

Sustainability as a quality dimension of competition: protecting our future (selves)

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ABSTRACT – It is considered by many that sustainability considerations should not be taken into account by competition authorities when analysing the effects of a conduct or transaction. This short article maintains that the impact on sustainability of certain types of conduct or transactions can be considered in the analysis of their price or non-price effects on quality, choice and innovation. This approach has the advantage of bringing sustainability considerations within the traditional competitive assessment framework, as opposed to characterising them as public policy considerations that are outside the realm of competition law. This can be done by means of a relatively light fine-tuning of the current analytical toolbox and of the design of competition investigations, and it can help ensure that competition on sustainability, when it affects demand and supply in a particular market, is preserved.

What is common to the greatest number has the least care bestowed upon it.
Aristotle, The Politics and the Constitution of Athens

1. The interplay between sustainability and competition policy

While the first UN Conference on Environment took place in Stockholm already in 1972, only in more recent years has climate change become perceived as the existential threat that it is now recognised to be by the international community.¹ In 2015, all United Nations Member States adopted the 2030 Agenda for Sustainable Development, calling governments to take action for the implementation of strategies aimed at achieving 17 Sustainable Development Goals (SDGs). Among other goals, the SDGs include promoting sustainable agriculture, providing affordable and clean energy, and fighting climate change.² One year later, in 2016, the Paris Agreement entered into force.³

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¹ William J. Ripple, Christopher Wolf, Thomas M. Newsome, Phoebe Barnard, William R. Moomaw, and 11,258 Scientist Signatories from 153 Countries, “World Scientists’ Warning of a Climate Emergency”, 70 *Bioscience* 1 (2020) <https://academic.oup.com/bioscience/article/70/1/8/5610806>.

² UN Sustainable Development Goals (2015) <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>.

³ 189 countries have thus far joined the Paris Agreement, United Nations Framework Convention on Climate Change (2016) https://sustainabledevelopment.un.org/content/documents/17853paris_agreement.pdf, which aims, inter alia, at “holding

The European Union (EU) is at the forefront of this international response. Discussions around the compatibility of competition and green growth goals have been ongoing in Europe at least since the introduction of sustainable development as an overarching objective of EU policies in the Treaty of Amsterdam in 1997. Even before, the intersection between competition and sustainability had surfaced in a few cases (Exxon/Shell⁴ and Philips-Osram⁵), and was later explored by the European Commission in the landmark case CECED⁶ in 2000, followed by DSD in 2001.⁷ Article 11 of the TFEU now provides for the integration of environmental protection obligations into EU policies and, according to the European Green Deal, the EU objective is to become climate-neutral, with net-zero greenhouse gas emissions, by 2050.

Against the backdrop of a broader policy debate on the sustainability of our free market economy model, where calls for ‘fairer’ competition outcomes also emerge,⁸ the question arises of whether the objectives of environmental protection and competition are at odds. Many raise doubts on whether sustainability may be considered under the consumer welfare standard and whether, in particular, competition authorities are well placed to take it into account when they are analysing anticompetitive practices or transactions.⁹

Drawing from European Commission’s cases, this article shows that, at least in some instances, the impacts on sustainability of a conduct or transaction can be accounted for by competition authorities, either as price effects or, as the case may be, as non-price effects (quality, choice or innovation). This approach does not require broadening the consumer welfare standard, but rather adjusting the traditional analytical tools to measure the full economic effects of a conduct or transaction, including its impact on sustainability. The article, therefore, departs from the belief that sustainability considerations should be always treated as public policy concerns outside of the competition enforcement framework.

The article starts with a brief introduction on the specific supply and demand market failures that may affect markets with significant environmental impacts (Section 2). It then discusses the possible complementary role of competition to regulation in these markets (Section 3). Section 4 and 5 explain how such impacts may be subsumed under the price and non-price competitive assessment. The article concludes by sketching some of the main practical challenges that may follow from adopting this approach within the EU legal framework and shows that they may not be insurmountable (Section 6).¹⁰

2. The market failures characterising markets with environmental impact

Markets with environmental impacts may be characterised by a number of market failures, affecting demand and supply.¹¹ An important one in this context is the cost externalities market failure, whereby the

the increase in the global average temperature to well below 2° C above pre-industrial levels” and “foster[ing] climate resilience and low greenhouse gas emissions development”.

