Weil

Making Greener Choices: Growing the Role of Sustainability in Global Merger Reviews

With growing demand for greener choices, environmental sustainability considerations are often playing a more important role in merger reviews. But for global deals the regulatory environment is patchy: notably, there is now a clear EU framework via recent guidance and the UK is showing signs of considering these issues, while the US position remains stricter.

This evolving and potentially divergent treatment of green deals has important implications for deal strategy and timing. In this post, we take stock of the current state of play and set out our practical takeaways for global M&A.

DEFINING (SUSTAINABLE) MARKETS

The European Commission's (EC) recently revamped market definition guidance expressly codifies recent case practice and showcases its consideration of sustainability upfront when defining markets. Market definition is important because it provides the framework for assessing the relative competitive strength of market players and whether any of them has market power. Differentiating greener offerings could mean narrower relevant markets and potentially more scope to identify perceived concerns with a merger.

PERMEATING THE COMPETITIVE ASSESSMENT

The EC has also set out the role of sustainability in its substantive assessment in a dedicated merger brief. For example:

- Sustainability can be important when determining the extent to which merging parties are **close competitors**, e.g. where they are both green innovators.
- The EC *"intends to defend (green) innovation vigorously"* – signaling more scrutiny of deals where the parties have significant overlapping green R&D programs and/or where internal documents discuss their rationalization. This is aimed at assessing potential **harm to innovation** where there is a risk of discontinuation of overlapping activities or reduced incentives to innovate.
- On the flipside, **green efficiencies** will be assessed but they need to: benefit consumers, be merger-specific and verifiable, and in principle should occur within the affected markets. The EC acknowledges the lack of cases where it has accepted out-of-market efficiencies. However, it *"may"* consider them if they *"cover substantially the same customers otherwise harmed by the merger."* So, while the bar remains high, at least the EC recognizes these out-of-market efficiencies could play a role in assuaging concerns.

DESIGNING APPROPRIATE REMEDIES

Where sustainability factors have played a role in the competitive assessment and/or where the EC has concerns about innovation competition, the EC has shown that this can affect the remedy design. For example, in Sika/MBCC, the EC cited the global scale of the R&D assets and innovation capabilities of the divestment business as a key factor in assessing the suitability of the proposed remedy, and whether to require an upfront buyer (which it did). However, it remains that the EC cannot unilaterally impose or choose the "greenest"

remedy among several alternatives, or a remedy which solely addresses environmental harm which does not also translate into competitive harm.

STATE OF PLAY OUTSIDE THE EU

Supporting sustainability objectives is also a clear UK priority. The Competition and Markets Authority (CMA) has expressly stated that it will factor sustainability and other non-price factors into its reviews. In a recent "fast tracked" phase 2 case involving providers of container handling equipment, the parties argued that an important part of the deal rationale was to make them better placed to address the increased demand for more sustainable products. Ultimately, the CMA blocked the deal because the alleged increased levels of sustainability and electrification potentially resulting from the merger were deemed insufficient to overcome its negative effects.

Conversely, Australia's Australian Competition and Consumer Commission (ACCC) cleared a transaction for the first time on the basis that the resulting accelerated roll-out of renewable energy generation outweighed the potential harm. The New Zealand authority has also said that it will consider broader environmental benefits as part of its reviews, regardless of the markets in which they occur.

US AGENCIES' FOCUS ON OTHER NON-PRICE FACTORS

A US Department of Justice (DOJ) Antitrust Division official recently confirmed at a symposium that sustainability arguments will not be taken into account as part of the merger assessment. US Federal Trade Commission (FTC) Chair Lina Khan had already warned that merging parties should be *"on notice"* that sustainability commitments will not be considered as a remedy for anticompetitive concerns. The prior administration shared the view that even "the loftiest of purported motivations" do not excuse anticompetitive collaboration among rivals.

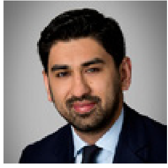
Meanwhile, the new US merger guidelines explicitly address the potential for mergers to affect workers and labor markets. This prioritization is no surprise given recent attention on labor issues in non-merger and merger contexts, including DOJ's lawsuit that blocked a book publishing merger to protect competition for authors and the FTC's ongoing lawsuit to block a supermarket merger based in part on alleged harm to workers.

