration helps to accelerate green innovation, this must not be disregarded.[67]

4.2 (Green) Efficiency Gains (2): Direct Reduction of the Carbon Footprint

It is easy to see how a merger could lead to productivity gains and thus lower costs but at the same time reduce the overall carbon footprint, for example by reducing energy consumption or air pollution from production facilities or transport of inputs.[68] Given the reduction in negative externalities, shouldn't this second aspect be given particular weight? The Merger Guidelines state that 'efficiencies … should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur'.[69] But, assuming that the notifying parties could demonstrate in a case that consumers in the market concerned attach a quantifiable value to the avoidance of negative externalities, should this not be taken into account in light of the primary law requirement to protect the climate and the environment?

On the question of tightening merger control, we have rejected this logic (as a follow-up to *Bayer/Monsanto*): merger control is designed to avoid distortions of competition caused by concentration, not to avoid negative externalities caused by concentration.[70] To be sure, the aspect of avoiding negative externalities as a defence was not at issue in the *Bayer/Monsanto* decision. Besides, the rationality of this decision does not apply (at least not necessarily) regarding this aspect. This can be seen from the fact that, for example, the climate-damaging effects of a merger owing to increased air pollution can, at least in

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[64] Horizontal Merger Guidelines (n 6), paras 76–88.
[65] Horizontal Merger Guidelines (n 6), para. 83.
[66] See above text accompanying n 37 and n 48.
[67] See Article 2(1)(b) EUMR.
[68] See Deutscher and Makris (2023), p. 5 note 22.
[69] Horizontal Merger Guidelines (n 6), para. 79.
[70] See above Section 3.2.

principle, be directly addressed by alternative regulatory instruments, namely emission limits. In contrast, the merger-specific avoidance of negative externalities (air pollution etc.) cannot (or at least cannot easily) be achieved through alternative regulatory instruments. In fact, it is hard to imagine that climate or environmental legislation could force concentration to reduce air pollution etc.

4.3 Vertical Upstream Integration and Compliance with Climate Standards

Companies operating in the EU often have an interest in ensuring that their upstream suppliers meet certain sustainability standards or at least provide sufficiently reliable information to identify and assess adverse impacts on climate and environmental sustainability. The incentive may be to protect the company's reputation, to meet voluntary commitments to customers, or to comply with legal requirements. The result can be a drive towards control of the entire supply chain through upstream integration. For example, the French luxury group LVMH has announced that '[t]o ensure responsible practices, LVMH will also continue vertical integration of farming and tanning, particularly for precious leathers'.[71]

Such a tendency can be accompanied by competitive risks in the form of input foreclosure at the expense of competing buyers.[72] Should the notifying parties be able to claim efficiency gains from increased climate protection by controlling the supply chain against competitive risks? I do not see why this should a priori be objectionable: indeed, upstream integration will usually be the surest way to achieve these objectives. It therefore follows from the argument in the previous section that 'green' efficiencies may also compensate for the harm that consumers suffer from restrictions on competition. Whether this is in fact the case should in principle depend on how consumers in the markets concerned value supply chain control and compliance with due diligence obligations along the supply chain.

When it comes to meeting legal requirements, it should be considered whether the legal requirement to meet a certain standard may obviate the need to measure how consumers value the enforcement of certain standards on suppliers. If the risk of non-compliance with certain regulatory standards due to merger-related market power can justify a prohibition,[73] then clearance should also be possible where market power through concentration can lead to compliance with regulatory standards.

4.4 Clearance of Mergers Based on Climate Commitments?

The European Commission will clear a merger subject to remedies if the remedies are sufficient to remove the competition concerns raised by the merger. The commitment to climate-friendly behaviour can therefore only be taken into account if it eliminates the potential for the merger to restrict competition. If the Commission recognizes the risk that concentration will reduce the potential for innovative products and technologies that protect the climate and the environment, then proposed commitments must precisely address this

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[71] LVMH (22 April 2021), 'The alliance of nature and creativity for a new vision of luxury: LVMH announces new objectives of LIFE 360 Environmental Strategy' (https://www.lvmh.com/news-documents/news/the-alliance-of-nature-and-creativity-for-a-new-vision-of-luxury-lvmh-announces-new-objectives-of-life-360-environmental-strategy) (accessed 9 April 2024).

[72] Lecchi (2023), p. 75.