⁴ European Commission, Decision of 18 May 1994, *Exxon/Shell*, IV/33.640, OJ L144, <http://data.europa.eu/eli/dec/1994/322/oj>.

⁵ European Commission, Decision of 21 December 1994, *Philips-Osram*, IV/34.252, OJ L378, <http://data.europa.eu/eli/dec/1994/986/oj>.

⁶ European Commission, Decision of 24 January 1999, *CECED*, IV.F.1/36.718, OJ L187, <http://data.europa.eu/eli/dec/2000/475/oj>.

⁷ European Commission, Decision of 17 September 2001, *DSD*, COMP/34493, 2001/837/EC, https://ec.europa.eu/competition/antitrust/cases/dec_docs/34493/34493_63_6.pdf, para. 148.

⁸ Maurice E. Stucke and A. Ezrachi, Covid-19 and Competition – Aspiring for More than our Old Normality, *Journal of Antitrust Enforcement* (2020) <https://doi.org/10.1093/jaenfo/jnaa031>, p. 3.

⁹ See, among others exploring this issue, E. Loozen, Strict competition enforcement and welfare: A constitutional perspective based on Article 101 TFEU and sustainability, 56 *Common Market Law Review* 5 (2019) pp. 1265 – 1302.

¹⁰ This article focuses on the analysis of effects of conduct and transactions within the competitive assessment and does not analyse the application of the State action and legitimate objective doctrine in relation to sustainability considerations.

¹¹ The Netherlands Authority for Consumers and Markets, Vision Document – Competition and Sustainability (2014) <https://www.acm.nl/en/publications/publication/13077/Vision-document-on-Competition-and-Sustainability>, pp. 11-12.

negative externalities on the environment of production and distribution are not integrated into the product price. Other market failures, such as consumer biases and other linked supply side market failures, which are particularly relevant for the non-price elements of competition, are explored below.

2.1. Consumers behavioural biases in relation to products with environmental impact

In several markets, consumers' purchasing choices may not be considered as complete expressions of their willingness to pay for more sustainable products. By these is meant eco-friendly, biodegradable, recyclable, fair-trade sourced or, more generally, products with lower environmental impact. Some behavioural biases may affect the interplay between the supply and demand in many business-to-consumer markets, but also in some business-to-business markets. The consequence may be that companies have reduced incentives to invest in greener inputs, processes or technologies.

One first important behavioural bias affecting people's perception of the climate emergency is hyperbolic discounting.¹² Events that may or will happen in the future have less influence on people's decision-making. Since many people consider that the consequences of climate change may not affect them directly or may do so only very remotely, making the choice between bearing an individual cost today and contributing to individual and collective benefit in the future is a complex assessment.¹³

A second bias is that, even when consumers have all necessary information, they may tend to simplify their decision-making, using heuristics to reduce the processing of information to one or two parameters, the more apparent ones (like price) typically being given more weight, sometimes leading to suboptimal decision-making.¹⁴ To exacerbate the problem is the difficulty for consumers to inform themselves and correctly assess the environmental footprint of the products they buy. This footprint may characterise certain parts of the product but not others, and there may be significant heterogeneity between, for instance, the eco-friendliness of the product itself (namely, its way of production) and that of its packaging, transport and distribution processes. For many products, this information is difficult to weigh against other elements, like price, performance, or durability.

A third bias derives from the coordination failure. Even those consumers that may be well-informed on product environmental footprints may decide to opt for less eco-friendly and lower price alternatives thinking that their sacrifice and contribution to the environment as individuals is minimal or will not make any significant difference. This diffusion of responsibility leads to consumers shifting the costs of their decision-making onto the community.¹⁵

Finally, a status quo bias may affect consumers' willingness to pay even when new more sustainable products or technologies are offered. This bias may undermine the efforts of a company taking the initiative to internalise the costs of the negative environmental externalities of its production process, for instance, due to the fact that consumers are used to the 'usual' price and do not want to incur in what they perceive as a loss.¹⁶

¹² Shane Frederick, George Loewenstein and Ted O'Donoghue, Time Discounting and Time Preference: A Critical Review, 40 *Journal of Economic Literature* 2 (2002) <http://www.jstor.com/stable/2698382>, pp. 351-401.

