



A Critical Discussion on the Co-existence of Efficiency and Environmental Protection Goals in EU Competition Law

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Abstract. There has been a wide discussion about whether efficiency and environmental protection goals should co-exist in EU competition law. This article argues that efficiency and environmental goals should co-exist. This is because the traditional efficiency-only analysis is likely to cause market failure and EU constitutional provisions have left room for environmental considerations to be included. This article explores how efficiency and environmental goals co-exist from the perspective of economic analysis and competition practice with a focus on merger control and horizontal agreement. Specifically speaking, environmental benefits should be a part of consumer welfare and only be evaluated when anti-competitive effects exist by investigating consumers how much they are willing to pay for environmental services. In merger control, whether to allow a merger should be evaluated on a post-merger price internalizing environmental externalities and whether the post-merger production method is green. For horizontal agreements, sustainable horizontal agreements should be permitted provided that they meet the conditions in Article 101(3) TFEU, despite the risks of reducing efficiency.

Keywords: Consumer welfare, Efficiency, Environment, Coexistence, Merger control, Horizontal agreement.

1 Introduction

It has been argued that competition law can not consider environmental protection legitimately. Based on the Chicago competition theory, competition enforcement aims to maximize efficiency and consumer welfare.¹ Consumer welfare is defined by efficiency economically.² Consumer welfare is maximal when efficiency is maximal. The competition law is therefore unrelated to other social concerns (eg. environmental protection) due to its overriding efficiency goals. The ordoliberal theory has also been interpreted as requiring a separation of efficiency and non-efficiency goals.³ Under such an interpretation, the spirit of the EU is to sustain economic freedom while other social goals should leave to the individual national level. In addition, the environmental goals can

be subjective and bring uncertainty to competition enforcement. As a result, it is better for EU competition law solely focuses on efficiency.

By contrast, there is a perspective suggesting that competition law can be polycentric and environmental protection is one of its goals.⁴ The polycentric approach deals better with the interplay of complex social factors. It makes competition law part of the solution not the problem of environmental problems.⁵ The approach makes environmental concerns part of consumer welfare and adds environmental considerations in competition law enforcement. In such a way, the consumer may enjoy efficiency and a good environment at the same time.

As a result, there is a need to determine whether environmental goals should co-exist with efficiency goals. This will be discussed in the following sections.

2 Whether to Co-Exist or Not

2.1 Economic Analysis

From an economic perspective, market failure often occurs for different reasons.⁶ Environmental impact can be one of them.⁷ I argue that traditional efficiency analysis has led to market failure for a lack of environmental considerations. Firstly, it fails to take into account the negative externalities brought by environmental loss.⁸ Environmental damage is causing heavy social costs. According to the European Environmental Agency, air pollution alone costs €277 and €433 billion equivalent to 2-3% of the EU GDP in 2017 Europe.⁹ Such a great cost is ignored in the traditional efficiency analysis. The consumers pay less than the real cost of products and society bears the extra cost. Secondly, it inhibits all producers from conducting clean production. Disregarding the impact of environmental factors on consumer welfare will not lead to neglect of sustainability by just one producer but by all producers. Producers are reluctant to raise their production costs if other producers do not invest in green production. This makes sustainability nowhere to go, making everyone worse off. Thirdly, traditional efficiency analysis aggravated the inaction against sustainability. There exists an information asymmetry about what would happen if environmental considerations are taken into enforcement, also known as “eco-paradox”.¹⁰ For example, fears about personal welfare sacrifices that get no payback still prevail though concerns about global warming persist. Therefore, it is necessary to add environmental protection to the competition decisions to explore what difference can make to the environment and break the inaction.

2.2 Legal Analysis

I argue that the EU constitutional provisions leave room for environmental considerations to be added to competition decisions.¹¹

Article 3 of the Treaty on European Union (TEU) stipulates that the EU works for the “sustainable development” of Europe and the improvement of environmental quality. Article 11 of the Treaty on the Functioning of the European Union (TFEU) rules that environmental protection must be integrated into the interpretation of the EU’s

policy and activity. The two provisions provide a legal foundation for taking environmental factors into competition decisions.