[73] Deutscher and Makris (2023), p. 361, Table 1, Scenario (B).

point. Examples include the *Dow/DuPont* case mentioned above[74] and General Electric's proposed acquisition of Alstom's energy business. The Commission was particularly critical of the latter because Alstom's heavy-duty gas turbines division was in the process of developing a new and highly efficient product that promised significant benefits in meeting the climate change targets. The authority therefore cleared the merger only after the notifying parties had committed to divesting central parts of Alstom's heavy-duty gas turbines business to Ansaldo.[75]

However, to the extent that merger-related negative effects on the climate and environment do not raise any relevant competition concerns, the question of remedial measures does not arise from the outset. If increased freight traffic, emissions and noise are not in themselves a potential reason to block a merger under the SIEC test,[76] then it does not matter what remedies might compensate for such climate and environmental damage.[77] Furthermore, the offer of 'climate remedies' by the notifying parties must not be considered to be possible compensation for unrelated competition concerns. In other words, the possibility of a merger being cleared on the basis of commitments must not lead to an (implicit) lowering of the standard for the competition assessment of mergers by allowing for a practical balance with climate protection concerns. Lina Khan, chair of the Federal Trade Commission and not suspected of downplaying the climate crisis or being hostile to sustainability issues as such, took the same line:

> I've heard would-be merging parties make all sorts of commitments to be better corporate citizens if only we would back off from a lawsuit. If only we hold off on suing to block the merger, they promise they will reduce their carbon footprints, give back to the community and so on … Some in corporate America seem to think that the FTC won't challenge an otherwise illegal deal if we approve of its ESG impact. They are mistaken. The antitrust laws don't permit us to turn a blind eye to an illegal deal just because the parties commit to some unrelated social benefit.[78]

5 What Member States Can Do: Blocking and Clearing Mergers for Climate Protection

The Commission has ruled out *prohibiting* a merger under Article 2 of the EUMR because of its negative effects on the climate or environmental sustainability as such.[79] *Clearing* anticompetitive mergers based on their climate benefits has not yet been addressed by Commission practice. In any case, there is no explicit legal basis for this under the EUMR. However, both options are conceivable for Member States, albeit in different scenarios.

5.1 Blocking Mergers: Protection of Legitimate Interests Other than Undistorted Competition (Article 21(4) EUMR)

Under Article 21(4) EUMR, Member States may block a merger that has been cleared by the Commission if they consider it necessary 'to protect legitimate interests other than those

[74] See above Section 2.2.1.
[75] Case COMP/M.7278 (8 Sept 2015), *General Electric/Alstom (Thermal Power – Renewable Poer & Grid Business).* Ansaldo successfully completed the development of this new turbine and subsequently won several tenders against the two market leaders, Siemens and GE. Badea et al. (2021), p. 7, note 24.
[76] See above n 53 and Section 2.2.1.
[77] Cf. Holmes (2020), pp. 393–394.
[78] Khan (2022).
[79] See above Section 3.1.

taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law’. Of the interests explicitly legitimized in the provision, only ‘public security’ could be considered in the context of climate concerns. The Commission understands this not only as national security against external attacks but also as internal security. The understanding of the identical justification in various provisions of the EU’s fundamental freedoms, such as Articles 36, 45(3), 52(1) and 65(1)(b) TFEU, can provide guidance in this respect.[80] According to this, protection must be directed towards the fundamental interests of a society or state, namely the protection of its ‘economy … all its institutions, its essential public services and … the survival of its inhabitants’.[81] In light of this, it seems conceivable that tangible and significant threats to environmental sustainability and the climate are included here because of the associated risks to the population.

Furthermore, it is apparent that the Commission, if requested by a Member State, would have to recognize that the protection of climate and environmental sustainability is to be counted among the ‘other public interest[s]’ within the meaning of Article 21(4) EUMR.[82] This is supported by the Commission’s reasoning in the *Bayer/Monsanto* case:[83] if, on the one hand, the consideration of climate concerns and environmental sustainability in all policy areas is required by EU primary law but, on the other hand, the Commission does not see itself legitimized to consider these independent objectives under the EUMR, then it follows that the Commission must at least – where necessary – grant the Member States regulatory freedom in this sense on the basis of Article 21(4) EUMR.