¹³ Matthew Wilburn King, How Brain Biases Prevent Climate Action, BBC, 8 March 2019, <https://www.bbc.com/future/article/20190304-human-evolution-means-we-can-tackle-climate-change>.

¹⁴ Oxera, Behavioural Economics and its Impact on Competition Policy (2013) <https://www.oxera.com/wp-content/uploads/2018/03/Behavioural-economics-and-its-impact-on-competition-policy-1.pdf>, pp. 12-13.

¹⁵ Jahel Mielke and Gesine A. Steudle, Green Investment and Coordination Failure: An Investors' Perspective (2018) https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/42745/file/mielke_diss.pdf, pp. 78 ss.

¹⁶ Simon Dietz and Frank Venmans, The Endowment Effect, Discounting and the Environment, *Journal of Environmental Economics and Management* 97 (2019) <https://doi.org/10.1016/j.jeem.2019.01.010> pp. 67-91. Some of these biases are also described by Jordan Ellison, A Fair Share: Time for the Carbon Defence? (2020) <https://ssrn.com/abstract=3542186> and Maurits Dolmans, Sustainable Competition Policy, 5-6 *Competition Law and Policy Debate* 4-1 (2020) p. 8.

2.2. Other supply-side market failures in relation to products with environmental impact

A possible consequence of biases on the demand side of certain markets with an environmental impact may be that these markets are unlikely to cater for the willingness to pay of a limited number of consumers that are less subject to biases or more informed.¹⁷ In certain markets with environmental impact, there may be, therefore, low incentives for companies to meet the expectations of those fewer, more ‘sophisticated’ consumers, particularly when it requires high R&D investments or high fixed sunk costs.

As regards the development of new technologies and the creation of new markets, companies may also face the first mover disadvantage in relation to innovation with environmental benefits. After having invested significant resources in ‘educating’ people about the environmental benefits of their products or in developing niche products that respond to higher standards, they still risk losing market shares to competitors that did not make that effort.

3. Competition policy as part of the solution

There are a number of potential solutions to these market failures. Some of these market failures can be addressed suitably by means of regulatory initiatives. Environmental regulations and other policy measures, like carbon taxation, emission trading schemes, State support,¹⁸ the conditioning of State aid or other state measures to the respect of environmental obligations and other forms of support to clean technology, are all fundamental to fight climate change. Various consumer protection initiatives aimed at correcting information asymmetry, such as the imposition of labelling obligations, can also play an important role, and so do some private initiatives, like certification schemes.

These initiatives, however, may not be sufficient. Many of these measures may be slow and expensive to implement and some of them may have only marginal impact.¹⁹

The response to the Covid-19 pandemic showed that competition can be part of a wider integrated policy response. In particular, it showed that, when there is a market failure resulting in a disconnect between demand and supply, competition policy may have a role to play. This was done, inter alia, by allowing appropriate and necessary private initiative responses in a speedy way and by carefully examining the factual circumstances of the case to avoid any anticompetitive distortions.²⁰

Similarly, there seems to be no reason to consider that competition policy should not also play a role in helping to address the market failures characterising some markets with environmental impact. The climate emergency too is a crisis and one that frames the economic and legal context in which businesses move. The possibility of considering dynamic effects under competition law, which regulation is unlikely to capture swiftly, makes it a relevant tool alongside targeted regulatory initiatives, to help address some of these market failures.

Importantly, the integration of sustainability considerations in the competition analysis as direct or indirect economic effects allows competition authorities to assess them both for the purposes of allowing or blocking an agreement or a transaction.

¹⁷ Grant Murray, Sustainability and Competition Law: So What is Allowed?, Baker McKenzie, 10 June 2020, <https://viewpoints.bakermckenzie.com/post/102g97t/sustainability-and-competition-law-so-what-is-allowed>.

¹⁸ It should be noted, however, that Government support for production and consumption of fossil fuels amounted to 478 billion USD in 2019 in 77 world economies and that some countries are orienting state aid to fossil fuel and connected industries during the Covid-19 crisis. See OECD, Rising fossil fuel support poses a threat to building a healthier and climate-safe future, 5 June 2020, <https://www.oecd.org/fossil-fuels/data/>.

