Leibniz Institute for Financial Research SAFE

SAFE Finance Blog

11 FEB 2022

Sustainability goals and competition law between harmony and restrictions

Some European countries have recently incorporated sustainability into their competition law. In Germany skepticism still prevails, despite various options

In Austria and the Netherlands, sustainability has been embedded in antitrust law and corresponding guidelines since 2021. According to the amended Austrian Cartel Act, when assessing the competitive effects of cooperations, contributions to an "ecologically sustainable or climate-neutral economy" are taken into account concerning the question of whether consumers participate appropriately in the (efficiency) benefits of competition-restricting cooperation. Other European countries, as well as the European Commission, are also working on reforming their guidelines, in particular for permissible business cooperations.

In Germany, these developments are met with skepticism. Many economists share this skepticism believing that in this context, tasks and responsibilities commingle. These criticisms resemble those raised against the efforts of other European institutions, such as the European Central Bank, to pursue sustainability within the scope of their existing goals or as a complement to them.

Interlock with increasing demands on companies

However, criticism on reforming the competition law often remains merely reflexive and ignores the broader context. These developments intertwine with society's and politics' increasing willingness to task the economy with sustainability. Concrete legal requirements serve this through corresponding environmental requirements, or, for example, the German Supply Chain Act ("Lieferkettengesetz") passed in 2021 (the expectedly broader, European pendant is still pending).

However, growing expectations and demands of citizens and politicians on the economy are not restricted to fulfilling only what is required by law. For example, the European Commission believes that industry is jointly responsible for achieving the so-called Green Deal. Companies are also facing increasing pressure from investors and other stakeholders, including employees, to make their business models more sustainable.

Competition law as a potential bottleneck

To achieve these goals, however, measures may be required that restrict competition, such as horizontal and vertical cooperation. This concerns, for example, the elimination of a possible first mover disadvantage in the development and introduction of more sustainable products or information exchange that may be necessary in individual cases, such as for the introduction of sustainability labels or the establishment of ethical and sustainability standards.

Under the current competition enforcement paradigm, such restraints of competition are only potentially permissible if consumers derive sufficient benefits, notably in the form of passed-on cost efficiencies. Such a tight corset has left little room for sustainability considerations so far. Therefore, the traditional antitrust practice still largely lacks a set of instruments to take sufficient account of such forms of cooperation that aim for sustainability. This implies the risk that the current enforcement policies will hinder the transformation process towards more sustainability.

Possibilities for further consideration of sustainability without conflicting goals

In a series of joint papers (Technical Report; Integrating Sustainability Benefits; Prospective Welfare Analysis; Reflective Willingness to Pay; Social Norms; Externalities), we have shown that sustainability goals can be given greater weight even within existing antitrust law. This is possible without imposing sustainability as an additional or even equivalent goal on antitrust authorities. First, we identify the significant potential for adapting analytical methods to determine consumers' willingness to pay for sometimes complex sustainability concerns, possibly across generations. Traditional approaches in competition economics risk falling short, unlike other approaches that have been employed in cost-benefit analyses of environmental and resource economics for decades. An important starting point is thereby the appropriate determination of sustainability preferences. The respective measurement can not be restricted to, for instance, situations at the point-of-sale where consumers may follow ingrained heuristics and pay little attention to new information. We also discussed the possibility of preference elicitation that considers the negative externalities imposed by other consumers. Again, it is potentially worthwhile to transfer the results to the financial sector, not least because the question of so-called green preferences is also becoming increasingly relevant there.

In short, by expanding the concept of consumer benefits and the corresponding empirical instruments in this manner, sustainability can be given greater consideration without overburdening the mandate of the competition authorities. Here, too, analogies exist in finance, for example in the context of the instruments of monetary policy or financial stability.

The primacy of politics in further consideration of sustainability goals

At the same time, our work also illustrates that the substance and purpose of competition law set clear boundaries for the consideration of sustainability goals. A so-called multi-goals approach in which competition authorities are supposed to pursue goals such as distributive justice or environmental sustainability pari passu with that of ensuring competition in the consumer interest is already bound to fail due to a lack of a common metric.

However, where societal concerns of particular interest can be clearly articulated, other legal instruments lend themselves to reconciling antitrust competition protection and sustainability goals. Within restrictions, this allows the so-called ancillary restraints doctrine. For instance, regarding the implementation of the Supply Chain Act, antitrust law may permit the exchange of information if it is necessary to prevent companies from otherwise withdrawing from certain countries and no longer maintaining any business relationships at all with suppliers there. Such evasion would run counter to the purpose of the law, which is to help improve standards there.

Policy makers could also agree on a very specific target for how to reduce the amount of particulate matter in inner cities within a certain time frame, to define a clearly outlined sustainability project, the implementation of which may then require and allow for coordinated action by companies. In this regard, the concept of marginal abatement costs offers a metric that, if appropriately legislated, can make the goals of sustainability and competition commensurable. To this end, however, politics must lay down specific legal requirements, and cannot exculpate itself by pointing to the independent contribution of the economy. Again, there are obvious parallels in terms of, for example, the mandate of the ECB.

Roman Inderst is Professor of Finance and Economics at the House of Finance at Goethe University Frankfurt.

Stefan Thomas is Professor of Private Law, Commercial Law, Competition and Insurance Law at the University of Tübingen and Director of the Tübingen Research Institute on the Determinants of Economic Activity (TRIDEA).

This blog post is based on the SAFE Policy Letter No. 94 "Nachhaltigkeit und Wettbewerb: Zu einer Reform des Wettbewerbsrechts für die Erreichung von Nachhaltigkeitszielen".

BACK

NEWS & LATEST

All News

Newsletter

SAFE Finance Blog

SAFE in the media

Events

Videos

Distribution List

In this Section:

FOLLOW US

CONTACT

Leibniz Institute for Financial Research SAFE

Theodor-W.-Adorno-Platz 3
60323 Frankfurt am Main

Phone: +49 69 798 30080
Fax: +49 69 798 30077
Email: info@safe-frankfurt.de