This is apparently also the view of the European Parliament, which has combined the statement that the EUMR allows the Member States to take appropriate measures to protect the climate and sustainability with a call for the Commission to be given the same powers when assessing the impact of mergers on the internal market.[84]

5.2 Clearing Mergers for Reasons of General Interest Under Member States’ Law

The Commission’s prohibition of a merger is the last word in a case (unless it is successfully challenged in the European courts): while under Article 21(4) EUMR Member States may block mergers that have been cleared by the Commission, they cannot clear mergers that have been blocked by the Commission. We need to understand and accept that this was a deliberate choice made by the EU legislature.[85]

To gain an understanding of such a scenario, we can turn to Member State law. The so-called ‘ministerial authorization’ under German law provides a good illustration, because here reasons of general interest other than the protection of competition can lead to the clearance

[80] Notes on Council Regulation (EEC) 4064/89, re Article 21(3), para. 2 (‘The Commission considers that the three specific categories of legitimate interests which any Member State may freely cite under this provision are to be interpreted as follows: … There may be wider considerations of public security, both in the sense of Article 224 [now Article 347 TFEU] and in that of Article 36 [now Article 36 TFEU], in addition to defence interests in the strict sense’). Reprinted in Commission of the European Communities, Bulletin of the European Communities, Supplement 2/90, Community Merger Control Law, p. 25.

[81] Case C-72/83, *Campus Oil*, ECLI:EU:C:1984:256, para. 34. See also the judgments of the ECJ in various ‘golden shares’ cases, e.g. Case C-463/00, *Commission v. Spain*, ECLI:EU:C:2003:272, para. 72.

[82] See Burnside et al. (2021), pp. 147–148.

[83] See above Section 3.1.

[84] European Parliament, P9_TA(2024)0011, Competition Policy – Annual Report 2023, para. 26.

[85] Burnside et al. (2021), p. 142.

of a merger in a separate procedure: if the Bundeskartellamt prohibits a merger, the federal minister for economic affairs can nevertheless authorize it, inter alia, 'if the concentration is justified by an overriding public interest'.[86] Climate protection and environmental sustainability are recognized as an overriding public interest. In approving the *Miba/Zollern* merger, the minister referred to Article 20a of the Grundgesetz, the German Constitution, which states:

> Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals … by executive … action.

The merger had been prohibited by the Bundeskartellamt[87] but was subsequently approved by the minister, who felt that combining the companies' R&D would be beneficial to innovation in the field of plain bearings. The latter are important components for wind turbines, gas turbines and gas-fuelled ship engines, for example. Securing and promoting the potential for innovation was therefore seen as essential for the energy transition and thus for climate protection and the sustainable use of resources.[88]

Similar to the German 'ministerial authorization', in Spain the Council of Ministers can authorize a merger for reasons of general interest (other than the protection of competition) if it has been prohibited or cleared only subject to commitments by the Council of the National Competition Commission.[89] The list of relevant criteria includes, inter alia, 'protection of the environment'.[90] However, as far as can be seen, this instrument has not yet been used to approve mergers because of their positive impact on environmental sustainability.

6 The Commission's Merger Practice, Climate Action and the EU's Constitutional Framework

Merger control is an integral element of competition policy, which is particularly important at the Community level, where it has been regarded since the Treaty of Rome as an essential instrument for ensuring the integration of the common market. Therefore, even if merger control – unlike the prohibition of cartels and of abusive practices under Articles 101 and 102 TFEU – is not laid down as a specific[91] element of primary law, it nevertheless serves an objective enshrined in primary law. Recital 2 of the EUMR states that,

> [f]or the achievement of the aims of the Treaty, [ex-]Article 3(1)(g) [of the Treaty establishing the European Economic Community] gives the Community the objective of instituting a system ensuring that competition in the internal market is not distorted.

With the Lisbon Treaty (2007), the establishment of a system of undistorted competition is no longer listed as an activity[92] of the Union in the text of the Treaty but has been moved to

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[86] Section 42(1) of the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen – Act against Restraints of Competition).

[87] Bundeskartellamt, 17 Jan 2019, B 5 – 29/18, *Miba/Zollern*.

[88] Der Bundesminister für Wirtschaft und Energie, 19 Aug 2019, I B 2 – 20302/14–02, *Miba/Zollern*, paras 167–201.

[89] Article 60 of the Spanish Competition Act (Ley 15/2007, de 3 julio, de Defensa de la Competencia). See Mora-Sanguinetti and Hernández De Cos (2011), p. 486.

[90] Article 10(4)(d) of the Spanish Competition Act.

[91] Acquisitions by dominant companies may also be subject to control on the basis of Article 102 TFEU. See Case 6/72, *Europemballage and Continental Can v Commission*, ECLI:EU:C:1973:22.

[92] See Monti (2013), pp. 31, 38–44.