¹⁹ Dolmans, fn. 16, p. 12.

²⁰ OECD, Co-operation between Competitors in the Time of Covid-19 (2020) <https://www.oecd.org/daf/competition/Co-operation-between-competitors-in-the-time-of-COVID-19.pdf>.

4. Is sustainability such stuff as other public policy considerations are made on?

Differently from public policy considerations going beyond consumer welfare and economic efficiency, there are two main reasons why sustainability considerations can be integrated into the competitive assessment, without any broadening of the consumer welfare standard.

The first reason is that the effects of a conduct or transaction on sustainability may be economic and affect consumer welfare as traditionally interpreted. They may have an impact on prices or on a non-price dimension of competition.²¹ The protection of sustainability may, therefore, be aligned with the basic objective of competition to promote efficient market outcomes in the form of lower prices, higher quality products, more choice and innovation.²²

On the one hand, sustainability, in some markets and for some products, may be protected by way of preserving competition on prices. This seems to have been, for instance, the case in the Aurubis/Metallo²³ acquisition, where the European Commission considered whether the increased buyer power of the merged entity would have allowed it to lower prices for copper scrap. Among other consequences, this would have led to a reduction of the incentives and ability of collectors of copper scrap to invest and collect this input. As noted by the now Executive Vice-President Margarethe Vestager, “A well-functioning, competitive copper recycling industry is key to meet the future needs of European industry and *to limit the impact on the environment*”.²⁴ The European Commission, therefore, seems to have acknowledged the potential impact of the merger on sustainability in this case.

On the other hand, sustainability may be a non-price dimension of competition affecting the dynamic effects of a conduct or transaction. Lower environmental impact, in other words, may equal more quality, more choice or more innovation. One example is that of a ‘sustainability-killer’ acquisition, where company A is an established market player with a polluting, ‘old-school’ production business model planning to merge with company B, which sells a greener version of the same product. If the internal documents of company A showed that the plan post-merger were to exploit the economies of scale and reduce costs by combining production lines and eliminating the greener line of production, leading to lower prices for the less eco-friendly product, a focus on price effects would not allow to consider this dynamic effect (lowered quality and choice). If this dynamic effect on sustainability were not taken into account, the merger would be cleared due to its positive impact on prices.

Similarly, an agreement whereby competitors limit the level of quality or innovation on sustainability of their products may infringe Article 101 TFEU. The European Commission is currently investigating whether some car manufacturers may have agreed not to compete on the development of technology to clean emissions of petrol and diesel cars.²⁵

A second, connected, reason is that, given that sustainability considerations may be part of the economic effects deriving from the environmental impact of a practice or transaction, the analysis and quantification of these effects is possible under a traditional, albeit adjusted, competition analytical framework. An assessment of the effects on sustainability of competition restrictions may therefore be relatively amenable to measurement and quantification.

²¹ See, for instance, Simon Holmes, Climate Change, Sustainability, and Competition Law, *Journal of Antitrust Enforcement* (2020) <https://academic.oup.com/antitrust/article-abstract/doi/10.1093/jaenfo/jnaa006/5819564>, p. 19.

²² OECD, Public Interest Considerations in Merger Control (2016) [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2016\)3&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)3&docLanguage=En), p. 4.

²³ Press Release by the European Commission, M.9409, *Aurubis/Metallo Group Holding*, 4 May 2020, https://ec.europa.eu/commission/presscorner/detail/en/IP_20_801.

²⁴ Press Release by the European Commission, M.9409, *Aurubis/Metallo Group Holding*, 19 November 2019, https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6305 (emphasis added).

²⁵ See, for instance, European Commission, Press Release, *Car Emissions*, AT.40178, 5 April 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2008.

The two Sections that follow focus on the practical aspects of the analysis of sustainability considerations as a non-price dimension of competition.

5. Sustainability as a non-price dimension of competition

In some cases, it is not possible to capture the impact on sustainability of a conduct or transaction by assessing merely its price effects, and the impact on prices and the impact on sustainability may go in different directions.