With the legal foundation established by TEU and TFEU, environmental economics should apply to EU competition law.¹² Articles 101 and 102 of TFEU can be tools for integrating environmental consideration with efficiency. As two commonly used provisions in competition enforcement, Articles 101 and 102 of TFEU are normally interpreted within the efficiency context but they can be interpreted legally with environmental consideration based on Article 3 of TEU and Article 11 of TFEU. For example, despite efficient production, low prices from unsustainable development may be still seen as unfair trading prices under TFEU 102 (a). Sustainable horizontal agreements may be permitted based on Article 101(3) despite some degree of potential anti-competitive effects. Therefore, rather than being a hindrance, the two provisions can be interpreted to promote environmental goals.

3 How Can Efficiency and Environmental Goals Coexist

3.1 Economic Analysis: Environmental Consideration and Consumer Welfare

Environmental benefits should be part of consumer welfare. As purportedly the ultimate goal of EU competition policy, the meaning of consumer welfare remains unclear.¹³ Based on the economic and legal analysis above, environmental impacts should be included. To be specific, internalising environmental externalities in economic analysis helps to avoid market failure and also cater to the constitutional provisions of the EU. The Dutch Competition Authority (ACM) has already recognized sustainability values as consumer welfare in the “Chicken of Tomorrow” case. As a result, despite a slight increase in the market price, consumer surplus may still increase if the environmental value increases.¹⁴ Critics may argue that environmental considerations mean more uncertainty.¹⁵ This makes competition decisions difficult to make. However, the environmental factors can largely be quantified as discussed below. This makes environmental evaluation objectively measurable, reducing the difficulty of making competitive decisions. The environment is also related to fundamental human rights to health. It is disrespectful of human rights to ignore human health simply because of the difficulty of making decisions. Therefore, the difficulty of decision-making should be overcome.

After the establishment that environmental considerations should be included in consumer welfare, there is a necessity to determine when to evaluate environmental considerations. I argue that environmental considerations should be evaluated only when the transaction has an anti-competitive effect. Competition law should have a main goal or it will completely replace environmental law and becomes the “law for all”. For example, the application of specific environmental protection law would be more appropriate than competition law if a merger has no anti-competitive effects but may cause environmental damage. Actually, environmental factors should be only used as an assist in determining whether a transaction should be restrained provided that it has an anti-competitive effect. For instance, it can be difficult to make a decision simply

based on efficiency. Assume a dominant company acquire a small innovative company to eliminate competition, the short-term lower prices (allocative efficiency) and potentially fewer future innovation (dynamic efficiency) conflicts. In such a case, EU competition enforcers may consider the environmental effects of the transaction and make a comprehensive decision.

It is necessary to measure the impact of environmental factors to determine their influence. Quantifying environmental factors is a good measurement. There are normally two approaches to quantifying the environmental value.¹⁶ The first is to evaluate customers' behaviour according to the environmental influence of the market service. For example, more tourists would come if a scenic spot has a better environment. The environmental value can be measured through the increase in tourists' travel costs. The second is to ask customers directly. In the approach, a market where environmentally affected consumers pay for environmental value should be assumed. Then, a sample of the population can be selected to ask how much they are willing to pay. I argue that the second approach should be preferred because the first approach can not estimate the full environmental value. The environment has mainly four types of value: "use value", "existence value", "option value" and "quasi-option value". The use values mean the experience of using environmental services. The first approach evaluates consumer behaviour to determine environmental value. Consumers' behaviour change is primarily to experience improved services as a result of environmental improvements, which is the use value of the environment. Therefore, the first approach can only measure the use value. By contrast, other values are difficult to measure. For example, the option value means the value for future use. Consumers pay more mainly for timely enjoyment brought by environmental improvement, not to have the option to continue to enjoy the service in the future. Thus, the customers' options for future environmental enjoyment can not be measured from the first approach. Therefore, the second approach is preferred to measure environmental considerations quantitatively.

3.2 Competition Practices: Merger Control and Horizontal Agreement

After integrating environmental considerations into consumer welfare, this economics should be the base for competition practices. The merger control and horizontal agreement are two common competition practices. I will discuss the coexistence in competition practices with the two practices as examples.