Protocol (No. 27), 'On the Internal Market and Competition'. However, the legal significance, in particular the hierarchical position of competition protection under EU law, has not changed.[93] Furthermore, Article 119 TFEU states that that activities of the Union for the purposes set out in Article 3 TEU (including the establishment of the internal market) shall include 'an economic policy which is … conducted in accordance with the principle of an open market economy with free competition'.[94]

However, the protection of the climate, environmental sustainability, and biodiversity also enjoy the status of EU primary law objectives.[95] Various horizontal clauses apply, in particular Article 11 TFEU, and recital 23 of the EUMR expressly requires that the Commission 'must place its appraisal within the general framework of the achievement of the fundamental objectives' referred to in (now) Article 3 TEU, which stipulates, inter alia, that the Union must aim at 'a high level of protection and improvement of the quality of the environment'. In light of all of this, would it not make sense for EU merger control to weigh climate protection as a potentially conflicting objective against the protection of competition? Would it not make sense to include climate risks or opportunities in the merger review as negative or positive externalities that ultimately affect consumers – albeit outside the market whose competitiveness is affected by the merger under review?

6.1 Recognition of and Respect for Differentiated Regulatory Competences as a Key Consideration

We have seen that in *Bayer/Monsanto* the Commission positioned the protection of competition as the sole overriding guiding principle for merger control. Accordingly, climate protection aspects should not be directly taken into account in merger control, either quantitatively by offsetting out-of-market effects against consumer welfare effects or by means of a qualitative balancing. Even if this is in line with the (original) EU legislature's ideas, shouldn't the above-mentioned superimposition of primary law values allow for a different approach?

The Commission opposes this, referring to the 'principle of conferral of powers':[96] where a measure of secondary law is based on a competence conferred upon the EU legislature for a specific policy area, concurring policy objectives, even if they are enshrined in EU primary law, should not be allowed to directly determine the regulatory level imposed by the implementation of that measure. Otherwise, institutional, substantive or procedural requirements for rule-making under the Treaties could be undermined.[97]

This may concern the horizontal distribution of regulatory power at EU level but also the vertical distribution between the EU and the Member States, which may take different forms depending on the policy area. The EUMR is based on (now) Articles 103 and 352 TFEU. In

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[93] See Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, ECLI :EU: C:2011:83, para. 20; BGH 10 Feb 2011, I ZR 136/09, BGHZ 188, 326; Juris, para. 33 – *Flughafen Frankfurt-Hahn*.

[94] Note that Articles 120 and 127 TFEU explicitly link this premise to the objective of 'efficient allocation of resources'.

[95] See Ackermann (2023), p. 3.

[96] See Article 5 TEU and Article 7 TFEU.

[97] Case COMP/M.8084 (21 March 2018), *Bayer/Monsanto*, paras 3014–3018.

addition, Article 114 TFEU could be used as a basis for procompetitive legislative measures including merger control.[98]

For climate action, the EU legislature can rely primarily on Article 192 TFEU, the power to impose measures to achieve environmental objectives as laid down in Article 191 TFEU. This provision has been the basis for a wide range of pieces of legislation that are also in the interests of climate protection. These include measures to limit industrial emissions,[99] to protect air quality,[100] to create an EU-wide scheme for greenhouse gas emission allowance trading[101] and to limit emissions in particular contexts, for example by setting CO_2 emission performance standards for new passenger cars.[102] In addition, the legislature has relied on internal market competence under Article 114 TFEU, e.g. in the case of the Taxonomy Regulation[103] in the field of sustainable financing and investment. Moreover, other bases of competence may also be relevant, such as Article 39 TFEU (agriculture) or Article 168 TFEU (health protection).[104]

6.2 Implication: Climate Protection Through Conceptually Extended Merger Control vs. Climate Protection Through Relaxed Merger Control

If the key argument against a stronger consideration of climate action, environmental sustainability etc. in merger control is respect for the differentiated allocation of regulatory competences, then it follows that a distinction must be made between two scenarios: conceptually extended vs. relaxed merger control.

6.2.1 Conceptually Extended Merger Control Risks Undermining Differentiated Exercise of Regulatory Powers

If the Commission were to use merger control as a lever to (indirectly) impose certain requirements on companies in the interest of climate protection, for example on emissions, it could as a matter of fact undermine the ordinary legislative procedure provided for in Article 192(1) TFEU.[105] It could also undermine a deliberate decision by the EU legislature not to specify a particular climate-related aspect at Union level. Given the shared competence of the Union and the Member States in the field of environmental regulation,[106] and in accordance with the principle of subsidiarity,[107] it could be considered beneficial to maintain, depending on the circumstances, the scope for decentralized rule-making to take account of different regional conditions, specific ecological features etc. Such a regulatory choice would

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[98] Franck et al. (2021), pp. 43–55.