One possible solution is to consider the negative externalities of a practice or a transaction with an environmental impact (i.e. the costs of carbon emission, water pollution, deforestation, etc.) as an increase in price borne by all consumers, to be added or weighed against any other price effects that may derive from it. For instance, competition authorities could prohibit a merger if it “can demonstrably be expected to increase carbon emissions appreciably (which would be equivalent to a price increase to all consumers for the product in question) [...]”.²⁶

This approach seems to have been adopted by the European Commission in the past. For instance, in *CECED*, the European Commission exempted an agreement between competitors aimed at stopping production and import into the EU of the least energy-efficient washing machines. In the analysis of the economic efficiencies deriving from the agreement, the European Commission took into account the collective environmental benefits of the agreement, in addition to individual economic benefits in the form of savings on electricity bills from the more efficient machines.

In this case, the European Commission *quantified* the negative externalities avoided by the agreements, i.e. “the saving in marginal damage from (avoided) carbon dioxide emissions [...] sulphur dioxide [...] and nitrous oxide”, concluding that the “benefits to society brought about by the CECED agreement appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines”.²⁷

Analogously, when examining the effects of the Philips/Osram²⁸ joint venture agreement for the production and sale of lead glass tubing for lamps, the European Commission observed that “[t]he use of cleaner facilities will result in less air pollution, and consequently in direct and indirect benefits for consumers from reduced negative externalities.”

While the internalisation of the negative externalities concerning a common resource is a traditional solution adopted to address ‘tragedy of the commons’-type problems, like the climate emergency, it may raise some issues as regards the interpretation of the notion of ‘consumer’. Taking into account the increase in costs due to environmental externalities in the market definition may also raise a few operational difficulties. In addition, significant challenges may arise when assessing and quantifying certain sustainability considerations the measurement of which is less standardised than that of carbon emission (e.g. loss of biodiversity).

Another viable and complementary approach is that of considering sustainability as a non-price dimension of competition. It is well-established that product quality, intending by this term to encompass all dynamic effects on competition including choice and innovation, is an important parameter of competition.²⁹ It is

²⁶ See, for further details on this approach, Dolmans, fn. 16, p. 12.

²⁷ *CECED*, fn. 6, para. 56.

²⁸ *Philips-Osram*, fn. 5, para. 27.

²⁹ European Commission’s Contribution to OECD, *The Role and Measurement of Quality in Competition Analysis* (2013) <http://www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf>, p. 80: “irrespective of how the exact boundaries between product quality, product variety and innovation are defined, all three form part of a wider category of dynamic effects on competition – effects that are recognised as relevant for the analysis of competitive effects under EU competition law”.

also recognised that a decrease in quality, choice or innovation can be as harmful to competition as an increase in price.

This approach may be applied not only when sustainability is a feature of the product or an intrinsic characteristic linked to its ingredients, process or components, but also when consumers could be reasonably deemed to consider it as a dimension of quality, choice and innovation.³⁰ One could consider, therefore, that less polluting or more sustainable production or distribution processes are also an element of quality and part of the direct or indirect economic benefits of a practice or transaction. This is the same as deeming products that are safer or less harmful to the health of the consumers or those around them of higher quality. In other words, it would be possible to consider as elements of quality sustainability considerations that may not immediately benefit consumers, but that they could be considered to prefer, also taking into account the consumer biases described in Section 2. This is acknowledged by the European Commission in the Horizontal Co-operation Guidelines in relation to standardisation agreements, where it notes that: “Standards on, for instance, quality, safety and environmental aspects of a product may also facilitate consumer choice and can lead to increased product quality” (para. 308).

Take, for instance, a consumer opting for a mobile phone with lower radiofrequency SAR (specific absorption rate) measurements. The radio frequency energy emitted by the phone may not affect its performance and may or may not represent a danger to health in the long-run, affecting the individual, the family or whoever may be in regular proximity. Even if it may not directly affect the performance of the phone, a lower radiofrequency SAR level offered for the same price would be likely to be considered a parameter of quality, choice or innovation in a competitive assessment. Yet, the evidence of the negative effects of radiofrequency energy seem to be more controversial than the negative effects of carbon-emission on human health and livelihood. In addition, these effects are just as remote and diffuse.