PRACTICAL IMPLICATIONS FOR GLOBAL M&A

- **Expect more intervention in green deals.** Authorities are likely to look closely at green deals, especially deals involving significant competition in innovation and R&D. This could mean longer reviews than expected (even simplified cases being bumped into in-depth reviews) – which could cause delays. It could also mean needing to formulate a more stringent remedies package (including a possible upfront buyer) to alleviate concerns. This should be factored into deal strategy and timing upfront.
- **Beware perceived green killer acquisitions.** The EC's latest referrals of otherwise non-reportable deals demonstrate its willingness to target sectors beyond tech and pharma, including energy and the reduction of emissions. So investors in small green start-ups or recent entrants (even with little or no turnover) should consider carefully whether their deal could be a candidate for referral.
- **Be ready to handle divergence between authorities.** While many authorities in Europe and elsewhere are ready to factor in sustainability into their merger assessments (which cuts both ways), others including in the US and Brazil are taking a different approach, with the potential for different outcomes. Parties to complex global deals in this space should be ready to engage proactively with authorities to mitigate the risks of divergence and achieve outcomes that work for all.
- **Don't forget about other non-price factors.** Sustainability is one non-price factor that many authorities are increasingly focusing on in response to shifting consumer demands. However, other factors such as the impact on workers and labor markets, or the impact on security or privacy, may be relevant, and dealmakers should factor this into their feasibility assessments.

For More Information

If you would like more information about the topics raised in this briefing, please speak to your regular contact at Weil or to any of the authors listed below:

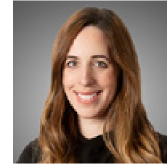


NAFEES SAEED

+44 20 7903 1122
nafees.saeed@weil.com

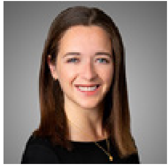
KRISTIN SANFORD

+1 202 682 7115
kristin.sanford@weil.com



BELLA SPRING

+44 20 7903 1753
bella.spring@weil.com



CLÉMENCE COPPIN

+33 1 4421 9797
clemence.coppin@weil.com

Sustainability & ESG Contacts

M&A AND ENERGY TRANSITION:

MURRAY COX
murray.cox@weil.com

SIMON LYELL
simon.lyell@weil.com

BRENDAN MOYLAN
brendan.moylan@weil.com

AMY WADDINGTON
amy.waddington@weil.com

SUSTAINABILITY AND IMPACT FUNDRAISINGS (INCL. ENERGY TRANSITION):

JAMES BROMLEY
james.bromley@weil.com

HANNAH LAURIE
hannah.laurie@weil.com

JAMES SARGENT
james.sargent@weil.com

MARC SCHUBERT
marc.schubert@weil.com

SUSTAINABILITY LINKED / GREEN FINANCE:

ALEX EAGLE
alex.eagle@weil.com

ANDREW HAGAN
andrew.hagan@weil.com

ALASTAIR MCVEIGH
alastair.mcveigh@weil.com

STEVEN ONG
steven.ong@weil.com

DISPUTES AND ANTITRUST:

LUCY CHAMBERS
lucy.chambers@weil.com

MATTHEW GIBBON
matthew.gibbon@weil.com

JENINE HULSMANN
jenine.hulsmann@weil.com

HAYLEY LUND
hayley.lund@weil.com

BELLA SPRING
bella.spring@weil.com

CHRIS THOMAS
chris.thomas@weil.com

OTHER SUBJECT MATTER EXPERTISE:

BARRY FISHLEY
Intellectual Property
barry.fishley@weil.com

LAURA MURRAY
Real estate & Environmental
laura.murray@weil.com

THOMAS WEATHERHILL
Employment
thomas.weatherhill@weil.com

GLOBAL KEY CONTACTS:

ANNEMARGARET CONNOLLY
annemargaret.connolly@weil.com

LYUBA GOLTSER
lyuba.goltser@weil.com

REBECCA GRAPSAS
rebecca.grapsas@weil.com

MATTHEW MORTON
matthew.morton@weil.com

ROBERT STERN
robert.stern@weil.com

WEIL.COM

©2024 WEIL, GOTSHAL & MANGES (LONDON) LLP ("WEIL LONDON"), 110 FETTER LANE, LONDON, EC4A 1AY, +44 20 7903 1000, WWW.WEIL.COM. ALL RIGHTS RESERVED.

WEIL LONDON IS A LIMITED LIABILITY PARTNERSHIP OF SOLICITORS, REGISTERED FOREIGN LAWYERS AND EXEMPT EUROPEAN LAWYERS AUTHORISED AND REGULATED BY THE SOLICITORS REGULATION AUTHORITY ("SRA") WITH REGISTRATION NUMBER 623206. A LIST OF THE NAMES AND PROFESSIONAL QUALIFICATIONS OF THE PARTNERS IS AVAILABLE FOR INSPECTION AT THE ABOVE ADDRESS. WE USE THE WORD 'PARTNER' TO REFER TO A MEMBER OF WEIL LONDON OR AN EMPLOYEE OR CONSULTANT WITH EQUIVALENT STANDING AND QUALIFICATION.

THE INFORMATION IN THIS PUBLICATION DOES NOT CONSTITUTE THE LEGAL OR OTHER PROFESSIONAL ADVICE OF WEIL LONDON. THE VIEWS EXPRESSED IN THIS PUBLICATION REFLECT THOSE OF THE AUTHORS AND ARE NOT NECESSARILY THE VIEWS OF WEIL LONDON OR OF ITS CLIENTS.

Weil