[99] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (recast), OJ L 334/17.

[100] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 152/1.

[101] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ 2003 L 275/32.

[102] Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) No 510/2011 (recast), OJ 2019 L 111/13.

[103] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ 2020 L 198/13.

[104] See Case COMP/M.8084 (21 March 2018), *Bayer/Monsanto*, para. 3015.

[105] In certain sensitive areas, Article 192(2) TFEU even requires unanimity in the Council.

[106] Article 4(1), (2)(e) TFEU

[107] Article 5(1) and (3) TEU.

be undermined if the Commission effectively implemented certain (stricter) rules through merger control.

If it is indeed deemed necessary to address merger-specific challenges separately, this could be done through a second (regulatory) merger barrier, which could be implemented on the basis of the regulatory power to combat climate change. As we have seen,[108] this is provided for in Article 21(4) EUMR – namely through intervention at Member State level. Such a parallel barrier could also be set up at Union level – as proposed by the European Parliament[109] – within the framework of its competences. The EU Foreign Subsidies Regulation[110] provides an example of this.

Against this background, in order to respect the exercise of differentiated regulatory competences, climate protection should not be implemented by means of climate-related extended control under the EUMR. By 'extended' merger control, I mean a conceptual extension of the assessment beyond the normative framework provided by the EUMR. This would be the case, for example, if (possible) negative externalities caused by the merger (such as increased emissions, either directly or through increased energy consumption) were included in the consumer welfare analysis under the SIEC test, so that business activities that are not prohibited by, for example, current emissions legislation could be prevented by (extended) merger control.

However, 'stricter' merger control should not be seen as problematic in the sense mentioned above if the Commission readjusts certain parameters within the conceptual and normative framework of the EUMR and this leads to stricter practice. This would be the case, for example, if the Commission attached greater importance to innovation competition or the protection of future (potential) competition in light of the primary legal requirement of climate protection. If, for example, the analytical framework for assessing the competitive risks of a merger were adapted by considering a longer time horizon[111] and also accepting a higher risk of false positives, this would certainly still be within the normative framework of the EUMR and would not run the risk of undermining the differentiated allocation of regulatory competences. All of the Commission's efforts to take account of climate change, environmental sustainability etc. in merger control, as outlined above,[112] are therefore clearly within the scope of its competences as laid down in the Treaties and reflected in the EUMR.

6.2.2 The Need to Allow for Relaxed Merger Control in Order to Respect Differentiated Regulatory Competences

As we have seen, there are scenarios where protecting the climate and environmental sustainability may make it necessary to clear a merger that would under a purely competition-based test have been blocked or cleared with commitments only.[113] Looking at these scenarios from the perspective of respecting differentiated regulatory competences,

[108] See above Section 5.1.
[109] See above note 84.
[110] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, OJ 2022 L 330/1.
[111] See above notes 37 and 48 and accompanying text.
[112] See above Section 2.
[113] See above Section 4.

the implications are different from those of the call for stricter or conceptually extended merger control discussed in the previous section: if the competence to regulate climate change (whether at EU or national level) is to be respected, the purely competition-based standard cannot simply be allowed to prevail. Otherwise, the objective of climate protection as laid down in the primary law of the EU would be marginalised.

This is because neither the EUMR nor any other provision requires mergers blocked by the Commission (or cleared only with commitments) to be cleared on climate change grounds (without commitments). To pursue public policy goals, Article 21(4) EUMR allows a second (Member State) barrier for mergers, but no clearance by Member States (even if they have the power for climate action regulation).[114] At EU level, there is no equivalent to the German ministerial authorization or the Spanish Council of Ministers authorization, which would allow a merger to be approved for climate protection purposes.[115] But could the EU legislator not remedy this shortcoming?