It should thus be possible to consider that sustainability, eco-friendliness, biodegradability, recyclability, fair-trade source, or lower environmental impact of products may integrate the preferences of consumers and be a quality dimension of competition, in spite of their effects being reflected on (or also on) the community, and not just on the individual consumer.

Whether consumers value sustainability as a dimension of quality of a product may be a factual question to be assessed based on the specific circumstances of the case.³¹ This kind of reasoning seems to have been adopted, for instance, by the Dutch competition authority in the Chicken of Tomorrow case, where it tried to determine whether consumers preferred price and choice over increased animal welfare and environmental benefits. The Dutch competition authority endeavoured to assess, by means of conjoint analysis, the consumers’ willingness to pay for an improvement of the chicken breeding conditions and the environmental impact of the processed meat.³²

As mentioned above, however, consumers’ behaviour may not be a full expression of their preferences on sustainability in a specific market due to a number of behavioural biases that may affect markets with environmental impact. When this is the case, consumers may not be offered the low prices and the level of quality, choice and innovation on sustainable products that they would benefit from if these biases were not present.

Competition authorities might have to take into account these market failures in the design of the investigation and subsequent competitive assessment for a fuller understanding of the elasticity of the demand and of the market dynamics. This would, *inter alia*, add legitimacy to the choice of the competition authority to consider sustainability as a parameter of competition and avoid the perception of a paternalistic

³⁰ See, in relation to this aspect in the context of Article 101(3) TFEU, Julian Nowag, *Environmental Integration in Competition and Free-Movement Laws*, Oxford University Press (2016) p. 232.

³¹ See, Holmes, fn. 21, p. 26: “The revealed preference of consumer surveys need to be used with extreme caution. In particular, they are very susceptible to what questions are asked (and how they are worded)” and Nowag, fn. 30, p. 233.

³² The Netherlands Authority for Consumers and Markets, *Analysis of the Sustainability Arrangements concerning the Chicken of Tomorrow*, https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.

super-imposition of the judgment of the competition authority in its interpretation of consumer welfare over that of consumers.

In this regard, it should be noted that competition authorities already take into account behavioural biases when analysing a market,³³ on the grounds that: “The impact of consumer biases on demand elasticity can be factually important in individual competition cases [...] Biases are in this sense part of the integral assessment of the economic effects in competition cases”.³⁴

Further, the analysis of non-price effects is increasingly gaining importance in the decisional practice of the European Commission, especially with regard to the assessment of effects on innovation in merger control.³⁵ An approach that takes into account dynamic effects is, therefore, aligned with this trend of considering effects that may manifest themselves in wider timeframes than the traditional 3 to 5 years. Innovation theories of harm are also relevant and should be considered in the context of sustainable products and processes, and those that affect the choice and quality of such products via green-field or incremental innovation.

In this context could be also read the reference that the European Commission made, when assessing the effects of the Dow/DuPont concentration, to the importance of innovation in crop protection not only for farmers and consumers, but also given its impact on food, environmental safety and human health.³⁶

An example of a merger harmful to sustainability-innovation might be that of a horizontal merger between two competitors that have a significant record of innovating on sustainable aspects of production or investing significant budgets in R&D to develop green technologies or processes. The potential loss of the competitive constraints and the loss of the pressure to innovate on sustainable aspects of their product or processes should then be analysed, to understand the impact of the transaction on future incentives to innovate on greener technologies and processes. Analogous analyses have been carried, for instance, in hospital mergers, where competition authorities have considered in their assessment the investments in acquiring new technology.³⁷

A decision of the French Competition Authority regarding a cartel in the hard-wearing floor coverings sector sanctioned cartel participants for agreeing to refrain from advertising environmental performance that went beyond a certain industry standard, thus withholding information that might have driven purchasing decisions. In addition, according to the Authority, “this agreement may have acted as a disincentive to manufacturers to innovate in order to offer their customers products characterised by better environmental performances, thereby impacting a product differentiation factor.”³⁸

More generally, a trend seems to be emerging in Europe of making the best use of the flexibility of the analysis of dynamic effects for the purpose of correcting market failures and advancing competitive

³³ See, for instance, European Commission, Decision 3 October 2014, *Facebook/WhatsApp*, M.7217, https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf, paras. 111, 124 and 134 and European Commission, Decision 18 July 2018, *Google Android*, AT.40099, https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, paras. 787, 791, 793 and 851.