In merger control, the post-merger product price should be the focus. After integrating environmental considerations into consumer welfare, the price should internalize environmental externalities. The EU competition enforcers should take a holistic view of the product price (production costs plus environmental costs). A merger, therefore, may not be allowed if it reduces production costs but increases environmental costs. In addition, the EU enforce should pay attention to post-merger production methods. Acquisition of a rival with environmental-friendly technology can help to promote green production while the merger with a highly polluting producer may increase environmental externalities. These production methods can impact future environmental costs greatly. Thus, the EU competition enforcer can require green commitments if there is an expectation for future polluting production.

In horizontal agreement, efficiency considerations can be compromised for environmental considerations when necessary. This is because that horizontal agreements that may be detrimental to efficiency can be allowed due to environmental considerations under Article 101(3) TFEU. Article 101(1) TFEU can limit certain horizontal agreements based on efficiency concerns. However, Article 101(3) can lift the limitations when the agreement meets four conditions: (1) it improves production or promotes economic or technical progress; (2) consumers receive a fair share of benefits; (3) the restriction in the agreement needs to be necessary; (4) it must not eliminate competition. Certain sustainable agreements can meet the conditions under Article 101(3) for the reasons below.

Firstly, greener production can be considered production improvement or technical progress. For example, an agreement to close down pollution facilities brings clean technology upgrades and greener production. Secondly, sustainable agreements can make the customers enjoy a fair share of environmental benefits with lower environmental costs. An opposing view may be that not all environmental benefits count as justification. The Guidelines on Article 81(3) TEC (Article 101(3) TFEU) rule that the benefits of agreements should “in principle” be assessed only in the “relevant market the agreements related”. Excluding environmental benefits arising from the market unrelated to the agreement, the leftover environmental benefits may not be great enough to count as a “fair share”. The agreements may even make customers in related markets pay more for products. However, “the guideline does not have the force of law”. Article 101(3) TFEU does not have the requirement to confine benefits within the same market. The phrase “in principle” also implies that certain exceptions exist and avoiding “environmental disasters” should be one of them. In addition, the environmental externality is “unfair” itself because the customers in the relevant markets get the benefits while society bears the costs. It would be unjust to confine the “benefits of fair share” to only consumers in the relevant market who are the cause of the problem. Thirdly, sustainable agreements can be necessary. The necessity requirement is a big obstacle to Article 101(3) TFEU applications because specialized environmental regulation can be a better way to reduce environmental externalities, and making sustainable agreements may be unnecessary. However, regulation has a lag time and horizontal agreements can help achieve sustainable goals without explicit regulation. For example, the rules allow for 100 tons of CO₂ emissions, but only less than 50 tons of emission can effectively reduce the environmental price. Sustainability agreements can then be used to further reduce CO₂ emissions to less than 50 tons. Therefore, sustainability agreements can be necessary as a complement to environmental regulation. At last, sustainable agreements can meet the condition that no possibility of eliminating competition exists. Therefore, sustainable horizontal agreements may not be bound by efficiency considerations when the conditions are met.

4 Conclusion

To conclude, I argue that efficiency and environmental goals should coexist in EU competition law. The economic reason is the lack of environmental consideration in

economic analysis is causing market failure and the legal reason is that both the constitutional and competition law provisions in the EU leave room for the inclusion of environmental considerations. From the economic perspective, environmental considerations should be integrated into consumer welfare. However, the environmental considerations are only evaluated when anti-competitive effects exist. A good way to evaluate environmental considerations is by quantifying environmental effects by asking consumers how much they are willing to pay for environmental services. From the view of competition law practice, I mainly discussed “merger control” and “horizontal agreement”. For merger control, the EU enforcer should decide whether to allow a merger based on a post-merger price that internalises environmental externalities and pay attention to whether the post-merger production is green. For horizontal agreements, horizontal agreements for sustainable goals should be permitted if they meet the conditions in Article 101(3) TFEU, though they may damage efficiency to some extent. By achieving such a balance, efficiency and environmental goals can integrate well into EU competition law.

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