First, it should be noted that such an instrument could not be based, certainly not solely, on EU environmental policy and thus on Article 193 TFEU. Because this would ultimately give the Commission or another body the power to define (i.e. lower) the level of competition protection in mergers. Ultimately, this would amount to a trade-off between the interests of climate protection and the interests of competition protection, with no a priori priority given to one or the other. In contrast, such an instrument could be adopted on the basis of Articles 103 and 352 TFEU, the current legal basis of the EU Merger Regulation. This is because the horizontal clause in Article 11 TFEU in particular requires and allows environmental and climate protection concerns to be taken into account in merger control.[116] However, this represents a very high hurdle in practice owing to the unanimity required in the Council. The objective of effectively pursuing environmental policy, which can in principle be implemented in the ordinary legislative procedure, is thus (indirectly) only partially taken into account at best.

Second, the climate-friendly merger-specific 'green' efficiencies discussed here cannot simply be replicated by EU legislation:[117] the possibility that two companies would be forced to merge because of climate regulations seems purely theoretical. Hence, if the merger were prohibited on competition grounds, with the argument that climate protection could be pursued in parallel on the basis of the competences available for this purpose, this would in practice mean that the merger-specific climate benefits would be forgone.

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[114] See above Section 5.2.

[115] Admittedly, the EU legislature could remedy this situation. However, this would (arguably) require an amendment to the EU Merger Regulation, which, at least from the point of view of the Commission (which would have to initiate such a reform) would only be possible on the basis of Articles 103 and 352 TFEU and would therefore require unanimity in the Council.

[116] For this reason, there would be no need to combine the competence for implementing competition policy with the competence for implementing environmental policy.

[117] In my view, the argument in favour of a (possible) weakening of merger control for reasons of climate protection is stronger at this point than in the case of Article 101 TFEU, where a similar question arises as to why companies should be allowed to coordinate in order to implement climate protection standards (and thus weaken the level of competition protection) when the legislator could also set such standards by regulation. Ackermann (2023), p. 12, has argued that Member State or EU legislation may prove inadequate for sustainable environmental protection due to the global and centralised nature of the task. See also Monti (2020), p. 126, stating that 'the role of private actors in complementing regulatory efforts is by now well-established' (with reference to Scherer, Palazzo and Matten (2014).

Therefore, in order to avoid climate change considerations, which argue for a more lenient approach to a merger, being a priori rendered irrelevant by this framework, it must be possible to take them into account in the assessment of individual cases under the EUMR. Recognizing this does not contradict the Commission's findings in the *Bayer/Monsanto* case: the statement that only the protection of competition empowers the Commission to intervene under the EUMR,[118] which is placed at the centre of the reasoning in this case, is obviously only meant to imply that climate protection etc. cannot justify stricter merger control than would be required from a purely competition point of view. In this case, the Commission had no reason to decide how to deal with the situation in which climate protection or environmental sustainability might require more lenient merger control.

Notifying parties must therefore remain free to put forward climate benefits from a merger. It must be possible that these benefits, such as the avoidance of negative externalities that materialize for the benefit of individuals beyond the competitively affected markets, can be taken into account even beyond the standard consumer welfare analysis under the SIEC test. In the interest of effective and efficient climate protection, the fact that the companies themselves are best placed to identify the 'green efficiency gains' associated with a merger can thus be exploited. However, companies will have to demonstrate that these benefits are substantial, merger-specific and verifiable, and thus meet the requirements of a 'standard' efficiency defence.[119] With regard to the time horizon, a distinction has to be made: on the one hand, we can demand a timely effect in terms of reducing emissions, saving energy etc. On the other hand, when balancing these effects against possible anticompetitive effects, the long-term positive effects on the climate must be taken into account.

The approach proposed here is not to transform the EUMR into an instrument that serves to pursue objectives other than the protection of competition. It is simply to ensure that merger practice leaves room for the pursuit of potentially conflicting objectives on the basis of other regulatory powers (whether of the EU institutions or of Member States). This means that the Commission must be given a wide margin of manoeuvre in the necessary assessment of whether, for climate protection reasons, a somewhat weaker merger control is appropriate in individual circumstances. Consequently, the Commission has a great deal of leeway in the technical implementation of such an assessment. It is not necessarily the case that climate issues, even if accurately substantiated by the notifying parties, will in fact influence the final decision.