³⁴ The Netherlands Authority for Consumers and Markets, Behavioural Economics and Competition Policy (2013) https://www.acm.nl/sites/default/files/old_publication/publicaties/11586_acm-behavioural-economics-competition-policy.pdf, p. 3.

³⁵ European Commission’s Contribution to OECD, Non-Price Effects of Mergers (2018) [https://one.oecd.org/document/DAF/COMP/WD\(2018\)14/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)14/en/pdf), p. 6.

³⁶ European Commission, Decision of 27 March 2017, *Dow/DuPont*, M.7932, https://ec.europa.eu/competition/mergers/cases/decisions/m7932_13668_3.pdf, para. 1980.

³⁷ US Contribution to OECD, Non Price Effects of Mergers (2018), [https://one.oecd.org/document/DAF/COMP/WD\(2018\)45/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)45/en/pdf), p. 5.

³⁸ French Competition Authority, Decision 17-D-20 of 18 October 2017, <https://www.autoritedelaconurrence.fr/fr/decision/relative-des-pratiques-mises-en-oeuvre-dans-le-secteur-des-revetements-de-sols-resilients> and Press Release, <https://www.autoritedelaconurrence.fr/en/communiqués-de-presse/19-october-2017-cartel-floor-coverings-sector>.

dimensions that are considered important for consumers beyond price. The most recent example of this is the reference to the protection of consumers' choice that has been made by the German Federal Supreme Court in the Facebook preliminary proceedings,³⁹ which is also instrumental to protecting their privacy.

6. Challenges of the competitive assessment of non-price sustainability considerations

Assessing dynamic effects is complex. As noted by the European Commission, "Making a precise definition of quality for a given product is a complex task in competition investigations given the many subjective features that may contribute to a perception of quality by customers, the multi-dimensional nature of quality, and the absence of measurable variables".⁴⁰

Giving sustainability considerations recognition as a non-price parameter of competition in the assessment of the effects or in the evaluation of the efficiencies deriving from a conduct or a transaction raises a number of challenges. Two of the main ones in the EU legal framework, and possible ways to overcome them, are briefly sketched below.

First, the difficulties in measuring non-price effects make them difficult to consider in competitive assessments, which led to them being so far devoted limited attention by competition authorities. However, as mentioned above, there is a trend towards the recognition of the importance of dynamic effects on competition, in particular in the assessment of effects on innovation in the merger review conducted in the last few years by the European Commission.⁴¹ Against this backdrop, the time seems to be ripe for assigning greater importance to non-price effects, including on sustainability.

One important challenge of analysing non-price effects in markets with environmental impact is that price and other dynamic effects may not be aligned and, if they go in opposite directions, they would have to be balanced against one another. For instance, it may be complex to assess the anticompetitive effects of a cooperation agreement or a merger increasing prices for consumers, but also increasing quality-sustainability by providing consumers with better green alternatives for a certain product. This exercise would not, however, be unfamiliar for competition authorities.

Further, an analysis of the European Commission decisions shows clearly that qualitative evidence is often used together with quantitative evidence, and sometimes the two are contrasted.

As regards quantitative evidence, it is possible to conceive that some of the traditional quantitative tools could be adapted for the competitive assessment of non-price sustainability considerations. For instance, if companies can be considered to compete on sustainability, the conceptual framework of the SSNDQ might be used to determine the impact of a small but significant and non-transitory decline in sustainability (SSNDS) to define a market. One could also imagine, as regards effects, that a similar type of analysis to upward pricing pressure could be developed. For example, diversion ratios may be adjusted by adapting surveys to consider consumer biases.⁴² Other instruments could be borrowed from environmental economics, such as life cycle analysis.⁴³

³⁹ For a commentary of the decision in English, see Rupperecht Podszun, Facebook@BGH, 23 June 2020, <https://www.d-kart.de/en/blog/2020/06/23/facebook-bgh/>.

⁴⁰ European Commission's Contribution to OECD, fn. 29, p. 78.

⁴¹ European Commission's Contribution to OECD, fn. 35, p. 6.

⁴² For instance, models could be developed along the lines of the one created for the assessment of downward quality pressure, Keith Waehrer, *Online Services and the Analysis of Competitive Merger Effects in Privacy Protections and Other Quality Dimensions* (2016) <https://ssrn.com/abstract=2701927>.

⁴³ Life cycle analysis is an international standard scientific assessment, defined as "a methodology for integrated impact assessment in which the (environmental) burdens associated to the whole life cycle of products are quantified". See S. Sala, F. Reale, J. Cristobal-Garcia, L. Marelli, R. Pant, JRC Technical Reports, *Life Cycle Assessment for the Impact Assessment of Policies* (2016), <https://op.europa.eu/en/publication-detail/-/publication/ff42870e-d95b-11e6-ad7c-01aa75ed71a1>.

Second, competition authorities are accustomed to measuring in-market effects and efficiencies and, in the EU legal framework, it is in principle required that effects and efficiencies of a practice or of a transaction are felt by the same consumers.

Given that the effects on environment, even when they are localised or limited in time, still tend to be cumulative (for instance, CO₂ emissions, increases in temperature, etc.), there seems to be a strong case for considering the important spill-over effects going beyond a specific market or category of consumers. The integration of sustainability considerations in the competitive assessment as a non-price effect, however, seems to eliminate this issue, because any decrease in quality-sustainability would be captured with reference to the consumers in that relevant market, although the effects on sustainability might be felt by the wider community or by future generations.

In other cases, the effects may be felt only beyond the timeframe for the competitive assessment typically considered by competition authorities when considering static effects. The consideration of dynamic effects would permit to take into account effects in a longer timeframe than the one typically adopted for prices, which may be more appropriate for sustainability considerations.

Whilst this approach may allow expanding the analysis of anticompetitive harm that would not be captured by a static analysis, it may be balanced by an equally comprehensive examination of potential efficiencies.

Under the current wording of EU Guidelines, environmental benefits accruing to the community may be difficult to consider, although the ongoing revision of the Horizontal Guidelines is likely to be an opportunity to address this issue.⁴⁴ Indeed, the cautionary wording adopted by the European Commission (“in principle”; “normally”) seems to soften the strict interpretation that disfavors crediting efficiencies when they are felt outside the relevant market. In the different legal framework existing at the time of the *CECED* case, the European Commission explicitly qualified the collective environmental benefit as a stand-alone counterbalancing factor for the increase in price of the product generated by the agreement that “would adequately allow consumers a fair share of the benefits *even if* no benefits accrued to individual purchasers of machines”.⁴⁵

7. Conclusions

This paper advocates that, in some instances, sustainability considerations can be taken into account in the competition assessment as either price or dynamic effects deriving from a conduct or merger, without requiring any upheaval of the way in which the consumer welfare standard is interpreted.

In certain cases, price effects and impacts on sustainability may be aligned. In other cases, in order to capture the full effects of a conduct or transaction under the consumer welfare standard as traditionally interpreted, sustainability may have to be considered as a dimension of competition, in the form of quality, choice and innovation.

This should be done by ensuring that sustainability considerations inform the design of the investigation and the analysis of conduct and merger transactions, in suitable cases. The competitive assessment on sustainability may be done by qualitative and quantitative means, by fine-tuning the current tools to perform the analysis in a way that allows a fuller understanding of all direct and indirect economic benefits affecting environment, including by considering the relevant consumer biases or other market failures

⁴⁴ For instance, in the EU legal framework regime, para. 79 of the Horizontal Merger Guidelines state that efficiencies “should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur”. A similar provision is set out in relation to anticompetitive agreements, at para. 43 of the Guidelines on Article 101(3), which also states that “[n]egative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market.”.

⁴⁵ *CECED*, fn. 6, para. 56 (emphasis added).

affecting markets with an environmental impact. This approach preserves the application of the traditional analytical framework whilst ensuring that competition between firms on sustainability is fostered.

Competition authorities thus need to be aware of the potential dynamic effects of certain conduct or transactions on sustainability, in order to consider them in their assessment, if appropriate. This will allow them to play a relevant role, alongside governments, in supporting the efficient reallocation of resources towards greener technologies.