Finally, it should be emphasized that there is no institutional overload in requiring the Commission to weigh up incommensurable interests.[120] Certainly, there are administrative costs involved. Yet, ideally, institutional arrangements should be found that avoid or minimize the scope of such trade-offs or at least provide transparent and clear guidelines for dealing with them. In principle, however, a democratically legitimized competition authority such as the Commission, which is accountable to the European Parliament, must be able to do this. Another question, which we will leave for another time, is whether an independent procedure

[118] See above n 53.
[119] See above n 64.
[120] See Holmes (2020), pp. 397–401.

with the possibility to approve mergers for climate protection reasons etc. would actually be preferable and how such a procedure could be structured at EU level.[121]

7 Concluding Remarks

Given the huge delta between what is currently being done to combat climate change and the level of climate action needed to ensure the survival of our civilization, it is not surprising that all the regulatory mechanisms at the Union's disposal are being examined to see what contribution they can make. However, despite the urgency of the matter, it remains crucial to respect the constitutional framework for intervention. This will ensure the democratic legitimacy and accountability of climate change policies. As these measures can have a profound impact on civil liberties and have significant redistributive effects, this is crucial for maintaining social peace. Against this background, it is not surprising, and indeed entirely justified, that the differentiated allocation of regulatory competences is at the centre of the discussion on whether and how climate protection should be taken into account in the European Commission's merger control practice. This paper makes four key points to help find the right framework.

First, there are developments in which competition protection and climate protection go hand in hand and which in principle do not require any normative adjustments. This applies, for example, to market definition and the assessment of closeness of competition with regard to possible unilateral price effects. All that is required is sensitivity and consideration of consumer preferences for climate-friendly products. If merger control is tightened in this respect, this may lead to more favourable market conditions for these products and thus to greater consumption.

Second, we see scenarios where competition protection and climate protection also converge within the conventional consumer welfare paradigm but where at the same time some shifts of a normative nature can be observed. This can be seen, for example, in the Commission's theory of harm of eliminating close competition in 'innovation spaces' in the *Dow/DuPont* and *Bayer/Monsanto* cases. The same applies to the Commission's willingness to monitor acquisitions of emerging competitors more closely, in particular with regard to the protection of 'green' innovation and technology, as demonstrated in the *Norsk Hydro/Alumetal* case. While stricter merger control in this respect fits perfectly into the conventional consumer paradigm, a workable analytical framework may require certain normative adjustments. This may concern the time horizon to be considered, which needs to be significantly extended. It may also require a lowering of the standard of proof and/or shifting the burden of proof to the notifying parties in certain situations, thereby accepting a higher risk of false positives.

Third, the Commission's reasoning in the *Bayer/Monsanto* case rules out the possibility of tightening merger control by taking account of negative externalities such as climate damage, even if these are measured in terms of consumer welfare. In doing so, the

[121] The risk of lobbying and horse-trading by national representatives – whether in the European Parliament, the Council or any other institution empowered to do so – on the outcome of different merger cases should be avoided at all costs.

Commission respects the differentiated distribution of regulatory competences through the EU constitutional framework. Climate concerns must therefore not be implemented through a conceptual extension of the assessment of mergers beyond the normative framework of the EUMR, which is in fact characterized by the protection of competition as the sole overriding normative principle and objective. However, this insight should not obscure the fact that, in practice, possible merger-specific negative externalities can also be taken into account to a considerable extent, namely by indirectly linking climate protection concerns to potential restrictions of competition. The theory of harm analysed by the Commission in the *Aurubis/Metallo* case is an illustrative example of this.

Fourth, under the current merger control framework at EU level, merger-specific positive effects on climate concerns need to be taken into account, even if they are not captured by the consumer welfare paradigm. Otherwise, merger practice would not sufficiently safeguard the pursuit of (possibly) conflicting objectives such as climate protection based on other regulatory powers. There is no viable alternative because, first, the option to clear mergers on climate change grounds could not be implemented (solely) based on environmental powers and, second, merger-specific 'green' efficiencies are not easily replicable through (environmental) legislation. This finding does not contradict the Commission's findings in the *Bayer/Monsanto* case, which concerned only stricter or conceptually broader merger control. The Commission has a wide margin of discretion as to the extent to which merger control should be relaxed in order to preserve concurrent objectives of equal normative importance, such as the fight against climate change.

Finally, it should be emphasised that, while similar questions to those addressed here may arise in relation to other policy objectives that may conflict with the protection of competition, the answers are not necessarily the same: on the one hand, this analysis was based on a detailed analysis of the EU constitutional framework with its vertically and horizontally differentiated distribution of competences, specifically with regard to merger policy and climate change mitigation policies. On the other hand, the fight against climate change has an especially prominent normative weight, as the survival of humanity is at stake. It is therefore particularly the protection of fundamental rights that obliges the EU institutions to make use of any regulatory leeway for climate protection.[122]

Bibliography

Ackermann T (2023) Der Einfluss des Umweltschutzes auf das EU-Kartellrecht. In: Pechstein M et al. (eds) Festschrift für Rudolf Streinz. C. H. Beck, pp 3–15

Badea A, Bankov M, Da Costa G, Cabrera JE, Marenz S, O'Connor K, Rousseva E, Theiss J, Usai A, Vasileiou S, Winterstein A, Zedler M (2021) Competition policy in support of Europe's green ambition. European Commission, Competition Policy Brief 2021-01

[122] In *KlimaSeniorinnen*, the European Court of Human Rights (ECtHR) relied on the right to respect for private and family life enshrined in Article 8 of the European Convention on Human Rights (ECHR) to justify the obligation to take adequate measures against climate change. ECtHR Grand Chamber (9 April 2024), *Case of Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Application no. 53600/20). Although the EU is not a party to the ECHR, this concept can be applied *mutatis mutandis* under Articles 7 and 52(3) of the EU Charter of Fundamental Rights, which the EU institutions must respect (Article 6(1) TEU).

Burnside A, De Backer M, Strohl D (2021) Can environmental interests trump an EUMR decision? In: Holmes S, Middelschulte D, Snoep M (eds) Competition law, climate change & environmental sustainability. Concurrences, pp 139–152

Crawford G, Valletti T, Caffarra C (2020) How tech rolls: potential competition and 'reverse' killer acquisitions'. VoxEU. https://cepr.org/voxeu/blogs-and-reviews/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions

Cunningham C, Ederer F, Ma S (2021) Killer acquisitions. Journal of Political Economy 129:649–702

Deutscher E, Makris S (2023) Sustainability concerns in EU merger control: from output-maximising to polycentric innovation competition. Journal of Antitrust Enforcement 11:350–399

Denicolò V, Polo M (2018) Duplicative research, mergers and innovation. Economics Letters 166:56–59

Denicolò V, Polo M (2019) The innovation theory of harm: an appraisal. Antitrust Law Journal 82:926–953

Federico G, Langus G, Valletti T (2017) A simple model of mergers and innovation. Economics Letters 157:136–140

Federico G, Langus G, Valletti T (2018) Reprint of: horizontal mergers and product innovation. International Journal of Industrial Organization 61:590–612

Franck J-U, Monti G, de Streel A (2021) Options to strengthen the control of acquisitions by digital gatekeepers in EU law. TILEC Discussion Paper, DP 2021-016

Jullien B, Lefouili Y (2018) Horizontal mergers and innovation. Journal of Competition Law and Economics 14:364–392

Haucap J, Podszun R, Hahn R, Kreuter-Kirchhof C, Rohner T, Rösner A, Offergeld P, May A (2023) Wettbewerb und Nachhaltigkeit in Deutschland und der EU. Studie im Auftrag des Bundesministeriums für Wirtschaft und Klimaschutz

Holmes S (2020) Climate change, sustainability, and competition law. Journal of Antitrust Enforcement 8:354–405

Khan L (2022) ESG won't stop the FTC. Wall Street Journal, 21 December. https://www.wsj.com/articles/esg-wont-stop-the-ftc-competition-merger-lina-khan-social-economic-promises-court-11671637135#comments_sector

Lecchi E (2023) Sustainability and EU merger control. European Competition Law Review 44:70–80

Monti G (2013) EU competition law from Rome to Lisbon – social market economy. In: Heide-Jorgensen C, Bergquist C, Neergard U, Troels Poulsen S (eds) Aims and values in competition law. DJØF, pp 27–66

Monti G (2020) Four options for a greener competition law. Journal of European Competition Law & Practice 11:124–132

Motta M, Tarantino E (2017) The effect of horizontal mergers, when firms compete in prices and investments. BSE Working Paper 987

Mora-Sanguinetti JS, Hernández De Cos P (2011) An assessment of the reform of the Spanish competition framework. World Competition 34:477–493

Rubinfeld DL, Hoven J (2001) Innovation and antitrust enforcement. In: Ellig J (ed.) Dynamic competition and public policy: technology, innovation, and antitrust issues. Cambridge University Press, pp 65–94

Scherer AG, Palazzo G, Matten D (2014) The business firm as a political actor: a new theory of the firm for a globalized world. Business & Society 53:143–156

van Dijk T 2021) A new approach to assess certain sustainability agreements under competition law. In: Holmes S, Middelschulte D, Snoep M (eds) Competition law, climate change & environmental sustainability. Concurrences, pp 55–68